IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02649

CARYN ANN HARLOS,
KIYOMI BOLICK,
ANDREW MADSON,

Plaintiffs,

v.

DISTRICT ATTORNEY MITCH MORRISSEY, in his official capacity;
ATTORNEY GENERAL CYNTHIA COFFMAN, in her official capacity;
SECRETARY OF STATE WAYNE WILLIAMS, in his official capacity;

Defendants.

PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PURSUANT TO F.R.C.P. 65

Plaintiffs, through their attorneys Adam Frank and Faisal Salahuddin of FRANK & SALAHUDDIN LLC, respectfully request that this Court issue a temporary restraining order and preliminary injunction prohibiting Defendants from having Plaintiffs arrested, having Plaintiffs summonsed, or prosecuting Plaintiffs or any similarly situated individuals for engaging in constitutionally-protected conduct that violates Colorado Revised Statute § 1-13-712. As grounds, Plaintiffs state the following:

FACTS

Plaintiffs incorporate by reference all statements of fact set forth in Plaintiffs' complaint [#1] as if fully set forth herein. Fed. R. Civ. P. 10(c).

LEGAL STANDARDS

"The primary function of a preliminary injunction is to preserve the status quo pending a final determination of the parties' rights." *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank*, 665 F.2d 275, 277 (10th Cir. 1981). "[T]he status quo is the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001) (internal quotation omitted). "To obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *General Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). "If the plaintiff can establish that the latter three requirements tip strongly in his favor, the test is modified, and the plaintiff may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1255-56 (10th Cir. 2003) (internal quotation omitted). While there is a higher standard for preliminary injunctions that seek to alter the status quo, Plaintiff here seeks only to maintain it.

ARGUMENT

Plaintiffs meet each of the four prongs for granting a preliminary injunction and temporary restraining order.

I. Plaintiffs Have a Substantial Likelihood of Succeeding on the Merits of this Case

The United States Supreme Court "has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and [is] not lightly

used." *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (footnote omitted). "It has become axiomatic that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *United States v. Robel*, 389 U.S. 258, 265 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). For the two independent reasons below, subsections (1) and (3) of Colorado Revised Statute § 1-13-712 ("C.R.S. § 1-13-712") each violate the First Amendment and should be enjoined.

A. C.R.S. § 1-13-712 Fails Strict Scrutiny and Is Therefore Facially Unconstitutional Under the First Amendment

i. C.R.S. § 1-13-712 Triggers Strict Scrutiny Because It Is Content-Based and Forbids the Dissemination of Truthful, Lawfully-Obtained Information on a Matter of Public Concern

Content-based restrictions are presumptively invalid, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and are permitted only if they are narrowly tailored to promote a compelling governmental interest. *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1054 (10th Cir. 2007).

C.R.S. § 1-13-712(1) and (3) are content-based restrictions because each prohibits the revelation of specific content – namely, how a voter voted or how a person believes a voter voted. A ballot omitting this content – even if it contains other handwritten messages – is not subject to the law's prohibitions. Whether an individual runs afoul of the law when showing that person's ballot depends entirely on whether the markings on the individual's ballot indicate how the person has specifically voted. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992) (law banning the display or distribution of campaign materials within 100-feet of the entrance to a polling place on election day was content based because "[w]hether individuals may exercise their free speech rights near polling places [under the law] depends entirely on whether their speech is related to a political campaign"). Put another way, the law is content based because it requires the government to examine the content of a ballot to determine whether the law has been violated. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (A law is "content based if it require[s] 'enforcement authorities' to 'examine the

content of the message that is conveyed to determine whether' a violation has occurred.") (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).[1]

The United States Supreme Court also recently explained in *McCullen v. Coakley* that a law is content based "if it [is] concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech." *McCullen*, 134 S. Ct. at 2531; *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). Here, the law's blanket prohibition exists because the State specifically disapproves of messages conveyed through the dissemination of marked ballots because of perceived undesirable effects. This is the very definition of a content-based regulation requiring strict scrutiny review.

C.R.S. § 1-13-712(1) and (3) trigger strict scrutiny for another independent reason: the laws forbid "the dissemination of truthful and lawfully obtained information on a matter of public concern." *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989). With such a regulation, the law "must meet a daunting standard"—namely, "punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order[.]" *Id.* (statute prohibiting instruments of mass communication from publishing the names of rape victims failed strict scrutiny review). Here, it cannot seriously be disputed that speech concerning an election is a "matter of public concern." The speech being suppressed by C.R.S. § 1-13-712(1) is not just an image depicting the identity of the candidate for whom a person voted; rather, the law bans individuals from voluntarily using photographs of marked ballots to more broadly engage in political commentary and discuss both their experience at the polls and reasons for voting for certain candidates. C.R.S. § 1-13-712(3) goes

[1] *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135-36 (1992) (law is content based where it discriminates on the basis of the content of the message); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (law banning anonymous campaign literature was content based because "the category of covered documents is defined by their content – only those publications containing speech designed to influence the voters in an election").

even further, barring conversations about who others have or may have voted for – a core part of political discourse.

ii. C.R.S. § 1-13-712 Is Not Narrowly Tailored to Serve a Compelling Government Interest

Even if there were a compelling governmental interest in addressing vote buying and voter coercion, the State of Colorado has no interest – let alone a compelling one – in regulating innocent, political speech far beyond the polling place that is unrelated to this asserted interest. To suppress such speech creates the real prospect of self-censorship and limits the breathing space for protected First Amendment expression. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (explaining our country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

C.R.S. § 1-13-12 also cannot be viewed as a narrowly-tailored means of addressing vote buying and voter coercion when the law sweeps within its scope speech wholly unrelated to these interests – including the political speech engaged in and desired to be engaged in by Plaintiffs. *See Reno v. ACLU*, 521 U.S. 844, 879 (1997) (Communications Decency Act of 1996 criminalizing the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age violated the First Amendment because it was not narrowly tailored to the goal of protecting minors from potentially harmful materials given the "breadth of this content-based restriction of speech"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 350 (1995) (ban on dissemination of anonymous campaign literature not narrowly tailored to interests of deterring fraud and libel because "the prohibition encompasses documents that are not even arguably false or misleading").

It is already illegal to engage in vote bribery and voter coercion under C.R.S. §§ 1-13-720, 1-13-721, and 1-13-713. Unlike C.R.S. § 1-13-712, these laws do not sweep within their scope a wide array of innocent, political speech. The United States Supreme Court's recent analysis in *McCullen v. Coakley* of whether Massachusetts' 35-foot abortion clinic buffer zone was narrowly tailored is

instructive here. There, the Court first observed that the law had reduced petitioners' opportunities to effectively speak with their intended audience through face-to-face communications. *McCullen*, 134 S. Ct. at 2535. The Court then explained that there were ample alternatives that would more directly address the government's asserted public safety interests without substantially burdening this speech, including "criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." *Id.* at 2538. The same is true here where the more narrowly-tailored response would be to aggressively investigate and prosecute violations of C.R.S. §§ 1-13-720, 1-13-721, and 1-13-713.[2] Indeed, if a person publicly posts a picture of a marked ballot on the Internet showing how he or she voted, the State could easily identify and investigate the voter for a potential violation of C.R.S. §§ 1-13-720, 1-13-721, or 1-13-713. Here, the State has not shown that the posting of displayed ballots on the Internet is even linked to violations of C.R.S. §§ 1-13-720, 1-13-721, or 1-13-713, let alone shown, as required by *McCullen*, "that [the state] seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 134 S. Ct. at 2539.

The State likely will argue that C.R.S. § 1-13-712(1) is necessary because a photograph of a marked ballot is the best evidence that a person who is selling a vote or has been coerced can present to a third party to prove that he or she voted a certain way. In other words, the State's argument is that this law makes it much easier to eliminate vote buying and voter coercion because it discourages an act that is necessary to consummate this illegal conduct. Even if this were true, this does not solve the law's narrow tailoring problem, or remedy the fact that the law sweeps within its scope innocent political speech. As the United States Supreme Court recently made clear in *McCullen*, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's

[2] *See also State v. Chong*, 121 N.H. 860, 862 (1981) (anti-leafleting law was unconstitutional because "[i]f the defendants were to litter, they could, of course, be charged with that violation").

interests, not simply that the chosen route is easier." *Id.* at 2540. The State cannot make such a showing here. The First Amendment cannot be sacrificed for the sake of efficiency.

Any argument by the State that C.R.S. § 1-13-712 is a tailored regulation governing speech in polling places on Election Day also fails. *See Burson*, 504 U.S. at 197 (law banning solicitation of votes and the display or distribution of campaign materials within 100-feet of the entrance to a polling place on election day survived strict scrutiny). Unlike the law in *Burson* that was limited only to political speech on Election Day and at the polling place, C.R.S. § 1-13-712 is far broader in duration and scope. For example, the law indefinitely bans the posting of one's ballot on the Internet, including postings made months or even years after the election. Additionally, C.R.S. § 1-13-712 prohibits a voter from uploading to Facebook a photograph of a marked ballot in places other than in the polling place, including in the privacy of one's home. In fact, all Plaintiffs in this case either uploaded images of their marked ballot or seek to do so from places other than the polling place.[3]

Because C.R.S. § 1-13-712 cannot survive any form of constitutional scrutiny—let alone strict scrutiny—the law violates the First and Fourteenth Amendments to the United States Constitution.

B. C.R.S. § 1-13-712 Is Substantially Overbroad, Violating the First Amendment

C.R.S. § 1-13-712 is also substantially overbroad. A statute is overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks and citations omitted). The Court's inquiry is not limited to the application of the challenged provisions to the

[3] C.R.S. § 1-13-712 also cannot possibly serve the purpose of protecting the victims of voter coercion. For example, if the State is concerned about a voter being coerced to vote in a certain way by a spouse, employer, or union representative, this statute actually penalizes the victimized voter who is alleged to have displayed his or her ballot to the coercing party.

particular plaintiffs before it: "Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).[4] In addition to the political speech that Plaintiffs have already engaged in or want to engage in, C.R.S. § 1-13-712 also prohibits all the forms of common political speech described in Part III of the Plaintiffs' complaint, some of which regularly take place inside peoples' own houses. *See* [#1], pp. 8-9 (exit polls, TV interviews of voters, family discussions). Such speech is at the core of American democracy. It is plainly protected under the First Amendment, and its regulation in no way effectuates the purpose of the law. *See McIntyre*, 514 U.S. at 346 ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

In light of these examples of innocent, political speech that are now banned, C.R.S. § 1-13-712's overbreadth – and thus facial unconstitutionality – is apparent. As the United States Supreme Court has explained, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (Child Pornography Prevention Act of 1996's ban on virtual child pornography was unconstitutionally overbroad because it proscribed speech which was neither child pornography nor obscene). Moreover, "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted …." *Broadrick*, 413 U.S. at 612. This is precisely why the overbreadth doctrine exists—to "prohibit[] the

[4] The Court need not reach Plaintiffs' overbreadth challenge because it is apparent that C.R.S. § 1-13-712 is not narrowly tailored. *See McCullen*, 134 S. Ct. 2518, 2540 n.9 (addressing tailoring first, and concluding that, since the law was not narrowly tailored, "we need not consider . . . petitioners' overbreadth challenge."). The Court need only reach the question of overbreadth if it determines that the law is narrowly tailored.

Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft*, 535 U.S. at 255.[5]

Finally, C.R.S. § 1-13-712 disregards the critical importance of online political speech to American culture. For many people throughout Colorado – indeed, the United States – the Internet has become the predominant means for communication and public discourse. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Reno*, 521 U.S. at 870; *see also Clement v. Cal. Dep't of Corrs.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (The First Amendment "protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era"). Now, more than ever, "[t]he content on the Internet is as diverse as human thought." *Reno*, 521 U.S. at 870 (internal quotation marks and citation omitted). The ideas, opinions, emotions, actions, and desires capable of communication through the Internet are limited only by the human capacity for expression. If First Amendment protections are to enjoy enduring relevance in the twenty-first century, they must apply with full force to speech conducted online and through social media platforms.

Because a substantial number of C.R.S. § 1-13-712's applications are unconstitutional, the law must be enjoined.

II. Plaintiffs Have Been and Will Be Irreparably Harmed by C.R.S. §1-13-712

Plaintiffs and members of the public will be irreparably harmed in the absence of a preliminary injunction, especially where the State has been asked if it will declare C.R.S. § 1-13-712

[5] *See also Reno*, 521 U.S. at 880 (Communications Decency Act of 1996 was overbroad because it "suppress[ed] a large amount of speech that adults have a constitutional right to send and receive"); *Stevens*, 559 U.S. at 475 (federal criminal statute's ban on "depictions of animal cruelty" was overbroad because "[a] depiction of entirely lawful conduct runs afoul of the ban").

unconstitutional and has refused to do so. "[T]o the extent that First Amendment rights are infringed, irreparable injury is presumed." *Cmty. Commc'ns Co. v. Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (court assumes irreparable injury where deprivation of speech rights). As the Supreme Court holds, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). If the State is permitted to continue enforcing the law, Plaintiffs and others will be prohibited from exercising their First Amendment free speech rights to engage in political speech on matters of public importance that is wholly unrelated to the purported interests behind the law. Thus, Plaintiffs and members of the public will be irreparably harmed by the loss of their First Amendment rights if a preliminary injunction is not granted.

III. Plaintiffs' Threatened Injury Outweighs the Nonexistent Harm a Preliminary Injunction and Temporary Restraining Order May Cause Defendants

Plaintiffs' hardships if the injunction is not granted outweigh any hypothetical harm that could come from the State not being allowed to enforce an unconstitutional statute. As Plaintiffs explain in their verified complaint, Plaintiffs have stopped themselves from engaging in core political speech based on the threat of prosecution under C.R.S. § 1-13-712. Absent relief from this Court, Plaintiffs will be required to continue to self-censor their expression or face punishment by the State. Thus, the law is imposing and will continue to impose irreparable harm upon Plaintiffs' free speech activities unless it is enjoined. In contrast, the State will not suffer any hardship if the injunction is granted, especially where it still has the ability to investigate and prosecute vote bribery and voter coercion under C.R.S. §§ 1-13-720, 1-13-721, and 1-13-713. In such a circumstance, "the threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute." *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999).

IV. A Preliminary Injunction and Temporary Restraining Order Are in the Public Interest

The granting of a preliminary injunction will benefit the public interest. It is in the public's interest to protect constitutional rights. *See Id.* ("Finally, we further agree that the preliminary injunction will not be adverse to the public interest as it will protect the free expression of the millions of Internet users both within and outside of the State of New Mexico."). Granting a preliminary injunction in favor of Plaintiffs would protect sacred freedom of speech principles. Thus, the public interest is best served by the granting of the injunction.

V. Laws Such as C.R.S. § 1-13-712 Have Been Held Unconstitutional Across the Country

Recently, courts across the country have struck down laws similar to C.R.S. § 1-13-712. The District of New Hampshire, the Southern District of Indiana, the Western District of Michigan, and the First Circuit have all held so-called "ballot selfie" prohibitions unconstitutional. *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015); aff'd 2016 U.S. App. LEXIS 17622 (1st Cir. Sept 28, 2016); *Ind. Civil Liberties Union v. Ind. Sec'y of State*, No. 15-cv-01356-SEB-DML, ECF #32 (S.D. Ind. Oct. 19, 2015); *Crookston v. Johnson*, No. 16-cv-1109, ECF #18 (W.D. Mich. Oct. 24, 2016). Given that C.R.S. § 1-13-712 sweeps far more broadly than any of these statutes by prohibiting in-person discussions about a voter's vote, it is even more plainly unconstitutional.

CONCLUSION

Wherefore, Plaintiff respectfully requests that this Court enter a temporary restraining order and preliminary injunction enjoining enforcement of Colorado Revised Statute § 1-13-712.

Respectfully submitted, October 25, 2016.

FRANK & SALAHUDDIN LLC

s/ *Adam Frank*
s/Faisal Salahuddin
Adam Frank
Faisal Salahuddin
1741 High Street
Denver, CO 80218
(303) 974-1084
adam@fas-law.com
faisal@fas-law.com
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I further certify that a copy of the foregoing was served via electronic mail separately from the CM/ECF system, addressed to the following:

Matt Grove
Assistant Attorney General (representing both Attorney General Coffman and Secretary of State Williams)
matt.grove@coag.gov

Alfredo Hernandez
Chief Deputy District Attorney and General Counsel
info@denverda.org

s/ Adam Frank
FRANK & SALAHUDDIN LLC