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OFFICE OF THE STATE ATTORNEY

EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA
BREVARD AND SEMINOLE COUNTIES

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August 7, 2024

Resident Agent in Charge Ryan Bliss
Florida Department of Law Enforcement
6769 N. Wickham Road, Suite #104
Melbourne, FL 32940

RE: FDLE Investigation EI-14-0198
SAO Case Number 1724SA09615

Dear Resident Agent in Charge Bliss:

The Office of the State Attorney for the 18th Judicial Circuit has received your investigation into allegations that St. Lucie County Sheriff Keith Pearson violated Florida criminal law when he posted a photograph of his completed ballot on social media following a March 19, 2024, Florida primary election. We are not filing charges in this case and write to memorialize our findings.

Florida State Statute Section 104.20, Ballot not to be seen, and other offenses., states:

> *Any elector who, except as provided by law, allows his or her ballot to be seen by any person*; takes or removes, or attempts to take or remove, any ballot from the polling place before the close of the polls; places any mark on his or her ballot by which it may be identified; endeavors to induce any elector to show how he or she voted; aids or attempts to aid any elector unlawfully; or prints or procures to be printed, or has in his or her possession, any copies of any ballot prepared to be voted is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.[1]

At first blush, it appears that Pearson's actions fall under the guise of this statute and merit the filing of criminal charges. To do so, however, would be contrary to constitutional freedom of speech protections as interpreted by numerous federal cases as follows:

[1] Emphasis added in order to identify (by way of italics) that portion of the statute which applies to Pearson's actions under review.

- Rideout v. Gardner, 838 F.3d 65 (United States Court of Appeals, 1st Circuit, 2016): Voters brought suit against the New Hampshire Secretary of State challenging the constitutionality of a New Hampshire statute that prohibited a voter from "allow[ing] his or her ballot to be seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has voted except as provided in RSA 659:20. This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means." (New Hampshire Section 659:35, I). The Federal Circuit Court of Appeals held that a state's prohibition on taking and disclosing digital or photographed copies of completed ballots was not narrowly tailored to serve a significant government interest and ran afoul of First Amendment free speech protections.

- Indiana Civil Liberties Union Foundation, Inc. v. Indiana Secretary of State, 229 F. Supp. 817 (United States District Court, S.D. Indiana, 2017): Plaintiff filed suit against the Indiana Secretary of State and others, alleging that an Indiana statute prohibiting voters from taking "a digital image or photograph of the voter's ballot while the voter is in the polling place" and sharing those photographs violated the First Amendment. (Indiana Code s. 3-11-8.-17.5(b)(1)). The Federal District Court held that the statute constituted content-based restriction on free speech and ruled in favor of the Plaintiff.

- Hill v. Williams, 2016 WL 8667798 (United States District Court, D. Colorado, 2016): Plaintiffs filed suit against the Colorado Secretary of State and Colorado Attorney General challenging enforcement of a Colorado statute which prohibited the Plaintiff voter(s) from "show[ing] his ballot after it is prepared for voting to any person in such a way as to reveal its contents." (Colorado Statute s. 1-13-712(1)). The Federal District Court enjoined both the Colorado Secretary of State and Attorney General from enforcing the statute and precluded them from prosecuting, referring for prosecution, and/or investigating violations of the statute unless said violation or publication was in connection violations of another criminal law.

We adopt the compelling legal analysis that has been set forth in these cases and find that a voter's photograph of his or her ballot constitutes a protected form of speech under First Amendment constitutional protections. As such, any law prohibiting First Amendment free speech, such as a voter's act of photographing his or her ballot, must pass the "strict-scrutiny" test. See Brown v. Entertainment Merchants Association, 131 S. Ct. 2729, 2738 (2011). The "strict-scrutiny" test requires that the government prove that the law under review is narrowly tailored, and that least-restrictive means were used to further the government's compelling interest in enacting said law. See Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

Laws that prohibit voters from showing others their ballots were created in order to prevent vote buying and coercion. The theory was that if the government criminalized the act of a voter showing his or her ballot to another in order to prove how he or she voted (thus satisfying the voter's side of a bargain to vote a certain way in exchange for money or some other benefit), it would tamp down on the historical problem of vote buying. As with so many things, however,

our ever-evolving world seems to have out-paced this historical problem, rendering the law unconstitutional for three reasons.

First, we note that the law at issue criminalizes a voter's act of "allow[ing] his or her ballot to be seen by any person." The statute does not require that the ballot be completed or marked in some way. As written, a voter's act of merely showing their incomplete ballot to another, in any format and via any means, would constitute a crime, and that is not in keeping with the purpose or intent behind rooting out vote buying or coercion.

Second, we find that the law at issue is not sufficiently narrowly tailored in this day and age so as to pass the "strict-scrutiny" test. For instance, photographs of ballots posted to social media are used to express pride in participating in the election and voting processes, to voice support for (or loathing of) a candidate or initiative, or to document errors or issues with the voting process. Criminalizing a voter's act of showing his or her ballot to another chills these areas of free speech and evidences a breadth of application that was unforeseen and unintended when the law was first enacted.

Third, the law does not address a current, actual problem that warrants governmental intrusion on a person's right to free speech. In order for the government to prove that a law restricting free speech meets the "strict-scrutiny" test, it must "specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." Brown, 131 S. Ct. at 2738. The "[m]ere speculation of harm does not constitute a compelling state interest." Consolidated Edison Company v. Public Service Commission, 447 U.S. 530, 543 (1980).

Undoubtedly, generations ago, the practice of vote buying, and illegal, coercive, electoral techniques, was rampant and warranted legislative action in order to root it out of our society. Today, however, vote buying is so rare that it is considered to be "statistically non-existent," as noted by Daniel A. Horwitz in his article, "A Picture's Worth a Thousand Words: Why Ballot Selfies are Protected by the First Amendment." (SMU Science and Technology Law Review, Volume XVIII, page 247, 259, November 10, 2016) ("despite the occasional 'isolated and anachronistic' instance of vote buying in one jurisdiction or another, statistically speaking, vote buying is non-existent.").

Mr. Horwitz succinctly summed up his constitutional analysis of this issue, as follows:

> In sum, laws that prohibit ballot photography and distribution represent content-based restrictions on core political speech, and states' widespread efforts to prohibit ballot selfies cannot withstand constitutional scrutiny. The problems with such prohibitions are multifaceted. First, ballot selfie prohibitions are not narrowly tailored because they unnecessarily restrict a substantial amount of protected speech while simultaneously doing nothing to prevent far simpler forms of vote buying. Second, the government's purportedly compelling need to prohibit personal ballot photography in order to prevent vote buying is highly questionable in light of the fact that vote buying is statistically non-existent even

> in jurisdictions where it is easy to accomplish. Third, because voters generally have the ability to change their votes after photographing their ballot selections, ballot selfies represent a useless tool for promoting vote buying anyway – rendering the entire premise behind such laws baseless.

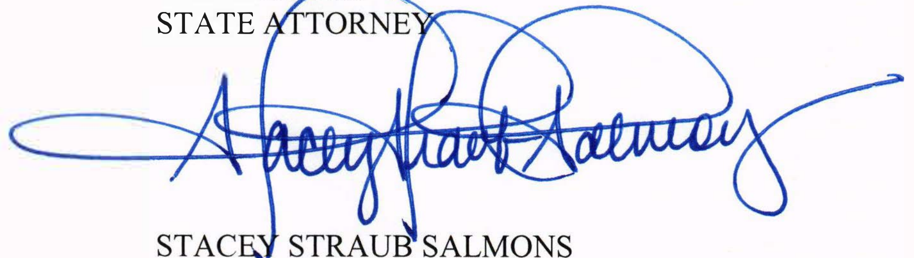
Id. at page 262.

In conclusion, we acknowledge that Sheriff Pearson's act of taking a photograph of his ballot on March 19, 2024, and then posting it to social media, falls within the plain language of Fla. Stat. s. 104.20, Ballot not to be seen, and other offenses. As such, it was wholly appropriate for the Florida Department of Law Enforcement to conduct an investigation into this matter and to submit it for prosecutorial review. The constitutional analysis we have conducted, however, leads us to conclude that there is no reasonable likelihood of Pearson's successful conviction on any resulting charges because our prosecution will not survive constitutional attack.[2]

We thank you for the time and attention you have paid to investigating this matter and for the opportunity to review your completed investigation.

Sincerely,

PHIL ARCHER
STATE ATTORNEY



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[2] We caution that our conclusion as to this isolated incident does not mean that every election-related photograph taken by a voter would constitute constitutionally protected speech. For example, photographing another voter's ballot without their consent would certainly warrant criminal investigation and review to determine if those facts give rise to a violation of Florida criminal law.