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Constitutional Q&A: Your First Amendment Right to Vote

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Free expression at polling places has become a contentious issue in recent years, with controversies over “ballot selfies,”² the wearing of political apparel to polling places, and even apparel that does not explicitly reference candidates, ballot issues, or politics.

When Linda McMahon, the wife of World Wrestling Entertainment (WWE) chairman Vince McMahon, ran for the U.S. Senate in Connecticut, there were questions over whether voters could be turned away for wearing WWE merchandise.³ In Georgia, a man was ordered to remove his NRA hat while going to vote in 2014.⁴ In 2016, legal challenges have been raised over whether the First Amendment protects the right to take ballot selfies and post them to social media.

The constitutionality of state laws restricting various polling place activities has been challenged in recent years as violations of the First Amendment’s guarantee to freedom of speech.

The following Q&A aims to provide clarification on lawful First Amendment activities in polling places.

Q: What are my rights when it comes to voting?

A: The United States Constitution generally grants all citizens aged 18 and older the right to vote in general elections.⁵ A citizen must have registered with the state or local agency responsible for conducting elections within the time prescribed by state law in order to be eligible to vote. Depending on the laws of one’s state, the right to vote also may be lost by some disqualifying behavior, such as having committed a crime of a particular severity.

Q: What behaviors are prohibited?

A: Generally, acts that induce, influence, or intimidate other voters are prohibited at voting locations. The law of each state frames this rule of “anti-electioneering” differently in the words of statutes regulating elections. Common examples of prohibited acts include distributing election literature, soliciting, pressuring other citizens from voting for certain candidates, and

other ways of actively influencing other voters. Conduct that disrupts or causes interference in the voting place also is prohibited.

Q: Where do the prohibitions take effect?

A: Each state prescribes a “buffer zone,” an immediate area surrounding the voting place which is off-limits for the purposes of political campaigning. For example, Virginia law makes it unlawful (1) to loiter or congregate within 40 feet of any entrance of any polling place; (2) within that distance to give, tender, or exhibit any ballot, ticket, or other campaign material to any person or in any manner attempt to influence any person in casting his vote; or (3) to hinder or delay a qualified voter in entering or leaving a polling place.”⁶

Similarly, a Massachusetts statute states that “no other poster, card, handbill, placard, picture or circular intended to influence the action of the voter shall be posted, exhibited, circulated or distributed in the polling place, in the building where the polling place is located, on the walls thereof, on the premises on which the building stands, or within one hundred and fifty feet of the building entrance door to such polling place.”⁷

The U.S. Supreme Court has ruled in *Burson v. Freeman* that the content of political speech may be restricted to some extent at voting precincts in order to provide for elections that are fair and free of pressure or confusion, but a state-imposed restriction must be necessary to serve a compelling interest.⁸ The Court decided that “buffer zones” near polling places meet this test, and all 50 states have some restriction on active campaigning near polling places to protect against intimidation of voters.

Due to subtle differences in these restrictions, e.g. distance from the polling place, it is important to check your local election laws.

Q: Can I wear election-related clothing to the poll?

A: Whether voters may wear political clothing/buttons at polling places is an unsettled question that has not been addressed by the U.S. Supreme Court.

While *Burson v. Freeman* upheld some restrictions on free speech in polling places, it did not address the passive display of political messages on apparel directly. Whether or not you can wear political apparel to the polls remains a matter of controversy and may be forbidden depending upon the state involved. On the one hand, Maryland⁹ and Virginia¹⁰ explicitly permit wearing apparel at or near polling places that advocates for a particular candidate or ballot issue. Maine permits buttons but does not permit other apparel.¹¹

Guidance to voters issued by Alabama,¹² Rhode Island,¹³ and Florida¹⁴ indicate that those states permit electioneering displays so long as there is no active campaigning and voters leave the polling place promptly after completing their ballots. On the other hand, California, Delaware, Kansas, Massachusetts, Minnesota, Montana, Nevada, New Mexico, New York, South Carolina, Vermont, and North Dakota¹⁵ all have laws explicitly banning this kind of political speech at voting precincts.

Additionally, Hawaii, Louisiana, South Dakota,¹⁶ and Tennessee more broadly forbid the display of political materials.¹⁷ Georgia,¹⁸ Michigan,¹⁹ Wisconsin,²⁰ and Indiana²¹ have issued statements meant to clarify their laws indicating that political apparel is prohibited. All other states have some restriction on electioneering or soliciting votes at polling places which may or may not be interpreted as covering apparel and buttons.

Q: Are these “button laws” a violation of my First Amendment rights to free speech?

A: Some courts have ruled that wearing clothing with a political message does not intrude on a voter’s rights in the way that active campaigning would and so restrictions on this kind of expression violate constitutional protections of the freedom of speech.

In 1996, the Oregon Court of Appeals struck down a state law banning political buttons as a violation of the voter’s right to free speech finding that such buttons do not interfere with free and fair elections.²² A Texas federal court blocked enforcement of a law in that state banning the possession of written communications in the voting booth.²³ And before the 2010 election, a federal court in Arizona issued an injunction allowing Tea Party members to wear T-shirts in support of their movement in polling places.²⁴

In response to that ruling, Arizona amended its statute from prohibiting the display of “political or electioneering materials” to prohibiting “electioneering materials.”²⁵ However, other courts have upheld bans on political messages, including a case where a federal appeals court rejected a First Amendment challenge to a Minnesota law that forbids wearing any “political badge, political button, or other political insignia” at or about a polling place after activists were asked to remove buttons before voting in 2010.²⁶ The Supreme Court declined to hear this case.²⁷

Overall, “button laws” remain an unresolved constitutional controversy.

Q: Can I take a selfie with my ballot and post it on social media?

A: When it comes to the issue of “ballot selfies,” many states prohibit the photographing and sharing of marked ballots, for fear of such a practice being used for vote-buying schemes in the case of photographing one’s own ballot, or for voter intimidation when it comes to photographing the ballots of others.

Arizona,²⁸ Maine,²⁹ Nebraska,³⁰ North Dakota,³¹ Oregon,³² Tennessee,³³ Utah,³⁴ Vermont,³⁵ and Wyoming³⁶ either explicitly allow or do not prohibit voter selfies, while Alabama,³⁷ Alaska,³⁸ California,³⁹ Colorado,⁴⁰ Florida,⁴¹ Georgia,⁴² Indiana,⁴³ Iowa,⁴⁴ Kentucky,⁴⁵ Louisiana,⁴⁶ Maryland,⁴⁷ Massachusetts,⁴⁸ Michigan,⁴⁹ Mississippi,⁵⁰ Missouri,⁵¹ Montana,⁵² Nevada,⁵³ New Hampshire (struck down by court case),⁵⁴ New York,⁵⁵ North Carolina,⁵⁶ Oklahoma,⁵⁷ Rhode Island,⁵⁸ South Carolina,⁵⁹ South Dakota,⁶⁰ Texas,⁶¹ West Virginia,⁶² and Wisconsin⁶³ either prohibit recording devices at polling places or photographing/sharing your ballot.

Arkansas,⁶⁴ Connecticut,⁶⁵ Delaware,⁶⁶ the District of Columbia,⁶⁷ Hawaii,⁶⁸ Idaho,⁶⁹ Illinois,⁷⁰ Kansas,⁷¹ Minnesota,⁷² New Jersey,⁷³ New Mexico,⁷⁴ Ohio,⁷⁵ Pennsylvania,⁷⁶ Virginia,⁷⁷ and Washington⁷⁸ all have laws which are ambiguous in some way.

Some of the states which ban selfies do so because they ban photography altogether, while others merely forbid sharing a marked ballot, so check your state laws to see if they allow other forms of photography around polling places.

Q: Are these restrictions a violation of my First Amendment rights to free expression?

A: While the specific issue of “voter selfies” is a new one without much legal precedent addressing it, a federal appeals court in Boston struck down a New Hampshire law banning the photographing of marked ballots in *Rideout v. Gardner*.⁷⁹ The decision reasoned that while voter fraud was a compelling state interest, the law in question was not narrowly tailored to such an interest, and the court cited a lack of evidence of complaints of voter fraud as the basis for the ruling that the law’s restriction on freedom of expression was unwarranted. Since then, federal courts in Indiana⁸⁰ and Michigan⁸¹ also have ruled that a state ban on ballot selfies violates the First Amendment finding that states were unable to articulate a compelling interest for the bans. There has yet to be any Supreme Court ruling on this issue, however, and so it is still not clear whether or not a selfie ban would be unconstitutional in all cases.

Q: What if I have a disability?

A: Help America Vote Act (HAVA), the federal election reform law enacted in 2002, stipulates that states “[provide] physical access for individuals with disabilities, [provide] nonvisual access for individuals with visual impairments, and [provide] assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language” at polling places⁸² HAVA mandates states to furnish polling stations with equipment to accommodate those with disabilities and provide alternative ways of voting.

Also, pursuant to Voting Accessibility for the Elderly and Handicapped Act, states are required to provide aid to handicapped and elderly voters, including instructions, printed in large type, conspicuously displayed at each permanent registration facility and each polling place, and information by telecommunications devices for the deaf.⁸³

Q: Can I have someone accompany me to the voting booth?

A: States allow the voting center staff to accompany voters to the booth as necessary. States also allow an individual under the age of 18 to accompany the voter provided that the individual is in care of the voter.⁸⁴

Should you have further questions or need legal assistance in exercising your constitutional rights, please contact the Legal Department at legal@rutherford.org.

Citations

¹ The Rutherford Institute, a nonprofit civil liberties organization based in Charlottesville, Va., is deeply committed to protecting the constitutional freedoms of every American and the integral human rights of all people through its extensive legal and educational programs. The Institute provides its legal services at no charge to those whose constitutional and human rights have been threatened or violated. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms.

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