

Date of Hearing: January 13, 2016

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Sebastian Ridley-Thomas, Chair

AB 1494 (Levine) – As Amended January 4, 2016

SUBJECT: Voting: marked ballots: distributing and sharing photographs and digital images.

SUMMARY: Authorizes voters to take and share photographs of their marked ballots. Specifically, **this bill:**

- 1) Authorizes a voter to take a photograph or digital image of his or her marked ballot and distribute or share the photograph or image using social media or by any other means.
- 2) Provides that a photograph or digital image taken and distributed or shared pursuant to this bill shall not be used to coerce or intimidate a voter, impede a voter's ability to vote, cause voter delay in a polling place, disrupt a polling place, or result in a monetary or tangible benefit for any purpose.
- 3) Makes corresponding and technical changes.

EXISTING LAW:

- 1) Provides that voting shall be secret.
- 2) Prohibits a voter from showing his or her ballot to any person, after the ballot has been marked, in such a way as to reveal the ballot's contents.
- 3) Prohibits a person other than an elections official or member of a precinct board, except as specified, from receiving a voted ballot from a voter or from examining or soliciting the voter to show his or her voted ballot. Provides that a violation of this prohibition is punishable by imprisonment, a fine, or both, as specified.
- 4) Prohibits a person from interfering or attempting to interfere with the secrecy of voting. Provides that a violation of this prohibition is punishable by imprisonment, as specified.
- 5) Permits the Secretary of State, the Attorney General, and any local elections official in the county in which the act occurs, to bring a civil action against any individual, business, or other legal entity that interferes or attempts to interfere with the secrecy of voting. Provides that a civil action brought pursuant to this provision may result in a civil penalty and injunctive relief, as specified.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Prior Consideration of This Bill:** This bill was previously heard by this committee in April of last year. At the time, this bill would have imposed a fee on specified independent expenditures made in connection with candidates for elective state office or state measures.

A motion to pass that version of this bill out of the committee failed to receive a second, and as a result, the bill was held in this committee.

Subsequent to its failure in committee, the prior contents of this bill were deleted and the current contents were added.

2) **Purpose of the Bill:** According to the author:

AB 1494 allows California voters to take ballot selfies and post them on social media. A ballot selfie is a [digital] image of a person's marked ballot.

Social media is a great tool for voters to share their civic participation. California law should encourage voter pride, political speech, and civic engagement through social media. Laws prohibiting photos of one's marked ballot were written before sharing digital images over the internet was ubiquitous. AB 1494 updates the law to reflect technology and the world in which we now live.

3) **Constitutional Guarantee of Secret Voting and Related Statutes:** Article II, Section 7 of the California Constitution provides, "Voting shall be secret." Notably, while this constitutional provision protects the right of a voter to cast a secret ballot, it also reflects distinct state interests in keeping voting secret. Requiring a secret ballot helps protect the integrity of the voting process by making it impossible to verify the votes cast by any single voter, thereby protecting against vote buying schemes and voter intimidation or coercion.

The California Elections Code contains a number of provisions that are intended to protect the secrecy of voting. For example, state law limits the persons who are allowed within the voting area at a polling place and prohibits more than one person from occupying a voting booth at any time, except in situations where a voter needs assistance in casting a ballot. Perhaps most relevant for the purposes of this bill, state law prohibits a voter from showing his or her ballot to any person in such a way as to reveal the ballot's contents after it has been marked. This provision can protect a voter from being coerced or intimidated into showing his or her marked ballot, thereby safeguarding the voter's right to cast a secret ballot. Furthermore, this provision protects against vote buying schemes by prohibiting a voter from providing proof of his or her vote selections.

The state law prohibiting a person from showing his or her marked ballot to any person in such a way as to reveal the ballot's contents has been in effect in various forms since at least 1891, and does not explicitly address the issue of voters taking photographs of their completed ballots. Nonetheless, the law arguably could apply to a person who takes a photograph of his or her ballot and shows that photograph to another person or posts that photograph on the Internet, through social media or other means. Notwithstanding the potential that state law could be interpreted in such a manner, committee staff is unaware of any instance in which a person has been prosecuted in California for taking a photograph of his or her completed ballot and sharing that photograph or posting it on the Internet. In fact, the Secretary of State's office indicates that they have no records of a voter *ever* having been prosecuted in the state for showing his or her marked ballot to another person.

This bill would expressly provide that the existing law prohibiting a voter from showing his or her completed ballot to another person does not prohibit a person from taking a photograph of his or her completed ballot and sharing that photograph. The author argues that authorizing "ballot selfies" will protect the free speech rights of voters and allow voters to promote civic participation through social media.

On the one hand, authorizing these "ballot selfies" arguably could help facilitate vote buying schemes and voter coercion or intimidation because a voter could use a "ballot selfie" to document the way that he or she marked the ballot. On the other hand, it is unclear whether ballot selfies would be an effective way to conduct vote buying schemes or voter coercion or intimidation. For one thing, a photograph of a marked ballot does not necessarily provide proof of the way a person actually voted—rather, it simply reflects the manner in which the ballot was marked at a particular point in time. If a voter subsequently changed his or her vote on that ballot, a photograph would not reflect that fact. Furthermore, with the widespread use of vote by mail (VBM) voting, it is difficult, if not impossible, for elections officials to ensure that VBM voters do not reveal the contents of their completed ballots to other persons. The Secretary of State's office indicates that they have no records of any complaints being made about cell phones or other photographic methods being used in vote buying schemes, or to coerce or intimidate voters.

- 4) **Use of Cameras at Polling Places:** At several recent elections (including, most recently, the November 2014 statewide general election), the California Secretary of State's office has sent a memo to county elections officials outlining the office's position that "the use of cameras or video equipment at polling places is prohibited" though the memo notes that elections officials could permit such photography under certain circumstances (such as a media organization filming a candidate voting at a polling place). In supporting this conclusion, the memo references numerous state laws including the constitutional requirement that voting shall be secret and statutory provisions that limit the persons who are permitted in the area of the voting booths while the polls are open, prohibit a voter from showing his or her ballot to any other person after it has been marked, and prohibit a person from photographing or video recording a voter entering or exiting a polling place within 100 feet of the polling place with the intent of dissuading another person from voting. The memo concludes that with these laws, "the Legislature and the Governor have sought to make the voting process private and free from any form of intimidation or coercion."

Because this bill expressly provides that a voter may take a photograph or digital image of his or her marked ballot, it is unclear whether California elections officials would be justified in continuing to take the position that the use of cameras or video equipment at polling places is prohibited. Although this bill prohibits a photograph or digital image taken pursuant to its provisions from being used "to coerce or intimidate a voter," among other provisions, it is unclear whether a more widespread presence and use of cameras at the polling place could nonetheless dissuade certain voters from participating in an election.

- 5) **Other States and Recent Federal Case Law:** As background in support of this bill, the author points to two recent decisions by federal courts that questioned the constitutionality of laws that make it illegal for voters to take and share photographs of their marked ballots. In

both cases, those states had enacted laws that were specifically designed to prohibit voters from taking photographs or digital images of their ballots and distributing or sharing those images.

In August 2015, the United States District Court for the District of New Hampshire invalidated a New Hampshire law that prohibits a voter from "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." The New Hampshire law was enacted in 2014 as an amendment to the state's law that prohibits a voter from allowing his or her ballot to be seen by any person with the intention of letting it be known how that person was about to vote. The author of the law indicated that he had introduced the bill "to prevent situations where a voter could be coerced into posting proof that he or she voted a particular way." In its decision, the court concluded that New Hampshire's law violated the First Amendment rights of voters by imposing "a content-based restriction on speech that deprives voters of one of their most powerful means of letting the world know how they voted." In reaching its decision, the court noted that there was no evidence of vote buying or voter coercion in New Hampshire since the late 1800s, and that "[n]either the legislative history of the new law nor the evidentiary record compiled by the parties provide support for the view that voters will be either induced to sell their votes or subjected to coercion if they are permitted to disclose images of their ballots to others." The New Hampshire Secretary of State subsequently appealed the district court's decision. The appeal is pending in the United States Court of Appeals for the First Circuit.

In October 2015, the United States District Court for the Southern District of Indiana, Indianapolis Division, issued a preliminary injunction enjoining the enforcement of an Indiana law that makes it illegal for a voter to take a digital image or photograph of the voter's ballot while the voter is in a polling place or other official location (such as a vote center or the elections official's office) at which the voter may cast a ballot in person, or to distribute or share such an image by social media or other means. Unlike the New Hampshire law, the Indiana law also applied to unmarked ballots. Much like in the New Hampshire case, the court noted that Indiana had "failed to demonstrate any current, ongoing or actual problem posed by or related to vote buying, much less a problem shown to be based on the use of digital photography to facilitate vote buying." The court thus concluded that Indiana's law violates the First Amendment of the United States Constitution. The Indiana Secretary of State has not yet indicated whether it will appeal the district court's decision.

By contrast to the laws in New Hampshire and Indiana that specifically prohibited voters from taking photographs or digital images of their ballots and distributing or sharing those images, at least two states recently took steps to clarify that "ballot selfies" are permitted in those states. In Utah, House Bill 72 of 2015 made it a misdemeanor for a person to take a photograph of someone else's ballot at a polling place, but also expressly allows an individual to share a photograph of his or her own completed ballot. Arizona's Senate Bill 1287 of 2015 prohibited a person from taking photographs or videos within 75 feet of a polling place, but also expressly allowed a voter to share an electronic image of his or her own ballot.

- 6) **Arguments in Support:** Secretary of State Alex Padilla, who has a "support if amended" position on this bill, writes:

I support the goal of AB 1494 (Levine) to protect the right of citizens to engage in political speech, while also protecting the integrity of our elections and each voter's right to privacy.

AB 1494 highlights the need for ongoing review of election laws, policies, and practices established before the advent of smartphones and other new technologies. Online voter registration and apps to help people find a polling place and access election information on mobile devices are new tools that make it easier to vote. Smartphones also have led to "ballot selfies," which two federal courts in other states have recognized as political speech protected by the First Amendment and one of the most powerful means for voters to tell the world how they voted.

While embracing the potential of new technologies, we must also preserve the integrity of our elections and each voter's right to privacy and a secret ballot. As the court that struck down New Hampshire's ban on "ballot selfies" stated, "few, if any, rights are more vital to a well-functioning democracy than either the right to speak out on political issues or the right to vote free from coercion and improper influence." AB 1494 seeks to protect all of these rights.

I look forward to working with the author on amendments to clarify how this bill would apply to the growing number of citizens who vote by mail and to provide clear direction for both voters and elections officials regarding the use of smartphones and other cameras in polling places.

- 7) **Arguments in Opposition:** In opposition to this bill, the Howard Jarvis Taxpayers Association writes:

Existing law prohibits a voter from showing their ballot after it is completed. AB 1494 would authorize voters to take and share a photo on social media of their ballot.

Notwithstanding provisions of AB 1494 that appear to prohibit these photos from being used to coerce, manipulate, or otherwise impede a voter's ability to vote, we still must oppose this bill. It is a constitutional right that "voting be done in secret." Any process that has the potential to alter the integrity of the ballot should be refrained from. Current law on this subject is unambiguous and there is no compelling reason to diminish that clarity at the potential risk of one's privacy.

- 8) **Double-Referral:** At the time this bill was originally referred to policy committee, it was double-referred to the Assembly Revenue & Taxation Committee. Subsequent to that referral, this bill has been gutted-and-amended to deal with a different subject. Based on those amendments, the Assembly Rules Committee has indicated that the bill no longer needs to be double-referred to the Assembly Revenue & Taxation Committee. Instead, this bill should be reported out to the Assembly Appropriations Committee if it is approved by this committee.

- 9) **Upcoming Deadlines and Amendments:** Due to impending committee deadlines, if this bill is approved in this committee today, it would need to be heard in the Assembly Appropriations Committee next week, absent a waiver of the Joint Rules. However, if this bill is amended in committee today, that may prevent this bill from being heard in the Assembly Appropriations Committee before next week's deadline for committees to hear and report two-year bills. In light of this fact, if it is the committee's desire to approve this bill with amendments, committee staff recommends that this bill be passed out of committee with the author's commitment to take those amendments subsequent to passage by this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Secretary of State Alex Padilla (if amended)

Opposition

Howard Jarvis Taxpayers Association

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