UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA CIVIL LIBERTIES UNION FOUNDATION. INC. doing business as AMERICAN CIVIL LIBERTIES UNION OF INDIANA, Plaintiff, vs. INDIANA SECRETARY OF STATE, MEMBERS OF THE INDIANA ELECTION COMMISSION, SUPERINTENDENT OF THE INDIANA STATE POLICE, Defendants.	)	1:15-cv-01356-SEB-DML

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This cause is before the Court on Plaintiff's Motion for Preliminary Injunction [Docket No. 8], filed on September 4, 2015. Plaintiff Indiana Civil Liberties Union Foundation, Inc. d/b/a American Civil Liberties Union of Indiana ("ACLU") filed suit on August 27, 2015, against Defendants Indiana Secretary of State, Members of the Indiana Election Commission, and Superintendent of the Indiana State Police ("the State"), alleging that Indiana Code § 3-11-8-17.5 violates the First Amendment of the United States Constitution.[1] For the reasons detailed below, we **GRANT** Plaintiff's motion.

[1] Although the ACLU has properly brought this action pursuant to 42 U.S.C. § 1983 against the defendants in their official capacities as the officers tasked with enforcement and administration of the

Background

Effective July 1, 2015, the Indiana General Assembly recently enacted a statute imposing level six felony penalties on voters who:

> (1) Take a digital image or photograph of the voter's ballot while the voter is in a polling place, an office of the circuit court clerk (under IC 3-11-10-26), a satellite office established under IC 3-11-10-26.3, or a vote center established under IC 3-11-18.1-4, except to document and report to a precinct election officer, the county election board, or the election division a problem with the functioning of the voting system.
>
> (2) Distribute or share the image described in subdivision (1) using social media or by any other means.

Indiana Code § 3-11-8-17.5(b).

On August 27, 2015, the ACLU has invoked associational standing in filing suit on behalf of its members who have taken photographs of their election ballots in the past or intend to do so in future elections, alleging that Ind. Code § 3-11-8-17.5 violates the First Amendment of the United States Constitution. Dkt. 1, 17, 25. On September 4, 2015, the ACLU moved for a preliminary injunction seeking to enjoin application and enforcement of the law. Dkt. 8. The first election when the new ban on photography and social media will apply is set for November 3, 2015. The issues have been fully briefed and oral arguments were heard on October 13, 2015. The motion is now ripe for decision.

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challenged statute, *see Ex parte Young*, 209 U.S. 123 (1908), we colloquially refer to Defendants collectively as the "State."

Legal Standard

In order to obtain a preliminary injunction, a party must show that it: (1) has a reasonable likelihood of success on the merits; (2) lacks an adequate remedy at law; and (3) will suffer irreparable harm if the preliminary injunction is not awarded. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). If this threshold is successfully crossed, courts next consider the balance of harms—weighing the irreparable harm to the moving party with the harm an injunction would cause to the opposing party, and also considering whether the public interest would be served by the preliminary injunction. *Id.* This balancing is done on a "sliding scale" in conjunction with the likelihood of success on the merits; "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.3d 1079, 1086 (7th Cir. 1984).

Discussion

We turn to address each of these elements of injunctive relief below.

I. Likelihood of Success

The First Amendment prohibits the government from making any law "abridging the freedom of speech." U.S. Const. amend. I. The ACLU alleges that Ind. Code § 3-11-8-17.5 violates this constitutional guarantee by restricting Indiana voters' rights to communicate through sharing photographs and using the internet and social media, to receive information, and to make recordings of information, citing *Hurley v. Irish-*

American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (holding that photographs are a protected medium of expression); *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that the internet is a protected medium of communication); *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (holding that there is a right to receive information and ideas); *ACLU of Ill. v. Alvarez*, 679 F.3d (7th Cir. 2012) (affirming a right to make audio and visual recordings).

The First Amendment prohibits the State from restricting "expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Any law that effectively restricts expression (including the communication of such content) is analyzed in the context of two possible categories: content-based restrictions or content-neutral restrictions. Depending on whether the law is content based or content neutral, it invited a particular form and level of judicial scrutiny. Content-based restrictions are subject to strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, __U.S.__, 135 S.Ct. 2218, 2231 (2015). Content-neutral restrictions are subject to intermediate scrutiny, which allows the Government to impose "reasonable restrictions on the time, place, or manner of protected speech" so long as the restrictions are "narrowly tailored to serve significant government interest, and [] leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Under either form of judicial scrutiny, the burden rests with the government to establish the

importance of its interests and the narrow tailoring of its restrictions. The parties before us do not agree as to whether the statute under review is content based or content neutral, though the ACLU contends that under either level of scrutiny, the statute does not pass constitutional muster.

A. Content-Based Restrictions

Government regulation of speech is content-based when two circumstances pertain: (1) "if [it] applies to particular speech because of the topic discussed or the idea or message expressed," or (2) if the restriction "though facially content neutral…cannot be justified without reference to the content of the regulated speech or [was] adopted by the government because of disagreement with the message the speech conveys." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015) (internal quotes omitted). If a governmental regulation of speech falls into either of these two categories, it is subject to strict scrutiny. *Id.*

In deciding whether a restriction constitutes a content-based regulation of speech "on its face," courts consider whether the restriction draws a distinction based on the message a speaker conveys. *Sorrell v. IMS Health Inc.*,___U.S.___, 131 S.Ct. 2653, 2664 (2011). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Reed*, 135 S.Ct. at 2227.

Our review discloses of Indiana Code § 3-11-8-17.5 discloses that it incorporates both of these distinctions. First, it defines which photographs are not allowed to be taken

and shared according to their subject matter by regulating or restricting only "photographs *of the voter's ballot*." Ind. Code § 3-11-8-17.5(b)(1) (emphasis added). And it also defines which photographs of voters' ballots are permitted according to their purpose by allowing photographs of a voter's ballot to be taken and shared only to "document and report…a problem with the functioning of the voting system." Ind. Code § 3-11-8-17.5(b)(1). Because this statute clearly defines the regulated expression according to its subject matter and its purpose, it is properly construed as being content based "on its face." *Reed*, 135 S.Ct. at 2227–29.

The State, however, maintains that this statute is content neutral based on several theories. First, the State contends that the law is content neutral based on the fact that it "was clearly not enacted [out] of disagreement with any particular message or form of communication." Defs.' Resp. at 10 (citing *Hill v. Colorado*, 530 U.S. 703, 719 (2000)). This purpose-based justification puts the cart before the horse. As the Supreme Court explained in *Reed*, it "skips the crucial first step in the content-neutrality analysis: determining whether the law is content based on its face." 135 S.Ct. at 2228. Courts are to consider whether a statute is content based on its face *before* turning to the legislature's purported justifications or purposes for enacting it. *Id.* (collecting cases). If the law is determined to be content based on its face, it is subject to strict scrutiny regardless of whether it was enacted with good intentions or benign motivations or out of an animus toward the ideas the speech contained. *Id.* "In other words, an innocuous

justification cannot transform a facially content-based law into one that is content neutral." *Id.*

The State further maintains that "Indiana Code § 3-11-8-17.5 is not content-based on its face, because all photography and posting to social media is banned regardless of the content of the photo." Defs.' Resp. at 9. This argument relies on a mischaracterization of the scope and nature of the statute at issue. Ind. Code § 3-11-8-17.5(b)(1) expressly provides that a voter may not "[t]ake a digital image or photograph *of the voter's ballot* while the voter is in the polling place." (emphasis added). A voter remains free, however, to take photographs of anything and everything other than her ballot while in the polling place. Ind. Code § 3-11-8-17.5(a). For example, a voter may take pictures of the que of voters waiting to enter the voting booths, of the voting booths themselves, of voters entering and exiting the booths; once inside a voting booth, she may take pictures of the interior walls, floors, curtains, indeed, any other aspect of her surroundings. A voter may even snap a "voting selfie" taken while in the act of voting so long as the image does not include a marked or unmarked ballot. Once a voter enters a polling place, she is free to take photographs or digital images with her smartphone (or camera) and to share them with whomever she pleases, in whatever way she pleases. Not until after her photographs are examined as to their content will the government know whether she has committed a felony under § 3-11-8-17.5. The required examination of the content of the image in order to enforce the terms of this statute plainly demonstrates its content-based nature. *See Rideout v. Gardner*, 2015 WL 4743731, at *9 (D. N.H. Aug. 11, 2015) ("In short, the

law is plainly a content-based restriction on speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter.")[2]

The State also argues that "Indiana's statute is not content based on its face [because] [i]t applies equally to all ballots, whether marked or unmarked." Defs.' Resp. at 10. While this argument accurately reflects the breadth of the statute to include its application only to images of ballots, it is nonetheless misleading. While the statute purports to treat marked and unmarked ballots equally, it does not actually treat "all ballots" equally since it permits a voter to photograph her ballot, whether marked or unmarked, only if she does so in order to "document and report…a problem with the functioning of the voting system." Photographs taken of ballots for any other purpose are forbidden. Ind. Code § 3-11-8-17.5(b)(1). Photographs of ballots are thus treated differently under the statute based on their purpose—another hallmark of content-based regulation.

The statute's alleged equal application to all ballots, regardless of the candidate(s) for whom they have been marked (or if left unmarked), does not foreclose strict scrutiny. Government regulation of speech based on the specific motivating ideology or opinion of the speaker is, of course, a "more blatant [and] egregious form of content discrimination,"

[2] Earlier this summer, the United States District Court for the District of New Hampshire ruled that a New Hampshire statute making it "unlawful for voters to take and disclose digital or photographic copies of their completed ballots in an effort to let others know how they have voted" was unconstitutional. *Rideout v. Gardner*,__F.Supp.3d__, 2015 WL 4743731 (D. N.H. Aug. 11, 2015), *appeal pending*, No. 15-2021 (1st. Cir.). While the Indiana statute at issue before us is not identical to the New Hampshire version, it presents many of the same issues and infirmities as the court addressed in *Rideout.*

but it is well established that speech regulation of a specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *See e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980); *Reed*¸ 135 S.Ct. at 2230 ("A law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.").

Thus, it is clear that the statute before us for review is on its face content based, requiring our strict scrutiny in order to determine its conformance with First Amendment principles. Strict scrutiny is required even though the statute's terms do not discriminate based on viewpoint and regardless of whether the General Assembly acted with good intentions when it adopted the law.

B. Strict Scrutiny

Having determined that Ind. Code § 3-11-8-17.5 is a content-based restriction, we next consider whether the State has established that the restriction is necessary to further a "compelling interest" and is "narrowly tailored" to achieve that interest. *See e.g., Reed*, 135 S.Ct. at 2231(citing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, ___U.S.___, 131 S.Ct. 2806, 2817 (2011)).

1. Compelling State Interests

The State contends that the ban on taking and sharing pictures of ballots serves the compelling interests of preventing vote buying and voter coercion as well as maintaining the integrity of the electoral process and the secrecy of voters' ballots. Defs.' Resp. at 11. It is undisputed that these asserted interests are, in the abstract, compelling. *See Burson v. Freeman*, 504 U.S. 191, 199 (1992) ("[T]his Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence…[and] in preserving the integrity and reliability of the electoral process itself"). "To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Id.* In other words, "[t]he state must specifically identify an 'actual problem' in need of solving." *Brown v. Entm't Merchs. Ass'n*, __U.S.__, 131 S.Ct. 2729, 2738 (2011) (quoting *Playboy*, 529 U.S. at 822–23); *see also Consol. Edison*, 447 U.S. at 543 ("Mere speculation of harm does not constitute a compelling interest.").

In its attempt to satisfy this requirement, the State has entirely failed to identify any such problem in Indiana relating to or evidencing vote buying, voter fraud, voter coercion, involuntary ballot disclosures, or an existing threat to the integrity of the electoral process. The State claims that "Indiana has a history of vote buying and selling," thus necessitating these protections, Defs.' Resp. at 11, but when asked to support this assertion with specifics, the State referenced two newspaper articles dating back to the late 1980's which pertained to vote-buying indictments of certain county officials, and a

2008 email exchange containing a third-hand allegation of a Scottsburg, IN voter placing his vote on eBay. Defs.' Exs. 1–2, 4. The State concedes that "digital photography has yet to contribute to vote buying issues in Indiana," even though smartphone cameras have been in general use for nearly fifteen years and digital cameras for much longer. Defs.' Resp. at 12. As the court in *Rideout* stated:

> Because the law at issue here is new and the technology it targets has been in use for many years, it is reasonable to expect that if the problem the state fears were real, it would be able to point to some evidence that the problem currently exists.

Rideout, 2015 WL 4743731, at *13. While the State asserts that "the legislature need not show or rely on elaborate, empirical verification of weightiness of the State's asserted justifications," Defs. Resp. at 11 (quoting *Timmons v. Twin Cities Are New Party*, 520 U.S. 351, 364 (1997)), it is true that "anecdote and supposition" as well as hypotheticals cannot substitute for evidence of a real problem.[3] *United States v. Playboy Ent'mt Group*, 529 U.S. 803, 822 (2000). Having 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 State has failed to establish

[3] The State's reliance on *Timmon*s and other similar cases is inapt. *Timmons* concerns the intersection of First Amendment associational rights and the integrity of the electoral process. Cases dealing with this intersection of rights are viewed under a sliding standard where the court weighs the character and magnitude of the burden a regulation imposes on the associational rights against the interests the state contends justify that burden, in determining the level of scrutiny to apply. *Timmons*, 520 U.S. at 358–60. The State has not provided and the Court is unaware of any cases applying that balancing scale to fundamental free speech rights.

that Ind. Code § 3-11-8-17.5 furthers a compelling governmental interest. As such, the statute does not or to withstand strict scrutiny.[4]

2. Narrow Tailoring

Even if the State had successfully established that this statute serves a compelling state interest, it would not survive strict scrutiny. This is true because any law restricting expression in an effort to serve a state interest must be "narrowly tailored to achieve that interest." *Reed*, 135 S.Ct. at 2231 (collecting cases). As we have previously noted, if the law restricts speech on the basis of its content, the burden is on the State to demonstrate that the restriction on speech it has adopted is the "least restrictive means" available to achieve the stated objective. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *McCullen*, 134 S.Ct. at 2530.

The State characterizes Indiana's new law as narrowly tailored by effectively sheltering voters from persons who might attempt to buy their votes and would request visual confirmation of their votes. This limited restriction leaves open other means by

[4] In conjunction with its argument that the ban on ballot photography will prevent vote-buying schemes, the State contends that the ban would also shield voters from pressure they might receive from friends, family, or others to vote in elections or for certain candidates. Defs.' Resp. at 3. We have our doubts that shielding voters from this type of peer pressure would constitute a compelling interest even in the abstract; nonetheless, the State has failed to present any evidence that the cellphone images of ballots have been or are in fact being used to coerce Hoosiers to vote by their family, or friends, or anyone else. When pressed at oral argument, counsel for the State admitted that it is likely impossible to adduce evidence that this type of activity exits. Once again, we affirm that "anecdote and supposition," speculation and hypotheticals cannot substitute for evidence of a real problem. *Playboy*, 529 U.S. at 822. For this reason, among others, the State's "peer pressure" argument does not constitute a compelling state interest.

which voters could communicate their ballot choices other than by sharing actual photographs of their ballots. Defs.' Resp. at 13.

The "narrowly tailored" standard is not satisfied, however, when the statute at issue is overinclusive.[5] *See Brown*, 131 S.Ct. at 2741. A law is significantly overinclusive if it covers far more speech than necessary to accomplish its goals. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991). Given the State's stated purpose in enacting § 3-11-8-17.5, its term and the reach of its restrictions simply cover too much ground. We do not understand, and the State has failed to explain, how banning voters from taking photos of *unmarked* ballots in any way serves its goal of protecting voters from vote buying and voter coercion.[6] More to the point, even the prohibition on taking and sharing pictures of *marked* ballots draws into its restrictions too many voters by including those who may wish to take photos for entirely legitimate and innocuous reasons. See Dkt. 17, 25. The State has been unable to point to a single instance in which digital photography facilitated vote buying or selling, despite the fact

[5] A law may also fail the narrow tailoring requirement if it is significantly underinclusive. The ACLU has argued here that Indiana's law is both overinclusive and underinclusive. It maintains that the law is underinclusive in that it does not apply to absentee voters who vote by mail. However, we regard absentee voting as being materially different than in-person voting, based on the inherent lack of privacy a voter may choose to have on his own and the control he has and would choose to exercise over his ballot.Thus, in our view, its exclusion from the challenged statute does not render the law significantly underinclusive. *See Brown v. State ex rel Stack*, 84 N.E.2d 883, 886 (1949) ("Any voter who wishes to avail himself of the right to vote by absent voter's ballot must be held to have waived some of the provisions for secrecy available to him if he voted in person at the polls.").

[6] The State has repeatedly pointed out that Indiana's law, unlike New Hampshire's law in *Rideout v. Gardner*, 2015 WL 4743731 (D. N.H. Aug 11, 2015), applies to both marked *and unmarked* ballots. We are surprised that the State continually highlights this difference since it actually strengthens the conclusion regarding the significantly greater breadth of Indiana's law compared to New Hampshire's law.

that, according to the State's evidence, approximately two-thirds of Americans own and/or use a smartphone with a camera and approximately three-quarters of Americans participate in some type of social media website. See Defs.' Ex. 3 (Pew Research Center Statistics). Given the evidence before us, Indiana's new law seems far more likely to ensnare a large number of voters wishing to make a political point or expressing their pride in voting or recording the moment for some innocuous personal reason than it is to achieve the State's goal of protecting voters from vote-buying predators.

The State acknowledges that the law could have been more narrowly tailored if it focused on only those voters who take and share pictures of their filled-in ballots as part of a vote-buying scheme or offense, but in making this concession, it also notes that such a narrowly tailored law would be "much more difficult to enforce, as the enforcing entity would be required to seek further proof or evidence that individual was photographing his or her ballot as part of a vote-buying scheme." Defs.' Resp. at 14. When content-based restrictions target vast amounts of protected political speech in an effort to address a tiny subset of problematic speech, the restriction simply cannot stand if other less restrictive alternatives exist. *See Ashcroft v. ACLU,* 542 U.S. at 666; *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.") (citation omitted).

Because the reach of Ind. Code § 3-11-8-17.5 is significantly overinclusive and because less restrictive alternatives exist to address the State's concerns, we hold that the

statute has not been narrowly tailored. As such, it fails to satisfy the requirements of strict scrutiny.[7]

C. Intermediate Scrutiny

For the reasons explained above, we hold that Indiana Code § 3-11-8-17.5 is a content-based restriction on speech which fails to withstand strict scrutiny and is violative of the First Amendment. Even if the statute imposed a content-neutral restriction on speech, it nevertheless would be unconstitutional because content-neutral restrictions must be "narrowly tailored to serve significant government interest, and [] leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The statute before us fails to withstand intermediate scrutiny given its significant overinclusiveness. Even content-neutral restrictions are required to be narrowly tailored to fend off any untoward attempt by the government to suppress speech out of mere convenience. *See McCullen v. Coakley*, ___U.S.___, 134 S.Ct. 2518, 2534 (2014). "Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and

[7] In striking down this portion of Indiana's election laws, we do not mean to suggest that the State must sit idly by while its voters are coerced or bribed. Indiana has a bribery statute making vote buying and selling illegal, see Ind. Code § 35-44.1-1-1(a)(9), in addition to laws making it illegal for Indiana voters to show their ballots to another person after they are marked or to do "anything to enable any other person to see or know for what ticket, candidates, or public questions the voter has voted." Ind. Code §§ 3-14-2-16, 18. We presume that law enforcement officials are ready and able to enforce these laws if and when violations are suspected.

means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." *Id.* at 2355 (citation omitted).

As previously noted, when a content-neutral restriction is challenged, the State bears the burden of showing that it does not restrict "substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. Unlike a content-based restriction, one that is content neutral does not have to be the "least restrictive or least intrusive" means of serving the government's interests, but the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 798–99.

Here, the State has failed to establish that the potentially broad array of photographs and images proscribed by § 3-11-8-17.5 is necessarily related to or limited to those involved in vote buying and voter coercion. Thus, the burden placed on speech by this restrictions in this statute will fall on voters who are engaged in legally innocuous activity. This clearly does not advance the State's asserted goals. At best, this statute is a blunt instrument designed to remedy a so-far undetected problem. As such, it does not survive even intermediate scrutiny.

II. Lack of Adequate Remedy at Law, Irreparable Harm, and Public Interest

If a party has shown a likelihood of success on the merits, it must also demonstrate that, unless an injunction issues, it faces an irreparable harm for which there is no adequate remedy at law. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). After passing this threshold, courts consider the

balance of harms and whether the public interest would be served by the preliminary injunction. *Id.* In cases of First Amendment violations, our analytical task is simplified:

> The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest. *Joelner v. Vill. of Wash. Park,* 378 F.3d 613, 619 (7th Cir. 2004)*; see also Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Christian Legal Soc'y v. Walker, 453 F.3d 853, 859 (7th Cir. 2006). We indulge fully that presumption of irreparable injury, leaving as the sole remaining issue the balance of harms.

III. Balance of Harms

In considering the balance of harms, we weigh the irreparable harm to the moving party with the harm an injunction would cause the opposing party, and also determine whether the public interest would be served by entering the preliminary injunction. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). This balancing is done on a "sliding scale" taking into account the likelihood of success on the merits: "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.3d 1079, 1086 (7th Cir. 1984).

Here, the balance weighs heavily in favor of the ACLU. The harm to the ACLU and its members as advanced on behalf of Indiana voters—the deprivation of First Amendment free speech rights—is presumptively irreparable. *Elrod,* 427 U.S. at 373; *Joelner,* 378 F.3d at 620. The State has failed to identify any harm that would result if an injunction were entered. See Defs.' Resp. at 12 (conceding that "digital photography has yet to contribute to vote buying issues in Indiana."). Central to our analysis of these factors is the principle that the public interest is always served when First Amendment freedoms are protected. *Elrod,* 427 U.S. at 373; *Joelner*, 378 F.3d at 620. Given the ACLU's likelihood of success and the balance of these harms, a preliminary injunction enjoining enforcement of this statute is both appropriate and necessary.

Conclusion

In 1928, in *Olmstead v. United States*, 277 U.S. 438, 479 (1928), the landmark Supreme Court decision (later reversed) which approved wiretap interceptions of private telephone conversation by law enforcement action without a warrant under the Fourth Amendment, Justice Louis Brandeis wrote these now famous words in his dissent: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Over the course of the eighty-seven years that have passed since he sounded this warning, neither the truth nor the importance of his observation has waned. If anything,

they have increased and expanded and, as is apparent from the issues before us in this litigation, assumed a new urgency.

For the reasons detailed in this order, we conclude that Ind. Code § 3-11-8-17.5 embodies a content-based restriction on speech that cannot survive strict scrutiny because it neither serves compelling state interests nor is narrowly tailored to achieve those interests. Plaintiff has demonstrated a likelihood of success on the merits and satisfied the subsidiary preliminary injunction elements—irreparable injury, favorable balance of harms, and the public interest. Plaintiff's Motion for Preliminary injunction is accordingly **GRANTED**, and enforcement of Indiana Code § 3-11-8-17.5 is hereby **ENJOINED** pending further order of the Court.

IT IS SO ORDERED.

10/19/2015

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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