

Legislative Analysis



PERMITTING "BALLOT SELFIES"

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4328 as reported from committee
Sponsor: Rep. Steven Johnson
Committee: Elections and Ethics
Complete to 3-20-19

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: House Bill 4328 would amend the Michigan Election Law to allow electors to use cameras, including cell phone cameras, in polling places and polling booths for the purpose of photographing themselves and/or their ballots.

FISCAL IMPACT: The bill would have no fiscal impact on state or local units of government.

THE APPARENT PROBLEM:

Michigan law currently prohibits a voter from taking a photo of his or her ballot. Some feel that, given the ubiquity of photo-capable devices, the commonplace habit of taking and sharing “selfies” to record and commemorate the fleeting occasions of one’s life, and the social media trend of posting ballots to promote voting, this law is unnecessarily restrictive. Legislation has been proposed to allow ballot photos in Michigan.

THE CONTENT OF THE BILL:

Currently, section 738 of the Michigan Election Law prohibits individuals from showing a completed ballot to another person other than those who are legally allowed to assist them while voting. If a voter exposes a ballot, it will be “rejected for exposure.” The Michigan Secretary of State also prohibits the use of electronics such as video and still cameras, cell phone cameras, and recording equipment in polling stations and voting booths.¹

The bill would specifically allow individuals to photograph themselves within a polling place; to photograph their ballot in a polling booth or voting compartment; or to photograph themselves with their ballot in such a booth or compartment.

Additionally, the bill would allow absent voters to take a photo of their absentee ballots or of themselves with their absentee ballots.

It would not matter, for the above provisions, whether the ballot had been completed at the time of the photo.

Proposed MCL 168.736h and 168.763

¹ <https://www.michigan.gov/sos/0,4670,7-127-29836-202491--F,00.html>

BACKGROUND INFORMATION:

“Ballot selfies” have been an increasing topic of debate in Michigan and other states. Some say that they are a type of free speech, while others argue that ballot selfies violate ballot exposure laws and threaten other individuals’ right to vote without interference or intimidation.

In *Crookston v Johnson*, the U.S. District Court for the Western District of Michigan² granted an injunction, suspending the rules against ballot selfies on the premise that they infringe upon the First Amendment of the U.S. Constitution. However, the U.S. Court of Appeals for the 6th Circuit granted the Michigan Secretary of State’s motion to stay the injunction, thus reinstating the ballot selfie prohibition.³ As of March 2019, the case is ongoing.

Other states are also facing this issue; in 2017, at least 15 states considered considering bills addressing ballot selfies and the secrecy of the ballot.⁴ Legislation in New Hampshire in 2014 prohibited voters from taking pictures of their ballots and sharing them on social media, but this ban was eventually overturned as the federal 1st Circuit Court of Appeals determined that the prohibition was too broad to survive the requisite level of scrutiny for restrictions on speech.⁵

ARGUMENTS:

For:

Proponents of the bill argue that the ballot selfie trend is a way for individuals to encourage voting in the era of social media, and is likely to continue. They wonder why an evolving method of encouraging citizen engagement should be prevented simply because it was not contemplated prior to widespread cell phone use. Additionally, some argue that the right to document one’s votes goes hand in hand with the right to vote itself.

Against:

There was no testimony in opposition to the bill. However, some question whether allowing ballot selfies would lead to abuse of that allowance, unnecessarily slowing down the voting process as person after person seeks to capture the perfect picture.

Historically, ballot photographs have been prohibited, at least in part, to prevent their use as evidence for how an individual voted in circumstances where another party might have coerced, intimidated, or paid for the voter to vote a certain way. In this context, ballot secrecy has been seen as a necessary element in protecting voters and preserving the integrity of the election process.

² Case number: 1:16-cv-01109

³ *Crookston v Johnson*, 841 F 3d 396 (2016).

⁴ <http://www.ncsl.org/research/elections-and-campaigns/secrecy-of-the-ballot-and-ballot-selfies.aspx>

⁵ *Rideout v Gardner*, 838 F 3d 65 (2016).

POSITIONS:

A representative of the American Civil Liberties Union of Michigan indicated support for the bill. (12-12-18)

Representatives of the following organizations indicated opposition to the bill (12-12-18):

Michigan Secretary of State

Michigan Association of Municipal Clerks

Ottawa County Clerk's Office

Legislative Analyst: Dana Adams
Fiscal Analyst: Michael Cnossen

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.