

**REPORTERS  
COMMITTEE**  
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# **ELECTION LEGAL GUIDE**



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**UPDATED 2020**

Given the intense public interest in the 2020 elections, this guide provides an overview of legal issues that journalists may face while covering the primaries or general election on November 3, 2020. Journalists may also report on protests and demonstrations during the election season. To learn more about the special risks journalists may face covering protests, please see the Reporters Committee's guide, [Police, Protesters, and the Press](#). These guides do not replace the legal advice of an attorney. Journalists with additional questions or in need of assistance should contact the [Reporters Committee's legal hotline](#).

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## Exit polling

### Exit polls conducted in person

Journalists' rights and restrictions regarding their presence at polling places are not set in stone. Whether a restriction is permissible often turns on its "reasonableness" under the circumstances. Although courts do not often address the general issue of newsgathering at polling places, a number of courts have considered the narrower question of whether journalists should be able to conduct exit polls on Election Day, usually finding that only some reasonable restrictions are allowed.

Generally, the First Amendment protects journalists' right to gather news outside polling places for the purpose of reporting on early election results. Although many states today have polling-place restrictions to prevent voter intimidation and election fraud, courts have invalidated legislation that is aimed at preventing exit polling.

In assessing the validity of these restrictions, the key question is whether the restriction seeks to limit speech or newsgathering. If it does, the restriction may be unconstitutional. But if the law applies equally to all expressive activity, does not single out newsgathering for unfavorable treatment, and promotes the safety and orderliness of the election process, reasonable restrictions—like a 25-foot limit on access—are generally permissible.

In the seminal case on exit polling, *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988), the U.S. Court of Appeals for the Ninth Circuit held that a state law prohibiting exit polling within 300 feet of a voting place was unconstitutional on its face. The court stated in no uncertain terms that "exit polling constitutes speech protected by the First Amendment." *Id.* at 384.

At least 18 other federal courts have considered the issue since *Munro*. Those courts have typically held that exit polling is constitutionally protected but have also permitted some restrictions, such as a 25-foot limit on access, *Nat'l Broad. Co. v. Cleland*, 697 F. Supp. 1204, 1215 (N.D. Ga. 1988),

or a rule against hindering voters from leaving polling places, *Am. Broad. Cos. v. Blackwell*, 479 F. Supp. 2d 719, 744 (S.D. Ohio 2006). Although the Supreme Court has not addressed exit polling specifically, it has made clear that states may restrict other activity such as electioneering within at least 100 feet of voting places. See *Burson v. Freeman*, 504 U.S. 191, 210 (1992) (allowing restriction on solicitation of votes and distribution of campaign materials in order to protect the government's compelling interest in preventing voter intimidation and election fraud).

When courts have considered restrictions that impact exit polling, they have generally agreed with the Ninth Circuit in *Munro* on a few key points. First, exit polls provide invaluable information to the public. See, e.g., *Cleland*, 697 F. Supp. at 1209. Second, exit polling is not inherently disruptive. See, e.g., *CBS Broad., Inc. v. Smith*, 681 F. Supp. 794, 801 (S.D. Fla. 1988); *Am. Broad. Cos. v. Wells*, 669 F. Supp. 2d 483, 490 (D.N.J. 2009). Third, distance restrictions, even if they apply generally to activity outside polling locations, may be overly burdensome on the press's ability to gather news. See *Smith*, 681 F. Supp. at 803; *Cleland*, 697 F. Supp. at 1209–10; *CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365, 1371 (S.D. Fla. 2006). The decisions vary on what distance is too burdensome. Compare, e.g., *Munro*, 838 F.2d at 386 (invalidating 300-foot restriction); *Cleland*, 697 F. Supp. at 1215 (barring enforcement of 250-foot restriction but permitting 25-foot restriction); *Nat'l Broad. Co. v. Colburg*, 699 F. Supp. 241, 243 (D. Mont. 1988) (invalidating 200-foot restriction); *Smith*, 681 F. Supp. at 806 (barring enforcement of 150-foot restriction); *Cobb*, 470 F. Supp. 2d at 1371 (barring enforcement of 100-foot restriction); *Am. Broad. Cos. v. Heller*, No. 06-CV-01268, 2006 WL 3149365, at \*13 (D. Nev. Nov. 1, 2006) (same); *Am. Broad. Cos. v. Ritchie*, No. 08-CV-05285, 36 Media L. Rep. 2601, 2008 WL 4635377 (D. Minn. Oct. 15, 2008) (same).

## Exit polls conducted by phone

While in-person exit polling remains a frequent practice, phone surveys are a growing practice. This tool allows access to absentee and early voters. Journalists conducting exit polls by phone should be aware that the [Telephone Consumer Protection Act](#) (TCPA) places restrictions on prerecorded calls. 47 U.S.C. § 227. The TCPA generally prohibits robocalls to landlines unless the recipient has provided express consent. § 227(b)(1)(B). But the law allows for certain exceptions, such as for calls that are not made for “a commercial purpose” or are made for a commercial purpose but do not include ads or telemarketing, and calls made by tax-exempt nonprofits. § 227(b)(2) (B). The FCC has clarified that [market research and polling calls](#) to landlines fall into this category and do not require prior consent, though these calls must still identify the caller at the beginning of the message and include a contact phone number. However, auto-dialed and prerecorded non-emergency calls to wireless phones are “[prohibited without prior express consent](#).”

## Newsgathering in or near polling places

Of the few courts that have addressed newsgathering at and around polling places apart from

exit polling, the results are mixed. In 2013, the U.S. Court of Appeals for the Third Circuit rejected a challenge to a Pennsylvania statute that required persons to remain at least 10 feet away from polling places, holding that there was no First Amendment right of access for newsgathering purposes. *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 113–14 (3d Cir. 2013). However, in 2004, the U.S. Court of Appeals for the Sixth Circuit barred enforcement of a similar law in Ohio that restricted people from entering the polling place or “loiter[ing]” in the adjacent area outside. *Beacon Journal Publ'g Co. v. Blackwell*, 389 F.3d 683, 685 (6th Cir. 2004). The court held that the state was required to permit a news organization “to have reasonable access to any polling place for the purpose of news-gathering and reporting so long as [they] do not interfere with poll workers and voters as voters exercise their right to vote.” *Id.*

With respect to photography, courts have upheld some restrictions *inside* polling locations, given concerns about election security. In 1989, the Florida Supreme Court heard a challenge by a newspaper whose photographer was ejected from a polling place after attempting to secure a photo of a candidate at the polls. *Firestone v. News-Press Publ'g Co.*, 538 So. 2d 457, 458 (Fla. 1989). The court held that a state law barring non-voters within 50 feet of a polling place was unconstitutional as applied outside of the voting room, but constitutional as applied within the room itself. *Id.* at 460. Likewise, the California Court of Appeals found that a policy prohibiting photography and videotaping within polling places was constitutional given the state’s interest in maintaining ballot secrecy and an orderly voting process. *Poniktera v. Seiler*, 104 Cal. Rptr. 3d 291, 304–05 (Cal. Ct. App. 2010).

One federal district court has upheld restrictions on photography outside a polling place, but such restrictions are less common. See *N.J. Press Ass’n v. Guadagno*, No. 12-CV-06353, 2012 WL 5498019, at \*7–8 (D.N.J. Nov. 13, 2012) (rejecting challenge brought by news media organizations against anti-loitering and solicitation law that effectively barred them from taking photographs and conducting interviews within 100 feet of a polling station).

## Ballot selfies

“Ballot selfies” have become a social media staple over the past several years. These photos may be used by journalists to demonstrate current political trends or to inform the public of any potential issues with the election process.

Generally, ballot selfies are considered a form of political speech. Political endorsements are typically considered a bedrock of the electoral process and a vital form of political expression. However, some fear that ballot selfies and other ballot photographs may encourage voter coercion or vote buying. To combat these fears, many states have adopted laws that prohibit photographing election ballots or sharing a photograph of a marked ballot with others.

A [2016 report](#) by The Associated Press found that 18 states had laws prohibiting ballot selfies, while 19 states and the District of Columbia permitted them. Some states, like Arizona, permit

photographs of absentee ballots but do not permit the use of cameras at polling sites. See, e.g., Ariz. Rev. Stat. § 16-515(G) (banning photography within 75 feet of the polls); Ariz. Stat. § 16-1018(4) (permitting a voter to make available an image of his or her own ballot). A number of states allow people to take pictures of polling stations so long as it is not disruptive or for electioneering purposes.

In recent years, several courts have considered the constitutionality of laws banning ballot selfies with mixed results. At least three federal courts have struck down such laws as unconstitutional under the First Amendment. In 2016, the U.S. Court of Appeals for the First Circuit found a New Hampshire law that prohibited taking and sharing photographs of a marked ballot – regardless of whether it was taken at a polling place – overly broad and concluded that the government had failed to identify a need for the legislation other than abstract concerns about vote buying and voter coercion. *Rideout v. Gardner*, 838 F.3d 65, 68, 73 (1st Cir. 2016). The following year, a federal district court—citing similar reasons—barred enforcement of an Indiana law that prohibited voters from taking or sharing images of even unmarked ballots while in a polling place. *Ind. Civil Liberties Union Found., Inc. v. Ind. Sec’y of State*, 229 F. Supp. 3d 817, 824–25 (S.D. Ind. 2017). A federal court in Colorado preliminarily blocked enforcement of that state’s law, which prohibited voters from showing their completed ballots, noting that state law already barred voter coercion and vote buying, and the majority of ballots were mailed in. *Hill v. Williams*, No. 16-cv-0267-CMA, 2016 WL 8667798, at \*11–12 (D. Colo. Nov. 4, 2016). The Colorado legislature subsequently changed the law to affirmatively allow ballot selfies. Colo. Rev. Stat. § 1-13-712(b) (2017).

On the other hand, a federal district court upheld New York’s ballot selfie ban, finding that the state’s interest in preventing vote buying and coercion justified the law. *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 479, 481 (S.D.N.Y. 2017). However, at the time of publication, the New York legislature [was considering a bill](#) to allow ballot selfies. S.B. 1781, 2019-20 Leg., Reg. Sess. (N.Y. 2020). The Sixth Circuit has also suggested, without deciding, that a Michigan ballot selfie ban may be constitutional, *Crookston v. Johnson*, 841 F.3d 396, 399 (6th Cir. 2016), but the case later settled when the [Michigan secretary of state agreed to permit ballot selfies in the voting booth](#).

The publication of ballot selfies or marked ballot photos should be permitted if they are obtained lawfully. Before taking ballot selfies or photos of voters at the polls, journalists and members of the public should ensure that their actions are permitted by state law. The National Conference of State Legislatures has a [helpful online resource](#) with information on ballot and polling place photography laws by state, though journalists should confirm that the laws cited are still current before relying on them.

# Sample Jurisdictions

## California

Although the California Secretary of State's office has [historically taken the position](#) that photography is not permitted at polling places, [a new California law](#) allowing voluntary disclosure of ballot selfies went into effect in January 2017. Cal. Elec. Code § 14291. This law provides that "a voter may voluntarily disclose how he or she voted if that voluntary act does not violate any other law." § 14291(b). Nevertheless, [a 2018 memorandum](#) from the Secretary of State's office suggests that election officials and poll workers may still be able to restrict the use of ballot selfies if they cause disruptions.

The Secretary of State's office also cautioned that the use of cameras both inside and outside polling places "should remain limited" and that photography inside polling places would also require the election official's consent. Credentialed media organizations should still, however, be able to photograph or film candidates voting at polling places, provided this does not interfere with voting, intimidate any voters or election workers, or compromise the privacy of voters.

With regard to exit polling, the Secretary of State's office "recommends advising news organizations and other pollsters to refrain from" it "[within at least 25 feet of a polling place.](#)"

## Florida

Although [Florida law prohibits](#) "solicitation" both inside polling places and within 150 feet of them, the law contains an express carve-out for exit polling. [Fla. Stat. § 102.031\(4\)\(a\)–\(b\)](#). The same law also generally prohibits photography in polling places, but a 2019 amendment to the law makes an exception for ballot selfies. [§ 102.031\(5\)](#) ("[A]n elector may photograph his or her own ballot").

## Iowa

Iowa law prohibits "electioneering" within 300 feet of a polling place as well as "[i]nterrupting, hindering, or opposing a voter while in or approaching the polling place." Iowa Code Ann. § 39A.4(a)(1)–(2). Yet exit polling is allowed within the 300-foot zone because the interviewer is approaching voters after they have cast their ballots and is "not advocating for a candidate or a position," [Molly Widen](#), legal counsel to the Iowa Secretary of State, has explained. [Secretary of State Paul D. Pate](#) has also noted that the media can conduct exit polling, but only outside of the polling place. However, if a newspaper is a "sham" intended to promote the candidacy of a particular person for public office, the 300-foot buffer applies, and the newspaper must follow at least some of Iowa's campaign finance laws. Iowa Admin. Code 351-4.48(68A).

“Credentialed reporters, photographers and other staff with the media” are allowed at the precincts or polling places as long as they do not interfere with the election process, [according to Secretary of State Pate](#). Widen explained in a phone interview that this means journalists should have some credentials demonstrating they are part of the news media, though specific credentials for polling places are not required. According to Pate, the news media may also “[photograph or film activity](#)” inside the polling place but cannot take any images of how a voter marks or has marked a ballot. A voter must give permission before being photographed or filmed.”

Although Iowa does not have specific rules on ballot selfies, it generally prohibits the use of cameras in voting booths if it “interferes with other voters” or the “orderly operation of the polling place.” Iowa Code Ann. § 49.88(1). Accordingly, so long as a ballot selfie does not interfere with others, it is permissible, [according to Widen](#). Ultimately, because Iowa has a caucus instead of a primary, the issue of ballot selfies will be more relevant during the general election.

In the past, Iowa has had a centralized [media filing center](#) in Des Moines. However, access to the center requires paying a fee and is not mandatory for coverage of the caucuses.

## Maryland

Although Maryland law generally prohibits the use of cameras, cellphones, pagers, and computer equipment inside polling places, [media representatives may use cameras](#) as long as they are recording polling place operations and not a screen or ballot. MD Code Regs. § 33.07.04.02(B)(1). [Journalists are permitted](#) in polling places unless they cause disruption, infringe on voter privacy, inhibit election judges from performing their duties, or otherwise interfere with the orderly conduct of the election. § 33.07.04.01(A). [Maryland law requests](#) – but does not require – that journalists provide the [local board of elections](#) in the county where they would like to observe election activities with a list of the polling places they would like to visit. § 33.07.04.01(B).

[Journalists may conduct exit polling](#) within Maryland’s 100-foot no-electioneering zone, as long as it is outside the voting room and the journalist informs voters that their participation is voluntary.

## New York

[New York’s ban on ballot selfies](#), which a federal trial court upheld in 2017, makes it a misdemeanor for a person to either show his or her completed ballot to another or to solicit a voter to do the same. N.Y. Elec. Law § 17-130(10); *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 481 (S.D.N.Y. 2017). New York City’s Board of Elections also prohibits photography at polling sites but creates exceptions for members of the media who obtain proper credentials. A federal court has upheld this policy. *Silberberg*, 272 F. Supp. 3d at 459–60. However, at the time of publication, the New York legislature was [considering a bill](#) to allow ballot selfies. S.B. 1781, 2019-20 Leg., Reg. Sess. (N.Y. 2020).

In New York, journalists should be careful not to obstruct, hinder, or delay voters as they are attempting to vote and must not unlawfully stand within the “guard-rail” of any polling place (which delineates the voting area), particularly if asked to leave. Both [are misdemeanors under New York law](#). N.Y. Elec. Law § 17-130(3), (6). New York [also bans “electioneering”](#) within 100 feet of a polling place, though electioneering refers to those actively participating in a campaign and has little application to independent journalists. § 17-130(4).

## Nevada

Nevada law prohibits “any person” from speaking to a voter about the voter’s ballot within 100 feet of a polling place. Nev. Rev. Stat. Ann. § 293.740. However, a coalition of media organizations challenged the application of this law to exit polling in 2006, and a federal trial court agreed that it likely violates the First Amendment and preliminarily blocked its enforcement. *Am. Broad. Cos. v. Heller*, No. 06-CV-01268, 2006 WL 3149365, at \*1 (D. Nev. Nov. 1, 2006). Nevada’s Secretary of State subsequently agreed to a final judgment, entered by the court, that declared the law unconstitutional as applied to the media coalition and permanently enjoined the law’s enforcement against the media plaintiffs in future elections. Although the judgment only applied to the media organizations who brought the lawsuit (ABC, The Associated Press, CNN, CBS, Fox News, and NBC Universal), the same First Amendment principles apply regardless of the particular journalist or news outlet involved. In fact, the Elections Division of Nevada’s Office of the Secretary of State has clarified, via email to a Reporters Committee attorney, that the Nevada law, § 293.740, “does not prohibit exit polling,” so journalists are free to conduct exit polls in the 100-foot area outside polling locations.

Nevada law prohibits members of the “general public” from taking photos or otherwise recording “the conduct of voting at a polling place,” so ballot selfies are not permitted at the polls. Nev. Rev. Stat. Ann. § 293.274(2). However, this law exempts journalists who are employed or contracted by a “newspaper, periodical, press association, or radio or television station.” § 293.274(3)(b).

Certain counties, including [Clark County, Nevada](#), home of Las Vegas, ask that if the media wish to interview a specific person, they do so outside the polling place. Additionally, the Clark County Election Department requests that “[no direct or clear shots of the ballot](#)” be captured.

## New Hampshire

New Hampshire does not have specific rules on exit polling, except that such activity [should not obstruct](#) voters who are entering or exiting the polling place. The Secretary of State’s [Election Procedure Manual](#) for New Hampshire, last updated in 2018–19, states that the “best practice” is to keep the press outside the “railed-in area”—beyond which only voters and election officials are permitted, N.H. Rev. Stat. Ann. § 659:21—and allow exit polling to occur in an “adjacent room,” if available.



Journalists should be aware that towns can adopt their own bylaws regarding, among other things, “any activity which affects the safety, welfare and rights of voters.” N.H. Rev. Stat. Ann. § 31:41-c. These bylaws must be given to the town clerk immediately following adoption and must be posted at each polling place at least 72 hours in advance of the polls opening. *Id.*

New Hampshire has several rules about the permissible distances between a member of the public, including the news media, and any part of the election process. Anyone can observe voter registration in New Hampshire but has to be more than five feet away from the voter registration table. N.H. Rev. Stat. Ann. § 654:7-c. In addition, a person may not stand within six feet of the ballot clerk to observe the check-in of voters unless that person obtains express permission from the moderators. N.H. Rev. Stat. Ann. § 659:13-a. Finally, only election officials may be present within four feet of the ballot counting, which occurs within the “guardrail,” though this process is conducted publicly. N.H. Rev. Stat. Ann. § 659:63.

Ballot selfies are allowed in New Hampshire. Although a state law previously prohibited them, the U.S. Court of Appeals for the First Circuit found that restriction an unconstitutional violation of the First Amendment in *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016), discussed above.

## South Carolina

In South Carolina, the State Election Commission has acknowledged that [exit polling is “legal”](#) but “may not be conducted inside the polling place.” In fact, South Carolina law explicitly provides that no one is allowed to speak to a voter who is in a voting booth, S.C. Code Ann. § 7-13-740, and no one, except for the voter, is allowed within the “guard rail,” which will be located at least five feet from the voting booths, S.C. Code § 7-13-770(A); S.C. Code Ann. § 7-13-130. Although not applicable to journalists who are merely interviewing voters or conducting exit polls, South Carolina law also prohibits distribution of campaign literature or posters within 200 feet of a polling place. S.C. Code Ann. § 7-25-180.

Ballot selfies are not allowed because South Carolina law prohibits voters from allowing their ballots to be seen by another person except those who must by law. S.C. Code § 7-25-100. In 2012, South Carolina’s Office of the Attorney General issued a letter stating that it considered using a cell phone, or any type of camera, to take a photo of a ballot to be a violation of this law, citing the state’s interest in maintaining ballot secrecy. S.C. Op. Att’y Gen. [2012 WL 1774921](#) (May 8, 2012).

## Texas

Texas law prohibits the use of cell phones, cameras, and other recording devices within 100 feet of a polling place, so ballot selfies are not permitted at the polls, Tex. Elec. Code § 61.014(a)-(b); [Tex. Elec. Advisory No. 2018-11](#). However, selfies of absentee ballots [are permissible](#).

Although Texas law prohibits “loiter[ing]” within 100 feet of a polling place, Tex. Elec. Code § 61.003(a)(1), the Texas Secretary of State’s Office has adopted a policy of permitting “non-disruptive” exit polling within this protected area, [Tex. Elec. Advisory No. 2018-11 \(2018\)](#).

## Virginia

According to a [2016 letter](#) from the Virginia Attorney General, ballot selfies are permitted. In addition, journalists may film and photograph inside polling places for “a reasonable and limited period of time,” but they may not do so in a way that reveals how someone voted. Va. Code § 24.2-604(I) (2018). Additionally, they [may not film or photograph](#) voter lists or records, or individuals who asked not to be filmed or photographed. *Id.*

[Virginia’s Department of Elections recommends](#), but does not require, that journalists who are considering filming at polling locations on Election Day [contact the general registrar](#) well in advance. At the polling place, [journalists must not](#) “hinder or delay” a voter or election official or otherwise impede the voting process and should conduct any live broadcasts, interviews, or exit polling at least 40 feet from the polling place. Va. Code § 24.2-604(D), (I).

## Washington, D.C.

Journalists [must have media credentials](#) or permission from the Board of Elections to remain in a polling place if not voting. If journalists do not have credentials, they can arrange for an election observer badge by calling the Public Information Officer at (202) 727-5411. The D.C. Board of Elections also encourages journalists to contact the [Board’s public information officer](#) to give advance notice before visiting a polling location. Upon arriving at a polling place, journalists should ask for the precinct captain, who is required to keep a report of all visitors in the polling place. D.C. Code § 705.3 (2018).

Inside a polling location and within 50 feet of the entrance, journalists must not interfere with the voting process, such as by speaking to voters who are checking in or casting their ballot or by touching any official record, ballot, or voting equipment. §§ 705.4(a)–(e), 705.5. Journalists may use cell phones to text in polling places but may not make phone calls. Exit polling must occur outside the 50-foot perimeter. § 705.5.

Ballot selfies are legal in the District of Columbia, although election [officials may nevertheless discourage them](#). The D.C. Board of Elections has requested that the media take [only wide-shot photographs](#) of the voting area; any close-ups require the subject’s consent and may not capture an up-close image of the ballot or a voter’s selection on the ballot.