

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

# **ELECTION LEGAL GUIDE**



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This guide<sup>1</sup> provides an overview of legal issues that journalists may face while covering the 2018 midterm election. It does not replace the legal advice of an attorney. Journalists with additional questions or in need of assistance should contact the Reporters Committee’s hotline via [its form](#), by emailing [hotline@rcfp.org](mailto:hotline@rcfp.org), or calling 800-336-4243.

## EXIT POLLING

### Exit polls outside of polling places

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 aimed to prevent voter intimidation and election fraud, courts have invalidated legislation that is aimed at preventing exit polling.

In contesting the validity of these restrictions, the key question is whether the restriction aims to limit newsgathering and speech. If there are no restrictions on the types of communications involved, and if the intent is to preserve the safety and orderliness of the election process, reasonable restrictions—like a 25-foot limit on access—will generally be allowed. The key is that the restriction must allow reporters to talk to voters as they leave the polls, so the reasonableness of restrictions will vary based on the circumstances.

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

About a dozen other federal courts have considered the constitutionality of exit polling since *Munro*. Those courts have typically held that exit polling is constitutionally protected, but have also upheld reasonable restrictions, such as a 25-foot limit on access, *Nat’l Broad. Co. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988), or a rule against hindering voters from leaving polling places, *Am. Broad. Cos. v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006). Although the Supreme Court has not addressed the exit polling issue, it has made clear that states may restrict other activity such as electioneering around voting places. See *Burson v. Freeman*, 504 U.S. 191 (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).

Courts that have considered the issue agree with the Ninth Circuit in *Munro* on a few key points. First, exit polls provide invaluable information to the public. See *Cleland*, 697 F. Supp. at 1209. Second, exit

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<sup>1</sup> By Reporters Committee staff and Intern Audrey Greene.

polling is not inherently disruptive. *See CBS Broad., Inc. v. Smith*, 681 F. Supp. 794, 801 (S.D. Fla. 1988). Third, distance restrictions may be overly burdensome on the press’s ability to gather news. *See id*; *Cleland*, 697 F. Supp. at 1209-10; *CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365, 1371 (S.D. Fla. 2006). Courts vary in what distance will be considered too burdensome. *Compare, e.g., Munro*, 838 F.2d (invalidating 300-foot restriction); *Cleland*, 697 F. Supp. at 1209 (enjoining enforcement of 250-foot restriction but permitting 25-foot restriction); *Nat’l Broad. Co. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988) (invalidating 200-foot restriction); *Smith*, 681 F. Supp. at 801 (enjoining enforcement of 150-foot restriction); *Cobb*, 470 F. Supp. 2d at 1371 (enjoining enforcement of 100-foot restriction); *Am. Broad. Cos. v. Heller*, No. 06-CV-01268, 2006 WL 3149365 (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. Although the TCPA generally prohibits robocalls to landlines unless the recipient has provided express consent, the law has certain carve-outs; for example, 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. 47 C.F.R. § 64.122(a)(3)(ii)–(iv). 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, [“\[a\]utodialed or prerecorded non-emergency calls to wireless phones are prohibited without prior express consent, regardless of the call’s content.”](#)

## 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 Third Circuit Court of Appeals 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 Pub. Co. v. Aichele*, 705 F.3d 91 (3d Cir. 2013). By contrast, the Sixth Circuit enjoined enforcement of a similar law in Ohio in 2004. *Beacon Journal Publ’g Co. v. Blackwell*, 389 F.3d 683 (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.* at 685.

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 Pub. Co.*, 538 So. 2d 457 (Fla. 1989). The court held that a state statute 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.

In 2012, news media organizations challenged a New Jersey state law that barred them from taking photographs and conducting interviews within 100 feet of a polling station. *N.J. Press Ass’n v. Guadagno*, No. 12-CV-06353, 2012 WL 5498019 (D.N.J. Nov. 13, 2012). The court rejected the challenge, observing

that “the State’s long history of election regulation and the practical need to prevent disturbances at the polls all prove that the Election Laws are necessary to protect the State’s interest in ensuring the right to vote.” *Id.* at \*5.

## BALLOT SELFIES

“Ballot selfies” have become a social media staple over the past several years. These photos may be utilized 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, voter fraud, and vote buying. To combat these fears, many states have laws that prohibit the act of photographing election ballots or the act of sharing a photograph of a marked ballot with others. While recent cases indicate that such laws violate the First Amendment, the laws of many states remain unclear.

A [2016 study](#) by the Associated Press showed that eighteen states had laws prohibiting ballot selfies. Other states have mixed provisions on photography near polling places or the act of photographing ballots. Journalists should be aware that some states permit photographs of marked or absentee ballots but do not permit the use of cameras at polling sites. In contrast, some states, such as Iowa, do not have specific regulations against ballot selfies but prohibit the use of cell phones, cameras, or any other form of electronic devices in voting booths. A number of states allow individuals and media to take photos of polling stations so long as the photography is not disruptive or used for electioneering purposes.

In recent years, several courts have considered the constitutionality of laws banning ballot selfies. In the days leading up to the 2016 presidential election, plaintiffs challenged the constitutionality of ballot selfie bans in [New York, California, and Colorado](#). Courts have upheld them in Michigan and New York but struck them down in New Hampshire and Indiana. Opponents of these laws may mount additional challenges as the midterm elections approach.

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. [HuffPost has published a helpful resource](#) 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 STATES

### California

Although the California Secretary of State’s office has [historically taken the position](#) that photography is not permitted at polling places, California passed a new law in 2016 that allows ballot selfies. [Cal. Assembly Bill No. 1494 \(approved Sept. 29, 2016\)](#). This law provides that “a voter may voluntarily disclose how he or she voted if that voluntary act does not violate any other law.” 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 elections 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” doing this “within at least 25 feet of a polling place.”

### Florida

Although Florida law prohibits “solicitation” both inside polling places and within 100 feet of them, the law contains an express carve-out for exit polling. [Fla. Stat. Ann. § 102.031\(4\)\(a\)-\(b\)](#). Florida law also prohibits photography in polling places, and thus ballot selfies are not permitted. [Fla. Stat. § 102.031\(5\)](#). In 2016, State Senator Frank Artiles introduced [SB 224](#), which would have made taking photos in polling places a misdemeanor. The bill was withdrawn in May 2017.

### Maryland

Although Maryland law generally prohibits the use of cameras, cell phones, 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.

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. *Id.* at § 33.07.04.01. 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.

Journalists may conduct exit polling within Maryland’s 100-foot no-electioneering zone, as long as it is outside of the voting room and the journalist informs voters that their participation is voluntary.<sup>2</sup>

### 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 of New York*, 272 F. Supp. 3d 454 (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 as well. *Silberberg*, 272 F. Supp. 3d at 459–60.

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<sup>2</sup> See MD State Bd. of Elections, *Rules and Information for Voters, Other Rules & Information*, [https://elections.maryland.gov/voting/election\\_day\\_questions.html](https://elections.maryland.gov/voting/election_day_questions.html).

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 from a polling place, though electioneering generally refers to those actively participating in a campaign and has little application to independent journalists. [N.Y. Elec. Law § 17-130\(4\)](#).

## Texas

Texas law prohibits the use of cell phones, cameras, and other recording devices within 100 feet of polling places, so ballot selfies are not permitted. [Tex. Elec. Advisory No. 2018-11](#). However, the Texas Secretary of State’s office has adopted a policy of permitting “non-disruptive” exit polling within this 100-foot protected area, so long as it does not constitute loitering or is disruptive. [Tex. Elec. Advisory No. 2018-11 \(2018\)](#).

## Virginia

According to a [2016 letter](#) from the Virginia Attorney General, ballot selfies are permitted.<sup>3</sup> 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. *See* VA. CODE ANN. § 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 that journalists who are considering filming at polling locations on Election Day [contact the general registrar](#) well in advance.<sup>4</sup> At the polling place, journalists must not hinder or delay a voter or election official or otherwise impede the voting process. VA. CODE ANN. § 24.2-604(D). Any live broadcasts, interviews, or exit polling must be conducted at least 40 feet from the polling place. *Id.* at § 24.2-604(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.<sup>5</sup> 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 this number 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.

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<sup>3</sup> Letter from Mark R. Herring, Attorney General, Commonwealth of Virginia, to Secretaries of Electoral Boards (September 29, 2016), [https://www.oag.state.va.us/files/Opinions/2016/16-038\\_Bell\\_Lind\\_issued.pdf](https://www.oag.state.va.us/files/Opinions/2016/16-038_Bell_Lind_issued.pdf).

<sup>4</sup> Guidelines For News Media During Elections, Virginia Department of Elections (October 6, 2017), <https://www.elections.virginia.gov/Files/Media/GuidelinesForNewsMediaDuringElections.pdf>.

<sup>5</sup> Rachel E. Coll, *Frequently asked Questions for the June 19, 2018 Primary Election* (June 15, 2018), <https://dcboe.org/CMSPages/GetFile.aspx?guid=da623aea-78b1-409a-8dbe-a1848dcd136d>.

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. 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.

Ballot selfies are [legal](#) in the District of Columbia, although election officials may nevertheless [discourage them](#).<sup>6</sup> 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.<sup>7</sup>

## CASES

### Exit polling

- *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988)
  - Held that a Washington statute that prohibited exit polling within 300 feet of a polling place was facially unconstitutional.
  - “The media plaintiffs' exit polling constitutes speech protected by the First Amendment, not only in that the information disseminated based on the polls is speech, but also in that the process of obtaining the information requires a discussion between pollster and voter.” *Id.* at 384.
  - Points emphasized by the Ninth Circuit and reiterated by other federal courts:
    - Exit polls provide invaluable information to the public. *See Cleland*, 697 F. Supp. at 1209.
    - Exit polls are not disruptive. *See Smith*, 681 F. Supp. 794 at 801.
    - Distance restrictions can be burdensome on the press's ability to gather news. *See Smith*, 681 F. Supp. 794 at 801; *Cleland*, 697 F. Supp. at 1209-10; *Cobb*, 470 F. Supp. 2d at 1371.
- *In re Attorney Gen.'s "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Groups," issued July 18, 2007*, 200 N.J. 283, 981 A.2d 64 (N.J. 2009)
  - Upheld as constitutional a 100-foot exclusion zone around polling places in New Jersey for all types of expressive activity, including exit polling.
  - A few months later, the court granted media plaintiffs a preliminary injunction allowing them to conduct exit polling within 100 feet of voting precincts. The court stated that *Exit Polling* incorrectly interpreted U.S. Supreme Court precedent. *See Am. Broad. Cos. v. Wells*, 669 F. Supp. 2d 483 (D.N.J. 2009).
  - In 2012, the court denied plaintiffs an injunction, finding that the law was necessary to protect voting practices. *See Guadagno*, 2012 WL 5498019.

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<sup>6</sup> Martin Austermuhle, *Early Voting Has Started In D.C. Here's Everything You Need To Know*, WAMU (June 5, 2018), <https://wamu.org/story/18/06/05/early-voting-started-d-c-heres-everything-need-know/>; *Ballot selfies: A look at where they are allowed or not*, AP (Oct. 23, 2016), <https://www.apnews.com/04c313da0672422ba28bb57c4e4a7ca0>.

<sup>7</sup> Coll, *supra* at 3.

- *Am. Broad. Cos. v. Ritchie*, No. 08-CV-05285, 36 Media L. Rep. 2601, 2008 WL 4635377 (D. Minn. Oct. 15, 2008)
  - Enjoined enforcement of a law which prohibited individuals other than voters and election officials from standing within 100 feet of a polling place.
  - Court found that the law was content neutral on its face, but its legislative history revealed a government interest in suppressing speech.
- *Am. Broad. Cos. v. Blackwell*, 479 F.Supp.2d 719 (S.D. Ohio 2006)
  - Enjoining ban on exit polling within 100 feet of polling places but upholding directive allowing for enforcement of general loitering laws where that directive did not “necessarily prohibit” exit polling but rather prohibited “loitering,” “congregating,” and “hindering” or “delaying” a voter from leaving the polling place.
- *Am. Broad. Cos. v. Heller*, No. 06-CV-01268, 2006 WL 3149365 (D. Nev. Nov. 1, 2006)
  - Enjoined Nevada from enforcing statute that prohibited exit polling within 100 feet of polling places.
- *CBS Broad., Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988)
  - Enjoined enforcement of Florida statute prohibiting the solicitation of opinions within 150 feet of any polling place.
  - Subsequently, the court enjoined enforcement of Florida statute prohibiting polling within 100 feet of the entrance of any polling place. *Cobb*, 470 F. Supp. 2d.
  - However, in *Browning*, 572 F.3d, the 11<sup>th</sup> Circuit upheld the law’s constitutionality.
- *Nat’l Broad. Co. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988)
  - Permanently enjoined enforcement of Georgia statute banning exit polling within 250 feet of polling place but upholding ban within 25 feet, including within the polling place.
- *Nat’l Broad. Co. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988)
  - Montana statute prohibiting exit polling within 200 feet of polling places was unconstitutional as applied.

## **Newsgathering in or near polling places**

- *PG Pub. Co. v. Aichele*, 705 F.3d 91 (3d Cir. 2013)
  - The court rejected a challenge to a Pennsylvania statute that required all persons to remain at least 10 feet away from the polling place, holding that there was no First Amendment right of access to polling places for newsgathering purposes.
  - The court also held that polling places are not public forums for purposes of the First Amendment.
- *Beacon Journal Publ’g Co. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004)
  - Granted news media emergency injunction in challenge to Ohio statute that prohibited all persons not voting from entering polling places. Court held that the state must allow “reasonable access to any polling place for the purpose of news-gathering and reporting so long as [journalists] do not interfere with poll workers and voters as voters exercise their



right to vote.”

- *Poniktera v. Seiler*, 181 Cal. App. 4th 121, 125, 104 Cal. Rptr. 3d 291, 294 (Cal. Ct. App. 2010)
  - Held that San Diego policy prohibiting photography and videotaping within polling places was not unconstitutional.
  - Stated that polling places are not public forums.
- *Firestone v. News-Press Pub. Co.*, 538 So. 2d 457 (Fla. 1989)
  - Held that Florida statute barring any nonvoters from coming within 50 feet of a polling place was unconstitutional as applied to the zone outside of a polling place but permissible with respect to restrictions on persons within the polling place.

## Ballot selfies

- *Crookston v. Johnson*, 854 F.3d 852, 853 (6th Cir. 2016)
  - Reversed district court’s grant of an injunction prohibiting enforcement of Michigan’s ban on ballot selfies.
- *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (Apr. 3, 2017)
  - Granted an injunction against New Hampshire’s ballot selfie ban.
- *Silberberg v. Bd. of Elections of New York*, 272 F. Supp. 3d 454 (S.D.N.Y. 2017)
  - Denied a motion to enjoin enforcement of a law prohibiting voters from showing their ballots after voting.
- *Hill v. Williams*, No. 16-CV-02627, 2016 WL 8667798 (D. Colo. Nov. 4, 2016)
  - Granted an injunction against enforcement of Colorado’s ballot selfie ban.
  - In 2017, the legislature passed [a law](#) legalizing ballot selfies.
- *Indiana Civil Liberties Union Found., Inc. v. Indiana Sec’y of State*, 229 F. Supp. 3d 817, 820 (S.D. Ind. 2017), *appeal dismissed* (Apr. 25, 2017)
  - Struck down Indiana’s ballot selfie ban on First Amendment grounds.

## Sample States

- *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp. 3d 454 (S.D.N.Y. 2017)
  - Upheld New York’s prohibition on ballot selfies.