



COMMONWEALTH OF KENTUCKY
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OAG 16-007

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Subject: Whether a voter is prohibited by law from taking a picture of oneself and their personal ballot inside the voting room, commonly known as a "ballot selfie."

Requested by: Alison Lundergan Grimes, Secretary of State

Written by: Taylor Payne, Assistant Attorney General

Syllabus: Kentucky law does not prohibit a voter from taking a "ballot selfie." However, taking a picture for the purpose of identifying another voter in the voting room violates KRS 117.236 and communicating support or nonsupport of a candidate, party, or measure on the ballot in the voting room may violate KRS 117.235. Thus, we advise voters to exercise caution in the practice of taking a "ballot selfie."

Statute construed: KRS 117.235; KRS 117.236

Opinion of the Attorney General

Due to recent media coverage of voters taking "ballot selfies" and the various state laws aimed at protecting the privacy of the voting booth, Alison Lundergan Grimes, Secretary of State, has requested an opinion of this office to address whether a Kentucky voter is prohibited by law from taking a "ballot selfie." We advise that Kentucky law does not prohibit a voter from taking a "ballot selfie." However, KRS 117.236(2) prohibits voters from using their device for the purpose of recording the identity of other voters in the voting room and KRS 117.235(4) prohibits voters from communicating their support or nonsupport for a candidate or measure on the ballot while still in the voting room.

Accordingly, when engaging in the activity of taking a “ballot selfie,” we are compelled to urge voters to exercise caution to refrain from inadvertently recording the identity of other voters or other ballots in the voting room or communicating their ballot choices while they are still in the voting room.

In 2013, the Oxford English Dictionary added the term “selfie” to its database, defining the term as “a photograph that one has taken of oneself, typically one taken with a smartphone or webcam and shared via social media.” Oxford English Dictionary, en.oxforddictionaries.com/definition/selfie (last visited November 2, 2016). A “ballot selfie” is a term used to describe the activity of a voter taking a picture of themselves in the voting room with their voting ballot.

Kentucky has two statutes that prohibit certain activities of voters in voting rooms: KRS 117.235 and KRS 117.236. KRS 117.235(4) states that “[n]o voter shall be permitted to converse with others while in any room in which voting, including absentee voting, is conducted concerning their support or nonsupport of any candidate, party, or issue to be voted on” KRS 117.236(2) states that “[n]o . . . voter . . . shall use paper, telephone, a personal communications device, or a computer or other information technology system for the purpose of creating a checkoff list or otherwise recording the identity of voters within the voting room” The issue before us is whether either statute should be interpreted to prohibit a voter from taking a “ballot selfie” as that term is defined above.

“The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect.” *Jefferson County Bd. Of Educ. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012) (citations omitted). Pursuant to KRS 446.080(1): “All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature.” To accomplish this, a court will first look at the “language employed by the legislature itself, relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions.” *Fell*, 391 S.W.3d at 719 (citations omitted).

KRS 117.235 and KRS 117.236 do not, by their plain language, prohibit a voter from taking a “ballot selfie.” In particular, KRS 117.236(2) prohibits a voter from using a smartphone or webcam “for the purpose of” creating a checkoff list or recording the identity of other voters in the voting room, but it does not prohibit the voter from recording his or her identity and his or her own ballot. If the legislature had intended to prohibit “ballot selfies,” it would have done so with clear language indicating this intent, or language that summarily prohibited the use of photographic or other electronic monitoring devices in the voting room, as other state legislatures have done. *See e.g.* Ga. Code Ann., § 21-2-413(e); 10 Illinois Compiled Statutes Annotated 5/29-9; Wisconsin Statutes Annotated § 12.13(1)(f); Florida Statutes Annotated § 102.031(5). Therefore, we find that interpreting either KRS 117.235 or KRS 117.236 to prohibit a voter from taking a “ballot selfie” would be inconsistent with the plain language of the statutes.

We understand KRS 117.235 and KRS 117.236 most aptly as efforts by the legislature to secure the independence of the voter in furtherance of the constitutional requirement of Section 147 of the Kentucky Constitution which states that “all elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited” The purpose of requiring voting by secret ballot is to enable the voter “to express his [or her] preference secretly, without being subject to intimidation or being made the victim of ill will or persecutions on account of his [or her] vote.” *Gardner v. Ray*, 157 S.W. 1147, 1152-53 (Ky. 1913) (citation omitted). The Kentucky Court of Appeals, the highest court at the time, also stated that a voter’s ballot “is absolutely privileged and the veil of secrecy should be impenetrable, **unless the voter voluntarily lifts it.**” *Johnson v. Commonwealth*, 13 S.W. 520, 521 (Ky. 1890) (citation omitted) (emphasis added).

This office has previously declined to strictly construe KRS 117.235(1) when doing so would potentially infringe upon First Amendment rights guaranteed by the United States Constitution. In OAG 88-76, we addressed “the right of news media to have access to the voting room for the purpose of observing the election process and to take photographs, or television film” in light of KRS 117.235(1), which precludes any person, other than election officers and challengers, from entering the voting room except for the purpose of voting or to


enforce the law. *Id.* We acknowledged that a literal interpretation of KRS 117.235(1) would prohibit news media from entering the voting room, however, we recognized that such an interpretation fails to serve the interests of the state and public and “works as an abridgement of the right of the media to gather and disseminate news.” *Id.* Therefore, when interpreting our election laws, we held that a balance must be struck “between the state’s interest in the integrity of elections as against the First Amendment interest of the affected party[.]” *Id.* (citation omitted). Striking that balance, we advised that KRS 117.235(1) should not be interpreted to prohibit the media from entering the voting room “for the very limited purpose of filming or observing the electoral process for a limited time” because it does not constitute “such an intrusion as to disrupt the peace, order and decorum at the polling place.” *Id.*

In this situation, we recognize that an overly broad interpretation of either KRS 117.235 or KRS 117.236 would also potentially implicate the First Amendment rights of voters who desire to take “ballot selfies.” See *Crookston v. Johnson*, No. 1:16-cv-01109, 2016 WL 6311623 (6th Cir. October 28, 2016); *Rideout v. Gardner*, No. 15-2021, 2016 WL 5403593 (1st Cir. September 28, 2016); *Indiana Civil Liberties Union Found., Inc. v. Indiana Sec’y of State*, No. 1:15-cv-01356-SEB-DML, 2015 WL 12030168 (S.D. Ind. October 29, 2015). It is a long-standing rule of statutory interpretation to narrowly construe statutes to avoid conflict with the United States Constitution. *Martin v. Commonwealth*, 96 S.W.3d 38, 54 (Ky. 2003) (citing *New York v. Ferber*, 458 U.S. 747, 769 n. 24, 102 S.Ct. 3348, 3361 n.24, 73 L.Ed.2d 1113 (1982)). Accordingly, we are guided by our decision in OAG 88-76 to strike a balance between protecting the state’s interest in the integrity of our elections and the First Amendment rights of our voters. Ultimately, we see no reason to conclude that the occurrence of “ballot selfies” threatens the independence of the voter or the secrecy of the ballot given that any sharing of a personal ballot is a voluntary lifting of the veil of secrecy afforded to a voter’s ballot. Thus, in our view, no compelling reason exists to broadly apply KRS 117.235 and KRS 117.236 to prohibit “ballot selfies.” To do so would defy the plain language of the statutes, be inconsistent with the purpose of the statutes and potentially infringe upon the First Amendment rights of voters.

We emphasize, however, that this opinion addresses only the question of whether our election laws prohibit “ballot selfies” as that term is used to describe a photograph a voter takes of himself or herself and their own personal ballot.

Due to the limited nature of this opinion, we are compelled to note that any voter who purposefully records the identity of another voter would be in violation of KRS 117.236(2), that the recording of any other person's ballot is a violation of KRS 117.236(2), any voter who communicates support or nonsupport for a candidate or measure on the ballot while still in the voting room may also be in violation of KRS 117.235(4). Moreover, if a "ballot selfie" is taken "for the purpose" of creating a checkoff list, it violates KRS 117.236(2). We advise that any voter who plans to take a "ballot selfie" should exercise caution to refrain from inadvertently recording the identity of another voter in the voting room or another voter's ballot and communicating their ballot choices while still in the voting room.

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