

1 Michael T. Risher (SB# 191627)
mrisher@aclunc.org
2 Julia Harumi Mass (SB# 189649)
jmass@aclunc.org
3 American Civil Liberties Union
Foundation of Northern California, Inc.
4 39 Drumm Street
San Francisco, CA 94111
5 Telephone: (415) 621-2493
Facsimile: (415) 255-8437
6

7 Lori L. Shellenberger (SB#154696)
lshellenberger@acluca.org
8 American Civil Liberties Union
of San Diego and Imperial Counties
9 P.O. Box 87131 55
San Diego, CA 92138
Telephone: (619) 398-4494
10 Facsimile: (619) 232-0036

11 Brendan Hamme (SB# 285293)
bhamme@aclusocal.org
12 ACLU of Southern California
1851 East 1st Street, Suite 450
13 Santa Ana, CA 92705
Telephone: (714) 450-3963
14

15 Peter Eliasberg (SB# 189110)
peliasberg@aclusocal.org
16 ACLU of Southern California
1313 West 8th Street
Los Angeles, CA 90017
17 Telephone: (213) 977-5228

18 Attorneys for Plaintiffs

19 **UNITED STATES DISTRICT COURT**
20 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

21 American Civil Liberties Union of
Northern California,
22 American Civil Liberties Union of
Southern California, and
23 American Civil Liberties Union of San
Diego and Imperial Counties

24 Plaintiffs,

25 v.

26 Alex Padilla,
27 California Secretary of State

28 Defendant.

Civil Case No. _____

**Complaint
for
declaratory and injunctive relief**

INTRODUCTION

1
2 1. This is a facial and as-applied challenge to a pair of California statutes that
3 prohibit voters from taking photographs of their marked ballots to show their support for
4 particular candidates or issues – so-called “ballot selfies.” The laws in question prohibit voters
5 from showing their marked ballots “to any person in such a way as to reveal its contents.” Cal.
6 Elec. Code §§ 14276, 14291.

7 2. Nearly every court that has examined similar laws, including the United States Court
8 of Appeals – has held that they violate the First Amendment. *See Rideout v. Gardner*, No. – F.3d.,
9 2016 WL 5403593 (1st Cir. Sept. 28, 2016); *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H.
10 2015); *Crookston v. Johnson*, No. 1:16-cv-1109 (W.D. Mich. Oct. 20, 2016), *order stayed* 2016
11 WL 6311623 (6th Cir. Oct. 28, 2016); *Indiana Civil Liberties Union Found. v. Indiana Sec’y of*
12 *State*, No. 115-cv-01356, 2015 WL 12030168 (S.D. Ind. Oct. 19, 2015).

13 3. Moreover, the California legislature has already repealed the laws that Plaintiffs
14 challenge, illustrating the lack of government interest in their enforcement. But because of the
15 timing of this repeal, the laws continue in effect until January 1, 2017.

16 4. Despite the unconstitutionality and abandonment by the legislature of these particular
17 laws, California law requires state and local officials to enforce all statutes, even if they believe
18 those statutes are unconstitutional, until and unless a court orders them not to. *See Lockyer v. City*
19 *& Cty. of San Francisco*, 33 Cal. 4th 1055, 1087-1112 (2004). Consistent with this principle, the
20 California Secretary of State issued a memorandum to local elections officials in October,
21 indicating that that they should continue to enforce the prohibition on ballot selfies during this
22 November’s election, even though the Legislature has voted to repeal the law, effective January 1,
23 2017.

24 5. Plaintiffs therefore request a temporary restraining order and a preliminary injunction
25 to allow their tens of thousands of California members to exercise their First Amendment rights
26 this November.

1 **JURISDICTION AND VENUE**

2 6. This action arises under 42 U.S.C. § 1983 and the United States Constitution. This
3 Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

4 7. This Court has personal jurisdiction over Defendant because he is a public official of
5 the State of California who performs official duties within the State.

6 8. Venue properly lies within this District under 28 U.S.C. § 1391(b). The Defendants
7 performs official duties in this District, and a substantial part of the events or omissions giving rise
8 to Plaintiffs’ claims have occurred or will occur in this District.

9 **INTRADISTRICT ASSIGNMENT**

10 9. This action may properly be assigned to the San Francisco or Oakland divisions of this
11 Court because a substantial part of the events or omissions which give rise to the claims in this
12 action will occur in Alameda and San Francisco Counties. Plaintiff ACLU-NC resides in San
13 Francisco County and has thousands of members in San Francisco and Alameda Counties,
14 including Jacquelyn Kennedy, who resides in Alameda County and has submitted a declaration in
15 this matter describing the effects of the challenged laws on her. *See* Local Rule 3-2.

16 **THE PARTIES**

17 **Plaintiffs**

18 10. The American Civil Liberties Union is a nationwide nonprofit, nonpartisan
19 organization with over 500,000 members, dedicated to the defense and promotion of the
20 guarantees of individual rights and liberties embodied in the state and federal constitutions.

21 11. Plaintiff American Civil Liberties Union of Northern California (ACLU-NC), founded
22 in 1934 and based in San Francisco, is one of the largest ACLU affiliates, with some 40,000
23 members in the state, thousands of whom live in this District.

24 12. Plaintiff American Civil Liberties Union of Southern California (ACLU-SC), founded
25 in 1923 and based in Los Angeles, has more than 25,000 members in the state.

26 13. Plaintiff American Civil Liberties Union of San Diego & Imperial Counties, founded
27 in 1933, has thousands of members living in those two counties.

1 14. The ACLU and its California affiliates have long worked to protect free-speech and
2 voting rights. They have expended resources in recent days responding to questions about whether
3 California voters can take ballot selfies.

4 15. Members of each California affiliate vote and wish to post photographs of their
5 marked ballots on their social media accounts to make a statement about the candidates and
6 initiatives they are supporting in the November 2016 general election. But Elections Code
7 §§ 14276 and 14291 are preventing them from doing this. They do not want to violate the law and
8 do not want to cause disruption at the polls, which would occur if they tried to take photographs at
9 the polls but were instructed not to do so by poll workers.

10 16. For example, Allen Asch is a member of the ACLU of Northern California and the
11 chair of its Sacramento Area chapter. Asch is a registered California voter who regularly uses
12 Instagram, Facebook, and Twitter to post information and his opinions about political issues,
13 including ballot initiatives. He has over 120,000 subscribers to his YouTube account, over 10,000
14 followers on Facebook, and over 2,700 followers on Twitter.

15 17. Asch has been covering the 2016 presidential election weekly for the last 183 weeks
16 by compiling and commenting on the week's media clips. He has also posted the ACLU's ballot
17 initiative guide to his personal Facebook page and will be making a Halloween display to urge
18 voters to pass Prop 62 and defeat Proposition 66 that he plans to record on video and post on social
19 media.

20 18. Asch, who is a lawyer and a member of the California Bar, understands that the
21 California Elections Code bars voters from showing their marked ballots. For past Election Day
22 social media posts, he has avoided including his marked ballot in photos because of this provision.
23 But he would like to share a photo that shows how he voted on state-wide initiatives this year
24 because he believes a photo makes a stronger statement than simply posting his opinions.

25 19. In addition, it would be particularly important for him to present photographic proof
26 of his vote in the presidential election because of the controversy among Bernie Sanders
27 supporters about whether they should vote for Hillary Clinton. He repeatedly encouraged his
28

1 followers to vote for Hillary Clinton despite the ambivalence of some, and he thinks it is important
2 that he show his followers that he voted for her.

3 20. However, unless a court order allows him to do so, he will again refrain from posting
4 photographs of his marked ballot, so as not to violate the law. *See* Ca. Business and Professions
5 Code § 6068(a) (“It is the duty of an attorney to ... support the Constitution and laws of the United
6 States and this state.”).

7 **Defendants**

8 21. Defendant Secretary of State is the state’s “chief elections officer” with the duty to
9 “administer the provisions of the Elections Code” and ensure that “state election laws are
10 enforced.” Gov’t Code § 12172.5. His office provides guidance to local elections officials thought
11 the state.

12 22. Defendant is sued in his official capacity only.

13 **Need for Injunctive and Declaratory Relief**

14 23. This controversy is ripe for judicial decision, and injunctive and declaratory relief are
15 necessary and appropriate pursuant to 28 U.S.C. §§ 2201 and 2202, so that the parties may know
16 the legal obligations that govern their present and future conduct. This is particularly important
17 here, because California law requires the Secretary to enforce the challenged statutes even if he
18 believes them to be unconstitutional, until and unless a court orders him not to. *See Lockyer v. City*
19 *& Cty. of San Francisco*, 33 Cal. 4th 1055, 1087-1112 (2004).

20 24. In the absence of court-ordered relief, Plaintiffs will suffer imminent, immediate, and
21 ongoing irreparable harm in the form a chilling of their free speech rights. No future award of
22 damages can remedy the loss of these constitutional rights. Both the public interest and equity
23 favor granting an injunction to allow Plaintiffs to exercise their constitutional free speech and
24 associational rights. Injunctive relief is therefore necessary and appropriate.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: October 31, 2016

Respectfully submitted,

By: /s/ Michael T. Risher

Michael T. Risher
Attorney for Plaintiffs