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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

American Civil Liberties Union of Northern)
California,)
American Civil Liberties Union of Southern)
California, and)
American Civil Liberties Union of San Diego and)
Imperial Counties,)

Plaintiffs,)

v.)

Alex Padilla,)
California Secretary of State)

Defendant.)

Civil Case No. _____

***Ex parte* application for temporary
restraining order and order to show cause
why preliminary injunction should not
issue**

1 Plaintiffs seek a temporary restraining order to prohibit the state from enforcing two
2 statutes that prohibit voters from displaying photographs of their marked ballots to show their
3 support for particular candidates or issues. *See* Ca. Elec. Code §§ 14276, 14291. These
4 photographs, which are usually posted to social media, have come to be known as “ballot selfies,”
5 even though they usually depict only the ballot, not the voter.

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

12 The California Secretary of State nevertheless issued a memorandum to local elections
13 officials on October 12, indicating that that they should continue to enforce the prohibition on
14 ballot selfies. Two days later, Plaintiffs asked the Secretary’s office to withdraw that
15 memorandum; the parties have been diligently trying to negotiate a resolution to this matter ever
16 since. *See* Declaration of Lori Shellenberger ¶ 1-8 (describing negotiations with Secretary’s office
17 and notice intent to request TRO). Plaintiffs informed the government on October 27 that they
18 would file a lawsuit and request a TRO on October 31 if the parties were not able to reach an
19 agreement. *Id.* ¶ 27. The government requested another 24 hours to try to reach an informal
20 resolution. *Id.* But on Friday, October 28, the Secretary’s office finally decided it would be unable
21 to accommodate Plaintiffs’ request, in part because California law requires state and local officials
22 to enforce statutes until a court determines that they are unconstitutional. *See id.* ¶ 7-8; *Lockyer v.*
23 *City & Cty. of San Francisco*, 33 Cal. 4th 1055, 1102 (2004).

24 Plaintiffs agreed to provide their moving papers to the government before filing, and have
25 done so. *See* Shellenberger Dec. ¶ 8; Declaration of Michael T. Risher ¶ 3.

26 **NEED FOR IMMEDIATE RELIEF**

27 Immediate relief is necessary because the challenged statutes violate the First Amendment.

1 “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably
2 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality). “When, as
3 here, a party seeks to engage in political speech in an impending election, a delay of even a day or
4 two may be intolerable.” *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th
5 Cir. 2012) (citation omitted).

6 Californians who want to display their marked ballots in an effort to convince other voters to
7 support their candidate or issue will not be able to do so after the November 8 presidential election;
8 without a TRO, their “free speech rights will be lost forever.” *Id.* And the harm will be particularly
9 severe because the First Amendment “has its fullest and most urgent application precisely to the
10 conduct of campaigns for political office” and voter initiatives. *McIntyre v. Ohio Elections Comm'n*,
11 514 U.S. 334, 347 (1995) (citation omitted).

12 **GROUND S FOR APPLICATION**

13 “The standard for a TRO is the same as for a preliminary injunction.” *Rovio Entm't Ltd. v.*
14 *Royal Plush Toys, Inc.*, 907 F. Supp. 2d 1086, 1092 (N.D. Cal. 2012). Thus, a “plaintiff seeking a
15 [TRO] must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable
16 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an
17 injunction is in the public interest.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). If
18 plaintiffs show a “likelihood of irreparable injury and that the injunction is in the public interest,” a
19 “preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to
20 the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Alliance*
21 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

22 As discussed above, Plaintiffs face imminent and irreparable harm. And “by establishing a
23 likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established
24 that both the public interest and the balance of the equities favor a preliminary injunction.” *Arizona*
25 *Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

26 Plaintiffs are likely to succeed on the merits. As noted above, all but one of the courts that
27 have examined similar statutes has held them unconstitutional on the grounds that they are not

1 narrowly tailored, a fundamental requirement of the First Amendment that prohibits the
2 government from banning whole categories of expression simply because it has concerns that some
3 people will use it for unlawful activity. Given the explosive popularity of ballot selfies, it is hard to
4 imagine that even a tiny percentage of the people posting them are engaged in anything other than
5 constitutionally protected expression of their political choices.

6 Plaintiffs discuss these cases in their Memorandum and have included copies of them for
7 the Court's convenience in a separate Appendix of Opinions in Similar Cases.

8 The only exception to this unanimity is an October 28 decision by a split panel of the Sixth
9 Circuit staying the preliminary injunction issued in the *Crookston* case on the grounds that the
10 plaintiff had waited too long to file suit, without justification. *See Crookston v. Johnson*, -- F.3d. --,
11 2016 WL 6311623 (6th Cir. Oct. 28, 2016); *but see id.* at *5-*7 (Cole, C.J., dissenting). But here,
12 Plaintiffs are filing only now for a good reason: they did not expect the state to be enforcing the
13 challenged statutes in November because the Legislature repealed them earlier this year. *See* 2016
14 Cal. Legis. Serv. Ch. 813 (A.B. 1494).¹ It therefore seemed that there was no need to challenge the
15 statute, even though under Article 4 § 8 of the California Constitution, this repeal does not actually
16 go into effect until 2017.

17 However, on October 12 the Secretary sent local elections officials a bulletin that directed
18 them to the statute prohibiting voter from showing marked ballots: "After the ballot is marked, a
19 voter shall not show it to any person in such a way as to reveal its contents."² The memorandum also
20 advised local election officials that "[a]lthough ... AB 1494 regarding ballot 'selfies' has been
21 signed into law, [the Secretary's] guidance will remain unchanged until January 1, 2017."³ Media
22 coverage of this memorandum and the issue of ballot selfies in general soon spread the word that
23 Californians would not be able to take ballot selfies this year, even of their absentee ballots. *See*

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25 ¹ Exhibit 3 to the Declaration of Michael T. Risher.

26 ² *See* California Secretary of State County Clerk/Registrar of Voters (CC/ROV) Memorandum
27 #16322 at 2 (quoting California Elections Code § 14291). A copy of this memorandum is attached
to Risher Dec. as Ex. 1.

28 ³ *Id.* at 1.

1 John Meyers, *Sorry, Californians, you still can't take ballot selfies on Nov. 8* (L.A. Times Oct. 13,
2 2016)⁴; Declaration of Kelli McCarthy ¶ 5-7 (media coverage led her not to post photo of ballot);
3 Shellenberger Dec. at 1 ¶ 4 (Oct. 23 A.P article stated that in California, “Legal Status is Mixed or
4 Unclear”).

5 Starting two days after the Secretary issued the Memorandum, Plaintiffs have been diligently
6 trying to resolve the issue with the Secretary’s office in an attempt to avoid litigation, discussing
7 the matter with the Secretary’s staff on October 14, 18, 24, 25, 27 and 28. *See* Shellenberger Dec.
8 at 1-2, ¶¶ 1-8. It was only on Friday, October 28 – after the Secretary’s office had requested
9 additional time to resolve the issue without litigation – that it became clear that the government did
10 not believe that it could change its policy without a court order, and that this lawsuit would
11 therefore be necessary. *See id.* at 2, ¶¶ 7-8. Plaintiffs filed this lawsuit the next business day. Filing
12 before negotiations were exhausted would have been premature and a potential waste of resources.
13

14 In addition, the law at issue in *Crookston* is a ban on all types of photography at the polls;
15 the Sixth Circuit was concerned that the injunction would disrupt or delay voting. *See Crookston*,
16 2016 WL 6311623 at *2-*3; *id.* at *5 (Guy, J., concurring). In contrast, California law allows
17 voters to take photos at the polls and even to photograph their marked ballots; it simply prohibits
18 them from sharing these photographs or photographs that they took of their absentee ballots in the
19 privacy of their own homes. The TRO that Plaintiffs request does not raise the issues about
20 changes to election-day procedures at polling stations that motivated the *Crookston* majority. And
21 because California’s law is content-based, it is more clearly unconstitutional than is the law before
22 the Sixth Circuit.
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28 ⁴ Exhibit 4 to the Risher declaration.

1 Ninth Circuit law law “clearly favors granting preliminary injunctions to a plaintiff ... who
2 is likely to succeed on the merits of his First Amendment claim.” *Klein v. City of San Clemente*,
3 584 F.3d 1196, 1208 (9th Cir. 2009). This Court should grant the TRO.

4 **RELIEF SOUGHT**

5 Plaintiffs respectfully request that the Court grant this *ex parte* motion as follows:

- 6 1. First, Plaintiffs request that the Court issue an immediate temporary restraining order that
7 enjoins Defendant Padilla, including his officers, agents, servants, employees, and attorneys
8 from enforcing Elections Code §§ 14276 and 14291 against, or otherwise interfering with,
9 voters’ taking and distributing images of their marked ballots. The Secretary of State is the
10 proper defendant because he is the state’s “chief elections officer” with the duty to ensure that
11 “state election laws are enforced.” Gov’t Code § 12172.5. *See Common Cause S. Christian*
12 *Leadership Conference of Greater Los Angeles v. Jones*, 213 F. Supp. 2d 1106, 1108 (C.D. Cal.
13 2001); *see also Doe v. Harris*, No. C12-5713 TEH, 2013 WL 144048, at *11–12 (N.D. Cal.
14 Jan. 11, 2013), *aff’d*, 772 F.3d 563 (9th Cir. 2014) (preliminary injunction against state official
15 binds local officials who work with her to enforce law in question).
- 16 2. Second, Plaintiffs ask the Court to issue an order to show cause why a preliminary injunction
17 should not issue to enjoin Defendant from enforcing these same laws, and set a hearing on the
18 motion for a preliminary injunction. Even if that occurs after the election, voters will still have
19 their marked ballots displayed on their social media sites and will therefore be in violation of
20 the law.

21 This motion is based on this *Ex Parte* Application and the following documents that are being
22 filed herewith:

- 23 1. Complaint for Declaratory and Injunctive Relief
24 2. Memorandum of Points and Authorities In Support of Temporary Restraining Order and
25 Preliminary Injunction
26 3. [Proposed] Temporary Restraining Order and Order to Show Cause
27 4. Declaration of counsel Michael T. Risher

- 1 5. Declaration of counsel Lori Shellenberger
- 2 6. Declaration of ACLU of Northern California member Allen Asch
- 3 7. Declaration of ACLU of Northern California member Jacquelyn Kennedy
- 4 8. Declaration of ACLU of Northern California member Natalie Wormeli
- 5 9. Declaration of ACLU of Southern California member Vanessa Hurtado
- 6 10. Declaration of ACLU of Southern California member Jennifer Rojas
- 7 11. Declaration ACLU of San Diego & Imperial County member Gerrlyn Gacao
- 8 12. Declaration of ACLU of San Diego & Imperial County member Amanda Le
- 9 13. Declaration of ACLU of San Diego & Imperial County member Kelli McCarthy
- 10 14. Declaration of Benjamin Monterroso, Executive Director of Mi Familia Vota and Mi Familia
- 11 Vota Education Fund
- 12 15. Declination to Proceed Before Magistrate Judge
- 13 16. Certification of Interested Parties
- 14 17. Appendix of Opinions in Similar Cases
- 15 and the complete files and records of this action; and such other and further matters as the Court may
- 16 properly consider.

17 DATED: October 31, 2016

Respectfully submitted,

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By: /s/ Michael T. Risher

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Michael T. Risher
Attorney for Plaintiffs

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