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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 **AMERICAN CIVIL LIBERTIES UNION**
14 **OF NORTHERN CALIFORNIA,**
15 **AMERICAN CIVIL LIBERTIES UNION**
16 **OF SOUTHERN CALIFORNIA, and**
17 **AMERICAN CIVIL LIBERTIES UNION**
18 **OF SAN DIEGO AND IMPERIAL**
19 **COUNTIES,**

Plaintiffs,

20 **v.**

21 **ALEX PADILLA, California Secretary of**
22 **State,**

Defendant.

3:16-cv-06287-WHA

DEFENDANT SECRETARY OF STATE
PADILLA'S OPPOSITION TO
PLAINTIFFS' EX PARTE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION SHOULD
NOT ISSUE

Date:
Time:
Courtroom:
Judge:
Trial Date:
Action Filed: October 31, 2016

Defendant Secretary of State Alex Padilla takes no position on the merits of Plaintiffs’ claim that California’s long-established prohibition on the disclosure of marked ballots violates the First Amendment. However, Secretary Padilla opposes Plaintiffs’ Ex Parte Application for Temporary Restraining Order based on its unjustifiably late timing—coming just eight days before the November 8, 2016 election, weeks after the start of early voting, months after the state Legislature engaged in a public debate on the issue, and more than 100 years since the prohibition became law. Plaintiffs fail to justify why they have not filed suit until now, and the Court should exercise its discretion and refrain from issuing an emergency injunction that would potentially require the retraining of thousands of poll workers just days before the election and that would immediately become moot based on a change in state law that takes effect on January 1, 2017.

BACKGROUND

I. BALLOT SECRECY LAWS IN CALIFORNIA

For more than a century, the right to a secret ballot has been enshrined in the California Constitution. *See, e.g.*, Cal. Const. art. II, § 7 (“Voting shall be secret.”), § 5 (guaranteeing “secrecy in voting”) (repealed 1972); *Bush v. Head*, 154 Cal. 277, 282 (1908) (citing former § 5 of article 2); *Scott v. Kenyon*, 16 Cal.2d 197, 201 (1940) (the right to a secret ballot “is the very foundation of our election system”). This right has long been recognized as “an important and valuable safeguard for the protection of the voter . . . against the influence which wealth and situation may be supposed to exercise.” *Robinson v. McAbee*, 64 Cal.App. 709, 714 (1923) (citation omitted). In other words, ballot secrecy laws help “protect the integrity of the voting process by making it impossible to verify the votes cast by any single voter, thereby protecting against vote buying schemes and voter intimidation or coercion.” Senate Rules Comm., Senate Floor Analysis of A.B. 1494 at 3 (Aug. 10, 2016), *available at* http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1494# (last visited Oct. 31, 2016); *see* Cal. Elec. Code §§ 18520-18523 (prohibiting vote buying), §§ 18540-18548 (prohibiting voter coercion or intimidation).

To ensure ballot secrecy, California has adopted a statutory regime prohibiting, among other things, the disclosure of marked ballots by voters (*id.* at §§ 14276, 14291), solicitation or

1 examination of marked ballots (*id.* at § 18403), and attempts to ascertain the contents of a marked
 2 ballot (*id.* at §§ 18562(a), 18562.5(b)(1)). At issue here is the disclosure ban codified at Elections
 3 Code §§ 14276 and 14291, which both provide that after a “ballot is marked, a voter shall not
 4 show it to any person in such a way as to reveal its contents.” As Plaintiffs argue, this effectively
 5 prohibits voters from sharing photographs of marked ballots, including “ballot selfies” in which
 6 voters take photographs of themselves with their marked ballots.

7 II. CHALLENGES TO “BALLOT SELFIE” BANS

8 Laws prohibiting photographs of marked ballots have recently been challenged in five
 9 states (not including California): New Hampshire, Indiana, Michigan, New York, and Colorado.
 10 *Crookston v. Johnson*, No. 1:16-cv-1109 (S.D. Mich. Oct. 24, 2016) (order issuing preliminary
 11 injunction), *stayed by Crookston v. Johnson*, No. 16-2490, 2016 WL 6311623 (6th Cir. Oct. 28,
 12 2016); *Indiana Civil Liberties Union Found., Inc. v. Indiana Sec’y of State*, No. 1:15-cv-01356-
 13 SEB-DML, 2015 WL 12030168 (S.D. Ind. Oct. 19, 2015); *Rideout v. Gardner*, 123 F. Supp. 3d
 14 218 (D.N.H. 2015), *aff’d by*, No. 15-2021, 2016 WL 5403593 (1st Cir. Sept. 28, 2016); *Hill v.*
 15 *Williams*, No. 1:16-cv-02627 (U.S.D.C. Colo. filed on Oct. 24, 2016); *Silberberg et al. v. Board*
 16 *of Elections of the State of New York*, No. 1:16-cv-08336-PKC (S.D.N.Y. filed on Oct. 26, 2016).
 17 The three district courts that have issued rulings—in New Hampshire, Indiana, and Michigan—
 18 each preliminarily enjoined the laws ahead of the November election, concluding they likely
 19 violate the First Amendment right to free speech. *Crookston*, No. 1:16-cv-1109 (S.D. Mich.
 20 Oct. 24, 2016); *Indiana Civil Liberties Union Found.*, 2015 WL 12030168 (S.D. Ind. Oct. 19,
 21 2015); *Rideout*, 123 F. Supp. 3d 218 (D.N.H. 2015). The First Circuit has affirmed the New
 22 Hampshire preliminary injunction, *Rideout*, 2016 WL 5403593 (1st Cir. Sept. 28, 2016), while
 23 the Sixth Circuit has stayed the Michigan injunction until after the election, *Crookston*, 2016 WL
 24 6311623 (6th Cir. Oct. 28, 2016).

25 The courts in these cases have mostly followed the same First Amendment analysis.
 26 Applying strict scrutiny *and* intermediate scrutiny,¹ they have determined that the states’ interest

27 ¹ The level of scrutiny applied in First Amendment analysis depends on the regulation: “Content-
 28 based laws—those that target speech based on its communicative content—are presumptively
 (continued...) ”

1 in protecting voters from undue influence and in preserving the integrity of elections is too
 2 speculative to support a ballot-selfie ban without evidence that the photographs lead to vote-
 3 buying or coercion. For instance, the First Circuit rejected New Hampshire’s stated interest of
 4 targeting vote-buying as overly “abstract” and “prophylactic.” *Id.*, 2016 WL 5403593, at *5
 5 (citing *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810
 6 (1984)). This was because the state had not received a complaint of vote-buying or voter
 7 intimidation since 1976, and “a few recent instances” of vote-buying unrelated to ballot
 8 photographs were insufficient to demonstrate the state’s interest in prohibiting the photographs.
 9 *Id.* The courts have also generally concluded that the challenged laws were not sufficiently
 10 tailored to the states’ interests, because the laws were overinclusive and the states had not shown
 11 that other state and federal voter-protection laws are inadequate to address vote-buying and
 12 coercion. *See, e.g., Rideout*, 2016 WL 5403593, at *7.

13 The Sixth Circuit, however, has stayed the preliminary injunction issued in the Michigan
 14 lawsuit. *Crookston*, 2016 WL 6311623. The court stated two reasons for its decision. First, it
 15 faulted the late timing of plaintiff’s lawsuit and, applying the “*Purcell* Principle,” declined to
 16 disrupt the state’s “venerable voting protocols” only ten days before the election. *Id.* at *2 (citing
 17 *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam) (establishing that when a court has
 18 “inadequate time to resolve the factual disputes” in a lawsuit challenging the administration of an
 19 imminent election, it “shall of necessity allow the election to proceed without an injunction”).
 20 Second, the court expressed strong “skept[ic]ism” that Michigan’s “ballot-exposure ban”—which,

21
 22 (...continued)

23 unconstitutional and may be justified only if the government proves that they are narrowly
 24 tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218,
 25 2226 (2015). By contrast, “the government may regulate the time, place, and manner of
 26 expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve
 27 a significant governmental interest, and leave open ample alternatives for communication.”
 28 *Burson v. Freeman*, 504 U.S. 191, 197 (1992). A content-neutral restriction on speech “need not
 be the least restrictive or least intrusive means” of serving the government’s interests; however,
 the government still “may not regulate expression in such a manner that a substantial portion of
 the burden on speech does not serve to advance its goals.” *McCullen v. Coakley*, 134 S. Ct. 2518,
 2535 (2014). In all of the court decisions to date (except for the district court decision in
Rideout), the courts have concluded that the ballot selfie bans fail to meet either level of scrutiny.

1 in part, closely tracks the language of Election Code §§ 14276 and 14291²—violated the First
 2 Amendment. *Id.* at *4. It recognized “several serious” and ongoing governmental interests in
 3 prohibiting photography in polling locations, and dismissed the argument that the state needed to
 4 show evidence of photography-related vote buying or coercion to justify the prohibition. *Id.* at *5
 5 (quoting *Burson*, 504 U.S. at 208). Finally, it questioned whether the law significantly infringes
 6 voters’ First Amendment rights, especially since the Secretary of State had indicated she would
 7 not prosecute voters for ballot selfies. *Id.*

8 **III. ASSEMBLY BILL 1494 & PREPARATION FOR THE NOVEMBER 8 ELECTION**

9 On September 29, 2016, Governor Jerry Brown signed into law Assembly Bill 1494—a bill
 10 strongly supported by Secretary Padilla—which legalizes photographs of marked ballots in future
 11 elections. *See* A.B. 1494, 2016 Cal. Legis. Serv. Ch. 813 (West) (repealing Election Code §
 12 14276 and amending § 14291 to allow a voter to “voluntarily disclose how he or she voted if that
 13 voluntary act does not violate any other law”), *available at*
 14 http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1494 (last
 15 visited Oct. 31, 2016). Acknowledging the ballot photography litigation in other states and
 16 increased interest in the issue in California, the bill aimed to proactively protect voters’ First
 17 Amendment rights and encourage voter participation and engagement. Assembly Elect. &
 18 Redistricting Comm., Assembly Floor Analysis of A.B. 1494 at 2 (Aug. 18, 2016), *available at*
 19 http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1494# (last
 20 visited Oct. 31, 2016). Notably, the Legislature chose not to have the law go into immediate
 21 effect with this election cycle, but wrote the law to take effect on January 1, 2017.

22 On October 12, 2016, Secretary Padilla issued an advisory on ballot photography to the
 23 state’s 58 county election administrators to ensure uniform application of existing state law in the

24 ² The Michigan lawsuit challenged, in part, a provision in effect since 1891 that prohibits a voter
 25 from “expos[ing]” a marked ballot “in a manner likely to reveal” whom the voter voted for.
 26 Mich. Comp. Laws § 168.579; *see Crookston*, No. 1:16-cv-1109 at *6 (S.D. Mich. Oct. 24, 2016).
 27 Plaintiffs attempt to distinguish the laws at issue here from *Crookston* on the basis that Michigan
 28 bans all polling place photography. Pls.’ Memo. of Points & Auth. at 13. While this may be true,
 the Sixth Circuit’s opinion examines and evaluates the state’s interest and evidentiary burden (and
 voters’ speech rights) as relate to the “ballot-exposure ban” specifically, not the broader
 photography ban. *Crookston*, 2016 WL 6311623 at *5.

November 8 election. Secretary of State, Memorandum No. 16322, General Election: Cameras at Polling Places (Oct. 12, 2016), *available at* <http://elections.cdn.sos.ca.gov/ccrov/pdf/2016/october/16322jl.pdf> (last visited Oct. 31, 2016).

The advisory stated:

The Secretary of State's office has historically taken the position that the use of cameras or video equipment at polling places is prohibited. Although there has been recent media coverage surrounding the use of cameras at polling places and AB 1494 regarding ballot "selfies" has been signed into law, our guidance will remain unchanged until January 1, 2017, when the new law goes into effect.

Id. at 1.

ARGUMENT

Article III, section 3.5 of the state Constitution prohibits state agencies and their executives from declaring statutes unconstitutional and refusing to enforce them in the absence of a court order. *See Reese v. Kizer*, 46 Cal. 3d 996, 1002 (1988); *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 48 (2001). Given this prohibition and considering that the current law expires in two months, Secretary Padilla does not take a position on the substance of Plaintiffs' claim that Election Code sections 14276 and 14291 violate the First Amendment.

However, Secretary Padilla opposes Plaintiffs' *ex parte* application on the basis that the Court should exercise its discretion and refrain from issuing a temporary injunction with so little time before the election. *See Purcell*, 549 U.S. at 5-6; *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012).

First, Plaintiffs fail to justify their last-minute request. The state's marked-ballot disclosure law has been in effect for more than a century, without a single known prosecution under the law. *See* Senate Rules Comm., Senate Floor Analysis of A.B. 1494 at 3 (Aug. 10, 2016), *available at* http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1494# (last visited Oct. 31, 2016). Amending the law to allow "ballot selfies" has been discussed publicly by the Legislature since January 2016. *See* A.B. 1494 (as amended on January 4, 2016), *available at* http://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201520160AB1494&cversion=20150AB149496AMD (last visited Oct. 31, 2016). The bill and the illegality of

1 ballot selfies were discussed in reports by the state’s major newspapers, and radio and television
 2 stations, beginning at least in January 2016 and up until the bill was signed by Governor Brown.
 3 *See, e.g.,* Christine Mai-Duc, *Ballot selfies are illegal, but this Bay Area legislator says they*
 4 *shouldn’t be* (L.A. Times Jan. 11, 2016) (noting the ACLU’s position that ballot photographs are
 5 political speech and that ACLU brought the Indiana and New Hampshire lawsuits), *available at*
 6 <http://www.latimes.com/politics/la-pol-sac-ballot-selfies-voter-turnout-bill-20160111-story.html>
 7 (last visited Oct. 31, 2016); Bakersfield Californian, *Ask TBC: Aren’t ‘Ballot Selfies’ Illegal?*
 8 (Bakersfield Californian June 12, 2016), *available at* [http://www.bakersfield.com/news/ask-tbc-](http://www.bakersfield.com/news/ask-tbc-aren-t-ballot-selfies-illegal/article_c5efdd89-6997-5453-8a94-c8afcaae1905.html)
 9 [aren-t-ballot-selfies-illegal/article_c5efdd89-6997-5453-8a94-c8afcaae1905.html](http://www.bakersfield.com/news/ask-tbc-aren-t-ballot-selfies-illegal/article_c5efdd89-6997-5453-8a94-c8afcaae1905.html) (last visited
 10 Oct. 31, 2016), Associated Press, *California Senate Votes to End Ban on Ballot Selfies* (KPBS
 11 Aug. 1, 2016), *available at* [http://www.kpbs.org/news/2016/aug/01/california-senate-votes-end-](http://www.kpbs.org/news/2016/aug/01/california-senate-votes-end-ban-ballot-selfies/)
 12 [ban-ballot-selfies/](http://www.kpbs.org/news/2016/aug/01/california-senate-votes-end-ban-ballot-selfies/) (last visited Oct. 31, 2016), Sandra Endo, *CA Governor approves gender-*
 13 *neutral restrooms, ballot selfies* (Fox 11 News Los Angeles Sept. 30, 2016), *available at*
 14 <http://www.foxla.com/news/local-news/208855066-story> (last visited Oct. 31, 2016). A.B. 1494
 15 clearly stated it would take effect on January 1, 2017, leaving the well-publicized prohibition on
 16 ballot selfies in effect for the November 8, 2016 election. Were there any doubt as to the state of
 17 the law after A.B. 1494 was signed in September, Secretary Padilla made the state’s position clear
 18 in his October 12 advisory.

19 Despite the consistent publicity around the issue throughout 2016, Plaintiffs fail to
 20 sufficiently explain why they have waited until one week before Election Day to file suit. *See*
 21 *Crookston*, 2016 WL 6311623 (6th Cir. Oct. 28, 2016) (staying injunction of Michigan ballot
 22 selfie prohibition because changing state election policy 10 days before the election “would
 23 require nuanced policy decisions that no one should be making at the eleventh hour—absent a
 24 good explanation for the delay.”) In a declaration filed with Plaintiffs’ ex parte application, one
 25 of Plaintiffs’ attorneys chronicles the dialogue between Plaintiffs’ counsel and Chief Counsel for
 26 the Secretary of State beginning October 14, 2016. Decl. of Lori Shellenberger ¶¶ 2-8. The
 27 declaration makes clear that Secretary Padilla stated from the outset that he did not have the
 28 authority to refuse to enforce a state law. *Id.* at ¶ 3; Cal. Const. art. III, § 3.5. More critically, the

1 declaration does nothing to explain why Plaintiffs did not raise the issue before October 2016,
 2 despite that state law has been unambiguous and consistent in prohibiting photographs of marked
 3 ballots.

4 Second, an injunction would disrupt long-enforced rules of election administration that
 5 prohibit photography in polling places, potentially causing voter and poll worker confusion,
 6 delays at the polls, and inconsistent interpretation of the law at the thousands of polling locations
 7 across the state. Early voting has already begun across the state,³ and the state's 58 county
 8 officials have likely already trained thousands of poll workers on existing law. Reversing course
 9 now would require emergency guidance to be issued to the counties, poll workers to be re-trained,
 10 polling place guidelines and signage to be revised, and an unplanned emergency voter outreach
 11 campaign to be conducted. As a matter of practicality and principle, the Court should be reluctant
 12 to allow unnecessarily last-minute lawsuits to undermine the systematic preparations of the state's
 13 county election officials—either with regard to “ballot selfies” or similar issues in the future.

14 CONCLUSION

15 For the reasons above, Secretary Padilla urges the court to deny Plaintiffs' Ex Parte
 16 Application for Temporary Restraining Order in its entirety.

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21 _____
 22 ³ See Elec. Code §§ 3001 (ballots available as early as 29 days before Election Day), 3018 (early
 23 voting may take place at county elections offices), 3104 (military and overseas voters offered
 24 same early voting schedule); *see, e.g.*, Secretary of State, Early Voting and Vote-by-Mail Drop-
 25 off Locations, *available at* <http://www.sos.ca.gov/elections/upcoming-elections/general-election-november-8-2016/county-early-voting/> (last visited Oct. 31, 2016) (listing early voting location in
 26 every county in the state); Alameda Registrar of Voters, Save Time . . . Vote Early!, *available at* <http://www.acgov.org/rov/earlyvoting.htm> (last visited Oct. 31, 2016) (early voting began on Oct.
 27 10, 2016 in Alameda County); San Francisco Department of Elections, Voting in the November
 28 8, 2016 Election – Where can I vote?, *available at* <http://sfgov.org/elections/voting-november-8-2016-election> (last visited Oct. 31, 2016) (early voting began Oct. 11, 2016 in San Francisco);
 Los Angeles County Registrar-Recorder, Early Voting, *available at* <https://www.lavote.net/home/voting-elections/voting-options/early-voting> (last visited Oct. 31,
 2016) (early voting began 29 days before election).

1 Dated: October 31, 2016

Respectfully submitted,

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