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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. _____

Memorandum of points and authorities in support of temporary restraining order and preliminary injunction

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I. Introduction

Plaintiffs seek a TRO to prohibit the state from enforcing two California statutes that prohibit voters from displaying photographs of their marked ballots to show their support for particular candidates or issues. These photographs, which are usually posted to social media, have come to be known as "ballot selfies," even though they usually depict only the ballot, not the voter.[1]

Nearly every court that has examined similar prohibitions – the First Circuit and three district courts – has held that they violate the First Amendment. *See Rideout v. Gardner*, No. – F.3d., 2016 WL 5403593 (1st Cir. Sept. 28, 2016) ("*Rideout II"*) (affirming *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015)) ("*Rideout I*") (issuing declaratory and injunctive relief); *Crookston v. Johnson*, No. 1:16-cv-1109 (W.D. Mich. Oct. 20, 2016) (issuing preliminary injunction) ("*Crookston I*"), *order stayed* 2016 WL 6311623 (6th Cir. Oct. 28, 2016); *Indiana Civil Liberties Union Found. v. Indiana Sec'y of State*, No. 115-cv-01356, 2015 WL 12030168 (S.D. Ind. Oct. 19, 2015) (same). The only exception is a very recent Sixth Circuit divided opinion staying the *Crookston* order. *See Crookston v. Johnson*, -- F.3d. --, 2016 WL 6311623 (6th Cir. Oct. 28, 2016) ("*Crookston II*"). But as Plaintiffs explain below, the reasons cited by the majority in that decision do not apply here, because the California Legislature has disclaimed any governmental interest in the challenged statutes, the statutes themselves are quite different, and Plaintiffs have been diligently attempting to resolve this issue without litigation. Plaintiffs have filed copies of these decisions concurrently with this Memorandum in an Appendix of Opinions from Similar Cases.

As these courts have explained, voters who disseminate photographs of their completed ballots are engaging in core political speech, which is entitled to the highest level of First Amendment protection. And whether the laws prohibiting this expression are evaluated as content-based or content-neutral restrictions on free speech, they violate the First Amendment because they are not narrowly tailored to serve the government's interests in preventing vote buying or voter intimidation. It is hard to imagine that even a small percentage of the thousands people posting ballot selfies are engaged in illegal vote buying. Moreover, the existence of other statutes that directly forbid these activities undercuts any need for these overbroad restriction.

[1] *See, e.g.*, John Meyers, *Sorry, Californians, you still can't take ballot selfies on Nov. 8* (L.A. Times Oct. 13, 2016), attached to the Risher Declaration as Exhibit 4 pp. 1-2.

In recognition of these considerations, the California legislature recently repealed the laws at issue in this case, effective January 1, 2017. *See* 2016 Cal. Legis. Serv. Ch. 813 (A.B. 1494).[2] But California law requires state and local officials to enforce statutes that are in effect, even if they believe those statutes are unconstitutional, until and unless a court orders them not to. *See Lockyer v. City & Cty. of San Francisco*, 33 Cal. 4th 1055, 1087-1112 (2004). Consistent with this principle, the California Secretary of State issued a memorandum to local elections officials in October, indicating that that they should continue to enforce the prohibition on ballot selfies during this November's election, notwithstanding the repeal. Risher Dec., Ex. 1. A court order is therefore necessary to protect Plaintiffs' members' First Amendment rights. And because Plaintiffs are likely to prevail on the merits and meet the other requirements for interim relief, the Court should grant a TRO and preliminary injunction.

II. Facts and Background

A. Plaintiffs' members want to share photographs of their completed ballots on social media to show their support for their candidates and issues.

Plaintiffs are the three California Affiliates of the American Civil Liberties Union. Together, they have more than 65,000 members who live throughout the state. *See* Risher Dec. ¶ 2.

Some of these members want to take photographs of their marked ballots so that they can display them on social media. For example, Allen Asch is a member of the ACLU of Northern California and the chair of its Sacramento Area chapter. Declaration of Allen Asch ¶ 2. Asch is a registered California voter who regularly uses Instagram, Facebook, and Twitter to post information and his opinions about political issues, including ballot initiatives. He has over 120,000 subscribers to his YouTube channel, over 10,000 followers on Facebook, and over 2,700 followers on Twitter. *Id.* ¶¶ 3-5.

Asch has been covering the 2016 presidential election for months by compiling and commenting on media coverage of it; he has posted ACLU's ballot initiative guide to his personal Facebook page and will post other political materials. *Id.* ¶ 6.

Asch, who is a lawyer and a member of the California Bar, understands that the California Elections Code bars voters from showing their marked ballots. *Id.* ¶¶ 2, 7. In past Election Day

[2] Exhibit 3 to the Declaration of Michael T. Risher.

posts, he has avoided including his marked ballot in photos because of this provision. *Id.* But he would like to share a photo that shows how he voted on state-wide initiatives this year because he believes a photo makes a stronger statement than simply posting his opinions. *Id.* It would be particularly important for him to present photographic proof of his vote in the presidential election because of the controversy among Bernie Sanders supporters about whether they should vote for Hillary Clinton. Asch has encouraged his followers to vote for Secretary Clinton despite the ambivalence of some, and he thinks it is important that he use a photo to show them that he actually voted for her. *Id.* ¶ 8. However, unless a court order allows him to do so, we will again refrain from posting photographs of his marked ballot, so as not to violate the law. *Id.* ¶ 7.

Plaintiffs have submitted declarations from six of their other members from around the state who also want to post photos of their marked ballots on social media but will only do so if this court issues an order allowing them to do so. *See* Declarations of Jacquelyn Kennedy, Natalie Wormeli, Vanessa Hurtado, Jennifer Rojas, Gerrlyn Gacao, and Amanda Le. [3] Another member wanted to post her ballot but mailed it in without doing so because she did not want to break the law. *See* Declaration of Kelli McCarthy.

B. Defendant is the appropriate defendant because he has the duty to enforce the challenged statutes.

Defendant Secretary of State is the state's "chief elections officer" with the duty to "administer the provisions of the Elections Code" and ensure that "state election laws are enforced." Gov't Code § 12172.5. He is therefore the appropriate defendant to obtain statewide relief from the enforcement of an unconstitutional provision of the Elections Code or policy. *See Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001); *see also Doe v. Harris*, No. C12-5713 TEH, 2013 WL 144048, at *11–12 (N.D. Cal. Jan. 11, 2013), aff'd, 772 F.3d 563 (9th Cir. 2014) (preliminary injunction against Attorney General binding on local officials).

[3] Plaintiffs have standing because these members have standing and because the organizations themselves have expended resources responding to questions about whether ballot selfies are legal in California. *See White Tanks Concerned Citizens, Inc. v. Strock,* 563 F.3d 1033, 1038-39 & n. 10 (9th Cir. 2009) (harm to single member of organization confers standing); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943-944 (9th Cir. 2011).

C. The statutes in question prohibit California voters from sharing photographs of their completed ballots.

Two provisions of the California Elections Code currently prohibit voters from showing their marked ballots to other persons:

> After his or her ballot is marked, a voter shall not show it to any person in such a way as to reveal its contents.[4]

> After the ballot is marked, a voter shall not show it to any person in such a way as to reveal its contents.[5]

As the legislative analysis of the bill that repeals these provisions explains, they, like the laws invalidated in other recent cases, were intended to ensure ballot secrecy, to prevent voter intimidation, and to "protect[] against vote buying schemes by prohibiting a voter from providing proof of his or her vote selections."[6] This analysis also notes that similar laws have recently been held unconstitutional and that the repeal bill is meant to "protect the First Amendment rights of voters to engage in political speech by voluntarily sharing how they voted."[7]

In light of the statute's purposes, the text of the statute, and the Secretary's position, it seems clear that "showing" a marked ballot to another includes showing a photograph of the ballot to people on social media or otherwise. And nothing in the statutory scheme excludes photos of absentee ballots from this prohibition. This means that people who photograph their absentee ballot in their own home to post on social media are violating the law. This is particularly significant in California, where most voters cast absentee ballots (58.92% of them in the 2016 primary, according to the Secretary). *See* Risher Dec. ¶ 9.

Unlike some other states, California does not have any statute or regulation prohibiting people from taking photographs at polling places (unless they are doing so to intimidate another voter, as discussed below). In fact, elections officials in at least one California county has actively encouraged voters to take photographs of their unmarked ballots at their polling stations, posting on its website that its Registrar of Voters is "hoping to generate excitement about voting in San Bernardino County by allowing voters to take a ballot selfie and sharing it on social media sites."[8]

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[4] Elec. Code § 14276.
[5] Elec. Code § 14291.
[6] Aug. 18, 2016, Assembly Floor analysis of AB 1494, attached as Exhibit 2 to the Risher declaration.
[7] *See id.* at 3-4.
[8] County of San Bernardino, *Vote early, take a ballot selfie in the 2016 Presidential Primary Election*

Moreover, California does not prohibit voters from photographing their absentee ballots. Thus, the question in this case is whether Californians can disseminate photographs that they have lawfully taken.

D. Other California statutes directly prohibit vote buying and voter intimidation and protect voter privacy.

California also has statutes that directly prohibit vote buying and voter intimidation. Vote buying is a felony. *See* Elect. Code §§ 18520, 18522. So is asking another person to show you his ballot. Elec. Code § 18403. Voter intimidation, including taking a photograph of a voter with the intent to intimidate, is also a crime. *See id.* §§ 18540, 18541. Plaintiffs do not challenge any of these other statues.

Finally, California voters have a right to vote in secret. *See Peterson v. City of San Diego*, 34 Cal. 3d 225, 226 (1983). But this does not purport to prohibit them from voluntarily disclosing their vote; the California Supreme Court has expressly rejected the argument that this protection means that voters must keep their votes secret. *See id.* at 227, 230 (rejecting argument that provision "should be interpreted to require not only that the voter's right to secrecy be protected by election procedures but also that the voters be required to cast their votes in secret"; purpose of provision is "protecting the voter's right to act in secret" if voter so desires).

E. The Secretary's October 12 guidance to local elections officials shows that the provisions will be enforced.

On October 12, the Secretary distributed a Memorandum to local elections officials informing them that "[a]lthough 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, [the Secretary's] guidance will remain unchanged until January 1, 2017, when the new law goes into effect." Risher Dec. Ex. 1 at 1. It then quotes one of the statutes that bans showing a marked ballot, without any indication that elections officials should not enforce it. *Id*. at 2 ("California Elections Code section 14291 states: After the ballot is marked, a voter shall not show it to any person in such a way as to

(May 16, 2016), Risher Dec. Ex. 5. The Secretary of State's October 12 memo reaffirms prior guidance that "the use of cameras or video equipment at polling places is prohibited," but also provides several exceptions to this general rule. *See* Risher Dec. Ex. 1. However, in the absence of a statute or formal regulation prohibiting photography of ballots or at the polls, the Secretary has no authority to prohibit these activities. *See California Grocers Ass'n v. Dep't of Alcoholic Beverage Control*, 219 Cal. App. 4th 1065, 1068, 1074-75 (2013).

reveal its contents."). The memorandum also describes circumstances in which poll workers could permit the use of cameras at the polls, but without mentioning the use of them to take photos of completed ballots. The memorandum thus makes clear that the selfie ban is still in effect. In fact, the day after the memorandum issued, the Los Angeles Times ran an article about it on its website under the headline "Sorry, Californians, you still can't take ballot selfies on Nov. 8."[9] The statutory text, the Secretary's memorandum, and the press coverage of it, would inform any reasonable California voter that ballot selfies are illegal.

III. Legal standard for a TRO and Preliminary Injunction

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

The law "clearly favors granting preliminary injunctions to a plaintiff… who is likely to succeed on the merits of his First Amendment claim." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

Because "the government bears the burden of justifying its speech-restrictive law," once a plaintiff requesting a preliminary injunction shows that a statute restricts First Amendment rights, "the burden shifts to the government to justify the restriction." *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (citations omitted).

[9] John Meyers, *Sorry, Californians, you still can't take ballot selfies on Nov. 8* (L.A. Times Oct. 13, 2016), attached to the Risher Declaration as Exhibit 4 pp. 1-2.

IV. Argument

A. Plaintiffs are likely to succeed on the merits.

1. The challenged statutes are direct restrictions on speech.

Photographs are a form of expression that is fully protected by First Amendment. *See White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (collecting cases). And speech about elections, candidates, and initiatives constitutes "core political speech," "where protection of robust discussion is at its zenith" and any restrictions are subject to "exacting scrutiny." *Meyer v. Grant*, 486 U.S. 414, 420-22, 425 (1988) (citations omitted); *see Rideout v. Gardner*, No. 15-2021, 2016 WL 5403593, at *7 (1st Cir. Sept. 28, 2016) (Ballot photograph "restriction affects voters who are engaged in core political speech, an area highly protected by the First Amendment.").

A photograph of a marked ballot can be a powerful way of showing support for a candidate or issue, both because it is proof positive that the voter truly voted the way she claims and also because images can have such a strong impact. *See* Asch Dec. at ¶¶7-8, Kennedy Dec. ¶7 (ACLU member wants to photograph and share historic ballot for candidate who may be the first female president of the United States because photography is an essential means of documenting meaningful events). As the Executive Director of Mi Familia Vota explains, his organization would like to encourage Latino voters to post photographs of their completed ballots on social media in order to encourage civic engagement, but it has not done so because of the ban. *See* Declaration of Benjamin Monterroso ¶¶ 6-9. Here, as is often the case, "a picture is worth a thousand words." *Rideout v. Gardner*, No. 15-2021, 2016 WL 5403593, at *8 (1st Cir. Sept. 28, 2016).

Equally importantly, the First Amendment presumes that "speakers, not the government, know best both what they want to say and how to say it. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 791 (U.S. 1988). If voters want to express themselves through photographs they should be able to do so.

Voters therefore have a strong First Amendment interest in using photographs of their marked ballots to show their support for candidates and issues.

The challenged statutes infringe this interest. Because First Amendment rights are fragile, "the amount of burden on speech needed to trigger First Amendment scrutiny as a threshold matter is minimal." *American Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 607 (4th

Cir. 2001); *see Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) ("First Amendment interests are fragile…"); *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."). California law requires state and local officials to enforce statutes unless a court directs them to do otherwise, which means that the Court should presume that they will do so. *See Lockyer v. City & Cty. of San Francisco*, 33 Cal. 4th 1055, 1087-1112 (2004). We do not want voters to ignore the directions of elections officials at voting places. And we rely upon individuals to obey the law – especially voting laws – even when they may be able to violate it without being caught and punished. People with professional credentials may have a duty to do so. *See* Ca. Business and Professions Code § 6068(a) ("It is the duty of an attorney to … support the Constitution and laws of the United States and this state."). And the existing laws have in fact chilled speech by ACLU members who would have posted ballot selfies but for the law, in this and previous elections. *See* Asch Dec. ¶7; Kennedy Dec. ¶ 6; McCarthy Dec. ¶¶ 5-7. The challenged statutes are therefore subject to First Amendment scrutiny.

2. The challenged statutes are content-based restrictions on speech and therefore subject to strict scrutiny.

"[C]ontent-based restrictions on speech … can stand only if they survive strict scrutiny." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. This is true regardless of the government's motives for passing the law, and regardless of whether the law discriminates based on viewpoint. *Id*. at 2228-2231; *see generally id*. (sign ordinance that distinguishes between signs based on what they said is content-based restriction on speech subject to strict scrutiny).

Here, plaintiffs have the right to post photographs of essentially anything on their social media accounts, except photographs of their marked ballots. This, like the sign ordinance in *Reed*, is a "paradigmatic example of content-based discrimination." *Id*. at 2230. The district courts that have addressed similar laws have recognized this. *See Indiana Civil Liberties Union Found. v. Indiana Sec'y of State*, No. 115CV01356SEBDML, 2015 WL 12030168, at *2-*4 (S.D. Ind. Oct. 19, 2015); *Rideout v. Gardner*, 123 F. Supp. 3d 218, 229 (D.N.H. 2015); *cf. Crookston I*, No. 1:16-cv-1109, at

7 (analyzing law as content-based restriction). Strict scrutiny therefore applies.

3. The challenged statutes fail strict scrutiny because they are not narrowly tailored and necessary to serve a compelling government interest.

"Because the [statutory scheme] imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (citation omitted). "The State must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Id*. (citations omitted). It is "rare" that the government can meet this burden. *Id*.

Although the government's interests in preventing vote buying and intimidation may have been compelling at one time, the state legislature has recently repealed the challenged statutes because they are neither necessary nor narrowly tailored for accomplishing these goals.[10] Moreover, California has a number of statutes that directly address these ills; there is no indication that the prohibition on ballot selfies is a necessary addition to this statutory scheme. *See Rideout II,* 2016 WL 5403593 at *7. And in any event, the law is not narrowly tailored, because it is clear that many – probably the vast majority – of people who want to share photos of their marked ballots do so in order to express their political views, not as part of a vote-buying scheme. Indeed, it would be shocking if more than a tiny percentage of the many thousands of people who have posted ballot selfies on social media are engaged in vote buying or voter intimidation.[11]

Thus, these laws cannot survive strict scrutiny. *See Indiana Civil Liberties Union Found.,* 2015 WL 12030168 at 7; *Rideout I,* 123 F. Supp. 3d at 235.

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[10] Note that the Ninth Circuit has held that communications used to facilitate vote *trading*, rather than vote buying, are constitutionally protected. *See Porter v. Bowen*, 496 F.3d 1009, 1025–26 (9th Cir. 2007). The Secretary therefore has no legitimate interest in preventing this conduct.

[11] Although there are no firm figures as to how many people have posted ballot selfies, a search for the phrase on Google generates 277,000 hits, which certainly suggests significant public interest. In an amicus brief it filed in the *Rideout* case, Snapchat reported that it alone had already "received thousands of user [photos] from inside voting booths in primaries around the country." *See* Brief Amicus Curiae of Snapchat, Inc. in Support of Appellees and Affirmance in *Rideout v. Gardner*, First Cir. No. 15-2021 (April 22, 2016), available at http://electionlawblog.org/wp-content/uploads/Snapchat-Ballot-Selfie-Amicus-With-ECF-Stamp.pdf . That is just one social media platform and was at the middle of the primaries, long before the election became as controversial as it now is.

4. The challenged statutes fail even the intermediate scrutiny that applies to content-neutral laws.

Even if the laws were considered to be content-neutral, they would still have to pass intermediate scrutiny. *Doe v. Harris*, 772 F.3d 563, 574–75 (9th Cir. 2014). "Content-neutral restrictions on protected speech survive intermediate scrutiny so long as they are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information." *Id.* at 576–77 (citations omitted). The "test is whether "the means chosen burdens substantially more speech than is necessary to further the government's legitimate interests." *Id*. The government must also "demonstrate that the recited harms are real ... and that the regulation will in fact alleviate these harms in a direct and material way." *Id*. As with strict scrutiny, the government bears the burden to show that the law satisfies these requirements. *See id.* at 570.

As discussed above, the challenged statutes are not narrowly tailored; because the vast majority of people who post ballot selfies doubtless do so for entirely legitimate purposes, it is almost impossible to imagine that the government could show that the laws do not burden substantially more speech than necessary. Moreover, there is no indication that forbidding ballot selfies alleviates real harms in a material way; in fact, the legislative history of the repeal measure reports that the Secretary does not know of any instances in which anybody was prosecuted for violating the challenged statutes.[12] They therefore fail intermediate scrutiny for the same reason they fail strict scrutiny. *See Rideout II*, 2016 WL 5403593 at *5 & n.4 (because law fails intermediate scrutiny, no need to decide whether strict scrutiny applies); *Crookston I*, No. 1:16-cv-1109, at 8-9; *Indiana Civil Liberties Union Found.*, 2015 WL 12030168 at 7.

B. Plaintiffs face imminent and irreparable harm.

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

Californians who want to display their marked ballots in an effort to convince other voters to support their candidate or issue will not be able to do so after the November 8 presidential election;

[12] *See* Aug. 18, 2016, Assembly Floor analysis of AB 1494, note 6 above, at 2.

without a TRO, their "free speech rights will be lost forever." *Id*.

C. An injunction against enforcement serves the public interest and the balance of equities tips in plaintiffs' favor.

"[B]y establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). In addition, ballot selfies serve a distinct public interest—that of encouraging excitement about and participation in our democracy. *See* Monterroso Dec. ¶¶ 2-12 (describing use of ballot selfies in campaign to get out the vote in diverse communities). The fact that the Legislature has already voted to repeal the statutes in question shows that the State does not have a strong interest in enforcing them (notably, any enforcement action would abate on January 1 when the repeal takes effect. *See Governing Bd. v. Mann*, 18 Cal. 3d 819, 829-830 (1977)).

D. Plaintiffs' lawsuit and application are timely.

As discussed in the *Ex Parte* Application, the Sixth Circuit recently stayed the preliminary injunction issued in the *Crookston* case on the grounds that the plaintiff had waited too long to file suit, without justification; the court did "not resolv[e] the merits" but held that the state should have an opportunity to present a full defense of the photograph ban at issue. *See Crookston II*, 2016 WL 6311623 at *1-*4; *contra id.* at *5-*7 (Cole, C.J., dissenting). Even if the stay were proper in that case, it is not here. First, the state has no interest in enforcing the challenged statutes. It has already repealed them. Procedurally, unlike the plaintiffs in *Crookston*, Plaintiffs have a justification for the timing of this challenge. Finally, the case is distinguishable because California law, unlike the Michigan law at issue in *Crookston*, allows photography at the polls but forbids dissemination of marked ballots, whether taken at the polls or in an absentee voter's own home.

Plaintiffs did not anticipate seeking an injunction against the challenged statutes for a good reason: they did not expect the state to be enforcing laws it had repealed. The Secretary's October 12 Memorandum and the media coverage changed this by indicating to poll workers and to voters that ballot selfies, whether taken at the polls or of an absentee ballot, are forbidden. *See* John Meyers, *Sorry, Californians, you still can't take ballot selfies on Nov. 8* (L.A. Times Oct. 13,

2016).[13] Plaintiffs immediately responded to this development by having their Voting Rights Director and other attorneys try to resolve the issue with the Secretary's office, beginning on October 14, in an attempt to avoid litigation; it was only on October 28 after numerous meetings and a request by the government for additional time to find a solution to the problem that it became clear that this lawsuit would be necessary. *See* Shellenberger Dec. at 1-2, ¶¶ 1-8. Plaintiffs sued the next business day. The court should not impose a rule that requires plaintiffs to file suit while they are still trying to resolve an issue without litigation. And it would be inappropriate for a defendant who has engaged in these negotiations – and who requested more time to try to resolve the issue without litigation – to argue otherwise.

Second, the law at issue in *Crookston* is quite different from California's because it bans all types of photography at the polls. *See Crookston II*, 2016 WL 6311623 at *3. This may change the constitutional analysis, because a complete ban on photography at polls may be a content-neutral law designed to protect voter privacy. In any event, the nature of that law meant that the Sixth Circuit majority was concerned about the disruption that could occur at polling places if the law were changed close to the election. *See id*; *id*. at *4 (Guy, J., concurring). It was also concerned that taking photographs at polling stations would lead to delays at the polls. *See id.*

In contrast, as discussed above, California law does not prohibit photography at the polls and does not bar voters from taking photos of their marked ballots; it simply prohibits them from sharing these photographs (or photographs that they took of their absentee ballots in the privacy of their own homes).

The Sixth Circuit's opinion is therefore inapposite: California law allows people to take photographs in polling places, but simply forbids them from sharing them. In addition, California law differs from the law at issue in *Crookston* because it prohibits voters from displaying photographs of their marked ballots that they take in the privacy of their homes; enjoining this aspect of the law will have no effect on what happens as the polls. The TRO that Plaintiffs request does not raise the issues that motivated the *Crookston* majority to stay the order in that case.

[13] Exhibit 4 to the Risher declaration.

E. Because the statutes fail First Amendment scrutiny, they are invalid.

A law that lacks narrowly tailoring is facially unconstitutional. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 (9th Cir. 2011). Similarly, a statute is facially unconstitutional if it is substantially overbroad, meaning that it "prohibit[s] or chill[s] "a substantial amount of protected speech." *Ashcroft v. Free Speech Coal., 535 U.S. 234, 237 (2002).* The standards for determining whether a law is overbroad are substantially the same used to determine whether a law is narrowly tailored under intermediate scrutiny; therefore, a law that fails that test will also be overbroad. *See Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 482-83 (1989).

The challenged statutes are overbroad for the same reasons discussed above that they are not narrowly tailored: they prohibit a substantial amount of speech that is constitutionally protected. They are therefore facially invalid. They are therefore facially invalid under both doctrines. *See Rideout v. Gardner*, No. 15-2021, 2016 WL 5403593, at *5 (1st Cir. Sept. 28, 2016) (holding statute facially unconstitutional). In any event, even if the statutes were not facially invalid, they would be invalid as applied to people who wish to display photographs of their marked ballots. Either way, Plaintiffs are likely to succeed in their constitutional challenge.

F. The Court should issue an injunction prohibiting the Secretary from enforcing the challenged statutes.

Because Plaintiffs have tens of thousands of members who live throughout the state,[14] the Court should issue an order completely prohibiting the Secretary from enforcing the challenged statutes because that broad relief is necessary to protect the ACLU's members' rights. The Ninth Circuit held in a similar case with an organization plaintiff that it was proper to completely enjoin the CHP from enforcing an unconstitutional policy regarding motorcycle helmets because it would be "unlikely" that the police would ask people whether they were a member of the plaintiff organization before ticketing them. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501–02 (9th Cir. 1996). Here, too, it would be neither likely nor proper for officials enforcing the statute to ask individuals whether they are members of the ACLU.

[14] *See* Risher Dec. ¶ 2.

V. Conclusion

Because voters have a First Amendment right to take and display photographs of their marked ballots, the Court should immediately issue interim injunctive relief prohibiting enforcement of the statutes here at issue, Elections Code §§ 14276 and § 14291, or otherwise prohibiting California voters from taking and displaying photographs of their marked ballots.

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Respectfully submitted,

By: */s/Michael T. Risher*

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