UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOEL CROOKSTON, Plaintiff, v. RUTH JOHNSON, Secretary of State of Michigan, in her official capacity, Defendant.	Civil Case No. 16-cv-1109 Hon. Janet T. Neff United States District Judge

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PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL

In the same way the Defendant has failed throughout the course of this case to recognize the importance of protecting new platforms for free speech under the First Amendment, she now expects this Court to ignore her ability to utilize such technology. Indeed, if this was 1891, not only might the laws challenged in this case be properly tailored given the technology of the time, but the Defendant's laches argument may have had merit as well. To inform poll workers from Monroe to Escanaba of procedural changes within 15 days before an election would have been, in the latter 19th Century, a nearly impossible task. However, it is 2016, when even the slower forms of transportation allow one to travel from one corner of Michigan to another in half a day. But transportation is unnecessary: through phones, e-mail, videoconferencing, and any number of other communications technologies, the Defendant may quickly update Michigan's decentralized elections workers to respect this Court's preliminary injunction.

Given the wording of the injunction, the Defendant may elect to provide poll workers a new instruction to voters, which could be as follows: "You may, if you would like, photograph your own marked ballot within the voting station before placing it in the secrecy sleeve. However, you may not display your marked ballot in a way that would reveal it to someone else here in the polling place or otherwise take pictures." This could be an oral instruction or in the form of a written sign. Voters, like poll workers, are usually capable of understanding distinctions such as this, and this example is no more or less difficult to comprehend than instructions for how to mark a ballot. *See, e.g.*, *Michigan Optical Scan Voting System*, YOUTUBE, June 18, 2013, https://youtu.be/aizel-SzoBw?list=PLJHaXzzP47l_Ijy0GomiScH6pyu2FSub2. If a voter is troubled or confounded by this freedom, both the voter and the poll worker will be required to have patience. This does not spell chaos that, once again, the Defendant describes with embellished flair. In the most orderly elections, poll workers face unexpected and very real problems, but they are capable of handling them like adults. The automated, efficient elections process *sans* ballot selfies that the Defendant presents to this Court is, frankly, unhuman, as is the argument that such a minor adjustment to polling place practices cannot be made in the next two weeks.

Moreover, the injunction in question places little affirmative duty on the Defendant. Although media coverage of this case will likely lead to inquiries from voters about ballot selfies on election day, which the Defendant would be wise to inform poll workers of how to answer,[1] the injunction in this case is, quite simply, to allow Michigan voters like Crookston to do what

[1] It is almost certain that Michigan poll workers will have to be prepared to field questions about ballot selfies due to ongoing press coverage of this case. *See, e.g.*, Jonathan Oosting, *Federal court suspends Michigan's 'ballot selfie' ban*, DETROIT NEWS, Oct. 24, 2016, http://www.detroitnews.com/story/news/politics/2016/10/24/federal-court-suspends-michigans-ballot-selfie-ban/92695282/.

they were already doing. That is, to take ballot selfies, but without the threat of losing their vote, fines or jail time. Ballot selfies were already a reality in Michigan before this case, and they will be no less so whether or not the injunction is stayed. *See* Compl. ¶1; Dkt. 13 at 8–9. As previously discussed, there are few written rules to modify here, other than a single publication Crookston was unaware of until two months ago and which, in pertinent part, the Defendant has repeatedly disavowed. *See* Dkt. 17 at 2–3; Dkt. 21 at 10.

There are still issues to resolve in this case. Plaintiff would like to join credentialed media in the freedom to more broadly photograph within the polling place, but is primarily concerned with ballot selfies. To have altered the Secretary's Rules at issue in this case outside of photographing one's own marked ballot and displaying it outside of a polling place *might* have posed a plausible burden on the Defendant due to the timing of the injunction. But this Court's injunction does not do that. This is a minor adjustment to accommodate the First Amendment, nothing more.

With a disregard for free speech bordering on callousness, the Defendant is left to patronize Crookston with suggestions that he should, rather than unequivocally show the world how he voted, don an "I Voted" sticker on November 8 and, if he must, take a selfie outside of his polling place. Dkt. 21 at 10. "Enough is enough." *Fed. Elec. Com'n v. Wisconsin Right to Life*, 551 U.S. 449, 478 (2007).

Respectfully submitted,

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Dated this 25th day of October, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2016, the foregoing Response in Opposition to Defendant's Emergency Motion for Stay Pending Appeal was electronically filed with the Clerk of the Court using the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Stephen Klein