No. 16-2490

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOEL CROOKSTON,

Plaintiff-Appellee,

v.

RUTH JOHNSON, Michigan Secretary of State, in her official capacity

Defendant-Appellant.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Janet T. Neff

PLAINTIFF-APPELLEE'S EMERGENCY PETITION FOR PANEL REHEARING WITH A SUGGESTION FOR REHEARING *EN BANC*

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INTRODUCTION

In the 2012 general election, Joel Crookston unknowingly broke one of Michigan's ballot exposure laws, which prohibits "an elector [from] show[ing] his or her ballot or any part of the ballot to any person . . . after the ballot has been marked[.]" *See* MICH. COMP. LAWS § 168.738(2). He did this not by exposing his ballot in a polling place, but by taking a photograph of it and later posting it to Facebook.

To vindicate his past action and protect this political speech in future elections—including, of particular importance here, next Tuesday's presidential election—Crookston filed a complaint on September 9, 2016, challenging this statute, a substantially similar statute that governs primary elections, and broad photography restrictions maintained by Secretary of State Johnson. MICH. COMP. LAWS § 168.579; *see* "Actionable Election Day Offenses and Duty to Act Under State and Federal Statutes," Oct. 2014, at 2, *available at* http://www.michigan.gov/documents/sos/Actionable_Election_Day_offenses_472371_7.pdf.

On October 24, 2016, the district court entered a preliminary injunction that enjoined the Secretary only from enforcing the challenged laws and regulations "against the photographing of one's own ballot and display of such photographs outside of polling places, pending resolution of this case . . . ." Injunction, R. 19,

Page ID # 284. Despite the narrowly-crafted injunction protecting Crookston's right to take a "ballot selfie," Judges Sutton and Guy stayed the injunction at 5:45 p.m. last Friday, October 28, 2016, ruling that Crookston's free speech rights will have to wait for another election. Chief Judge Cole dissented, observing that Michigan's statutory regime not only punishes free expression but does so by depriving the speaker of an equally foundational constitutional right: the right to vote.

Pursuant to Fed. R. App. P. 35 and 40, Crookston brings this emergency petition for rehearing of the panel's decision with a suggestion for rehearing *en banc*. *See* Order, 6th Cir. R. 14-2 (included as **Attachment A**). This proceeding presents a question of exceptional First Amendment importance, and the panel's decision conflicts with the authoritative decision of the United States Court of Appeals for the First Circuit and related precedents from the United States Supreme Court. Fed. R. App. P. 35(b)(1); *Rideout v. Gardner*, No. 15-2021, 2016 WL 5403593 (1st Cir. Sept. 28, 2016). Moreover, the majority decision conflicts with well-established laches principles and First Amendment case law.

If the panel will not reconsider its stay, consideration by the full Court is necessary to address the exceptional issue presented herein and secure and maintain uniformity of the Court's decisions. Fed. R. App. P. 35(b)(1). Crookston requests that this Court consider his petition on an emergency basis because, if the

panel's stay is not vacated, the state's unconstitutional restrictions on speech will cause irreparable harm to the voters of Michigan in the upcoming general election on November 8, 2016, which is now just eight days away.

ARGUMENT

I. This proceeding presents a question of exceptional importance, and the panel's decision conflicts with authoritative decision of the United States Court of Appeals for the First Circuit as well as the United States Supreme Court.

The panel's order in this case suffers from at least two significant flaws: it both (1) understates the constitutional infirmities of the statutes and regulations in question, and (2) overstates the disruption that the district court's injunction would cause to the upcoming election.

A. The challenged regulations are clearly unconstitutional because they burden the right to express oneself outside the ballot box (not merely inside the polling place) and they punish the exercise of free speech by depriving the speaker of the right to vote.

Even under intermediate scrutiny, which is afforded to content-neutral laws that affect free speech, broad ballot photography bans like those challenged in this case cannot survive. This is the conclusion recently reached by the First Circuit Court of Appeals in *Rideout v. Gardner*. 2016 WL 5403593. There, applying intermediate scrutiny, the court found unconstitutional a New Hampshire law, which stated in pertinent part that "'[no] voter shall allow his or her ballot to be

seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has voted[.]'" *Id.* at *1, *citing* N.H. REV. STAT. § 659:35, I. As applied to ballot photography and displaying such photographs outside of a polling place, the court found "a substantial mismatch between New Hampshire's objectives and the ballot-selfie prohibition[.]" *Id.* at *5, *citing McCutcheon v. Fed. Elec. Com'n*, 134 S.Ct. 1434, 1446 (2014). Banning speech that occurred outside of a polling place—including, for example, posting a photograph on Facebook—was a far too overbroad method of preventing voting fraud, such that the ballot-selfie prohibition did not exhibit the "close fit between ends and means" that is required to prevent the government "from too readily 'sacrific[ing] speech for efficiency.'"" *Id.* at *6, *citing McCullen v. Coakley*, 134 S.Ct. 2518, 2534 (2014).

The First Circuit's reasoning is persuasive, and its straightforward application of recent precedent from the United States Supreme Court is readily applicable to the Michigan laws and rules at issue in this case. The court below, in a reasoned preliminary injunction opinion, properly paralleled this reasoning.

The panel majority, however, underplayed the constitutional infirmities of the challenged regulations, suggesting that *Burson v. Freeman*, 504 U.S. 191 (1982), gives the state free rein to regulate expression in the polling place. But *Burson*—itself an anomaly in First Amendment jurisprudence—involved a buffer zone regulation that placed restrictions on expression only within a specific

physical space around a polling place: a 100-foot radius. Here, by contrast, the challenged regulations purport to punish an individual's posting of a photograph anywhere in the world, including the internet, with no physical or even temporal proximity to the voting act itself. The regulations in this case are vastly more burdensome on free speech than were those involved in *Burson*.

Moreover, as Chief Judge Cole observes, the punishment for engaging in protected speech (i.e., for posting a photograph of one's ballot on Facebook) is draconian: the loss of the right to vote in the relevant election at all.

Particularly in the context of this impassioned election, individual voters are likely to have significant desire to document themselves as having voted either for or against one of the candidates. Michigan's current regulatory scheme substantially chills a voter's First Amendment right to document his or her vote by threatening to disenfranchise the voter who does so. The scheme is patently unconstitutional.

B. There is no support for the Secretary's argument that enjoining their ability to punish free speech would lead to electoral "chaos."

The panel majority also accepted the Secretary's outlandish claims about electoral anarchy and the difficulties of updating election workers on the contours of the preliminary injunction. As Chief Judge Cole observed, this is not a case where new ballots would need to be printed or where a substantial overhaul of the

electoral scheme would be necessary. Instead, the only disruption would be minimal at worst, requiring communication to local precincts that the prohibition on ballot selfies was no longer applicable. The Secretary of State's arguments that the electoral process would be thrown into utter disarray by the district court's injunction fly in the face of common sense and modern technological realities.

II. The panel's decision to stay the district court's preliminary injunction conflicts with laches and First Amendment precedents.

The majority's reasoning also misapplies long-established principles of laches. In the context of elections, the doctrine of laches protects government from unreasonable relief by requiring citizens to press concerns in a timely manner that will not unduly upset "the state's interest in proceeding with the election[,]" which "increases in importance as resources are committed and irrevocable decisions are made[.]" *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980). This is a serious concern in cases involving ballot access and other administrative efforts that cannot be realistically altered within certain timeframes due to time and expense.

Such concerns are not implicated by this case, even in the context of the November 8 election next week. Rather than ordering an expensive or time-intensive administrative action, the injunction from the court below merely requires the Secretary to, at most, inform election workers that they cannot deprive voters of their vote for "photographing . . . one's own ballot and display of such photographs outside of polling places[.]" Injunction, R. 19, Page ID # 284; *see*

Order (Dissent), 6th Cir. R. 14-2, at 12. That simple prohibition asks very little of the Secretary.

The panel's October 28 order expands the laches doctrine to such breadth that it conflicts with ample First Amendment precedent. "Crookston's motion and complaint raise interesting First Amendment issues, and he will have an opportunity to litigate them in full—after this election." Order, 6th Cir. R. 14-2, at 1. Crookston and Secretary Johnson fully briefed the free speech implications of this case and the governmental interests at issue, and district court below found Crookston's free speech arguments persuasive enough to provide limited injunctive relief that fully respects the laches doctrine. Now, simply on the basis that Crookston became aware of these unconstitutional restrictions around three months before the election, even expeditious filings throughout the course of this case are of no avail.

"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). Such injury must not be acceptable under laches when the government's committed "resources" constitute any kind of election worker training and "irrevocable decisions" are any element of that training. *Kay*, 621 F.2d at 813. The censorship here may and should be remedied before the election next week.

CONCLUSION

Chief Judge Cole's dissent correctly assessed the merits of the Secretary's motion:

> The Secretary has failed to make a meritorious argument for a stay. A contrary finding, as the majority finds here, results from a weighing of the administrative costs to the state over the constitutional rights of individual Americans. This improper weighing of the motion to stay factors has the real world effect of allowing an unconstitutional law to remain in effect while depriving Michigan citizens of their right to vote.

Order (Dissent), 6th Cir. R. 14-2, at 13. The panel's order is not only a misapplication of precedent for granting a stay, it is a dangerous expansion of the laches doctrine that forecloses expeditious relief for the exercise of free speech. The panel should reconsider its stay and restore the preliminary injunction. If it does not, the full Court should review the panel's order *en banc*, vacate the panel's stay order and restore the preliminary injunction of the court below. In either case, action should be taken before the rapidly-approaching November 8, 2016 election.

Respectfully submitted,

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Dated: October 31, 2016

CERTIFICATE OF SERVICE

I certify that on October 31, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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