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 ORAL ARGUMENT REQUESTED

PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Exercising one's civic duty can be fun. When Joel Crookston answered a post on social media on November 6, 2012 to write-in vote his former college classmate Michael Glud for an office—selecting Michigan State University Trustee—one might think it was just good fun. *See* Compl. ¶1. But it meant much more. By photographing part of his marked ballot and posting it on social media as proof of his write-in, Crookston made a number of serious statements, including that he voted, that he voted "down ballot" all the way to the officers for Michigan's public universities, and that these offices are unserious enough to warrant writing in a friend who was not even seeking such office. Whether interpreted as humorous or serious, this was a fundamental act of free speech, not a threat to ballot integrity. *See Rideout v. Gardner*, 123 F. Supp.3d 218, 226–27 (D. N.H. 2015) (Detailing an investigation by the New Hampshire attorney general of Andrew Langlois, who posted a ballot photograph of his write-in vote for his recently deceased dog, Akira). Nor did Crookston's photograph—now commonly referred to as a "ballot

selfie"—pose any risk of unduly influencing fellow voters. Nevertheless, state law and orders from the Secretary of State threaten Crookston and all Michigan voters with forfeiting their votes, fines and even imprisonment for this simple, effective act of political speech. Moreover, even if Crookston took a simple "selfie"—a photograph of himself—in a polling place or voting station, he could be punished with fines and imprisonment, even though he may be photographed by the institutional press while in a polling place. Rather than wait to be charged for his infraction in 2012 or risk future charges for these activities, Crookston brings this action to require ballot and polling place photography restrictions to answer to the First Amendment, and seeks injunctive relief before the general election on November 8, 2016.

This lawsuit endeavors to respect the integrity of the voting process, including ballot secrecy, while calling upon this Court to recognize that circumstances today—namely, the advancement of technology and the advent of new outlets for political speech through social media on the Internet—require existing law to be more reasonably tailored. *See* Compl. ¶13 (detailing Crookston's numerous social media accounts). "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Fed. Elec. Com'n*, 558 U.S. 310, 340 (2010). Selfies in polling places and ballot selfies are not a problem to be solved: they are an exciting form of political expression and allow voters such as Crookston to tell their friends and the world over not merely that they voted, and not merely whom they claim to have voted for, but for whom they actually voted.

In order to secure a preliminary injunction under FED. R. CIV. P. 65(a), the following elements must be established: "(1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest

will be advanced by issuing the injunction." *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009). "'When a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.'" *Id.* at 265–66 (quoting *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998)). Crookston's First Amendment challenge has a substantial likelihood of success, and he has established each of the elements for this Court to issue a preliminary injunction.

ARGUMENT

I. Crookston Has Demonstrated a Substantial Likelihood that the Laws and Rules in Question Are Unconstitutional Under the First Amendment

Crookston is harmed by four provisions that prohibit photography in polling places and voting stations. Compl. ¶15–16. Only two of these are actual state laws;[1] the remainder are orders within the Secretary of State's "Actionable Election Day Offenses" publication. *See* "Actionable Election Day Offenses and Duty to Act Under State and Federal Statutes," Michigan Secretary of State, Oct. 2014, at 2, *available at* http://www.michigan.gov/documents/sos/Actionable_Election_Day_Offenses_472371_7.pdf (hereinafter "Actionable Election Day Offenses"). As authority to make these rules, the Secretary of State cites MICH. COMP. LAWS § 168.931(1)(h). *Id.* at 2. Assuming the Secretary's authority has been lawfully exercised, willful violation of these rules are misdemeanors, punishable with

[1] This memorandum will discuss potential narrowing constructions to some of the challenged provisions. *See infra* Part (I)(A)(2); (III). Counsel has endeavored to locate every provision in Michigan law that may restrict photography in polling places and has included them in this lawsuit, declining to challenge statutes would only apply through the most egregiously overbroad interpretations. *See, e.g.*, MICH. COMP. LAWS §§ 168.786 (requiring electors to maintain secrecy "from all other persons" "while voting" at a voting machine), 168.738(1) (requiring electors to leave a voting station and deliver a marked ballot without exposing it); MICH. COMP. LAWS CONST. art. 2, § 4 ("The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.").

up to $500 in fines and 90 days of imprisonment. *See* MICH. COMP. LAWS §§ 168.931(2), 168.934. Each of these provisions are unconstitutional facially and as applied to selfies in polling places and ballot selfies under the First Amendment. U.S. CONST. amend. I.

Photography implicates free speech under the First Amendment. *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003). Ballot photography and selfies in polling places implicate a major purpose of the First Amendment—the protection of political speech. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Finally, sharing such photographs on social media, or the Internet, is also First Amendment activity. *Reno v. Am. Civil Liberties Union* (*ACLU*), 521 U.S. 844, 868–70 (1997). The prohibitions challenged here are subject to different precedents and constitutional principles, but are each ultimately overbroad, unconstitutional abridgments of free speech.

A. MICH. COMP. LAWS §§ 168.579 and 168.738(2) Are Unconstitutional Facially and As Applied to Ballot Selfies and Publication

In Michigan primary elections, the following law applies:

> If an elector, after marking his or her ballot, exposes it to any person in a manner likely to reveal the name of any candidate for whom the elector voted, the board of election inspectors shall reject the ballot and the elector shall forfeit the right to vote at the primary. A note of the occurrence shall be made upon the poll list opposite the name of the elector.

MICH. COMP. LAWS § 168.579. The following applies to all Michigan elections:

> If an elector shows his or her ballot or any part of the ballot to any person other than a person lawfully assisting him or her in the preparation of the ballot or a minor child accompanying that elector in the booth or voting compartment . . . after the ballot has been marked, to disclose any part of the face of the ballot, the ballot shall not be deposited in the ballot box, but shall be marked "rejected for exposure", and shall be disposed of as are other rejected ballots. If an elector exposes his or her ballot, a note of the occurrence shall be entered on the poll list opposite his or her name and the elector shall not be allowed to vote at the election.

MICH. COMP. LAWS § 168.738(2). The breadth of these statutes on their face is apparent: they are prohibitions on an elector displaying marked ballots in any way. Given the short period of time an elector is in possession of his or her marked ballot, the restrictions in question here occur within a polling place. Although these laws have not been challenged previously, they may appear to fit within precedents upholding the restrictions of advocacy within polling places and the immediate areas surrounding polling places to preserve election integrity and prevent undue influence over other citizens' right to vote. *See, e.g.*, *Am. Federation of State, County & Municipal Employees Council 25 v. Land* ("*AFSCME*"), 583 F.Supp.2d 840, 846–49 (E.D. Mich. 2008); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 747–53 (6th Cir. 2004). However, the laws challenged here do not preserve election integrity or protect against undue influence—they simply eliminate important channels of protected First Amendment speech.

1. Sections 168.579 and 168.738(2) are Subject to Strict Scrutiny and, As Applied to Ballot Selfies, These Laws Serve No Governmental Interest and Are Not Reasonably Tailored

"[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2230 (2015). Both laws here are content-based because they restrict the display of only marked ballots. "The required examination of the content of the image in order to enforce the terms of this statute plainly demonstrates its content-based nature." *See ACLU of Indiana v. Indiana Secretary of State*, 15-cv-01356, Doc. No. 32, at 7 (S.D. Ind. 2015) (citing *Rideout*, 123 F.Supp.3d at 229). Content-based restrictions are subject to strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest[.]" *Reed*, 135 S.Ct. at 2231–32 (citation omitted). In a recent Sixth Circuit

opinion, the court affirmed a relaxed standard of strict scrutiny for regulations relating to speech in or around polling places:

> In *Anderson* we held that *Burson* imposed a "modified burden of proof" on the State, which is "an important component of the *Burson* analysis, for it stands as the Supreme Court's recognition of the deference due to the states in our federal system of government." . . . . When we apply strict scrutiny in this context, we therefore will hold that a state law satisfies strict scrutiny's narrow-tailoring prong "provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights."

Russell v. Lundergan-Grimes, 784 F.3d 1037, 1050–51 (6th Cir. 2015) (quoting *Anderson v. Spear*, 356 F.3d 651, 656 (6th Cir. 2004); *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (plurality opinion)). In *Russell*, the court affirmed the 100-foot advocacy buffer zone around polling places recognized by the Supreme Court in *Burson*, but struck down Tennessee's 300-foot buffer zone as unable to meet even this relaxed standard. 784 F.3d at 1054.

At the outset, this Court must consider whether the *Burson* standard is applicable to the laws at issue given the activity in question, and should rule that it is not. *See generally United Food & Commercial Workers*, 364 F.3d at 749 (concluding the inside of a polling place is a nonpublic forum). Although a ballot selfie is First Amendment conduct that occurs within a polling place, the display of a ballot selfie does not actually occur within a polling place unless another voter accesses that specific social media while there on election day. Even in that instance, the speech in question is not imposed upon the viewer, and is thus outside of the governmental interests at issue. *See Reno*, 521 U.S. at 868–69 ("'[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden.'" (citation omitted)). A modern cell phone takes an image of a ballot and transmits it to servers on the Internet, such as Facebook or Snapchat, where viewers may review and comment on it.

Because of this, the forum in question is more accurately the Internet, not polling places. Thus, this Court should not apply the relaxed strict scrutiny standard of *Burson* to the statutes at issue.

Even applying *Burson* scrutiny, however, Sections 579 and 738(2) are unreasonable and significantly impinge upon free speech. For reasons quite similar to the analysis for selecting scrutiny, restricting ballot selfies serves no governmental interest. In a previous lawsuit, the Secretary's office cited a number of interests for justifying a restriction on electors wearing campaign buttons in polling places:

> [1] "a secure, orderly environment which is free of distractions when casting their ballots," [2] "to prevent campaigning from being brought into the actual room where voters are waiting to vote and voting," and avoiding [3] "debate and contention in the polling place between voters standing in line who support opposing candidates."

AFSCME, 583 F.Supp.2d at 848–49 (quoting the Secretary of State's Response Brief in the case). The advocacy of ballot selfies is, plainly, different—that is, a ballot selfie is an inseparable component of advocacy that actually occurs in a forum removed from a polling place or voting booth, posing no distractions upon other voters, and triggering no campaigning or debates within polling places.

In other recent successful challenges to laws that restrict ballot selfies, states have argued one additional interest to justify ballot display bans beyond the polling place: ballot integrity. Specifically, states have argued that allowing one to photograph and publish his or her own marked ballot would too easily facilitate vote-buying schemes. *See Rideout*, 123 F.Supp.3d at 231–33; *ACLU of Indiana*, *supra*, at 10–12. In both of these cases the courts rightfully rejected this interest as wholly speculative.

> Although it is true that vote buying was a problem in this country before the adoption of the Australian [secret] ballot, the historical record establishes that vote buying has not been a significant factor in elections in more than 100

> years. Further, because . . . the technology [the law] targets has been in use for many years, it is reasonable to expect that if the problem the state fears were real, it would be able to point to some evidence that the problem currently exists.

Rideout, 123 F.Supp.3d at 233.

The Secretary of State's office has banned ballot photography for at least a decade, and has previously warned against efforts to engage in ballot selfie activity, but the office has not prosecuted a vote-buying scheme relating to the practice, and plaintiff's counsel could not locate a single instance of denying someone a vote for the taking a ballot selfie.[2] *See* **Attachment A** (October 29, 2008 press release from former Secretary of State Land noting the laws and prohibitions challenged in this lawsuit, and emphasizing that they apply to "recording features built into many cell phones."); *see also Election News*, MICH. DEP'T OF STATE, Nov. 1, 2006, at 2, *available at* http://www.michigan.gov/documents/sos/Issue_40_177190_7.pdf. Moreover, if this is truly a governmental interest the restrictions in Michigan election law are under-inclusive, for there are no prohibitions on the photography or display of marked absentee ballots outside of polling places, undermining the argument that such secrecy is required to prevent vote-buying.

Finally, it must be noted that a cursory review of social media reveals that Crookston is not the only Michigan elector who has taken and posted a ballot selfie in recent elections. For example, three ballot selfies were posted on Twitter on August 2, 2016 indicating votes for U.S.

[2] Although these facts rebut potential claims that banning the display and photography serves a governmental interest, these facts should not be mistaken as undermining Crookston's standing to challenge the provisions in this case. In the context of pre-enforcement challenges to laws or policies that restrict political First Amendment rights, relaxed rules of justiciability are the norm. *See, e.g.*, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988); *Ruocchio v. United Transp. Union*, 181 F.3d 376, 385 (3d Cir.1999) ("[C]ourts have been expansive in their view of standing to bring legal action in situations in which free speech rights are implicated.").

Representative Justin Amash in the Michigan primary, each of which were re-posted on Amash's Twitter account:

- https://twitter.com/rickdeneau/status/760434626158526464;
- https://twitter.com/RedSoxTimmy/status/760517817275932672;
- https://twitter.com/jess1ca32/status/760484874784481280[3]

Sections 579 and 738(2) significantly impinge upon First Amendment rights—indeed, the laws entirely foreclose truthfully evidencing how one has voted. In prohibiting ballot selfies, the restrictions serve no governmental interest. They thus fail tailoring under either strict or relaxed strict scrutiny.

2. Alternatively, Sections 168.579 and 168.738(2) Are Facially Overbroad, But May Be Narrowly Construed to Not Prohibit Ballot Photography and Publication

The Supreme Court has summarized the doctrine of First Amendment overbreadth as follows:

> To succeed in a typical facial attack, [one] would have to establish "that no set of circumstances exists under which [the law] would be valid" . . . . In the First Amendment context, however, this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."

U.S. v. Stevens, 559 U.S. 460, 472–73 (2010) (citations omitted). However, "'[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.' . . . . Therefore, we must consider any limiting construction of the statute

[3] Because this is a First Amendment facial challenge, Crookston represents the interests of these and all other Michigan electors who would like to take ballot selfies. *See infra* Part (I)(A)(2); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question.").

that Michigan can present." *Speet v. Schuette*, 726 F.3d 867, 879 (6th Cir. 2013) (citations omitted).

Ballot selfie activity is so far removed from the advocacy restrictions upheld in previous cases that it is quite plausible that the Sections 579 and 738(2) were never intended to prohibit ballot selfies. *But see* **Attachment A** (indicating former Secretary of State Land tied these provisions to the camera ban). The wording and context of the statutes suggests they might not be part of the laws' sweep. The punishment, in particular, is the forfeiting or rejection of one's ballot; Section 738(2) specifically calls for an exposed ballot to not be deposited in a ballot box. To realistically enforce these provisions, an elector must be observed displaying his or her marked ballot within the polling place after voting and before submitting the ballot. Otherwise, to so closely monitor voters in voting stations election officials would risk breaking other election laws. *See* MICH. COMP. LAWS § 168.786. Alternatively, finding a ballot selfie on social media after a ballot has been deposited, election officials would themselves compromise the integrity of elections by weeding out ballots that have already been accepted and deposited. *See In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 458 (Mich. 2007) ("The prevention of fraud in the first instance is critical, because it is impossible to remedy the harm inflicted by the fraudulently cast ballot by correcting the vote count, as our constitution requires that ballots remain secret."). Thus, these laws may be interpreted by this Court to only prohibit direct display of ballots within polling places.

A provision not challenged in this lawsuit reinforces this interpretation of the law and further ensures the narrowness of ballot selfie activity:

> *Before leaving the booth or voting compartment*, the elector shall fold his or her ballot or each of the ballots *so that no part of the face shall be exposed*, and with the detachable corner on the outside. Upon leaving the booth, the elector shall at once deliver in public view the ballot or ballots to the inspector

> designated to receive the ballot or ballots. Except as provided in subsection (2), the inspector shall tear off the corner of the ballot, where perforated, containing the number and shall then in the presence of the elector and the board of inspectors deposit each ballot in the proper ballot box without opening the ballot.

MICH. COMP. LAWS § 168.738(1) (emphasis added). Ballot selfies occur in voting stations; one photographs them after marking the ballot but before making an effort to deposit the ballot. The challenged laws need not apply to this situation, and will still assure that attempts to use ballot selfie activity as actual advocacy within polling stations or to otherwise expose a marked ballot within a polling place may still be punished and deterred. Other laws not subject to this lawsuit can ensure ballot selfies are, in fact, mere disclosure of the photographer's own ballot. *See* MICH. COMP. LAWS § 168.932(d) ("A person shall neither disclose to any other person the name of any candidate voted for by any elector, the contents of whose ballots were seen by the person . . . ."). Thus, removing constitutionally problematic provisions of the law will not upend Michigan election law because a variety of provisions already protect voting integrity and against vote-buying.

The activity of taking a ballot selfie before leaving a voting station—in view of an elector and a camera but no one else in the polling place—could be narrowed by this Court to not meet the statutes' definition of exposing or disclosing one's ballot. This would leave the law undisturbed, properly confined to regulate advocacy within polling places, and protect ballot selfies—speech that takes place far beyond polling places. Without such a construction given by this Court, Sections 579 and 738(2) are unconstitutional facially and as applied.

B. Secretary's Rule 1 is Unconstitutional Facially and As Applied to Voting Selfies and Ballot Selfies

The Secretary's Rules in this case prohibit not only ballot selfies, but almost any photography within polling places:

> Persons shall not use video cameras, cell phone cameras or video recording, cameras, television or recording equipment in the polling place, except that broadcast stations and credentialed media may be permitted to briefly film from public area [sic]. Personnel working for broadcast stations or media shall not set up cameras in the polling place . . . .

Actionable Election Day Offenses at 2. This is another content-based speech restriction that cannot survive *Burson* scrutiny, intermediate scrutiny, and, moreover, violates equal protection under the Fourteenth Amendment.

1. Secretary's Rule 1 is subject to Strict Scrutiny, and As Applied to Voting and Ballot Selfies Serves No Governmental Interest and Is Not Reasonably Tailored

Secretary's Rule 1 goes beyond ballot selfies and includes any photography by citizens like Crookston in polling places. Selfies and photography generally are no less tied to political speech in this context than ballot selfies. *Buckley*, 424 U.S. at 14. The rule is content-based because of whom it allows to take photographs, placing an unequivocal ban on electors such as Crookston but allowing "broadcast stations and credentialed media" to photograph and video. This cannot be understood as anything less than viewpoint discrimination; the Secretary allows for "credentialed" newsgathering activity but prohibits citizens from doing so. Whatever the justification, the rule "cannot be '"justified without reference to the content of the regulated speech,"'" *Reed*, 135 S.Ct. at 2227 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Photos in polling places published in newspapers by credentialed photographers will be unthreatened; selfies from polling places published by citizens on social media may be punished as misdemeanors. *See Citizens United*, 558 U.S. at 352 (*quoting Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (Scalia, J., dissenting)) ("'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'"). Thus, strict scrutiny is again proper.

Unlike ballot selfies, the breadth of photographic activity at issue makes the *Burson* strict scrutiny appropriate. *Russell*, 784 F.3d at 1050–51. The interests here, however, are unreasonable and significantly impinge upon constitutionally protected rights. It is unreasonable to prohibit citizen photography while allowing the institutional press to engage in the activity. The restrictions placed on the press—to "briefly film" polling places and voters from public areas—does not salvage the prohibition on citizens' photography, but provides this Court a compelling reason to narrowly construe the challenged laws to permit citizen photography. *See infra* part (I)(B)(2).

The government's interests are further undermined by the increasing importance of social media and citizen journalism. Social media has provided an outlet for political speech, one that led to the invention of ballot selfies. But social media has also buttressed—and is supplanting—traditional news. Camera phones have been ubiquitous for a decade, and publication of photographs and videos by citizens such as Crookston are in many instances replacing the media produced by "credentialed" reporters. "[T]he majority of Millennials get political news from digital and social media and elsewhere online, while comparatively few get political news from local television—the exact opposite of the way older generations obtain political news." Brief of *Amicus Curiae* Snapchat, Inc. in Support of Appellees and Affirmance, *Rideout v. Gardner*, No. 15-2021 (1st Cir.), at 20, *available at* http://electionlawblog.org/wp-content/uploads/Snapchat-Ballot-Selfie-Amicus-With-ECF-Stamp.pdf (citing Pew Research Center, *Millennials & Political News: Social Media—the Local TV for the Next Generation?*, June 1, 2015, *available at* http://www.journalism.org/files/2015/06/Millennials-and-News-FINAL-7-27-15.pdf). The Secretary's outdated rule cuts off the most modern, relevant way news is delivered—through social media networks—while favoring the established, institutional, and antiquated press. This

cannot survive serious First Amendment scrutiny.

Far from an infraction itself, citizen journalism can prove a most valuable check on electoral integrity. This is not to say reasonable time, manner and place restrictions cannot be placed on citizen photography in polling places, but simply that Secretary's Rule 1 does not accomplish this in a reasonable manner. The rule must be struck down facially or as applied.

2. Alternatively, Secretary's Rule 1 Fails Intermediate Scrutiny

"Even content-neutral restrictions are required to be narrowly tailored to fend off any untoward attempt by the government to suppress speech out of mere convenience." *ACLU of Indiana*, *supra*, at 15 (citing *McCullen v. Coakley*, S. Ct. 2518, 2534 (2014)). Under a scrutiny standard more relaxed than *Burson* scrutiny, Secretary's Rule 1 must still fail. Recent precedent from the Supreme Court affirms that while intermediate scrutiny—unlike strict—does not require the government to utilize the least restrictive means to serve compelling interest, the government may not "forgo[] options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage." *McCullen*, 134 S. Ct. at 2537. That is, even under intermediate scrutiny this Court must determine whether the interests at issue may be addressed with "less intrusive means" or "more targeted means." *Id.* at 2538.

That photography, absent some other action or attendant circumstances (such as, perhaps, using a flash), can serve as distraction to other voters or even intimidation—particularly when one is photographing oneself as in a selfie—is incredible. Given the ubiquity of cameras and camera phones it is hardly a surprise one may be filmed; indeed, to vote in Michigan under Secretary's Rule 1 an elector must already accept that he or she can be filmed by broadcast stations or credentialed media. It serves no interest to place a blanket prohibition on citizen

photography in this fashion, and tailoring is not satisfied because a typical citizen is no more or less of a threat than credentialed media. The Secretary may take a number of approaches that would be more suitably targeted to prevent photography from being used to annoy, distract or intimidate voters in polling places. *See, e.g.*, CAL. ELEC. CODE § 18541 (restricting photography "with the intent of dissuading another person from voting"). In serious cases, voter intimidation is already a felony under Michigan law. MICH. COMP. LAWS § 168.932(a).

None of the four likely interests—(1) preserving an orderly environment, (2) preventing campaigning at voting places, (3) avoiding contention in voting places between voters of differing ideological views, and (4) preserving voting integrity—are implicated by Secretary's Rule 1. Voters taking photographs to reflect patriotism and civic pride may be regulated in sensible ways, but an outright ban is unsupportable. "At best, this statute is a blunt instrument designed to remedy a so-far undetected problem. As such, it does not survive even intermediate scrutiny." *ACLU of Indiana*, *supra*, at 16. To be sure, there is a great deal of election malfeasance that may be suitably prevented by state law, but like ballot selfies the Secretary can offer no ties between citizen photography and any of these acts. Moreover, as asserted previously citizen photography may give rise to exposing malfeasance, and is not—by itself—a threat to voters.

3. Secretary's Rule 1 Also Violates the Equal Protection Clause of the Fourteenth Amendment

"Content-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech." *Burson*, 504 U.S. at 197 n.3. Equal Protection analysis requires this Court to consider (1) whether Crookston is similarly situated to broadcast stations and credentialed media, (2) the appropriate level of scrutiny, and (3) whether the law serves a

sufficiently important governmental interest and if the law is sufficiently connected to that purpose. *See Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692–93 (6th Cir. 2015). When the law in question impinges upon a fundamental right, the appropriate level of scrutiny should align with the standard scrutiny applied by that right. *Id.* at 693.

For reasons substantially similar to arguments made against the constitutionality of Secretary's Rule 1 under the First Amendment, the rule also violates Crookston's right to equal protection under the Fourteenth Amendment. Crookston is similarly situated to journalists of all types, and has numerous outlets through which he may publish media. *See* Compl. ¶¶11, 13. Under either *Burson* strict scrutiny or intermediate scrutiny, the law serves no governmental interest and is not reasonably tailored, while significantly impinging upon Crookston's constitutional rights. *See infra* Part (I)(B)(1)–(2).

Under the First and Fourteenth Amendments, Secretary's Rule 1 is unconstitutional facially and as applied to Crookston. The Secretary has broad authority under the Michigan Election Code to issue orders, and thus has the authority to alter them. If she will not do so, this Court should enjoin its enforcement.

C. Secretary's Rule 2 is Unconstitutional as Applied to Voting Selfies and Ballot Selfies

As labeled Secretary's Rule 2 in the complaint, a second order from the Secretary can interfere with both voting selfies and ballot selfies. *See* Compl. ¶16. The rule states that "[p]ersons shall not use cell phones once they have entered voting station. Cell phones may be used in the polling place by voters (while waiting in line), challengers and pollwatchers as long as they are not disruptive to the voting process." Actionable Election Day Offenses at 2. For substantially similar reasons as the arguments laid out in Parts (I)(A)(1) and (I)(B)(1)–(2), Secretary's Rule 2 is unconstitutional facially and as applied to voting selfies and ballot selfies.

However, unlike Secretary's Rule 1—but *like* Sections 579 and 738(2)—Secretary's Rule 2's may be interpreted by this Court to not restrict voting selfies or ballot selfies. *See supra* Part (I)(A)(2). Though selfies are generally taken with cameras that are features of cell phones, in the same context discussed previously the "use" of cell phones prohibited by this rule may be limited to voice discussions occurring on cell phones within voting booths. This addresses the governmental interests discussed previously, allows the rule to stand and protects both voting selfies and ballot selfies. It further protects other innocuous uses of cell phones in voting booths, such as using digital voter guides, referring to one's own notes kept on a cell phone's word application, or the other non-verbal phone functions that are tied to free speech and the right to vote and pose no threat to election security or unduly influencing other voters; otherwise, such restrictions would further contribute to unconstitutional overbreadth. *See Stevens*, 559 U.S. at 472–73.

Crookston challenges the election provisions in this case simply to prevent punishment of political speech. This can be accomplished with sensible interpretations of existing law and orders by this Court for rule changes by the Secretary of State. Otherwise, "[Michigan] law seems far more likely to ensnare a large number of voters wishing to make a political point or expressing their pride in voting or recording the moment for some innocuous personal reason than it is to achieve the State's goal of protecting voters from vote-buying predators" or preventing undue influence or distractions within polling places. *ACLU of Indiana*, *supra*, at 14. Crookston has a substantial likelihood of success on his First Amendment claims, and this Court should issue a preliminary injunction. *See* Compl. at 9.

II. Plaintiff Will Be Irreparably Harmed if an Injunction Does Not Issue

Where First Amendment rights are at issue, irreparable harm is established: "[t]he 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); *see Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson City*, 274 F.3d 377, 400 (6th Cir. 2001) ("even minimal infringement upon First Amendment values constitutes irreparable injury"). Now aware of the photography prohibitions in question, Plaintiff has silenced himself under threat of civil and criminal penalties. If an injunction is not issued, it will only result in further irreparable harm.

III. The Balance of Harms Tips in the Plaintiff's Favor

"[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu of Nashville*, 274 F.3d at 400. Currently, Crookston is entirely prohibited from ballot selfie and voting selfie activity, a total loss of First Amendment freedoms. Moreover, any harm inflicted upon the defendants is *de minimis*; as discussed, ballot selfies and voting selfies are already a reality in Michigan, thus far unpunished for reasons only known to the Defendant. *See supra* part (I)(A)(1). This does not, however, alleviate "sanctions [that] 'hover[] over each [voter], like the proverbial sword of Damocles[.]'" *Reno*, 521 U.S. at 882 (citation omitted). The balance of harms overwhelmingly weighs in Plaintiff's favor.

IV. Issuing an Injunction Works in Favor of the Public Interest

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest"). Thus, permitting

Crookston and other Michigan voters to speak freely serves the important goal of protecting an "essential mechanism of democracy" and our safeguard to "hold officials accountable to the people." *Citizens United*, 558 U.S. at 339.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion for preliminary injunction.

Respectfully submitted,

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Dated this 26th day of September, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2016, the foregoing Memorandum of Support of Motion for Preliminary Injunction 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

ATTACHMENT A

Land reminds voters of camera ban

Contact: (Media Contact) Kelly Chesney 517-373-2520
Agency: Secretary of State

OCTOBER 29, 2008

ELECTION NEWS

Secretary of State Terri Lynn Land and the Michigan Association of Broadcasters remind voters that a national video project urging them to record their Election Day experiences cannot be conducted in Michigan polling places.

The Video Your Vote project is one example of election-related information circulating on the Internet that unintentionally may confuse or mislead Michigan voters. Land is addressing some of the most common questions stemming from those reports by posting the correct information at www.Michigan.gov/sos.

"The enthusiasm about this year's election is admirable," Land said. "It also is generating well-meaning attempts by organizations to address voters' questions or engage them in the elections process. However, in some cases this information is misleading, incorrect or does not apply to Michigan. Since it's often targeted to first-time voters, it is especially important that we set the record straight and prevent any misunderstandings at the polls. We want everyone to have a satisfying voting experience."

The Video Your Vote project encourages voters to use camera phones or other devices to document their observations at the polls as well as the actual casting of a ballot.

The project is sponsored by YouTube, the video-sharing site of Google Inc., and Public Broadcasting System (PBS).

Land pointed out that the use of video cameras, still cameras and other recording devices are prohibited in the polls when they are open for voting. This includes still cameras and other recording features built into many cell phones. The ban applies to all voters, challengers, poll watchers and election workers. Exceptions are made for credentialed members of the news media though certain restrictions remain.

The ban protects voters who may feel intimidated in the polling place by the presence of a camera. Additionally, under Michigan election law, a ballot is rejected if deliberately exposed. A voter who deliberately exposes their ballot will not be allowed to vote in that election. The ban also serves as a deterrent to those who may try to sell their vote which is also prohibited by law.

YouTube and PBS do caution that some states such as Michigan prohibit the use of recording devices in the polls. However, Land and many of her counterparts nationwide are concerned that not everyone will be aware of the warning.

Karole White, president and chief executive officer of the Michigan Association of Broadcasters, commended the project for encouraging young voters but emphasized that the state's election laws must be upheld.

"Michigan broadcasters have a distinguished history of educating voters and encouraging Election Day participation," White said. "We look forward to providing important information and allowing voters to share their experiences. We do, however, urge anyone interested in the Video Your Vote project to help ensure the integrity of Michigan's elections. By keeping recording devices out of the polling place, you can still tell your story while respecting the law and the rights of other voters."

ATTACHMENT A

Land addressed other topics generating voters' questions, including:

- Voting rights of residents in jail or prison: Michigan residents confined in jail or prison who are awaiting arraignment or trial are eligible to vote. However, residents who are serving a sentence in jail or prison after conviction cannot vote during the period of confinement. When residents are released from jail or prison after serving a sentence, they are free to participate in elections without restriction.
- Early voting: While some states allow all voters to cast ballots prior to Election Day, Michigan does not have early voting. Of course, qualified Michigan voters can cast absentee ballots prior to Election Day.
- Displaying election-related materials at the polls: Michigan has prohibited this practice for decades. It includes clothing and buttons as well as material such as pamphlets, fliers and stickers. You cannot display such items in the polling place or within 100 feet of an entrance to a polling place. If a voter goes to the polls with a T-shirt or button bearing campaign-related images or slogans, he or she will be asked to cover or remove it.
- Voting a straight party ticket: At the top of each political party's column on the ballot, there is an opportunity to vote "straight" party, which selects all candidates on that party's ticket with a single vote. If you vote straight party, there is no need to vote again for any individual candidate in the party column. However, if you do vote straight party and then vote for an individual candidate in that same party, it will not invalidate your vote for that candidate.
- Split-ticket voting: You may "split" your ticket - vote for candidates of different parties - in the Nov. 4 general election. This differs from the August primary in which you must confine your votes to a single party column. Selections are not invalidated unless you cast votes for more candidates than are allowed in a certain race. Even if you vote a "straight" ticket, you may cross over and vote for candidates of a different party.
- Voting the entire ballot: You are not required to vote the entire ballot. You may pick and choose the races or ballot questions for which you want to vote. Skipping sections of the ballot does not invalidate your ballot.
- Challenges based on home foreclosures: The compilation of home foreclosure information alone does not provide sufficient reason to challenge a person's voting status. In fact, the Michigan Republican and Democratic parties are in agreement that so-called foreclosure lists do not provide a reasonable basis to challenge voters.

Visit the department Web site or the Michigan Voter Information Center at www.Michigan.gov/vote for more information.