

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

	)	
	)	
JOEL CROOKSTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Case No. 16-cv-1109
	)	
RUTH JOHNSON, Michigan Secretary	)	
of State, in her official capacity,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

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VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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Plaintiff Joel Crookston, by his attorneys Stephen Klein of the Pillar of Law Institute and Miller Johnson, brings this action for declaratory and injunctive relief, and complains as follows:

**INTRODUCTION**

1. On November 6, 2012, Plaintiff Joel Crookston responded to a prompt on social media to write-in vote for an acquaintance from college for an office in the Michigan general election. After voting, Crookston not only disclosed his vote, but provided photographic evidence, obtained within a voting station inside a polling place. *See Exhibit A.*<sup>1</sup>
2. For this activity, Michigan law requires the rejection of Crookston’s ballot and forfeiting his right to vote in a primary or general election. *See MICH. COMP. LAWS §§ 168.579, 168.738(2).*

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<sup>1</sup> The prompt leading to this action was made by Plaintiff’s counsel Klein, who is a friend of the Plaintiff. A screen capture of this prompt is also included in **Exhibit A**.

3. Under current instructions or orders from the Defendant Secretary of State, Crookston could be imprisoned and fined for photography in a polling place or voting station.
4. Crookston is but one of thousands citizens nationwide who have taken “selfies” or “ballot selfies” in voting stations and polling places on election day. *See generally* “selfie”, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/selfie>; *see also* Brief of *Amicus Curiae* Snapchat, Inc. in Support of Appellees and Affirmance, *Rideout v. Gardner*, No. 15-2021 (1st Cir.), at 25, *available at* <http://electionlawblog.org/wp-content/uploads/Snapchat-Ballot-Selfie-Amicus-With-ECF-Stamp.pdf> (“Snapchat has received thousands of user Snaps from inside voting booths in primaries around the country, submitted to Snapchat by users with the knowledge that their Snaps could be viewed by millions of people.”).
5. Having been made aware of Michigan law and the Secretary’s rules, Crookston will refrain from further photography in polling places or voting stations. If it were not for Michigan law and the Secretary’s rules, however, Crookston would engage in taking selfies and ballot selfies in future elections. Compliance with the law and the Secretary’s orders requires Crookston to sacrifice his right to free speech under the First Amendment. U.S. CONST. amend. I. This Court should enter preliminary relief and issue a final judgment ruling that the law and the Secretary’s rules in question are unconstitutional. *See Rideout v. Gardner*, 123 F.Supp.3d 218 (D. N.H. 2015) (declaratory judgment against ballot photography ban); *Am. Civil Liberties Union of Ind. v. Ind. Sec. of State*, 15-cv-01356, Doc. No. 32 (S.D. Ind. 2015) (preliminary injunction against ballot photography ban).

### **JURISDICTION AND VENUE**

6. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 because Plaintiff's claims arise under the First and Fourteenth Amendments to the Constitution of the United States. This Court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, and the Civil Rights Act, 42 U.S.C. § 1983.
7. This Court has jurisdiction to award attorneys' fees, in its discretion, in this action. 42 U.S.C. § 1988(b).
8. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1), (2) because Defendant resides in the Western District of Michigan and all of the events or omissions giving rise to the claims occurred in this district.

### **PARTIES**

9. Plaintiff Joel Crookston is a lifelong resident of Michigan and currently lives in Portage. He first registered to vote in 2002, has voted in most primary and general elections since then, and is a qualified elector under Michigan law. He intends to vote in the general election on November 8, 2016 as well as future Michigan primary and general elections.
10. Defendant Ruth Johnson is the Secretary of State of the State of Michigan and maintains an office in Lansing, Michigan. Secretary Johnson has the duty to “[a]dvice and direct local election officials as to the proper methods of conducting elections.” MICH. COMP. LAWS § 168.31(b). Furthermore, the Secretary has the power to investigate and refer violations of the challenged provisions for prosecution. MICH. COMP. LAWS § 168.31(h). She is sued in her official capacity.

## STATEMENT OF FACTS

11. Crookston owns and usually carries a cell phone that is capable of capturing digital photographs and video and uploading such files to social media accounts.
12. In the 2012 general election, Crookston used a camera on a cell phone in a voting station within a Michigan polling place to capture a photograph of part of his ballot—a ballot selfie—and then posted the photograph on the Facebook social media platform. *See supra* ¶1; **Exhibit A**.
13. Crookston currently maintains social media accounts on Facebook, Twitter, Instagram and Snapchat, to each of which he frequently uploads photographs for display to connections and the public at large, including occasional selfies.
14. Crookston would engage in selfie and ballot selfie activity in future elections in polling places, including voting stations, but his prohibited from doing so under Michigan law and orders from the Michigan Secretary of State.
15. In pertinent part, the Michigan Election Code states that

[i]f 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*.

MICH. COMP. LAWS § 168.579 (emphasis added). A similar law also applies to all 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 under section 736a, 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) (emphasis added).

16. Currently, Secretary of State Johnson maintains the following instructions or orders for polling places in all elections:

[1] 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 [sic] public area. Personnel working for broadcast stations or media shall not set up cameras in the polling place. . . .

[2] Persons 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 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](http://www.michigan.gov/documents/sos/Actionable_Election_Day_Offenses_472371_7.pdf)

(hereinafter referred to as “Secretary’s Rule 1” and “Secretary’s Rule 2”). Secretary Johnson considers these “a basis for prosecution under Michigan election law” and “lawful instruction[s] or order[s] of the Secretary of State as chief state election officer,” violations of which are punishable as a misdemeanor. *Id.* at 1–2, *citing* MICH. COMP. LAWS § 168.931(1)(h); *see also* MICH. COMP. LAWS § 168.931(2) (“A person who violates a provision of this act for which a penalty is not otherwise specifically provided in this act, is guilty of a misdemeanor.”).

17. Secretary’s Rule 1 broadly prohibits citizen photography or videography in polling places, which contain voting stations. Secretary’s Rule 2 prohibits the use of cell phones in voting stations. The penalties for violating these rules are fines and imprisonment:

Any person who shall be found guilty of a misdemeanor under the provisions of this act shall, unless herein otherwise provided, be punished by a fine of not

exceeding \$500.00, or by imprisonment in the county jail for a term not exceeding 90 days, or both such fine and imprisonment in the discretion of the court.

MICH. COMP. LAWS § 168.934.

18. Taken together, these provisions subject Crookston to fines and imprisonment if he takes a selfie in a polling place or voting station or forfeiting his vote, fines and imprisonment if he takes a ballot selfie in a voting station.

### COUNT I

#### **MICH. COMP. LAWS § 168.579 and § 168.738(2) Violate the First Amendment**

19. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.
20. State laws and regulations must respect the First Amendment, pursuant to the Fourteenth Amendment. U.S. CONST. amend. XIV; *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015).
21. Electoral advocacy is a key purpose of the First Amendment. “[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . [including] discussions of candidates . . . .” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).
22. “The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.” *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003).
23. MICH. COMP. LAWS §§ 168.579 and 168.738(2) are content-based prohibitions, penalizing electors such as Crookston for “reveal[ing] the name of any candidate for whom the elector

voted” by displaying a ballot after it is marked, whether within a polling place or “in any manner[.]”

24. Content-based speech prohibitions are subject to strict scrutiny. *Russell*, 784 F.3d at 1050–51.
25. Whatever interests the State of Michigan might have relating to the integrity of the electoral process such as preventing election fraud and voter intimidation, they can be secured in a more reasonable manner than the prohibitions in MICH. COMP. LAWS §§ 168.579, 168.738(2). Because these laws run roughshod and ban photography of one’s own ballot and visual disclosure of a citizen’s own ballot far beyond a voting station or polling place without serving any governmental interest, they cannot be said to be properly tailored.
26. MICH. COMP. LAWS §§ 168.579, 168.738(2) deprive individuals of the First Amendment right to express themselves freely—and unquestionably truthfully—regarding candidates for whom they have voted by imposing overbroad bans. Because these laws are unequivocal bans untailored to any compelling governmental interest, they must be declared unconstitutional and enjoined.

## COUNT II

### **The Secretary of State’s Instruction and Order Regarding Photography in Polling Places (“Secretary’s Rule 1”) Violates the First and Fourteenth Amendments**

27. Secretary’s Rule 1 unequivocally prohibits persons from “us[ing] video cameras, cell phone cameras or video recording, cameras, television or recording equipment in the polling place,” which includes voting stations, except for “credentialed media” who may film from public areas.
28. Secretary’s Rule 1 entirely forecloses selfies or ballot selfies, entire mediums of expression, and cannot be justified without reference to the content of recorded activity—voting. *Reed v.*

*Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015) (“Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.”) This content-based restriction on speech must be subjected to strict scrutiny.

29. Voting selfies are among the few ways to truthfully document that one has engaged in voting, a most powerful message that encourages fellow citizens to participate in the republic. *Amicus Curiae* Brief of Snapchat, Inc., *supra* ¶4, at 5 (“[D]igital expressions of civic engagement encourage others to vote—particularly younger voters who have historically low turnout rates.”).
30. Ballot selfies are the only way to truthfully document how one has actually voted so that one may express that truth outside of a voting stations or polling place. Restrictions also upset any effort of an elector to document the integrity of his or her own ballot or voting activity.
31. The State’s interests in the integrity of the electoral process can be secured in a more reasonable manner than the prohibition in Secretary’s Rule 1.
32. Secretary’s Rule 1 is an unconstitutional ban on free speech and expression.
33. For substantially similar reasons, the Secretary’s Rule 1 also violate the Plaintiff’s equal protection rights under the 14th Amendment. *See Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692–93 (6th Cir. 2015); *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.”).

### COUNT III

#### **The Secretary of State's Instruction and Order Regarding the Use of Cell Phones in Voting Stations ("Secretary's Rule 2") Violates the First Amendment**

34. Secretary's Rule 2 is an unequivocal prohibition on the use of cell phones in voting stations.

This extends to the use of features of cell phones such as cameras.

35. Secretary's Rule 2 entirely forecloses selfies or ballot selfies in voting booths, entire mediums of expression.

36. The State's interests in the integrity of the electoral process can be secured in a more reasonable manner than the prohibition in Secretary's Rule 2.

37. Secretary's Rule 2 is an unconstitutional ban on free speech and expression.

#### **PRAYER FOR RELIEF**

Wherefore, Plaintiff prays for the following relief:

1. A declaratory judgment that MICH. COMP. LAWS §§ 168.579, 168.738(2) are unconstitutional.
2. A declaratory judgment that the Secretary of State's rules regarding photography in polling places, discussed here as "Secretary's Rule 1" and "Secretary's Rule 2," are unconstitutional.
3. Preliminary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 against enforcement of MICH. COMP. LAWS §§ 168.579, 168.738(2) and the Secretary of State's rules.
4. Plaintiffs' reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988, or any applicable statute or authority, and further relief this Court may grant in its discretion.
5. Any other relief that the Court deems just and appropriate.

Respectfully submitted,

/s/ Stephen Klein

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Dated this 9th day of September, 2016.

# EXHIBIT A



**Steve Klein**



November 6, 2012 · Cheyenne, WY ·

Anyone in Michigan: please write in [Michael Glud](#) for something.



Matthew J. Erickson, Shannon Webb and 3 others

1 Comment



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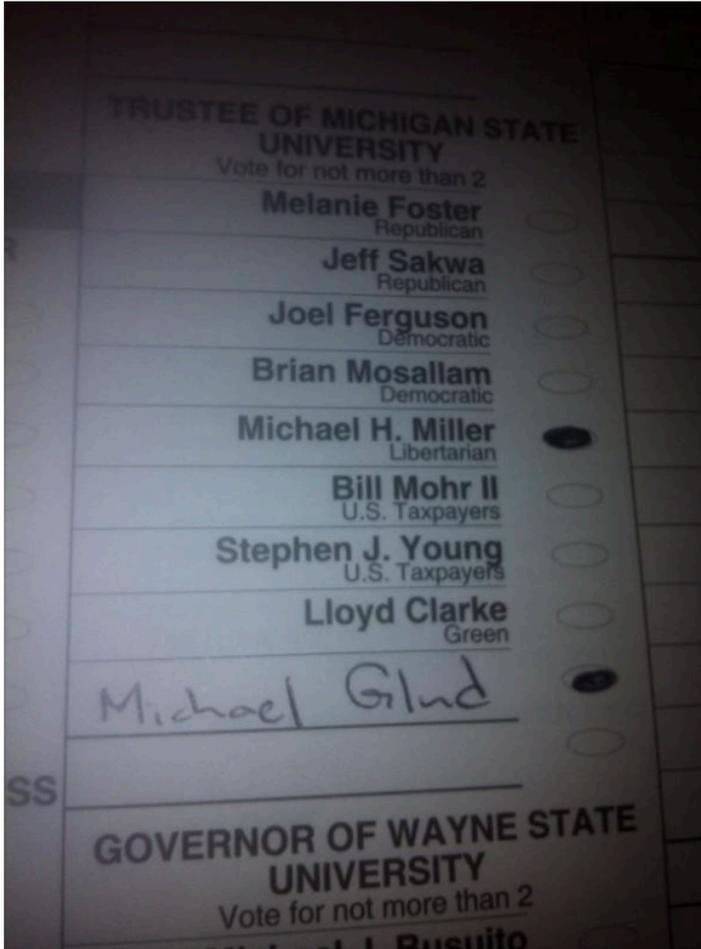
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Joel Oliver ▶ Steve Klein

November 6, 2012 · 2

Glud for trustee of MSU? Written in.



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