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18 Attorneys for Plaintiffs

19 **UNITED STATES DISTRICT COURT**
20 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

21 American Civil Liberties Union of
Northern California,
22 American Civil Liberties Union of
Southern California, and
23 American Civil Liberties Union of San
Diego and Imperial Counties

24 Plaintiffs,

25 v.

26 Alex Padilla,
27 California Secretary of State

28 Defendant.

Civil Case No. _____

**Complaint
for
declaratory and injunctive relief**

INTRODUCTION

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2 1. This is a facial and as-applied challenge to a pair of California statutes that
3 prohibit voters from taking photographs of their marked ballots to show their support for
4 particular candidates or issues – so-called “ballot selfies.” The laws in question prohibit voters
5 from showing their marked ballots “to any person in such a way as to reveal its contents.” Cal.
6 Elec. Code §§ 14276, 14291.

7 2. Nearly every court that has examined similar laws, including the United States Court
8 of Appeals – has held that they violate the First Amendment. *See Rideout v. Gardner*, No. – F.3d.,
9 2016 WL 5403593 (1st Cir. Sept. 28, 2016); *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H.
10 2015); *Crookston v. Johnson*, No. 1:16-cv-1109 (W.D. Mich. Oct. 20, 2016), *order stayed* 2016
11 WL 6311623 (6th Cir. Oct. 28, 2016); *Indiana Civil Liberties Union Found. v. Indiana Sec’y of*
12 *State*, No. 115-cv-01356, 2015 WL 12030168 (S.D. Ind. Oct. 19, 2015).

13 3. Moreover, the California legislature has already repealed the laws that Plaintiffs
14 challenge, illustrating the lack of government interest in their enforcement. But because of the
15 timing of this repeal, the laws continue in effect until January 1, 2017.

16 4. Despite the unconstitutionality and abandonment by the legislature of these particular
17 laws, California law requires state and local officials to enforce all statutes, even if they believe
18 those statutes are unconstitutional, until and unless a court orders them not to. *See Lockyer v. City*
19 *& Cty. of San Francisco*, 33 Cal. 4th 1055, 1087-1112 (2004). Consistent with this principle, the
20 California Secretary of State issued a memorandum to local elections officials in October,
21 indicating that that they should continue to enforce the prohibition on ballot selfies during this
22 November’s election, even though the Legislature has voted to repeal the law, effective January 1,
23 2017.

24 5. Plaintiffs therefore request a temporary restraining order and a preliminary injunction
25 to allow their tens of thousands of California members to exercise their First Amendment rights
26 this November.

JURISDICTION AND VENUE

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6. This action arises under 42 U.S.C. § 1983 and the United States Constitution. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

7. This Court has personal jurisdiction over Defendant because he is a public official of the State of California who performs official duties within the State.

8. Venue properly lies within this District under 28 U.S.C. § 1391(b). The Defendants performs official duties in this District, and a substantial part of the events or omissions giving rise to Plaintiffs’ claims have occurred or will occur in this District.

INTRADISTRICT ASSIGNMENT

9. This action may properly be assigned to the San Francisco or Oakland divisions of this Court because a substantial part of the events or omissions which give rise to the claims in this action will occur in Alameda and San Francisco Counties. Plaintiff ACLU-NC resides in San Francisco County and has thousands of members in San Francisco and Alameda Counties, including Jacquelyn Kennedy, who resides in Alameda County and has submitted a declaration in this matter describing the effects of the challenged laws on her. *See* Local Rule 3-2.

THE PARTIES

Plaintiffs

10. The American Civil Liberties Union is a nationwide nonprofit, nonpartisan organization with over 500,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions.

11. Plaintiff American Civil Liberties Union of Northern California (ACLU-NC), founded in 1934 and based in San Francisco, is one of the largest ACLU affiliates, with some 40,000 members in the state, thousands of whom live in this District.

12. Plaintiff American Civil Liberties Union of Southern California (ACLU-SC), founded in 1923 and based in Los Angeles, has more than 25,000 members in the state.

13. Plaintiff American Civil Liberties Union of San Diego & Imperial Counties, founded in 1933, has thousands of members living in those two counties.

1 14. The ACLU and its California affiliates have long worked to protect free-speech and
2 voting rights. They have expended resources in recent days responding to questions about whether
3 California voters can take ballot selfies.

4 15. Members of each California affiliate vote and wish to post photographs of their
5 marked ballots on their social media accounts to make a statement about the candidates and
6 initiatives they are supporting in the November 2016 general election. But Elections Code
7 §§ 14276 and 14291 are preventing them from doing this. They do not want to violate the law and
8 do not want to cause disruption at the polls, which would occur if they tried to take photographs at
9 the polls but were instructed not to do so by poll workers.

10 16. For example, Allen Asch is a member of the ACLU of Northern California and the
11 chair of its Sacramento Area chapter. Asch is a registered California voter who regularly uses
12 Instagram, Facebook, and Twitter to post information and his opinions about political issues,
13 including ballot initiatives. He has over 120,000 subscribers to his YouTube account, over 10,000
14 followers on Facebook, and over 2,700 followers on Twitter.

15 17. Asch has been covering the 2016 presidential election weekly for the last 183 weeks
16 by compiling and commenting on the week's media clips. He has also posted the ACLU's ballot
17 initiative guide to his personal Facebook page and will be making a Halloween display to urge
18 voters to pass Prop 62 and defeat Proposition 66 that he plans to record on video and post on social
19 media.

20 18. Asch, who is a lawyer and a member of the California Bar, understands that the
21 California Elections Code bars voters from showing their marked ballots. For past Election Day
22 social media posts, he has avoided including his marked ballot in photos because of this provision.
23 But he would like to share a photo that shows how he voted on state-wide initiatives this year
24 because he believes a photo makes a stronger statement than simply posting his opinions.

25 19. In addition, it would be particularly important for him to present photographic proof
26 of his vote in the presidential election because of the controversy among Bernie Sanders
27 supporters about whether they should vote for Hillary Clinton. He repeatedly encouraged his
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1 followers to vote for Hillary Clinton despite the ambivalence of some, and he thinks it is important
2 that he show his followers that he voted for her.

3 20. However, unless a court order allows him to do so, he will again refrain from posting
4 photographs of his marked ballot, so as not to violate the law. *See* Ca. Business and Professions
5 Code § 6068(a) (“It is the duty of an attorney to ... support the Constitution and laws of the United
6 States and this state.”).

7 **Defendants**

8 21. Defendant Secretary of State is the state’s “chief elections officer” with the duty to
9 “administer the provisions of the Elections Code” and ensure that “state election laws are
10 enforced.” Gov’t Code § 12172.5. His office provides guidance to local elections officials thought
11 the state.

12 22. Defendant is sued in his official capacity only.

13 **Need for Injunctive and Declaratory Relief**

14 23. This controversy is ripe for judicial decision, and injunctive and declaratory relief are
15 necessary and appropriate pursuant to 28 U.S.C. §§ 2201 and 2202, so that the parties may know
16 the legal obligations that govern their present and future conduct. This is particularly important
17 here, because California law requires the Secretary to enforce the challenged statutes even if he
18 believes them to be unconstitutional, until and unless a court orders him not to. *See Lockyer v. City*
19 *& Cty. of San Francisco*, 33 Cal. 4th 1055, 1087-1112 (2004).

20 24. In the absence of court-ordered relief, Plaintiffs will suffer imminent, immediate, and
21 ongoing irreparable harm in the form a chilling of their free speech rights. No future award of
22 damages can remedy the loss of these constitutional rights. Both the public interest and equity
23 favor granting an injunction to allow Plaintiffs to exercise their constitutional free speech and
24 associational rights. Injunctive relief is therefore necessary and appropriate.

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**COUNT I: VIOLATION OF THE FIRST AMENDMENT TO
THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

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25. Plaintiffs hereby re-allege and incorporate by reference the allegations contained in the above paragraphs as though fully set forth herein.

26. The provisions of California Elections Code sections 14276 and 14291 violate the First Amendment because they prohibit people from displaying or distributing photographs of their marked ballots.

27. Defendant and his agents, acting under color of state law, have threatened to and will enforce and implement the challenged laws against the Plaintiffs' members, in violation of their First Amendment rights.

28. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have and will suffer irreparable harm, which will continue absent injunctive relief.

RELIEF SOUGHT

WHEREFORE, Plaintiffs, on behalf of themselves and their members, seek the following relief:

1. A temporary restraining order, preliminary injunction, and permanent injunction enjoining Defendant Padilla, including his officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with, from enforcing California Elections Code sections 14276 and 14291 against, or otherwise interfering with, voters' taking and distributing images of their marked ballots.
2. A declaration that California Elections Code sections 14276 and 14291 are unconstitutional, facially and as applied.
3. Costs and attorney's fees incurred in this action under 42 U.S.C. § 1988 and other applicable laws.
4. Such other and further relief as may be just and proper.

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DATED: October 31, 2016

Respectfully submitted,

By: /s/ Michael T. Risher

Michael T. Risher
Attorney for Plaintiffs

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, American Civil Liberties Union of San Diego and Imperial Counties
(b) County of Residence of First Listed Plaintiff San Francisco
(c) Attorneys (Firm Name, Address, and Telephone Number)
Michael T. Risher, Julia Harumi Mass
American Civil Liberties Union of Northern California, 39 Drumm Street, San Francisco, CA 94111, Tel: (415) 621-2493

DEFENDANTS
Alex Padilla, California Secretary of State
County of Residence of First Listed Defendant Sacramento
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State 1 1
Citizen of Another State 2 2
Citizen or Subject of a Foreign Country 3 3
Incorporated or Principal Place of Business In This State 4 4
Incorporated and Principal Place of Business In Another State 5 5
Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT: 110 Insurance, 120 Marine, 130 Miller Act, 140 Negotiable Instrument, 150 Recovery of Overpayment of Veteran's Benefits, 151 Medicare Act, 152 Recovery of Defaulted Student Loans, 153 Recovery of Overpayment of Veteran's Benefits, 160 Stockholders' Suits, 190 Other Contract, 195 Contract Product Liability, 196 Franchise
REAL PROPERTY: 210 Land Condemnation, 220 Foreclosure, 230 Rent Lease & Ejectment, 240 Torts to Land, 245 Tort Product Liability, 290 All Other Real Property
PERSONAL INJURY: 310 Airplane, 315 Airplane Product Liability, 320 Assault, Libel & Slander, 330 Federal Employers' Liability, 340 Marine, 345 Marine Product Liability, 350 Motor Vehicle, 355 Motor Vehicle Product Liability, 360 Other Personal Injury, 362 Personal Injury - Medical Malpractice
PERSONAL INJURY: 365 Personal Injury - Product Liability, 367 Health Care/Pharmaceutical Personal Injury Product Liability, 368 Asbestos Personal Injury Product Liability, 370 Other Fraud, 371 Truth in Lending, 380 Other Personal Property Damage, 385 Property Damage Product Liability
PRISONER PETITIONS: Habeas Corpus: 463 Alien Detainee, 510 Motions to Vacate Sentence, 530 General, 535 Death Penalty; Other: 540 Mandamus & Other, 550 Civil Rights, 555 Prison Condition, 560 Civil Detainee-Conditions of Confinement
FORFEITURE/PENALTY: 625 Drug Related Seizure of Property 21 USC § 881, 690 Other
LABOR: 710 Fair Labor Standards Act, 720 Labor/Management Relations, 740 Railway Labor Act, 751 Family and Medical Leave Act, 790 Other Labor Litigation, 791 Employee Retirement Income Security Act
IMMIGRATION: 462 Naturalization Application, 465 Other Immigration Actions
BANKRUPTCY: 422 Appeal 28 USC § 158, 423 Withdrawal 28 USC § 157
PROPERTY RIGHTS: 820 Copyrights, 830 Patent, 840 Trademark
SOCIAL SECURITY: 861 HIA (1395ff), 862 Black Lung (923), 863 DIWC/DIWW (405(g)), 864 SSID Title XVI, 865 RSI (405(g))
FEDERAL TAX SUITS: 870 Taxes (U.S. Plaintiff or Defendant), 871 IRS-Third Party 26 USC § 7609
OTHER STATUTES: 375 False Claims Act, 376 Qui Tam (31 USC § 3729(a)), 400 State Reapportionment, 410 Antitrust, 430 Banks and Banking, 450 Commerce, 460 Deportation, 470 Racketeer Influenced and Corrupt Organizations, 480 Consumer Credit, 490 Cable/Sat TV, 850 Securities/Commodities/Exchange, 890 Other Statutory Actions, 891 Agricultural Acts, 893 Environmental Matters, 895 Freedom of Information Act, 896 Arbitration, 899 Administrative Procedure Act/Review or Appeal of Agency Decision, 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. section 1983
Brief description of cause: First Amendment challenge to state Elections Code provisions; injunctive and declaratory relief.

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions): JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)
(Place an "X" in One Box Only)
SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE: 10/31/2016 SIGNATURE OF ATTORNEY OF RECORD: /s/ Michael T. Risher