SO-CALLED "BALLOT SELFIES": WHO SHOULD DRAW THE LINE BETWEEN THE FIRST AMENDMENT AND THE FIRST AMENDMENT IN MICHIGAN ELECTIONS?

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I. INTRODUCTION

On November 6, 2012, Joel Crookston, a Michigan voter, responded to a prompt on social media to cast a write-in vote for an acquaintance from college for any office in the Michigan general election.[1] After voting, Mr. Crookston not only disclosed his vote, but also provided photographic evidence in the form of a so-called "ballot selfie"[2] and posted the following picture of his ballot on social media:[3]

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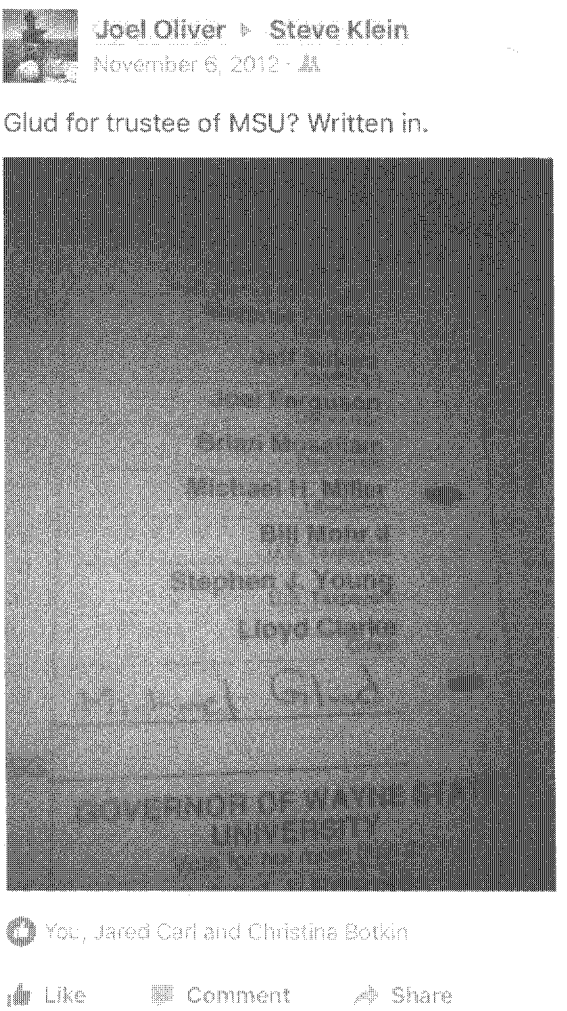
1. Crookston v. Johnson, No. 1:16-cv-01109, 2016 WL 9281943, at *1 (W.D. Mich. Oct. 24, 2016), *rev'd*, 854 F.3d 852 (6th Cir. 2016).

2. *See Ballot selfie*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ballot_selfie [http://web.archive.org/web/20200301215219/https://en.wikipedia.org/wiki/Ballot_selfie] (defining a ballot selfie as "a type of selfie that is intended to depict the photographer's completed ballot in an election, as a way of showing how the photographer cast his or her vote").

3. *Crookston*, 2016 WL 9281943, at *1.



Because he posted a ballot selfie on social media, Michigan statutes required the rejection of Mr. Crookston's ballot. Specifically, Michigan Compiled Laws (MCL) sections 168.579 and 168.738(2) provide:

> 168.579 Primary elections; electors; exposure of ballot; rejection; applicability of section under MCL 168.736a.
>
> 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. This section does not apply to an elector who exposes his or her ballot to a minor child accompanying that elector in the booth or voting compartment under section 736a.[4]
>
> 168.738 Voting; ballots; folding; deposit in ballot box; rejection for exposure.
>
> (2) *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."[5]

Almost four years later, Mr. Crookston sued the Michigan Secretary of State, arguing that Michigan's statutory ban on ballot selfies was unconstitutional.[6] In particular, Mr. Crookston alleged that MCL Sections 168.579 and 168.738(2) deprive individuals of their First Amendment right to express themselves freely by imposing overbroad bans.[7] Consequently, on September 26, 2016, Mr. Crookston filed his request for a preliminary injunction to end the ballot selfie ban.[8] On October 24, 2016, the United States District Court for the Western District of Michigan granted the preliminary injunction in favor of Mr. Crookston, thereby enjoining the enforcement of the ballot selfie ban in Michigan.[9] However, a mere four days later, the United States Sixth Circuit Court of Appeals granted a stay of the preliminary injunction, so that the ballot selfie ban remained in place for Michigan's 2016 elections.[10]

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4. MICH. COMP. LAWS § 168.579 (2019).
5. MICH. COMP. LAWS § 168.738(2) (2019) (emphasis added).
6. *Crookston*, 2016 WL 9281943, at *1.
7. *Id.*
8. *Id.*
9. *Id.* at *7–8.
10. *See* Crookston v. Johnson, 841 F.3d 396, 401 (6th Cir. 2016).

Thereafter, Mr. Crookston's case languished in the United States District Court for the Western District of Michigan. It took the court less than thirty days to grant Mr. Crookston's requested motion for preliminary injunction, but over nine months to deny the Michigan Secretary of State's motion to dismiss the case.[11] Why this delay? Whatever the answer here, the delay resulted in waiting out the tenure of term-limited Secretary of State, Ruth Johnson, whose term expired on January 1, 2019.[12]

Secretary Johnson vigorously opposed Mr. Crookston's claims and, in fact, filed a Motion for Summary Judgment to dismiss this case on December 14, 2018.[13] However, shortly after Secretary Jocelyn Benson took office on January 1, 2019, there were indications that settlement discussions were occurring.[14] Thereafter, a settlement agreement (hereinafter Settlement Agreement) was reached on terms which included the following: (1.) Secretary Benson agreed that MCL Sections 168.579 and 168.738(2) do not apply to displaying a photograph of one's own marked ballot outside of the one-hundred-foot buffer zone around the polling place; (2.) Secretary Benson agreed to amend the polling place photograph and cell phone instructions to allow voters to photograph their own marked ballots; (3.) Mr. Crookston agreed to dismiss his case; and (4.) Mr. Crookston received ninety thousand dollars.[15]

In accordance with the Settlement Agreement, Secretary Benson issued the following instructions for local election officials in July 2019:

> USE OF VIDEO CAMERAS, CELL PHONES, CAMERAS, TELEVISIONS AND RECORDING EQUIPMENT IN THE POLLS: To ensure that all voters who attend the polls on

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11. *See* Crookston v. Johnson, 370 F. Supp. 3d 804 (W.D. Mich. 2018).

12. *See Ruth Johnson*, BALLOTOPEDIA, https://ballotpedia.org/Ruth_Johnson [http://web.archive.org/web/20200302001550/https://ballotpedia.org/Ruth_Johnson].

13. Brief for Defendant in Support of Motion for Summary Judgment, Crookston v. Johnson, No. 1:16-cv-01109 (W.D. Mich. Dec. 14, 2018), ECF No. 83-1.

14. Joint Motion to Hold Case in Abeyance until April 12, 2019, Crookston v. Johnson, No. 1:16-cv-01109 (W.D. Mich. 2016), ECF No. 92.

15. Proposed Stipulation and Order Dismissing Plaintiff's Claims, Crookston v. Johnson, No. 1:16-cv-01109 (W.D. Mich. 2016), ECF No. 99. During the previous eight years of Secretary Ruth Johnson's term as Michigan Secretary of State, the Michigan Department of State paid no funds to any plaintiff in settlement of a case. *See* SENATE FISCAL AGENCY, FY 2017–18 STATUS OF LAWSUITS INVOLVING THE STATE OF MICHIGAN (July 2019), http://www.senate.michigan.gov/sfa/Publications/Lawsuit/Lawsuit_MostRecent.pdf [http://web.archive.org/web/20200301222848/https://www.senate.michigan.gov/sfa/Publications/Lawsuit/Lawsuit_MostRecent.pdf].

> Election Day have a full opportunity to express themselves and exercise their right to vote in private without undue distractions or discomfort, the following must be observed:
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> • *While in the voting booth only*, voters may use a camera or cell phone to take a photograph of their voted ballot. Otherwise, the use of video cameras, still cameras and recording devices by voters, challengers and poll watchers is prohibited in the polls during the hours the polls are open for voting. (This includes the video camera, still camera and recording features built into many cell phones and other electronic devices.) Voters:
>
> > • May take a photograph *only* of a ballot and *only* while in the voting booth.
> >
> > • Must direct their camera at the ballot and within the voting booth (voters should leave the ballot flat on the table if possible).
> >
> > • Must not take pictures of their ballot outside the voting booth, and must not take pictures of themselves, other voters, other voters' ballots, or anything else within the voting area.
> >
> > • Must not share an image of their ballot (including on social media or by other electronic means) until they are at least 100 feet away from any doorway used by voters to enter the building in which a polling place is located.[16]

While the result of *Crookston v. Benson* is not objectionable, the question remains: Do the ends justify the means? The remainder of this Article questions the validity and advisability of "sue and settle" cases like *Crookston v. Benson.*

16. MICHIGAN BUREAU OF ELECTIONS, ELECTION OFFICIALS' MANUAL 39 (July 2019) (emphasis in original), https://www.michigan.gov/documents/sos/XI_Election_Day_Issues_266009_7.pdf [http://web.archive.org/web/20200301223323/https://www.michigan.gov/documents/sos/XI_Election_Day_Issues_266009_7.pdf].

II. IS THE SETTLEMENT AGREEMENT IN *CROOKSTON V. BENSON* MEANINGLESS?

From an appearance standpoint, the Settlement Agreement in *Crookston v. Benson* appears to allow ballot selfies in accordance with the instructions issued to local election officials in July of 2019.[17] Further, MCL section 168.31(b) gives the Secretary of State the authority to "[a]dvise and direct local election officials as to the proper methods of conducting elections."[18] Therefore, because the July 2019 ballot selfie instructions represent Secretary Benson's direction to local election officials, one would assume that these directions now represent the law of the land.

However, appearances can be deceiving because the Michigan Secretary of State has absolutely no authority to amend Michigan election law. To this end, Article III, Section 2 of the Michigan Constitution provides that: "The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."[19]

The Michigan Constitution vests the legislative power of the State of Michigan—i.e., the power to enact substantive law—in the Legislature.[20] Specifically, Article II, Section 4(2) of the Michigan Constitution provides:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. 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. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for

17. *Id.*; *see* Proposed Stipulation and Order Dismissing Plaintiff's Claims, Crookston v. Johnson, No. 1:16-cv-01109 (W.D. Mich. 2016), ECF No. 99.

18. MICH. COMP LAWS § 168.31(b) (2019).

19. MICH. CONST. art. III, § 2.

20. MICH. CONST. art. IV, § 1.

> identification of candidates for the same office who have the same or similar surnames.[21]

Commenting on this constitutional provision, the Michigan Attorney General noted: "Thus, pursuant to the preceding broad mandate, it is within the *exclusive* province of the legislature to enact laws providing for the registration of voters, and the time, place, and manner of conducting elections."[22]

As recognized by the Michigan Court of Appeals in *Andrews v. Branigin*,[23] the Legislature's exclusive role in the election process is a time-honored principle dating back to at least the 1890 Michigan Supreme Court case of *Common Council v Rush*.[24] Discussing *Rush*, the court of appeals in *Andrews* stated, "Under these broad provisions, it has been frequently held to be the exclusive province of the Legislature to enact laws providing for the registration of voters, and the time, place, and manner of conducting elections."[25] Consequently, as the foregoing authorities demonstrate, the Michigan Secretary of State may not regulate the time, manner, or place of elections because Article II, Section 4 of the Michigan Constitution vests such authority exclusively in the Legislature.[26]

In *Sittler v. Board of Control*, the Michigan Supreme Court set forth the following well-settled rules of law: "The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. . . . Public officers have and can exercise only such powers as are conferred on them by law."[27] As indicated earlier, the Michigan Secretary of State is statutorily authorized to "[a]dvise and direct local election officials as to the proper methods of conducting elections."[28] According to *Michigan Chiropractic Council v. Commissioner*, "[a]dministrative interpretation is not binding on the courts and must be rejected if not in accord with the

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21. MICH. CONST. art. II, § 4.
22. Op. Att'y Gen. 5194 (1977) (emphasis added) (citations omitted).
23. Andrews v. Branigin, 21 Mich. App. 568, 175 N.W.2d 839 (1970).
24. Common Council of City of Detroit v. Rush, 82 Mich. 532, 46 N.W. 951 (1890).
25. *Andrews*, 21 Mich. App. at 572, 175 N.W.2d at 841.
26. MICH. CONST. art. II, § 4.
27. Sittler v. Bd. of Control of Mich. Coll. of Mining & Tech., 333 Mich. 681, 687, 53 N.W.2d 681, 684 (1952) (quoting Twp. of Lake v. Millar, 257 Mich. 135, 142, 241 N.W. 237, 240 (1932)).
28. MICH. COMP. LAWS § 168.31(b) (2019).

intent of the Legislature."[29] Stated differently, "an agency interpretation cannot overcome the plain meaning of the statute."[30]

Therefore, the Michigan Secretary of State may neither amend the Michigan election law nor interpret the Michigan election law in a manner that overcomes its plain meaning, viz., to interpret MCL sections 168.579 and 168.738(2) to allow ballot selfies. So, what effect, if any, does the Settlement Agreement in *Crookston* create?

Rather than reinvent the wheel on this question, election law scholar Michael T. Morley provides an excellent discussion on the mechanics of settlement agreements between a private party plaintiff and a government-defendant.[31] As to the definition of a settlement agreement:

> A settlement agreement is a private contract among some or all of the parties to a case that requires termination of the settling plaintiffs' claims. The defendants often agree to some concession, such as paying the plaintiffs, taking or refraining from certain acts, dismissing counterclaims, or waiving or disclaiming certain alleged rights of their own.[32]

As to the enforceability of a settlement agreement:

> The settlement agreement itself, rather than a court order, specifies the parties' obligations toward each other and, in most cases, the court is not required to review or approve it. As litigants may stipulate to dismiss a case without the court's approval, a court has little or no opportunity to reject most settlements. Indeed, the court may not even see the settlement agreement; many settlement agreements contain confidentiality clauses that prohibit public disclosure of their terms. A settlement agreement is enforceable in the same manner as any other contract: through a breach-of-contract suit for

29. Mich. Chiropractic Council v. Comm'r of Office of Fin. & Ins. Servs., 262 Mich. App. 228, 233, 685 N.W.2d 428, 431 (2004) (citing Lanzo Constr. Co. v. Dep't of Labor, 86 Mich. App. 408, 414, 272 N.W.2d 662 (1978), *vacated*, 475 Mich. 363, 716 N.W.2d 561 (2006).

30. *In re* Complaint of Consumers Energy Co., 255 Mich. App. 496, 504, 660 N.W.2d 785, 789 (2002) (citing Ludington Serv. Corp. v. Acting Comm'r of Ins., 444 Mich. 481, 505, 511 N.W.2d 661, 672 (1994)).

31. *See generally* Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PENN. J. CONST. L. 637 (2014).

32. *Id.* at 682–83.

> compensatory damages or, if the requirements for equitable relief are satisfied, specific performance.
>
> In general, a claim for breach of a settlement agreement must be brought in state court unless there is an independent basis for federal jurisdiction. The Supreme Court has held, however, that parties to a settlement agreement arising from a federal lawsuit may stipulate that the federal court in which that lawsuit was filed may exercise jurisdiction over disputes concerning the agreement. . . . In the event that the government enters into a settlement agreement that declares a legal provision invalid and bars the government from enforcing it, requires the government to apply or enforce a provision in certain ways, or mandates that an agency promulgate particular regulations, a court likely would refuse to enforce the agreement against unwilling officials under the "reserved powers" doctrine.[33]

As to the remedies available to a plaintiff against a government-defendant, damages, rather than specific performance, is the likely result:

> Even if a court rejected all of these doctrines and held that a settlement agreement invalidating, definitively construing, or requiring enforcement of a legal provision were valid, the court would be unlikely to grant specific performance. "[E]ven where courts have found that a legislature is bound by the contractual promises of a former legislature, the remedy is simply damages, not enforcement of a legislative scheme that the future body does not favor." A court also has the further alternative of treating the settlement agreement as rescinded, rejuvenating the original legal challenge. Thus, unlike consent decrees, executive officials cannot use settlement agreements to circumvent statutory limitations on their authority or entrench their preferred constitutional and policy preferences in a legally enforceable manner.[34]

Accordingly, with respect to the Settlement Agreement in *Crookston*: (1.) The Settlement Agreement was never approved by the U.S. District Court for the Western District of Michigan, rather, the court merely

33. *Id.* at 683–84.
34. *Id.* at 687.

dismissed the case;[35] (2.) MCL sections 168.579 and 168.738(2) still impose the ballot selfie ban; and (3.) If Secretary Benson or any successor Secretary of State issues new instructions to uphold the ballot selfie ban as required by Michigan election law, then Mr. Crookston's likely remedy is damages for breach of contract rather than specific performance.[36]

Based on the limited effect of the Settlement Agreement in *Crookston v. Benson*, is it fair to conclude that this Settlement Agreement is meaningless? From a legal perspective, the answer here is "yes"; however, from a practical perspective, a settlement agreement still has some value.

> Despite their limitations, settlement agreements can play a valuable role in allowing plaintiffs to negotiate agreeable resolutions to cases against government defendants. Institutional inertia may contribute to the "stickiness" of settlement agreements, regardless of their legal enforceability. Moreover, if a plaintiff's legal theory is sound and a court likely would rule in its favor, then subsequent administrations would be unlikely to nullify a negotiated settlement. Successor administrations are most likely to abrogate settlement agreements where the plaintiffs' underlying claims are weak or the legal issues are unsettled, but these are precisely the types of cases for which we would not want an incumbent administration to irrevocably bind its successors without a court ruling on the merits, and for which judicial resolution of the issues is desirable. Thus, using settlements instead of consent decrees not only prevents Article III justiciability problems but also, in the context of government-defendant cases, helps prevent government officials and agencies from entrenching their policy preferences and making permanent commitments to which they lack the legal authority to agree.[37]

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35. Proposed Stipulation and Order Dismissing Plaintiff's Claims, Crookston v. Johnson, No. 1:16-cv-01109 (W.D. Mich. 2016), ECF No. 99.

36. Morley, *supra* note 31, at 687. *See generally* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1781 (2003). Stated differently, a governing body may not enter into contracts that restrict subsequent bodies in the exercise of their governmental powers. *See* City of Hazel Park v. Potter, 169 Mich. App. 714, 719–22, 426 N.W.2d 789, 791–94 (1988). By contrast, a governing body may enter into contracts that bind its successor(s) in the exercise of its proprietary and business powers. *See* Harbor Land Co. v. Grosse Ile Twp., 22 Mich. App. 192, 205–06, 177 N.W.2d 176, 182–84 (1970).

37. Morley, *supra* note 31, at 688.

It must be recognized that Secretary Benson's "sue and settle" options were rather limited in *Crookston*. As indicated earlier, the Michigan Legislature has the exclusive authority to amend Michigan election law pursuant to the Michigan Constitution.[38]

In *League of Women Voters v. Benson*, the U.S. District Court for the Eastern District of Michigan recognized that Secretary Benson had no authority to enter into a consent decree in matters where the Michigan Legislature has exclusive jurisdiction under the Michigan Constitution.[39] This mistake was not to be repeated in *Crookston v. Benson*, hence the Settlement Agreement.

III. THE LIKELY RESULT IN *CROOKSTON V. BENSON* IF SETTLEMENT WAS NOT REACHED

Had *Crookston v. Benson* not been settled in the U.S. District Court for the Western District of Michigan, the Sixth Circuit Court of Appeals would have likely upheld the ballot selfie ban. The Sixth Circuit when it stayed the preliminary injunction initially granted to Mr. Crookston stated, "[W]e are skeptical of the District Court's assessment of Crookston's odds of success on the merits."[40]

In *Crookston*, the Sixth Circuit stated, with regard to voter privacy, that the "ban on photography at the polls seems to be a content-neutral regulation that reasonably protects voters' privacy—and honors a long tradition of protecting the secret ballot."[41] The Sixth Circuit reasoned:

> [E]ven if the ballot-exposure is not content-neutral, the Supreme Court has upheld content-specific speech restrictions in polling places before, either because the State can further its compelling interests in protecting "the rights of its citizens to vote freely" in an election "conducted with integrity and reliability" through "reasonable" voting regulations that do not "significantly impinge" on First Amendment rights . . . or because a polling place is not a traditional public forum.[42]

The Sixth Circuit then invoked the State's policy and its advancement of "serious" governmental interests, such as "preserving the privacy of

38. MICH. CONST. art. III, § 2.

39. League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867 (E.D. Mich. 2019), *vacated sub nom.* Chatfield v. League of Women Voters of Michigan, 140 S. Ct. 429 (2019).

40. Crookston v. Johnson, 841 F.3d 396, 399 (6th Cir. 2016).

41. *Id.* (citing Connection Distrib. Co. v. Holder, 557 F.3d 321, 328 (6th Cir. 2009)).

42. *Id.* at 400 (citations omitted).

other voters, avoiding delays and distractions at the polls, preventing vote buying, and preventing voter intimidation."[43] While Mr. Crookston attempted to minimize the risk to the voting process when taking his photo, multiple Sixth Circuit cases dealt with less secure situations.[44]

The *Crookston* court explores the United States Supreme Court decision *Burson v. Freeman*, where the Court noted that the links between these aforementioned governmental interests and the ban on ballot exposure are "common sense" rather than a "historical accident."[45] The Sixth Circuit in *Crookston* noted that it was uncertain whether Mr. Crookston's proposal "creates no risk of delay, as ballot-selfie takers try to capture the marked ballot and face in one frame—all while trying to catch the perfect smile."[46] Nor did the Sixth Circuit "think much of Crookston's argument that the State has offered no evidence of ballot photography being used in vote-buying schemes or to intimidate voters. The Supreme Court made quick work of a similar argument in *Burson*."[47] The *Crookston* court quoted the *Burson* holding: "The fact that these laws have been in effect for a long period of time . . . makes it difficult for the States to put on witnesses who can testify as to what would happen without them."[48]

The Sixth Circuit declared that it is unclear whether a ban on ballot selfies "significantly impinges" upon Crookston's First Amendment rights.[49] The court reasoned that a "picture may be worth a thousand words, but social media users can (and do) post thousands of words about whom they vote for and why."[50] While the loss of First Amendment freedoms deserves serious consideration, the court concluded that the "government's interests in a stay outweigh any imposition on the expressive rights of Crookston and other would-be-selfie-takers—particularly given the privacy interests of *other* voters in not having *their* votes made public."[51] Finally, the Sixth Circuit stated:

> [T]here is no risk that Crookston or anyone else will be fined or face jail time for sharing photographs of their ballots. The

43. *Id.*

44. *Id.*; *see also* United States v. Robinson, 813 F.3d 251, 254 (6th Cir. 2016) (affirming a vote-buying conviction); United States v. Turner, 536 F. App'x 614, 615 (6th Cir. 2013); United States v. Young, 516 F. App'x 599, 600–01 (6th Cir. 2013).

45. Burson v. Freeman, 504 U.S. 191, 198–99 (1992).

46. *Crookston*, 841 F.3d at 400.

47. *Id.*

48. *Id.* (quoting *Burson*, 504 U.S. at 208).

49. *Id.* (citing *Burson*, 504 U.S. at 198–99).

50. *Id.*

51. *Id.*

> Secretary remarked that she will not prosecute anyone for such violations. Instead, with a hint of Solomonic wisdom, the law declares that violators will face one penalty: the vote they wanted the world to see will not count.[52]

The court indicated that it was "not resolving the merits of the case."[53] However, the detailed "skepticism" noted above suggests that the likely result of *Crookston* was that the selfie ban would have been upheld had the case not been settled in the U.S. District Court for the Western District of Michigan.[54]

It must be emphasized that Mr. Crookson's likely defeat at the hands of the Judiciary would not have ended his quest to eliminate the ballot selfie ban. As indicated earlier, it is within the exclusive province of the Michigan Legislature to determine the fate of the ballot selfie ban.[55] Significantly, on March 7, 2017, House Bill No. 4328 was introduced in the Michigan House of Representatives with significant bipartisan support.[56] The bill proposed to eliminate the ballot selfie ban in Michigan elections.[57] Significantly, on December 12, 2018, the bill was passed out of the Committee on Elections and Ethics for the Michigan House of Representatives.[58] In fact, Mr. Crookston himself testified at this committee hearing in favor of House Bill No. 4328.[59] Although House Bill No. 4328 was not enacted into law, the fact remains that the proper remedy to eliminate the ballot selfie ban lies with the Michigan Legislature.[60]

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52. *Id.*

53. *Id.* at 401.

54. It is interesting to note that if the Sixth Circuit had been given the opportunity to uphold the ballot selfie ban, this position would be contrary to at least one other circuit, which has struck down a ballot selfie ban. *See* Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016).

55. Andrews v. Branigin, 21 Mich. App. 568, 572, 175 N.W.2d 839, 841 (1970).

56. H.R. 4328, 2017 Leg., 99th Sess. (Mich. 2017).

57. *Id.*

58. *See* H.R. 99-79, Reg. Sess., at 2618 (Mich. 2018).

59. See *Hearing on H.B. 4328 Before the Committee on Elections and Ethics* (Mich. 2018), http://house.michigan.gov/SessionDocs/2017-2018/Minutes/ELEC121218.pdf [http://web.archive.org/web/20200302000807/https://www.house.mi.gov/SessionDocs/2017-2018/Minutes/ELEC121218.pdf]; *see also* Kathleen Gray, *House Panel Votes to Allow Selfies at Voting Precincts*, DET. FREE PRESS (Dec. 12, 2018, 6:43 PM), https://www.freep.com/story/news/politics/2018/12/12/house-panel-vote-lifts-selfie-ban-polling-places/2294514002/ [http://web.archive.org/web/20200302001038/https://www.freep.com/story/news/politics/2018/12/12/house-panel-vote-lifts-selfie-ban-polling-places/2294514002/].

60. *See House Bill 4328*, Michigan Legislature (2017), https://www.legislature.mi.gov/(S(pld2d4rvrdzfbf3miniq13ab))/mileg.aspx?page=getObj

IV. CONCLUSION

The result of the Settlement Agreement in *Crookston v. Benson* is not objectionable: the elimination of the ballot selfie ban.[61] Because Secretary Benson or a successor Secretary of State is able to issue new instructions to local election officials at any time, the Settlement Agreement is not a permanent "fix" to eliminate the ballot selfie ban. Moreover, although rather unlikely, any elector in Michigan could presumably file a lawsuit against the Michigan Secretary of State to issue polling place instructions that are compliant with MCL sections 168.579 and 168.738(2).[62] Nonetheless, the practical effect of the Settlement Agreement is that, currently, there is no ban on ballot selfies in Michigan elections.

Governments struggle to draw the appropriate line between protecting the First Amendment rights of freedom of speech and expression (that is, the ability to photograph and disseminate a ballot selfie) and the First Amendment rights to protect the electoral process (that is, to prevent vote buying, polling place disruptions, etc.). As this Article illustrates, the Michigan Constitution provides that the Michigan Legislature—not the Michigan Secretary of State—should draw this line between the First Amendment and the First Amendment in Michigan elections. But now that the wrong branch of Michigan government has overstepped its role, it is unlikely that the Legislature—the appropriate branch of Michigan government to act here—will properly end the ballot selfie ban based on the mistaken perception that this issue has now been resolved.

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ect&objectName=2017-HB-4328 [https://web.archive.org/web/20200402003045/https://www.legislature.mi.gov/(S(pld2d4rvrdzfbf3miniq13ab))/mileg.aspx?page=getObject&objectName=2017-HB-4328]; *Andrews*, 21 Mich. App. at 572, 175 N.W.2d at 841.

61. *See* Proposed Stipulation and Order Dismissing Plaintiff's Claims, Crookston v. Johnson, No. 1:16-cv-01109 (W.D. Mich. 2016), ECF No. 99.

62. Michigan courts have held that ordinary citizens have standing to enforce the law in election cases. *See, e.g.*, Deleeuw v. Bd. of State Canvassers, 263 Mich. App. 497, 506, 688 N.W.2d 847, 853 (2004); Helmkamp v. Livonia City Council, 160 Mich. App. 442, 445, 408 N.W.2d 470, 472 (1987).