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**IN THE UTAH STATE SUPREME COURT**

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| FARLEY ANDERSON ; HELEN ANDERSON; STEVEN G. MAXFIELD: STEVEN K. MAXFIELD; et al.,<br><br>Petitioners,<br><br>v.<br><br>LT. GOVERNOR GREG BELL: MARK THOMAS: PAUL NEUENSCHWANDER: SPENCER HADLEY: JOHN DOES 1-10,<br><br>Respondents. | **SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT AND AMENDED PETITION FOR EXTRAORDINARY WRIT**<br><br>Case No. 20100237 |

Lieutenant Governor Greg Bell, Mark Thomas, Paul Neuenschwander, and Spencer Hadley (Lieutenant Governor), through their attorney of record, Thom D. Roberts, Assistant Utah Attorney General, submit the following Supplemental Memorandum in Opposition to Petition for Extraordinary Writ and Amended Petition for Extraordinary Writ.

Farley Anderson, unaffiliated with a registered political party, attempted to file a Certificate of Nomination to run as a candidate for Governor. The Lieutenant Governor was

unable to determine that there were signatures of more than 1,000 registered voters attached to the Certificate of Nomination; therefore, he refused to accept and process Mr. Anderson's Certificate of Nomination. Mr. Anderson brought this action for extraordinary relief, seeking to have the Court order the Lieutenant Governor to place his name on the ballot as an unaffiliated candidate for Governor.

## INTRODUCTION

The briefs Petitioners and Amicus Curiae filed with the Court present two questions. First, did the Utah Legislature intend that independent candidates for state-wide office (and those seeking to qualify initiatives) be permitted to use electronic signatures to meet their statutory signature requirements. Second, if the Legislature has not permitted electronic signatures, does the state or federal constitution mandate their use by Petitioner or Amicus.

To answer the first question, Petitioners knit together isolated provisions from various parts of the Utah Code to claim that the Utah Legislature has considered, and approved, the use of electronic signatures to satisfy Election Code requirements. Notable by its absence is any citation to any statute in which the Legislature specifically authorizes or mandates e-signatures to meet Election Code requirements.

When the Utah Code is examined as a whole, several points come into focus. The Elections Code contemplates a paper and ink system. The default definition of "signature" in the statute on statutes, which never uses the word "electronic," is not the Legislature's

pronouncement on when e-signatures may be used: the Uniform Electronics Transactions Act ("UETA") is.

Under UETA, the use of electronic signatures is only allowed in transactions where both parties have agreed to use electronic records or signatures, which is not the case here. Further, by its express language, UETA does not require the State to accept Petitioner's electronic signatures: "*nothing in this chapter requires any state or governmental agency to . . . (b) use or permit the use of electronic records or electronic signatures.*" Utah Code Ann. § 46-4-501(4) (emphasis added).

As to the constitutional question, Petitioners argue that this is a "ballot access" case. They claim the Constitution mandates that if the state fails to recognize and use electronic signatures, they will be denied access to the ballot. Petitioners cite no cases in support of such a broad proposition. In addition, even if this were a "ballot access case," this Court would be asked to balance the burdens and harms to the Petitioners against the interests of the State. There is no evidence before this Court that the paper and ink system the Legislature imposed constitutes an undue burden upon independent candidates seeking a place on the ballot. The alleged burdens and harms do not justify striking down a system that has been in use for 114 years.

Petitioners and UEG also claim that the Lieutenant Governor acted beyond his authority and imposed additional non-statutory requirements on Mr. Anderson's ballot petition. This is fiction. The Lieutenant Governor, in consultation with the Attorney General's Office, reviewed

the provisions of the Election Code, interpreted those Code provisions, and determined that Mr. Anderson did not satisfy the statutory requirements. Rather than being improper, those actions of interpreting the legislative provisions and administering and executing the laws is exactly what executive branch officers always have done, and always will do, under their constitutional authority.

Petitioners and UEG seek to have this Court do what the legislative and executive branches of government have not done: authorize the use of electronic signatures to meet Utah's Election Code Requirements. Respondents respectfully urge this Court to decline the invitation to judicially mandate the recognition of electronic signatures in the administration of the election laws.

## ARGUMENT

### I. UTAH STATUTORY LAW DOES NOT REQUIRE THAT THE STATE USE OR PERMIT THE USE OF ELECTRONIC SIGNATURES TO FULFILL ELECTION CODE REQUIREMENTS

Petitioners and UEG stridently argue that the Utah Legislature has authorized the use of electronic signatures and that the Office of Lieutenant Governor has acted outside the law in refusing to accept them. To make this argument, Petitioners and UEG bounce around the Utah code, picking and choosing isolated provisions. The argument fails when one's focus in reviewing the Code is understanding the will of the Legislature rather than seeking to exploit imagined loopholes. Starting with a review of the signature gathering requirements, the Code

reveals that the Legislature contemplated that ink and paper signatures would be submitted to the county clerks.

If that were not enough, the Legislature's pronouncement on electronic signatures and records, the Utah Uniform Electronic Transactions Act (UETA), Utah Code Ann. §§ 46-4-101 et. seq., does not require that electronic signatures be accepted in the elections context. On the contrary, it specifically provides that a governmental agency is not required to accept electronic signatures unless it has agreed to accept them. The Act further specifies that no governmental agency is required to accept electronic signatures. Those pronouncements are not undone, as Petitioners suggest, by the default definition of "signature," which does not even use the word "electronic" in describing what a signature is.

### A. The Utah Election Code Contemplates that Independent Candidates for Governor Submit Ink Signatures on Paper

Election Code provisions for Certificate of Nomination petitions for candidates not affiliated with a party contemplate and require a paper-based, pen and ink system grounded in the physical, not virtual, world. This is how it has always been interpreted and complied with – Petitioner Anderson is the first to ask for a different standard.

Utah Code Ann. § 20A-9-502 requires an independent candidate to prepare a "certificate of nomination" and sign and swear to before a notary, who attaches his or her notarial certificate. The candidate is then required to "attach" "signature sheets" to "that" certificate. The statute does not say the candidate may "link" a signature "page" to the certificate or that a supporter may

"type the signature" on the same web page. Nor does it say that later the candidate can type a list of the names and addresses of those people may have gone to a website and provided information and that the typed list of names contains "signatures" when presented to a county clerk or the Lieutenant Governor. Further, the signature sheet must contain "a place for the registered voter's signature," "a place for the registered voter to *print his name*" and a "place for the registered voter's address." Utah Code Ann. § 20A-9-502(2)(a) (emphasis added). These provisions, along with the historical use of holographic signatures, show that Legislature was describing and creating a paper-based system.

The requirements to qualify an initiative for the ballot contain even more dictates that can only be satisfied by paper and ink. In the initiative process,[1] an initiative petition is "printed" and required substantially to be in the form as set forth in the statute. Utah Code Ann. § 20A-7-203(1)(a). Sponsors create an initiative packet, which consists of a copy of the initiative petition, a copy of the proposed law, and up to fifty signature sheets; the packets are bound "at the top" so that the packets may be "conveniently opened for signing." *Id.* § 20A-7-204(4)(b). Signature sheets are required to be "printed on *sheets of paper* 8 ½ inches long, 11 inches wide." *Id.* § 20A-7-203(2)(a) (emphasis added). Anyone who signs the packet states that they "have personally signed *this* petition." *Id.* § 20A-7-203(1)(a) (emphasis added). The final page of each

[1]Electronic signatures in the initiative process are not properly before the Court. This is provided as an example of another area indicating electronic signatures are not contemplated under the Election Code.

initiative packet is required to have a printed or typed verification to be signed by the person who circulates the petition, verifying that all the names in the packet "were signed by persons who professed to be the persons whose names appear in it, and each of them signed his name on it in my presence." *Id.* § 20A-7-203(3).

That the signatures must be applied to signature sheets which are "printed on sheets of paper" unquestionably contemplates a paper-based system with holographic signatures. But the other requirements–from the binding, the circulation, that it was personally signed, and signed in the presence of another–again demonstrate the legislative understanding and intent for a paper-and-ink-based system.

When the Legislature *has* directed the Lieutenant Governor to accept and electronic signatures and records, the Legislature has expressly done so in the Election Code. *E.g.,* Utah Code Ann. § 20A-11-103(2) (requiring Office of Lieutenant Governor to accept financial reports electronically); *see also* Utah Code Ann. § 20A-7-801 *et seq.* (requiring Office of Lieutenant Governor to establish a statewide electronic voter information website program). Such explicit instruction would be unnecessary if Petitioners' and UEG's theory that the Legislature had already authorized electronic records and signatures were correct. Nor would the Legislature need to take up the issue of the use of electronic signatures in the elections context as an interim study item this year. *See* S.J.R. 15, 2010 Session, Item 101.

UETA is a uniform act promulgated by the National Conference of Commissioners on Uniform State Laws. According to the Act, part of its rationale is to "make uniform the law with respect to the subject of this chapter among the states enacting it." Utah Code Ann. § 46-4-106(3). It is telling that none of the other 48 states that have adopted the uniform law permit electronic signatures to satisfy their election requirements, nor have any cases or opinion said that any state must.

When all of the relevant provisions are considered, there can be no question that the Election Code as adopted by the Legislature and administered by the Lieutenant Governor envisions a paper and ink system, not electronic signatures.

### B. By its Express Language, UETA Does Not Require a Governmental Agency to Use or Permit the Use of Electronic Signatures, but Does Require a Party to a Transaction, like the Lieutenant Governor, to Agree to the Application of UETA

The Legislature's pronouncement on electronic signatures is set forth in UETA. That statute does not require, as Petitioners and Amicus claim, that the State must accept electronic signatures to meet Election Code requirements. Indeed, UETA gives the Lieutenant Governor complete discretion to not accept electronic signatures.

In several places UETA makes plain that, with the exception of certain transactions listed in Section 46-4-503, governmental agencies possess complete discretion to decide when they will and will not accept electronic signatures. This concept is found in UETA's long title, along with

the Legislature's declaration that UETA is to be its pronouncement on electronic records and signatures:

> An act relating to establishing criteria, procedures, and legal standards governing electronic transactions; authorizing state agencies to make rules defining transactions that *will and will not be* conducted electronically; requiring state agencies to comply with existing record retention requirements; and authorizing the Chief Information Officer to prepare model rules and standards to assist state agencies.

S.B. 125, 2000 Legislative Session (emphasis added).

UETA and its provisions on electronic signatures only apply to transactions where both parties have agreed to use electronic signatures. Utah Code Ann. § 46-4-105(2)(a). UETA reinforces this discretion in Section 46-4-501, which states: a "state governmental agency *may*, by following the procedures and requirements of Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules that: (a) identify specific transactions that the agency is willing to conduct by electronic means; (b) identify specific transactions that the agency *will never conduct by electronic means*. . . ." If that were not sufficiently clear, the statute reiterates in subsection 4 of that provision that, with the exception of retaining electronic records for audits, "nothing in this chapter requires any state governmental agency to: (a) conduct transactions by electronic means; or (b) use or permit the use of electronic records or electronic signatures." Utah Code Ann. § 46-4-501(4).

These provisions insure that any governmental entity will have input and the ability to control the manner and format of electronic records and signatures that it will use, permit the use

of, or act upon. This explicitly allows the governmental entity to insure that communication can occur in compatible formats, readable by the entity, and that the electronic processes will satisfy the public interests and statutory purposes involved in the transaction. The statute provides for various provisions and features of electronic transactions, but it also authorizes the parties to vary the terms, conditions, or requirements of UETA, Utah Code Ann. § 46-4-105(4), making government consent essential to determine what provisions and requirements apply. UETA constitutes the legislatively adopted policy with regard to electronic records and signatures generally and specifically as to state entities in the use or recognition (i.e., to "permit the use") of electronic records and signatures.

Even in the absence of that unequivocal language (i.e., that a governmental agency need not to accept electronic signatures), the Lieutenant Governor has the same right as any other party to a transaction to accept an electronic signature only if he agrees to allow the transaction to be conducted electronically. UETA does not require any record or signature to be created, generated, communicated or otherwise processed electronically – it is applicable only to transactions between parties who have each agreed to conduct the transactions by electronic means. Utah Code Ann. § 46-4-105(1), (2)(a).

The Lieutenant Governor has not specified the manner and format for electronic records and electronic signatures, specified or controlled the processes and procedures to insure adequate integrity, security, or other required attributes for the electronic records and signatures as

discussed in section 46-4-501(1), or determined that the electronic signatures and records are compatible with the policy and purposes of records and signatures under the election law. He has not agreed to conduct transactions under the Election Code electronically, including certificates of nomination for unaffiliated candidate filing. Therefore, UETA does not authorize use of electronic records for signatures in these circumstances.

Petitioner Anderson claims that the "transaction" involved is between the signer and the Anderson campaign, that each of them have agreed to the use of electronic means, and therefore UETA applies. However, the transaction in question, and the transaction that is the basis of this suit, is between Mr. Anderson and the Lieutenant Governor regarding accepting and processing his Certificate of Nomination and placing him on the ballot.

"Transaction" is defined under UETA:

> (16) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

Utah Code Ann. § 46-4-102(16). Mr. Anderson is attempting to complete a transaction involving governmental affairs–being placed on the ballot as a candidate for Governor—with the Lieutenant Governor. Mr. Anderson is not attempting to enforce the business or commercial transaction between him and the signer (they cannot have "governmental affairs" as they are not officers, officials, or members of the government). Rather, it is Anderson's relation with the

Lieutenant Governor in attempting to establish his entitlement to be on ballot that is the transaction involving "governmental affairs" and at issue here.

This is not similar to a court upholding an electronic transaction against a statute of frauds defense. This is not similar to a governmental licensing entity recognizing the transfer of property between two parties done electronically. Those involve the rights between the private parties and the governmental recognition of those rights. Here it is the Lieutenant Governor administering the election laws and determining whether Petitioner Anderson complied with the statutory requirements such that he may be placed on the ballot. The Lieutenant Governor is enforcing the states' compelling interests in the proper functioning of its election system. That is the transaction that is involved here.

The Lieutenant Governor must insure that the state's interests and requirements are met before a candidate is put on the ballot. The governmental entity (Lieutenant Governor) cannot be required to "use or permit the use of electronic records or electronic signatures." Utah Code Ann. § 46-4-501(4)(b). Rather, the Lieutenant Governor must consent to the use of such records or signatures in the transaction, *id.* § 46-4-105(2)(a), in order for UETA to apply and the electronic signatures to be accepted. Since the State has not agreed to the use of, or to permit the use of, electronic signatures under the Election Code process, they are not acceptable. The State cannot be required to accept them.

### C. The General Definition of Signature, Which Does Not Even Mention Electronic Signatures, Does Not Override the Elections Code and UETA

Petitioners and UEG ask this Court to disregard the Election Code's plain language and to ignore the provisions of UETA that expressly state that a governmental agency need not accept electronic signatures. They prefer that this Court base its decision on Utah Code Ann. § 68-3-12. There are many manifest problems with this approach.

First, Section 68-3-12 is a "default" set of definitions and is specifically limited in its application. It is a "rule of construction" found in the statute on statutes. Section 68-3-12(2) states:

> In the construction of the statutes, the definitions listed in this subsection (2) shall be observed, unless the definition would be inconsistent with the manifest intent of the Legislature, or repugnant to the context of the statute.

The definition for "signature" is in Section 68-3-12(2)(w) and that for a "writing" is in Section 68-3-12(2)(cc); both are subject to that limitation on use.

Petitioners and UEG ask that this Court find that this general definition trumps and controls over the structure of the Election Code, the express provisions of UETA, and the manifest intent of the Legislature. This is contrary to the well settled principle of statutory construction that "when two provisions address the same subject matter and one provision is general while the other is specific, the specific provision controls." *Emergency Physicians Integrated Care v. Salt Lake County*, 207 UT 72, ¶ 19, 167 P.3d 1080 (citation and internal quotations omitted).

Petitioners and UEG claim that electronic signatures are included within the statute on statutes definition and are to be treated the same as holographic signatures. Such a construction is inconsistent with the structure of the Election Code, the express provisions of UETA, and the manifest intent of the Legislature. The Legislature intended UETA to set the policies with regard to the electronic records and signatures, their use and acceptability, and their legal effect. It authorizes governmental entities to use, receive, and give effect to electronic records and signatures, subject to the restrictions and requirements of that Act. That electronic signatures are the same as holographic signatures and must be accepted by all parties in all circumstances and without one party's consent, including government's, is incompatible with and contrary to UETA. Thus, under Section 68-3-12(2), the statutory definition and Petitioners' construction is not applicable.

The argument that the general definition requires recognition of these supposed "electronic signatures" is also repugnant to the context of the election statutes. The Election Code provisions, including the provisions for Certificate of Nomination petitions for candidates not affiliated with a party, generally contemplate and require a paper-based, pen and ink system. When the Legislature has directed the Lieutenant Governor to accept filings electronically, such as financial statements, the Legislature has specifically authorized it in the Election Code. *See* Utah Code Ann. § 20A-11-103(2). In order to appear on the ballot as an unaffiliated candidate, the candidate must show a modicum of support by having circulated his nominating petition,

with attached signature sheets, and obtained the signatures of 1,000 registered voters within the state. Candidates and election officials have always used holographic signatures and no one, until Petitioner Anderson, has attempted to use or establish the right to use anything other than individual voter signatures on the petition.

Petitioners and UEG may have an even more fundamental problem with their argument. It is not altogether clear that the general definition of "signature" actually recognizes electronic signatures. The word electronic does not appear anywhere in the definition of signature which is defined as a mark or a "writing." In 2003, the Utah Legislature modified the definition of "writing" to include writings that are electronically stored, but made no change to the definition of signature.[2]

The broad use of the definition of "signature" and "writing" as applying to electronic signatures is inconsistent with the manifest intent of the Legislature as expressed in UETA. It is also repugnant to the context of the election statutes involved here. On both of those bases, and pursuant to the limitations contained in the rules of construction, that definition and the common law context do not apply to require acceptance of the alleged electronic signatures under the election code.

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[2]Petitioners and UEG also claim that Utah law has always allowed and recognized electronic signatures. However, UEG also argues that the primary purpose of UETA was to overrule judicial decisions which had refused to recognize electronic signatures. *See* Memorandum of Utahns for Ethical Government at 36(citing "Uniform Electronic Transactions Act, Legislative Developments, 2002 UTAH L. Rev 935, 939).

## II. NEITHER THE UTAH CONSTITUTION NOR THE FEDERAL CONSTITUTION REQUIRES THE RECOGNITION OR USE OF ELECTRONIC SIGNATURES UNDER UTAH ELECTION LAW

Petitioners and UEG make two arguments that the State and federal constitutions mandate that the Lieutenant Governor recognize and allow electronic signatures in his administration of the Election Code. First, they argue that if the State refuses to permit electronic signatures, it constitutes a denial of access to the ballot. Second, they appear to argue that their free speech rights will be violated if they are not permitted to use electronic signatures. Neither constitutional theory requires the State of Utah and the Lieutenant Governor to recognize and permit the use of electronic signatures.

### A. An Inability to Utilize E-Signatures Does Not Impermissibly Restrict Access to the Ballot

#### 1. The U.S Constitution Does Not Require that the State Permit the Use of Electronic Signatures.

Petitioners and UEG argue that this is a "ballot access case" and that any regulation should be reviewed under the "strict scrutiny" standard. Further, they argue that the State cannot justify the regulations under that. However, they misstate the standard to be applied, which is a balancing test, and cannot prevail under the correct standard.

Under federal law, the right of a candidate to appear on the ballot is not fundamental and the existence of barriers to a candidate's access to the ballot does not itself compel strict scrutiny. *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (quoting Bullock v. Carter, 405 U.S. 134, 143

(1972)); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986).

In *Anderson v. Celebrezze*, 460 U.S. 780, (1983), the Court struck down an early filing deadline for presidential candidates. The Court described the standard and process for review, stating that a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the [c]ourt must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

*Id.* at 789. Courts recognize that the State must play an active role in structuring elections: "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The United States Supreme Court and this Court have, accordingly, recognized that it is inappropriate to apply strict scrutiny to every election law regulation

*Burdick v. Takushi*, 504 U.S. 428 (1992), quoted by this Court in *Utah Safe-to-Learn/Safe-to-Worship Coalition v. Utah*, 2004 UT 32, 94 P.3d 217, involved a challenge to Hawaii not allowing write-in votes. The Court, first noting the requirement of States to pass

regulations in election matters, held that any ballot challenge should be reviewed by balancing the interests as in *Anderson*:

> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized, when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289, 112 S. Ct. 698, 705, 116 L. Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson* [*v. Celebrezze*], 460 U.S. at 788.

*Burdick*, 504 U.S. at 434. In other words, strict scrutiny is not always the standard in election challenges. Rather, the Court weighs the burdens on the constitutional rights against the interests of the state.

In this case, Utah law imposes a small burden upon an independent candidate because a candidate need only show that he has a modicum of support from likely voters. He shows this by submitting signatures of 1,000 registered voters. Courts have reviewed and upheld much more onerous signature requirements. For example, the Tenth Circuit has upheld a challenge to an Oklahoma election statute requiring "a party seeking recognized status to obtain signatures equaling at least five percent of the number of votes cast in the last general election." *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740, 742 (10th Cir. 1988). Depending on the voter turnout in the previous elections, a party would have been required to collect between 45,497 and

62,784 signatures. *Id.* The Court quickly dismissed the challenge to the statute, stating that "the five percent requirement itself is undeniably constitutional." *Id.* at 744. Likewise, the Supreme Court unanimously rejected a challenge to a Georgia statute requiring independent candidates to submit signatures of 5 percent of eligible voters in the previous election before being placed on the ballot. *Jenness v. Fortson*, 403 U.S. 431, 438 (1971). Since no state law contemplates the use of electronic signatures for the purpose of initiatives or candidate petitions, it is accurate to say that state laws requiring hand-written signatures by 5% of eligible voters in the previous election have consistently been upheld under constitutional challenges.

This puts Petitioner in the untenable position of having to argue that, while the Tenth Circuit has determined that it is not unconstitutionally burdensome to have to collect more than 62,000 handwritten signatures to qualify for the ballot, it unduly burdens his right to appear on the ballot to require him to collect 1,000 unless he can do so electronically.

2. The Utah Constitution Does Not Require the State to Permit the Use of Electronic Signatures.

Utah's Constitution does not require strict scrutiny analysis either. *Utah Safe-to-Learn/Safe-to-Worship* involved a challenge to various requirements to get an initiative on the ballot. The Court dealt with the issue of a standard to be applied in ballot access cases. The Court had previously found the right to directly legislate through initiative and

referendum as "sacrosanct" and a fundamental right, *Gallivan v. Walker*, 2002 UT 89, ¶ 27, 54 P.3d 1069, and thus of equal, if not greater, right to protection than a candidate's placement on the ballot.

In arriving at the standard of review under the Utah Constitution, this Court first noted the need for government to adopt regulations in the election context and rejected the strict scrutiny standard:

> "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections," and subjecting every initiative regulation to heightened scrutiny "would tie the hands of states seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433, 119 L. Ed. 2d 245, 112 S. Ct. 2059 (1992). Thus, applying heightened scrutiny to each and every provision challenged under [Utah's Constitutional Initiative provision] is neither required nor appropriate.

*Utah Safe-to-Learn/Safe-to-Worship*, 2004 UT 32, ¶ 34. In discussing the standard, this Court recognized that a statute is presumed to be constitutional and that the Legislature has "wide latitude in complying with constitutional directives." *Id.* at ¶ 35. The Court then stated the standard as follows:

> In making this determination, a court should assess whether the enactment is reasonable, whether it has a legitimate legislative purpose, and whether the enactment reasonably tends to further that legislative purpose. In evaluating the reasonableness of the challenged enactment and its relation to the legislative purpose, courts should weigh the extent to which the right of initiative is burdened against the importance of the legislative purpose.

*Id.* Reviewing the standard, the Court stated that it bore a resemblance to the Court's "traditional minimal scrutiny review" but it required a more exacting analysis. *Id.* at ¶ 37.

But the standard still involves balancing the burdens imposed by regulation with the importance of the purposes of the provision.

In this case, Utah law only requires a showing of a modicum of support: 1,000 valid signatures. Initiatives, which must obtain signatures equal to 10% of those who voted for Governor, have to obtain 94,552 signatures. *See* Lieutenant Governor's website: http://elections.utah.gov/electionresults.html.

The analysis thus involves weighing the burden imposed upon the Petitioners of gathering holographic signatures, as opposed to electronic signatures, compared to the State's interests in following UETA and ensuring that electronic records are only used with the prior consent of the election official, along with the state's general regulatory interests. An historic review indicates that this is not a significant burden – Utah has a significant number of independent candidates at every election. *See* Lieutenant Governor's website, election results: http://elections.utah.gov/signature_nos.htm. The analysis leads to the conclusion that there is no unconstitutional burden on Petitioners' rights and no constitutional violation is involved.

### B. Petitioners' Free Speech Rights Have Not Been Unconstitutionally Infringed

Petitioners and UEG claim that the inability to use electronic signatures violates their First Amendment speech rights. However, the requirement of holographic

signatures, as opposed to electronic signatures, is an issue concerning election process, not a regulation of speech.

Courts have found constitutional provisions that regulate the process rather than regulate speech. As stated by the Tenth Circuit,

> [a]lthough the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise. In *Save Palisade FruitLands v. Todd* . . . [w]e held that "the right to free speech . . . [i]s not implicated by the state's creation of an initiative procedure, but only by the state's attempts to regulate speech *associated with* an initiative procedure. . . . The distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not.

*Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1099-1100 (10th Cir. 2006).

In that case, the Initiative and Referendum Institute had challenged the Utah requirement that wildlife management initiatives pass by a supermajority (two-thirds) because that requirement allegedly chilled and otherwise denied the plaintiffs' First Amendment rights. The Tenth Circuit rejected plaintiffs' theory and their claims, noting:

> Under the Plaintiffs' theory, every structural feature of government that makes some political outcomes less likely than others–and thereby discourages some speakers from engaging in protected speech–violates the First Amendment.

*Initiative and Referendum Initiative*, 450 F.3d at 1100. This Court should reach the same conclusion here: the nonrecognition of electronic signatures concerns the *process* by which a

candidate (or an initiative) is placed on the ballot and does not impact or burden First Amendment rights.

Stated differently, the action of individuals signing the Certificate of Nomination petition is not "speech" that is protected by the First Amendment. Rather, the action is part of the citizen process to place a candidate unaffiliated with a party on the ballot. It is a legal act with legal consequences; it is not the type of discussion or statement that constitute free speech. Even more attenuated from the claim of speech is the form and manner of the signature – electronic versus holographic.

With or without the ability to submit electronic signatures, Petitioner Anderson's supporters are free to actively campaign for him, donate or spend money on his behalf, and otherwise fully exercise their free speech rights. Indeed, Petitioners and their supporters can create a website, hold virtual town halls, send out emails, tweets and podcasts explaining their views.

Petitioners and UEG cannot save their argument by claiming that they will be denied access to a forum for speech if they cannot collect electronic signatures. The United States Supreme Court denied a similar argument in *Burdick v. Takushi*. As already noted, that case involved a challenge to Hawaii's refusal to allow write-in voting. Plaintiffs claimed this violated their First Amendment right to expressive conduct in the manner in which they voted and the message sent by their vote; in short, their "vote" was speech. The Court rejected this claim:

> [T]he function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s]. Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.

*Burdick*, 504 U.S. at 438 (quotations and citations omitted).

Like a ballot, a Certificate of Nomination petition is not for engaging in First Amendment speech. Signers sign their name as registered voters as part of the election process; they can't sign someone else's name, sign a pretend name, or engage in any expressive activity on the petition. The signing of the nomination petition lacks the indicia of being speech, a statement, or in any manner expressive. Rather, it is an act with legal effect, exercised by a registered voter to put a candidate on the ballot. Regulation of the act of signing, let alone the manner of signing, does not burden or implicate any First Amendment rights.

Even if the Court were to find that a nomination petition affects First Amendment rights, it would not mean that strict scrutiny would apply. The Court must still determine the extent to which the right is impacted. If the First Amendment rights are "severely" restricted, regulation must be narrowly drawn to advance compelling interests; otherwise, the State's important regulatory interests are generally sufficient to justify the restriction. *Burdick*, 504 US at 434; *Utah Safe-to-Learn/Safe-to-Worship*. 2004 UT 32, ¶ 35. Here, any restriction of speech is not severe.

The challenged restriction does not limit how Anderson or his supporters may speak. They may advocate for Anderson, work for Anderson, or campaign for him. The government imposes no sanction or disability for having signed (or not signed) the nomination petition.

Petitioners and UEG claim in some manner that signing electronically is easier and some may not participate otherwise. That claim is similar to that made in *Initiative and Referendum Institute* where a two-thirds majority requirement to pass a wildlife initiative made it allegedly more difficult to pass an initiative and, therefore, people were less likely to participate. The Tenth Circuit rejected the theory that structural features that may discourage some speakers from engaging in free speech activities violated the First Amendment. *Initiative and Referendum Institute*, 450 F.3d at 1100. The purposes of the First Amendment and the reason to protect speech are to allow for discussion of public issues, allowing an unfettered exchange of ideas for bringing about change, and that debate should be uninhibited, robust, and wide open. *McIntyre v. Ohio Elections Comm'n*, 514 US 334, 346-67 (1995).

As a class and a group, Petitioners have not shown that the burdens or restrictions on the speech rights of the signers are severe, requiring exacting scrutiny. Therefore, even if there is some restriction on First Amendment rights, it is subject to the lesser standard of scrutiny under *Burdick* and *Utah Safe-to-Learn/Safe-to-Worship.* Under that less exacting level of scrutiny, the State's important regulatory interests are generally sufficient to justify the restrictions. *Burdick*, 504 US at 434.

Requiring holographic signatures on nomination petitions for unaffiliated candidates, as Utah has done for 114 years, does not violate the First Amendment or free speech rights of candidates and their supporters under either the federal or state constitution.

## III. THERE IS AN INSUFFICIENT BASIS TO DETERMINE THAT PETITIONER'S TYPED LIST OF NAMES ARE "SIGNATURES," OR "ELECTRONIC SIGNATURES"

Petitioners and UEG argue that Anderson's petition signature sheets, which consist merely of typed lists of names and addresses, are "signatures, or "electronic signatures." However, there was not a sufficient basis for the Lieutenant Governor to have made such a determination based upon what was actually presented to him. He properly determined that the typed lists were not "signatures" under the Election Code. Nor is there sufficient evidence or basis on which this Court could reach a contrary determination.

Petitioner Anderson submitted to the Lieutenant Governor the Certificate of Nominations to which were attached signature sheets. *See* Petition for Extraordinary Writ, Affidavit of Mark Thomas. Some of the unaffiliated candidate petition signature pages had hand-printed names, signatures, addresses, and birth dates. Some signature sheets were all typed, with ID numbers, the first, middle and last names, "signatures," dates of birth, and addresses. No further evidence or indication was given of what the typed lists were, how they were obtained, or what they represented.

There is no additional evidence before this Court other than what was given to Lieutenant Governor. Petitioner Maxfield, in one of his pleadings after the Lieutenant Governor's responses, makes some claim about how the typed lists came to be generated. But that is not in the form of any admissible evidence before this Court, nor is there any indication that that information was previously given to the Lieutenant Governor (it was not). UEG in its Memorandum talks of how it has gathered signatures in connection with its pending initiative. Again, that is not sworn or admissible evidence. Moreover, UEG's actions in its initiative campaign have no bearing on what Petitioner Anderson did or whether he complied with the Election Code regarding his candidacy.

Utah has long allowed for signatures on candidate petitions as well as initiative and referendum petitions. These have always used holographic or "wet" signatures. The candidates, initiative sponsors, and elections officials are used to generating, reviewing, and taking action based upon those holographic signature lists. There is a familiarity in how they are generated – individuals take the petition in hand, fill in their personal information, and then sign the page. The statement in the Certificate of Nomination that the signature pages contained signatures of registered voters, their familiar hand signed form and apparent authenticity, plus a lack of any evidence or indications of any problems or concerns that they may be anything other than individually authored signatures justified the decision by the Lieutenant Governor that those pages containing holographic signatures were "signatures" under the statute.

The signature sheets with typed lists of names are different. Typed or electronic signatures have never been used in Utah and thus there is no history or familiarity with their use by candidates, initiative sponsors, or election officials. No other state authorizes the use of electronic signatures in such a fashion. In the absence of evidence of how they were obtained, what they represented, and the process used to generate them, there was (and is) no basis to determine, based solely on their mere appearance on the petition sheet, that they are "signatures" or "electronic signatures" under the statute, as opposed to being a mere typed list of names and addresses.

Petitioners and UEG make some strongly worded claims concerning the Lieutenant Governor's action. These include: that he lacked authority to make his "ruling" regarding electronic signatures; that he allegedly failed to comply with the Utah Administrative Rule Making Act; and that he added nonstatutory requirements to Mr. Anderson's candidacy. Rather, Lieutenant Governor did what all executive officers and agencies do in the administration and execution of the laws – interpret their provisions.

Petitioner Anderson attempted to file his Certificate of Nomination with the Lieutenant Governor because the statute directed him. *See* Utah Code Ann. § 20A-9-503(1)(a)(i). Since this involved a statewide office, the Lieutenant Governor is the Chief Election Officer to "exercise direct authority over the conduct of elections." *Id.* 67-1a-2(2)(a)(ii). The Lieutenant Governor determined that Mr. Anderson's Certificate of Nomination included the "signatures" of less than

1,000 registered voters. *Id.* § 20A-9-502. He was not improperly assuming the responsibility assigned to county clerks, *see id.* § 67-1a-2(2)(b), as no one clerk had certified more than 1,000 names and because no clerk had reviewed the petition to determine whether or not these typed lists were "signatures" under the Election Code. *See* Affidavits of Sherrie Swensen, Salt Lake County Clerk, Kim Hafen, Washington County, and Karla Johnson, Kane County. Furthermore, to allow the individual county clerks to decide the standard for what constitutes a "signature" under the statute could result in inconsistent determinations among the county clerks. What would be a signature in one county might not be a signature in another, which would raise constitutional issues. *See Page v. McKeachnie*, 2004 UT 65, ¶ 5, 97 P.3d 1290.

Rather than acting as a "outlaw," the Lieutenant Governor was properly analyzing and interpreting a statute to determine wether Petitioner Anderson had complied with the statutory requirements such that the Lieutenant Governor could place him on the ballot. The Lieutenant Governor had to make that determination, based upon the authority granted to him by the Legislature under the Election Code. It was also not a decision or determination that had been assigned to someone else or that anyone else had done. The Lieutenant Governor was, in all respects, doing what the law required of him.

## IV. IF THIS COURT IS PERSUADED TO PERMIT MR. ANDERSON TO USE ELECTRONIC SIGNATURES, INITIATIVES HAVE SIGNIFICANT AND SEPARATE CONCERNS AND DIFFERENCES FROM CANDIDATE PETITIONS AND SHOULD BE TREATED SEPARATELY

UEG was allowed to file a Supplemental Memorandum as Amicus Curiae. UEG engaged in significant discussion concerning initiatives and use of electronic signatures in initiative campaigns. However, the initiative petition process is not before the Court. The initiative process involves different provisions and raises different issues and interests than the candidate petitions. The Court should not rule on the signature issue in connection with initiatives except in a separate case, based upon the unique aspects of the initiative context.

The initiative process has a different authority structure. Under the Utah Constitution, the Legislature is given specific constitutional power and authority to proscribe the conditions and manner in which the initiative power shall be exercised. Utah Const. art. VI, § 1(2)(a)(i). The signature gathering process in the Election Code contains other provisions indicating, if not requiring, a holographic signature on paper. The signer says that he has "personally signed this petition," that the signature sheet is a piece of paper attached to the initiative packet, and that it is signed in the presence of the person who circulates the petition. Utah Code Ann. §§ 20A-7-203, -205. The process that UEG describes in its Memorandum, i.e., having the signer of the initiative petition also be the circulator who verifies his or her own signature,[3] is not supported by evidence and is not properly before the Court. Notably, that process eliminates one of the three separate certifications and review of the signature process that this Court found critical in *Page*, 2004 UT 65, ¶ 5, to support the presumption of a proper signature.

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[3]This process does not satisfy the statutory requirements on circulating initiative petitions.

Initiatives also raise different levels of concern with regard to security, opportunity for fraud, and potential impact on state processes. Initiatives are part off the legislative process conducted by the people and may result in adoption of a binding law. This Court, to the extent that it allows electronic signatures for candidates, should separately–and only after full briefing directed specifically at initiatives–address the issue of electronic signatures in the context of initiatives.

## V. THERE IS NO CONSTITUTIONAL VIOLATION BASED UPON THE FILING DEADLINE FOR UNAFFILIATED CANDIDATES

Petitioner raised, after pleadings had closed, a claim that the March 19th filing deadline for unaffiliated candidates is unconstitutional. This issue appears to be raised solely as a possible remedy for Mr. Anderson to correct the deficiencies and get on the ballot should this Court rule against him on the signature question.[4] Petitioner should not prevail on this new issue as he has no standing to raise it and, under the appropriate standard of review, he cannot demonstrate that the statute is unconstitutional as applied to him.

### A. Anderson Does Not Have Standing to Challenge the Filing Deadline.

Standing, under the federal system, is an express constitutional requirement. This Court has recognized that although Utah Constitution contains no such express limitation, the constitution "nevertheless mandates certain standing requirements, which emanate from the principles of separation of powers." *Brown v. Division of Water Rights*, 2010 UT 14, ¶ 12, 228

[4]Declaring the filing date unconstitutional may not be the only way to provide this namely.

P.3d 747. The Court there also recognized that the state and federal standing requirements contain the same three basic elements – injury, causation, and redressability, but the standards are not identical. *Id.* at ¶ 17.

In *Utah Chapter of the Sierra Club v. Utah Air Quality*, 2006 UT 74, 148 P.3d 960, the Court discussed the traditional and the alternative tests for standing. The traditional test for standing requires a distinct and palpable injury and includes a three-step inquiry:

> First, the party must assert that it has been or will be adversely affected by the [challenged] actions. Second, the party must allege a causal relationship between the injury to the party, the [challenged] actions and the relief requested. Third, the relief requested must be substantially likely to redress the injury claimed.

*Id.* at ¶ 19 (internal quotations and citations omitted).

In this instance, there is no injury or harm to Petitioner Anderson caused by the March 19th deadline. He makes no claim that the early date caused him any problems or burdened him in any way. In addition, the reason for the denial of his Certificate of Nomination was the lack of signatures, not the date of filing. *See LaRouche v. Monson*, 599 F.Supp. 621 (D. Utah 1984) (concluding putative candidate had no standing to challenge early filing date where denial was based on lack of signatures). Petitioner thus lacks standing under the traditional test.

This Court also allows for an alternative test for standing:

> Under the alternative test, a petitioning party must first establish that it is an appropriate party to raise the issue in the dispute before the court. *Id.* A party meets this burden by demonstrating that it has the interest necessary to effectively

> assist the court in developing and reviewing all relevant legal and factual questions and that the issues are unlikely to be raised if the parting is denied standing.

*Utah Chapter of the Sierra Club*, 2006 UT 74, ¶ 36. In the instant case, Mr. Anderson has not been impacted by the early date. He even has indicated that he had sufficient holographic signatures but nonetheless sought to establish the right to use electronic signatures. As indicated below, the standard of scrutiny to determine the constitutionality of the "early" filing date is a balancing test, weighing the asserted injury to fundamental constitutional rights of the Petitioner with the interests of the state. Anderson lacks the personal involvement in any of the problems or burdens that an early filing date may cause to others and thus he is not an appropriate party. Therefore, the Court should also deny Petitioner Anderson standing under the alternative test.

**B. Utah's Filing Deadline for Independent Candidates is Constitutional.**

The standard of review with regard to challenges of this type is a balancing test. *See Utah Safe to Learn/Safe to Worship*; *Anderson.* In conducting that review, the Court must undertake the task of considering and weighing the asserted injury to fundamental constitutional rights against the interests of the state in the regulation, plus the extent to which it is necessary to burden important rights in order to achieve important state interest. *Anderson*, 460 U.S. at 788. Here, the claimed harms to Petitioner Anderson are the burdening of the signature effort by the early date for filing and limitation on the choice of candidates. But here there is no adverse affect or burden on Anderson or his rights. He knew he wanted to run as an independent and timely

filed. He was able to raise signatures in sufficient number to be able to qualify by the application deadline, and he timely filed. Thus, he cannot show any harm or burden to his constitutional rights. Opposed to this, Utah has its general regulatory interests, the stability of the election laws, and the certainty of a date.

The circumstances in Utah are also different than that in the other cases that have struck down an "early" filing date. In Utah, losers in a party process cannot go on to run as an independent, Utah Code Ann. § 20A-9-501(2), and the only candidates that can be on the ballot in the party processes also have to have filed their application in March. Utah requires a mere 1,000 signatures, not 5% as other states (in Utah that would require 47,000 signatures). Finally, Utah has a strong history of multiple unaffiliated candidates in every election cycle. *See* Utah Lieutenant Governor Bell's website for election results, http://elections.utah.gov/electionresults.htm.

Under the balancing test, Petitioner cannot demonstrate that his constitutional interests were severely burdened (or burdened at all) by requiring him to file when he did. In addition, the State's interests support the early filing date, particularly since Utah's laws differ in significant ways from those states that have had their election processes struck down. Petitioner has not demonstrated that the March 19th application deadline was unconstitutional as applied to him.

## CONCLUSION

Petitioner and UEG want to use electronic signatures to meet the Election Code requirements. The Office of Lieutenant Governor determined that the Utah Legislature intended, based upon the plain language of the Utah Code, that paper and ink signatures are required under the Election Code. The Lieutenant Governor has not set the requirements for permitting the use of electronic signatures under UETA, nor has he determined that the Election Code requirement for a signature is an appropriate place to allow electronic signatures. The Lieutenant Governor exercised the authority UETA expressly granted to him and has not agreed to permit the use of electronic signatures. UETA further provides that a governmental entity may not be required to use or permit the use of electronic signatures. Neither the Code's more general provisions defining signatures, nor any provision of the State and federal constitutions, dictate a different result. On this record, the Court should decline Petitioner's invitation to, by judicial decree, make Utah the first state in the nation to approve the use of electronic signatures in its Election Code.

Stated differently, Petitioner has not demonstrated a "(1) clear and legal right to the performance of the act demanded, and (2) a plain duty of the officer . . . to perform as demanded." *Hoggs R Us v. Town of Fairfield*, 2009 UT 21, ¶ 12, 207 P.3d 1221. Petitioner thus

has not demonstrated a right to the extraordinary relief that he has requested, and this Court should deny his request.

Dated this 14 day of June, 2010.

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## CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT AND AMENDED PETITION FOR EXTRAORDINARY WRIT was served this 14 day of June, 2010, by electronic mail, where such an address is shown, and/or by first-class mail, with postage prepaid, to the following:

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