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IN THE UTAH SUPREME COURT

NANCY LORD, JANALEE S. TOBIAS,
and MADISON M. HUNT,

Petitioners,

vs.

GREG BELL, in his official capacity as
Lieutenant Governor of the State of Utah;
and JOHN DOES 1-10,

Respondents.

Case No. _____

**DECLARATION OF
DARCY M. GODDARD
IN SUPPORT OF PETITION FOR
EXTRAORDINARY WRIT**

I, DARCY M. GODDARD, hereby declare as follows:

1. I am over the age of twenty one and I have personal knowledge of the matters set forth herein.

2. I am the Legal Director for the American Civil Liberties Union of Utah Foundation, Inc. (“ACLU of Utah”). I submit this declaration in support of the Petitioners Janalee Tobias’, Nancy Lord’s, and Madison Hunt’s (collectively, “Petitioners”) Petition for Writ of Extraordinary Relief.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Lieutenant Governor’s Office filed notice of a 120-Day (Emergency) Rule, “Electronic Signatures and Referenda,” issued July 8, 2010.

4. On or about July 14, 2010, the Lieutenant Governor’s Office filed a Notice of Proposed Rule (New Rule), “Electronic Signatures in Initiatives and Referenda” (“Notice of Rule”), which proposed to make final the earlier Emergency Rule. Because it appears the Lieutenant Governor’s Office never submitted notice of an effective date or change to the proposed rule in connection with the Notice of Rule, however, the Emergency Rule never became final.

5. A true and correct copy of SB 165 as originally proposed, which had its first reading on February 25, 2011, is attached hereto as Exhibit 2.

6. A true and correct copy of SB 165 (First Substitute) is attached hereto as Exhibit 3.

7. In the March 1, 2011, Committee hearing on SB 165 (First Substitute), the sponsor testified that his intention when adding a blanket prohibition on the use of electronically collected signatures in support of initiatives and referenda was in response

to “the on-going dispute, the confusion over initiative processes.”¹ (See Audio Tr. 03/01/11 Committee Hr’g, available at <http://le.utah.gov/~2011/htmdoc/sbillhtm/sb0165.htm>, “Senate Revenue and Taxation Committee 3/1,” at 2:19-2:23.) He described the bill as addressing, among other things, “whether or not electronic signatures are allowed without, uh, any verification or checks and balances as to the security of those signatures.” (*Id.* at 2:30-2:37). Notably, however, the bill did not provide for (or permit) any such “verification” processes or “checks and balances as to security” of signatures collected electronically; instead, it simply imposed a blanket ban on the use of any electronically collected signatures, in support of any referendum or initiative, regardless of what processes might be in place to assure verification of the signer’s identity.² The entire Committee debate on SB 165 (First Substitute) took less than six minutes.

8. SB 165 (First Substitute) was debated on the Senate floor. The first debate occurred on March 7, 2011. (See Audio Tr. 03/07/11, available at <http://le.utah.gov/asp/audio/index.asp?Sess=2011GS&Day=42&House=S>.) The sponsor characterized the bill as addressing (*id.* at 0:35-1:38):

[A] great deal of controversy concerning our initiative and referendum provisions, specifically as it relates to timing of when certain steps in the

¹ SB 165 also greatly increased the number of signatures required to support a statewide initiative or referendum, raising the figure from ten percent of the number of Utah voters who voted in the last gubernatorial election, i.e., currently approximately 65,000 signatures, to ten percent of the number of Utah voters who voted in the last presidential election, i.e., currently approximately 100,000 signatures. See, e.g., Ex. 3 hereto at lines 433-435 (initiatives) and lines 497-499 (referenda). That language remained in SB 165 (Second Substitute) and was passed into law.

² SB 165 (First Substitute) also contained language authorizing people to vote if they registered on-line at least fifteen days in advance of the election. See Ex. 3 hereto at lines 354-390. That language was included in SB 165 (Second Substitute) and passed into law.

process need to be concluded, when the time frame is . . . [and] whether electronic signatures should be allowed for the initiative, ballot, candidate qualification, and political parties. And the way it deals with them is [sic] specifically prohibits electronic signatures from being used for those purposes. The reason for the prohibition as opposed to a moratorium is that currently it is very difficult to have the kind of integrity in the process for electronic signatures. The verification process, the notion that, that our system of governance, that the vote is the most sacred thing that we do, and signing a petition is tantamount to casting a vote.

9. When questioned, the sponsor acknowledged that there were “a number of places where electronic signatures have been accepted.” (*Id.* at 2:33-2:36). He continued, however (*id.* at 2:37-3:14):

[T]here’s been a, an uncertainty about the use of electronic signatures specifically as it relates to ballot qualification for initiatives and referendums, for candidate qualification relating to the ballot, and for the number of signatures necessary to register a political party. This specifically prohibits that. In speaking with the Lieutenant Governor, the reason for a prohibition as opposed to a moratorium, this gives clear direction to the courts on the matter. It doesn’t prohibit the Lieutenant Governor, when the technology catches up with our intent to have openness in the process, that that can be brought back at that time.

10. Questioned again about why a blanket prohibition on electronically collected signatures was necessary (*id.* at 3:14-3:38 (Senator McAdams expressing concern that SB 165 (First Substitute) might be moving in the “wrong direction,” and noting that the better course might be to explore “how we can use electronic and on-line means to involve the public in this process)), the sponsor did not respond. After less than four minutes of substantive discussion, SB 165 (First Substitute) was moved into its third reading. (*Id.* at 3:44-8:00.)

11. SB 165 (First Substitute) was replaced the following day, March 8, 2011, with SB 165 (Second Substitute). A true and correct copy of SB 165 (Second Substitute) is attached hereto as Exhibit 4.

12. SB 165 (Second Substitute) was briefly addressed for the first time on the Senate floor on March 8, 2011. There was no substantive debate on the bill as it was first presented for third reading. (See Audio Tr. 03/08/11, available at <http://le.utah.gov/asp/audio/index.asp?Sess=2011GS&Day=43&House=S>, at 0:01-2:22 (sponsor noting that the bill “deals with a host of issues dealing with our election law, and if there is some concerns, we ought to have a debate on it”).) When SB 165 (Second Substitute) came up a second time on March 8, 2011, the sponsor stated that the bill would, among other things, “prohibit[]the use of an electronic signature, and require[] the use of a holographic signature . . . and for those who don’t know what a holographic signature is, that means a handwritten signature, not something that comes on a Star Trek holodeck. . . . But it prohibits an electronic signature for qualifying a candidate for the ballot, a ballot proposition, or signing a petition to organize and register a political party.” (Audio Tr. 03/08/11 available at <http://le.utah.gov/asp/audio/index.asp?Sess=2011GS&Day=43&House=S>, at 1:00-1:41). He also noted that SB 165 (Second Substitute) would require “a county clerk to compare the signatures on a packet to the voter registration database.” (*Id.* at 1:50-1:56).

13. In response to SB 165 (Second Substitute), Senator McAdams again expressed concerns with the language. Noting that he “like[s] citizens’ initiatives and think that they are a constructive part of the process,” he questioned whether the bill’s

increased signature requirements, i.e., from approximately 65,000 to 100,000, set too high of a bar (*id.* at 4:00-5:45), and again expressed concerns with, among other things, the blanket prohibition on electronically collected signatures. Specifically, he stated: “Overall, I just have a philosophical disagreement with limiting the use of electronic signatures. I would like to find a way to make it work. I understand that there are some concerns with the way it works currently, but I would like to explore a way that we can make it work.” (*Id.* at 7:47-7:59). He also noted that the signature comparison requirements—which would necessarily envision only the use of holographic signatures—would be excessively expensive, and that it would be an “overly burdensome requirement to require every [that] every signature be compared to its on-line counterpart where there may not be suspicion of fraud or tampering.” (*Id.* at 7:15-7:30). Other than Senator McAdams comments, and summary comments by the sponsor,³ there was no

³ The sponsor’s summary consisted of the following statement (Audio Tr. 03/08/11 available at <http://le.utah.gov/asp/audio/index.asp?Sess=2011GS&Day=43&House=S>, at 8:23-10:09):

I think this is important that we pass this bill. The issue of ambiguity in our election process. The franchise, the ability to vote, to set policy, is vested in the Legislature. When citizens take it upon themselves, its appropriate, in our constitution, that it’s a right that’s guaranteed. It’s appropriate to have some fairly strict and rigorous standards by which that can be accomplished.

Now to the issue of a signer’s signature that appears substantially similar to a signature on a statewide registration database, ironically, this week, just yesterday, in a tax case, there was a question about whether or not a taxpayer’s tax return had been filed, that had been filed, was signed by both the, uh, the husband and the wife. The IRS conceded no expectation of fraud. But when I asked for an original copy of the return . . . this is in the context of an audit . . . the IRS had to concede that the signatures clearly

substantive discussion of SB 165 (Second Substitute) before it was passed by the Senate. (See generally *id.* at 0:01-11:51.)

14. Discussion of SB 165 (Second Substitute) was similarly truncated in the House. (See generally Audio Tr. 03/09/11, available at <http://le.utah.gov/asp/audio/index.asp?Sess=2011GS&Day=44&House=H>, at 0:08-14:32.) As it pertained to the issue of electronically collected signatures, the House sponsor stated that the bill (*id.* at 0:10-1:08):

[E]ssentially says that electronic signatures are not valid for qualifying a candidate for a ballot, for, uh, on a ballot proposition, or to sign a petition to organize a political party. Now let me tell you why that's important. The fact is, having played in the electronics world, it is indeed possible to have secure electronic signatures. However, the cost to do that is prohibitive. And so, frankly, the cheapest method is to require only handwritten signatures. That is the fundamental policy change here.

15. When questioned as to the ruling in *Anderson*, which allowed electronic signatures, and whether SB 165 (Second Substitute) would be “problematic with that ruling” (*id.* at 1:50-2:00), the House sponsor replied (*id.* at 2:06-2:20): “The fact is, is a statute, any clarifying statute, I believe would trump that. I would believe the Supreme Court has ruled [inaudible] existing statute and if we change the law then that would

were written by the same individual and did not match other signatures from one of the two, uh, taxpayers.

It's appropriate to have some checks and balances. It's appropriate to have clarity and, and certainty when it comes to the provisions related to the qualifying for the ballot initiative. How the signatures are gathered, how they are verified, what the timeline is. As we have seen over the last two years, there are those who would try to take something that appears clear in the law and try to create ambiguity for the purposes or pursuing their own agenda. I believe this bill will clarify all of those issues that are currently being disputed on recent, uh, initiative activities.

clarify the intent of the Legislature.” The House sponsor also addressed questions relating to the logical inconsistency between SB 165 (Second Substitute)’s blanket ban on electronically collected signatures in support of initiatives and referendum, on the one hand, and the State’s acceptance of on-line voter registrations on the other hand (*id.* at 2:23-2:58), as follows (*id.* at 2:59-3:25): “That’s a good question. The fact is, when you are registering, uh, to vote, there are several checks that take place to make sure that you are the person, not the least of which, um, is the fact that if you show up at a polling place you have to show your identification. And so there are a number of checks in place when you are registering to vote that are not in place, nor could they physically be put in place without a prohibitive amount of cost, for signing a petition.”

16. After approximately six minutes of substantive discussion, the House sponsor was asked for his summation (*id.* at 6:14-6:16). His discussion of SB 165 (Second Substitute)’s prohibition on the collection and use of signatures collected electronically consisted of the following (*id.* at 6:29-7:37):

Let me just say this. I think the initiative process is important. I think it is essential that we have it in place. However, I also understand that making sure that the people signing those petitions are actually the people that, whose [sic] those signatures belong to. The fact is, if we have an electronic signature system, it is very, very easy to hack into it and put in false signatures, and it’s extremely difficult and very expensive for our election officials to do that. If we are going to allow for electronic signatures, and I’m not necessarily opposed to that, we have to face up to the fact that the cost is going to be millions and millions of dollars. That’s just all there is to it. . . .

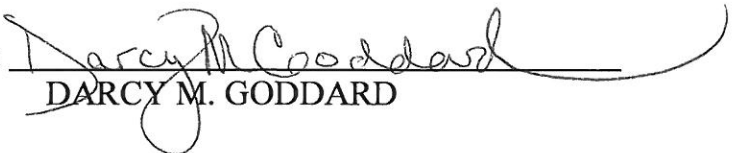
17. With no further discussion or evidence in support of the House sponsor’s assertion, for example, that “[i]f we are going to allow for electronic signatures . . . the

cost is going to be millions and millions of dollars,” the House passed SB 165 (Second Substitute) on March 9, 2011. A true and correct copy of the enrolled version of SB 165 is attached hereto as Exhibit 5.

18. Governor Herbert signed the enrolled copy of SB 165 into law the next day, March 10, 2011.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

EXECUTED this 24th day of March 2011.

By: 
DARCY M. GODDARD