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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. _____ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF EXTRAORDINARY RELIEF**

Petitioners Nancy Lord, Janalee S. Tobias, and Madison Hunt (collectively, "Petitioners") respectfully submit this Memorandum of Points and Authorities in Support of their Petition for Writ of Extraordinary Relief.

INTRODUCTION

Petitioners' request for an extraordinary writ comes from extraordinary circumstances. On March 10, 2011, Utah Governor Gary Herbert signed into law House Bill 477 ("HB 477"). HB 477 amends Utah's Government Records Access Management Act ("GRAMA")—the law that secures the public's right to obtain government records that show how the public's business is being done. Among its many now-notorious provisions, HB 477 shields from public disclosure voice mails, instant messages, video chats and text messages—even when those communications relate to public business. It expands the fees the government can charge for retrieving public records. HB 477 also eliminates the presumption that government records may be publicly disclosed and places on the requesting party the burden to show why the records that concern public business should be accessible.

The public's reaction to HB 477 has been swift and overwhelmingly negative. Rarely, if ever, has this state seen citizens of nearly every political stripe and every political label united in such an outpouring of opposition to the legislature's work.

Petitioners Lord and Tobias are sponsors of the HB 477 Referendum, and wish to submit electronically gathered signatures in support of their effort. On March 10, 2011, the same day he signed HB 477, the Governor also signed into law Senate Bill 165 ("SB 165"), which struck at the heart of Utah voters' fundamental constitutional right to legislate directly through initiatives and referenda. In SB 165, the legislature decided that only handwritten (or "holographic") signatures, and not electronically collected signatures, could be counted toward the total signatures required to put an initiative or

referendum on the ballot. As a result of SB 165, Respondent Lt. Gov. Bell has stated his refusal to count any electronically collected signatures supporting the HB 477 Referendum.

The effect of SB 165 is to exclude thousands of Utah voters from exercising their constitutional right to sign petitions supporting initiatives and referenda. Not only does SB 165 impose a facially unconstitutional burden on Utah voters' fundamental right to exercise the right to initiative and referendum, it also violates the uniform operation of laws provision in the Utah Constitution, which requires laws that implicate fundamental rights to treat similarly situated people equally. In mandating that only handwritten signatures will be accepted, the legislature has effectively ruled that thousands of registered Utah voters not present in the state during the signature gathering period—such as Petitioner Madison Hunt (a University of Pennsylvania student), our military servicemen and women, missionaries, and others—have no right to exercise their constitutional right to support initiatives and referenda. This disenfranchisement of thousands of Utah voters is unfair, unnecessary, and unconstitutional.

In singling out and prohibiting all electronically gathered signatures, SB 165 is nothing more than a purported solution in search of a problem. As this Court made clear less than a year ago in *Anderson v. Bell*, no valid reason exists to distinguish between electronic signatures and handwritten signatures so long as the intent of the signer is manifest. While SB 165's sponsors hypothesized about the "integrity" of electronic signatures, this Court recognized in *Anderson* that signatures gathered electronically can be verified, if anything, more easily than holographic signatures, and have the potential to

deter fraud. All of that could be done at no cost to the state. Accordingly, Respondent's refusal to count any electronically collected signatures violates Utah voters' constitutional rights to use the initiative and referendum power, which is expressly reserved for the people in Article VI, Section 1 of the Utah Constitution.

The unjustified, unconstitutional burden created by SB 165 is even more onerous when the blanket ban on electronically collected signatures is considered along with the other unnecessary and undue burdens included in the law. For example, although SB 165 did not expand the forty-day time period petition sponsors have to collect signatures, the legislature nevertheless increased the total number of signatures required by at least one-third. In addition, the legislature added a blatantly unconstitutional requirement that county clerks individually verify each petition signature against a signature in the state's voter registration database to make sure the two are "substantially similar." The law does not explain how county clerks are to accomplish the Herculean task of verifying these signatures in the limited time frames the laws allow.

In HB 477, the legislature has attempted to secure its ability to do legislative work beyond the public's view using twenty-first century technologies like video chats and text messaging. In SB 165, however, the legislature condemned Utah voters to using ancient technology when attempting to exercise their constitutional right to check the legislature's power through initiatives and referenda. This Court's decisions make clear that the public's right to exercise the power of initiative and referendum deserves the utmost protection, and that principle must be applied here. Ultimately, SB 165's only purpose is

to make it more difficult for citizens to gather the signatures necessary to support initiatives and referenda, including the HB 477 Referendum.

ARGUMENT

I. THE PEOPLE'S RIGHT TO REFERENDA AND INITIATIVE IS SACROSANT UNDER THE UTAH CONSTITUTION.

The Utah Constitution vests in "the people of the State of Utah" the power both to initiate "any desired legislation" and to hold a referendum on "any law passed by the Legislature" before that law may take effect. Utah Const. art. VI, § 1. The people's right to "directly legislate through initiative and referenda is sacrosanct and a fundamental right." *Gallivan v. Walker*, 2002 UT 89, ¶ 27, 54 P.3d 1069. Accordingly, "Utah courts must defend it against encroachment and maintain it inviolate." *Id.* This Court has described the right to initiative and referenda as "sacred right to be carefully preserved" and protected "against any encroachment." *Id.* (citing *In re Referendum Pet. No. 18, State Question No. 437*, 417 P.2d 295, 297 (Okla. 1966); *Bernstein Bros., Inc. v. Dep't of Revenue*, 661 P.2d 537, 539 (Or. 1983)). Because this "fundamental right" is found "at the very core of our republican form of government," any law that limits the right to initiative and referenda is "'viewed with the closest scrutiny.'" *Id.* (quoting *Urevich v. Woodard*, 667 P.2d 760, 762 (Colo. 1983)). The rights to initiative and referenda embody the maxim that "[t]he government of the State of Utah was founded pursuant to the people's organic authority to govern themselves." *Id.* ¶ 22. Thus, although "lawmaker" and "legislator" have become colloquial synonyms, it cannot be forgotten that the "power of the legislature and the power of the people to legislate through

initiative and referenda are coequal, coextensive, and concurrent and share 'equal dignity.'" *Id.* ¶ 23. (quoting *Utah Power & Light Co. v. Provo City,* 74 P.2d 1191, 1205 (1937) (Larson, J., concurring)).

Petitioners' challenge to SB 165 is rooted in this Court's decision in *Gallivan,* which reaffirmed that limitations on the people's "fundamental right" right to initiative and referenda are constitutionally suspect. *Gallivan*, 2002 UT 89, ¶ 52. In *Gallivan*, the Court granted a petition for extraordinary writ and struck down the multi-county ballot initiative petition signature requirement in Utah's then-existing initiative statute. *Id.* ¶ 95. The Court held that the restriction diluted the signatures of urban voters in favor of voters from less-populous rural counties. *Id.* ¶ 49. This requirement came at the expense, the Court held, of the people's constitutional right to "exercise their direct legislative power through initiatives and referenda." *Id.* ¶ 23. In particular, the Court held that the rural/urban voter distinction that the multi-County signature requirement created violated the uniform operation of laws provision of the Utah Constitution. *See* Utah Const. Art. I, § 24. As shown in this Petition, SB 165 must be struck down as unconstitutional for the same reasons that supported the Court's decision in *Gallivan.*[1]

[1] The multi-county requirement that the Court struck down in the initiative statute in *Gallivan* still exists in the referendum statute. *See* Utah Code Ann. § 20A-7-301(1)(a)(ii) (requiring a referendum sponsor to gather "from each of at least 15 counties, legal signatures equal to 10% of the total of all votes cast in that county for all candidates for governor at the last regular general election at which a governor was elected"). That portion of the referendum statute is, thus, also unconstitutional.

II. LT. GOV. BELL'S REFUSAL TO COUNT SIGNATURES GATHERED ELECTRONICALLY VIOLATES THE UNIFORM OPERATION OF LAWS PROVISION IN THE UTAH CONSTITUTION.

SB 165 excludes thousands of Utah voters from participating in the initiative and referendum process by imposing a requirement that only handwritten signatures will be counted. The legislature has not merely "burdened" the constitutional rights of Utah voters, but has excluded voters from exercising those rules at all by refusing to recognize their valid electronic signatures. This disparate impact on Utah voters cannot be tolerated.

The Utah Constitution states that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. This constitutional requirement is "at least as exacting and, in some circumstances, more rigorous than the [equal protection] standard applied under the federal constitution." *Gallivan*, 2002 UT 89, ¶ 33. However, the general principal embodied in both constitutional provisions is the same: "'persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same. '" *Id.* ¶ 31 (quoting *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984)). It is not sufficient for the text of SB 165 merely to appear "uniform" to satisfy the constitutional standard. Rather, it is the "operation" of the law that impacts the "equal protection principle inherent in the uniform operation of laws provisions." *Id.* ¶¶ 37-39 (quotations omitted). Laws that "'single out one person or group of persons from among the larger class on the basis of a tenuous justification that has little or no merit'" are unconstitutional. *Id.* ¶ 38 (quoting *Malan*, 693 P.2d at 671)). As shown below, the classifications SB 165 creates do not operate

uniformly "on all persons similarly situated within constitutional parameters." *Gallivan*, 2002 UT 89, ¶ 38 (quotation omitted).

A. SB 165 Impacts the People's Fundamental Rights and Is Subject to Heightened Scrutiny.

Where a challenged statute implicates a "fundamental or critical right," or creates classifications that are "considered impermissible or suspect in the abstract," the Court applies a "heightened degree of scrutiny" in its operation of laws analysis. *Id.* ¶ 40.

SB 165 presents an even stronger case than *Gallivan* in demonstrating a violation of the uniform operation of laws provision. Here, SB 165 implicates the people's "fundamental right" to initiative and referenda because it precludes petition sponsors from gathering signatures electronically, notwithstanding this Court's recognition that such signatures are equal in every material respect to handwritten signatures. *See Anderson*, 2010 UT 47, ¶ 17 (noting "we cannot see how the manner the signor elects to place his name" on a nominating petition "has any impact on the signor's intent to support the petitioner's candidacy"). Of particular significance, the Court noted in *Anderson* that "the importance of the intent of the signor, as opposed to the form of the signature" had long been recognized in the common law of this state, 2010 UT 47, ¶16, 234 P.3d at 1152, and that, "'[w]hile one's signature is usually made by writing his name, the same purpose can be accomplished by placing <u>any writing, indicia or symbol</u> which the signor chooses to adopt and use as his signature and by which it may be proved: e.g., by finger or thumb prints, by a cross or other mark, or by <u>any type of mechanically reproduced</u> or stamped facsimile of his signature, as effectively as by his own handwriting,'" 2010 UT

47, ¶ 16, 234 P.3d at 1152 (emphasis in original) (citations omitted). Unlike *Gallivan*, SB 165 does not merely give greater weight to some voters over others. Rather, it categorically excludes some voters from participating in the process at all based on an artificial distinction about what kind of signature they use. Accordingly, the Court must apply "heightened scrutiny" to its analysis of SB 165. *Gallivan*, 2002 UT 89, ¶¶ 41-42.

B. SB 165 Creates Discriminatory Classifications that Treat Similarly Situated Voters Differently.

Laws that discriminate against citizens' fundamental rights are subject to rigorous analysis under *Gallivan*. *Id.* ¶ 42 (quoting three-part test set forth in *Lee v. Gaufin*, 867 P.2d 572, 582-83 (Utah 1993)). The Court must first determine: "(1) what, if any, classification is created and (2) whether that classification is discriminatory, that is whether it treats members of the class or subclasses disparately." *Id.* ¶ 43. In *Gallivan*, the Court held that the multi-county signature requirement created "two subclasses of registered voters," i.e., those who reside in rural counties and those who reside in urban counties. *Id.* ¶ 44. Because the multi-county signature requirement gave greater power to rural voters, the Court held that the petitioners satisfied the threshold test of the uniform operation of laws analysis. *Id*. ¶¶ 44-45.

As in *Gallivan*, SB 165 creates "two subclasses of registered voters," thus satisfying the first element of the threshold test. SB 165 distinguishes between registered voters who are able to sign a petition holographically and registered voters, like Petitioner Hunt, who are not able to sign a petition holographically but are capable of signing a petition electronically. This distinction is evident on the face of SB 165, which expressly

states that "an electronic signature may not be used to sign a petition" for ballot access purposes.[2] *See* SOF ¶ 10.

The second element of the threshold test is also satisfied because these discriminatory classifications have a disparate impact on Utah voters. In *Gallivan*, the Court struck down the multi-county signature requirement because it raised rural voters to the "level of gatekeepers who can effectively keep initiatives off the ballot despite the existence of significant numeric support for the initiative in urban portions of the state." *Id.* ¶ 45. Similarly, SB 165 limits the number of voters able to support a petition to those able to execute a handwritten signature, while excluding other citizens from participating in a petition drive altogether because they are unable to do so. This classification baselessly places the form of the signature over the signer's intent to exercise his or her fundamental right to sign the petition. *See Anderson*, 2010 UT 47, ¶ 16 (recognizing that "'it is the intent [to sign] rather than the form of the act that is important'" (quoting *Salt Lake City v. Hanson*, 425 P.2d 773, 774 (1967))).

The discriminatory classifications SB 165 creates excludes thousands of Utah voters from exercising their constitutional right to sign referendum and initiative petitions. For example, government records show that approximately 1,000 high school graduates left Utah in 2006 to study in higher learning institutions outside Utah. *See* National Center for Education Statistics Participation in Education Table.[3] *See* Add. F.

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[2] Like *Gallivan*, these subclasses emerge not from the language of the statute but from its effect. *Gallivan*, 2002 UT 89, ¶ 44.

[3] *Available at* http://nces.ed.gov/programs/coe/2008/section1/table.asp?tableID=871 (last visited Mar. 22, 2011).

Although we do not know how many of those students remain registered Utah voters, those who are registered Utah voters are effectively disenfranchised from participating in petition drives that require a holographic signature. SB 165 also disenfranchises other classes of citizens, such as soldiers or missionaries[4] living overseas, who cannot satisfy SB 165's holographic signature requirement. According to Mark Thomas, Director of Elections for the State of Utah, in 2010 Utah sent out 1,452 ballots to "civilian overseas voters" and "1,487 ballots to military voters" both in the United States and abroad. (*See* Add. E, Thomas E-Mail). The interests of these military personnel are particularly significant because "[h]ow and where they conduct their lives is dictated by the government." *Bush* v. *Hillsborough Cnty. Canvassing Bd.*, 123 F.Supp.2d 1305, 1307 (N.D. Fla. 2000). In *Bush*, the court acknowledged the right of military personnel to receive an absentee ballot because, "[f]or our citizens overseas, voting by absentee ballot may be the only practical means to exercise" the right to vote. *Id.* For service members, "[t]he vote is their last vestige of expression and should be provided no matter what their location." *Id.* SB 165 shuts off these citizens' right to participate in the equally fundamental right to sign a petition. Indeed, although SB 165 creates a statutory avenue for voters to obtain an absentee ballot electronically, Utah Code Ann. § 20A-2-206(1), the same law also bans voters from signing a petition electronically.

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[4] According to statistics cited in an opinion in *Utah v. Evans*, which involved the State of Utah's claim that overseas LDS missionaries should be included in Utah's census count, there were approximately 11,000 missionaries serving overseas as of April 1, 2000. *Utah v. Evans*, 143 F. Supp. 2d 1290, 1293 (D. Utah 2001). That figure does not include any missionaries who are not overseas but reside out of state and whom SB 165 would also impact.

SB 165 completely prevents these Utah voters' participation in the initiative and referendum signature-gathering process and violates their constitutional right to be treated the same as other Utah voters. Under Utah's election code, it is the county clerk's duty in verifying petition signatures to determine whether each signatory is a Utah resident, at least 18 years old, and a registered voter. *See* Utah Code Ann. § 20A-7-305 (verification procedure for referenda). These are the only valid criteria required for a signature to be certified, and those criteria can be applied equally to all signers, regardless of whether a voter signed the petition electronically or holographically. SB 165, however, creates an additional undue burden, requiring the signer to execute the petition in a specific manner before their signature is counted.

Such an obvious disenfranchisement of even some Utah voters in the petition-gathering process cannot be swept aside, particularly where the Court's heightened scrutiny standard applies. After all:

> The voters' right to initiative does not commence at the ballot box: The voters' right to legislate via initiative includes signing a petition to get the proposed initiative on the ballot. Signing a petition is inextricably connected to the voters' right to vote on an initiative because it serves a gatekeeping function to the right to vote. Accordingly, "[t]he use of . . . petitions . . . to obtain a place on the [state's] ballot is an integral part of [its] elective system."

Gallivan, 2002 UT 89, ¶ 26 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) (first and second alterations in original)). SB 165's exclusion of signatures gathered electronically deprives Utah voters the right to "associate for the advancement of political beliefs" and, for petition signers, to "cast their votes effectively." *Id.* (quotation omitted). Applying the appropriate level of scrutiny, it is apparent that SB 165 does "not apply

equally to the subclasses" of Utah voters and "in effect creates a discriminatory classification because of its disparate impact." *Id.* ¶ 45.[5]

C. SB 165's Discriminatory Classifications Are Impermissible Under the Utah Constitution's Uniform Operation of Laws Provision.

Having determined that SB 165 results in discriminatory classifications among Utah voters, the question becomes whether those classifications are constitutionally permissible. To answer that question, the Court applies the rigorous three-part analysis described in *Gallivan*, which requires consideration of "each stated legislative purpose" supporting SB 165 to determine whether (i) the stated legislative purpose is legitimate; (ii) whether it "substantially furthers that purpose," and (iii) whether the stated purpose is "reasonably necessary to further the legislative purpose." *Gallivan*, 2002 UT 89, ¶¶ 42, 43. None of the purported justifications for SB 165 survive that analysis.

1. SB 165 Is Not Necessary To Protect the Integrity of the Signature Gathering Process.

Despite SB 165's vast impact on the constitutional rights of Utah voters, the legislative history supporting SB 165 is extraordinarily brief, with recordings of committee and floor discussions in both the Senate and the House totaling less than thirty

[5] Respondents may contend that SB 165 does not create any greater disparate impact among Utah voters than existing law, which requires petition circulators to verify that petition signers signed the petition in the "presence" of the petition circulator. *See, e.g.*, Utah Code Ann. § 20A-7-303(3) (stating petition form requirements for referenda). The Utah Code does not define "presence" in this statute. Nevertheless, in light of the fundamental rights at issue, the Court cannot construe the term "presence" strictly to mean "physical presence" because that narrow construction appears nowhere in the statute and it would necessarily disenfranchise voters of their constitutional rights to participate in petition drives. Whenever possible, it is this Court's policy to construe a statute to "avoid potential constitutional conflicts." *Cole v. Jordan Sch. Dist.*, 899 P.2d 776, 778 (Utah 1995).

minutes, only a sliver of which was substantive. *See* Statement of Facts in Petition for Writ of Extraordinary Relief ("SOF ") at ¶¶ 10-22. During this brief discussion, the legislative purpose first advanced to support SB 165 was that a blanket ban on electronically gathered signatures was necessary to preserve the integrity of the signature-gathering process for ballot access measures. SOF ¶ 13. For example, Senator Curt Bramble, Senate sponsor of SB 165, argued: "[C]urrently it is very difficult to have the kind of integrity in the process for electronic signatures." *Id. see also* SOF ¶ 11 (stating concern about "whether or not electronic signatures are allowed without, uh, any verification or checks and balances as to the security of those signatures").

Concern about the "integrity" of electronic signatures could be a legitimate legislative purpose only if it sought actually to protect, rather than burden, the people's free exercise of their constitutional rights. On that point this Court has been clear:

> The initiative power and the citizens' right to legislate directly through the exercise of that power is a fundamental right guaranteed in the Utah Constitution. The legislature's purpose to unduly burden or constrict that fundamental right by making it harder to place initiatives on the ballot is not a legitimate legislative purpose.

Gallivan, 2002 UT 89, ¶ 52 (citation omitted). Accordingly, since no matter the stated purpose, the effect of implementing that purpose is to restrict the exercise of constitutional rights, or in this case absolutely deny them to thousands of voters, then it is illegitimate.

Notwithstanding its ostensible purpose, SB 165 does nothing to protect the integrity of signature gathering. Although SB 165's Senate sponsor's publicly stated concern was the "security" of electronically collected signatures, the legislature made no

specific findings—nor could they—about any security flaws in any (let alone all) of the various methods for collecting and verifying signatures on-line. SOF ¶ 11 . Indeed, the legislature engaged in no meaningful inquiry into how, when, where, or why electronically gathered signatures are less reliable than holographic signatures.[6] For example, although styled as "fact," the House sponsor's comments reveal the paucity of actual evidence impugning the integrity of electronic signature gathering:

> 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.

SOF ¶ 21. Critically, the House sponsor offered no evidence that "hack[ing]" into electronic signature systems has ever been a problem in Utah or why "millions of millions of dollars" would be required to address such a non-issue. Armed only with only vague and unsupported attacks, Respondents cannot show that the law "substantially furthers" the any legitimate legislative purpose, including the one expressed by SB 165's sponsors.

The Court cannot reasonably conclude that a blanket ban on all signatures collected electronically would "substantially further" the legislative purpose of protecting the "integrity" of the signature-gathering process without first accepting the premise that

[6] The legislature also added new provisions to the Election Code in SB 165 that purport to require county clerks to determine whether each holographic petition signature "appears substantially similar to the signature on the statewide voter registration database." SOF ¶ 16. This provision is independently unconstitutional for the reasons set forth in Part V, below.

such signatures necessarily, no matter the verification procedures in place, threaten the integrity of that process. No such evidence exists here to justify departure from *Anderson*'s recognition of the validity of electronic signatures.

Given the constitutional implications of banning all electronically collected signatures in support of referenda or initiatives, the burden to show that SB 165 is "reasonably necessary" is a heavy one. *Gallivan*, 2002 UT 73, ¶ 47. The fundamental question is whether SB 165 is needed to correct some problem with electronic signature verification in the status quo. The answer is no. This Court has already considered and rejected that argument in *Anderson*:

> The Lt. Governor . . . contends that electronic signatures attached to a certificate of nomination lack "apparent authority" as genuine signatures. This position is based on a theory that a holographic signature is self-authenticating because the reviewing party may merely look at the signature and see that someone put pen to paper to sign their name. In contrast, an electronic signature lacks apparent authority, because it appears as a typed list of names. The Lt. Governor's argument here, however, is really about fraud and the ability to detect fraud. <u>We are unpersuaded that an electronic signature presents special concerns regarding candidate fraud; a candidate could as easily handwrite or type fraudulent names onto a certificate of nomination.</u>

Anderson, 2010 UT 47, ¶ 23, n.7.[7] (emphasis added).

[7] Indeed, this Court concluded that electronic signatures could "be a <u>better</u> deterrent to candidate fraud" (emphasis added) because electronic signature gathering systems can easily "incorporate[] readily verifiable personal, but not-public, information." *Anderson*, 2010 UT 47, ¶ 23, n.7. Petitioners Lord and Tobias are prepared to collect electronic signatures in support of the HB 477 Referendum using "an existing system designed to verify the authenticity of signatures gathered and the identity of the signers." SOF ¶ 1 (Declarations of Petitioners, Add. B at ¶ 4 ; Add. C at ¶ 4).

Banning all electronically collected signatures is also not "reasonably necessary" because the claimed "legislative purpose could still be furthered without infringing constitutionally protected rights through less restrictive, burdensome, or discriminatory means." *Gallivan,* 2002 UT 73, ¶ 56. Rather than forbid electronically gathered signatures altogether, the legislature could simply have implemented verification procedures that would ensure all registered voters are capable of signing a petition electronically. SB 165's shotgun approach does not even leave room for discussion about the merits of such verification procedures; instead, it categorically excludes an entire class of signatures (and thus voters) from the petitioning process while providing no alternative mechanism for permitting voters disenfranchised by the holographic signature requirement to participate in petition drives.

2. Clarifying a Legislative Intent that Violates the Constitution is Not a Legitimate Legislative Purpose.

The second purported legislative purpose for SB 165 is that the measure was necessary to provide "direction to the courts" and "clarify the intent of the legislature" in the wake of *Anderson*. SOF ¶ 14. Although "clarify[ing] the intent of the legislature" may be a perfectly legitimate justification for some legislation, that purpose is not legitimate if the underlying effect of the bill is to discriminate against some Utah voters and deprive them of their constitutional rights of initiative and referenda. *See, e.g.*, *Gallivan,* 2002 UT 73, ¶ 59, n.11 ("The legislature is not free to enact restrictions on constitutionally established and guaranteed rights and powers whenever it perceives that the system of checks and balances is misaligned or out of equilibrium. Such a purpose is

not a legitimate legislative purpose."). As discussed above, SB 165 denies the referendum right to thousands of Utah voters who are unable to sign petitions holographically. To the extent the legislature's express purpose in passing SB 165 is to make clear its intent to forbid electronic signatures, this legislative purpose is illegitimate on its face because it unduly burdens and forbids the exercise of fundamental constitutional rights among otherwise similarly situated Utah voters.

Because the claimed legislative purpose to "clarify the intent of the legislature" is not legitimate, it is irrelevant whether SB 165 "substantially furthers" or is "reasonably necessary" to effect an unconstitutional purpose.

3. SB 165 Does Not Save Money For the State.

The third purported legislative purpose for SB 165 is that it will save money for the State of Utah. Although there is no indication in the legislative history that the legislature ever studied the cost impact of accepting electronically gathered signatures, the House sponsor of SB 165 asserted that any system allowing the use of electronic signatures would be cost "prohibitive," SOF ¶ 19, and that, "[i]f we are going to allow for electronic signatures, . . . the cost is going to be millions and millions of dollars," SOF ¶ 21. This contention apparently rests on the unsupported (and insupportable) notion that the only way in which the State could ever allow electronically collected signatures for ballot access would be if the State were to design its own on-line signature collection system, on its own time and at its own expense. That is simply not the case.[8] The

[8] Even if the State did want to design its own system to collect electronic signatures, no reason exists to hold hostage the constitutional rights of Utah voters until the legislature

legislative history contains nothing to support the idea that the sponsors of any initiative or referenda have ever sought to have the State of Utah shoulder the burden of paying for electronic signature gathering. Indeed, Petitioners have made clear they will pay for such a system themselves. SOF ¶ 1 (Declarations of Petitioners, Add. B at ¶ 4 ; Add. C at ¶ 4).

SB 165 does not avoid any expenditures, much less the expenditure of "millions and millions of dollars." SOF ¶ 21. By any standard, SB 165 is not "reasonably necessary" to advance the state's interest in saving money.

III. THIS COURT SHOULD NOT APPLY THE LOWER STANDARD OF SCRUTINY FROM THE *UTAH SAFE TO LEARN* CASE.

Even if this Court declines to find that SB 165 violates the uniform operation of laws provision in article VI, section 1 of the Utah Constitution, this Court should still apply heightened scrutiny to the restrictions on referendum signatures enacted by SB 165 and reject the lower standard of scrutiny set forth in *Utah Safe to Learn-Safe to Worship Coalition v. State of Utah*, 2004 UT 32, 94 P.3d 217. This is true for two reasons. First, the new distinction created in *Utah Safe to Learn* between restrictions on the initiative right that warrant heightened scrutiny, and those that do not, is circular and inadequately protective of the people's fundamental referenda rights. This Court should return to the bright-line standard employed in *Gallivan* and apply heightened scrutiny in this case. Second, even if the Court maintains the *Utah Safe to Learn* distinction for initiatives, it

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sets aside "millions and millions of dollars" for that effort. In any event, the Lt. Gov.'s own report prepared in connection with the interim rules on electronic signatures for initiative and referenda demonstrates that there is no cost impact in collecting electronic signatures. *See* Rule R623-4, Electronic Signatures in Initiatives and Referenda, Notice of 120-Day (Emergency) Rule, DAR File No. 33815.

should decline to extend that rule to referenda because, unlike initiatives, referenda are designed as a specific check on legislative power. The legislature's self-interested curtailment of the people's referendum rights is thus inherently suspect and should be subject to exacting scrutiny.

A. This Court Should Depart From the Distinction Created by *Utah Safe to Learn*.

As noted above, in *Gallivan* this Court was clear that restrictions on the initiative right contained in enabling legislation implicate fundamental rights, and therefore trigger heightened scrutiny. *Gallivan*, 2002 UT 89, ¶¶ 27, 40. In *Utah Safe to Learn*, this Court departed from this bright-line rule, holding that certain restrictions on the initiative right are merely part of the legislature's enabling duties and are inherent in the "self-limiting" nature of the initiative right, implying that such restrictions do not implicate fundamental rights. 2004 UT 32, ¶¶ 28-29, 34 (upholding initiative provisions relating to senate districts, one-year deadline, and signature removal procedures). This Court held that such restrictions "need not be subjected to heightened scrutiny review." *Id.* ¶ 29. In explaining why the heightened scrutiny of *Gallivan* did not apply, the *Utah Safe to Learn* court held that *Gallivan* involved a restriction that implicated "two constitutional values"—the constitutional right to initiatives, and the uniform operation of laws provision. *Id.* ¶ 33. When a restriction implicates only the initiative right itself, the Court held that lesser scrutiny is appropriate.[9] *Id.* ¶ 34.

[9] This distinction is unsupported by the language in *Gallivan*. Nowhere in that opinion did this Court premise its application of heightened scrutiny on the violation of "two constitutional values," rather than simply one. Indeed, the disjunctive language in the

Even if this Court were inclined to extend the *Utah Safe to Learn* initiative rule to the referendum context—which it should not do—Petitioners respectfully submit that the distinction created in that case is circular and should be reconsidered. This Court should return to the bright-line rule followed by *Gallivan* and apply heightened scrutiny to this case.

The *Utah Safe to Learn* opinion does not explain when a legislative restriction on the initiative right crosses the line from mere exercise of enabling powers to unconstitutional restriction on a fundamental right. The fact that the right is "self-limiting" does not answer this question, because it is obvious the legislature's enabling authority does not include the plenary power to restrict the right completely, or even unduly. If *Utah Safe to Learn* therefore stands for the proposition that some legislative restrictions are so innocuous that they warrant lower scrutiny, but more severe restrictions can implicate fundamental rights and trigger higher scrutiny, then the distinction created by that case is circular because the only measure for when lower scrutiny applies is that the restriction does not unduly curtail the initiative right—the very question that scrutiny is applied to answer.

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opinion suggests the opposite. *See Gallivan*, 2002 UT 89, ¶¶ 40 ("Where a legislative enactment implicates a 'fundamental or critical right' or creates classifications which are 'considered impermissible or suspect in the abstract,' we apply a heightened degree of scrutiny" (citations omitted; emphasis added)); *id.* ¶ 41 ("The starting point of our analysis, therefore, is whether the multi-county signature requirement of the initiative enabling statute implicates a 'fundamental or critical right' or creates classifications which are 'considered impermissible or suspect in the abstract.'" (citations omitted; emphasis added)).

If, on the other hand, *Utah Safe to Learn* stands for the proposition that restrictions on the initiative right, no matter how severe, trigger heightened scrutiny only if they also violate another fundamental right, then the distinction trivializes the initiative right and gives nearly unfettered power to the legislature. Applying heightened scrutiny only where two constitutional violations exist significantly undermines the commitment in *Gallivan* that "the people's right to directly legislate through initiative and referenda is sacrosanct and a fundamental right." *Gallivan*, 2002 UT 89, ¶ 27.

The bright-line rule followed by *Gallivan* solves this dilemma. Although it is true that the rights to initiatives and referenda are self-limiting, that does not mean that the legislature's enabling statutes do not implicate those rights. Any time the legislature imposes restrictions on the initiative and referenda processes—and particularly when they enact self-interested restrictions affecting the people's right to referenda—those restrictions should be subject to heightened scrutiny. If some restrictions regarding time, place, and manner of the people's exercise are so innocuous that they clearly fall within the self-limiting nature of the right, then they will easily pass scrutiny. Other restrictions that are more severe may not. But that does not mean in either case that the Court's evaluation of those restrictions on fundamental rights should be any less searching.

B. This Court Should Adopt a Heightened Standard of Review for Restrictions on Referendum Rights.

Even if this Court chooses not to depart from the lower scrutiny rule in *Utah Safe to Learn*, it should decline to extend that rule to the referendum context based on fundamental differences between initiatives and referenda.

While the people's fundamental rights to create legislation through initiative and to reject legislation through referendum are both set forth in the same section of the Utah Constitution, those rights are different in nature. As this Court has explained, an "initiative petition offers an avenue for voters to create statutory law without the participation of the legislature. On the other hand, a referendum petition is for the sole purpose of giving voters the opportunity to accept or reject a specific legislative enactment." *Snow*, 2007 UT 63, ¶ 17. Thus, while the initiative process allows the people to exercise their co-equal power to create legislation, the referendum process exists solely as a check on the exercise of legislative power, serving as an enduring reminder that "all political power is inherent in the people." *Gallivan*, 2002 UT 89, ¶ 22 (quoting Utah Const. art. I, § 2).

This distinction is constitutionally important. Even critics of initiatives concede that referenda are substantially unique, recognizing that the right to check specific legislative enactments is fundamentally different from the right to exercise concurrent legislative power. *See* Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. Colo. L. Rev. 709, 724 (1994). Put differently, with a referendum the people are not exercising a power also given to the legislature, but instead are exercising a different and fundamental right to check their legislative representatives' use of their own legislative power.

For this reason, courts have consistently recognized the important role of referenda in constraining the power of legislatures. *See, e.g.*, *Midway Orchards v. Cnty. of Butte*, 220 Cal. App. 3d 765, 776-79 (1990) ("[T]he power of referendum guarantees to the

citizens an ultimate check on legislative power."); *Michigan Farm Bureau v. Sec'y of State*, 151 N.W.2d 797, 800 (Mich. 1967) (noting that, the "referral process, forming as it does a specific power the people themselves have expressly reserved, [must] be saved if possible as against conceivable if not likely evasion or parry by the legislature"); *Luker v. Curtis*, 136 P.2d 978, 981 (Idaho 1943) ("[T]he referendum was designed as a check upon all legislative enactments not favored by the people.").

Although the Utah Constitution allows the legislature to enact enabling legislation setting forth certain conditions and requirements for exercise of the referendum right, *see* Utah Const. art. VI, § 1(2), that power is not plenary.[10] When the legislature imposes restrictions on the referendum right, it is essentially engaging in a type of self-dealing—i.e., diminishing the power of the people to check the legislature itself, and by necessity expanding the legislature's own unchecked powers. This separation of powers concern is unique to referenda and was not at issue in either *Gallivan* or *Utah Safe to Learn*.

In similar contexts where a governmental actor has a stake in a particular transaction, courts have applied heightened judicial scrutiny to ensure that the actual motivations of the government serve the public good. *See, e.g., Clingman v. Beaver*, 544

[10] For example, the legislature could not rely on its enabling authority to require that a petition receive unanimous voter support, afford only two days to gather signatures, require that it be raining when signatures are gathered, or count only signatures gathered in Salt Lake City. *See Utah Safe to Learn*, 2004 UT 32, ¶ 34 (even under lesser scrutiny, an enactment cannot "unduly burden or diminish the initiative right"); *see also Sevier Power Co. , LLC v. Bd. of Sevier Cnty. Comm'rs*, 2008 UT 72, ¶ 10, 196 P.3d 583 ("It does not follow, logically or constitutionally, that the authority to set limits on *conditions*, *manner*, or *time* gives the legislature the broader authority to deny the initiative right to the people. . . . To do so would require us to conclude that the constitutional reservation of the initiative power by the people was intended to be, and in fact is, illusory.").

U.S. 581, 604 (2005) (O'Connor, J., concurring) (recognizing that partisan self dealing in the electoral process warrants heightened judicial scrutiny).[11]

This Court should be especially suspect of any legislative efforts to diminish the people's fundamental right to counterbalance the legislature through the power of referenda. Even if a particular enactment does not implicate Utah's uniform operation of laws provision, the self-interested nature of the legislature's restrictions, and the fundamental nature of the referendum right, warrant the heightened scrutiny applied in *Gallivan*. Because SB 165 fails under heightened scrutiny for the reasons discussed above, it should be declared unconstitutional.

IV. SB 165 IS UNCONSTITUTIONAL EVEN IF THE COURT APPLIES *UTAH SAFE TO LEARN*.

Although the Court should reject application of the lower standard of scrutiny in *Utah Safe to Learn*, SB 165 is unconstitutional even if the Court applies that standard here. In *Utah Safe to Learn*, the Court held that challenges to restrictions on the initiative right that are based solely on article VI, section 1 of the Utah Constitution must prove that the restriction "unduly burdens the right to initiative." *Utah Safe to Learn*, 2004 UT 32, ¶ 35. To make this determination the Court assesses whether the challenged law has a

[11] *See also United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977) (explaining that when a State enacts a law that modifies the State's own contractual obligations, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake"); *Condell v. Bress*, 983 F.2d 415, 418 (2d Cir. 1993) ("Courts are less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligations of its own contracts."); *cf. also B.A.M. Dev., L.L.C. v. Salt Lake County*, 2005 UT 89, ¶¶ 27, 42, 128 P.3d 1161 (amended and reissued as 2006 UT 2, ¶46, 128 P.3d 1161) (affirming application of "heightened-scrutiny rough proportionality test" to governmental takings).

"legitimate legislative purpose" and whether the law "reasonably tends to further that legislative purpose." *Id.* The reasonableness of the law and its relation to the legislative purpose are considered in light of "the extent to which the right of initiative is burdened against the importance of the legislative purpose." *Id.* This analysis is less burdensome than the uniform operation of laws analysis applied in *Gallivan*. 2002 UT 73, ¶¶ 42-43 (quoting *Lee v. Gaufin,* 867 P.2d 572, 582-83 (Utah 1993)). Petitioners assert that their challenges to the legislative purposes supporting SB 165 survive the more rigorous analysis applicable in *Gallivan*. Accordingly, it is unnecessary to repeat in detail the challenges to SB 165's legislative purposes under the lower *Utah Safe to Learn* standard, which effectively ends at the second step in the *Gallivan* analysis.

As shown above, none of the purported legislative purposes for SB 165 are sufficient given the substantial burden that SB 165 places on the fundamental right for initiative and referenda. SB 165 does not add "integrity" to signature gathering and it does not save money. Although SB 165 does have the additional stated legislative purpose of providing direction to the courts, that in and of itself is not a legitimate legislative purpose. The fact that the legislature wants to ban all electronically gathered signatures, without some legitimate policy rationale to do so, fails easily under *Utah Safe to Learn.*[12] Regardless of what message the legislature wants to send to the courts, an

[12] *Utah Safe to Learn* makes clear that the legislative purpose must be "reasonable and reasonably tend to further a legitimate legislative purpose." 2004 UT 32, ¶ 43. In that case, the legislative purpose was "ensuring a modicum of support for an initiative throughout the statewide population," a purpose expressly acknowledged in *Gallivan* that relates directly to the "procedures enacted to enable" the initiative right. *Id; see also Gallivan,* 2002 UT 73, ¶ 53.

outright, categorical merely makes it even harder to gain the signatures needed to put initiative and referenda on the ballot. That is not a legitimate legislative purpose. *See Gallivan,* 2002 UT 73, n. 11 (holding that a "legitimate" legislative purpose cannot include "overly burdensome restrictions on the initiative power when the constitutional responsibility and duty of the legislature in enacting initiative enabling legislation is to facilitate the initiative process.").

At its core, the only real purpose served by SB 165 is to make it "not so easy" to get initiatives and referenda on the ballot "simply for the sake of making it harder to do so." *Gallivan*, 2002 UT 73,¶ 53. The *Gallivan* Court warned of the inevitable consequences arising from such piecemeal attacks on the right of initiative and referenda:

> The legislature's purpose to unduly burden or constrict that fundamental right by making it harder to place initiatives on the ballot is not a legitimate legislative purpose. Endorsing this legislative purpose would essentially allow the legislature without limitation to restrict and circumscribe the initiative power reserved to the people, thus rendering itself the only legislative game in town. If such a legislative purpose were legitimate, the legislature would be free to completely emasculate the initiative right and confiscate to itself the bulk of, if not all, legislative power. This would obviously contravene both the letter and the spirit of article VI of the constitution.

Gallivan, 2002 UT 73, ¶ 52. Moreover, such needless intervention in restricting how voters can sign petitions vastly overstates the nature of the state's interest in governing how petition sponsors go about gathering support for their initiatives and referenda. *See e.g. Bell*, 2010 UT 47, ¶ 25 (the "Lt. Governor's interest here is in ensuring that the unaffiliated candidate has sufficient support to justify including him or her on the

statewide ballot. That interest is not diminished because the unaffiliated candidate demonstrates the necessary support through signatures recorded electronically).

Finally, it is evident that the ban on electronically collected signatures lacks any legitimate legislative purpose when viewed in light of additional changes to the Utah Election Code contained in SB 165, which were also intended to make it much more difficult to pass an initiative or referendum in Utah. First, the legislature effectively increased the total number of votes required to get an initiative or referendum on the ballot from 65,000 to approximately 100,000 by changing the number of votes required to gain ballot access to 10% of the total votes cast for president of the United States, rather than in the last general election for governor. SOF ¶ 10, n.5. Second, the legislature substantially (and unconstitutionally) increased the chances that more signatures will be invalidated through the unprecedented requirement that each petition signature must validated as "substantially similar" to the signature in the state voter registration database. *Id.* Third, the legislature left untouched the period of time, i.e., forty days after conclusion of the session, required to gather holographic signatures. When viewed in total, in addition to forbidding referendum sponsors from using available technology to gather signatures, SB 165 also requires them to collect more signatures, in the same amount of time, and in the face of draconian new requirements that will invalidate the signatures of unsuspecting voters who were never told that their voter registration signature would be used to match future petition signatures and that it would be thrown out if it didn't match. Under no circumstances can that reasonably be seen as a "legitimate" legislative purpose.

V. THE REQUIREMENT THAT A PETITION SIGNER'S SIGNATURE MUST BE "SUBSTANTIALLY SIMILAR" TO THE VOTER DATABASE SIGNATURE IS INDEPENDENTLY UNCONSTITUTIONAL.

The legislature, in SB 165, also sought to impose on the various county clerks additional signature-verification requirements that, even separate and apart from the bill's unconstitutional blanket prohibition on the collection and use of electronically collected signatures in support of referenda and initiatives, would run afoul of this Court's decision in *Page v. McKeachnie*, 2004 UT 65, 97 P.3d 1290, and are unconstitutional.

As noted above, SB 165 included language that would require county clerks, when verifying whether each signer is a registered Utah voter, to examine each "signature" to determine whether, in the clerk's opinion, it "appears substantially similar to the signature on the statewide voter registration database." SOF ¶ 16. Only after that visual comparison is completed would the county clerk be authorized to "declare the signature valid." *Id.*

In the specific context of referenda, signature gatherers have forty days after the legislative session ends in which to collect signatures and submit them to the county clerks for verification. Utah Code Ann. § 20A-7-306(1). The county clerks then have another fifteen days in which to verify that each signer is a registered Utah voter, certify each signature, and deliver all of the verified referendum packet to the Lieutenant Governor's Office. Utah Code Ann. § 20A-7-306(3)(a)-(c). Under the newly imposed, heightened signature requirements included in SB 165, the county clerks statewide thus now have fifteen days in which to complete this verification process for approximately 100,000 signatures.

Leaving aside the near-impossibility that the various county clerks could complete this cumbersome verification process in the limited time allowed by statute,[13] any signature verification process that relies on each county clerk (and each employee thereof) to utilize his or her own discretion in determining whether a signature "appears substantially similar to the signature on the statewide voter registration database" is constitutionally problematic. As this Court recognized in *Page*, 2004 UT 65, 97 P.3d 1290, any signature-verification system that relies on the "wide discretion" of the various county clerks,

> creates the very real likelihood that a signature that would be certified by one county clerk could be rejected by another, thus creating disparities in the ability to participate in the initiative process among Utah voters statewide. Given the constitutional status of the right of the people to initiate legislation, *Gallivan v. Walker,* 2002 UT 89, ¶ 21, 54 P.3d 1069; *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. Utah,* 2004 UT 32, ¶ 23, 94 P.3d 217, such disparities would be problematic . . . .

Id. ¶ 5.

It is true that the Court in *Page* noted that, despite "recent revisions to the statutes governing referenda and initiatives [that] have greatly clarified the standards and

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[13] According to the most recent census data, Utah's overall population is approximately 2.8 million, with approximately one million people (or roughly one-third of Utah's population) residing in Salt Lake County. Assuming that signatures collected in support of a statewide referendum would be collected in numbers roughly proportional to the overall population of each county, the Salt Lake County clerk might be required to verify and certify approximately 33,000 voter signatures within that 15-day window. Even if the county clerk were to work twenty-four (24) hours per day for all fifteen (15) days—which is itself highly unlikely—she would have to process those 33,000 signatures in a total of only 360 hours, at a rate of 91.7 signatures per hour (or 1.52 signatures per minute). It is one thing to process signatures at that rate utilizing electronic means such as electronic voter registration rolls (to establish voter status, compare addresses, or whatever else might be reasonably required), but it is quite another if the process must also include individual visual comparisons of each and every signature.

procedures for" county clerks to verify signatures, "[i]t may be that further attention from the legislature would be helpful regarding certification standards for county clerks." *Id.* ¶ 6. But that "further attention . . . regarding certification standards" cannot, under the reasoning of *Page*, result in a system in which each county clerk is mandated to conduct a visual comparison of each signature submitted in support of a referendum or initiative to determine whether, in his or her opinion, it "appears substantially similar to the signature on the statewide registration database." SOF ¶ 16. To rely on each county clerk's individualized, subjective determination of "substantial similar[ity]" is precisely the type of haphazard, county-by-county practice that was found unconstitutional in *Page*. *See* 2004 UT 65, ¶5. (invalidating signature-verification procedures where there was no "common policy or uniformity in the practices of the many county clerks' offices statewide").

Our county clerks are not trained handwriting experts. They cannot reasonably be expected to make the sort of case-by-case determinations mandated by SB 165, especially where—as is likely to be the case with voter rolls—many (if not most) of the signatures used for comparison will have been recorded years, even decades, earlier. And even if the county clerks could be expected to do so, and to do so for each signature in the very limited time available for them to complete the verification process, the uniformity of process mandated by the *Page* decision would be functionally impossible. This new requirement serves no purpose, legitimate or otherwise, except to increase the likelihood that the same signatures that would have been accepted in prior petition drives will be

unnecessarily excluded. Like the rest of SB 165's challenged provisions, its effect is simply to make it harder to pass initiatives and referenda.

CONCLUSION

SB 165 violates two fundamental provisions in the Utah Constitution: Utah's uniform operation of laws provision, art. I, § 24, and Utah's referendum and initiative provision, art. VI, § 1. SB 165 creates impermissible discriminatory distinctions between Utah voters. It permits only holographic signatures to be counted, and categorically excludes those signatures of Utah voters who are unable to sign holographically. None of the legislative purposes advanced in support of SB 165 justify disenfranchising Utah voters from exercising their constitutional right to sign initiatives and referenda. For these and other reasons, SB 165 fails no matter what standard of scrutiny the Court applies.

Petitioners respectfully request that the Court grant this petition and declare SB 165 unconstitutional and void of all effect. Petitioners further seek an order requiring Respondent to count all signatures gathered electronically in support of the HB 477 Referendum.

DATED: March ____, 2011

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that on March ____, 2011, I caused a true and correct copy of the foregoing **PETITION FOR EXTRAORDINARY WRIT OF RELIEF** to be served in the method indicated below to the following:

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