IN THE SUPREME COURT OF THE STATE OF UTAH

UTAHNS FOR ETHICAL GOVERNMENT, Appellant/Cross-Appellee, vs. CLERKS OF ALL COUNTIES, *et al.*, Appellees/Cross-Appellants.	Appellate Case No. 20120594-SC

BRIEF OF AMICUS CURIAE ACLU OF UTAH FOUNDATION, INC.

Appeal from a Certified Final Order of the Third Judicial District Court
for Salt Lake County, State of Utah, the Honorable Todd Shaughnessy Presiding

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JOINDER IN SECTIONS OF BRIEF OF APPELLANT

The ACLU of Utah joins in and adopts by this reference the Jurisdictional Statement, Statement of Issues, Standards of Review, and Preservation, and Statement of the Case set forth in the Brief of Appellant Utahns for Ethical Government ("UEG") ("Brief of Appellant").

DETERMINATIVE PROVISIONS

In addition to the Determinative Provisions set forth in the Brief of Appellant, which are adopted by this reference, the ACLU of Utah notes the following provisions relevant to this brief:

- Article VI, section 1 of the Utah Constitution provides, in relevant part:

> **Section 1. [Power vested in Senate, House and People.]**
> (1) The Legislative power of the State shall be vested in:
> (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and
> (b) the people of the State of Utah as provided in Subsection (2).
> (2)(a)(i) The legal voters of the State of Utah in the numbers, under the conditions, in the manner, and within the time provided by statute, may:
> (A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute….

- Article I, section 24 of the Utah Constitution provides:

> **Section 24. [Uniform operation of laws.]**
> All laws of a general nature shall have uniform operation.

- Utah Code section 20A-1-306 (2011) provides:

> **Electronic signatures prohibited.**
> Notwithstanding Title 46, Chapter 4, Uniform Electronic Transactions Act, and Subsections 68-3-12(1)(e) and 68-3-12.5(24) and (33), an electronic signature may not be used to sign a petition to:

(1) qualify a ballot proposition for the ballot under Chapter 7, Issues Submitted to the Voters;
(2) organize and register a political party under Chapter 8, Political Party Formation and Procedures; or
(3) qualify a candidate for the ballot under Chapter 9, Candidate Qualifications and Nominating Procedures.

- Utah Code section 20A-7-101(18) (2011) provides:

(18) (a) "Signature" means a holographic signature.
(b) "Signature" does not mean an electronic signature.

- Utah Code section 20A-7-206.3(2) (2011) provides, in relevant part:

(2) The county clerk shall use the following procedures in determining whether or not a signer is a registered voter:
(a) When… the signer's signature appears substantially similar to the signature on the statewide voter registration database, the county clerk shall declare the signature valid….

SUMMARY OF ARGUMENT

The Utah Constitution vests the people of this State with the coequal power and right to enact legislation through the initiative process. That right is fundamental, sacrosanct, and essential to check the power of the legislature to exercise unfettered dominance over the substance of this State's laws. When the legislature attempts to restrict the initiative right, it is engaging in a form of self-dealing that is subject to strict judicial scrutiny under *Gallivan v. Walker*, 2002 UT 89, 54 P.3d 1069.

The district court's Order below interpreted Utah Code sections 20A-7-203 & 204 as prohibiting the counting of electronic signatures in connection with UEG's initiative petition. This Order has the same effect as the express prohibitions on the counting of electronic signatures enacted by the legislature in 2011 through Senate Bill 165 ("SB 165"), a reaction to this Court's decision in *Anderson v. Bell*, 2010 UT 47, 234 P.3d

1147. Both the district court's interpretation of sections 20A-7-203 & 204 and the amendments wrought by SB 165 are unconstitutional.

This Court recognized in *Anderson* that the touchstone to assessing the validity of a voter's signature is the manifestation of voter intent, not the form in which the signature is expressed. In this day and age, there is no valid reason to distinguish between holographic and electronic signatures. The only effect that prohibiting the use of electronic signatures has is to preclude Utah voters who are unable to sign a petition holographically from exercising their fundamental initiative rights. These disenfranchised voters include thousands of overseas military personnel, missionaries, and students attending schools out of state. Because the prohibition on the counting of electronic signatures serves no valid government purpose, but serves only to unduly burden the initiative right and treat similarly situated voters differently, that prohibition violates the Utah Constitution.

In *Utah Safe to Learn-Safe to Worship Coalition v. State of Utah*, 2004 UT 32, 94 P.3d 217, this Court held that a lesser degree of scrutiny applies to certain enabling limitations on the initiative right. That standard does not apply here because the provisions at issue impact two constitutional rights—the initiative right and Utah's uniform operation of laws provision. Moreover, the *Utah Safe to Learn* standard is circular and analytically unhelpful because it provides no test for when a legislative curtailment of the initiative right crosses the line from an enabling limitation to an unconstitutional restriction. This Court should return to the bright-line standard established by *Gallivan*, which imposes strict scrutiny on legislative curtailments of the

initiative right. Finally, even if this Court were to apply lower scrutiny under *Utah Safe to Learn*, the prohibition on counting electronic signatures serves no legitimate government purpose and fails under that standard as well.

For all of these reasons, this Court should rule that the prohibition on the counting of electronic signatures in support of initiation petitions violates the Utah Constitution.

ARGUMENT

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

The Utah Constitution directly vests in "the people of the State of Utah" the power to "initiate any desired legislation and cause it to be submitted to the people for adoption." 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 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 referendum 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. 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)).

In *Gallivan*, this 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, holding that the requirement diluted the signatures of urban voters in favor of voters from less-populous rural counties. *Id.* ¶¶ 49, 95. This requirement came at the expense, this Court held, of the people's constitutional right to "exercise their direct legislative power through initiatives and referenda," and thus violated the uniform operation of laws provision of the Utah Constitution. *Id.* ¶ 23; Utah Const. art I, § 24. For the reasons discussed below, the Utah Legislature's attempt to ban the counting of all electronic signatures in the initiative process is similarly unconstitutional.[1]

[1] The ACLU of Utah understands that UEG intends to focus its constitutional argument on the federal First Amendment questions raised by the prohibition on electronic signatures. This brief focuses on the questions raised under the Utah Constitution. Both constitutional analyses are relevant to the statutory interpretation at issue because this Court must consider the constitutional consequences of upholding the district court's interpretation. *See, e.g., State v. Arave*, 2011 UT 84, ¶ 28, 268 P.3d 163 (noting that the Court has a "'duty to construe a statute whenever possible so as to . . . save it from constitutional conflicts or infirmities'" (quoting *State v. Morrison*, 2001 UT 73, ¶ 12, 31 P.3d 547) (alteration in original)).

II. A BAN ON COUNTING ELECTRONIC SIGNATURES VIOLATES THE UNIFORM OPERATION OF LAWS PROVISION OF THE UTAH CONSTITUTION.

In *Anderson v. Bell*, 2010 UT 47, 234 P.3d 1147, this Court examined whether it was proper to refuse to count electronic signatures on a nominating petition for a political candidate for governor. In upholding the use of electronic signatures in that context, this Court noted 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, *id*. ¶ 16, and that "'[w]hile one's signature is usually made by writing his name, the same purpose can be accomplished by placing *any writing, indicia or symbol* 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 *any type of mechanically reproduced* or stamped facsimile of his signature, as effectively as by his own handwriting.'" *Id*. (citations omitted).

This Court also considered the assertion that holographic signatures were required to ensure the integrity of the petition process or to prevent voter fraud. Rejecting that argument, this Court stated that it was "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." *Id*. ¶ 23 n.7. Indeed, "electronic signatures may be a better deterrent to candidate fraud because an electronic signature incorporates readily verifiable personal, but not-public, information." *Id*.

Concluding that "[w]e 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," *id*. ¶ 17, this Court instructed the Lt. Governor to count the electronic signatures submitted in connection with the petition. *Id.* ¶ 28.[2]

This case raises anew the question of whether the State may validly exclude electronic signatures, this time in the context of the people's constitutional right to enact legislation by initiative. The district court's Order below interpreted Utah Code sections 20A-7-203 & 204 as implicitly banning the counting of electronic signatures in the initiative process. (Order at 7-9.) This interpretation has the same effect as the amendments wrought by SB 165, a bill passed in response to *Anderson* during the 2011 legislative session that expressly banned the counting of electronic signatures in all initiatives and referenda under the Election Code.[3] Collectively, sections 20A-7-203 & 204 (as interpreted by the district court) and the amendments enacted by SB 165 are referred to herein as the "challenged statutes."[4]

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[2] Because this Court found in *Anderson* that the use of electronic signatures was proper under the statutory language of the Election Code, it did not reach the question of whether prohibiting the counting of electronic signatures violated the Utah Constitution. *Id*. ¶ 7.

[3] A copy of SB 165 is attached hereto as Addendum A. The bill similarly banned the use of electronic signatures in connection with the formation of political parties and the nomination of candidates—notably, all restrictions that make it more difficult for the people or third-party candidates to check the power of the legislature. The provisions of SB 165 that are relevant to the ban on electronic signatures in the statewide initiative process are now codified at Utah Code sections 20A-1-306, 20A-7-101(18), and 20A-7-206.3(2) (2011).

[4] The ACLU of Utah acknowledges that the provisions of SB 165 were not directly at issue below because they were enacted after UEG's initiative effort began. Because the constitutional analysis of those amendments is exactly the same as the analysis of the district court's interpretation of sections 20A-7-203 & 204, however, this Court should reach those provisions to clarify the rules governing current signature requirements. If the Court's analysis is limited to the prior versions of the statute at issue below, its

A ban on electronic signatures excludes scores of Utah voters from participating in the initiative process by requiring that only handwritten signatures be counted. This prohibition is not merely a condition under which Utah voters may exercise their initiative rights. For some voters, it amounts to a complete bar on their ability to exercise those rights. In doing so, the challenged statutes treat similarly situated voters differently in violation of the Utah Constitution.

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*

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decision will not resolve the critical issue (which is likely to evade review) of whether the express prohibitions enacted by SB 165 are similarly invalid, leaving the electorate in a state of uncertainty regarding the types of signatures that may be gathered in future initiative or referendum drives. *See, e.g.*, *Ellis v. Swensen*, 2000 UT 101, ¶ 27, 16 P.3d 1233 (holding that violation of Utah's Election Code is likely to evade review since election will be over before violation could be litigated and may not involve same parties); *see also Guardian ad Litem v. State ex rel. C.D.*, 2010 P.3d 724, ¶ 14, 245 P.3d 724 (interpreting *Ellis*). This Court should therefore take this opportunity to address the constitutionality of the provisions of SB 165, especially since the issue is a purely legal one that is not dependent on any fact finding below and is of extraordinary importance and widespread interest. *See, e.g.*, *State v. Gibbon*, 740 P.2d 1309, 1311 (Utah 1987) (reaching issue not directly preserved below because "unusual circumstances" existed); *In re Woodward*, 384 P.2d 110, 111 n.2 (Utah 1963) (reviewing issues raised for first time on appeal "in view of the considerable public interest and concern engendered"); *In re E.D.*, 876 P.2d 397, 401 (Utah Ct. App. 1998) ("In an exceptional or extraordinary case reviewing courts will consider a constitutional claim that was not raised before the trial court." (quotations omitted)).

v. Lewis, 693 P.2d 661, 669 (Utah 1984)). It is insufficient for the challenged statutes 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)). The challenged statutes fail this constitutional test.

A. The Challenged Statutes Create 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.

Here, the challenged statutes plainly create "two subclasses of registered voters"—those who are able to sign a petition holographically, and those who cannot (whether due

to physical disability or extended presence out of state), but who could sign a petition electronically. As a result, the first element of the threshold test is met.

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, the challenged statutes limit 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 above 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 that the challenged statutes create exclude thousands of Utah voters from exercising their constitutional right to sign initiative and referendum petitions. For example, government records show that over 2,000 high school graduates left Utah in 2008 to study in higher learning institutions outside Utah. *See* National Center for Education Statistics Participation in Education Table.[5] Many of these out-of-state students likely remain registered Utah voters, but cannot return to the

[5] *Available at* http://nces.ed.gov/programs/digest/d10/tables/dt10_230.asp (last visited July 17, 2012).

state during signature gathering periods due to school or employment commitments. Those students are effectively disenfranchised from participating in petition drives that require a holographic signature.[6]

The challenged statutes also disenfranchise other classes of citizens, such as soldiers or missionaries[7] living overseas, who cannot satisfy the challenged laws' holographic signature requirement. The interests of military personnel are particularly significant because "[h]ow and where they conduct their lives is dictated by the government." *Bush v. Hillsborough County 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.* The challenged statutes shut off these citizens' right to participate in the equally fundamental right to sign a petition. Indeed, although SB 165 creates a statutory

[6] As in *Gallivan*, this unequal operation arises from the effect of the law, as there is no technical requirement in the Election Code that a person sign a petition while in Utah. *Gallivan*, 2002 UT 89, ¶ 44. There is a requirement, however, that signatures be made in the "presence" of the verifier with the signature packet. *See* Utah Code § 20A-7-203(3). Theoretically, then, a Utah voter not present in the state could quixotically hope that a petition sponsor would travel the country seeking signatures from scattered Utah voters. The practical effect of this restriction, however, is to disenfranchise voters who are not present where all signatures are being gathered—within the State of Utah.

[7] 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 the challenged laws would also impact.

avenue for voters to obtain an absentee ballot electronically, Utah Code § 20A-2-206(1), the same law also bans voters from signing a petition electronically.

The challenged statutes prevent these Utah voters from participating in initiative and referendum signature-gathering processes and thus violate their constitutional right to be treated the same as other Utah voters. In this way, the prohibition is significantly worse than the provision struck down in *Gallivan*, since the issue in that case was merely whether some voters' votes were given greater weight than others. *Gallivan*, 2002 UT 89, ¶ 59. Here, the challenged statutes categorically exclude a class of voters from participating in the process entirely based on an artificial distinction about what kind of signature they use.

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 § 20A-7-305 (verification procedure for referenda). These are the only valid criteria required for a signature to be certified, and these criteria can be applied equally to all signers, regardless of whether a voter signs a petition electronically or holographically.

This disenfranchisement of certain classes of Utah voters should not be condoned, particularly under heightened scrutiny. 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)). The challenged statutes' exclusion of signatures gathered electronically deprives Utah voters of the right to "associate for the advancement of political beliefs" and, for petition signers, to "cast their votes effectively." *Id.* (quotation omitted). The challenged statutes therefore do "not apply equally to the subclasses" of Utah voters and "in effect create[] a discriminatory classification because of [their] disparate impact." *Id.* ¶ 45.

B. The Challenged Statutes' Discriminatory Classifications Are Not Constitutionally Permissible.

Because the challenged statutes result in discriminatory classifications among Utah voters, the question becomes whether those classifications are constitutionally permissible. To answer that question, this Court applies the rigorous three-part analysis described in *Gallivan*, which requires consideration of "each stated legislative purpose" supporting a challenged piece of legislation 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.

The conclusion in the district court's Order that Utah Code sections 20A-7-203 & 204 "cannot be reconciled with any form of electronic signature," (Order at 9), and thus implicitly prohibit electronic signatures, is not supported by any stated legislative purpose, as the prohibition is implicit. But it is worth noting that requirements such as physical packets with signature sheets were likely developed "with a paper-format in

mind; an electronic format would not have been available at the time the scheme was designed." *Anderson*, 2010 UT 47, ¶ 17. Either way, the past limitations of technology are not a permissible reason to refuse to recognize otherwise valid signatures merely because they are now possible in electronic form.

The express prohibitions in SB 165 also do not pass constitutional muster. From the legislative history available to the public, there are three identifiable legislative purposes for SB 165. First, there is the argument that holographic signatures are necessary to prevent fraud and preserve the "integrity" of the signature-gathering process. As noted above, however, this Court already rejected that argument in *Anderson*, and it is no more persuasive here. *Id*. ¶ 23 n.7 ("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. Moreover, electronic signatures may be a better deterrent to candidate fraud….").

Even if there were valid fraud concerns regarding electronic signatures, however, a categorical ban is 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 to ensure that electronic signatures were valid. 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.

A second stated purpose for SB 165 was to react to and legislatively overturn this Court's decision in *Anderson*. The legislature's desire to express disagreement with this Court's decision, however, is not a legitimate purpose if the effect is to restrict fundamental rights. *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."). On this 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).

The third purported legislative purpose for SB 165 was that it would save money for the State of Utah. This contention apparently rested on the unsupported notion that the only way in which the State could ever allow electronically collected signatures for ballot access would be for the State to design its own online signature collection system, on its own time and at its own expense. That is simply not the case.[8] In any event, even if saving money were a legitimate justification for restricting the fundamental rights of

[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 sets aside money for that effort. In any event, the Lt. Governor'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.

thousands of Utah voters (which it is not), a blanket prohibition on all electronic signatures is not reasonably necessary to serve that goal.

As this Court intimated in *Anderson*, in this day and age there is no valid reason to treat holographic and electronic signatures differently. Where, as here, imposing such a distinction prevents thousands of Utah voters from exercising their fundamental right to engage in the initiative process, that prohibition violates the Utah constitution and should be struck down.

III. THIS COURT SHOULD NOT APPLY THE LOWER STANDARD OF SCRUTINY FROM *UTAH SAFE TO LEARN*, BUT EVEN IF IT DOES, THE CHALLENGED STATUTES FAIL.

As noted above, in *Gallivan* this Court was clear that restrictions on the initiative right implicate fundamental rights, and therefore trigger heightened scrutiny. *Gallivan*, 2002 UT 89, ¶¶ 27, 40. In *Utah Safe to Learn-Safe to Worship Coalition v. State of Utah*, 2004 UT 32, 94 P.3d 217, 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 and need only be reviewed for placing undue burdens. 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" in every case. *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.

For the reasons set forth below, the ACLU of Utah respectfully submits that the distinction created by *Utah Safe to Learn* is circular, analytically unhelpful, and should be reconsidered. This Court should instead return to the bright-line rule established by *Gallivan* that applies heightened scrutiny whenever restrictions are placed on the rights of initiative and referendum. Even if this Court declines to do so, however, the challenged statutes fail under the lower standard of scrutiny set forth in *Utah Safe to Learn*.

A. The *Utah Safe to Learn* Standard is Circular and Analytically Unhelpful.

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. That the right is "self-limiting" does not answer this question, because it is obvious that the legislature's enabling authority

[9] For this reason alone, *Utah Safe to Learn* does not apply here because the prohibition on electronic signatures implicates both the initiative right and the uniform operation of laws provision. It is worth noting, however, that 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 one. Indeed, the disjunctive language in the 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)).

does not include the plenary power to restrict the right completely, or even unduly.[10] 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, 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.

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.

[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 Lehi. *See Utah Safe to Learn*, 2004 UT 32, ¶ 34 (even under lesser scrutiny, an enactment cannot "unduly burden or diminish the initiative right"); *Sevier Power Co., LLC v. Bd. of Sevier County 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.").

These concerns are particularly acute in this context because when the legislature restricts the people's coequal power to pass legislation—including, as in this case, legislation that is disfavored by the legislature itself—it is essentially engaging in a type of self-dealing, reserving to itself greater power to dictate the substance of this State's laws. In similar contexts where a governmental actor has a stake in a particular issue, 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 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 initiatives. 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 initiative right, warrant the heightened scrutiny applied in *Gallivan*.

The bright-line rule followed by *Gallivan* solves this problem. Although it is true that the rights to initiatives and referenda are self-limiting, that does not mean that the

[11] *See also U.S. 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).

legislature's enabling statutes do not implicate those rights. Any time the legislature imposes restrictions on the initiative and referenda processes—and particularly when it enacts self-interested restrictions—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, 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.

This Court should accordingly apply the heightened scrutiny prescribed by *Gallivan* and find the challenged statutes unconstitutional.

B. The Challenged Statutes Fail Even Under the *Utah Safe to Learn* Test.

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." 2004 UT 32, ¶ 35. To make this determination, this Court assesses whether the challenged law has a "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.*[12]

[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

As shown above, none of the legislative purposes for the challenged statutes are sufficient given the undue burden they place on the initiative right. They do not add "integrity" to signature gathering, nor do they save money. And that the legislature disagrees with *Anderson* and wants to make it more difficult for the people to exercise their coequal legislative powers is not a legitimate justification to restrict those rights. *See Gallivan*, 2002 UT 73, ¶ 59 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 the challenged statutes is to make it "not so easy" to get initiatives on the ballot "simply for the sake of making it harder to do so." *Id.* ¶ 53. This Court warned in *Gallivan* of the inevitable consequences arising from such piecemeal attacks on the initiative right:

> 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.

Id. ¶ 52.

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relates directly to the "procedures enacted to enable" the initiative right. *Id.*; *see also Gallivan*, 2002 UT 73, ¶ 53.

That erosion is what is at issue in this case. This Court stands as a safeguard to the rights of Utah voters to exercise their coequal legislative powers and check the otherwise unfettered powers of the legislature. It should reject the legislature's self-interested and unconstitutional restriction of the initiative right and reaffirm the principle that the people's sovereign right to govern themselves remains inviolate.

CONCLUSION

For all of these reasons, the ACLU of Utah respectfully requests that this Court rule that the prohibition on the counting of electronic signatures in the initiative process violates the Utah Constitution.

RESPECTFULLY SUBMITTED this 20th day of July 2012.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

As required by Rule 24(f)(1)(C) of the *Utah Rules of Appellate Procedure*, I certify that this brief contains 8,220 words, exclusive of the Table of Contents and the Table of Authorities. I relied on my word processing program, Microsoft Word 2007, to obtain the word count. I certify that, to the best of my knowledge and belief, the information contained in this certification of compliance is true and correct.

DATED this 20th day of July 2012.

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John Mejia

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2012, ten true and correct hard copies and one true and correct, searchable-PDF electronic copy of the foregoing **BRIEF OF AMICUS CURIAE ACLU OF UTAH FOUNDATION, INC.** were filed with the Clerk of the Utah Supreme Court, and two true and correct hard copies and one true and correct, searchable-PDF electronic copy were served on each of the following:

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