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## IN THE TURBULENT WAKE OF *ANDERSON V. BELL*: PROTECTING CORE POLITICAL SPEECH AND UTAHNS' RIGHT TO INITIATIVE

Daniel W. Boyer\*

### I. INTRODUCTION

At the turn of the twentieth century, Utah adopted a statutory initiative and referendum process whereby citizens could pass laws and suspend statutes by gathering enough signatures to place an issue on a statewide ballot for voting.<sup>1</sup> Initiatives provided citizens a means of engaging directly in the state lawmaking process by drafting proposed bills. Similarly, through popular referenda, citizens could challenge and potentially repeal specific acts of the legislature. Since its inception, this democratic process has had a troubled existence and seen many obstacles.<sup>2</sup> For several years after its ratification in 1900, the constitutional amendment granting Utah citizens the right to initiative remained ineffectual due to the legislature's failure to pass reasonable implementing laws.<sup>3</sup> Not until over sixteen years later did initiative and referenda proponents finally influence the legislature to pass an implementing bill.<sup>4</sup> As M. Dane Waters, founder of the Initiative and Referendum Institute, notes, however, this first bill "was worthless."<sup>5</sup> "[I]t specified that anyone signing a petition to put an initiative on the ballot had to sign 'in the office and in the presence of an officer competent to administer oaths.'"<sup>6</sup> This stifled early initiative and referendum efforts by preventing circulation of petitions throughout voting districts. Not until 1960 did Utahns finally pass a citizen initiative.<sup>7</sup>

More recently, initiative and referenda proponents have encountered resistance from the legislature in the form of Senate Bill 165 (S.B. 165), which categorically banned use of electronic signatures gathered on the Internet. The bill effectively stifles Internet circulation efforts, which provide citizens a secure and effective way to disseminate political information. The Utah legislature has also

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<sup>1</sup> UTAH CONST. art. VI, § 1, cl. 2 (guaranteeing that "the legal voters . . . may . . . 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; or . . . require any law passed by the Legislature, except those laws passed by a two-thirds vote of the members elected to each house of the Legislature, to be submitted to the voters of the State, as provided by statute, before the law may take effect").

<sup>2</sup> See M. DANE WATERS, *THE INITIATIVE AND REFERENDUM ALMANAC* 400 (2003).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (quoting *Direct Legislation Elections*, 1917 Utah Laws 188, 190).

<sup>7</sup> *Id.*

prohibited the use of e-signatures in election drives conducted under Utah's Election Code, which allows candidates for state office who are unaffiliated with a registered political party to collect and submit signatures from registered voters so that their name may be placed on the official, statewide ballot.<sup>8</sup> Such signatures must be holographic—that is, handwritten—to qualify candidates for the public vote.<sup>9</sup>

This Note addresses the constitutionality of these recent measures that annul the legal effect of e-signatures in grassroots political movements. Specifically, it will examine how S.B. 165 has violated Utah voters' core political speech rights by creating an undue burden on both grassroots political campaigns and circulation of initiatives and referenda. This examination proceeds in two parts. Part I provides a historical context of the use of electronic signatures in the commercial and electoral activities of the United States. It then narrows its focus to examine Utah's checkered legislative history regarding the use of e-signatures for both electoral petitions and initiative and referenda movements. This turbulent history came to a head with Farley Anderson's abbreviated rise to candidacy for governor and the controversy that spurred the Utah Supreme Court's 2010 decision in *Anderson v. Bell*.<sup>10</sup> Part I concludes by documenting the legislature's response to *Anderson*, exposing both the haste and lack of substantiation with which it enacted S.B. 165.

Part II attempts to do, in part, what the court declined to do in *Anderson*: address the merits of Anderson's constitutional claims. Specifically, Part II analyzes Anderson's claims under a free-speech rubric, taking his case as representative of past and future actions in which the constitutionally vested right to engage in core political speech by circulating voting petitions and initiatives is threatened. Utah plaintiffs have generally avoided raising this species of constitutional challenge, relying instead upon Utah's uniform operation of laws provision, which, like the equal protection clause, provides that "persons similarly situated should be treated similarly."<sup>11</sup> Ultimately, a free-speech challenge cuts closer to the constitutional harm caused by S.B. 165 than the uniform operation of laws challenges brought by plaintiffs in earlier initiative and referenda cases, such as *Gallivan v. Walker*.<sup>12</sup> Whereas uniform operation of laws challenges were successful in preventing rural Utah counties from exercising disproportionate voting power over multicounty petitions, they likely would not succeed against the new constitutional harm brought by S.B. 165. Absent a clear discriminatory practice on the part of the government in applying the ban on e-signatures, a free-speech challenge more accurately identifies the constitutional violation. S.B. 165 thwarts the politically expressive conduct of the voter memorialized in signature,

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<sup>8</sup> See UTAH CODE ANN. § 20A-7-101(18)(a)–(b) (West 2012).

<sup>9</sup> *Id.* (defining "[s]ignature" as "a holographic signature" and providing that it "does not mean an electronic signature").

<sup>10</sup> 234 P.3d 1147 (Utah 2010).

<sup>11</sup> *Gallivan v. Walker*, 54 P.3d 1069 (Utah 2002).

<sup>12</sup> See *id.* at 1087.

as well as the persuasive communication preceding it. The First Amendment protects both of these stages in a petition-gathering effort.

Ultimately, any state action that unilaterally seeks to limit a group of voters' access to the ballot deserves strictest scrutiny, and the legislature's action cannot withstand this scrutiny because S.B. 165 unduly burdens petitioner gatherers' interest in the franchise, which is inviolable.

## II. BACKGROUND

### A. *E-signatures in American Commerce and Elections*

The issue of authentication, often raised in electronic signature disputes, has haunted nonholographic signatures since the telegraph. An early example, *Howley v. Whipple*,<sup>13</sup> involved a boundary dispute between two landowners near the Canadian border in New Hampshire where the trial court excluded a telegraphic communication made by the plaintiffs, which they had hoped would establish the location of one of their party members on a key date in dispute.<sup>14</sup> The Supreme Court of New Hampshire upheld the trial court's exclusion, opining that the telegraphic communication was inadmissible hearsay because an operator in New Hampshire had copied the original message of the sender in Montreal.<sup>15</sup> The court, however, acknowledged a widely accepted practice of contracting over the telegraph—a practice that complied with the writing requirement under the Statute of Frauds.<sup>16</sup> The court concluded that it does not make “any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office.”<sup>17</sup> *Howley* thus reasoned through the legal equivalency of the two media—ink and electricity—as premised upon a more basic similarity between their physical properties as fluids. The case stands for a growing awareness in late nineteenth-century jurisprudence that the “subtle” difference between the two media was only a matter of degree, not category. In the last analysis, what mattered was the intent of the signor, not the form of the signature.

The advent of computers, and subsequently the Internet, prompted a complete restructuring of the commercial landscape. Electronic signatures have now become the norm in memorializing interstate business transactions.<sup>18</sup> In 2000, Congress passed the Electronic Signatures in Global and National Commerce Act (ESIGN),

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<sup>13</sup> 48 N.H. 487 (1869).

<sup>14</sup> *See id.* at 487.

<sup>15</sup> *Id.* at 489.

<sup>16</sup> *Id.* at 488.

<sup>17</sup> *Id.*

<sup>18</sup> *See Take on Tech: E-Signatures Become the Norm* (MarketWatch Radio Network Sept. 6, 2012), available at <http://www.marketwatch.com/story/e-signatures-become-the-norm-2012-09-06-10107192>.

intended to facilitate the implementation of electronic records and signatures in interstate and foreign commerce by safeguarding the validity of contracts entered into electronically.<sup>19</sup> This law preempts state efforts to limit parties to signing business agreements only with holographic, paper signatures.<sup>20</sup> Although ESIGN provides for the continued validity of holographic signatures, it clearly stands for a federal endorsement of the shift to e-business.

Concurrent with this shift, several states began implementing programs allowing citizens to vote over the Internet by using electronic signatures in place of paper ballots. Just prior to the controversial 2000 ballot count that prompted the U.S. Supreme Court's decision in *Bush v. Gore*,<sup>21</sup> a lesser-known historic event occurred. Among the tens of millions of ballots cast and counted that year, eighty-four had been submitted online by citizens overseas.<sup>22</sup> The implementation of the Internet as a tool for democracy raised several questions. On the one hand, proponents of Internet voting felt that it was a natural transition for the franchise and would make voting accessible to those individuals who might otherwise have difficulty visiting the polls, such as those in wheelchairs, military and executive personnel overseas, busy single parents, and youth between the ages of eighteen and twenty-five who consume nearly all of their information online.<sup>23</sup>

On the other hand, critics of an Internet-driven election process noted the security risks involved in maintaining online databases where votes would be stored.<sup>24</sup> In 2000, hackers infiltrated and shut down several large corporate websites, including Amazon.com, Buy.com, CNN.com, eBay.com, and Yahoo.com.<sup>25</sup> In 2001, over a quarter-million computers suffered from the Code Red worm, which caused the Department of Defense to close many websites to public access until prophylactic measures could be developed.<sup>26</sup> Given the prevalence of these breaches, critics reasoned, how could the American electorate expect its voting information to be stored any more securely? Another emerging criticism of electronic voting was that it created a "digital gap" in the electorate, where race and socioeconomic status correlated with access to efficient and reliable Internet networks.<sup>27</sup> Some argued that wealthy, white homeowners would have more control over the franchise should the electronic vote replace the paper

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<sup>19</sup> See 15 U.S.C. §§ 7001–7031 (2006).

<sup>20</sup> See Carol S. Weissert & Sanford F. Schram, *The State of U.S. Federalism, 1999–2000*, PUBLIUS, Winter 2000, at 1, 6.

<sup>21</sup> 53 U.S. 98 (2000).

<sup>22</sup> R. MICHAEL ALVAREZ & THAD E. HALL, POINT, CLICK, AND VOTE: THE FUTURE OF INTERNET VOTING 2 (2004).

<sup>23</sup> See *id.* at 5–6.

<sup>24</sup> See *id.* at 7.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 8–9.

ballot.<sup>28</sup> Despite these concerns, in 2012, over thirty states allowed military and overseas voters to return ballots by email, a web portal, or by facsimile.<sup>29</sup>

*B. E-Signatures in Utah Commerce, Elections, and Article 6 Initiatives*

As in other states, Utah laws have consistently recognized the validity of nonholographic signatures. In *Salt Lake City v. Hanson*,<sup>30</sup> for instance, the Utah Supreme Court determined that stamped signatures made by a magistrate and arresting officers in a criminal matter created a valid and binding warrant for the arrest of misdemeanants.<sup>31</sup> The court emphasized that the form of the signature did not matter; whether “by finger or thumb prints, by a cross or other mark, or by any type of mechanically reproduced or stamped facsimile,” a nonholographic signature functioned just “as effectively as by [the signor’s] own handwriting.”<sup>32</sup> *Hanson* thus presents an early example of Utah’s adoption of the common law principle that “it is the intent rather than the form of the act that is important.”<sup>33</sup>

Currently, the e-signature provides manifestation of mutual assent for a significant portion of business transactions in Utah. In 2000, Utah adopted the Uniform Electronic Transactions Act (UETA),<sup>34</sup> becoming one of the first of forty-seven states to model the federal E-SIGN act.<sup>35</sup> The UETA provided Utah businesses, legal practitioners, and governmental agencies with speed, efficiency, and cost benefits, while promoting reliability and authenticity in online dealings.<sup>36</sup> To facilitate these various transactions, the new law pronounced, “If a law requires a signature, an electronic signature satisfies the law.”<sup>37</sup> Moreover, it plainly stated, “A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”<sup>38</sup> Given these legislative protections against

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<sup>28</sup> *Id.* at 8.

<sup>29</sup> PAMELA SMITH, MICHELLE MULDER & SUSANNAH GOODMAN, COUNTING VOTES 2012: A STATE BY STATE LOOK AT ELECTION PREPAREDNESS 81 (2012), *available at* [http://countingvotes.org/sites/default/files/CountingVotes2012\\_Final\\_August2012.pdf](http://countingvotes.org/sites/default/files/CountingVotes2012_Final_August2012.pdf); T.C. Sotteck, *Why Can't You Vote Online?*, VERGE (Oct. 11, 2012, 11:30 AM), <http://www.theverge.com/2012/10/11/3479170/why-cant-you-vote-online-elections-us>.

<sup>30</sup> 425 P.2d 773 (1967).

<sup>31</sup> *See id.* at 774.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 2000 Utah Laws 244 (codified as amended at UTAH CODE ANN. §§ 46-4-101 to -503 (West 2012)).

<sup>35</sup> *Electronic Signatures Come of Age: From Elections to Commerce and Beyond*, INFORMATION LAWGROUP (June 23, 2010), <http://www.infolawgroup.com/2010/06/articles/esignatures-1/electronic-signatures-come-of-age-from-elections-to-commerce-and-beyond>.

<sup>36</sup> *See id.*

<sup>37</sup> 2000 Utah Laws at 245 (codified at UTAH CODE ANN. § 46-4-201).

<sup>38</sup> *Id.*

governmental interference with e-signatures, along with the Act's contemplation of e-signatures being used outside of the commercial context, the Lieutenant Governor's and the legislature's recent stance against the use of signatures on petitions for both gubernatorial candidates and popular initiatives is not only curious, but also counter to Utah's policy.

Farley Anderson, gubernatorial candidate in 2010, felt acutely the effects of this change in legislative sentiment. On February 10, 2010, before Anderson's official submission for candidacy, Lieutenant Governor Greg Bell adopted an opinion issued over the signature of Utah Attorney General Mark Shurtleff in which the State invalidated all electronic signatures used in the petition-gathering process for initiative and referenda; this also extended to gubernatorial candidates' nomination packets.<sup>39</sup> Pursuant to this "ruling," when the Lieutenant Governor received Anderson's submission, he excised all e-signatures from the candidate's petition.<sup>40</sup> Anderson's petition thus fell short of the required minimum of 1,000 signatures, and the Lieutenant Governor rejected it, precluding Anderson's candidacy for the 2010 election.<sup>41</sup>

Anderson responded by filing a petition for extraordinary writ to the Utah Supreme Court, which was granted.<sup>42</sup> Although the court declined to address the constitutional challenges Anderson raised against the Lieutenant Governor's action disallowing e-signature, it nevertheless held that electronic signatures were valid instruments for purposes of securing a place on the ballot for candidates unaffiliated with a registered political party.<sup>43</sup> It therefore "grant[ed] Mr. Anderson his writ of extraordinary relief and instruct[ed] the Lt. Governor to recount the signatures submitted by Mr. Anderson on March 19, 2010 to determine if he ha[d] satisfied the requirements of section 20A-9-502."<sup>44</sup> Anderson's votes were recounted and, after successfully obtaining a spot on the ballot and running for governor in the November 2010 election, he lost by a landslide.<sup>45</sup>

### *C. The Enactment of S.B. 165 and the ACLU's Response*

Responding to the Utah Supreme Court's ruling, in March 2011, the Utah legislature passed S.B. 165, creating a categorical ban on e-signatures in Title 20,

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<sup>39</sup> See Memorandum of Utahns for Ethical Government on the Use of E-Signatures for Initiatives Under Utah's Election Code at 8, *Anderson v. Bell*, 234 P.3d 1147 (Utah 2010) (No. 20100237) [hereinafter Brief for Utahns for Ethical Government].

<sup>40</sup> *Anderson v. Bell*, 234 P.3d 1147, 1148 (Utah 2010).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1149.

<sup>43</sup> *Id.* at 1156 (adhering to the principle of constitutional avoidance).

<sup>44</sup> *Id.*

<sup>45</sup> See *Utah Election Results*, UTAH.GOV, <http://electionresults.utah.gov/xmlData/300080.html> (last visited Aug 2, 2013) (showing that Anderson received less than 2% of the vote, whereas Gary Herbert, winner and current governor, received over 64%).

Utah's Election Code.<sup>46</sup> This bill amended Title 20 to limit "signature" to mean "a holographic signature,"<sup>47</sup> and expressly provides that "[s]ignature" does not mean an electronic signature."<sup>48</sup> Under the current form of section 20A-9-502, a candidate must ensure that the signature sheets contain the following declaratory statement imputed to each signing voter: "I have personally signed this petition with a *holographic* signature."<sup>49</sup> Not only did S.B. 165 reach signatures in the Election Code, but it also extended into the initiative and referenda context. Under the new statute, an electronic signature could no longer be "used to sign a petition . . . to qualify a ballot proposition for the ballot."<sup>50</sup>

Senator Curt Bramble, the bill's sponsor when it was first presented on the Senate floor in 2011, argued that the intent behind the bill was to protect Utah's "system of governance," noting that "the vote is the most sacred thing that we do, and signing a petition is tantamount to casting a vote."<sup>51</sup> In order to "give clear direction to the courts on the matter,"<sup>52</sup> the bill purported to resolve an apparent "ambiguity" that was before the legislature as to what constituted a permissible vote.<sup>53</sup> Claiming that the authority to resolve this "ambiguity" was "vested in the legislature,"<sup>54</sup> Bramble contended that "when citizens take it upon themselves" to conduct an initiative, "it is appropriate to have some strict and fairly rigorous standards," such as "checks and balances," and "clarity and certainty when it comes to the provisions related to the qualifying for the ballot initiative."<sup>55</sup> He concluded by saying that he believed this bill would "clarify all of those issues that are currently being disputed on recent initiative activities."<sup>56</sup> When questioned as

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<sup>46</sup> See S.B. 165, 59th Leg., Gen. Sess., 2011 Utah Laws 17.

<sup>47</sup> UTAH CODE ANN. § 20A-7-101(18)(a) (West 2012).

<sup>48</sup> *Id.* § 20A-7-101(18)(b).

<sup>49</sup> *Id.* § 20A-9-502(b)(vi) (emphasis added).

<sup>50</sup> *Id.* § 20A-1-306(1). Consider how the legislature, through Senate Bill 165, has managed to nest a provision in the Election Code that purports to reach to and control a Sixth Amendment guarantee in Utah's Constitution.

<sup>51</sup> Senate Floor Debate, S.B. 165, 59th Leg., Gen. Sess. (Utah Mar. 7, 2011) (Senate audio recording, Part 2) (statement of Sen. Curt Bramble), available at <http://le.utah.gov/asp/audio/index.asp?House=S&Sess=2011GS> (Choose "SB0165S01" from "Bill from Session" form; then select hyperlink "Day 42 (3/7/2011)") [hereinafter *First Senate Floor Debate*].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Senate Floor Debate, S.B. 165, 59th Leg., Gen. Sess. (Utah Mar. 8, 2011) (Senate audio recording, Part 1), available at <http://le.utah.gov/asp/audio/index.asp?House=S&Sess=2011GS> (Choose "SB0165S01" from "Bill from Session" form; then select hyperlink "Day 42 (3/8/2011)").

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



to why a blanket prohibition was necessary to achieve this clarity,<sup>57</sup> the sponsor did not respond.

Concurrent with the bill's passage in the waning days of the 2011 legislative session,<sup>58</sup> another voter referendum took root that sought to repeal House Bill 477 (H.B. 477), "Government Records Amendments," a controversial bill that, like S.B. 165, was introduced and passed rapidly through the last legislative sessions of 2011.<sup>59</sup> H.B. 477 amended Utah's Government Records Access Management Act (GRAMA)—a law protecting citizens' access to governmental records—to shield all government voice mails, instant messages, video chats, and text messages from public review, even when the content of those records related substantially to public business.<sup>60</sup>

The grassroots referendum seeking to abolish H.B. 477 relied largely on electronic signatures. Therefore, on March 25, 2011, Lieutenant Governor Bell, acting in accordance with the blanket legislative ban imposed by S.B. 165, declared his refusal to recognize referendum packets that proponents sent to county clerks. The American Civil Liberties Union of Utah reacted quickly.<sup>61</sup> Representing the cosponsors of the referendum, Janalee Tobias and Nancy Lord, the ACLU filed suit against the Lt. Governor that same day, contending,

S.B. 165 violate[d] the state and federal constitutional rights of Utah voters—including those of a third ACLU client, Madison Hunt, who attend[ed] college out of state and who, like many Utah voters (like soldiers or missionaries), [could not] participate in the HB 477 Referendum if she [was not] able do so on-line.<sup>62</sup>

The ACLU specifically addressed two provisions of the Utah Constitution that the Lieutenant Governor, acting under the color of S.B. 165, had violated by

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<sup>57</sup> *First Floor Debate*, *supra* note 51 (statement of Sen. Ben McAdams) (expressing concern that S.B. 165 (First Substitute) might be moving in the "wrong direction," and noting that the better course might be to explore "how we can use electronic and on-line means to involve the public in this process").

<sup>58</sup> Bramble presented S.B. 165 to the legislature on the forty-second and forty-third days of the 2011 General Legislative Session. *Id.* It passed the House and was put into effect on March 10, 2011, the forty-fifth and last day of the General Session. *See* S.B. 165, 59th Leg., Gen. Sess., 2011 Utah Laws 17; *see also* UTAH CONST. art. VI, § 16, cl. 2 (limiting sessions called by the governor to thirty days unless for impeachment purposes).

<sup>59</sup> *See Unconstitutional E-Signatures Ban Results in Lawsuit*, ACLU OF UTAH, <http://www.acluutah.org/SB165lawsuit.html> (last visited Apr. 6, 2013).

<sup>60</sup> Memorandum of Points and Authorities in Support of Petition for Writ of Extraordinary Relief at 1, *Lord v. Bell*, No. 20110259 (Utah Mar. 25, 2011).

<sup>61</sup> *See* Petition for Writ of Extraordinary Relief, *Lord v. Bell*, No. 20110259 (Utah Mar. 25, 2011), *available at* [http://www.acluutah.org/SB165\\_Petition\\_Extraordinary\\_Writ\\_032511.pdf](http://www.acluutah.org/SB165_Petition_Extraordinary_Writ_032511.pdf), *withdrawn* Mar. 31, 2011.

<sup>62</sup> *Unconstitutional E-Signatures Ban Results in Lawsuit*, *supra* note 59.

his outright refusal to accept signature packets that Tobias and Lord had collected in their referendum: first, the petitioners argued that S.B. 165 patently contravened Utahns' constitutionally vested and fundamental right to initiate legislation and hold referenda on "any law passed by the Legislature";<sup>63</sup> second, petitioners claimed that the ban on e-signatures ran afoul of Utah's uniform operation of laws provision, which requires that "[a]ll laws of a general nature shall have uniform operation."<sup>64</sup> Central to the ACLU's constitutional challenge was their theory under the uniform operation of laws provision that S.B. 165 created discriminatory class distinctions and treated similarly situated voters differently.<sup>65</sup> By engaging in what amounted to an equal protection analysis, petitioners relied largely upon the Utah Supreme Court's rationale in *Gallivan v. Walker*, where the court struck down a multicounty ballot initiative petition signature requirement that diluted urban votes in favor of votes from less-populous rural counties.<sup>66</sup>

Only hours after the ACLU filed its petition, the legislature voted to repeal H.B. 477 amidst a torrent of public opposition to the bill.<sup>67</sup> The ACLU then voluntarily withdrew its petition challenging S.B. 165 and the Lieutenant Governor's refusal of e-signatures.<sup>68</sup>

### III. ANALYSIS

While the ACLU correctly situated its attack on S.B. 165 within Utah's constitutional protection of initiative and referenda, it relied too much on *Gallivan's* uniform operation of laws analysis. A free speech analysis provides an alternative and sharper lens through which to scrutinize the legislature's violations. As the government's prohibition on initiative e-signatures is categorical and extends to all residents with a vested liberty interest in the franchise, pursuing a constitutional claim under the First Amendment strikes at the heart of the unilateral actions taken by the Lieutenant Governor and the Utah legislature. The evil inherent in these state actions arises precisely out of their indiscriminating, unequivocal burden on the franchise and their blanket silencing of core political speech. The following sections will address specifically how a free speech challenge improves upon the uniform operation of laws complaint levied in *Gallivan*, how S.B. 165 directly targets Utahns' First Amendment interest in

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<sup>63</sup> Memorandum of Points and Authorities in Support of Petition for Writ of Extraordinary Relief, *supra* note 60, at 4–5 (quoting UTAH CONST. art. VI, § 1); *see also* *Gallivan v. Walker*, 54 P.3d 1069, 1081–82 (Utah 2002) (holding that the right to "directly legislate through initiative and referenda is sacrosanct and a fundamental right").

<sup>64</sup> Memorandum of Points and Authorities in Support of Petition for Writ of Extraordinary Relief, *supra* note 60, at 6–18 (quoting UTAH CONST. art. I, § 24).

<sup>65</sup> *Id.* at 8–12.

<sup>66</sup> 54 P.3d at 1087–88.

<sup>67</sup> *See Unconstitutional E-Signatures Ban Results in Lawsuit*, *supra* note 59.

<sup>68</sup> *Id.*

political discourse, why it deserves the strictest scrutiny of the court, and how it must fail such scrutiny.

*A. Why Free Speech Cuts Deeper than Gallivan’s Uniform Operation of Laws Analysis*

In *Gallivan*, the Utah Supreme Court addressed a different kind of limitation on the initiative-gathering process. At the time *Gallivan* was decided—in 2002—the legislature had included a multicounty distribution provision requiring petition circulators to obtain signatures from at least twenty of the twenty-nine counties equal to 10% of all votes cast for candidates for governor in the last regular general election.<sup>69</sup> This multicounty distribution requirement was intended to incorporate a greater geographical cross section of the Utah electorate. It precluded petition gatherers from getting initiatives onto the statewide ballot by concentrating their efforts solely on urban areas. This, as the court noted, created a situation in which “rural counties . . . wield[ed] a disproportionate amount of power in the determination of whether an initiative qualifie[d] to be placed on the ballot.”<sup>70</sup> The court found that the statutory provision created “two subclasses of registered voters: those who reside in rural counties and those who reside in urban counties.”<sup>71</sup> Rural county voters had an effective veto power over the larger urban demographic.

Given this disproportionate allocation of franchise powers, a uniform operation of laws analysis was appropriate because it squarely targeted the unequal effects on the franchise invited by a multicounty distribution requirement. Article 1, section 24 of the Utah Constitution states: “All laws of a general nature shall have uniform operation.”<sup>72</sup> This provision shares with the Fourteenth Amendment of the United States Constitution “the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same.”<sup>73</sup> The *Gallivan* court held that the class distinctions resulting from the multicounty distribution provision were discriminatory because they had “the effect of diluting the power of urban registered voters and heightening the power of rural registered voters in relation to an initiative petition, thereby treating similarly situated registered voters disparately.”<sup>74</sup> Although petitioners had levied free speech challenges in their brief, the court declined to address them because it had already determined a violation of fundamental rights had occurred under the uniform operation of laws analysis.<sup>75</sup>

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<sup>69</sup> UTAH CODE ANN. § 20A-7-201(2)(a) (West 2012) (amended in 2003 and 2011).

<sup>70</sup> *Gallivan*, 54 P.3d at 1086–87.

<sup>71</sup> *Id.* at 1086.

<sup>72</sup> UTAH CONST. art. I, § 24.

<sup>73</sup> *Gallivan*, 54 P.3d at 1083–84.

<sup>74</sup> *Id.* at 1086–87.

<sup>75</sup> *Id.* at 1097.

In Anderson's case, however, where the legislature has created a uniform prohibition on e-signatures, no such concern for disproportionate treatment of the electorate exists. Given the blanket nature of the prohibition and the fact that it infringes on the fundamental right of everyone with access to a computer and Internet service, a uniform operation of laws analysis is not germane to a challenge against it. In fact, inviting the court to engage in such analysis may prove self-defeating. While plaintiffs generally contemplate two subclasses of voters affected by the ban on e-signatures—Utahns residing in-state and those located out of state—a uniform operation of laws analysis may invite the court to scrutinize the “digital gap” separating some disadvantaged groups from Internet access. As Alvarez and Hall note, “Individuals who connect to the Internet at home tend to be white, wealthy, well educated, male, and Republican.”<sup>76</sup> Therefore, even among the members of the electorate who do have Internet service, the quality of that access varies in proportion to socioeconomic status. Those who cannot afford high-speed services may be perceived as disadvantaged in the voting process.<sup>77</sup>

Whether these disparities in fact create substantial obstacles to the franchise is subject to debate. A uniform operation of laws analysis, however, when conducted over the several counties of Utah—with their disparities in race and socioeconomic status—may result in the court upholding the legislative ban on e-signatures. This possibility of backfiring underscores that the uniform operation of laws challenge is not well suited to address S.B. 165. In sum, the government's categorical ban on e-signatures should not be analyzed under an equal protection rubric, but instead, as demonstrated below, under the First Amendment's guarantee of protecting citizens' right to engage in core political speech.

### *B. Why Electronic Signatures on Initiatives Are Protected Speech*

While *Gallivan* did not analyze Utahns' right to initiative under the First Amendment, its central holding rested on basic fundamental principles of free speech. When the court acknowledged that “[t]he initiative right encourages political dialogue and allows the general populace to have substantive and meaningful participation in enacting legislation that impacts society,”<sup>78</sup> it highlighted both the expressive and communicative political interaction that initiatives foster. This type of political discourse “is democracy in its most direct and quintessential form.”<sup>79</sup> Therefore, although *Gallivan* declined to reach the petitioner's free-speech challenges, these basic First Amendment rights were integral to its constitutional analysis.

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<sup>76</sup> ALVAREZ & HALL, *supra* note 22, at 8.

<sup>77</sup> *See id.*

<sup>78</sup> *Gallivan*, 54 P.3d at 1081.

<sup>79</sup> *Id.*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>80</sup> The Fourteenth Amendment makes this provision applicable to Utah.<sup>81</sup> Freedom of speech means an assurance of “unfettered interchange of ideas for the bringing about of social changes desired by the people.”<sup>82</sup> In *Meyer v. Grant*,<sup>83</sup> the Supreme Court explained that the circulation of a petition for state initiatives and referenda “involves the type of interactive communication . . . that is appropriately described as ‘core political speech.’”<sup>84</sup> Furthermore, one’s signature on such petitions expresses the political view that the whole electorate should consider the issue raised by the initiative, and thus each signature deserves the same core protections.<sup>85</sup>

*Meyer* followed an earlier decision in which the Court recognized solicitation of charitable contributions as speech protected by the First Amendment.<sup>86</sup> The Court based its recognition of the circulation of initiatives and referenda as core political speech upon their similar tendency to advance certain speech interests—“communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.”<sup>87</sup> As the Court noted,

Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.<sup>88</sup>

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<sup>80</sup> U.S. CONST. amend. I.

<sup>81</sup> U.S. CONST. amend. XIV, § 1; see *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (incorporating the Free Press Clause); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating the Free Assembly Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (incorporating the Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (incorporating the Establishment Clause).

<sup>82</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>83</sup> 486 U.S. 414 (1988).

<sup>84</sup> *Id.* at 421–22.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 422 n.5 (citing *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980)).

<sup>87</sup> *Id.* (quoting *Schaumburg*, 444 U.S. at 632).

<sup>88</sup> *Schaumburg*, 444 U.S. at 632.

In *Meyer*, the Court similarly directed its focus towards protecting the marketplace of political ideas. Indeed, initiatives and referenda are geared more specifically at engaging this market, as they seek out not a passive payment, but rather an active political voice expressed in signature. It is in this sense that initiatives and referenda constitute core political speech. Electronic signatures, no less than holographic signatures, stand for a vital moment in political discourse—when political advocacy has reached out and affected constituents of the franchise. The electronic signature memorializes both the politically expressive conduct of the voter and the persuasive communication preceding it.

*C. Why Recent Title 20 Amendments Deserve the Strictest Scrutiny*

Utah citizens have reserved the power to propose legislation and nominate political candidates by initiative petition. As shown in Section III.B above, this power emanates not only from Article VI of the Utah Constitution, but also from the First Amendment's protection of interactive political speech, and the Utah legislature may not restrict, dilute, or otherwise limit those powers unless they can do so by passing a law that survives strict scrutiny.<sup>89</sup> "Restrictions on access to the ballot burden two distinct and fundamental rights, the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively."<sup>90</sup>

Accordingly, the legislature's decision to amend provisions of Utah's Election Code to deny voters the right to circulate ballot petitions electronically is "subject to exacting scrutiny."<sup>91</sup> The blanket exclusion of e-signatures places "burden[s] on political expression,"<sup>92</sup> and "trenches upon an area in which the importance of First Amendment protections is 'at its zenith,'"<sup>93</sup> thus "inevitabl[y] . . . reducing the total quantum of speech on a public issue."<sup>94</sup> As such, these restrictions "are to be closely scrutinized and narrowly construed."<sup>95</sup> The government must first show that S.B. 165 advances a compelling interest. If it can clear that hurdle, it must still show that the bill is as narrowly tailored as possible to address that interest. The government, having assumed a burden that "is well-nigh insurmountable,"<sup>96</sup> cannot do either.

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<sup>89</sup> See *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999).

<sup>90</sup> *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citation and internal quotation marks omitted).

<sup>91</sup> *Meyer*, 486 U.S. at 420.

<sup>92</sup> *Id.* at 428.

<sup>93</sup> *Id.* at 425.

<sup>94</sup> *Id.* at 423; see also *Socialist Workers Party*, 440 U.S. at 184.

<sup>95</sup> *Meyer*, 486 U.S. at 423 (quoting *Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983)).

<sup>96</sup> *Id.* at 425.

*D. S.B. 165's Ballot Access Restriction Creates an Undue Burden on First Amendment Rights*

When ballot access restrictions impose a “severe” burden on the electorate, they are subject to strict scrutiny and cannot pass muster unless narrowly tailored to serve a compelling state interest.<sup>97</sup> In examining a law that severely infringes upon the franchise, a court must “consider[] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.”<sup>98</sup> Strict scrutiny of the government’s position means weighing “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>99</sup> The interests put forward by S.B. 165’s sponsor hardly justify the character and magnitude of the injury that the bill imposes upon voters.

*1. None of the Legislature’s Purported Concerns Justify the Enactment of S.B. 165*

First, Senator Bramble’s stated interest in resolving an apparent “ambiguity”<sup>100</sup> cannot survive even rational basis review. Prior to the enactment of S.B. 165, the Utah Code specifically contemplated the use of electronic signatures for initiatives and referenda. Section 68-3-12 imposed clear “[r]ules of construction” for interpreting provisions like those contained in section 20A-9-502, upon which Anderson relied in collecting e-signatures to secure candidacy. The statute clearly defined “signature” to include a “name, mark, or sign written with the intent to authenticate any instrument or writing.”<sup>101</sup> The legislature further clarified the meaning of “writing” as “printing,” “handwriting,” and “*information stored in an electronic or other medium* if the information is retrievable in a perceivable format.”<sup>102</sup> The statutory instruments provided in section 68-3-12 left no room for ambiguity.

Assuming *arguendo* that any doubt remained, however, the Utah Supreme Court resolved it in *Anderson v. Bell*. There, the court held that electronic signatures unambiguously constitute valid signatures under section 20A-9-502.<sup>103</sup> While Bramble claimed that S.B. 165’s purpose was to provide “direction to the

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<sup>97</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>98</sup> *Storer v. Brown*, 415 U.S. 724, 730 (1974) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)) (internal quotation marks omitted).

<sup>99</sup> *Burdick*, 504 U.S. at 434.

<sup>100</sup> *First Floor Debate*, *supra* note 51.

<sup>101</sup> UTAH CODE ANN. § 68-3-12.5(26) (West 2012) (renumbered in 2011).

<sup>102</sup> *Id.* § 68-3-12.5(35)(a)–(c) (emphasis added).

<sup>103</sup> *Anderson v. Bell*, 234 P.3d 1147, 1156 (Utah 2010).

courts” and “clarify the intent of the legislature” in the wake of *Anderson*,<sup>104</sup> the legislature was not at liberty to make its intent clear at the expense of Utah voters’ fundamental rights of initiative and referenda.<sup>105</sup> Therefore the State’s asserted interest in clearing up confusion in the law by enacting S.B. 165 cannot survive even rational basis review.

Second, the government’s purported interest in fraud prevention, while important, cannot withstand a least restrictive means test under *Burdick v. Takushi*,<sup>106</sup> which forces the government to marshal a precise justification and show why the law is necessary.<sup>107</sup> While Senator Bramble contends that S.B. 165 disposes of a difficulty in the verification process of signatures and thereby maintains the integrity of that process,<sup>108</sup> he fails to specify what this difficulty entails. He similarly fails to marshal an exact explanation of how using electronic signatures compromises the integrity of the verification process, and he does not provide any statistical basis for his already highly generalized grievances. He has thus fallen woefully short of the demands imposed by *Burdick*, which require him to articulate a precise and compelling interest underlying the legislature’s injunction.<sup>109</sup>

Assuming that by referring to the integrity of the verification process, the Senator meant to address potential fraudulent practices involving electronic signatures, the government’s position is still unavailing. This argument was considered and rejected in *Anderson*.<sup>110</sup> Given the court’s disposition of this issue, along with the advances in e-signature verification technology since *Anderson* was decided, the government’s interest in maintaining security of the vote cannot meet the standard under strict scrutiny, which requires a “compelling” interest.

Moreover, even assuming the interest is compelling, the government has presented no specific findings to show that S.B. 165 is narrowly tailored to its stated interest in fraud prevention. Recent studies show that new digital encryption used in e-signing has not only leant authenticity to the electronic signature, but has

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<sup>104</sup> *First Floor Debate*, *supra* note 51.

<sup>105</sup> *See Gallivan v. Walker*, 54 P.3d 1069, 1090 n.11 (Utah 2002) (holding that “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”); *see also* discussion *supra* Section III.B (arguing that electronic signatures, under *Meyer v. Grant*, 486 U.S. 414 (1988), are constitutionally protected speech).

<sup>106</sup> 504 U.S. 428 (1992).

<sup>107</sup> *Id.* at 534.

<sup>108</sup> *First Floor Debate*, *supra* note 51.

<sup>109</sup> *Burdick*, 504 U.S. at 534.

<sup>110</sup> *See Anderson v. Bell*, 234 P.3d 1147, 1155 n.7 (Utah 2010) (“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.”).



also allowed voters to maintain their anonymity by encrypting the signature until verification is necessary.<sup>111</sup> A Stanford graduate student—Rebecca Bellovin—has analyzed how these advances in public key cryptography have enabled election boards (and by analogy, county clerks) to verify the authenticity of the signor while maintaining the secrecy of the vote. Bellovin shows that, “with sufficient redundancy in the encryption scheme . . . [public key cryptography is] vanishingly unlikely to disenfranchise legitimate voters.”<sup>112</sup>

Several critics of e-voting have referenced a 2004 report issued by a panel of computer security experts called upon by the U.S. Department of Defense to analyze potential security risks in the Secure Electronic Registration and Voting Experiment (SERVE).<sup>113</sup> SERVE, an experiment in online voting conducted by the Department of Defense to open the franchise to military personnel overseas, was test-run by Utah, as well as Arkansas, Florida, Hawaii, North Carolina, South Carolina, and Washington during the 2004 national election.<sup>114</sup> The panelists’ report criticized SERVE for having “fundamental security problems that leave it vulnerable to a variety of well-known cyber attacks (insider attacks, denial of service attacks, spoofing, automated vote buying, viral attacks on voter PCs, etc.), any one of which,” they argue, “could be catastrophic.”<sup>115</sup>

However, the Vista Voter Registration System<sup>116</sup> deployed by petition circulators in Utah and similar jurisdictions reduces the risk of fraud for three

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<sup>111</sup> See Rebecca Bellovin, *Cryptography: Authentication, Blind Signatures, and Digital Cash 1–4* (Aug. 2008) (unpublished graduate note, Stanford University) (on file with Department of Mathematics, Stanford) (crediting David Chaum, *Blind Signatures for Untraceable Payments*, in *ADVANCES IN CRYPTOLOGY: PROCEEDINGS OF CRYPTO 82*, at 199 (David Chaum et al. eds., 1983); David Chaum et al., *Untraceable Electronic Cash*, in *LECTURE NOTES IN COMPUTER SCIENCE: ADVANCES IN CRYPTOLOGY – CRYPTO 88*, at 319 (Shafi Goldwasser ed., 1990), available at <http://math.stanford.edu/~rmbellov/writings/chaum.pdf>.

<sup>112</sup> *Id.* at 4; see ADOBE SYS., INC., *ELECTRONIC SIGNATURES: SOLUTION SCENARIOS FOR YOUR IT ENVIRONMENT 3* (2008) [hereinafter *ADOBE WHITE PAPER*], available at <http://www.evolutionbook.it/documenti/presentazioni/Electronic%20signatures%20-%20Solution%20scenarios%20for%20your%20IT%20environment.pdf>.

<sup>113</sup> DAVID JEFFERSON ET AL., *A SECURITY ANALYSIS OF THE SECURE ELECTRONIC REGISTRATION AND VOTING EXPERIMENT (SERVE)* (2004).

<sup>114</sup> John Schwartz, *Report Says Internet Voting System Is Too Insecure to Use*, N.Y. TIMES (Jan. 21, 2004), <http://www.nytimes.com/2004/01/21/technology/23CND-INTE.html>.

<sup>115</sup> JEFFERSON ET AL., *supra* note 113, at 2; see also R. MICHAEL ALVAREZ & THAD E. HALL, *ELECTRONIC ELECTIONS: THE PERILS AND PROMISES OF DIGITAL DEMOCRACY 84* (2008) (Alvarez and Hall outline the SERVE project and note, importantly, that “the report did not directly criticize the SERVE system or its architecture. Instead, the problem with Internet voting is with the Internet itself” where any transaction—“from buying a book to e-filing your taxes—is dangerous when done online.”).

<sup>116</sup> See Brief for Utahns for Ethical Government, *supra* note 39.

reasons. First, it borrows upon the same encryption technology used to secure commercial transactions, thus providing a means of authenticating e-voters' identities while maintaining their anonymity. As Alvarez and Hall have noted in regard to such registration systems, "voters can be required to use password-protected digital certificates to authenticate themselves . . . and if any attempt is made to read or alter the ballot, both the voter and election officials can detect the attempt."<sup>117</sup> Second, clerks engaged in the process of verifying the voter against a central database can rely exclusively on a voter registration system that performs cross-checks electronically, thus mitigating human error.<sup>118</sup> Third, political and market pressures will continue to increase cybersecurity for online voting. Given that the technology supporting secure commercial transactions has historically been the same as that used for online voting, and private groups had made cybersafety a primary condition on lending,<sup>119</sup> local governmental databases will no doubt draw from these private innovations in security to protect the e-vote. Furthermore, court-imposed sanctions for voter fraud online will reinforce the cybersecurity of the e-signature and the vote it memorializes. Because commercial and governmental databases are subject to cyber attacks, their stewards benefit materially by cooperating to mitigate these risks. In sum, the Utah legislature's lack of specificity in articulating its interests and its failure to marshal any precise evidence to justify its concerns for voter fraud are fatal to S.B. 165's legacy.

Finally, the Utah legislature's categorical ban on electronic signatures was not "necessary" under *Burdick* because the government could have deployed less restrictive means to prevent voter fraud. As an alternative to an outright prohibition on such signatures, the legislature could have promulgated rules to guide the verification process, requiring county clerks to follow certain procedures while confirming the identity of the e-signer. The difficulty of the procedure currently followed by county clerks, who must mechanically verify each holographic signature against an electronic database,<sup>120</sup> further exposes the attenuated link between the government's action and its justification. The current manual verification process not only offers a potentially worse alternative to voter-fraud

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<sup>117</sup> ALVAREZ & HALL, *supra* note 22, at 90.

<sup>118</sup> In fact, Utahns for Ethical Government has noted that the county clerks' certification process, under the initiative statute, has nothing to do with "testing" signatures for form or authenticity. Because the clerks are not forensic experts at handwriting analysis, their role is limited to determining "whether or not each signer is a registered voter according to the requirements of Section 20A-7-206.3." UTAH CODE ANN. § 20A-7-206(3)(a)–(b) (West 2012). Therefore, the Vista system adds a forensics mechanism where none existed beforehand.

<sup>119</sup> ALVAREZ & HALL, *supra* note 22, at 96–99.

<sup>120</sup> New provisions in the Election Code established by S.B. 165 require county clerks to determine whether each holographic petition signature "appears substantially similar to the signature on the statewide voter registration database." S.B. 165, 59th Leg., Gen. Sess., 2011 Utah Laws 17.

prevention; it also requires more time and tax dollars. Since S.B. 165 patently silences core political speech, while providing no alternative mechanism for voters who have been denied the franchise by its injunction on e-signatures, none of the government's stated interests can support it.<sup>121</sup>

## *2. The Nature and Magnitude of the Harm Brought Upon Utah Voters Constitutes an Undue Burden on Speech*

While the legislature may provide reasonable regulations regarding the procedure for signature verification, these regulations may not disenfranchise voters who nonfraudulently sign onto an initiative.<sup>122</sup> These procedural requirements rise to the level of an undue burden when a "reasonably diligent" initiative proponent could, absent the regulation, normally qualify a statutory initiative.<sup>123</sup> Although the Utah Constitution grants limited authority to the legislature to set certain conditions and requirements for exercise of the referendum right, it may not abuse that authority by making preemptive attacks on voters' First Amendment rights or expand its own unchecked powers in the process.

Both the Lieutenant Governor and the Utah legislature have engaged in precisely this kind of abuse of power by making rules that insulate government from the voting public. The Lieutenant Governor acted first in 2010 to issue a ruling that divested Farley Anderson of his candidacy by declaring void all of his petition votes that had been signed electronically. By doing so, Lieutenant Governor Bell stepped outside his constitutionally defined sphere of authority and exercised unbridled control over Anderson and his supporters' speech interests.<sup>124</sup> While the Lieutenant Governor still demurs to his claimed authority as "chief election officer," under section 67-1a-2(2)(a) of the Utah Code, this "general

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<sup>121</sup> For a new perspective on a working paradigm for online voting, see ALVAREZ & HALL, *supra* note 115, at 156–78 (providing the outline for a risk management model that would serve to negotiate the risks inherent to any online transaction and proposing a rigorous oversight process that, like the FDA's process of regulating drug manufacturing, would better position states to certify that local voting efforts are conducted in accordance with best practices).

<sup>122</sup> See *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999) (acknowledging that "states may not place overly restrictive conditions on citizens attempting to exercise initiative or referendum rights").

<sup>123</sup> *Storer v. Brown*, 415 U.S. 724, 742 (1974).

<sup>124</sup> See Brief for Utahns for Ethical Government, *supra* note 39, at 11 n.21 (outlining the Lieutenant Governor's statutorily imposed duties in counting initiative signatures and illustrating that the Utah Supreme Court "has not been persuaded" that his "ministerial" role "should be expanded . . . to include general oversight and fraud prevention") (citing *Page v. McKeachnie*, 97 P.3d 1290 (Utah 2004); *Cope v. Toronto*, 332 P.2d 977, 978–79 (Utah 1958)).

supervisory” authority does not vest him with the discretion to make extrastatutory pronouncements that disenfranchise nonfraudulent supporters of initiative and referenda. Even under the color of S.B. 165, the State’s continued encroachment on Utahns’ core political speech interests leaves the “reasonably diligent” prospective candidate<sup>125</sup> with limited options for pursuing a spot on the ballot.

In sum, the State has imposed an undue burden on voters’ ballot access, a speech interest that resides at the heart of a community-driven government. Since the legislature, whose intent has been articulated by Senator Bramble, can provide no valid, let alone compelling, justification for S.B. 165’s enactment, it must be ruled unconstitutional.

#### IV. CONCLUSION

Senator Bramble correctly noted that “the vote is the most sacred thing that we do, and signing a petition is tantamount to casting a vote.”<sup>126</sup> However, the legislature’s endorsement of S.B. 165 runs counter to this constitutional principle. Where the right to “directly legislate through initiative and referenda is sacrosanct and a fundamental,”<sup>127</sup> the government may not stand between the circulators of a political message and their audience.

The voting public witnessed the effects of such unwarranted interposition when the Lieutenant Governor nearly prevented Farley Anderson from claiming his right to candidacy in 2010. Since then, the Utah legislature and Lieutenant Governor have continued to disregard a constitutional mandate deeply rooted in the public’s right to engage in the marketplace of political ideas by decertifying electronic signatures and excising quanta of speech in the franchise.

This continued abuse of the franchise has wide-reaching effects. Voters residing temporarily out of the state, such as Madison Hunt, who joined as petitioner in suit against Lieutenant Governor Bell in 2011, have limited recourse in light of the State’s categorical ban on e-signatures.<sup>128</sup> As the ACLU has indicated, the State’s injunction negatively affects missionaries who have been assigned to locations outside of Utah, and also may prevent soldiers from taking part in important referenda that affect the state they are charged, in part, with defending. The ban also presents obstacles for college students attending out-of-state universities who still retain Utah residency from engaging in a vital, educational discourse. In short, S.B. 165 divests out-of-state residents of the franchise and imposes an unnecessary burden on in-state residents’ access to the ballot.

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<sup>125</sup> *Storer*, 415 U.S. at 742.

<sup>126</sup> *First Floor Debate*, *supra* note 51.

<sup>127</sup> *Gallivan v. Walker*, 54 P.3d 1069, 1081–82 (Utah 2002).

<sup>128</sup> *See Unconstitutional E-Signatures Ban Results in Lawsuit*, *supra* note 59.

Given these constitutional ills, it is only a matter of time before the bill will be struck down. The ACLU has stated its intention to remain vigilant in scrutinizing the government's treatment of initiative signatures and has promised to "pursue whatever challenge, in whatever forum, that will best protect the rights of all Utah voters to participate fully in the petitioning process."<sup>129</sup> Since the court in *Anderson* already affirmed the validity of electronic signatures in Title 20 through statutory rules of construction and common law principles, it will likely have to address the constitutional challenges it declined to reach in that case when it is visited with new challenges to the State's ban on e-signatures in ballot petitions and initiatives. This Note offers an alternative to the uniform operation of laws analysis, which plaintiffs have recently employed against the Lieutenant Governor and S.B. 165. Free speech analysis supplies parameters that are more closely suited to address the type of constitutional wrong that the Lieutenant Governor committed and that the legislature has recently upheld.

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<sup>129</sup> *Id.* ACLU of Utah Legal Director Darcy M. Goddard issued a public statement on March 30, 2011, insisting that the ACLU "still intend[ed] to challenge SB 165's blanket ban on e-signatures offered in support of citizens' referenda and initiatives . . . [and to] protect the rights of all Utah voters to participate fully in the petitioning process." *Given Legislative Repeal of HB 477, ACLU of Utah Voluntarily Withdraws Supreme Court Petition*, ACLU OF UTAH, <http://www.acluutah.org/SB165033011.html> (last visited August 12, 2013).