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16 SUPERIOR COURT OF CALIFORNIA
17 COUNTY OF SAN MATEO

18 MICHAEL NI,
19
20 Plaintiff and Petitioner,
21
22 v.
23 WARREN SLOCUM, in his official
24 capacity as Chief Elections Officer of San
25 Mateo County, and DOES 1 – 100,
26 inclusive,
27
28 Defendant and Respondent.

Case No. CIV 492074
Action Filed: February 18, 2010

**REPLY MEMORANDUM IN SUPPORT OF
PETITIONER'S VERIFIED PETITION FOR
PEREMPTORY WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY RELIEF**

**Date: March 18, 2010
Time: 9:00 a.m.
Dept: 28**

1 **I. INTRODUCTION**

2 The peremptory writ should issue directing Defendant and Respondent Warren Slocum
3 (“Respondent”) to accept Plaintiff and Petitioner Michael Ni’s (“Petitioner”) petition signature.
4 Neither Respondent nor the Secretary of State (“the Secretary”) as *amicus curiae* was able to
5 establish that a voter must use a pen to sign an initiative petition or that the petition itself must be
6 made of paper. They only cite to a vetoed bill and veto message *that never come close to*
7 *touching any issue before this court.* Similarly, they fail to prove that a signature created using
8 industry standard signature dynamics technology is not a “signature.” The term “signature” itself,
9 they admit, has no general definition in the Elections Code. Security concerns were raised only
10 half-heartedly since they only serve to boost Petitioner’s arguments – indeed, the Secretary states
11 on her own website that signature dynamics technology creates a more secure signature than ink
12 on paper. Putting those unsupported contentions aside, Respondent and the Secretary are left
13 with only two additional arguments, neither of which succeed:

14 (1) Respondent and the Secretary argue that Petitioner Michael Ni did not “personally
15 affix” his signature to the petition. However, the two cases they cite focus entirely on the
16 “personally” part of the equation. And it is not in dispute that Mr. Ni – and not some other person
17 – did the affixing. That leaves the issue of how the signature was affixed to the petition. First,
18 the common sense answer is that Petitioner affixed it. Going beyond common sense, as discussed
19 in more detail below, the technical mechanics also confirm that Petitioner affixed his signature to
20 the petition.

21 (2) Respondent and the Secretary argue that there are technical defects in the petition
22 itself (e.g., the circulator’s “city” is typed, not handwritten). Here, the courts have been very
23 clear: if the petition (i) gave all necessary information about the measure to the signer, and (ii)
24 allows the elections official to verify the signer’s and circulator’s signature and residence address,
25 there is substantial compliance with the law. Both factors are met in the present case.

26 For at least these reasons, this petition should be granted.

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1 **II. ARGUMENT.**

2 **A. "Ink On Paper" Is Not Required By The Elections Code.**

3 The electronic signature submitted by Petitioner satisfies the plain statutory requirements
4 for an initiative petition signature. These provisions do *not* require the use of ink on paper in
5 order to create a signature that may be verified. Respondent argues that disallowing the new
6 technology will not prevent the public from participating in the initiative process. (Respondent's
7 Response to OSC ("County Resp."), 7:20-21.) This issue is not before the Court. The sole issue
8 is whether Petitioner's signature is valid under the Elections Code provisions under review. As
9 demonstrated in Petitioner's opening Memorandum ("Op. Br."), when a statute is silent as to
10 *methodology*, California courts will permit the use of new technologies to comply with old
11 statutes. (Op. Br., Section V. E.) Petitioner's signature, admittedly the first electronic one in
12 history, is *still a signature* and, therefore, complies with Elections Code sections 100 and 9020.
13 (See Op. Br., Section V. H.).

14 Respondent's search to find *any* support for his position that only "ink on paper" petitions
15 are lawful leads to his citation of AB 44 from 1997. If it had not been vetoed, the bill would have
16 mandated the study of a digital electoral system. Since that does not help Respondent,
17 Respondent first cites to a legislative "preamble" that does not exist (Respondent actually quotes
18 the Legislative Counsel's Digest of AB 44, which, unlike a preamble, is not an express statement
19 of the Legislature's intent). Respondent then alleges the following:

20 The Secretary [of State] was specifically directed to study whether the Legislature
21 should "permit any eligible person to ... sign any petition" electronically. *Id.*

22 (County Resp., 9:10-11.)

23 Respondent's lead-in language "whether the Legislature should" is misleading. The quoted
24 provision in the bill actually stated:

25 SECTION 1. (a) The Secretary of State shall assign a task force to conduct a
26 study on the creation of a digital electoral system. The digital electoral system may
27 include the collection, storage, and processing of electronically generated and
28 transmitted digital messages to permit any eligible person to register to vote, sign
any petition, and vote in any election, including applying for and casting an
absentee ballot.

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(Emphasis added.)

Thus, the actual language says *absolutely nothing* about whether the Legislature should permit a person to sign a petition electronically.

Governor Wilson’s veto message of AB 44, also cited by Respondent, lends even less aid to Respondent’s position. The Governor summarizes the bill as calling “for a task force to study establishing a digital electoral system” Again, there is nothing even remotely suggesting that legislation would be needed to do this.

The Secretary of State’s *Amicus Curiae* Brief (“Secretary’s Brief”) also cites AB 44 for the same unconvincing reasons, but then adds that an initiative proponent’s submission of a proposed initiative 10 years ago, which would have allowed the collection of digital signatures, “further shows that the Elections Code does not currently authorize collection of petition signatures by electronic means.” (Secretary’s Brief, 7:8–8:14.) One individual’s unknown reasons for including that provision, in an initiative that did not qualify for the ballot a decade ago, is not relevant to any issue in this case.

In support of her argument that a mechanism for allowing Petitioner’s electronic signature should be established by the Legislature, the Secretary notes that the Legislature has enacted legislation relating to touch-screen voting. (Secretary’s Brief, 11:5-8.) The Secretary’s note ignores the fact that it is unknown *why* the legislation was enacted: it could have been because current law could not accommodate such voting; the Secretary and the Legislature wanted to regulate it; or the Help America Vote Act mandated it.

B. Petitioner’s Electronic Signature Contains Safeguards To Ensure That It Is Genuine and Unique To The Signed Document.

Respondent and the Secretary have tried to paint the electronic signature in question as something that it is not. Respondent cites the Secretary of State’s February 9, 2010, Memorandum, which states that “submitting a facsimile of the information” does not comply with the Elections Code. (County Resp., 6:20-21.) Petitioner would agree if the signature in this case was a facsimile. However, Verafirma’s software does *not* create a facsimile. Declaration of

1 Michael Marubio In Support of Reply Brief “Marubio Decl.”), ¶ 2. A facsimile is a “flat” image
2 of an original signature. *Id.* Petitioner’s electronic signature, on the other hand, contains
3 attributable biometric characteristics preserved in their original form in the petition, and employs
4 the industry-standard signature dynamics technology that has been deemed acceptable by the
5 Secretary of State, precisely *because* it protects against fraud. *Id.*

6 Respondent cites *Capo for Better Representation* and *Mapstead* for the proposition that
7 “to ensure that a voter is making a deliberative decision, and discourage fraud, it is important that
8 an individual voter be the one that writes [] on the body of the petition itself.” (County Resp., 6:7-
9 9.) Petitioner agrees that the State’s key concerns are: (1) whether the voter is making a
10 deliberative decision, and (2) the risk of fraud. As described below, the Verafirma software
11 addresses both of these concerns.

12 A faxed signature is a *copy* of an original signature. Marubio Decl., ¶ 2. It lacks the
13 forensic evidence necessary to qualify it as genuine and verifiable. *Id.* Conversely, an electronic
14 signature is an original signature encrypted with an identifier of the original document and bound
15 to the signed document. *Id.* Therefore, if ever questioned, it can be easily ascertained if the
16 signature belongs to the document, or was lifted from another document. This security feature
17 makes Petitioner’s electronic signature more secure than a “pen and ink” signature. *Id.*

18 Respondent also argues that the “software, and not Petitioner, converted [the signature] to
19 data and then simultaneously stamped that data on multiple places on a digital image.” (County
20 Resp. 3:21-4:2.) Again, Respondent’s analysis is factually inaccurate. A stamp will yield an
21 identical image of a voter’s signature every time, and will not yield a unique identifier pertaining
22 to the document being signed. In our case, Petitioner’s electronic signature was not “stamped.”
23 Rather, it was created specifically for the petition, handwritten by Petitioner at the time of
24 signing, under the sole control of Petitioner, and personally affixed in each blank space through
25 Petitioner’s physical actions.

26 Despite these facts, Respondent mischaracterizes the signature dynamics software as
27 playing an active role in the signing process. He alleges that Petitioner did not personally affix
28 his signature; rather, the software accomplished this feat. Even the most basic understanding of

1 the software reveals that this is not the case. During the course of the signing, Petitioner was
2 prompted to “affix” his signature, both as petitioner, and as circulator. Marubio Decl., ¶ 3. The
3 same is true *for every other required piece of information* on the petition: Petitioner had to take
4 affirmative steps to fill in each field. *Id.* Petitioner’s actions – and only his actions – caused his
5 signature to be affixed to the document. The software is no different than a pen: it cannot
6 perform its mechanical functions without the express physical control and intent of the signer.¹

7 *Id.*

8 According to Respondent’s position, the voter who uses pen and paper does not personally
9 affix his signature to the petition – the pen does. Of course, no one would make this argument.
10 Verafirma’s software, like a pen, is simply a tool by which a voter may personally affix his
11 signature to an initiative petition.

12 **C. The Electronic Signature Software Has Been Deemed Acceptable Technology**
13 **By The State.**

14 The Verafirma electronic signature software is designed such that the signer has to make
15 numerous deliberative decisions throughout the process of filling out a petition to ensure against
16 mistake or fraud. As stated in Petitioner’s Opening Brief, the Secretary of State – in a regulation
17 entitled “List of Acceptable Technologies” – has approved the use of Signature Dynamics
18 (Verafirma’s system) and another system (Public Key Cryptography) without the need for case-
19 by-case approval by the Secretary of State:

20 The technology known as "Signature Dynamics" is an acceptable technology for
21 use by public entities in California, provided that the signature is created consistent
22 with the provisions in Section 22003(b)(1)-(5).

23 (Cal. Code Regs., tit. 2, § 22003(b).)

24 And, as noted in the Opening Brief, the Secretary of State expressly acknowledges on her website
25 that signatures created using signature dynamics are *more secure* than paper signatures. If
26 Respondent is challenging whether Verafirma’s software meets the criteria, Petitioner is willing
27 and able to demonstrate that for the Court.

28 ¹ The Secretary’s Brief even highlights the step-by-step process that Petitioner underwent to sign the petition (“He then went through the three steps required to affix his signature to the electronic petition . . .”) (Secretary’s Brief, 4:16-17.)

1 **D. Government Code Section 16.5 Does Not Resolve The Issue Presented In This**
2 **Case.**

3 Respondent states that Petitioner's position regarding Government Code section
4 16.5 is somewhat vague. Petitioner did not address that statute in more detail in his
5 Opening Brief because he agrees that the Elections Code provides all of the guidance
6 needed to resolve the present dispute. Section 16.5 would allow every Elections Official
7 in the state to accept digital initiative petitions if they qualify as "written
8 communications," an issue beyond the scope of this lawsuit. Thus, while Respondent
9 *could* perhaps accept Petitioner's signature under Section 16.5, Respondent is *required* by
10 the Elections Code to accept the signature.

11 **E. Petitioner Has Substantially Complied With The Circulator Declaration**
12 **Requirements Under The Election Code.**

13 Respondent argues that the city of residence was typed on Petitioner's circulator
14 declaration, and it should have been written in his own hand. (County Resp., 7:4-8.) Respondent
15 fails to mention, however, that since everything else was written in his own hand, there is
16 substantial compliance with Sections 104 and 9022, which is the standard in such instances.

17 In *California Teachers' Assn. v. Collins* (1934) 1 Cal. 2d 202, the Supreme Court found a
18 defective petition to be valid, stating:

19 "The requirements of both the Constitution and the statute are intended to and
20 do give information to the electors who are asked to sign the initiative petitions. If
21 that be accomplished in any given case, little more can be asked than that a
22 substantial compliance with the law and the Constitution be had, and that such
23 compliance does no violence to a reasonable construction of the technical
24 requirement of the law."

25 (*Id.* at p. 204.)

26 Second, the courts have been concerned with any defect that would prevent the elections
27 official from verifying signatures, and have invalidated such petitions:

28 While the use of stamps to enter the dates violated the statute, we conclude there
 was substantial compliance. The apparent purpose of this requirement is to ensure
 all signatures were obtained during the proper time limits and to assist the clerk in
 determining whether those who signed the petition were registered voters. (See
 Assembly v. Deukmejian, supra, 30 Cal.3d at p. 653.) Here, each petition was

1 signed by the respective circulator under penalty of perjury and nothing indicates
2 the use of stamped dates would have impeded Carlson from carrying out her
duties.

3 (*Nelson v. Carlson* (1993) 17 Cal.App.4th 732, 741 fn. 6.)

4 In the present case, the alleged defects did not impede Respondent's duties in any way.

5 Finally, the Court of Appeal has found that defective affidavits accompanying a petition
6 "are not part of the petition themselves, and failure of such should not invalidate a petition which
7 was in fact signed by the requisite number of voters who themselves had complied with all
8 statutory requirements to make their petition effective." (*Truman v. Royer*, (1961) 189 Cal. App.
9 2d 240, 244.) *Truman* was recently cited with approval in *Preserve Shorecliff Homeowners v.*
10 *City of San Clemente* (2008) 158 Cal.App.4th 1427, 1453 [finding that technically defective
11 affidavits of the circulators do not invalidate a petition when there is no question that the petition
12 had in fact been signed by the required number of voters].

13 **F. The Secretary of State's Views On The Elections Code Sections At Issue in**
14 **This Lawsuit Are Entitled To Very Little, If Any, Deference By The Court.**

15 In February 2010, the Secretary of State's office placed on its official website a
16 memorandum addressed to "All County Clerks/Registrars of Voters," referring obliquely to
17 Petitioner's electronic signature and stating in relevant part:

18 After carefully considering the issue, the Secretary of State's office has
19 concluded that documents circulated and information gathered in the above
manner are not valid under current law and may not be accepted by an elections
official.

20 * * *

21 What is or will be provided, either electronically or on paper, to an elections
22 official is a facsimile of the required information that each voter, by law, must
23 personally affix to a petition. Submitting a facsimile of the information required to
be collected and personally affixed by EC 100 does not comply with the law.

24 (Declaration of Steve Churchwell In Support of Reply Memorandum, ¶ 2, Ex. A)

25 The Secretary argues that her interpretation of Elections Code Section 100, as described in this
26 memorandum, "is entitled to great weight." (Secretary's Brief, 5:19.) In support of this
27 proposition, the Secretary cites *Andal v. Miller* (1994) 28 Cal.App.4th 358, 364 fn. 3. The case is
28 inapposite.

1 The *Andal* case involved a dispute about the *ballot designation* of a candidate for elective
2 office. The Secretary is intimately involved in the ballot designation process for candidates,
3 possesses broad statutory authority over ballot designations (see Elec. Code, § 13107), and has
4 used that authority to adopt *13 pages* of regulations in the area. (See Cal. Code Regs., tit. 2,
5 §§ 20710–20719.) The ballot designation regulations were adopted after notice, 45 days for
6 public comment, a public hearing, and were approved by the Office of Administrative Law in a
7 process that took more than eight months. They have been amended through the same process.

8 In sharp contrast, the Legislature has delegated to the Secretary *no* statutory authority over
9 the Elections Code provisions relating to initiative petition formatting, circulation, filing or
10 verification, *other than adding up the “raw signature” and “verified signature” numbers sent to*
11 *her by the counties* and reporting the total of those numbers. Rather, all of the substantive duties
12 related to initiative petitions are delegated by the Legislature to other public officials, with the
13 bulk of the work resting on the County Registrars. (See Elec. Code, § 9000–9031.) The actual
14 initiative petitions are never in the Secretary of State’s office – from the start, the moment it
15 begins circulating, to the finish, the moment the measure qualifies with enough signatures to
16 appear on the ballot.

17 As the Supreme Court held in *Yamaha Corp. of America*, “[t]he ultimate interpretation of
18 a statute is an exercise of the judicial power ... conferred upon the courts by the Constitution”
19 (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha I*)).
20 Deference to an agency’s interpretation is limited to specific situations that are not present here.
21 (*Ordlock v. Franchise Tax Bd.* (2006) 38 Cal.4th 897, 910 [italics added].) (“As we previously
22 have explained, although we have the ultimate responsibility of construing these statutes, in
23 general we accord significant weight and respect *to a long-standing statutory construction* -
24 whether in the form of a policy or a rule - by the agency charged with enforcement of the
25 statute.”). The Secretary’s memorandum is not entitled to deference because the memorandum
26 does not implicate the exercise of a delegated lawmaking power. (See *Yamaha I*, supra, 19
27 Cal.4th at 11-12.)


28

1 **III. CONCLUSION**

2 For these reasons, and the reasons set forth in Petitioner's Opening Brief, Petitioner
3 respectfully requests that the Court: (1) issue a peremptory writ of mandate directing Respondent
4 to include the electronic signature of Petitioner in any signature count submitted to the Secretary
5 of State; and (2) issue declaratory relief construing the Elections Code to allow the use of such
6 signatures.

7 Dated: March 12, 2010

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