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Election Law White Paper

Affixing Signatures to an Initiative Petition Using a Mobile Device Screen

"Provisions relating to the initiative should be liberally construed to permit,
if possible, the exercise by the electors of this most important privilege."

– California Supreme Court

Question Presented

If a registered voter affixes his or her signature to an initiative petition using the secure signature technology described below, is such a signature valid in California, assuming all other legal requirements are met?

Summary

Yes. Such a signature would meet each and every requirement of the California Elections Code.

Introduction

During a flight to Seattle last week, as I reached down to fish a book out of my backpack, I noticed that the young woman on my left was reading a book on a Kindle, a wireless reading device. I had heard about them but had never seen one up close. I said to her, "I think we are reading the same book!" The man on my right said, "That *thing* is not a book. A book has pages you can turn with your hand, and a cover and a binding." After an awkward silence, I changed the subject to whether we would be getting a meal on that flight, and we all laughed.

Such exchanges are commonplace in today's world, where technology is rapidly changing the way we do everything. Initiative petitions in California are already being circulated via the Internet. After years of hard work, we are taking the next logical step – circulating the first initiative petition in California bearing signatures signed on a home computer. When we have previewed the system for elections professionals, the initial response has been guarded: "Would the Elections Code allow that?" After checking off the requirements one-by-one, skepticism generally has given way to an acknowledgement that the Elections Code allows voters to use this technology to affix their signatures to an initiative petition.

December 13, 2009

As pioneers of this method of signature gathering, we are not naïve, however. We realize that we will face skepticism – and maybe even opposition to this small technological step forward. We welcome such discussions and realize that this is not a new debate. Supreme Court Justice Hugo Black refused to extend the Fourth Amendment's "search and seizure" protections to wiretaps by the government. He maintained that since the amendment's drafters in 1789 could not have contemplated electronic eavesdropping, only tangible items should be protected. His views did not prevail, but the case proves that the application of old law to new technology is never easy.

Similarly, did the California Legislature in 1913, when it enacted the initiative signature requirement,[1] envision that signatures would one day be affixed to the petitions using new technology? Of course not. But thankfully the law adapts to changing conditions. No one questions today that what we are doing in the checkout line at Target on a small, plastic pad is "signing" a credit card receipt, and that the result is a legal "signature." The adoption of that signature technology in 1989 required no change in the applicable financial laws. The technology proved acceptable because everyone involved in the transactions understood the benefits intuitively.

That same software, which has passed a barrage of privacy and security tests over the past 20 years, has been adapted for use in signature gathering. It is certain to be a positive force for political change, lowering the cost of signature collection and making the process more accessible to true grassroots efforts. We cannot predict whether the resulting petitioning process will be any faster or easier. Allowing voters to carefully consider a petition at home may well result in more petitions being *rejected*. We believe, however, that voters ultimately will sign only those petitions that they believe are deserving of a place on the ballot.

<u>**Background**</u>

The idea of utilizing the Internet to gather initiative signatures has been around for at least a decade in California. (See *Online Signature Gathering for California Initiatives*, Walter Baer and Roy Ulrich (June 2008); *Signing Initiative Petitions Online: Possibilities, Problems and Prospects*, Walter Baer (Jan. 2001).) The obvious advantages of the approach were discussed in both papers: voters could carefully and thoughtfully review, in the comfort of their own home, the text of the measure, as well as the Attorney General's title and summary and the fiscal impact statement prepared by the Legislative Analyst's Office. Then and only then would they decide whether to sign the petition. When compared to the current practice of having a petition – usually with dozens of pages in 8-point type – thrust in your face as you are leaving a retail store, the benefits become even more apparent. The Internet also solves the chief criticism of the current initiative process: the cost of circulating a statewide petition ($1 - $4 million or more) has made the process the exclusive province of wealthy special interests.

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[1] That language is now codified in Elections Code § 100, discussed *infra*.

December 13, 2009

The writers of the two papers cited above were focused upon a kind of digital "signature" that is a long string of letters and numbers that ostensibly would be issued to all voters by a central, governmental authority, such as the Secretary of State. Because the approach did not include a voter writing out a signature that could be compared to the voter registration rolls, it would have required a massive rewrite of the Elections Code and, therefore, never was implemented.

Fortunately, the technical team at a California company called Verafirma[2] has overcome these obstacles with a system in which voters actually fill out all of the petition's boxes *by hand*, including signing their *original signature* to the petition in a reliable and verifiable way. Using secure technology standards in widespread use, Verafirma's software allows voters to:

- Review the petition on a personal computer screen;

- Write – in their own hand – their signature, printed name and residence address on a mobile device screen[3]; and

- Affix this information to the petition.

Upon completion of its signature gathering efforts, initiative proponents will deliver signatures to County Elections Officials in both electronic and printed form.

Applicable Law

A. A Precious Constitutional Right

The California Constitution acknowledges that "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Cal. Const., art. II, § 1.) One of the ways in which the people may determine for themselves what "their protection, security, and benefit ... or the public good may require" is the initiative process. "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them. An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed" by the requisite number of electors. (Cal. Const., art. II, § 8(a) & (b).)

B. Courts "Jealously Guard" the Initiative Process

Because the initiative process is "one of the most precious rights of our democratic process," it is "the duty of the courts to jealously guard this right of the people." (*Rossi v.*

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[2] The Verafirma team has more than 50 years of combined experience designing and delivering electronic signature, secure document management, and electronic records processing systems to more than 400 customers.

[3] Currently, an iPhone and iPod Touch. Soon the Blackberry Storm 2, Motorola Droid, etc.

December 13, 2009

Brown (1995) 9 Cal.4th 688, 695.) Thus, the courts have stated repeatedly that it "has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled." (*Ibid.*) Courts long ago rejected the strict construction of laws relating to the initiative process; instead, courts will liberally construe the laws "to the fullest tenable measure" to preserve the "spirit as well as letter" of the right to initiative. (*Schmitz v. Younger* (1978) 21 Cal.3d 90, 92.) "If doubts can reasonably be resolved in favor of the use of [the initiative] power, courts will preserve it." (*Ibid*.)

C. The Courts Will Not Allow Technical Interpretations Of the Elections Code to Impair the Petitioning Process

The extent to which California courts will defeat efforts by government officials to interpret existing requirements in a way that impair petitioning, but add nothing to the security and reliability of the petitioning process, is illustrated by the California Supreme Court's discussion in *Costa v. Superior Court* (2006) 37 Cal.4th 986:

> "[A]ll of our past cases emphasize the utmost importance of ensuring the integrity of the electoral process and of interpreting and applying the applicable constitutional and statutory provisions in a manner that closely safeguards the integrity of that process. ... [¶] <u>At the same time … the governing cases also have recognized that an unreasonably literal or inflexible application of constitutional or statutory requirements that fails to take into account the purpose underlying the particular requirement at issue would be inconsistent with the fundamental nature of the people's constitutionally enshrined initiative power and with the well-established " 'judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.</u>' " (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591; see also *Epperson* v. Jordan (1938) 12 Cal.2d 61, 66 [emphasizing "the fundamental concept that provisions relating to the initiative should be liberally construed to permit, if possible, the exercise by the electors of this most important privilege"].)" (*Id.* at pp. 1012-13 [emphasis added].)

In *California Teachers' Assn. v. Collins* (1934) 1 Cal.2d 202, the plaintiffs claimed that two defects in the short title of an initiative petition rendered the petition invalid. The Supreme Court stated: "<u>The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the initiative petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law</u>." (*Id.* at p. 204 [emphasis added].) Because the purpose of the short title – to prevent deception of the electors – was served in that case, the Supreme Court found substantial compliance sufficient. (*Id.* at p. 205; see also *Perry v. Jordan* (1949) 34 Cal.2d 87, 94-95.)

December 13, 2009

D. The Statutory Framework for Petition Signatures

The state constitution delegates to the Legislature the power to "provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors." (Cal. Const., art. II, § 10(e).) The Legislature has done so in the Elections Code. With regard to signatures, it provides in Section 100:

> "[W]henever any initiative, referendum, recall, nominating petition or ... any other petition or paper, is required to be signed by voters ..., only a person who is an eligible registered voter at the time of signing the petition or paper is entitled to sign it. <u>Each signer shall at the time of signing the petition or paper personally affix his or her signature, printed name, and place of residence</u>, giving street and number, and if no street or number exists, then a designation of the place of residence which will enable the location to be readily ascertained. A space at least one inch wide shall be left blank after each name for the use of the elections official in verifying the petition or paper ... ." (Elec. Code <u>§ 100</u> [emphasis added].)

In considering the requirement of Section 100 that each signatory must "personally affix" a printed name and address, the Court of Appeal has stated:

> "The requirement ... is neither redundant [to checking whether the signature was valid] nor insignificant. Both the additional attention of the signer (who must 'personally affix' the information) and the result (the additional ability to verify that the signer was actually involved in the process) aid in preventing forgery and other potential abuse. In addition, the requirement that the signer 'personally affix' the information ensures that the signer, at the time of signing, has actually affirmed the residence address placed on the petition. This affirmation goes to the very heart of the process – the Registrar's ability to verify whether those who signed the petition were entitled to do so." (*Mapstead v. Anchundo* (1998) 63 Cal.App.4th 246, 270 [citations omitted].)

Section 9020 is specific to initiative petitions and echoes these requirements:

> "The petition sections shall be designed so that each signer shall personally affix all of the following: [¶] (a) His or her signature. [¶] (b) His or her printed name. [¶] (c) His or her residence address, giving street and number, or if no street or number exists, adequate designation of residence so that the location may be readily ascertained. [¶] (d) The name of his or her incorporated city or unincorporated community. [¶] Only a person who is a qualified registered voter at the time of signing the petition is entitled to sign it ... ."

December 13, 2009

E. Verification of Petition Signatures

Once the proponent submits the petition sections to the county elections official, verification begins in accordance with Section 9030:

> "(a) Each section of the petition shall be filed with the elections official of the county or city and county in which it was circulated. …
> (b) … the elections official shall determine the total number of signatures affixed to the petition and shall transmit this information to the Secretary of State. …
> (c) If the number of signatures filed with all elections officials is 100 percent or more of the number of qualified voters needed to declare the petition sufficient, the Secretary of State shall immediately so notify the elections officials.
> (d) Within 30 days after this notification … the elections official shall determine the number of qualified voters who have signed the petition. ...
> (e) The elections official, upon the completion of the examination, shall immediately attach to the petition, except the signatures thereto appended, a properly dated certificate, showing the result of the examination, and shall immediately transmit the petition and the certificate to the Secretary of State. …"

Section 105 provides more detail regarding verification of residence addresses:

> "For purposes of verifying signatures on any initiative, referendum, recall, nomination, or other election petition or paper, the elections official shall determine that the residence address on the petition or paper is the same as the residence address on the affidavit of registration. If the addresses are different, or if the petition or paper does not specify the residence address, or, in the case of an initiative or referendum petition, if the information specified in Section 9020 is not contained in the petition, the affected signature shall not be counted as valid.
>   Any signature invalidated pursuant to this section shall not affect the validity of other valid signatures on the particular petition or paper."

What is most critical is that the county elections official must be able to compare the signatures on the petition to the signatures on the voter registration cards. This software allows an accurate, visual comparison.

F. Verification of Petition Signatures Is a Purely Ministerial Act

The role of an election official in verifying signatures has been repeatedly described by the courts as <u>purely ministerial</u>, involving no exercise of discretion. (See *Alliance for a Better Downtown Millbrae v. Wade*(2003) 108 Cal.App.4th 123, 132-133 and authorities cited therein.) The courts have emphasized that the role of the election official is meant to be as impersonal as possible. (See *Farley v. Healey*(1967) 67 Cal.2d 325, 327.) "If the person

signing the petition has registered and has subscribed to the required affidavit, he may sign the petition, and the [elections official] has no power to disqualify him by reason of a conjecture on his part, or by reason of information gained from other than the registration records. ... Any other rule might result in depriving a major portion of their right to sign such petitions, and this we are not inclined to sanction." (*Ley v. Dominguez* (1931) 212 Cal. 587, 596.)

In *Wheelright v. County of Marin* (1970) 2 Cal.3d 448 537, the California Supreme Court explained the role of an elections official in determining whether a petition signature is valid:

> "Each signature on the petition must be handwritten and [the elections official] must compare this handwriting with that on the registration affidavit to determine if it is the handwriting of the voter. [The official] must use ... eyesight and critical faculties to determine whether sufficient similarities exist ... to certify that this is a valid signature. If [the official] certifies that the petition contains the requisite number of valid signatures, ... [that decision] is therefore prima facie correct. It is not conclusive, however, and may be challenged and reviewed by a court in mandamus proceedings. [¶] ... [¶] ... Where the signature on the petition is obviously spurious and is not that of the voter as shown by the registration affidavit, the [official] may and must reject it. [The official] has no discretion to certify a spurious signature. Where there are dissimilarities which are so minor as to make ... rejection of the signature an unreasonable or arbitrary act, the court may not accept the [official's] determination. Where ... the dissimilarities are not so minor and the similarities are not so great that only one conclusion can be made as to the validity or invalidity of the signature, and where the court finds that in acting upon these dissimilarities and other indicia the [official] was not acting unreasonably or arbitrarily ..., the court must accept the [official's] determination." (*Id.* at pp. 455-456 [citations omitted].)

Discussion
A. The Elections Code Requirements for
Initiative Petitions Are Met by This Procedure

The statutory requirements for a California statewide initiative[4] petition are unambiguous. (*Friends of Bay Meadows v. City of San Mateo* (2007) 157 Cal.App.4th 1175, 1188 ["The governing statutes all use plain language … ."].) California courts follow the "plain meaning rule" when interpreting statutory language. "Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use. If the

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[4] Although this white paper is focused upon initiative petitions, the concepts discussed herein also would apply to referendum petitions.

language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature ... ." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Because the petition requirements are clear on their face, the first task is to determine whether the statutory language applies to a computer-based signature, just as it does to a pen on paper. We note first that the Elections Code defines a "writing" as "any form of recorded message capable of comprehension by ordinary visual means." (Elec. Code § 7.) Accordingly, a voter who fills out an initiative petition online via computer and mobile phone clearly is "writing" his or her information. Second, both Sections 100 (generally) and 9020 (specifically for initiative petitions) require each signer to <u>personally affix</u> to the petition or paper: a <u>signature</u>, <u>printed name</u>, a <u>printed residence address</u> (street and number). We discuss these requirements in greater detail below.

1. Personally Affix

Even the most erudite among us would not speak the word "affix" in casual conversation, and the term is not defined in the Elections Code. Fortunately, in a recent decision, *Capo for Better Representation v. Kelley* (2008) 158 Cal.App.4th 1455, the Court of Appeal translated the word – in the context of Elections Code section 100 – into modern English that we can better understand. That case dealt with a situation in which the proponents were trying to recall all seven members of a school board simultaneously. A voter would *sign* all seven petitions but complete the *address* information on only one. Then a volunteer would copy the voter's printed name and address information on the other six. The court invalidated the latter petitions, because the petition signer must *personally* complete the information.

But what does "affix" mean? In describing the facts of the case, the court stated: "But the recall never happened because the Registrar of Voters disqualified signatures where the signers' addresses had been <u>filled in</u> by someone other than the actual signer." (*Id*. at p. 1459 [underscoring added].) Then, in analyzing the legal issues, the court wrote:

> "The problem was, cutting that corner violated at least two California statutes. Those statutes, Elections Code sections 100 and 11043, practically duplicate each other, and both plainly require that each signer of a recall petition *personally* 'affix' his or her residence address to a recall petition. Disallowing signatures where signers hadn't themselves actually <u>filled out</u> the address box meant that none of the recall petitions had the requisite number of signatures (20,421)." (*Id*. at p. 1460 [italics in original; underscoring added].)

The court used the terms "affixed," "filled out" and "filled in" synonymously in its decision. Therefore, "to affix," in the context of the blank boxes on an initiative petition, means "to fill out" or "to fill in."

The courts have noted that whether a signer "personally affixed" the required information "is essentially a factual question." (*Mapstead v. Anchundo* (1998) 63 Cal.App.4th 246, 269.) Verafirma's technology enables an individual to <u>personally affix</u> to an initiative petition a handwritten signature and all other legally required information using a mobile phone or device and a personal computer. The software works in much the same fashion as a pen, mechanical typewriter, or a computer word processing program. The device is under the sole control of the user at the time of signing. Through physical movements, the signer creates a signature and other information. Verafirma's software requires the individual to attest on three separate occasions that by continuing through the process, he or she is "personally affixing" his or her own signature and information to the document. Further, once created by the voter, the document is tamper-evident, and if altered after signing, will display an "invalid" marker.

2. Signature

Although there is no general definition of "signature" in the Elections Code,[5] courts have opined that the *purpose* of the signature requirement in Sections 100 and 9020 is to enable the elections official to compare a voter's signature on the petition with the same voter's signature in the county's voter registration file. (See, e.g., *Friends of Bay Meadows v. City of San Mateo* (2007) 157 Cal.App.4th 1175.) It is the elections official's ability to *compare* these two signatures that provides the best safeguard against fraud in the petitioning process. Concomitantly, the most critical feature of any electronic petitioning software is its ability to accurately record and preserve the signature of the voter who is signing the petition. The Verafirma system produces a signature that is as accurate and verifiable as the prototypical signature that is written by a voter on a clipboard while standing in front of a retail store. More important, it is much less subject to fraud than a traditional paper petition filled out with a pen.

Verafirma technology also captures and can reproduce the "behavioral biometrics" underlying the handwritten signature that make it unique to the signer and capable of verification. As a user signs, Verafirma captures the shape, speed, acceleration, stroke, stroke order, timing, and relative location of strokes during the act of signing. Verafirma's technology conforms to the Secretary of State's regulations on acceptable Signature Dynamics technology, ensuring that the electronic signature is "unique to the person using it." (2 Cal. Code Regs. § 22000-22005.) Therefore, the resulting signature on the petition <u>is an original handwritten signature personally affixed to a petition by a voter</u>.

This signature and the signature biometric data are then bound to the signed document within a signature digest that contains all of the information entered by the user, the signature image, the signature biometric data and the audit trail information that is secured using the industry standard Secure Hash Algorithm (SHA). This signature digest once bound to the document, cannot be altered or copied. In addition, the signature biometric

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[5] Elections Code section 354.5 provides that the term " 'Signature' *includes* …" under specified circumstances, a person's mark and a signature stamp. (Italics added.)

stroke data is encrypted using the industry standard RSA and triple DES encryption standards and stored as part of the record for later verification. This meets the Secretary of State's regulations for acceptable Signature Dynamics technology as being "under the sole control of the person using it."

Most registrars verify petition signatures through visual inspection. Modern touchscreen technology used in many mobile devices, like the iPhone or iPod Touch, will create a signature capable of this kind of verification. Further, Verafirma has also developed a forensic tool, available for free and online to any registrar or agent of a election official that requests it that allows a handwriting or signature expert to extract enough information from the stroke data to enable them to compare the signature on the signed petition to the signature on record. The electronic signature is "replayed" in a browser as an animated movie so that the signature expert can see in real time how the signer created the signature. Additionally, Verafirma's technology captures rate and acceleration comparisons and other forensic elements of the signing process. Thus, the signatures created by Verafirma's software meet the Secretary of State's regulations concerning acceptable Signature Dynamics technology as "capable of verification."

3. Printed Name

The courts have stated that the purpose of this requirement is to assist the elections official in verifying the signature on the petition:

> "Here, it is clear from the introductory phrase of section 105 that the purpose of requiring signers of a referendum[6] petition to include their printed names is to assist the election clerk in verifying that the signature on the petition is that of a validly registered voter. To interpret section 105 as requiring a signer to print separately each letter of his or her name would not serve to advance that purpose and would run afoul of the strong judicial policy of resolving all doubts in favor of the exercise of the power of referendum. (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 652.) [¶] When that which is set forth in the area designated "Printed Name" does not assist the election department, it is reasonable to require the election department to employ other procedures to determine whether the signature is valid." (*Malick v. Athenour* (1995) 37 Cal.App.4th 1120, 1126.)

The court's majority opinion expressly declined to address the issue of whether a *blank* "printed name" box would be grounds for disqualifying a signature. But as pointed out by Justice Poche in his concurrence, it is pretty obvious that for a signature to be counted: (1) there must be *something* in the "printed name" box; and (2) it must have been put there by the voter. (*Id*. at p. 1131 [Poche, J., concurring].)

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[6] This section also applies to initiative petitions.

As explained above, Verafirma's software will fulfill the "personally affix" requirement for signatures, as it will for the printed name field on the petition. "Printed" in this context is an adjective used to distinguish a printed name from a "cursive" or signed name. This is clear because the requirement is that "each signer shall personally affix ... his or her printed name." In addition, the Legislature specified a "printed name" in Sections 100 and 9020 to distinguish this field from the signature field.

4. Residence Address

The courts have been clear that the elections official may require proof that the *voter personally* filled in his or her residence address. (See, e.g., *Friends of Bay Meadows v. City of San Mateo* (2007) 157 Cal.App.4th 1175; *Mapstead v. Anchundo*, supra.) Not a circulator and not a volunteer. As the Mapstead court pointed out:

> "The requirement ... is neither redundant [to checking whether the signature was valid] nor insignificant. Both the additional attention of the signer (who must 'personally affix' the information) and the result (the additional ability to verify that the signer was actually involved in the process) aid in preventing forgery and other potential abuse. In addition, the requirement that the signer 'personally affix' the information ensures that the signer, at the time of signing, has actually affirmed the residence address placed on the petition. This affirmation goes to the very heart of the process – the Registrar's ability to verify whether those who signed the petition were entitled to do so." (*Mapstead*, supra, 63 Cal.App.4th at p. 1189.)

As explained above, Verafirma's software requires an individual to print legally required information, fulfilling the "personally affix" requirement for residence addresses.

B. The Elections Code Petition Requirements for Circulators Also Are Met by These Electronic Signatures

Verafirma's software allows an individual to sign a petition and declare that he or she is also a circulator, as is frequently done with today's petition gathering efforts. The requirements for a circulator's declaration parallel the requirements for a signer. They are set forth in Elections Code section 104 (generally) and Section 9022 (specifically for statewide initiatives). The requirements are:

1. Signed

2. Setting forth, in the circulator's own hand

3. Printed name of circulator

4. Residence address

5. Dates between which the signatures were gathered

6. Date and place of execution

December 13, 2009

The purpose of the circulator 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.) The Attorney General has opined that an irregularity in the affidavit of a petition circulator, "especially where [it] consists merely of the omission of an address which does not affect the validity of the petition itself and can easily be corrected" will not invalidate the entire petition. (36 Ops.Cal.Atty.Gen. 68 (1960).)

Statutory requirements 1, 3, and 4 above track precisely the requirements of Section 9020 for signers, and Verafirma's technology is compliant with each of those as discussed above. Compliance with the additional requirements in 5 and 6 above are also met by the software. Statutory requirement 2, set forth in Sections 104 and 9022, is that the declaration be completed "in the circulator's own hand." The software requires that the voter write each of these required pieces of information on the touch-screen of the mobile device plainly in the individual's own hand.

CONCLUSION

Use of this procedure meets all current Elections Code requirements. As it gains wide-spread use, the direct democracy envisioned by Governor Hiram Johnson will once again flourish in California.

December 13, 2009