

1st Civil No.  
A128721  
Div. 1

IN THE  
**COURT OF APPEAL**  
STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT

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MICHAEL NI,

Appellant,

v.

CHIEF ELECTIONS OFFICER WARREN SLOCUM,

Respondent.

---

Appeal from the Superior Court for the County of San Mateo, Case No. 492074,  
Honorable George A. Miram, Presiding

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**[PROPOSED] AMICUS CURIAE BRIEF OF CITIZENS IN CHARGE, THE  
HUMANE SOCIETY OF THE UNITED STATES, AND THE NATIONAL  
TAXPAYERS UNION IN SUPPORT OF APPELLANT MICHAEL NI**

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Corey A. Evans (CSB #218789)  
Robert Stamps (CSB #254732)  
Evans & Page  
2912 Diamond Street #346  
San Francisco CA 94131  
Telephone: (415) 896-5072  
Facsimile: (415) 358-5855  
*Counsel for Amici Curiae*  
*Citizens In Charge*  
*The Humane Society of the United States*  
*The National Taxpayers Union*

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## AMICUS CURIAE BRIEF

### **A. Introduction**

The ballot initiative is intended to provide forms of direct democracy that will “gain citizens a voice on questions of public policy.” (*James v. Valtierra* (1971) 402 U.S. 137, 141). By the trial court’s decision in this case, California citizens lose a portion of their future voice on questions of public policy. The trial court decided to deny the writ petition because: (1) the electronic initiative petition appellant signed did not have the margins specified in the Elections Code; and (2) respondent could not determine whether appellant “personally affixed” his signature or whether a third party did so.

This amicus brief starts with a short history of the ballot initiative in the United States and in California. The trial court’s decision is counter to the intent and long history of the ballot initiative. The next portion of the brief explains why the public policy behind ballot initiatives in California favors overturning the trial court’s decision. Finally, the last portion ends with support as to how the trial court’s ruling will have a major impact on public policy, citizen engagement, and the use of technology in our political process in the future.

### **B. Initiatives Play an Important Role in California**

#### 1. History of the Ballot Initiative

Initiatives are an old saw in the toolbox of American democracy. In 1775, Thomas Jefferson argued to give Virginians initiative power in the Virginia state constitution. (M. Dane Waters, The Initiative and Referendum Almanac (Carolina Academic Press 2003) (“Waters”).) Indeed, James Madison established the philosophical

framework for the ballot initiative in Federalist 49 when he declared: “[a]s the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power[] is derived, it seems strictly consonant to the republican theory to recur to the same original authority . . . whenever it may be necessary . . . .”

The First Amendment right to petition the government for redress of grievances has long been linked to the vitality of American democracy and the ability of citizens to invoke directly the principles of self-government. (Vincent R. Johnson, Regulating Lobbyists: Law, Ethics, and Public Policy, 16 Cornell J.L. & Pub. Pol’y 1, 5-6 (2006) (noting the historical recognition of the importance of protecting self government).) The United States Supreme Court repeatedly has “recognized [the] right to petition as one of ‘the most precious of the liberties safeguarded by the Bill of Rights.’” (*BE & K Constr. Co. v. N.L.R.B.* (2002) 536 U.S. 516, 524 (citing *Mine Workers v. Illinois Bar Ass’n* (1967) 389 U.S. 217, 222).) The initiative is the most effective way of preserving the power to petition because it allows citizens to design and enact substantive legislation. (Daniel A. Smith & Caroline J. Tolbert, Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in American States xiii-xiv (2004) (“Educated by Initiative”).)

In the late 1800s and early 1900s, the initiative developed in numerous states in order to counterbalance unresponsive and unaccountable legislatures. (Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall 1 (1989).) American citizens used initiatives to push for important reforms resisted by many

legislatures such as the direct election of U.S. Senators and women's suffrage. (Waters, *supra*.) In 1898, South Dakota became the first state to establish an initiative process in its state constitution. (*Id.*)

In California, the initiative has a sacred and storied history, particularly as a catalyst for reform. In 1911, Governor Hiram Johnson established the initiative process in California to battle the corrupting power of the railroads. (Center for Government Studies, Democracy by Initiative: Shaping California's Fourth Branch of Government (2d ed. 2008) ("CGS").) Since then, the initiative has flourished in California as the popular will of the people; sometimes lowering property taxes, and other times, expanding funding for schools or making it easier to pass school bonds. Today, twenty-four states have some form of initiative process. (Waters, *supra*.)

## 2. California Uses Ballot Initiatives to Reform Politics & Empower Its Voters

"California voters have a powerful tool, the ballot initiative, to make public policy." (*Howard Jarvis Taxpayers Ass'n v. Bown* (2011) 192 Cal.App.4th 110, 2011 WL 242446, at \*1 (citing Cal. Const., art. II, § 8, subd. (a) ("The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them").) Because this initiative is based on "the theory that all power of government ultimately resides in the people," the California Constitution recognizes a power reserved by the people, not a right granted to them. (Cal. Const., art. IV, § 1 ("The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum").)



The initiative process is popular with California voters. In a statewide survey conducted last year, 75% of Californians surveyed prefer citizens and not the legislature to make decisions for the state.<sup>1</sup> (Public Policy Institute of California, Pew Center on the States, Facing Facts (2010.)) Consequently, the power reserved by the people is liberally construed in favor of its use. (*Referendum Comm. v. Hermosa Beach* (1986) 184 Cal.App.3d 152, 161; *Associated Home Builders v. Livermore* (1976) 18 Cal.3d 582, 591); *see State Comp. Ins. Fund v. State Bd. of Equalization* (1993) 14 Cal.App.4th 1295, 1301 (liberal construction).)<sup>2</sup> California courts repeatedly hold that local governments have the purely ministerial duty to place duly certified initiatives on the ballot, and cannot unilaterally refuse to do so. (*See, e.g., Save Stanislaus Area Farm Econ. v. Bd. of Supervisors* (1993) 13 Cal.App.4th 141, 148-49.)

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<sup>1</sup> The ballot initiative remains popular even though approximately two of every three initiatives failed to pass into law in the last decade. (CGS, *supra*.)

<sup>2</sup> *See, e.g.,* Catherine Engberg, The Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?, Note, 54 Stan. L. Rev. 569 (2001) (congressional reform of state initiative lawmaking to guarantee republican form of government); Stephen Salvucci, Note, Say What You Mean and Mean What You Say: The Interpretation of Initiatives in California, 71 S. Cal. L. Rev. 871 (1998) (interpretation of initiatives in California); Peter Schrag, The Fourth Branch of Government? You Bet, 41 Santa Clara L. Rev. 937 (2001) (symposium on initiative process); Karl Manheim, Symposium on the California Initiative Process, 31 Loy. L.A. L. Rev. 1161 (1998) (symposium on California's initiative process); Julia Anne Guizan, Note & Comment, California Civil Rights Initiative A Wolf in Sheep's Clothing?: Distinguishing Constitutional Amendment From Revision in California's Initiative Process, 31 Loy. L.A. L. Rev. 261 (1997) (distinguishing constitutional amendment from revision in California's initiative process); Catherine A. Rogers & David L. Faigman, And to the Republic for Which it Stands: Guaranteeing a Republican Form of Government, 23 Hastings Const. L.Q. 1057 (1996) (focusing on modern state initiatives); Kara Christenson, Interpreting the Purposes of Initiatives: Proposition 65, Note, 40Hastings L.J. 1031 (1989) (interpreting purposes of initiatives).

The initiative process serves as a safety valve for Californians to use when they feel the legislature has failed or refuses to act.<sup>3</sup> It may indeed be the only way to achieve major and substantive change. Denying a vote on a ballot initiative because the electronic version of the initiative petition contained an incorrect margin, as in this case, only adds to that frustration and dissatisfaction; the trial court's decision just adds to that belief that the system is "broken" and needs to be fixed. In any event, this Court should consider the ballot initiative as an integral part of California and it should endeavor to protect that process.

The trial court's decision undermines the positive effects of ballot initiatives. Since ballot initiatives became part of California's political system, they have allowed citizens to act as lawmakers by proposing and enacting legislation. Ballot initiatives also serve to increase citizen knowledge of, and engagement with, politics. This educative effect was part of the rationale not only for California, but for states across the country in enacting the initiative process in the 1800s and 1900s. Ballot initiatives generate discussion and debate among citizens as they seek support for their measures, and citizens are more engaged, more knowledgeable, and more likely to vote as a result.

For these positive effects to occur, all Californians must be allowed the opportunity to discuss their ideas with others, sign petitions, and engage in the public political discourse that the original proponents of ballot initiatives envisioned.

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<sup>3</sup> The initiative process in California "may be more widely employed and by more people in the state than in any other democratic society in the world." (Douglas C. Michael, Preelection Judicial Review: Taking the Initiative in Voter Protection, 71 Cal. L. Rev. 1216, 1216 n.1 (1983) (quoting D. Butler & A. Ranney, Referendums 91 (1978)).)

Appellant's effort to electronically sign an initiative petition supports these positive effects.

3. Ballot Initiatives Serve as a Check on Government

One of the goals of the initiative process is to ensure that elected officials remain accountable to the electorate. Allowing citizens to challenge laws or introduce new laws puts a much-needed check on the power of state legislatures. Initiatives constitute a way to correct sincere but mistaken legislators as to the wishes of the people. Voters vote for reasons other than proclaiming their support for a political candidate. They are motivated by the opportunity to decide for themselves how issues close to their lives are managed and resolved, instead of leaving it up to lawmakers. Voters want to participate on important issues such as the medical use of marijuana<sup>4</sup> and same-sex marriage.<sup>5</sup> In this way, ballot initiatives serve as a check upon overzealous legislators and helps hold government accountable to the people.

Most importantly, instead of covering up mistakes by the legislature, citizens have the incentive to fix them. Whereas legislators often try to hide their personal mistakes to protect their political careers, citizens just want to see the best policies enacted. Despite the fact that the citizens adopted the initiative process to ensure accountability, the trial court's order now seeks to restrict rather than facilitate the use of these powers by the

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<sup>4</sup> While strongly supportive of Mr. Ni's right to affix his electronic signature to an initiative petition and have it be counted by respondent, the *amici curiae* submitting this brief have no interest in and take no position on the particular ballot measure at issue in this case.

<sup>5</sup> Caroline J. Tolbert, The Educative Effects of Ballot Initiatives on Voter Turnout, Kent State University, and Daniel A. Smith, University of Florida (2005), available at <http://www.clas.ufl.edu/users/dasmith/APR%202005.pdf>

people of California. Ballot initiatives allow citizens to enact meaningful policy changes that otherwise have little chance of being passed by politicians. Including as many diverse groups as possible, including the tech-savvy, creates a large group of independent people to make better decisions.

### **C. Technology Advances the Ballot Initiative Process**

Ballot initiatives have an educative effect on voters by increasing civic engagement, increasing voter participation, and reducing voter dissatisfaction with the government. (Educated by Initiative, *supra* at 59.) While the authors of the California Constitution did not envision the technology that we possess today, they probably would concur that old law should incorporate new technology when the technology meets or exceeds the specified legal requirements as appellant demonstrates.

Today, electronic signature technology is commonplace from banks to grocery stores, to federal courts.

Digital signatures are commonplace at this time, and often take the place of an ink signature. Indeed, the court takes judicial notice of its own CM/ECF procedures where important judicial documents, even the present motions before the undersigned, are accompanied by a /s/ or other type of digital signature. Plaintiff makes no valid argument why digital signatures should also not be recognized by the Social Security Administration-it is not a “rubber stamp” signature.

(*Johnson v. Astrue* (E.D. Cal. June 18, 2009), No. CIV S-08-0182 GGH, 2009 WL 1748790, at \*3.) Further, the use of mobile devices which allows signature technology to be used for initiative petitions is widespread and growing. By Christmas 2011, one in two mobile phones purchased in the United States will be smartphones and fifty different

tablet devices will be available to consumers, all capable of using electronic signature technology. (Roger Entner, Smartphones to Overtake Feature Phones in US by 2011, Nielsen Wire, March 26, 2010, *available at* <http://blog.nielsen.com/nielsenwire/consumer/smartphones-to-overtake-feature-phones-in-u-s-by-2011/>.)

The development of this technology will be beneficial for Californians who now will have a user-friendly way to sign initiative petitions and, therefore, engage more readily in the democratic process. As California's population has grown, the act of collecting signatures to meet initiative requirements has become so challenging that it is almost essential for most initiatives to engage professional signature gatherers in the petition effort. In fact, no initiative in California has qualified for the ballot with an all-volunteer effort since 1982. (CGS, *supra*.) The high cost of the signature-gathering process has led one commentator to posit that it has created an economic inequity with regard to initiative access:

[T]he greatest risk of government by initiative is it becoming a plaything of special interests. Signature gathering in California is so costly that only those who can write big checks to professional petitioners can be sure of qualifying a ballot measure. Sooner or later the field will be limited to celebrities, industry lobbies and the California Chamber of Commerce.

(Michael Hiltzik, Ways to Reform the Initiative Process, Los Angeles Times, July 28, 2005, *available at* <http://www.latimes.com/business/la-fi-golden28jul28,1,2750191.story>.) New technology will help true grassroots efforts to participate in direct democracy as it initially was envisioned by the leaders of the

Progressive movement in the early 1900s.

1. Permitting Electronic Signatures Will Increase Civic Engagement

Initiatives increase civic engagement by providing voters with a voice that allows them to participate in the political process beyond merely casting a vote during elections. (See *Educated by Initiative*, *supra*, at 53). Studies show a considerable decline in the average American's interest in politics over the past several decades, especially among young people. (*Id.* at 54). When an initiative appears on the ballot and it addresses public concerns, civic engagement increases.<sup>6</sup> (*Id.* at 58-59). Permitting voters to sign initiative petitions electronically will allow all voters (and especially young voters) to easily join the political process and spark their interest in government. In a state like California with a large population and low voter enthusiasm, anything to modernize and jump-start the initiative process means more Californians will engage in the political process.

2. Electronic Signatures Will Increase Voter Turnout Rates

Ballot initiatives increase voter involvement in the political process. Initiatives positively affect voter turnout in elections as a result of the increase in voter knowledge and awareness of the issues. (See Mark A. Smith, Ballot Initiatives and the Democratic Citizen, 64 J. of Politics 892 (2002) (noting increased political knowledge created by ballot initiatives).) The ability to vote on statewide and local issues, in addition to voting for candidates in an election, is consistently reported in polling as a motivating factor for

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<sup>6</sup> In 1996, voters in states with initiatives had a 27% chance of answering five of six questions related to politics — 3% higher than states without initiatives. (*Id.* at 61).

nonvoters to turn out and vote. (See Cronin, *supra* at 226-27.)

Studies also indicate that permitting citizens to raise a ballot initiative results in a larger voter turnout. During the 1990s, voter turnout was 7% to 9% greater in midterm elections and 3% to 4.5% higher in presidential elections in states that have the initiative process over those that do not.<sup>7</sup> This can be attributed to the fact the people believe that their vote can make a difference when voting on initiatives. They realize that when they vote for an initiative, they get what they voted for. That is the key distinction between voting on an initiative and voting for a candidate. With a candidate there are no guarantees – you can only hope that the candidate delivers on his or her promises.

Since initiatives address issues rather than political personalities, theoretically voters consider the issues with more objectivity than do members of the legislature. Additionally, voters have the opportunity to become knowledgeable of the issues, for they need to consider only a small portion of propositions in comparison to the vast number the legislature must consider. H. Lowe, Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash. L. Rev. 175, 189 (1979).

Allowing electronic signatures will further increase voter participation with ballot initiatives. Of course, that process will be stifled and not permitted to grow if electronic signatures are prohibited. It is common knowledge that young people do not turnout in large numbers for elections. (Michael P. MacDonald, Young People Don't Vote in Midterm Elections, Huffington Post, July 28, 2010, *available at*

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<sup>7</sup> Caroline Tolbert & John Grummel, The Effects of Ballot Initiatives on Voter Turnout in the American States, Am. Politics Research 29.6 (2001).

[http://www.huffingtonpost.com/michael-p-mcdonald/young-people-dont-vote-in\\_b\\_664312.html](http://www.huffingtonpost.com/michael-p-mcdonald/young-people-dont-vote-in_b_664312.html).) Electronic signatures will encourage more young people to sign initiative petitions and, as a result, to vote. With more and more young people, and Americans in general, doing their shopping online and in their own home, they are less likely to participate in a ballot initiative system that engages shoppers at a local store.

### 3. Permitting Electronic Signatures is Responsive to the Needs of Voters

An initiative process that includes the use of electronic signatures is a process that is more responsive and receptive to the needs and interests of California voters. Because initiatives provide voters with the opportunity to participate directly in the political process, they are more likely to feel that they have a say if the Elections Code is read broadly to include the use of electronic signatures.

### 4. Streamlining

The application of old laws to new technology never is easy. Today, everyone “signs” a small plastic pad for a credit card transaction at almost any retail store. The result is a legal “signature.” No one would argue that this electronic payment process is less streamlined or efficient than handwriting a check at a check-out counter.

Ballot initiatives allow Californians to directly influence issues at the local level and state level by implementing laws of their own choosing instead of relying on the legislature. Using the ballot initiative process, citizens can bring about a public vote on a proposed statute or constitutional amendment by gathering a pre-determined amount of signatures from registered voters and turning those signatures in to the state. One state court has held that an integral part of the electorate’s initiative power is the right to be



given adequate opportunities to obtain signatures for petitions. (*State v. Cargill* (Or. App. 1990) 786 P.2d 208, 214.) What better way to do so, then to allow electronic signatures on ballot initiatives? This new technology is going to be a positive force for political change by making the process more accessible to grassroots efforts, lowering the cost of signature collections, and bringing a larger segment of society into the political process.

#### **D. Conclusion**

Ballot initiatives are integral to the proper functioning of our democratic system. As the cost of collecting handwritten initiative signatures skyrockets and the signature-gathering process becomes big business, technology has presented us with an opportunity to level the playing field. Good public policy would ensure that the initiative process continues to provide citizens with an effective method for political change.

Additionally, California law does not require an ink-on-paper signature for initiative petitions, and California law also provides that “[i]f a law requires a signature, an electronic signature satisfies the law.” (Cal. Civil Code § 1633.7 subd. (d).)

Lastly, electronic signatures have become commonplace in commercial transactions, government filings, and court proceedings. Electronic signatures are more reliable in many respects than squiggles consisting of ink-on-paper.

For the foregoing reasons, the organizations respectfully request that this Court hold appellant Michael Ni's signature on the underlying initiative petition was proper and should not have been rejected by respondent. Thus, this Court should overturn the trial court's denial of appellant's petition for writ of mandate.

Date: February 22, 2011

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By: Corey A Evans, Esq.  
*Counsel for Amicus Curiae*  
*Citizens In Charge*  
*The Humane Society of the United States*  
*The National Taxpayers Union*

**WORD COUNT CERTIFICATION**

I, Corey Evans, hereby certify, pursuant to California Rules of Court, Rule 8.204 subdivision (c), that the word count of my Microsoft Word computer program for this brief indicates that it contains (4,515), including footnotes.

I declare under penalty of perjury under the laws of this State of California that the foregoing is true and correct. Executed this 22nd day of February, 2011.

\_\_\_\_\_  
Corey Evans

**PROOF OF SERVICE**

I, Corey Evans, hereby declare that:

I am over the age of 18 years and not a party to or interested in the within entitled cause at the time of this service. My business address is 2912 Diamond Street #346, San Francisco California. On the date stated below, I served a true copy of:

**[PROPOSED] AMICUS CURIAE BRIEF OF CITIZENS IN CHARGE, THE  
HUMANE SOCIETY OF THE UNITED STATES, AND THE NATIONAL  
TAXPAYERS UNION IN SUPPORT OF APPELLANT MICHAEL NI**

by the following method:

xx By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

**ATTORNEY FOR RESPONDENT**

Michael P. Murphy, County Counsel  
County Counsel for San Mateo County  
400 County Center  
Redwood City, CA 94063

**AMICUS CURIAE FOR RESPONDENT**

Hiren Patel  
Deputy Attorney Gen. for The Secretary of State  
1300 I Street, Suite 125  
Sacramento, CA 94244-2550

**SAN MATEO SUPERIOR COURT**

Superior Court of California, County of San Mateo  
Attn: Clerk of the Appellate Division  
400 County Center  
Redwood City, CA 94063

I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in San Francisco CA on **February 22, 2011**.

\_\_\_\_\_  
**Corey Evans**