No. 20240965-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

League of Women Voters of Utah, et al.,
Appellees (Plaintiffs),
v.
Utah State Legislature, et al.,
Appellants (Defendants).

BRIEF OF APPELLEES

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Dianna M. Gibson, District Court No. 220901712

Oral Argument: September 25, 2024

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CURRENT AND FORMER PARTIES

Appellants ("legislature" or "Defendants")

Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Mike Schultz, and Sen. J. Stuart Adams

> Represented by Victoria Ashby, Robert H. Rees, Eric N. Weeks, and Michael Curtis of the Office of Legislative Research and General Counsel; and Tyler R. Green, Taylor A.R. Meehan, and Frank H. Chang of Consovoy McCarthy PLLC

Appellees (Plaintiffs)

League of Women Voters of Utah, Mormon Women for Ethical Government, Stephanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, and Jack Markman

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Parties below not parties to the appeal

Defendant Lt. Governor Deidre Henderson

Former Defendant Rep. Brad Wilson (Ret.) (succeeded in official capacity by Rep. Mike Schultz)

Plaintiff Dale Cox (voluntarily dismissed)

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ADDENDA

A September 12, 2024 Ruling and Order Granting Plaintiffs' Motion for Leave to File Supplemental and First Supplemental Complaint and Granting Motion for Preliminary Injunction on Counts 9-14 and 15 (District Court Dkt. No. 375.)

Bates numbering Sept12Order001-16 applied by counsel for ease of reference.

B September 9, 2024 Transcript of Scheduling Conference

C September 11, 2024 Transcript of Preliminary Injunction Hearing

D Nov. 22, 2022, Ruling and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (District Court Dkt. No. 140.)

E Utah Const. Art. XXIII, § 1

F Utah Const. Art. IV, § 2

G Utah Code § 20A-7-103

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INTRODUCTION

People decide elections; the house speaker and senate president don't. But earlier this year, legislative leadership transferred from nonpartisan staff to itself the task of drafting ballot language. In doing so, they thought they gave themselves the power to control whether to tell voters the most fundamental thing needed to meaningfully vote—what it is the people are actually voting on. The ballot language for Amendment D is the culmination of that troubling process. A voter would think Amendment D *strengthens* the people's initiative rights by requiring the legislature to respect the purpose of initiatives. In fact, Amendment D *weakens* the people's initiative rights by *eliminating* the legislature's obligation to respect the purpose of government reform initiatives.

The legislature compounded this harm by ignoring its obligation to cause timely publication of the Amendment's full text in newspapers. Now it seeks to blame the lieutenant governor, plaintiffs, the district court—*anyone but itself*—for failing to comply with its constitutional obligation. It demands that this Court simply ignore the plain text of this constitutional requirement based on a specious no-harm, no-foul, argument that everyone has the internet and should therefore be presumed to know that the ballot communicates the opposite of what would occur if Amendment D were adopted.

The district court correctly found for Plaintiffs on both grounds. This Court should affirm.

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that Amendment D's ballot language was false and misleading in violation of the Amendment Submission Clause (Article XXIII, Section 1) and the Right to Vote Clause (Article IV, Section 2)?

2. Did the district court correctly conclude that the legislature failed to comply with the Publication Clause of Article XXIII, Section 1?

3. Did the district court properly weigh the equities in granting a preliminary injunction?

Preservation. Plaintiffs raised all issues in their motions for preliminary injunction. Doc. 333, 342.

Standard of Review: The district court's grant of a preliminary injunction is reviewed for abuse of discretion. *Osguthorpe v. ASC Utah, Inc.*, 2015 UT 89, ¶ 37, 365 P.3d 1201. Questions of law are reviewed de novo. *Martin v. Kristensen*, 2021 UT 17, ¶ 19, 489 P.3d 198.

STATEMENT OF THE CASE

I. Factual Background

A. The legislature's "emergency" special session.

On July 11, 2024, this Court held that Article I, § 2 and Article VI of the Utah Constitution guarantee the people a fundamental constitutional right to alter or reform the government through initiatives. *League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, ¶ 74, --- P.3d --- ("*LWVUT*"). Further, the Court held that the legislature

cannot impair a reform initiative unless it does so in a manner that is narrowly tailored to further a compelling government interest. *Id.* ¶ 75.

Barely more than a month later, the Utah legislature convened a special session, declaring this Court's decision an "emergency in the affairs of the state."[1] At the special session, the legislature adopted S.J.R. 401, which proposes a constitutional amendment to modify Article I, § 2 as follows:

> All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government through the processes established in Article VI, Section 1, Subsection (2), or through Article XXIII as the public welfare may require.[2]

The proposed Amendment also modifies Article VI, § 1 of the Utah Constitution to (1) prohibit foreign individuals, entities, and governments from supporting or opposing initiatives or referenda and (2) provides that:

> Notwithstanding any other provision of this Constitution, the people's exercise of their Legislative power as provided in Subsection (2) does not limit or preclude the exercise of Legislative power, including through amending, enacting, or repealing a law, by the legislature, or by a law making body of a county, city, or town, on behalf of the people whom they are elected to represent.[3]

It also purports to establish that the changes—other than the foreign influence prohibition—have retrospective operation.[4]

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[1] Utah State Legislature, Legislative Special Session Proclamation, https://le.utah.gov/session/2024S4/Proclamation.pdf?r=1.
[2] S.J.R. 401, Proposal to Amend Utah Constitution – Voter Legislative Power, 65th Leg., 2024 4th Spec. Sess. (Utah 2024), https://le.utah.gov/~2024S4/bills/static/SJR401.html.
[3] *Id.*
[4] *Id.*

S.J.R. 401 provides that the amendment—eventually certified as "Amendment D"—will be proposed to the voters at the next general election, and if approved, would take effect January 1, 2025.[5] S.J.R. 401 was adopted barely 24 hours after the text was made publicly available, with minimal opportunity for public input.[6]

At the same session, the legislature enacted S.B. 4002, which created Section 20A-7-103.1 to apply only to this proposed amendment and to exempt it from various Code provisions regulating the timing and process for drafting and presenting arguments in favor and opposition to the voters.[7]

The legislature also enacted S.B. 4003 to take effect only if Amendment D is approved. The legislation adds 20 days to the time voters have to submit referendum signatures and provides that the legislature should give deference to initiatives when *amending* them "in a manner that, *in the legislature's determination*, leaves intact the general purpose of the initiative."[8] But that deference only applies to amendments that occur during the next general session following the initiative's adoption. And the language says nothing about *repealing* initiatives.[9] Moreover, no deference is required if the initiative has a fiscal effect.[10] In any event, the statute is trumped by Amendment D itself,

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[5] *Id.*
[6] Utah Legislature, Business & Labor Interim Comm. – August 21, 2024, https://le.utah.gov/av/committeeArchive.jsp?mtgID=19496, at 1:33:18-1:34:35, 1:38:30-1:48:30.
[7] S.B. 4002, Ballot Proposition Amendments, 65th Leg., 2024 4th Spec. Sess. (Utah 2024), https://le.utah.gov/~2024S4/bills/static/SB4002.html.
[8] S.B. 4003, Statewide Initiative and Referendum Amendments, 65th Leg., 2024 4th Spec. Sess. (Utah 2024), https://le.utah.gov/~2024S4/bills/static/SB4003.html (emphasis added).
[9] *Id.*
[10] *Id.*

which provides that state law requires zero legislative deference to the purpose of initiatives.[11]

Governor Cox signed both S.B. 4002 and 4003 on August 22, 2024.[12]

B. Speaker Schultz and President Adams draft misleading and inaccurate ballot language for Amendment D.

The Utah Code requires the Speaker of the House and the President of the Senate to "draft and designate a ballot title for each proposed amendment . . . that [] summarizes the subject matter of the amendment . . . and [] summarizes any legislation that is enacted and will become effective upon the voters' adoption of the proposed constitutional amendment." Utah Code § 20A-7-103(3). Until May 2024, this task was assigned to the nonpartisan legislative general counsel.[13]

On the evening of September 3, 2024, Lieutenant Governor Henderson signed the 2024 General Election Certification, which certified the ballot language for Amendment D.[14] The Certification was not published on the lieutenant governor's website until mid-day September 4, 2024.[15]

The certified ballot language reads:

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[11] *Id.*
[12] 2024 4th Spec. Sess. Bills Passed, Utah State Legislature (Sept. 5, 2024), https://le.utah.gov/asp/passedbills/passedbills.asp?session=2024S4.
[13] S.B. 37, Election Law Revisions, 65th Leg., 2024 Gen. Sess. (Utah 2024), https://le.utah.gov/~2024/bills/static/SB0037.html.
[14] Office of the Lieutenant Governor, 2024 General Election Certification, https://vote.utah.gov/wp-content/uploads/sites/42/2024/09/2024-Official-General-Election-Certification.pdf.
[15] Office of the Lieutenant Governor, 2024 Election Information, https://vote.utah.gov/current-election-information/.

Constitutional Amendment D

> Should the Utah Constitution be changed to strengthen the initiative process by:
> - Prohibiting foreign influence on ballot initiatives and referendums.
> - Clarifying the voters and legislative bodies' ability to amend laws.
>
> If approved, state law would also be changed to:
> - Allow Utah citizens 50% more time to gather signatures for a statewide referendum.
> - Establish requirements for the legislature to follow the intent of a ballot initiative.
>
> For ( ) Against ( ).[16]

Commenting on the language, Republican Representative Raymond Ward stated, "I believe that ballot language that has been written by them is deceptive and it incorrectly claims that the effect is to strengthen the initiative process when, to me, it seems the main purpose of the amendment is to seriously weaken the initiative process."[17] Republican Representative Marsha Judkins posted on social media: "You have got to be kidding. What misleading language!"[18]

Utahns have expressed confusion about the ballot language and Plaintiffs have testified it will impede their voter education efforts. Doc. 342, Ex. A.[19]

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[16] Office of the Lieutenant Governor, 2024 General Election Certification at 34-35, https://vote.utah.gov/wp-content/uploads/sites/42/2024/09/2024-Official-General-Election-Certification.pdf.

[17] Robert Gehrke, *"Deceptive" and "Misleading": Ballot language to limit voters' initiative power thrashed by critics—including Republicans*, Salt Lake Tribune (Sept. 4, 2024), https://www.sltrib.com/news/politics/2024/09/04/ballot-language-limit-voters/.

[18] *Id.*

[19] Saige Miller & Elle Crossley, *Critics say Amendment D language misleads. So we asked Utahns what D says*, KUER (Sept. 9, 2021), https://www.kuer.org/politics-government/2024-09-09/critics-say-amendment-d-language-misleads-so-we-asked-utahns-what-d-says.

C. The legislature fails to cause Amendment D to be published in newspapers across the state for two months preceding the election.

Article XXIII, § 1 of the Utah Constitution provides that after the legislature approves a proposed constitutional amendment, "the legislature shall cause the same to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election." Utah Const. art. XXIII, § 1 ("Publication Clause").

As of September 15, 2024—well beyond the two-month deadline—the legislature had not caused Amendment D's text to be published in any newspaper in any county, let alone at least one newspaper in each county in Utah where a newspaper is published. Nor had the legislature caused the full text of Amendment D to be published on any website of a Utah newspaper.[20]

On September 11, the House Chief of Staff indicated that she had only just "taken the necessary steps to purchase . . . space in 35 newspapers to publish the ballot title and full text of each proposed constitutional amendment certified to appear on the November 2024 general election ballot." Defs.' Ex. C-398. Her "understanding" was that publication would "occur in each newspaper during the week of September 16, 2024." (*Id.* at 400.) However, the legislature's failure to timely commence publication cannot be cured because, as Defendants themselves stress, the election is already "less than two months away." Rule 23C Mot. at 1.

[20] *See, e.g.*, Utah Press Association, Utah Legals & Public Notices, https://www.utahlegals.com/(S(oy51nxsefg1gf5u5gjbnmey2))/default.aspx.

The 2024 general election is the first of which Plaintiffs are aware where the legislature has not delegated to *any* government official the task of fulfilling Article XXIII, Section 1's newspaper publication requirement. This is because in 2023, the legislature amended Utah Code § 20A-7-103(2) to *eliminate* what was previously the lieutenant governor's duty to effectuate the Constitution's newspaper publication requirement.[21]

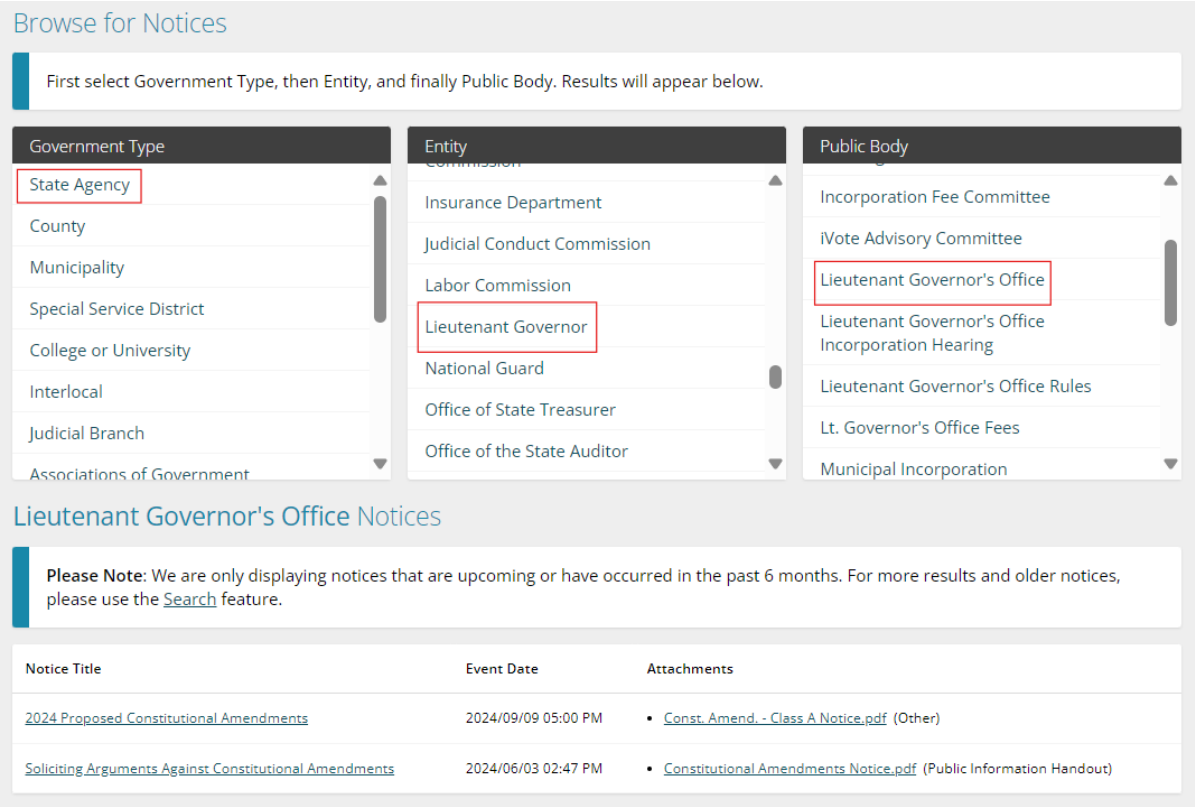
Utah Code § 20A-7-103(2) now instead requires the lieutenant governor to, "not more than 60 days or less than 14 days before the date of the election, publish the full text of the amendment . . . as a class A notice under Section 63G-30-102 through the date of the election." Under Utah Code § 63G-30-102, "class A notices" for matters affecting the entire state must be published (1) on the Utah Public Notice Website and (2) on the relevant official's website if that official maintains one and has "an annual operating budget of $250,000 or more." Utah Code § 63G-30-102(1)(a)-(b) & 4(a). Despite repealing the provision of the Code that delegated its Publication Clause responsibilities, the legislature did nothing to ensure that it directly fulfilled them itself with respect to this year's proposed constitutional amendments.

The lieutenant governor did not publish Amendment D's text on the state's Public Notice Website until September 9.[22]

Unlike browsing a newspaper delivered to one's doorstep, searching the Public Notice Website for proposed amendments requires an intimate familiarity with the

[21] S.B. 43, Ballot Proposition Amendments, 65th Leg., 2024 Gen. Sess. (Utah 2023), https://le.utah.gov/~2023/bills/static/SB0043.html.
[22] Utah Archives & Records Service, 2024 Proposed Constitutional Amendments (Sept. 9, 2024), https://www.utah.gov/pmn/sitemap/notice/938513.html.

hierarchy of government entities in the state—and a good dose of perseverance. As the screenshot below illustrates, to find Amendment D's text on the Public Notice Website voters must know to navigate to www.utah.gov/pmn, click "State Agency" under "Government Type," then scroll down under "Entity" and click "lieutenant governor," then finally scroll down under "Public Body" to click "lieutenant governor's Office."[23]



As Defendants note, the lieutenant governor must also prepare a Voter Information Pamphlet that includes, *inter alia*, the text, analysis of, and arguments for and against a proposed amendment. Utah Code § 20A-7-701, 702(7)(c)-(e).

[23] *See* Utah Archives and Records Service, Public Notice Website, https://www.utah.gov/pmn. Although the lieutenant governor's *own* website also posts it, voters must first know there is a reason to visit her website.

In 2020, however, the legislature eliminated a longstanding provision requiring the pamphlet to be printed and distributed to each Utah household.[24] The same bill repealed a provision requiring the lieutenant governor to either (1) send a notice to each household describing how to request additional pamphlets and pointing voters to the state's voter information website, or (2) ensure that a copy of the pamphlet is placed in one issue of every newspaper of general circulation in the state.[25] Then, in 2022, the legislature repealed the statute that authorized the lieutenant governor to "distribute a voter information pamphlet at a location frequented by a person who cannot easily access the Statewide Electronic Voter Information Website."[26] The lieutenant governor is now *only* authorized to publish the pamphlet on the state's voter information website "[n]o earlier than 75 days, and no later than 15 days, before the day on which voting commences." Utah Code § 20A-7-702.5(1).[27]

In this year's omnibus elections bill, the legislature also repealed a requirement that analyses of proposed constitutional amendments in the Voter Information Pamphlet be "impartial."[28] And it transferred the responsibility of preparing these analyses from the

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[24] S.B. 5012 Statutory Adjustments Related to Budget Changes, 2020 5th Spec. Sess. (Utah 2020), https://le.utah.gov/~2020s5/bills/static/SB5012.html.
[25] *Id.*
[26] H.B. 40, 2022 Leg., Gen. Sess. (Utah 2022), https://le.utah.gov/~2022/bills/static/HB0040.html#20a-7-702.
[27] Defendants cite (at 6) outdated and inapposite statistics to support their claim that Voter Information Pamphlets are "widely read." The claim that nine out of ten Utahns reported reading all or part of the pamphlet before the election comes from a 2002 law review article citing data collected before the 1992 election—a time when pamphlets were mailed to each household.
[28] S.B. 37, Election Law Revisions, 65th Leg., 2024 Gen. Sess. (Utah 2024), https://le.utah.gov/~2024/bills/static/SB0037.html.

nonpartisan Office of Legislative Research and General Counsel to the House Speaker and Senate President.[29] Utah Code § 20A-7-702(7)(c).

The legislature's recent shift to providing online-only notice of proposed constitutional amendments leaves the estimated 47,900 Utah households without internet access with no means to consider the text of Amendment D.[30]

The text of proposed amendments must be "printed on cards" at polling locations. Utah Code § 20A-5-103(1)(a). However, the vast majority of Utahns do not visit polling locations to cast their ballots. *See id.* § 20A-3a-202(1)(a) (requiring that voting be conducted "primarily by mail").

II. Procedural History

On September 5—one day after the lieutenant governor published Amendment D's ballot language—Plaintiffs sought leave to file a first supplemental complaint challenging the ballot language and moved for a preliminary injunction.

On September 6, the lieutenant governor responded, describing her role in overseeing ballot production. Doc. 339. The submission represented that to comply with federal law—the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)—counties would need to begin mailing approximately 4,451 ballots to overseas voters by September 20, 2024. *Id.* at 4-5.

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[29] *Id.*

[30] U.S. Census Bureau, American Community Survey 2022 5-Year Estimates, B28002 Presence & Types of Internet Subscriptions in Household (last accessed Sept. 15, 2024), https://data.census.gov/table/ACSDT5Y2022.B28002?q=Telephone, Computer, and Internet Access&g=040XX00US49.

On September 7, Plaintiffs sought leave to file a second supplemental complaint and preliminary injunction, alleging that the legislature had also violated the Publication Clause of Article XXIII, Section 1. Doc. No. 341.

At a September 9, 2024, status conference, the lieutenant governor's counsel represented that "the absolute drop-dead date for getting proofs to the printer is this Thursday," *i.e.*, September 12, 2024. Add. B at 9:1-3. Because "ballots need to go to the printers Thursday," "[t]hings have to happen before then." *Id*. at 9:12-18. Based on the lieutenant governor's representations, the district court accelerated the briefing schedule and set a preliminary injunction hearing for Wednesday, September 11. At the hearing, the lieutenant governor's counsel stated a preference for a remedy (which he advised could be implemented easily at "de minimus" cost) that would "allow Amendment D on the ballot and then not count any votes toward it." Add. C at 50:2-51:4.

Following the hearing, the legislature submitted a supplemental brief and declaration to, among other things, indicate that it had secured space in 35 newspapers to print the text of Amendments A through D during the week of September 16, 2024—while protesting that it had no obligation to do so. Defs.' Ex. C-400.

On September 12, the district court granted Plaintiffs' motions for preliminary injunction. Add. A at 1. The court ruled that by failing to "fairly and accurately" compose the ballot language so as "to assure a free, intelligent, and informed vote by the average citizen," Amendment D violates Article XXIII, § 1's Submission Clause and the fundamental right to vote under Article IV, § 2. *Id.* at 8-11. The court further ruled that Defendants failed to timely publish the amendment in Utah newspapers in violation of

Article XXIII, § 1. *Id.* at 12-13. These violations could, the court found, "have Utahns unwittingly *eliminate* a fundamental constitutional right that has existed since 1895," causing Plaintiffs irreparable harm. *Id.* a 14.

The court found Defendants would not be harmed by an injunction, attributing any inconvenience to their own efforts to "truncat[e] deadlines, sidestep[] normal processes, and propose[] . . . a constitutional amendment . . . with inaccurate descriptions." *Id.*

To protect the public's interest in "the integrity of our democracy," the court declared Amendment D void, allowed ballots to be printed as certified, and ordered the lieutenant governor to ensure that any votes cast for or against the voided amendment not be counted. *Id*.

SUMMARY OF ARGUMENT

The district court's preliminary injunction should be affirmed. The court correctly applied the law and did not abuse its discretion, either in its factual determinations or in weighing the injunction factors.

First, the district court correctly concluded that Amendment D's ballot language was misleading and counterfactual, violating Article XXIII's Amendment Submission Clause and Article IV, § 2's Right to Vote Clause. This Court, in line with a host of other state supreme courts, has held that ballot language must not mislead and must allow a reasonably intelligent voter to understand the amendment. Amendment D's ballot language does the *opposite*. In that way, the legislature has failed to "submit the [] amendment" to voters as the Constitution requires, and it has abridged and distorted the right to vote. For

similar reasons, by asserting undue influence over the voting process, the legislature has violated constitutional guarantees of free elections, free speech, and free government.

Second, the district court correctly concluded that the legislature failed to comply with Article XXIII, Section 1's Publication Clause by failing to publish the text of Amendment D in newspapers across the state for two months. In arguing otherwise, Defendants ignore text, history, and precedent and essentially ask the Court to rewrite the Constitution. The Publication Clause is no optional, technical requirement. It ensures voters are provided—rather than required to seek out—information about how the legislature seeks to change our Constitution.

Third, the district court did not abuse its discretion in balancing the equities. Plaintiffs—and the public—are harmed by deceptive ballot language, especially where the deception masks the true effect of an amendment that would eliminate fundamental constitutional rights that have existed since 1895. Defendants are not harmed by being required to follow the Constitution, and the public is not served by voting in an election infected with deceit and undue influence.

The Constitution has existed since 1895. If the legislature wants to change it, it must follow the rules for doing so.

ARGUMENT

I. The district court correctly concluded that Defendants' misleading ballot language violates Utah law.

The district court properly ruled that Defendants' deceptive ballot language for Amendment D violates the Amendment Submission (Article XXIII, § 1) and Right to Vote

(Article IV, § 2) Clauses of the Utah Constitution. Defendants' misleading and inaccurate ballot summary fails to notify voters that Amendment D *eliminates* a fundamental constitutional right that Utahns have held since 1895 and misleads voters about the Amendment's purpose and content. Indeed, it is counterfactual in its characterization of the effect of a favorable vote on the Amendment.

A. Defendants' deceptive ballot summary violates Article XXIII, Section 1.

The district court correctly ruled that Defendants' deceptive ballot summary violates Article XXIII, Section 1 of the Utah Constitution. Article XXIII provides that if two-thirds of all members elected to each house of the legislature vote in favor of a proposed amendment, "the said amendment . . . shall be submitted to the electors of the state for their approval or rejection, and if a majority of the electors voting thereon shall approve the same, such amendment . . . shall become part of this Constitution." Utah Const. art. XXIII, § 1. The provision's plain language, as understood in 1895 or today, requires that *the proposed amendment*—or at least an accurate summary of it—be submitted to voters for approval.

This Court "interpret[s] the [C]onstitution according to how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." *LWVUT*, 2024 UT 21, ¶ 101 (cleaned up). "When [courts] interpret the Utah Constitution, the 'text's plain language may begin and end the analysis.'" *State v. Barnett*, 2023 UT 20, ¶ 10, 537 P.3d 212 (quoting *South Salt Lake City v. Maese*, 2019 UT 58, ¶ 23, 450 P.3d 1092). But if any doubt exists, courts "can and should consider all relevant materials." *Maese*, 2019 UT 58, ¶ 23 (quoting *In re*

Young, 1999 UT 6, ¶ 15, 976 P.2d 581). This includes "the historical context in which [constitutional provisions] were ratified." *LWVUT*, 2024 UT 21, ¶ 103; *see also Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 12, 466 P.3d 178 (noting that determining original public meaning requires analyzing the provision's "text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting" (cleaned up)).

As the district court observed, "the most straightforward reading of Article XXIII is that the *actual text* of the amendment must be presented to voters." Add. A at 8. The legislature, however, has interpreted Article XXIII to allow for the ballot to include "a ballot title for each proposed amendment . . . submitted by the legislature that [] summarizes the subject matter of the amendment." Utah Code § 20A-7-103(3)(c). Such interpretation may be permissible because of the Clause's publication requirement, which is intended to provide notice of an amendment's full text to voters. *See, e.g., Snow v. Keddington*, 195 P.2d 234, 238 (1948) ("It should be remembered that the amendment is not printed in full on the ballot. . . . Such being the case, the notice of importance to the voter is the publication in the newspapers prior to the general election"). But either way, the plain meaning of Article XXIII's requirement that "the said amendment" be "submitted to the electors of the state for their approval or rejection" cannot plausibly encompass submitting a summary of the amendment that *falsely* and *misleadingly* describes the effect of the amendment as doing the opposite of what its text accomplishes.

Indeed, as this Court has held, ballot language is not "legally sufficient" if a "reasonably intelligent voter [would be] misled [] as to what he was voting for or against."

Nowers v. Oakden, 169 P.2d 108, 116 (Utah 1946). The Court explained that ballot questions must be

> [f]ramed with such clarity as to enable the voters to express their will. The proposition to be voted on must, of course, be placed on the ballot in such words and in such form that the voters are not confused thereby. The ballot together with the immediately surrounding circumstances of the election must be such that a reasonably intelligent voter knows what the question is and where he must mark his ballot in order to indicate his approval or disapproval.

Id.

Nowers aligns with the decisions of state supreme courts across the country interpreting similar constitutional provisions—decisions that have held that such clarity is necessary for the amendment at issue to be properly "submitted to the electorate." Utah Const. art. XXIII, § 1. For example, Article XI, Section 5 of the Florida Constitution requires that "[a] proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election . . . ." Fla. Const. art. XI, § 5. The Florida Supreme Court has held that "[i]mplicit in this provision is the requirement that the proposed amendment be accurately represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000); *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) ("[T]he voter should not be misled . . . [T]he Constitution requires . . . that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." (citation omitted)).

Numerous other state courts have reached the same conclusion. *See, e.g.*, *State ex rel. Voters First v. Ohio Ballot Bd.*, 978 N.E.2d 119, 126 (Ohio 2012) (ballot language "ought to be free from any misleading tendency, whether of amplification, or omission")

(cleaned up); *Kahalekai v. Doi*, 590 P.2d 543, 546, 552-53 (Haw. 1979) ("[T]he ballot must enable the voters to express their choice on the amendments presented and be in such form and language as not to deceive or mislead the public"); *Lane v. Lukens*, 283 P. 532, 533-34 (Idaho 1929) (voiding constitutional amendment post-election where ballot question did not communicate the amendment's effect); *Opinion of the Justices*, 283 A.2d 234, 236 (Me. 1971) ("an amendment presented to the voters by means of a question which is clearly misleading is void and of no effect"); *Ex parte Tipton*, 93 S.E.2d 640, 642 (S.C. 1956) (invalidating a "voter approved" amendment where "the ballot did not submit the question in the language prescribed by the proposing resolution, but submitted instead the misleading title of the resolution"); *League of Women Voters of Minn. v. Ritchie*, 819 N.W.2d 636, 647 (Minn. 2012) (holding amendment submission clause violated where "the ballot question as framed is 'so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote'") (citation omitted); *Knight v. Martin*, 556 S.W.3d 501, 506-07 (Ark. 2018) (a "ballot title must be an impartial summary of the proposed amendment, and it must give the voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law" (cleaned up)); *Dacus v. Parker*, 466 S.W.3d 820, 823, 826 (Tex. 2015) (recognizing common law protection from misleading ballot and noting that "ballot title must be an impartial summary of the proposed amendment, and it must give the voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law" (cleaned up)).

Indeed, just last week, the Texas Supreme Court ordered a ballot measure removed from the ballot, holding that the common law protects the right to a truthful and accurate ballot and "limits" discretion over ballot language, which must not "misle[a]d" voters. *In re Dallas HERO,* --- S.W.3d ---, 2024 WL 4143401, at *3-4 (Tex. Sept. 11, 2024). The Texas Supreme Court has recognized this common law right of voters not to be "misled" since the late 1800s. *Reynolds Land & Cattle Co. v. McCabe*, 12 S.W. 165, 165 (Tex. 1888); *City of Austin v. Austin Gas Light & Coal Co.*, 7 S.W. 200, 205 (Tex. 1887). Other cases likewise demonstrate that this rule is no modern invention. *See, e.g.*, *Brown v. Carl*, 82 N.W.1033, 1034 (Iowa 1900) (holding that it is a "manifest" limitation on governments that they cannot present "misleading" ballot language); *Jersey v. Peacock*, 223 P. 903, 904-05 (Mont. 1924) (considering whether ballots "were so misleading as to have resulted in conveying misinformation to voters, and thereby preventing a free and untrammeled expression of their intentions in casting their votes").

Further, courts have held that accurate ballot language is particularly necessary "where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right." *Armstrong*, 773 So. 2d at 17-18 (citing *People Against Tax Revenue Mismanagement v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991)) ("This is especially true if the ballot language gives the appearance of creating new rights or protections when the actual effect is to reduce or eliminate rights or protections already in existence.").

The Florida Supreme Court's decision in *Askew* is illustrative. There, the court considered the validity of a ballot summary for a proposed amendment that would have

banned former legislators from lobbying for two years after leaving office unless they fully disclosed their financial interests. 421 So. 2d at 156. Although the ballot summary was consistent with the amendment's text, the Florida Supreme Court struck the proposed amendment from the ballot because the summary failed to disclose that the Constitution already prohibited lobbying by former legislators for a two-year period, with no exception for financial disclosures. *Id.* The Court reasoned that by failing to explain the *existing* constitutional provision, the summary "fails to give fair notice of an exception to a present prohibition." *Id.* The purpose of the amendment, the Court reasoned, was to "remove the two-year ban on lobbying by former legislators," but the ballot summary was "disguised as something else" and impermissibly "fl[ew] under false colors." *Id.* Because the ballot summary was "so misleading to the public concerning material changes to an existing constitutional provision," it was stricken. *Id.*

Likewise in *Armstrong,* the Florida Supreme Court struck a proposed constitutional amendment where the ballot summary omitted the main purpose of the Amendment, which was to nullify the constitution's ban on cruel or unusual punishment. 773 So. 2d at 17-18. "The main effect of the amendment is *not* stated anywhere on the ballot." *Id.* (emphasis in original). Invalidating the amendment, the Court explained that the accuracy requirement "ensure[s] that each voter will cast a ballot based on the *full* truth. To function effectively—and to remain viable—a constitutional democracy must require no less." *Id.* The misleading ballot summary, the Court explained, would have caused voters to favor the amendment "on the false premise that the amendment will promote the basic rights of Florida citizens"

and gave "no hint of the radical change in state constitutional law that the text actually foments." *Id.*

Strict judicial enforcement of the accuracy requirement was particularly necessary, the Court explained, because "the amendment's main effect is to nullify a fundamental state right that has existed in the Declaration of Rights *since this state's birth* over a century and half ago." *Id.* (emphasis in original). When "citizens are being called upon to nullify an original act of the Founding Fathers, each citizen is entitled—indeed, each is duty-bound—to cast a ballot with eyes wide open." *Id.* at 22.

Consistent with these precedents, the district court correctly concluded that Amendment D's false and misleading ballot summary—one that leads voters to believe adoption of the amendment would strengthen a fundamental right when it would in reality extinguish that right—fails to submit the amendment to the voters and thus violates Article XXIII, § 1.

First, the ballot summary says nothing about how the Amendment would eliminate the public's constitutional right to alter or reform the government without legislative interference. Instead, the ballot summary asks voters: "Should the Utah Constitution be changed to *strengthen* the initiative process by . . . [c]larifying the voters and legislative bodies' ability to amend laws."[31]

[31] Office of the Lieutenant Governor, 2024 General Election Certification at 34-35, https://vote.utah.gov/wp-content/uploads/sites/42/2024/09/2024-Official-General-Election-Certification.pdf (emphasis added).

As the district court observed, this language "amplifies by using 'strengthen' and simultaneously omits the material and consequential change, that the legislature will have the unlimited right to change law passed by citizen initiative. The omission entirely eliminates the voters' fundamental constitutional right." Add. A at 9; *see Askew*, 421 So. 2d at 156; *Armstrong*, 773 So. 2d at 17-18, 21. While the Amendment "does *strengthen* and *clarif[y]* the *legislature's* power to change laws passed by citizen initiatives for any reason," it does so "at the expense of the people's Legislative power. . . . This significantly impacts and weakens the people's fundamental rights under the Utah Constitution." Add. A at 10.

Tellingly, the legislature showcased the result of the Amendment voters would likely find appealing—"[p]rohibiting foreign influence on ballot initiatives and referendums." But it camouflaged the result voters would likely find repellent—empowering the legislature to veto citizen initiatives. The ballot summary leaves as a mystery what the "clarif[ication]" actually *is*. Instead, it comforts voters by assuring them that the clarif[ication] will "strengthen" the people's initiative powers. That is false.

Indeed, the text of the Amendment—in sweeping language—*wholesale exempts* the legislature from complying with *any* constitutional provision when it acts to amend, repeal, or enact laws in relation to voter-approved initiatives.[32] This Constitution-free zone created

[32] *See* S.J.R. 401, Proposal to Amend Utah Constitution – Voter Legislative Power, 65th Leg., 2024 4th Spec. Sess. (Utah 2024), https://le.utah.gov/~2024S4/bills/static/SJR401.html ("*Notwithstanding any other provision of this Constitution*, the people's exercise of their Legislative power . . . does not limit or preclude the exercise of Legislative power, including through amending, enacting, or repealing a law, by the legislature . . . .") (emphasis added).

by the Amendment's text is a far cry from the existing constitutional provision, which limits the legislature's power to impair voter-initiated government reforms. Exempting the legislature from any constitutional restraint when it seeks to undo government reform initiatives does not "strengthen" the initiative process.

Second, the ballot summary falsely asserts that "[i]f approved, state law would also be changed to . . . [e]stablish requirements for the legislature to follow the intent of a ballot initiative."[33] To the contrary, the *current* Constitution establishes requirements for the legislature to follow the intent of a ballot initiative—it cannot impair government reform initiatives if it does so in a manner that is not narrowly tailored to serve a compelling government interest. *LWVUT*, 2024 UT 21, ¶ 75. Amendment D's central feature is to *eliminate* the requirement that the legislature follow the intent of a ballot initiative. In this regard, the ballot language is not only misleading, but *counterfactual*—it tells voters the *opposite* of what will occur if the Amendment is approved.

Below, the legislature erroneously relied on S.B. 4003 to support the proposed ballot language. S.B. 4003 is a contingent statute that purports to require the legislature, if it *amends* an initiative in the first general session following its adoption, to defer to "to the initiative by amending the law in a manner that, *in the legislature's determination*, leaves intact the general purpose of the initiative."[34] No deference is required if money is at stake,

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[33] Office of the Lieutenant Governor, 2024 General Election Certification at 34-35, https://vote.utah.gov/wp-content/uploads/sites/42/2024/09/2024-Official-General-Election-Certification.pdf.

[34] S.B. 4003, Statewide Initiative and Referendum Amendments, 65th Leg., 2024 4th Spec. Sess. (Utah 2024), https://le.utah.gov/~2024S4/bills/static/SB4003.html (emphasis added).

and the provision does not apply at all to an outright *repeal* of the initiative—or legislative action in subsequent sessions. *Id.*

But more fundamentally, Amendment D renders S.B. 4003 a nullity. If Amendment D is adopted, the *Constitution* will free the legislature of *any* requirement to defer to the purpose of initiatives. To the extent S.B. 4003 could have ever been characterized as a "require[ment]" on the legislature, the statute is meaningless because it endeavors to achieve by statute what the Constitution would foreclose. It is fundamentally counterfactual to tell voters that, if Amendment D is approved, state law would "be changed to . . . [e]stablish requirements for the legislature to follow the intent of a ballot initiative."[35]

Third, the ballot summary misleads voters regarding a right contained in the Utah Constitution's Declaration of Rights since the state's founding. As the Florida Supreme Court held in *Armstrong*, courts must be especially vigilant in guarding against deceptive ballot summaries where "the amendment's main effect is to nullify a fundamental state right that has existed in the Declaration of Rights *since the state's birth* . . . ." 773 So. 2d at 21 (emphasis in original). Such is the case here.

Amendment D does not satisfy the standard this Court set forth in *Nowers*. It is not "legally sufficient" because a "reasonably intelligent voter [would be] misled as to what he was voting for or against." 169 P.2d at 116.

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[35] Office of the Lieutenant Governor, 2024 General Election Certification at 34-35, https://vote.utah.gov/wp-content/uploads/sites/42/2024/09/2024-Official-General-Election-Certification.pdf.

Defendants assert (at 12-13) that the legislature is due "significant deference" in summarizing proposed amendments. Nothing in *Nowers* suggests such a standard. Defendants highlight (at 12) the *Nowers* Court's observation that there was "no general legislative mandate as to how a proposition must be worded on the ballot." *Id.* But that observation only shows that *Nowers* articulates a *constitutional* obligation not to mislead. Defendants do not contend that any other Utah precedent supports their position.

Nor do Defendants accurately characterize other states' precedent. For example, citing (at 13) *Advisory Opinion*, 384 So. 3d 122, 127 (Fla. 2024), Defendants claim that Florida law "has changed" to reject the standard outlined in *Armstrong—i.e.*, that a ballot summary must accurately summarize a proposed amendment. 773 So. 2d at 12. But entirely consistent with *Armstrong*, the *Advisory Opinion* actually held that a ballot summary must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." 386 So. 3d at 132 (citation omitted). In analyzing that question, the Florida Supreme Court noted that "the ballot summary" in question was not a summary like Amendment D at all. Rather, it was "a nearly verbatim recitation of the proposed amendment language," *id*. at 136, and would not "give voters a false impression about what is contained in the actual text of the proposed amendment," *id*. at 134. The takeaway from *Advisory Opinion* and the other cases cited by Defendants is that *even if* the legislature has discretion in drafting a ballot summary, that discretion does not extend to *misleading* voters.

Even if this Court adopted Defendants' proposed standard, the ballot summary for Amendment D would still fail. Defendants' *only* argument that the ballot language is not

misleading appears in a *footnote* in their brief, and it is nonsensical. Their principal contention is that the district court "misread the amendment." Pet. at 10. But the district court's conclusion is indisputable: "the short summary the legislature chose does not disclose the [amendment's] chief feature, which is also the most critical constitutional change – that the Legislature will have the unlimited right to change laws passed by citizen initiative." Add. A at 10. "Given this glaring omission, the ballot [summary] is 'counterfactual.'" *Id*. (citation omitted).

Ignoring this reality, Defendants claim (at 11) that the district court did not apply the "reasonably intelligent voter" standard set out in *Nowers*, disregarded its "evidence," and "presumed" that Utahns "cannot read, cannot think, and cannot ultimately cast an informed vote on Amendment D." In essence, Defendants' central argument is that *voters should be smart enough to know the ballot language is false*. This is akin to a con artist arguing that his mark "should not have trusted or believed me." *Johnson v. Allen*, 158 P.2d 135, 137 (Utah 1945).

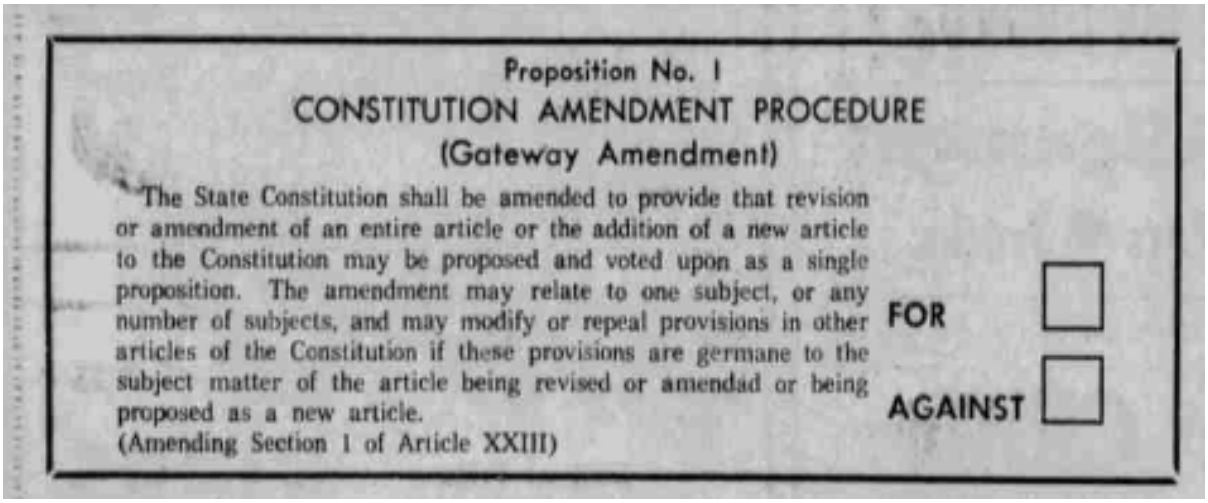
Even if voters were obligated to distrust their ballots and conduct their own search for the truth, the "surrounding circumstances" evidence Defendants cite does not solve their dilemma. While Defendants overload their appendix with online news articles about the special session and this litigation, *not a single one of their cited materials* includes the full text of proposed Amendment D. Moreover, as Defendants admit, voter information pamphlets are not yet available to voters and will only be posted online. And those pamphlets will be drafted by the very legislators who drafted Amendment D's deceptive ballot language.

Defendants cite (at 11) *Dutton v. Tawes*, 171 A.2d 688, 692 (Md. 1961), for the proposition that the Court should not "'assume' that the 'people who voted . . . did not understand the issue on which they voted' given extensive news coverage about a ballot measure." But in *Dutton* the only allegation was of a publication failure. *Id.* at 690. The court explained that had the suit been filed *before* the election, it would have strictly enforced the publication requirement, but because it was filed *after* the election, a substantial compliance rule would apply and there had been sufficient pre-election public attention to educate voters. *Id.* at 693. Moreover, the court emphasized that the issue "turn[s] fundamentally on whether the mistake in procedure has caused harm *by misleading the electorate* or by tending to prevent or frustrate an intelligent and full expression of the intent of the voters," *Id.* (emphasis added). *Dutton* does not aid Defendants.[36]

Defendants characterize (at 1) the district court's order voiding Amendment D as "unprecedented." But *Defendants' deceptive ballot language* is unprecedented. In any event, this Court *has* previously invalidated a voter-approved constitutional amendment for violating Article XXIII, Section 1. In 1960, voters approved an amendment granting the executive and legislative branches emergency powers in the event of enemy attack. H.J.R. 2, 1959 Gen. Sess. (Utah 1959). This Court held that the amendment violated Article XXIII's prohibition on multiple-subject amendments. *See Lee v. State*, 367 P.2d 861, 863-64 (Utah 1962). In response, the legislature proposed an amendment to abrogate *Lee*. *See*

[36] Defendants' reliance on *Commonwealth Telephone Co. v. Public Service Comm'n*, 263 N.W. 665, 668 (Wis. 1935), is also misplaced because that case involved no allegation of misleading ballot language.

S.J.R. 1, 1969 Leg., Gen. Sess. (Utah. 1969). The ballot language for that amendment—the last time that the legislature abrogated a constitutional holding of this Court—stands in stark contrast to this case. The 1970 ballot question for Proposition 1 forthrightly explained that the amendment would change the Constitution to allow for proposed amendments covering multiple subjects, as shown below:[37]



Proposition No. 1

CONSTITUTION AMENDMENT PROCEDURE

(Gateway Amendment)

"The State Constitution shall be amended to provide that revision or amendment of an entire article or the addition of a new article to the Constitution may be proposed and voted upon as a single proposition. The amendment may relate to one subject, or any number of subjects, and may modify or repeal provisions in other articles of the Constitution if these provisions are germane to the subject matter of the article being revised or amendad or being proposed as a new article.
(Amending Section 1 of Article XXIII)

FOR ☐

AGAINST ☐

It did not, for example, say: "Shall the Constitution be amended to strengthen voters' power to evaluate proposed amendments by clarifying their scope." Instead, it honestly explained that, if approved, voters could be posed with a single amendment addressing multiple subjects. The Constitution demands that honesty.

Under any standard, the ballot language certified by Defendants fails to submit "the Amendment" to voters as Article XXIII, § 1 requires because it omits the central feature of the Amendment, misleads voters, and is counterfactual.

[37] *The Sun Advocate* at 24 (Oct. 29, 1970), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=25324043#g23.

B. Defendants' deceptive ballot summary violates Article IV, Section 2.

Defendants' deceptive ballot summary also violates Article IV, § 2 of the Utah Constitution. Utah's Right to Vote Clause provides that "[e]very citizen of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, *shall be entitled to vote in the election*." Utah Const. art. IV, § 2 (emphasis added). As the district court held, "Utah law unequivocally acknowledges that the right to vote is fundamental to our democracy and our representative form of government." Add. A at 11 (citing *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960)). Indeed, the right to vote is considered "more precious in a free country" than any other right. *Gallivan v. Walker*, 2002 UT 89, ¶ 24, 54 P.3d 1069, 1081 (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964)).

The plain language of the Clause's text provides an affirmative mandate to protect the right to vote, stating that "[e]very citizen" who meets certain eligibility requirements "*shall* be entitled to vote." Utah Const. art. IV, § 2 (emphasis added). The use of "shall" signifies a command and a right secured to the people. Moreover, at the time of the adoption of the Constitution, "vote" meant "to express or signify the mind, will, or preference," and to provide an "opinion of a person." Webster's Practical Dictionary (1884). This means that the Right to Vote Clause protects more than just physically casting a ballot; Defendants themselves have emphasized that voting is how a voter "express[es] . . . his will, preference, or choice." Br. of Petitioners at 52, *LWVUT*, No. 20220991-SC (Mar. 31, 2023), https://campaignlegal.org/document/petitioners-brief (quoting *Vote*, Black's Law Dictionary (1891)).

Historical evidence shows that the Framers rejected additional voter qualifications, such as longer residency requirements and literacy tests.[38] Their efforts to make voting more accessible suggest that Utah's right to vote is expansive, and as the lower court previously held, protects against government action that prevents "the true public will" from being "ascertained" or causes it to be "distorted." Doc. 140 at 55.

More than a century of this Court's precedents have held that the right to vote must be "meaningful" and undiluted. *Shields v. Toronto*, 16 Utah 2d 61, 66, 395 P.2d 829, 832-33 (1964). This Court has held that the right to vote cannot be "abridged, impaired, or taken away, even by an act of the legislature," which must instead "secure[] a fair expression at the polls." *Earl v. Lewis*, 77 P. 235, 237-38 (Utah 1904); *Nowers*, 169 P.2d at 117. As the district court ruled, the Right to Vote Clause "guarantees 'more than the physical right to cast a ballot[,]'" Add. A at 11, as "the goal of an election 'is to ascertain the popular will, and not to thwart it' and 'aid' in securing 'a fair expression at the polls.'" *Id*. (quoting *Earl*, 77 P. at 237-38). As such, government action violates the Right to Vote clause if it renders the "right to vote . . . improperly burdened, conditioned, or diluted." *Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985).

Both Defendants and their amici mistakenly suggest that it is the district court's decision—as opposed to Defendants' conduct—that imperils the right to vote. Pet. at 2, 14; Utah Republican Party (URP) Amicus Br. at 17-18. But it was the legislature's actions to

[38] C.J. Christine Durham, Daniel J.H. Greenwood & Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, in George E. Connor & Christopher W. Hammons (eds.), The Constitutionalism of American States (Univ. of Missouri Press, 2006), https://sites.hofstra.edu/daniel-greenwood/utahs-constitution-distinctively-undistinctive/.

hastily produce a false and misleading ballot question for Amendment D that would have prevented voters from meaningfully exercising their franchise. The voting rights Defendants purport to defend ring hollow when the proposed vote is infected with inaccuracy of the legislature's own making.

C. Defendants' violation of the Free Elections Clause, Free Speech protections, and Free Government Clauses provide alternative grounds for affirmance.

Defendants' misleading ballot language also violates Article I, § 17 (free elections), Article I, §§ 1 and 15 (free speech and expression), and Article I, §§ 2 and 27 (free government) of the Utah Constitution. All of these claims incorporate the meaning of "free," which as defined in the 1891 Black's Law Dictionary meant "[u]nconstrained; having power to follow the dictates of his own will,' '[e]njoying full civic rights,' and '[n]ot despotic; assuring liberty; defending individual rights against encroachment by an person or class; instituted by a free people; said of governments, institutions, etc.'" *Free*, Black's Law Dictionary, 1st ed. 1891. Indeed, even Defendants in their prior briefing in this Court acknowledged that the Free Elections Clause prohibits undue influence by the government in administering elections—the very thing the Amendment D's ballot summary seeks to achieve. *See* Pet'rs' Br. at 40, 42, *LWVUT*, No. 20220991-SC (Mar. 31, 2023), https://campaignlegal.org/document/petitioners-brief.

The parties briefed these alternate grounds for affirmance in the proceedings below. *See* Defs.' Ex. B (Plaintiffs' Motions for Preliminary Injunction); Defs.' Ex. C (Defendants' Preliminary Injunction Response); Doc. 371 (Plaintiffs' Preliminary Injunction Reply). "[I]t is well established that an appellate court may affirm the judgment

appealed from if it is sustainable on any legal ground or theory apparent on the record, even if it differs from that stated by the trial court." *LWVUT*, 2024 UT 21, ¶ 173 (cleaned up). Plaintiffs incorporate those arguments as alternative grounds for affirming the district court's judgment.[39]

II. Defendants violated the Publication Clause of Article XXIII, Section 1.

The district court likewise correctly concluded that Plaintiffs are likely to succeed on the merits of their Article XXIII, Section 1 Publication Clause claim. As the district court found, Defendants have taken no steps to comply under any plausible conception of the Clause's requirements.

A. The text, precedent, and history of the Publication Clause reflect a mandatory requirement.

The Utah Constitution provides that after approving a proposed amendment,

> [T]he legislature shall cause the same to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the state for their approval or rejection, and if a majority of the electors voting thereon shall approve the same, such amendment or amendments shall become part of this Constitution.

Utah Const. art. XXIII, § 1. Meanwhile, Article I, Section 26 states that "[t]he provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Utah Const. art. I, § 26; *see Barnett*, 2023 UT 20, ¶ 27 ("Section

[39] The Court need not reach Plaintiffs' § 20A-7-103(3) claim, as the constitutional claims resolve the case without needing to determine the existence of a statutory right of action.

26 means that . . . courts cannot ignore the constitution. That is, courts are not free to pick and choose which parts of the constitution they will enforce.").

This Court has held that the Publication Clause's requirements are mandatory. In *Snow v. Keddington*, the Court adjudicated a request to invalidate a successful constitutional amendment on the grounds that a county clerk had failed to post the correct "effective date"—which was part of the text of the amendment—on a polling station poster as required by *statute*. 195 P.2d 234, 237-38 (Utah 1948). The Court observed that "[u]nder the constitutional provision, Section 1, Article XXIII, the *legislature is required* to have the amendment published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election." *Id.* at 238 (emphasis added). The Court explained that because the text of the amendment is not printed on the ballot in full, "the notice of importance to the voter is the publication in the newspapers prior to the general election. This is the publication that permits the voter time to consider the merits or demerits of the proposed change." *Id.* The Court reasoned that "[a]ll voters throughout the state are entitled to notice," and that "[u]nder our constitutional requirements, notices *must* be carried in the newspapers." *Id.* (emphasis added). The Court further explained that

> the probabilities and possibilities of the voter being fully informed of the context of an amendment are reasonably assured if the publication is in the newspapers. Accordingly, the method of notice prescribed by the constitution is one reasonably calculated to give notice to the voters, and this method was here complied with. This is sufficient to sustain a finding that the proposed amendment . . . was submitted to the voters for approval or disapproval.

Id. Snow thus makes clear that compliance with the Publication Clause is mandatory, and a proposed amendment that fails to comply has not been "submitted to the electors of the state" as Article XXIII, Section 1 requires.

The *Snow* Court had no trouble understanding the meaning of the Publication Clause because its words are plain. (And, in that case—unlike this one—the legislature did cause publication to occur as required.) The historical evidence also shows that the *Snow* Court's interpretation is consistent with the Clause's original public meaning.[40]

The legislature shall cause publication in newspapers. The plain meaning of the word "cause" in 1895 was "[t]hat which produces an effect." *Cause*, Black's Law Dictionary 181 (1st ed. 1891); *see Barnett*, 2023 UT 20, ¶ 10 ("When [courts] interpret the Constitution, the 'text's plain language may begin and end the analysis." (cleaned up)). The "effect" that the legislature must "cause" is the amendment "to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next election." Utah Const. art. XXIII, § 1. A "cause" cannot exist without an "effect." And because the Clause tasks the *legislature* with producing the specified effect, the Clause makes the *legislature* the responsible party for ensuring publication occurs as required.

History shows that the original public meaning accords with this commonsense understanding. This Court has explained that the work of the earliest legislatures—

[40] The historic sources cited below are available online and easier to navigate and view electronically. Given that, and the exigencies of the briefing schedule, Plaintiffs have provided hyperlinks to the relevant documents. They are happy to provide hard copies of any cited materials at the Court's request.

including the Code of 1898—"can provide persuasive evidence about what the people of Utah would have understood our state constitution to mean." *Maese*, 2019 UT 58, ¶ 46.

The second Utah legislature—elected in 1896 and convened in 1897—approved the first five proposed amendments to the 1895 Constitution.[41] These joint resolutions expressly provided that "[t]he Secretary of State is hereby ordered to cause this proposition to be published in at least one newspaper in every county of the state where a newspaper is published for two months immediately preceding the next general election."[42] The Secretary did so, and thus the 1898 legislature satisfied its obligation to cause the publication as required.[43] The text and history reveal an original public meaning obligating the *legislature* to take steps to ensure compliance with the Publication Clause.

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[41] All five were rejected by voters at the November 8, 1898 election. *See* Jean Bickmore White, *Charter for Statehood: The Story of Utah's State Constitution* 92 (1996).

[42] *See* H.J.R. 23 § 2 1897 Leg., Gen. Sess. (Utah 1897), https://images.archives.utah.gov/digital/collection/432n/id/2743/rec/4; H.J.R. 7 § 2, 1897 Leg., Gen. Sess. (Utah 1897), https://images.archives.utah.gov/digital/collection/432n/id/3198/rec/46; S.J.R. 6 § 2, 1897 Leg., Gen. Sess. (Utah 1897), https://images.archives.utah.gov/digital/collection/428/id/165139/rec/43; S.J.R. 7 § 2, 1897 Leg., Gen. Sess. (Utah 1897), https://images.archives.utah.gov/digital/collection/428/id/165146/rec/43; S.J.R. 9 § 2, 1897 Leg., Gen. Sess. (Utah 1897), https://images.archives.utah.gov/digital/collection/428/id/165160/rec/43.

[43] *See, e.g.*, *Eastern Utah Advocate* at 4 (Sept. 1, 1898), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=2754677#g3 (Carbon County); *Davis County Clipper* at 4 (Sept. 2, 1898), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=1121911#g0 (Davis County); *Grand Valley Times* at 1 (Sept. 2, 1898), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=20055730#g0 (Grand County); *The Salt Lake Tribune* at 7 (Sept. 7, 1898), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=12794589#g6 (Salt Lake County); *The Vernal Express* at 1 (Sept. 1, 1898), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200

Published in one newspaper in every county. The public in 1895 would have understood "newspaper" to be a printed publication of news, opinion, notices, and advertisements to which people subscribed and which were circulated for delivery. The internet did not exist in 1895, and thus at the time "newspaper" could only mean a physical, printed newspaper—thus the word news*paper*. But more important than its physical paper form is the concept of circulation—delivery of the newspaper to subscribers' homes at a regular interval.[44]

The 1898 Code reflects the centrality of circulation to proper newspaper notice. For example, the Code required county and municipal clerks to publish lists of candidate nominations in local newspapers and that "[t]he clerk or recorder in selecting the respective papers for such publication, shall select those which, according to the best information he can obtain, have the largest circulation within the county." Utah Code § 18-3-830 (1898). The 1898 Code is replete with references to circulation of newspapers. *See, e.g.*, *id.* § 4-90 ("newspaper having general circulation" in a county); *id.* § 7-231 (requiring city auditor to publish report of financial condition of city "in some newspaper having a general circulation in the city"); *id.* § 10-17-302(18) (requiring cities to publish new ordinances in

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&parent_i=21233360#g0 (Uintah County); *The Wasatch Wave* at 2 (Sept. 2, 1898), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=21992735#g0 (Wasatch County); *The Ogden Daily Standard* at 7 (Sept. 6, 1898), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=7643699#g6 (Weber County).

[44] *See, e.g.*, University of Utah, Utah Digital Newspapers, *Deseret Evening News* (1867-1920), https://digitalnewspapers.org/newspaper/?paper=Deseret%20News (noting that paper had daily delivery to city subscribers and semi-weekly delivery to rural subscribers).

"some newspaper having a general circulation in such town"). This ensured that citizens *received*—rather than were required to seek out—the text of proposed constitutional amendments.

Perhaps most instructive of the original public meaning of "newspaper" is the fact that the 1895 Constitution proposed by the Convention was printed for the public to read in newspapers.[45] A "competent and reasonable" Utahn in 1895 would have understood a "newspaper" to be something like the "newspaper" he or she used in May 1895 to read the proposed Article XXIII, Section 1. *Maese*, 2019 UT 58, ¶ 19 n.6.

Moreover, publication is required in at least one newspaper that physically publishes its papers within each county, *i.e.*, local newspapers, not papers of statewide circulation. The 1898 Code distinguished publication from geographic circulation. *See, e.g.*, Utah Code § 11-3-377 (1898) (requiring directors of banks to post notice regarding public auction of stock "in a newspaper published in the county where the bank is located, or, if no newspaper is published therein, then in any newspaper having general circulation in such county"); *id.* § 4-90 (required notices of assignment by "publication in some newspaper in the county, and if none, then in a newspaper having general circulation therein"); *see also State v. Bd. of Comm'rs of Big Horn Cnty.*, 250 P. 606, 609 (Mont. 1926) (holding that "the word 'published' . . . means printed and published. It refers to a newspaper having its home in the county" (cleaned up)). This understanding likewise accords with the practice of the second Utah legislature, which proposed the first five amendments. *See supra* note 42.

[45] *See, e.g.*, Supplement: Constitution, *The Salt Lake Herald*, May 8, 1895, https://chroniclingamerica.loc.gov/lccn/sn85058130/1895-05-08/ed-1/.

For two months preceding the next general election. Unlike the "cause" and "newspaper" requirements, the temporal requirement of the Publication Clause is susceptible to more than one plausible meaning. Are the two months immediately preceding the next general election the two *calendar* months that do so—*i.e.*, September and October? Or is "two months" a quantity of days that immediately precede election day itself?

The "Rules of Construction" provision of the 1898 Code provides that "[t]he word 'month' means a calendar month unless otherwise expressed." Utah Code § 65-2-2498(1) (1898); *see Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 35, 466 P.3d 178 (noting persuasive value of 1898 Code to original public meaning of constitutional terms). But the phrase "immediately preceding the next general election" in Article XXIII, Section 1 may constitute an expression otherwise, rendering the rule of construction inapposite.

The historical evidence of how the early legislatures caused publication to occur is instructive. Newspaper records reveal that in both 1898 and 1900, the legislature caused (via the Secretary of State) the text of the first eight proposed constitutional amendments to begin being published no later than September 7, 1898, and September 5, 1900.[46] The

[46] *See supra* note 42 (1898 examples); *Park Record* at 2 (Sept. 1, 1900), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=8331665#g1 (Summit County); *Eastern Utah Advocate* at 4 (Aug. 30, 1900), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=2761859#g3 (Carbon County); *Beaver County Blade* at 2 (Sept. 1, 1900), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=28501750#g1 (Beave County); *Logan Nation* at 3 (Sept. 3, 1900), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=4690425#g6 (Cache County); *Ogden Daily Standard* at 4 (Sept. 5, 1900),

1898 election occurred on Tuesday, November 8 while the 1900 election occurred on Tuesday, November 6. This suggests that the earliest legislatures viewed the "two month" requirement as commencing on the same date in September as the date in November that "immediately preced[es]" the date of "the next general election." Utah Const. art. XXIII, § 1.

This understanding also fits best with the text. It avoids the error inherent in assuming "two months" means 60 days—given that no consecutive two calendar months each have 30 days—and it avoids the "gap" between election day and the preceding full two calendar months of September and October.

Another question is how frequently publication must occur "for two months immediately preceding the next general election." Utah Const. art. XXIII, § 1. In 1898, the legislature caused publication to occur in every issue of each newspaper in which the proposed amendments were printed for the two-month period—regardless of whether the particular county newspaper had daily, semi-daily, or weekly circulation schedules. [47] This

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https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=7689379#g3 (Weber County).

[47] See, *e.g.*, *Eastern Utah Advocate*, https://newspapers.lib.utah.edu/search?page=2&facet_paper=%22Eastern+Utah+Advocate%22&facet_type=issue&date_tdt=%5B1898-01-01T00%3A00%3A00Z+TO+1898-12-31T00%3A00%3A00Z%5D (Carbon County) (amendment text published weekly from September 1, 1898 through November 3, 1898) *Davis County Clipper*, https://newspapers.lib.utah.edu/search?page=2&facet_paper=%22Davis+County+Clipper%22&facet_type=issue&date_tdt=%5B1898-01-01T00%3A00%3A00Z+TO+1898-12-31T00%3A00%3A00Z%5D (Davis County) (amendment text published weekly from September 2, 1898 through November 7, 1898); *Grand Valley Times*, https://newspapers.lib.utah.edu/search?facet_paper=%22Grand+Valley+Times%22&facet_type=issue&date_tdt=%5B1898-01-01T00%3A00%3A00Z+TO+1898-12-31T00%3A00%3A00Z%5D (Grand County) (amendment text published weekly from

interpretation by the earliest legislature best accords with the constitutional text, *i.e.*, "for two months," and best serves the purpose of ensuring maximal notice to voters of the proposed amendment. *See Snow*, 195 P.2d at 238.

Under this reading, the legislature must have caused the publication of Amendment D in newspapers from September 4, 2024, through November 4, 2024. But under no plausible reading did it comply.

At which time said amendment . . . shall be submitted to the electors. The only time the text of Article XXIII, Section 1 permits amendments to be submitted to the electors is "[a]t which time" they have completed being published in newspapers for two months immediately preceding the election day. *Id.* Consistent with this, the *Snow* Court made clear that publication in the newspapers was necessary for the amendment to be considered

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September 2, 1898 through November 4, 1898); *The Salt Lake Tribune*, https://newspapers.lib.utah.edu/search?page=10&facet_paper=%22Salt+Lake+Tribune%22&facet_type=issue&date_tdt=%5B1898-01-01T00%3A00%3A00Z+TO+1898-12-31T00%3A00%3A00Z%5D (Salt Lake County) (amendment text published daily from Sept. 7, 1898 through November 7, 1898). *The Vernal Express*, https://newspapers.lib.utah.edu/search?page=2&facet_paper=%22Vernal+Express%22&facet_type=issue&date_tdt=%5B1898-01-01T00%3A00%3A00Z+TO+1898-12-31T00%3A00%3A00Z%5D (Uintah County) (amendment text published weekly from September 1, 1898 through November 3, 1898); *The Wasatch Wave* https://newspapers.lib.utah.edu/search?page=2&facet_paper=%22Wasatch+Wave%22&facet_type=issue&date_tdt=%5B1898-01-01T00%3A00%3A00Z+TO+1898-12-31T00%3A00%3A00Z%5D (Wasatch County) (amendment text published weekly from September 2, 1898 through November 4, 1898); *The Ogden Daily Standard*, https://newspapers.lib.utah.edu/search?page=9&facet_paper=%22Ogden+Daily+Standard%22&facet_type=issue&date_tdt=%5B1898-01-01T00%3A00%3A00Z+TO+1898-12-31T00%3A00%3A00Z%5D (Weber County) (amendment text published daily from September 6, 1898 through November 7, 1898).

to have been lawfully "submitted to the voters for approval or disapproval." *Snow*, 195 P.2d at 238.

B. The district court correctly voided Amendment D because of the legislature's Publication Clause violation.

The district court correctly concluded that Amendment D is void and cannot be submitted for a vote because the legislature has not complied with the Publication Clause. Defendants ask this Court to simply excuse that constitutional violation, while quizzically accusing the district court (at 14) of "ignor[ing] th[e] text" of the Publication Clause.

1. The Publication Clause requires publication in circulating newspapers.

The Publication Clause requires the legislature to cause publication in physical newspapers—which existed in 1895 and continue to exist today. Under no reasonable interpretation of that provision did Defendants comply with that requirement. Their contrary arguments lack merit.

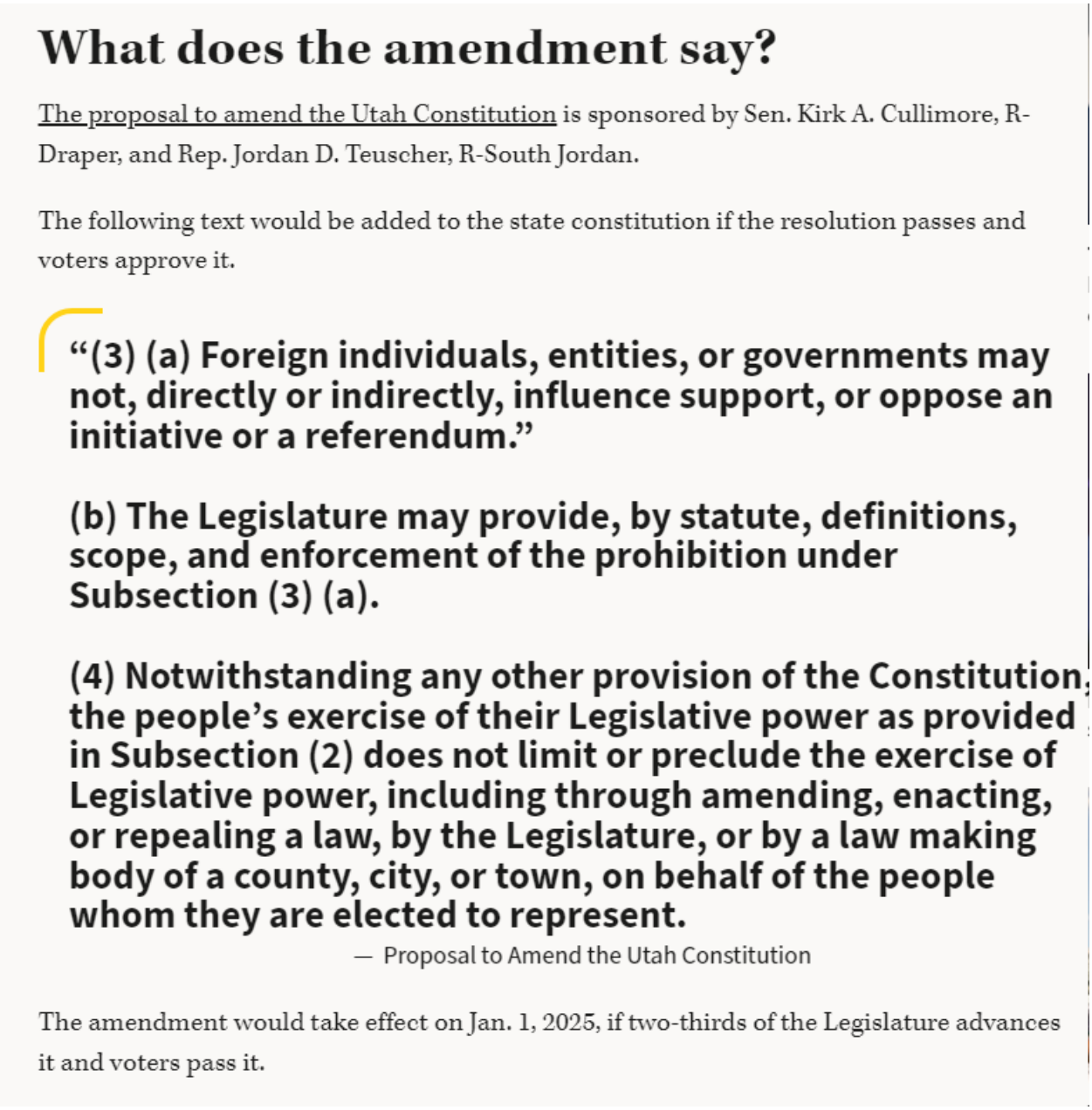
First, not only was the original public meaning of "newspaper" a print publication with circulation among the community, but that remains its meaning today.[48] The fact that news companies have websites on which they also publish material, or that some news companies only publish online and do not publish newspapers, does not make the word "newspaper" synonymous with "online website." Moreover, Defendants' contention (at 11, 14) that "public notice website" is equivalent to a "newspaper" is belied by multiple

[48] *See Newspaper*, Merriam-Webster, https://www.merriam-webster.com/dictionary/newspaper ("[A] paper that is printed and distributed usually daily or weekly and that contains news, articles of opinion, features, and advertising").

provisions in the Utah Code that treat those terms as distinct. *See, e.g.*, Utah Code § 45-1-101(1)(a)(i) ("public legal notice website or in a newspaper"); *id.* § 11-13-531(3) (requiring notices on "public notice website" and in "newspapers"); *id*. § 40-8-13(6)(c) (requiring notices in "newspapers" and on a "public legal notice website"); *id.* § 20A-2-104(10)(c) (alternative notices in a "newspaper" or the "public notice website"); *id.* § 59-2-919(6) (requiring different notices "in a newspaper" and "electronically" on public notice website under § 45-1-101).

Second, Defendants are wrong (at 15) to compare the legislature's obligation to cause publication of proposed amendments in newspapers with provisions of the Declaration of Rights that have modern applications that were not predicted in 1859, like freedom of speech or the right to bear arms. Those constitutional provisions—core rights—"enshrine[] principles, not application of those principles." *Planned Parenthood Ass'n of Utah v. State*, 2024 UT 28, ¶ 126, --- P.3d --- (*PPAU*) (cleaned up). By contrast, Article XXIII, Section 1's Publication Clause directs the legislature to complete a specific task in a specific way—using a word (newspaper) the plain meaning of which has not changed. In any event, to the extent "newspaper" enshrines a principle—rather than a plain meaning that has not changed—it is the principle of a periodical publication in circulation that is delivered to one's home. That does not describe an online website that one must intentionally visit.

Third, Defendants' contention (at 15) that an August 21, 2024, *Deseret News* online article satisfies its Publication Clause obligations is meritless. Here is the relevant portion of the online article:



What does the amendment say?

The proposal to amend the Utah Constitution is sponsored by Sen. Kirk A. Cullimore, R-Draper, and Rep. Jordan D. Teuscher, R-South Jordan.

The following text would be added to the state constitution if the resolution passes and voters approve it.

"(3) (a) Foreign individuals, entities, or governments may not, directly or indirectly, influence support, or oppose an initiative or a referendum."

(b) The Legislature may provide, by statute, definitions, scope, and enforcement of the prohibition under Subsection (3) (a).

(4) Notwithstanding any other provision of the Constitution, the people's exercise of their Legislative power as provided in Subsection (2) does not limit or preclude the exercise of Legislative power, including through amending, enacting, or repealing a law, by the Legislature, or by a law making body of a county, city, or town, on behalf of the people whom they are elected to represent.

— Proposal to Amend the Utah Constitution

The amendment would take effect on Jan. 1, 2025, if two-thirds of the Legislature advances it and voters pass it.

Defs.' Ex. C-133-34. The article does not contain the full text of Amendment D—only the proposed new subsection of Article VI.[49] It does not include Amendment D's changes to Article I, § 2—the Declaration of Rights—nor does it include Sections 3, 4, or 5 of

[49] Defendants are wrong (at 4 n.5) to contend that the failure to publish the changes to the Alter or Reform Clause is harmless. It is necessary to alert voters that the Article VI amendments gut their rights under the Alter or Reform Clause.

Amendment D.[50] While Defendants cite (at 3) the fact that the article includes a hyperlink to the legislature's website, a hyperlink does not constitute the amendment being "published *in* . . . [a] newspaper," Utah Const. art. XXIII, § 1 (emphasis added).

The hyperlink—which appears as underlined text of the article—is the closest thing Defendants identify to satisfying the legislature's obligation to "cause the [amendment] to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election." Utah Const. art. XXIII, § 1. It is not a serious argument.

2. The legislature has not "caused" publication in newspapers.

Under no conceivable interpretation has the legislature "caused" publication in newspapers. Defendants fault (at 15) the district court for failing to ask "what 'the legislature' has done—not what other government officials or the newspapers did." Had the district court asked the "right" questions, Defendants say, it would have concluded that the legislature satisfied the Publication Clause by reducing S.J.R. 401 to writing and posting it on *its* website—which the newspapers were then free to reprint—and by directing the lieutenant governor to post Amendment D's text on her website and the state-run public notice website. Br. at 15-16. That argument is flawed for several reasons.

To begin, the legislature has not "caused" timely publication in newspapers across the state because *that has not happened*. There can be no cause without an effect. Moreover, the legislature's passive reliance on other actors—*e.g.*, the lieutenant governor and the

[50] *See* S.J.R. 401, Proposal to Amend Utah Constitution—Voter Legislative Power, 2024 4th Spec. Sess. (Utah 2024).

newspapers—is foreclosed by the Constitution, which makes *the legislature* responsible for ensuring timely newspaper publication occurs. *See* Utah Const. art. XXIII, § 1. Indeed, the legislature's argument would render the Publication Clause superfluous if the legislature could satisfy it by merely reducing its proposed amendment to writing during the legislative process.

Historically, the legislature complied. In earlier years, the legislature's joint resolution proposing an amendment directed the secretary of state to publish the text of proposed amendments in newspapers for the mandated two-month period. *See supra* note 41. This practice continued through much of the twentieth century. Below, for example, is the secretary of state's publication of proposed amendments on the 1970 ballot—including his preface (dated September 1, 1970) noting that the legislature delegated him this responsibility:[51]

[51] *The Sun Advocate* at 17 (Oct. 29, 1970) (Carbon County), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=25324043#g16.

Proposed Changes in Utah's Constitution

STATE OF UTAH
OFFICE OF THE SECRETARY OF STATE
SALT LAKE CITY

September 1, 1970

Dear Fellow Citizens:

The Legislature of the State of Utah has entrusted me with the responsibility for publishing the following Propositions, which relate to changes in the Constitution of the State of Utah.

In the beginning of the body of each Proposition we have set forth the Title of the Proposition. Because of the very serious nature of these Propositions which your State Legislature has caused to be placed before you, I urge that each of you study the text of the Propositions in full.

I urge you to consult with your friends, neighbors and local civic leaders in order that you may gain all information necessary to render a just and wise decision.

Sincerely,
CLYDE L. MILLER
Secretary of State

PROPOSITION NO. 1
CONSTITUTION AMENDMENT PROCEDURE
(Gateway Amendment)

A JOINT RESOLUTION PROPOSING TO AMEND ARTICLE XXIII, SECTION 1, OF THE CONSTITUTION OF THE STATE OF UTAH, RELATING TO PROPOSED AMENDMENTS TO THE CONSTITUTITON AND PROVIDING THE METHOD FOR REVISION OF AN ENTIRE ARTICLE.

Be it resolved by the Legislature of the State of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

Section 1. Amend article. It is proposed to amend Article XXIII, Section 1, of the constitution of the State of Utah to read as follows:

Section 1. Method of amending articles. Any amendment or amendments to this constitution may be proposed in either house of the legislature, and if two-thirds of all the members elected to each of the two houses, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays taken thereon; and the legislature shall cause the same to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the state for their approval or rejection, and if a majority of the electors voting thereon shall approve the same, such amendment or amendments shall become part of this constitution.

The revision or amendment of an entire article or the addition of a new article to this constitution may be proposed as a single amendment and may be submitted to the electors as a single question or proposition. Such amendment may relate to one subject, or any number of subjects, and may modify, or repeal provisions contained in other articles of the constitution, if such provisions are germane to the subject matter of the article being revised, amended or being proposed as a new article.

Section 2. Proposed amendment. The secretary of state is directed to submit this proposed amendment to the electors of the state of Utah at the next general election in the manner provided by law.

Section 3. Effective date. If adopted by the electors of this state, this amendment shall take effect on January 1, 1971.

PROPOSITION NO. 2
RESIDENCY FOR VOTING

A JOINT RESOLUTION PROPOSING TO AMEND ARTICLE IV, SECTION 2 OF THE CONSTITUTION OF THE STATE OF UTAH, RELATING TO THE STATE RESIDENCE REQUIREMENT FOR QUALIFICATION TO VOTE AND REDUCING IT TO SIX MONTHS.

Be it resolved by the Legislature of the State of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

Section 1. It is proposed to amend Article IV, Section 2 of the Constitution of the State of Utah to read as follows:

Every citizen of the United States, twenty-one years of age or over, who has been a legal resident of this state for six months and of the county for 60 days next preceding any election, shall be entitled to vote in the election, except that in a presidential election year persons who make proper proof of residence in this state for 30 days immediately preceding the last voter registration day may register and vote for a president and a vice-president of the United States only.

Section 2. The secretary of state is directed to submit this proposed amendment to the electors of the State of Utah at the next general election in the manner provided by law.

Section 3. If adopted by the electors of this state, this amendment shall take effect on January 1, 1971.

PROPOSITION NO. 3
INCOME TAX BY REFERENCE

A JOINT RESOLUTION PROPOSING TO AMEND ARTICLE VI, SECTION 22 OF THE CONSTITUTION OF THE STATE OF UTAH, RELATING TO THE PASSAGE AND AMENDMENT OF LAWS; AND PROVIDING FOR PASSAGE AND AMENDMENT OF LAWS IMPOSING A TAX OR TAXES BY REFERENCE TO THE LAWS OF THE UNITED STATES.

Be it resolved by the Legislature of the State of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

Section 1. It is proposed to amend Article VI, Section 22 of the Constitution of the State of Utah to read as follows:

Section 2. The enacting clause of every law shall be "Be it enacted by the Legislature of the State of Utah." Except such laws as may be passed by the vote of the electors as provided in subdivision 2 section 1 of this article, and such laws shall begin as follows, "Be it enacted by the people of the State of Utah." No bill or Joint Resolution shall be passed, except with the assent of the majority of all the members elected to each house of the Legislature, and after it has been read three times. The vote upon the final passage of all bills shall be by yeas and nays; and no law shall be revised or amended by reference to its title only; but the act as revised, or section as amended, shall be reenacted and published at length. The Legislature, in any law imposing income taxes may define the amount on, in respect to, or by which the taxes are imposed or measured, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time and may prescribe exceptions or modifications to any such provision.

Section 2. The Secretary of State is directed to submit this proposed amendment to the electors of the State of Utah at the next general election in the manner provided by law.

Section 3. If adopted by the electors of this state, this amendment shall take effect on January 1, 1971.

I, CLYDE L. MILLER, Secretary of State of the State of Utah, DO HEREBY CERTIFY that the foregoing is a full, true and correct copy of the constitutional amendments proposed by the regular session of the Thirty-Eighth Legislature, 1969.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the Great Seal of the State of Utah, at Salt Lake City, this 1st day of September, 1970.

CLYDE L. MILLER
Secretary of State

Subsequently, the legislature by statute tasked the lieutenant governor with newspaper publication. For example, in 1995, the legislature enacted Utah Code § 20A-7-103(2), which provided that when amendments are proposed, "[t]he lieutenant governor shall, not later than 60 days before the regular general election, publish the full text of the amendment . . . in at least one newspaper in every county of the state where a newspaper is published." *See* 1995 Utah Laws Ch. 30 § 20 (S.B. 161), 51st Leg., Gen. Sess. (Utah 1995).[52]

For most of its history, the legislature has complied with its Publication Clause responsibilities. But in 2002 and 2008, the legislature amended the statute to shorten the period of publication—causing the legislature to fall out of compliance with the Publication Clause's requirements in its reliance upon the lieutenant governor. *See* 2002 Utah Laws Ch. 127, § 1 (H.B. 86), 54th Leg., 2002 Gen. Sess. (Utah 2002) (amending § 20A-7-103 to reduce the statutorily required time period from "not later than 60 days" to "not more than 60 days or less than ten days before the regular general election"); 2008 Utah Laws Ch. 225, § 11 (S.B. 12), 57th Leg., 2008 Gen. Sess. (Utah 2008) (increasing period to at least fourteen days prior to the election).

[52] Earlier iterations of this statute appear to have begun in 1973. *See* H.B. 27, 1973 Leg., Gen. Sess. (Utah 1973). From 1982 through 1988, it appears the legislature amended the relevant statutes to only require publication via distribution of the voter information pamphlet in newspapers. *See* S.B. 84, 1982 Leg., Gen. Sess. (Utah 1982). In 1988, the legislature brought the statute back into compliance with Article XXIII in what ultimately was recodified in 1995 as § 20A-7-103(2). *See* S.B. 178, 1988 Leg., Gen. Sess. (Utah 1988).

Although the legislature since 2002 has failed to comply with its obligation to cause publication to occur for two months prior to the election, it was, at least, still causing publication to occur in *newspapers*. For example, the most recent proposed constitutional amendment—approved by the legislature in 2021—was published in newspapers.[53] *See* H.J.R. 12, 2021 Leg., Spec. Sess. (Utah 2021), https://le.utah.gov/~2021/bills/static/HJR012.html.

But in 2023, the legislature removed from § 20A-7-103(2) the requirement that Article XXIII mandates: publication in a newspaper. The bill text is below:

> § 20A-7-103
>
> (2) The lieutenant governor shall, not more than 60 days or less than 14 days before the date of the election, publish the full text of the amendment, question, or statute ~~in at least one newspaper in every county of the state where a newspaper is published~~ for the state, as a class A notice under Section 63G-28-102, through the date of the election.[54]

With the sequence of amendments to § 20A-7-103(2) from 2002 to 2023, the legislature has rendered the statute ineffective as a mechanism to fulfill its Article XXIII, Section 1 Publication Clause obligations. Because the legislature no longer tasks any official with complying with the constitutional mandate, *it* must do so directly if it wishes to successfully submit a proposed amendment to voters as the Constitution requires. For this reason, the Defendants' observation (at 16) that the legislature has "never taken th[e]

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[53] *See, e.g.*, *The Park Record* at 17 (Oct. 17, 2022), https://newspapers.lib.utah.edu/search?facet_type=%22page%22&gallery=1&rows=200&parent_i=31093763#g16 (Summit County).

[54] S.B. 43, Ballot Proposition Amendments, 65th Leg., 2024 Gen. Sess. (Utah 2023), https://le.utah.gov/~2023/bills/static/SB0043.html.

step [of directly securing newspaper space] before" is irrelevant. It has not previously done so because it previously delegated that obligation. The fact that it has not placed roadblocks in the way of other actors is legally insufficient to comply with the Constitution's affirmative obligations. (Pet. 15-16.)

For that reason, it is likewise irrelevant that "the legislature expressly 'directed' the lieutenant governor . . . 'to submit [Amendment D] to the voters of the state . . . in the manner provided by law." Br. at 16 (citations omitted). Just last year it relieved the lieutenant governor of undertaking the legislature's obligation to cause publication in newspapers. The Constitution requires the legislature to cause publication as prescribed and it failed to do so. The blame for the legislature's predicament lies in the mirror—not with the lieutenant governor, Plaintiffs, or the district court.

3. Neither the law nor the facts support a substantial compliance standard.

The Constitution requires strict—not substantial—compliance with the Publication Clause. Article I, Section 26 provides that "[t]he provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Utah Const. art. I, § 26. This provision precludes this Court from "pick[ing] and choos[ing] which parts of the constitution [it] will enforce." *Barnett*, 2023 UT 20, ¶ 27.

Moreover, the text of the Publication Clause itself makes clear that strict compliance is required. It directs what the legislature "shall" do. Utah Const. art. XXIII, § 1. And the clause dictates a particular consequence for the legislature's failure to comply: it is only "*at which time*" the amendments have been published in newspapers across the state for

two months that "said amendment or amendments shall be submitted to the electors of the state for their approval." *Id.* Even in the statutory context where courts distinguish between strict and substantial compliance—a test that does not control constitutional interpretation—providing a consequence for noncompliance is the hallmark of language requiring strict compliance. *See ICS Corrs., Inc. v. Utah Procurement Policy Bd.*, 2022 UT 24, ¶ 27, 513 P.3d 677.

The Constitution thus compels Utah to join with other states that strictly enforce their constitutions' amendment publication requirements. *See, e.g.*, *State ex rel. Montana Citizens for the Preservation of Citizens' Rights v. Waltermire*, 738 P.2d 1255 (Mont. 1987) (voiding constitutional amendment violating "mandatory" publication requirement because "the rule which gives to the courts and other departments of the government a discretionary power to treat a constitutional provision as directory, and to obey it or not . . . is fraught with great danger to the government") (internal quotations omitted); *Walmsley v. McCuen*, 318 Ark. 269, 273 (Ark. 1994) (adopting strict compliance for constitutional six-month publication requirement because "[the Court] must . . . interpret language of the Constitution according to its plain and common meaning"); *Watland v. Lingle*, 85 P.3d 1079, 1091 (Haw. 2004) (adopting strict compliance for constitutional publication requirement because requirement is "not merely directory, but mandatory"); *Westerfield v. Ward*, 599 S.W.3d 738, 751 (Ky. 2019) (adopting strict compliance for constitutional publication requirement because "our constitution is too important and valuable to be amended without the full amendment ever being put to the public").

In this regard, the Utah Constitution stands in contrast to those states that have adopted a substantial compliance standard. None of those states has a constitutional provision akin to Article I, Section 26. *See, e.g.*, Del. Const.; W. Va. Const.; Ala. Const.; La. Const.; Fla. Const.; *see* Defs.' Exhibit C-46-47 (citing cases). The cases cited by Defendants also make clear that substantial compliance cannot excuse misleading ballot language. *See* Defs.' Ex. C-46-47.

In any event, the district court did not abuse its discretion in concluding that the facts cannot support a finding of substantial compliance. Defendants cite (at 17) the legislature's procurement of space in 35 newspapers two weeks after the deadline as evidence for its purported substantial compliance. But the declaration of the House Chief of Staff states merely that it is her "understanding [] that publication of the ballot titles and full text of the amendments will occur in each newspaper *during the week of September 16, 2024*." Leg. Exhibit C-400 (emphasis added). This appears to suggest a single week of publication—not the ongoing publication the Constitution requires. Either way, failing to publish for 25% of the mandatory time would not be substantial compliance if such a standard applied, and the district court did not abuse its discretion in so concluding.[55]

[55] Defendants complain that the district court judge—who accommodated *their* timing demands by working through the night—did not see their late-filed declaration until 5 a.m. the next morning. Pet. at 17 n.16. But the district court informed the parties at the hearing that while she would work through the night, that effort would be without the aid of staff—the same staff to whom Defendants emailed their after-hours filing. Add. C at 64:17-66:17.

III. The district court did not abuse its discretion in weighing the equities and considering the public interest.

The district court did not abuse its discretion in weighing the equities and considering the public interest in determining that a preliminary injunction was warranted.

First, Plaintiffs would suffer irreparable harm in the absence of the district court's injunction. Irreparable harm "is that which cannot be adequately compensated in damages" and is "fundamentally preventive in nature." *Zagg, Inc. v. Hammer*, 2015 UT App 52, ¶¶ 6, 8, 345 P.3d 1273 (quotation omitted). Without a preliminary injunction, Defendants' misleading and inaccurate ballot language would allow a vote on Amendment D—and unwittingly permit Utahns to *eliminate* a fundamental constitutional right that has existed since 1895. Subjecting Plaintiffs and other Utahns to such deception constitutes irreparable harm that the district court's injunction prevents. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968) ("[T]he right of qualified voters . . . to cast their votes effectively . . . rank[s] among our most precious freedoms"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitute[s] irreparable injury.").

Defendants do not refute the irreparable harm that Plaintiffs would face in losing their constitutional rights via deception, nor do they explain how that harm would be reparable. Instead, Defendants claim (at 19) only that the harm is too speculative. It is not. Without the injunction, voters will be misled into adopting Amendment D contrary to their intent.

Furthermore, the possibility of passage under those circumstances, even if not guaranteed, is sufficient. *See Elrod*, 427 U.S. at 373 (finding preliminary injunction justified where constitutional interests were "either threatened or in fact being impaired"). The district court correctly found that Plaintiffs would suffer irreparable harm absent an injunction, and that finding is reviewed only for abuse of discretion. *PPAU*, 2024 UT 28, ¶ 192 n.47.

Second, the balance of the equities favors Plaintiffs. The inquiry focuses on "whether the applicant's injury exceeds the potential injury to the defendant." *Id.* ¶ 210. The harm that Plaintiffs would suffer from the proposed Amendment's ballot language—which tricks voters into surrendering a fundamental constitutional right under the false pretense of *strengthening* that right—outweighs any harm Defendants may suffer by having the illegal amendment voided. *See, e.g.*, *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) (there can be "no harm from the state's nonenforcement of invalid legislation"). Utahns have possessed the fundamental constitutional right discussed in *LWVUT* since the founding. Defendants are not harmed by being unable to undo that right this November based on a false description of the proposed amendment.

The district court's injunction reasonably preserves the status quo that existed before the certification of the misleading ballot language, which is "the last uncontested status between the parties which preceded the controversy." *PPAU*, 2024 UT 28, ¶ 226 (citation omitted).

Defendants complain (at 18) that the district court did not sufficiently weigh the equities, but Defendants simply disagree with the district court's weighing. As the district

court explained, Defendants have no interest in having an invalid amendment on the ballot. Defs.' Ex. A-14.

Defendants miss the mark when they point to a handful of declarations from individual voters who claim they can understand the ballot language and want to vote for Amendment D. Pet. at 18. Defendants cannot manufacture harm to themselves where none exists by relying on affidavits from nonparties. Moreover, the fact that a handful of cherrypicked nonparties can parse Defendants' false and misleading ballot language does nothing to negate the irreparable harm to other voters who cannot.

Amici underscore this point in their acknowledgment that in Utah, only harm to *defendants* is considered in the weighing of equities. Br. of Amici at 19 (quoting *PPAU*, 2024 UT 28, ¶ 210). Amici nevertheless try to argue otherwise with citations to various out-of-state decisions. *Id.* But regardless, Amici have no fundamental right to vote on unconstitutionally misleading ballot language.

Defendants' desire to present this rushed amendment to voters as soon as possible with false ballot language does not overcome the serious risk this poses to Plaintiffs' fundamental rights. Whatever harm might have existed for Defendant Henderson in having to resend ballot proofs to the printer was obviated when the district court chose to void the amendment rather than order it struck from the ballot.[56] The balance of equities thus favors Plaintiffs.

[56] Indeed, voiding the Amendment and not counting any votes cast for or against it was *Defendants'* stated preference were the district court to grant Plaintiffs relief. Add. C at 50:2-51:4.

Finally, the public interest supports the injunction. The "purpose of a preliminary injunction is 'to preserve the status quo pending the outcome of the case.'" *PPAU*, 2024 UT 28, ¶¶ 224, 225 (internal citation omitted). Without an injunction here, a fundamental constitutional right that has existed since 1895 will be in jeopardy due to misleading and counterfactual ballot language.

Furthermore, whether they ultimately support Amendment D or not, the people of Utah "are entitled to an accurate summary of any proposed constitutional amendment that impacts their fundamental rights, and they are entitled to the constitutionally required notice." Def. Ex. A-14. The handful of declarations from nonparty individuals submitted by Defendants does not change this analysis, because there is no right to vote for an illegally presented amendment. *Cf. Burdick v. Takushi*, 504 U.S. 428, 440 n.10 (1992) ("[L]imiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable."). The public thus faces no deprivation of fundamental rights in the voiding of proposed Amendment D. But the over 1.7 million registered Utah voters *would* face such deprivation if votes based on deceptive ballot language could eliminate their fundamental rights.

Nor will voiding Amendment D keep voters away from the polls, as Defendants suggest (at 19). It is a presidential election year with contested races on the ballot at every level of government. Defendants present no evidence that voiding Amendment D will make voters less likely to turn out for the many other races on the ballot.

Defendants also complain (at 20) that Plaintiffs offered no remedy allowing a vote on proposed Amendment D this election cycle. As the district court noted, Defendants "truncated the deadlines, sidestepped normal processes, and proposed in short order a constitutional amendment, with inaccurate descriptions, to shift power from the people to the legislature." Defs.' Ex. A-14. In this circumstance, no constitutional vote on the amendment is possible this election cycle, and the public interest favors voiding proposed Amendment D.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

DATED this 19th day of September, 2024.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 13,930 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the addendum requirements of Utah R. App. P. 24(a)(12).

3. This brief complies with Utah R. App. P. 21(h) regarding public and non-public filings.

DATED this 19th day of September, 2024.

/s/ *Caroline A. Olsen*

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of September, 2024, I caused the *Brief of Appellees* to be served via email on:

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Addendum A

September 12, 2024 Ruling and Order Granting Plaintiffs' Motion for Leave to File Supplemental and First Supplemental Complaint and Granting Motion for Preliminary Injunction on Counts 9-14 and 15 (District Court Dkt. No. 375.)

Bates numbering Sept12Order001 – 16 applied by counsel for ease of reference

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX, Plaintiffs, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**RULING AND ORDER** **GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL AND FIRST SUPPLEMENTAL COMPLAINT** **AND** **GRANTING MOTION FOR PRELIMINARY INJUNCTION ON COUNTS 9-14 AND 15** Case No. 220901712 Judge Dianna M. Gibson

Plaintiffs filed two motions for preliminary injunction on September 5, 2024, and September 7, 2024, requesting this court either remove Amendment D from the ballot entirely or rule that it is void and to be given no effect. The Lieutenant Governor's Office represents that the proofs of the final ballots must be sent to the printers as soon as possible before or no later than Thursday, September 11, 2024.

This court has reviewed the parties' written submissions and heard oral argument on September 9, 2024. For the reasons stated below, Plaintiffs' two Motions for Preliminary Injunction are GRANTED. Amendment D is declared void.

BACKGROUND

On July 11, 2024, the Supreme Court issued a decision in *League of Women Voters of Utah v. Utah State Legislature,* 2024 UT 21, affirmed that Utah citizens have the fundamental

constitutional right to alter or reform their government through the citizen initiative process and, importantly, that the Utah Legislature cannot amend or repeal a law passed by citizen initiative that alters or amends government unless it does so in a way "narrowly tailored to further a compelling government interest." *Id.* ¶74. On the heels of that decision, the Utah Legislature quickly moved to propose a constitutional amendment to the citizen initiative process, specifically Article I, Section 2 and Article VI, Section 1, Subsection (2) of the Utah Constitution and took steps to ensure that the proposed amendment would appear on the November 2024 Ballot for the General Election.

To place the constitutional amendment on the ballot, an emergency legislative session was called. A new statute was created.[1] Statutory timelines were shortened and certain statutory processes were deemed not to apply.

The Proposed Constitutional Amendment

In August 2024, the Utah Legislature announced it would hold a special session to introduce a proposed constitutional amendment. "Lawmakers to Convene to Restore and Strengthen the Initiative Process," Utah State Legislature (Aug. 19, 2024), house.utleg.gov/wp-content/uploads/August- 2024-Special-Session-Statement_Press-Release.pdf. The announcement stated the Legislature would *"[r]estore* and strengthen the long-standing practice that voters, the Legislature, and local bodies may amend or repeal legislation." *Id.* (emphasis added.)

On August 21, 2024, the Legislature proposed amendments to Article I, Section 2 and Article VI, Section 1, Subsection (2). The proposed amendments are underlined and are set forth below:

> **Article I, Section 2. All political power inherent in the people.**
>
> All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government <u>through the processes established in Article VI, Section 1, Subsection (2) or through Article XXIII</u> as the public welfare may require.
>
> **Article VI, Section 1. Power vested in Senate, House, and People—Prohibition on foreign influence on initiatives and referenda.**
>
> (1) The Legislative power of the State shall be vested in:
>
> (a) a Senate and House of Representatives which shall be designated the

[1] The Legislature enacted Utah Code Section 20A-7-103.1, which provided special rules and a different, expedited and truncated process to get this specific constitutional amendment on the ballot. Section 20A-7-103.1 exempts the proposed Amendment from established requirements for constitutional amendments and specifically eliminated the opportunity to present arguments in favor of and opposition to the proposed amendment, before final approval for the ballot. S.B. 4002, Ballot Proposition Amendments, 65th Leg., 2024 4th Spec. Sess. (Utah 2024), https://le.utah.gov/~2024S4/bills/static/SB4002.html.

Legislature of the State of Utah; and

(b) the people of the State of Utah as provided in Subsection (2).

(2)(a)(i) The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:

(A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute; or

(B) 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.

(ii) Notwithstanding Subsection (2)(a)(i)(A), legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of

taking wildlife shall be adopted upon approval of two-thirds of those voting.

(b) The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:

(i) initiate any desired legislation and cause it to be submitted to the people of the county, city, or town for adoption upon a majority vote of those voting on the legislation, as provided by statute; or
(ii) require any law or ordinance passed by the law-making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect.

(3)(a) Foreign individuals, entities, or governments may not, directly or indirectly, influence, support, or oppose an initiative or a referendum.

(b) The Legislature may provide, by statute, definitions, scope, and enforcement of the prohibition under Subsection (3)(a).

(4) Notwithstanding any other provision of this Constitution, the people's exercise of their Legislative power as provided in Subsection (2) does not limit or preclude the exercise of Legislative power, including through amending, enacting, or repealing a law, by the Legislature, or by a law-making body of a county, city, or town, on behalf of the people whom they are elected to represent.

The Legislature also enacted contingent legislation that will take effect if voters approve the

proposed Amendment. That legislation, among other things, does add 20 days to the time voters have to submit referendum signatures. It also amends Utah Code Ann. Section 20A-7-212(3)(b) to now state:

> (3)(b) *If, during the general session next following the passage of a law* submitted to the people by initiative petition, the Legislature amends the law, the Legislature:
> (i) shall give deference to the initiative by amending the law in a manner that, *in the Legislature's determination,* leaves intact the general purpose of the initiative; and
> (ii) *notwithstanding Subsection (3)(b)(i), may amend the law in any manner determined necessary by the Legislature to mitigate an adverse fiscal impact of the initiative.*

S.B. 4003, Statewide Initiative and Referendum Amendments, 65th Leg., 2024 4th Spec. Sess. (Utah 2024), https://le.utah.gov/~2024S4/bills/static/SB4003.html (emphasis added). The language does represent that the Legislature will give deference to the initiative if any amendments are made, but this deference is limited in time (to the next general session following the initiative's adoption), is subject to the Legislature's discretion, and subject to amendment to mitigate *any* "adverse fiscal impact." Notably, this statute is trumped by the amendment to Article VI, Section 1, subpart (4) which states that the Legislature's authority to amend, enact or repeal a citizen initiative is not limited, in any way, including by any other constitutional provisions.

The proposed constitutional amendment and contingent enabling legislation was voted on and passed on August 22, 2024. Since that time, the full text of the proposed amendments has been posted on the Lieutenant Governor's official website.

The Proposed Ballot Language

Utah law requires the Speaker of the House and the President of the Senate to "draft and designate a ballot title for each proposed amendment or question submitted by the Legislature that: (i) *summarizes the subject matter of the amendment* or question; and (ii) for a proposed constitutional amendment, *summarizes any legislation that is enacted and will become effective upon the voters' adoption of the proposed constitutional amendment.*" Utah Code Ann. § 20A-7-103(3)(c)(i), (ii) (emphasis added).

On September 3, 2024, the ballot language for the constitutional amendment, titled Amendment D, was certified, and the certified language was published on either September 3 or 4, 2024. Amendment D and a summary of the constitutional amendments appearing on the November 5, 2024 General Election ballots describes that the amendments will "strengthen" and "clarify" the citizen initiative process and "establish requirements for the legislature to follow the intent of a ballot initiative."

The certified ballot language states:

Constitutional Amendment D

Should the Utah Constitution be changed to strengthen the initiative process by:
- Prohibiting foreign influence on ballot initiatives and referendums.
- Clarifying the voters and legislative bodies' ability to amend laws.

If approved, state law would also be changed to:
- Allow Utah citizens 50% more time to gather signature for a statewide referendum.
- Establish requirements for the legislature to follow the intent of a ballot initiative.

For ( ) Against ( ).

Office of the Lieutenant Governor, 2024 General Election Certification at 34-35, https://vote.utah.gov/wp-content/uploads/sites/42/2024/09/2024-Official-General-Election-Certification.pdf.

Publication Requirements

Article XXIII, Section 1 of the Utah Constitution provides that after the Legislature approves a proposed constitutional amendment, "the Legislature shall cause the same to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election." Utah Const. art. XXIII, § 1.

Separately, Utah Code § 20A-7-103(2) provides that "[t]he lieutenant governor shall, not more than 60 days or less than 14 days before the date of the election, publish the full text of the amendment . . . as a class A notice under Section 63G-30-102, through the date of the election. Utah Code § 20A-7-103(2). Section 63G-30-102 requires "class A notices" for matters affecting the entire state to be (1) published on the Utah Public Notice Website and (2) published on the relevant official's website if that official maintains one and has "an annual operating budget of $250,000 or more." Utah Code § 63G-30-102(1)(a)-(b) & 4(a).

Pending Motions

Plaintiffs filed two Motions for Preliminary Injunction, asserting that Amendment D violates the Utah Constitution.[2] Plaintiffs first argue that the certified ballot language for Amendment D fails to accurately submit the proposed constitutional amendment to the voters, preventing voters from making an informed decision about whether to vote for or against the Amendment. Plaintiffs assert the summary as presented in Amendment D is not accurate, fails to disclose the impact on each citizen's fundamental rights, and is actually misleading. Plaintiffs assert that Amendment D does not actually "strengthen" citizen initiatives; rather it weakens the

[2] Because the events surrounding the proposed constitutional Amendment D arose entirely after Plaintiffs filed their initial complaint in 2022 and after the Supreme Court's 2024 ruling, Plaintiffs have filed two motions to supplement the original complaint to add additional claims. The two pending motions are based on these new claims.

power of citizen initiatives under Utah's constitution, as that right was recognized and affirmed by the Utah Supreme Court on July 11, 2024, in *League of Women Voters of Utah v. Utah State Legislature,* 2024 UT 21 . . . the ruling that initiated the emergency legislative session to amend the Constitution. Plaintiffs assert Amendment D violates the Utah Constitution, specifically Article XXIII, § 1 and Utah Code Section 20A-7-103(c)(Presentation / Summary of Constitutional Amendments to Voters), Article 1, § 17 (Free Elections), Article I, § 1 (Free Speech and Expression), Article IV§2 (Right to Vote), and Article 1, Section 2 (Free Government). Plaintiffs filed a Motion to Supplement Counts 9-14 to add these new claims.

Plaintiffs assert Amendment D has not been published as required by the Utah Constitution and therefore voters will not have sufficient time to review the actual text of the proposed constitutional amendment in advance of the election. The Publication Clause, under Article XXIII, § 1, requires a proposed constitutional amendment to be "published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election." They assert this mandatory publication requirement cannot now be complied with; therefore, voters will not have adequate opportunity to become informed. Plaintiffs filed a Motion to Supplement count 15 to include Article XXIII, §1.

ANALYSIS

Defendant's Justiciability and Redressability Arguments

Before the court addresses the legal requirements for a preliminary injunction, Defendants raise two arguments that the Court must address.

First, Defendants argue that the issue before the court, specifically, reviewing the Amendment D ballot language is not justiciable. The Court disagrees. There is Utah precedent for reviewing ballot language. *See Nowers v. Oakden,* 110 Utah 25, 29, 169 P.2d 108, 116 (1946). Defendants also assert that it is outside of the court's jurisdiction to line-edit the Amendment D summary. That relief has not been requested.

Second, this matter is redressable. Defendants argue that Plaintiffs' failure to name county officials as defendants makes Plaintiff's requested relief a nonstarter. The Legislative Defendants argue that the Lieutenant Governor does not have authority over the county clerks. The Court disagrees. Under Utah Code Section 20A-1-403(1) it states: "The election officer shall, without delay, correct any errors in ballots that the election officer discovers, or that are brought to the election officer's attention, if those errors can be corrected without interfering with the timely distribution of the ballots." Section 20A-1-102 (23)(a), (b) defines an "election officer" as the Lieutenant Governor, for all statewide ballots and elections, and the county clerk, for county ballots and elections. Section 20A-5-405(3)(a) also confirms again that election officers shall, without delay, correct any error discovered in a ballot. The statutes make clear that election officers have an independent duty to ensure the ballots contain no errors. Finally, Section 20A-1-105, details the duties, authority and enforcement obligations of the Lieutenant Governor as the "Chief election officer of the state." Under this statute, it makes clear that all election officers have the obligation to fully assist and cooperate with the Lieutenant Governor. *Id. §* 20A-1-105(3). In addition, she has the authority to issue orders,

that have the effect of law, if it is determined that any election officer is not complying with any law or rule. Under Utah law, the Lieutenant Governor has full authority over county clerks for purposes of administering an election and the ballots.

Motions to Supplement

Plaintiffs filed two Motions to Supplement and two Motions for Preliminary Injunction. Plaintiffs seeks to add new events and claims that have happened post-July 11, 2024. Under Rule 15(d) of the Utah Rules of Civil Procedure, "[t]he court may, on just terms, permit a party to file a supplemental pleading." Utah R. Civ. P. 15(d). In addition, this court has broad discretion in granting a motion to supplement. *Rowley v. Milford City*, 10 Utah 2d 299, 301, 352 P.2d 225, 226 (1960). A motion to file a supplemental pleading "should be freely granted," if doing so would not be "unjust." *Harvey v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 2017 UT 75, ¶ 56. Additionally, "the fundamental purpose" of Utah's liberalized pleading rules "is to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) (internal citation omitted). Typically, motions to supplement are "liberally" granted unless it includes "untimely, unjustified, and prejudicial factors." *Daniels v. Gamma W. Brachytherapy, LLC,* 2009 UT 66, ¶ 58. Here, the Court concludes that Plaintiffs' motions are timely, justified and not futile. Therefore both Motions to Supplement Complaint to add counts 9-14 and count 15 are GRANTED.[3]

Preliminary Injunction

A court may issue a preliminary injunction if Plaintiffs show that: (1) "there is a substantial likelihood that [Plaintiffs] will prevail on the merits of the underlying claim," (2) "[Plaintiffs] will suffer irreparable harm unless the . . . injunction issues," (3) "the threatened injury to [Plaintiffs] outweighs whatever damage the proposed . . . injunction may cause the party . . . enjoined," and (4) "the . . . injunction, if issued, would not be adverse to the public interest." Utah R. Civ. P. 65A(e). Plaintiffs have met their burden.

1. **There is a substantial likelihood that Plaintiffs will succeed on the merits of their claim that Amendment D violates the Utah Constitution, specifically Article XXIII, § 1 (Presentation of Constitutional Amendments to Voters), the Article IV§2 (Right to Vote) and Article XXIII (the Publication Clause).**

The Legislature has placed on the ballot a proposal to amend the Utah Constitution in a way that will change each citizen's fundamental right to alter or amend their government through citizen initiatives. This constitutional right has existed since the Utah Constitution was ratified and, on July 11, 2024, the Utah Supreme Court interpreted the provision to impose limits on the Legislature's ability to amend or repeal a law passed by citizen initiative, unless it is narrowly tailored to advance a compelling state interest. The Legislature now requests that Utah's citizens vote on whether to modify their fundamental right to alter or amend their government, as set forth in *League of Women Voters of Utah v. Utah State Legislature,* 2024 UT 21, to give the Legislature unlimited power to

[3] Note, in this Order Granting Preliminary Injunction, the Court substantively addressed three of the six claims. In order to grant this Motion, the Court did not need more than one claim.

amend, repeal and enact any law. While the Legislature has every right to request the amendment, it has the duty and the obligation to accurately communicate the "subject matter" of the proposed amendment to voters and to publish the text of the amendment in a newspaper in each county two months before the election. It has failed to do both.

a. Article XXIII, § 1 and Utah Code Ann. § 20A-7-103(3) (Presentation of Constitutional Amendment to Voters)

Under Article XXIII, Section 1 of the Utah Constitution, a constitutional amendment requires two-thirds of all members elected to each house of the Legislature to vote in favor of the proposed amendment. Once the amendment passes, "the Legislature shall cause *the same* to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election, *at which time the said amendment or amendments shall be submitted to the electors of the state for their approval or rejection*, and if a majority of the electors voting thereon shall approve the same, such amendment or amendments shall become part of this Constitution." Utah Const. art. XXIII, § 1 (emphasis added).[4] The plain language of Article XXIII requires that the proposed amendment presented to the Legislature must be "submitted to the electors of the state for their approval or rejection." Utah Const. art. XXIII, § 1. The most straightforward reading of Article XXIII is that the *actual text* of the amendment must be presented to voters. The actual text of the amendment, however, is not typically presented on the ballot.[5] Instead, Utah Code Section 20A-7-103(3) requires that each proposed amendment appear on the ballot by title, with language "summarizing the subject matter of the amendment." Utah Code § 20A-7-103(3)(c). "Implicit in th[ese] provision[s] is the requirement that the proposed amendment be accurately represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (interpreting similar Florida constitutional language).

In the only Utah case addressing ballot language, the Utah Supreme Court in *Nowers v. Oakden*, 169 P.2d 108 (Utah 1946) requires the court evaluate ballot language "in the light of the circumstances of its submission," and determine if it is "framed with such clarity as to enable the voters to express their will." *Id.* 116 (stating the ballot should use "words in such form that the voters are not confused thereby"). Ballot language should ensure that "no reasonably

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[4] When interpreting constitutional language, Utah courts "start with the meaning of the text as understood when it was adopted." *LWVUT*, 2024 UT 21, ¶ 101 (cleaned up). The focus is on "the objective meaning of the text, not the intent of those who wrote it." *Id.* (cleaned up). The Court thus "interpret[s] the [C]onstitution according to how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." *Id.* (cleaned up). "When [courts] interpret the Utah Constitution, the 'text's plain language may begin and end the analysis.'" *State v. Barnett*, 2023 UT 20, ¶ 10 (quoting *South Salt Lake City v. Maese*, 2019 UT 58, ¶ 23).

[5] *See* Utah Const. art. XXIV, § 14 (providing for submission of the Constitution to the voters for ratification and specifying that "[a]t the said election the ballot shall be in the following form: For the Constitution. Yes. No," with instructions to the voters to erase Yes or No depending upon their vote).

intelligent voter [is] misled as to what he is voting for or against." *Id.* The integrity of the voting process requires that ballot language fairly and accurately present the issue to be decided in order to assure a "free, intelligent and informed vote by the average citizen." *State ex rel. Voters First v. Ohio Ballot Bd.*, 978 N.E.2d 119, 126 (Ohio 2012). The ballot language "ought to be free from any misleading tendency, whether of amplification, or omission." *Id.* (cleaned up). And "any omitted substance of the proposal must not be material, i.e., its absence must not affect the fairness or accuracy of the text." *Id.; see also Askew v. Firestone*, 421 So.2d 151, 154–55 (Fla.1982) ("What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot."). In addition, "where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election." *Armstrong v. Harris*, 773 So. 2d 7, 17–18 (Fla. 2000) (*citing People Against Tax Revenue Mismanagement v. County of Leon*, 583 So.2d 1373, 1376 (Fla.1991) ("This is especially true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.").[6]

In light of these considerations, the Amendment D ballot language does not fairly and accurately "summarize" the issue to be decided to assure a free, intelligent and informed vote by the average citizen. The "summary" both amplifies by using "strengthen"[7] and simultaneously omits the material and consequential constitutional change, that the Legislature will have the unlimited right to change law passed by citizen initiative. The omission entirely eliminates the voter's fundamental constitutional right.[8] The omission:

> Notwithstanding any other provision of this Constitution, the people's exercise of their Legislative power as provided in Subsection (2) does not limit or preclude the exercise of Legislative power, including through amending, enacting, or repealing a law, by the Legislature, or by a law-making body of a county, city, or town, on behalf of the people whom they are elected to represent.

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[6] In Plaintiffs' Motion for Preliminary Injunction Counts 9-14, p. 9-17, Plaintiffs cite numerous cases supporting their argument that inaccurate, misleading and deceptive ballot language justifies removal from the ballot and/or voiding the proposed amendment. The cases are persuasive authority from numerous states, which this Court incorporates by reference as additional authority. (

[7] Plaintiffs suggest that including in the short summary the adjective "strengthen" is suggestive and encourages voters to vote in favor of the proposed amendment, but without fully summarizing all of the amendments on the ballot.

[8] Counsel for the Legislative defendants argued that the constitutional amendments did not change anything. But they did. In August 2024, the Utah Legislature announced it would hold a special session to introduce a proposed constitutional amendment. "Lawmakers to Convene to Restore and Strengthen the Initiative Process," Utah State Legislature (Aug. 19, 2024), house.utleg.gov/wp-content/uploads/August- 2024-Special-Session-Statement_Press-Release.pdf. The announcement stated the Legislature would ***"[r]estore*** and strengthen the long-standing practice that voters, the Legislature, and local bodies may amend or repeal legislation." *Id.* (emphasis added.) Based on the Legislature's representation, its intention was to use the legislation to change or in its words, "restore" the initiative process to its pre-July 11, 2024 status.

This provision does *strengthen* and *clarifies* the *Legislature's* power to change laws passed by citizen initiative for any reason, but at the expense of the people's Legislative power. The plain language of the proposed amendment provides no limitation on Legislative power. Notably, that power is limited today. By modifying Article I, Section 2 of the Constitution ("All Power Inherent in the People"). the people's Legislative power to alter and amend their government is now limited to a specific process, which it was not before. The people's Legislative power is no longer co-equal to the Legislature or to any other "law-making body of a county, city or town" as well, based on the Utah Constitution. And, the first clause - "notwithstanding any other provisions of this Constitution" – it effectively states that any other constitutional right or protection provided in the Constitution effectively gives way to the Legislative power of the Legislature. This significantly impacts and weakens the people's fundamental rights under the Utah Constitution.

Amendment D also states that "Utah citizens [will] have 50% more time to gather signatures for a statewide referendum" and it will "[e]stablish requirements for the legislature to follow the intent of a ballot initiative." While these additions are beneficial, they are not additions to the Utah constitution. Rather, they are proposed as new statutory amendments, which can be amended or repealed by the Legislature at any time for any reason.

Defendants argue that the language certified in Amendment D is not inaccurate or misleading. They argue the Legislature has broad discretion to describe the amendments. The Court does not disagree. But this is not a situation where the language used is ambiguous. The Court is not asserting that it would have chosen different words. Rather, the short summary the Legislature chose does not disclose the chief feature, which is also the most critical constitutional change – that the Legislature will have the unlimited right to change laws passed by citizen initiative. Given this glaring omission, the ballot is "counterfactual." *See Lane v. Lukens,* 283 P. 532, 533 (Idaho 1929) (holding ballot fundamentally counterfactual when it told voters terms limited to four years when they were actually extended.)

It is the Legislature's duty and obligation to inform voters and accurately describe constitutional amendments that impact a citizen's fundamental rights. Only the Legislature can propose constitutional amendments. If Amendment D passes, and citizens don't like it, only the Legislature change the constitution. Citizens cannot.

A voter has a right to know what they are being asked to vote upon. In many instances, the only real knowledge a voter may have on an issue is when the voter enters the polling location and reads the description of the proposed amendment on the ballot. This court cannot say that the Amendment D ballot language fairly and accurately summarizes the proposed constitutional amendments for the average voter.[9] Therefore, there is a substantial likelihood that Amendment D violates Article XXIII, § 1 of the Utah Constitution.

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[9] The parties submitted competing affidavits from citizens verifying that they either were or were not mislead. Whether the language is *subjectively* clear or confusing is not the issue. The question is whether objectively the ballot language accurately summarizes the proposed amendment for the average voter.

b. Article IV § 2 (Right to Vote)

The Right to Vote Clause provides that "[e]*very citizen* of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, *shall be entitled to vote in the election.*" Utah Const. art. IV, § 2 (emphasis added).[10] Utah law unequivocally acknowledges that the right to vote is fundamental to our democracy and our representative form of government. *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).[11] In fact, it is said to be "more precious in a free country" than any other right. *Gallivan*, 2002 UT 89, ¶ 24 (quoting *Reynolds*, 377 U.S. at 560). If the right "of having a voice in the election of those who make the laws under which, as good citizens, we must live," is undermined, "[o]ther rights, even the most basic, are illusory. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right." *Id.*

This Clause guarantees "more than the physical right to cast a ballot." Utah law has recognized that the right to vote must be "meaningful." *Shields v. Toronto*, 16 Utah 2d 61, 66, 395 P.2d 829, 832-33 (1964) (explaining the foundation and structure our democratic system of government depends upon participation of the citizenry in all aspects of its operation."). And it "cannot be abridged, impaired, or taken away, even by an act of the Legislature." *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 237-38 (Utah 1904). The goal of an election "is to ascertain the popular will, and not to thwart it," and "aid" in securing "a fair expression at the polls." *Id.*[12] The Amendment D ballot language does not accurately summarize the proposed amendments. In fact, it shifts power from the people to the Legislature without full disclosure. Without transparent, accurate and complete disclosure about the amendments, there can be no meaningful right to vote. Plaintiffs are likely to succeed on their right to vote claim.

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[10] The Court notes that neither party presented any arguments regarding the plain meaning of this clause, historical evidence regarding the drafting or adoption of this clause or discussed any particular test to be applied.

[11] "The right to vote and to actively participate in its processes is among the most precious of the privileges for which our democratic form of government was established. The history of the struggle of freedom-loving men to obtain and to maintain such rights is so well known that it is not necessary to dwell thereon. But we re-affirm the desirability and the importance, not only of permitting citizens to vote but of encouraging them to do so." *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).

[12] There is only one Utah case specifically addressing the Right to Vote Clause. *See Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985). In *Dodge*, a prison inmate challenged a law requiring him to vote in the county in which he resided prior to incarceration rather than in the county in which he was incarcerated. Plaintiff alleged that his right to vote under the Right to Vote Clause was in effect denied. *Id.* at 272-73. In analyzing that claim, the Utah Supreme Court stated, "Dodge made no contention that his right to vote was improperly burdened, conditioned or diluted." *Id.* at 273. The implication is that a claim under the right to vote clause may include an allegation that the right was "improperly burdened, conditioned or diluted."

c. Article XXIII, § 1 (the Publication Clause).

Article XXIII, § 1 of the Utah Constitution mandates that, prior to submitting a proposed amendment for approval or rejection by the people, "the Legislature shall cause the [proposed amendment] to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election..."

Plaintiffs argue that the Legislative Defendants failed to fulfill their constitutional duty to publish the full text of the amendment in a newspaper for two months immediately preceding the next general election. The Legislative Defendants argue that, despite the language requiring publication in a newspaper, the requirements of Art. XXIII, § 1 were satisfied when the legislature "caused" the amendment to be published by directing the Lieutenant Governor to publish the text of Amendment D on the Lieutenant Governor's website, since August 2024 and more recently since September 9, 2024.[13] In addition, they appear to argue that they have substantially complied, given the numerous news stories related to this case. Under the circumstances presented here, the court disagrees.

The Court is not persuaded by the Legislative Defendants' argument that it has either complied by posting on the Lieutenant Governor's website or that Utah recognizes or that the facts support substantial compliance in this case. Article I, Section 26 of the Utah Constitution expressly states that all constitutional provisions are "mandatory and prohibitory, unless by express words that are declared to be otherwise." Utah Const. art. I, § 26. The Utah Supreme Court interpreted this provision to mean that "courts are not free to pick and choose which parts of the constitution they will enforce." *State v. Barnett*, 2023 UT 20, ¶ 27, 537 P.3d 212, 217. It follows that this court cannot simply ignore the explicit requirement in Article XXIII, § 1 of the Utah Constitution mandating that the Legislative Defendants publish the full text of Amendment D in a "newspaper" for at least two months prior to the November 5, 2024 general election. In addition, given Utah's rules of constitutional construction, it is unclear how the court could interpret "newspaper" to mean an "on-line website."

In *Snow v. Keddington*, 195 P.2d 234 (Utah 1948), the Utah Supreme Court considered the validity of a constitutional amendment where a county clerk posted the text of the proposed amendment, as required by statute, but did not include the effective date of the amendment on the poster. The Court found that the exclusion of the effective date of the amendment did not render the amendment void because the legislature had complied with the notice requirements in Article XXIII, § 1. As stated in *Snow*, "all voters throughout the state are entitled to notice." *Id.* at 238. And "the notice of importance to the voter is the publication in the newspapers prior to the general

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[13] Separately, Utah Code § 20A-7-103(2) provides that "[t]he lieutenant governor shall, not more than 60 days or less than 14 days before the date of the election, publish the full text of the amendment . . . as a class A notice under Section 63G-30-102, through the date of the election. Utah Code § 20A-7-103(2). Section 63G-30-102 requires "class A notices" for matters affecting the entire state to be (1) published on the Utah Public Notice Website and (2) published on the relevant official's website if that official maintains one and has "an annual operating budget of $250,000 or more." Utah Code § 63G-30-102(1)(a)-(b) & 4(a). There is no indication that the Lieutenant Governor will not comply with these publication requirements. And, as of September 9, 2024, Defendants proffer that the proposed amendments currently appear on the Lieutenant Governor's website. They, however, do not satisfy the Legislature's constitutional requirement.

election. This is the publication that permits the voter time to consider the merits of demerits of the proposed change. At most, the card in the voting booth could only be a helpful reminder of the general sense of the proposed change." *Id.* The court continued, "[u]nder our constitutional requirements, notice must be carried in the newspapers." *Id.* (finding that "the probabilities and possibilities of the voter being fully informed of the context of an amendment are reasonably assured if the publication is in the newspapers."). Accordingly, the *Snow* court concluded that the "method of notice prescribed by the constitution is one reasonably calculated to give notice to the voters." *Id.* The constitutional requirement has not changed and *Snow* remains good law.

Election day is November 5, 2024. As of September 11, 2024, it was 55 days to the election. No evidence has been presented that either the Legislature or the Lieutenant Governor "has caused" the proposed constitutional amendment to appear in any newspaper in Utah.[14] The parties do not dispute that there are numerous new articles about the Legislature's emergency session and this dispute and that the text of the amendment, along with the Amendment D ballot language, has been published by various news outlets. The fact that there are news reports and stories, offering pros and cons and opinions, about Amendment D does not satisfy the constitutional publication requirement. Further, the voter information pamphlet will be published, but made available only on-line. It will not be printed nor mailed to voters along with the ballot. The complete text of the amendment will only be printed and posted at polling locations on Election Day. However, it was noted that most Utah voters vote by mail. While more opportunities to provide notice of the actual text of the proposed amendment is better for voters, these additional opportunities to provide notice do not satisfy the constitutional publication requirement.

Finally, the Legislative Defendants argue against this interpretation because "[t]he Legislature has no way to force an unwilling publisher to post the proposed amendment because doing so would constitute compelled speech under the First Amendment." (*Legislative Defendants' Combined Opposition to Plaintiffs' Motions for Preliminary Injunction*, Docket No. 352, p. 39.) The Court finds this argument to be completely unpersuasive because, even if true, the Legislative Defendants have failed to establish that forcing publishers to print the text of the amendment against their will is the only way by which the legislature could cause publication of the amendment in a newspaper. Furthermore, the Legislative Defendants' argument on this point is undermined by their acknowledgment that Utah newspapers and other media outlets have printed numerous stories about the proposed amendment and by its recent update, despite the fact that the legislature took no independent steps to publish the text of the amendment. In addition, this argument is now moot, given the recent representation that the Legislative Defendants have contacted 35 newspapers to publish the text.

Plaintiffs will likely succeed on its claim that Defendants violated Article XXIII, § 1 of the

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[14] At 5:00 a.m. the Court noticed a supplemental filing from the Legislative Defendants, with an affidavit submitted by Abby Osborne. The supplemental filing was filed sometime after the 3:00 hearing on 9/11/2024. Ms. Osborne represents that she has purchased space in 35 papers to publish the ballot title and the full text of each proposed constitutional amendment certified to appear on the November 2024 general ballot. This information was not presented during the hearing. The Court considers it, however, given the plain language of both Articles 23, Section 1 and Article 1, Section 26, the requirement is mandatory. No legal authority was submitted to support substantial compliance. The Court does not suggest that there is no possible argument for it, however, the facts of this case do not support it.

Utah Constitution.

2. **Plaintiffs will suffer irreparable harm in the absence of an injunction.**

Plaintiffs will suffer irreparable harm in the absence of an injunction against the proposed Amendment. Irreparable harm "is that which cannot be adequately compensated in damages" and is "fundamentally preventative in nature." *Zagg, Inc. v. Hammer*, 2015 UT App 52, ¶¶ 6, 8 (quotation omitted). Without a preliminary injunction, Defendants' inaccurate ballot language would have Utahns unwittingly *eliminate* a fundamental constitutional right that has existed since 1895. Subjecting Plaintiffs and other Utahns to this outcome is irreparable harm. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968) ("[T]he right of qualified voters ... to cast their votes effectively ... rank[s] among our most precious freedoms").

3. **The threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may case the party enjoined.**

The balance of the equities, which "considers whether the applicant's injury exceeds the potential injury to the defendant," favors Plaintiffs. *Planned Parenthood Assoc. of Utah v. State*, 2024 UT 28, ¶ 210. The harm that Plaintiffs would suffer from the proposed Amendment's ballot language, which omits the impact on Utah citizens' fundamental constitutional rights but appears to represent to the people that it *strengthens* rights, outweighs any harm Defendants may suffer if the requested injunction is granted. *See, e.g., United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) (there can be "no harm from the state's nonenforcement of invalid legislation"). If Amendment D proceeds to vote, Utah citizens may vote based on the ballot language, without being fully informed, and the proposal could pass. The proposed constitutional amendments will become effective and in fact will be retroactive, which will moot Plaintiffs' claims on remand.

In attempting to balance the equities, Defendants are somewhat responsible for the impact on ballot printing for the November 2024 election. They truncated the deadlines, sidestepped normal processes, and proposed in short order a constitutional amendment, with inaccurate descriptions, to shift power from the people to the Legislature. Under the circumstances, the court cannot say that Defendants will be harmed by being unable to advance an inaccurate description of the proposed Amendment in the November 2024 election.

4. **The injunction will not be adverse to the public interest.**

The injunction promotes the public interest. The people of Utah are entitled to an accurate summary of any proposed constitutional amendment that impacts their fundamental rights and they are entitled to the constitutionally required notice, by publication in a newspaper two months before the election. These requirements are fundamental to the integrity of our democracy.

CONCLUSION

The injunctive relief requested – to either strike Amendment D or rule that it is void – is an extraordinary remedy. The court's discretion "should be exercised within the purview of sound equitable principles, taking into account all the facts and circumstances of the case." *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983) (citation omitted). "A

preliminary injunction is an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one." *Hunsaker v. Kersh*, 1999 UT 106, ¶ 8 991 P.2d 67. (Internal citations omitted.) Plainiffs have established that they are entitled to a preliminary injunction.

A preliminary injunction should serve "to preserve the status quo pending the outcome of the case." *Id.* In addition the Court must consider all of the facts and circumstances in the case and should attempt to mitigate the associated risks and impact of the court's ruling on all parties and non-parties, including all the voters of Utah. While striking Amendment D is legally justifiable, it may jeopardize Utah's ability to comply with all election deadlines and may significantly increase the parties' exposure to legal, financial and timing risks associated with the November 5, 2024 election.

For the reasons discussed above, Plaintiffs' preliminary injunction is GRANTED. The Court ORDERS as follows:

1. Amendment D is void and shall be given no effect.
2. Ballots may be printed as certified.
3. The Lieutenant Governor's Office represented that a process is in place for handling matters removed from the ballot, pre-election, to ensure that they are not counted. That process shall be applied to Amendment D.
4. The Lieutenant Governor's Office shall notify all County Clerks of the injunction and ensure that they are bound by these terms, subject to further order of this or another court.

DATED September 12, 2024.

BY THE COURT:

DIANNA M. GIBSON
DISTRICT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 220901712 by the method and on the date specified.

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09/12/2024 /s/ KACI BOBO

Date: _____ _____

Signature

Addendum B

September 9, 2024 Transcript of Scheduling Conference

IN THE THIRD JUDICIAL DISTRICT COURT - SALT LAKE

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, et al., Plaintiffs, v. UTAH STATE LEGISLATURE, et al., Defendants.	Case No. 220901712 TRANSCRIPT OF: SCHEDULING CONFERENCE

BEFORE THE HONORABLE DIANNA GIBSON

THIRD DISTRICT COURT
450 SOUTH STATE STREET
SALT LAKE CITY, UT 84111

SEPTEMBER 9, 2024

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September 9, 2024

P R O C E E D I N G S

THE COURT: All right. Good afternoon, everyone. We're here in the matter of League of Women Voters of Utah, et al, vs. Utah State Legislature, et al, Case 220901712.

Counsel starting with the plaintiffs, please make your appearances.

MR. REYMANN: Good afternoon, your Honor. David Reymann on behalf of Plaintiffs. We are expecting Mr. Gaber to join us also remotely, but I don't see him yet. So -- oh, there he is.

THE COURT: Okay.

MR. REYMANN: So I'll let them make their own appearances.

THE COURT: Great. Give us one second. I'll make everyone panelists.

Is there anyone online who'd like to make an appearance on behalf of Plaintiffs?

All right.

MR. REYMANN: I know that he will. He may just not be able to yet. There he is.

THE COURT: Oh, it looks like -- all right.

Mr. Gaber, can you hear me?

If there's anyone who would like to make their appearances, go ahead and unmute and make your appearance for

Plaintiffs.

MR. REYMANN: Do you want to try and get him on the phone?

THE COURT: It's okay. Do you want to just make an appearance for him?

MR. REYMANN: Yeah. Also appearing is Mark Gaber.

THE COURT: Okay. Great.

MR. SORENSON: Good afternoon, your Honor. Lance Sorenson and David Wolf on behalf of Defendant Lieutenant Governor Henderson.

THE COURT: Great. Good afternoon.

MR. GREEN: Good afternoon, your Honor. Tyler Green for the legislative defendants. And my colleagues online, Mr. Chang and Ms. Meehan, are appearing remotely.

THE COURT: Great. All right.

MR. BILLINGS: Good afternoon, your Honor. David Billings on behalf of the proposed intervenors. And available online is Mr. Richard Medina. (Inaudible.)

MR. MEDINA: Good afternoon.

THE COURT: All right. Any other appearances?

Okay. All right. We're set for a scheduling conference today. Counsel, what would you like to address?

MR. REYMANN: Mr. Gaber was going to do all the talking, so I'm happy to try and fill in if he's unable to hear us. But...

THE COURT: Let's -- I'm happy to see if we can assist Mr. Gaber. Mr. Gaber, can you hear me? We just unmuted you.

MR. REYMANN: I apologize, your Honor.

THE COURT: That's okay. Not a problem. Do you want to try and get in touch with him?

MR. REYMANN: Yeah. I'm e-mailing him right now. Yeah. He says they can't hear anything.

THE COURT: It looks like they're fully connected on our end. Maybe increase the volume?

(Computer voice.)

UNKNOWN SPEAKER: It sounds like we can hear them.

THE COURT: Yeah. We can hear him. There you go. You're unmuted. Mr. Gaber?

MR. GABER: Sorry, your Honor. Can you hear me? I can't -- I can't hear you.

THE COURT: I can hear you now. Can you hear me?

MR. REYMANN: Technology is wonderful.

THE COURT: Until it's not.

MR. GABER: I apologize, your Honor. I can hear now.

THE COURT: Okay. Great.

MR. GABER: Excellent. I'm so sorry.

THE COURT: Not a problem. I'm glad you're able to hear.

All right. So my question is what is it that we need

to address at the scheduling conference today?

MR. GABER: Yes. Thank you, your Honor. Thank you for calling it quickly. I wanted to talk a little bit about the briefing and the hearing schedule in light of the Lieutenant Governor's filing on Friday and the information presented there. As I understand it, some counties may begin to -- I didn't read it to say all, but that some counties may begin today sending the ballot proofs to the third party printers. And it's our position that if we prevail on the preliminary injunction, the public interest is strongly in favor of not having a ballot -- you know, an amendment on the ballot to vote on, that this be deemed unlawful and not lawfully placed on the ballot.

So to that end, I wanted to talk about two things. One, the schedule for this weekend and next, as well as some potential interim steps that the Lieutenant Governors could direct the county clerks to take, or the Court could potentially order (inaudible) jurisdiction and ensuring that it can grant full relief.

With respect to the schedule, we had originally set -- and the Court ordered Monday as the reply deadline. We would be willing to move that up on our end to file our reply brief this coming Friday or Saturday at the latest, depending on the scope of -- of what's in the responses. And I was going to suggest to the Court, then, if the Court is available, that

we could schedule the hearing for the following Monday to give us the best chance of getting relief if it's awarded that can affect the actual ballots. And we would be available on Monday for that purpose.

With respect to the Lieutenant Governor's filing and the ongoing ballot proofing process, it seems to us, given that there's a small number of ballots at issue for the first UOCAVA, overseas, and military deadline -- I think it was around 4,500 perhaps that the Lieutenant Governor cited. It seems to us that the most prudent step would be to prepare two proofs, that they've already prepared the one that has (inaudible), to prepare a proof that has it removed. And if necessary, print two sets of ballots for the UOCAVA that have it on as (inaudible) and one that has Amendment D removed so that the Court is able to grant full relief and that the party -- and the Lieutenant Governor and the county clerks are able to administer that in an orderly way should the Court rule in our favor.

So I wanted to raise those two points and just emphasize that, you know, we think that if we do prevail, that the best course of public interest is that the unlawful question not appear on the ballot at all.

THE COURT: Mr. Sorenson? Mr. Wolf?

MR. SORENSON: Thanks, your Honor. Timing is incredibly important in this election. And working backward

from the UOCAVA deadline, which is September 20th, the absolute drop-dead date for getting proofs to the printer is this Thursday. That doesn't mean that there's nothing going on before Thursday, right? There's programming. There's proofing. And counties need time to do that and to do it well and not risk the run of making mistakes if we have to do it all Wednesday night -- right? -- and try to get something out Thursday.

But we put in our -- in our filing, your Honor, the way this works. These printers, they're lined up already with proofs coming in from all over the country, right? So it's -- Thursday is the drop-dead date for getting ballots to them. Things have to happen before then. The idea of two proofs is costly and runs the risk of confusion for the counties, and so we would be opposed to that as a solution here.

THE COURT: What other solutions could you offer?

MR. SORENSON: Well, your Honor, what I can say is ballots need to go to the printers Thursday. And I don't -- you know, we have the certification deadline and these deadlines so that things can run smoothly, and we're already up against these deadlines. So if any of the Court's remedy for any problem here involves reprinting ballots, that's going to be really hard at this point, especially if we get past Thursday.

THE COURT: And there's no possible way to just push

that deadline even to next Monday or Tuesday?

MR. SORENSON: No. We've got 29 counties that all operate on schedules with their printers, and the UOCAVA deadline is -- it's just a hard deadline that can't be missed. And if we go past Thursday, we run the risk of missing that, and we run the risk down the road of, you know, can these printers actually get these ballots in and programmed in a timely manner to get them out to voters?

THE COURT: Okay. When are you planning on submitting those proofs to the printers on Thursday?

MR. SORENSON: Well, each county operates on its schedule. Some are ready to go; some are still proofing. They're all planning on getting them out this week before Thursday, by Thursday.

THE COURT: So you're saying by Wednesday actually?

MR. SORENSON: And they're proofing, they're programming before Thursday. So -- one moment.

THE COURT: Okay.

MR. SORENSON: They can send them to them on Thursday.

THE COURT: On Thursday? Is that like 11:59 p.m. on Thursday? Or is it --

UNKNOWN SPEAKER: Yeah.

THE COURT: -- earlier? Okay. Okay.

So with that information, how do you want to proceed?

MR. GABER: Are you talking to me, your Honor?

THE COURT: I'm opening it up for everyone to problem-solve.

MR. GABER: Sorry.

THE COURT: I want to make sure everyone has an opportunity to respond and also reply and try and squeeze in a hearing. But it doesn't give us a lot of time.

MR. GREEN: Your Honor, if I may, your Honor.

THE COURT: Yes. Go ahead, Mr. Green.

MR. GREEN: On behalf of the legislature. I would just say since we got these two motions that came in right after -- you know, one right after we had finished our sort of negotiations and briefing with the Court on the summary judgment schedule, we got one Thursday night, as the Court knows, and one Saturday night. We've been working as diligently as we can in that interim period to try to meet the Thursday deadline. So that's what we're on track for. I suppose if it would be helpful to the Court -- what I don't want to do is prejudice my clients' rights to present a complete defense to the claims, which it probably would not surprise the Court to hear our view that the claims don't have merit to them.

But we would be willing to submit something, you know, maybe like a sort of partial response or half response, or if there's, you know, some sort of middle ground sooner than

their proposed deadline, Thursday, which is what we've been working towards, we would be happy to try to do that, but, again, not to the extent it would prejudice our ability to offer some sort of more fulsome and complete response later on down the line, for whatever that's worth for the Court's consideration.

THE COURT: Okay. If we were to -- or if you could shorten that deadline, what would be your request?

MR. GREEN: In terms of?

THE COURT: Just shortening the deadlines. Sometime before --

MR. GREEN: Like a new deadline somehow?

THE COURT: Yeah. Before Thursday.

MR. GREEN: Instead of Thursday?

THE COURT: Mm-hmm.

MR. GREEN: You know, we can do our best to try to get you something I suppose by like mid-day Wednesday, sometime Wednesday afternoon.

THE COURT: Okay.

MR. GREEN: 2:00 or 3:00 p.m. or something on Wednesday. But I don't -- you know, to the extent -- what I don't want to do is detract, I think, from what the Lieutenant Governor has said, and probably the most important thing that will be said in this hearing today, and is the notion of, you know, jeopardizing the state's ability to meet the counties'

deadlines with the printers and sort of invoke the nuclear problem that comes with missing a UOCAVA deadline, number one. But number two, the reality that there just can't be two ballots. You can imagine the sort of Pandora's box that it would open if there were one -- potentially one ballot and then another one sent and then which one gets actually sent to the voters and how does it look. And they can't do -- as I understand it -- the Lieutenant Governor could confirm -- I don't think the printers have the capacity to do a sort of limited run of 4,500 ballots or something one way and then hold the rest of them for later.

I think the counties have their time slots, and those are their time slots. And if they miss them, it's anybody's guess as to whether we could even have ballots for the rest of -- for the rest of the election, which, again, is not just Amendment D. It's presidential election all the way down. It's just a single ballot, your Honor, going to all of the voters here in Utah. So I want to make sure that that's emphasized and whatever we do here doesn't jeopardize our citizens' ability to actually vote in this election.

THE COURT: Okay.

Mr. Gaber.

MR. GABER: Thank you, your Honor. I think -- so it sounds to me like there are two options, and I certainly am fine with advancing the briefing on the motion so that the

Court has it submitted before the Thursday deadline if that would work for the Court and the Court could issue an order in that time. The Court had mentioned whether or not there might be a need for an evidentiary hearing. My answer to that is going to be dependent on what I see in the responses, but certainly I think there are declarations in the record, and I think some of it -- that some of this is noncontested. I don't think there's an issue of whether or not they were actually published in the newspapers or not. And (inaudible) language -- the Court can compare the language to the text of the amendment. So I don't know that there is likely to be a need for evidence, but I don't want to foreclose that possibility, depending on what might come in the way of responses.

So I think that's an option for the Court to move this up to Wednesday, and we could certainly file a reply brief, you know, expeditiously. We've moved heaven and earth to move expeditiously so far on this matter. Obviously I know less about the printing of the ballots, but it does seem to me that this Amendment D is the last question that appears on the ballots, and I think printing -- you know, if the Court wanted to just keep its printing schedule, I think printing a limited set of 4,500 -- I don't see why that would be impossible to do, to print 4,500 ballots that don't have Amendment D listed and just set them aside in the event that they were needed. But

certainly if the Court's willing to entertain a faster schedule, I think we can do that as well.

MR. SORENSON: Your Honor, if I may.

THE COURT: Go ahead.

MR. SORENSON: The Amendment D would go on every ballot in the state, and the ballots look different depending on the county. And even in the county, there's multiple ballots depending on congressional districts, state districts. So there's 1.7 million ballots that would need to be done twice, not 4,500.

THE COURT: If the Court were to agree with the plaintiffs and order that the Amendment D either not be presented to voters or invalidate it, void it after the fact, what would be your solution, then? Just say -- it seems impractical to meet the deadline and to give everybody the opportunity to fully respond. It seems like, based on what you're saying, we must move forward with the printing. So it will likely be included.

What is the solution if the Court does agree with Plaintiffs then? Have you thought through that?

MR. SORENSON: Well, I know the plaintiffs have asked for alternative remedies. And logistically, one of the other remedies is just run the ballots and then deal with it after. That is, if you decide that it shouldn't be on there, then don't count them.

There is a process in the code for not counting ballots for, say -- or votes for, say, candidates who drop out after the deadline. That type of process exists. I think logistically, that could be used for Amendment D. But I haven't thought through other implications of doing that, whether that could create confusion on the counties to make sure they tabulate correctly. Or it could create confusion on the voters. But logistically, it's possible.

THE COURT: What is the Lieutenant Governor's office preference with regard to how we go forward? Given the issues that are before the Court and the deadlines that you're facing? What is your request?

MR. SORENSON: We would need a ruling by Wednesday in order to give county clerks time to reconfigure ballots by Thursday, if that's the direction the Court's going.

THE COURT: Otherwise, we just move forward, they're printed, and then we'll figure out how to -- how to deal with that after the fact? If the Court rules in favor of the plaintiffs?

MR. SORENSON: Correct.

In that event -- and we're not to the PI stage yet -- the LG would request that a bond be posted in an amount to cover the cost of reconfiguring, reprinting, and whatever it takes for the first option that we talked about.

THE COURT: Will you repeat that one more time?

MR. SORENSON: We'd request that a bond be posted to cover the costs of now going back and reprogramming, reproofing ballots, if that's the course we go down.

THE COURT: Is the bond that you're requesting, is that dependent on the Court's ruling, the timing of the Court's ruling?

MR. SORENSON: Yeah. If we get -- if we get to the PI stage and say, okay, I think we're going to enter into an injunction requiring all the county clerks to now go back and redo something. And then we're going to go through the rest of the litigation. We'd just need the bond posted, because there's going to be costs of doing that.

THE COURT: Okay. All right.

MR. GABER: Your Honor, may I address the bond issue?

THE COURT: Yes. Go ahead, Mr. Gaber.

MR. GABER: I've been doing election law for quite a while now, and I don't think I've ever heard of a scenario in which plaintiffs have been required to post bond for a monetary amount for the state to come into compliance with the constitutional requirements if we prevail. And given that, I think -- given the Lieutenant Governor's position, I think that the fast course, if the Court is able to do it, would be to advance these proceedings and get resolution this week in advance of the deadline. And perhaps some of these arguments can be made orally, but I don't think we should be in a

situation where private citizens are being asked to pay money so that the state can follow the constitution.

THE COURT: So that would -- what if the Court issued a ruling on Thursday? Is that still too late?

MR. SORENSON: It's not just the printing -- we can't snap our finger and get the ballots out. Right?

THE COURT: Right.

MR. SORENSON: There's programming. If there's -- if we have to take it off, if we have to change the language, it takes time to do that. And we have 1.7 million ballots.

THE COURT: Okay.

Mr. Green, any way you can submit something earlier than Wednesday?

MR. GREEN: Well, I mean, I guess it depends on what the Court wants to see. We have our sort of working outline. I don't know that it would be terribly helpful. But to build out I think the arguments that we would want to build them out and present them to the Court in a way that I think preserves the merits of our arguments, like, we can try. We can make it -- I mean, we're pushing -- I'll tell you, all of our cylinders are firing as quickly as they can fire. We've got -- we've had people working on this around the clock since it came in. So I can see what I can do and try to push it to sometime earlier Wednesday if that would be useful.

The issue again is, you know, there's -- we're

dealing with, you know, roughly 50 or so pages of new briefs and, like, arguments that nobody's looked at and stuff we haven't talked about before, so we're trying to make sure we get it right and do it right and go as far as we can to get the Court the right answer that will help resolve this.

And on that note, I mean, one thing I think -- this is largely unprecedented in this -- not just largely -- I think it is unprecedented in this state. I don't think the relief the plaintiffs are seeking have happened before. And the closest we could find -- I would point the Court to this In Re Cook case from the Supreme Court. It's 882 P.2d 656. This was a Chief Justice Zimmerman opinion and a request to stop -- I think it was a request to stop the printing of some of the ballots, but certainly the voter information pamphlet that was at issue in this particular election back in '94.

And I would point the Court to some language at the end of the opinion, starting on page 659, where the Court -- even the Court found potentially some merits with the plaintiffs' arguments about some misleading language in the voter information pamphlet, it still said -- notwithstanding the potential merits to those arguments, the Court denied relief there, declined to issue an injunction that would stop the dissemination of those voter information pamphlets, based on this language: "The overriding importance of the public's interest and the integrity of the election process and the

breadth of equities -- of a court of equity's discretion."

So the Court -- I think the Utah Supreme Court has been mindful of the closer we get to when the election is actually supposed to start happening, the election mechanics, the more orders from court have the ability to fundamentally alter voter behavior. You can imagine the scenario where there's been plenty of news coverage about this case. Plaintiffs' attorneys have been quoted themselves a number of times in a number of different stories about this. And if a voter is in a situation where a ballot shows up and Amendment D is on the ballot because of -- precisely because of the problems that the Lieutenant Governor has talked about and all the things that counties have to do, and that -- I don't think it can help but fundamentally change voter behavior with respect to the amendment. Is it on? Is it not? Sure it's on, but does it count? Is the Court not going to consider my vote? You can imagine the questions that voters are going to ask when this happens, if it should happen.

So I think with respect to these equitable arguments, I don't think we can emphasize and state their importance too much.

THE COURT: So your position is that we should move forward, allow it to be printed, let the parties have briefing, and then address the issue. And then whatever the Court's decision is, we'll deal with those repercussions at that time?

MR. GREEN: I think -- I think there's certainly a separate set of repercussions. I think that's right. There's one set of considerations, equitable considerations to what happens if the state, through its counties -- because, again, it's not a state-centralized function. It's a county-by-county function. So what actually happens to Utah's 1.37 million voters if we don't get ballots from the printer on time and we fundamentally can't conduct the election from president on down? There's one set of issues there, to be sure.

There's a separate set, I think, that we're happy to talk about, and we can talk about the timing of those. But if the ballots go out and the amendment is on it, but then there's still news coverage or headlines or back and forth about, "Well, they're out, but maybe they're improper," or "Maybe a Court's going to do something with them," "Should I vote? Should I not? Is it worth it as a citizen to take my time to educate myself about the amendments and then cast an informed vote?" I think there's an entirely separate set of equitable considerations there that I know we're certainly concerned about.

But I don't -- but, again, with the timing of all of it, I think we're all in a little bit of a bind and we'll do our best to get to what we can by Wednesday.

THE COURT: Okay. Mr. Gaber.

MR. GABER: I would say that given what Mr. Green

said, I think that that lends in favor of adjudicating this before those ballots are printed, so then we can avoid -- that's precisely why we were suggesting that it's in the public's interest to not have it on the ballot if it's unlawful. And I think the constitution actually says it wouldn't be submitted to the voters if it's unlawful.

So perhaps -- if the legislature can get its brief in by -- by, you know, Wednesday morning, or if it's noon on Wednesday, you know, we could certainly do our reply in the form of an oral reply and have the, you know, Court -- if the Court can issue its decision, then, on Wednesday.

THE COURT: All right. When do you think you could submit your opposition? Either Tuesday night, early Wednesday morning?

MR. GREEN: I think Tuesday night will be a bit of a stretch, but I think if we could shoot for Wednesday, we can do that.

THE COURT: Wednesday morning?

MR. GREEN: Wednesday at -- I mean, Mr. Gaber suggested Wednesday at noon. I think we'll -- we can make that work if that works for the Court.

THE COURT: Could you do it a little earlier? The reason I'm suggesting a little earlier is I still have to read. And then also --

MR. GREEN: That's important. No question.

THE COURT: Right. So you give me a time.

MR. GREEN: Could we shoot for 10:30? Give you --

THE COURT: Let's do 10:30.

MR. GREEN: 10:30? Okay.

THE COURT: And then with regard to a reply, do you want to do a written reply or just do an oral response at the hearing that we'll set on Wednesday?

MR. GABER: If we can -- how about this? If we can get it written, then we would file it so your Honor could read it in advance. But certainly, if we can preserve the right to do, you know, the reply orally, at the very least, we can do that.

THE COURT: Okay. Then, let's see. Why don't we set a hearing -- how much time do you want for that hearing? It sounds like we're not really doing an evidentiary one. It's just going to be oral argument at this point. Is that right? Everyone agree?

MR. GABER: I think that's likeliest. If there's some issue that's raised in their response with respect to, you know, an evidentiary failure, then certainly we would want to be able to have the ability to have someone testify if necessary. But I don't think that's likely.

MR. GREEN: That's my expectation right now, your Honor. If that should change as we're wrapping this up, we'll certainly let the Court and counsel know.

THE COURT: Okay. What time do you want to have the hearing, then, on Wednesday afternoon? Luckily, my Wednesday afternoon is open. It was our judicial conference Wednesday, Thursday, Friday. So I've got the entire afternoon open.

MR. GREEN: How long does the Court want to read the briefs?

THE COURT: I'm sure that I'll probably need more time than I will have, but you tell me. I want to make sure that you have adequate opportunity to present your arguments.

MR. GREEN: I guess I would ask Mr. Gaber their position. It's their motion. Certainly, your Honor, we're responding to it. But I think if we did something in the neighborhood of 2:00 or 3:00, that would work for us.

MR. GABER: That probably works, your Honor. I too will need to read it, but we'll endeavor to do that quickly.

THE COURT: Okay.

MR. GABER: But I think that that would work.

THE COURT: Why don't we say 3:00, then?

All right. So September 11th, 3:00. We'll make WebEx available as well. And whoever would like to appear in person, you're welcome to do that as well.

MR. GREEN: Will that be back in this courtroom, your Honor?

THE COURT: Yes. It will be right here.

Mr. Billings?

MR. BILLINGS: Just -- I was just wondering if the Court could rule on our motion to intervene before the hearing.

THE COURT: I will try. I will definitely do my best to review that and issue a ruling.

MR. BILLINGS: Thank you.

THE COURT: Thank you. Well, let me just ask. So since we're here.

The issue that -- so I've read the motion. The issue that's been presented is that the intervention could potentially delay resolution of the limited issue that's been remanded to this court. Would you address that?

MR. BILLINGS: Sure. Mr. Medina, do you wish to address it?

MR. MEDINA: Sure, your Honor. I'm prepared to speak to that. We don't think it needs to. Your Honor has already set a schedule on the summary judgment motion. Obviously our motion to intervene is pending. And given the very rapid schedule that your Honor has just set on the preliminary injunction motion, we don't expect to be heard on that. However, we do think there's plenty of time for us to be heard on the merits given the schedule that's been entered on the summary judgment motion.

You know, I don't really see how, you know, responding to perhaps another set of briefs or arguments is going to necessarily delay. There's been some suggestion that

the intervenors are going to seek additional discovery beyond what's already been shared. I think that's just not true from the face of our papers. So that -- we've spoken to that as well in our reply, and I would incorporate those arguments. But we don't see really a reason why our participation should delay the case.

THE COURT: What is the difference between the Court allowing your client to intervene versus your client just submitting an amicus brief for purposes of the Court addressing on summary judgment Count V?

MR. MEDINA: Sure. There's a couple differences. First is our rights to participate in any remedial proceedings, our right to appeal, participating as amicus, while we could, you know, make legal arguments, obviously it doesn't grant the full rights of a party. And that's what Rule 24 is for. So those would be the primary differences.

THE COURT: And why is the Democratic Party's interest not already adequately represented by the -- by some of the plaintiffs who have identified as democrats?

MR. MEDINA: Sure. So, I mean, we've laid this out in our reply brief. The fact that some of the plaintiffs happen to be registered democrats does not mean that they represent the interests of the Democratic Party. In addition to the registered democratic voters, there are nonpartisan organizations, republican registered voters, who have joined

together in common cause to the extent that they share an interest here.

I'll note also that the likely outcome of this case is going to be some kind of remedial proceedings, which is going to need to be adopted on a new congressional map. There's potentially infinite configurations that the parties could propose, that the Court could adopt. And we think it's quite likely that the interests of the party will diverge from this, you know, very diverse coalition of nonpartisan and bipartisan plaintiffs as far as remedial proceedings go.

THE COURT: Is it critical for the Court to rule on this motion before Wednesday given the discrete issues that are before the Court?

MR. BILLINGS: No. We just want to be heard in the interim.

THE COURT: Okay. All right. I will try to see if I can do that. I want to make sure that I am prepared for the issues I have to quickly decide.

MR. MEDINA: And, your Honor, I should just add, speaking for the proposed intervenors, you know, I don't see a need to -- certainly don't see a need to delay these highly expedited preliminary injunction proceedings to rule on the intervention motion. You know, your Honor has a limited number of hours in the day of course. And so certainly given the exigencies here, you know, I'll add that just from having

reviewed the papers, we, you know, believe that (inaudible) in their arguments on the preliminary injunction motion, but don't see a need to delay proceedings on our account.

THE COURT: Great. All right. Thank you, Mr. Medina.

All right.

MR. GABER: Your Honor, may I (inaudible) matter?

THE COURT: Of course.

MR. GABER: Sorry, your Honor. The responses that are coming on Wednesday, I assume, that are to the preliminary injunction, that (inaudible) we had filed a motion for leave to file the supplemental complaints. I just want to make sure that we have the pleading, you know, granted to do that when we're arguing on the preliminary injunction. So I didn't know if there was any opposition to the actual filing of the supplemental complaints. We may be able to dispense with that.

THE COURT: Are you planning on opposing?

MR. GREEN: The only issue I think with that is this issue we dealt with last week, which was all of a sudden now we have more claims to either answer or move to dismiss. There's just additional logistics on our end now if a complaint is entered. So the only thing I would ask from the Court is some consideration with respect to whatever the deadlines might be for the legislature to respond on the merits, either answering or, you know, some other sort of motion.

THE COURT: I thought about that, and I assumed that the argument that you would make in opposing leave to supplement would really be futility or some other legal-based argument. And I assume that that likely would be raised in the opposition to the preliminary injunction.

MR. GREEN: I think that's a fair assumption, your Honor.

THE COURT: Okay. So I -- I believe I can deal with all of them. I don't know that we need you to take extra time to address that. I think I'll hear most of those substantive arguments that I'll need to decide whether or not Plaintiffs should be allowed to supplement.

Okay. All right. Counsel, anything else?

MR. GABER: Nothing for the plaintiffs.

THE COURT: All right. Well, thank you for your appearances today. Court is adjourned. I'll see you on Wednesday at 3:00. Court is in recess.

(Proceedings concluded.)

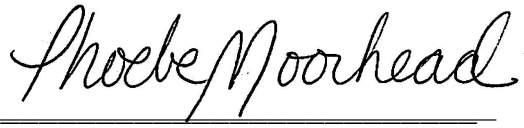
STATE OF UTAH)
)
COUNTY OF SALT LAKE)

I, PHOEBE S. MOORHEAD, Certified Shorthand Reporter for the State of Utah, certify:

That I received the audio recording and transcribed it to the best of my ability into typewriting; that a full, true, and correct transcription of said audio recording so recorded and transcribed is set forth in the foregoing pages.

I FURTHER CERTIFY that I am neither counsel for nor related to any party to said action nor in anywise interested in the outcome thereof.

Certified and dated this 9th day of September, 2024.



PHOEBE S. MOORHEAD, RPR, CRR
Certified Shorthand Reporter
for the State of Utah

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Addendum C

September 11, 2024 Transcript of Preliminary Injunction Hearing

IN THE THIRD JUDICIAL DISTRICT COURT - SALT LAKE

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, et al., Plaintiffs, v. UTAH STATE LEGISLATURE, et al., Defendants.	Case No. 220901712 TRANSCRIPT OF: PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE DIANNA GIBSON

THIRD DISTRICT COURT
450 SOUTH STATE STREET
SALT LAKE CITY, UT 84114

SEPTEMBER 11, 2024

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September 11, 2024

P R O C E E D I N G S

THE BAILIFF: All rise. Third District Court is now in session. The Honorable Judge Gibson is presiding. Please be seated.

THE COURT: All right. Good afternoon, everyone. We're here in the matter of League of Women Voters of Utah vs. Utah State Legislature, Case 220901712.

Counsel starting with plaintiffs, please make your appearances.

MR. REYMANN: Afternoon, your Honor. David Reymann from Parr Brown on behalf of the plaintiffs.

MR. GABER: Good afternoon, your Honor. Mark Gaber of the Campaign Legal Center on behalf of plaintiffs. And also by WebEx are Annabelle Harless, Benjamin Phillips, and Aseem Mulji for plaintiffs.

THE COURT: Thank you. Good afternoon.

MR. SORENSON: Good afternoon, your Honor. Lance Sorenson and David Wolf on behalf of the Lieutenant Governor.

MR. GREEN: Good afternoon, your Honor. Tyler Green on behalf of the legislative defendants. And I believe my colleagues are on the line as well, Ms. Meehan and Mr. Chang.

THE COURT: Great. Thank you. Good afternoon, counsel.

MR. BILLINGS: Good afternoon, your Honor. David

Billings on behalf of the proposed intervenors. And I believe on the WebEx is Richard Medina as well.

THE COURT: All right. Good afternoon. Thank you.

All right. So we're here for oral argument on the preliminary injunction motion. Counsel, I've reviewed all the written submissions.

Mr. Reymann, Mr. Gaber, are you ready to proceed?

MR. GABER: Yes, your Honor.

THE COURT: All right.

MR. GABER: Good afternoon, your Honor. And may it please the Court.

The Utah Constitution protects the people's right to alter or reform their government by a majority vote without the government responding by repealing that reform effort or impeding its purpose. Amendment D proposes to eliminate that right and allow the government to unilaterally reject Utahns' reforms for any or no reason at all, compelling, not narrowly tailored, or otherwise.

But the ballot language certified by defendants doesn't reveal that. Instead, it asks voters whether they want to, quote, strengthen the initiative process, and it asks -- it informs them that if they vote "yes" on the amendment, state law will be changed such that there will be requirements for the legislature to follow the intent of the voters in passing initiatives.

The amendment does not do either of those things. It's false and misleading and, in that way, violates the constitution, and as well violates the constitution because the legislature has not published the amendment as the constitution requires.

I want to start with the false and misleading claims. And it's false and misleading in three -- in two main ways and one sort of third issue that elevates all of this and requires heightened judicial scrutiny.

So, first, the amendment does not say that it is repealing an existing fundamental constitutional right that was written into the constitution by the framers in 1895 and ratified by the voters that year, the fundamental right to alter and reform the government without the government undoing that reform.

And the Florida Supreme Courts in the Askew and the Armstrong cases are directly on point in this regard where the failure of the state to indicate that the amendment would eliminate an existing right is especially misleading. And in particular, the Askew case in which the Court considered the instance of the lobbyists who were banned under the existing provision -- or, sorry -- the former legislators who were banned from becoming lobbyists under the existing provision. And the amendment had that clause but then said "unless they file a financial report." And that was all that was presented

to the voters such that they would think a new provision banning lobbying was being put into effect.

And similarly here, the voter who's looking at the ballot would think that a new provision is being put into effect that strengthens the initiative process to require the legislature to respect the intent of voters' initiatives, when, in fact, the language of the amendment allows the legislature free authority to entirely repeal the initiatives that the voters passed with no regard to the intent of the voters.

And in that regard, the use of the language "strengthen" is particularly misleading. First of all, the use of any such language in a ballot (inaudible) subjective-laden language like "strengthen" and the like is really inappropriate for a ballot because it's the legislature putting a judgment -- you know, positive judgment on the fact that voters should vote for it. "Strengthen" is not an appropriate word in any sense, even if there was some evidence that there was strengthening happening here. But here, what's happening and what was the express purpose was to weaken the initiative process as the Supreme Court have interpreted it in its decision in this case and make it so that the legislature have full power to eliminate voters' initiatives regardless of their intent or purpose or regardless of whether they were altering or reforming the government under Article 1 Section 2.

And perhaps most alarmingly -- and we talk about this

in our reply brief filed today -- the defendants take the position that, "Well, we should just -- only if there's a counterfactual statement should the ballot amendment be legally suspect." And they say that it's not here because they've -- the legislature passed SB 4003, I think is the number, or 4002 -- that would -- sort of a ride-along shirttail statute that says that if, in the first general session after an initiative is passed, the legislature chooses to amend it, it shall respect the intent of the initiative, except when money is at stake, and then they don't have to. And even on its face, it's only in that first general session and only if it's an amendment. And they cite that for why they've added that language to the ballot that says that the law of the state will be changed so that requirements are established that the legislature respect the intent of the voters.

But what the amendment does -- the text of the amendment and its purpose is to eliminate the requirement that the intent of the voters be respected when the legislature is deciding to repeal or amend or do anything with -- with a voter initiative. That's -- that is the express terms of the amendment. That was its entire purpose. It was all in reaction to the Supreme Court's decision that the legislature had to respect the purpose of the amendment and not impede it.

And it's sort of remarkable that in the same general -- same special session, the legislature passes a

constitutional amendment to get rid of the requirement that they respect the intent of the voters, passes this conditional statute that says only in one circumstance, sometimes are we going to maybe respect the intent of the voter if we amend, that statute would be unconstitutional under the constitutional amendment they passed on the same day. Because there would be no way to enforce any requirement that the legislature respect the intent of the voters, the amendment in the constitution says they don't have to do that.

And so obviously in Utah, the constitution reigns supreme over any contrary statute. And certainly, if the legislature repeals an initiative, which the statute that they passed to go along with the amendment doesn't even speak to, they're not required to respect the intent of the voters if they repeal the initiative. If the legislature repeals an initiative, it is certainly not respecting the intent. It's doing the furthest thing it could from respecting the intent of the voters. It's getting rid of the initiative altogether.

And so the statute's not constitutional. It only applies in certain circumstances. And the constitutional amendment says that the legislature does not have to respect the intent. It got rid of that requirement. So it is counterfactual. It is 100 percent false to say that if the voters vote "yes" on the amendment, state law will be changed to require the legislature to respect the intent of voters when

they pass an initiative. It does the precise opposite of that.

And so even under defendant's preferred standard, a strict standard that only strikes down counterfactual ballot language, this ballot language cannot stand.

Now, that shouldn't be the standard. Indeed, we cited for the Court the Utah Supreme Court's decision in Nowers vs. Oakden, in which the Court spoke to the requirement that ballot language not be confusing, not mislead, and allow for a reasonably intelligent voter to know what they are voting on.

Now, a reasonably intelligent voter who read the amendment would think that they were strengthening the initiative process to put limits on the legislature's ability to repeal an initiative and disregard the intent of the voters. Anyone who would -- would read that and think that. And that is just indisputably not what the text of the amendment does. And so the Court shouldn't adopt this strict standard. Other states haven't. And -- some have; others haven't. The Utah Supreme Court's language does not support it. But in any event, the standard would be met here by the blatant falsehood in that last section of the ballot language.

As the Florida Supreme Court said in the Armstrong case, extra judicial scrutiny and vigilance is required when what's happening is -- a fundamental provision in the declaration of rights that has existed since the constitution was created in 1895 is at issue in the amendment. And that's

the case here. This amendment to Article 1 Section 2, the right to alter or reform the government, is being amended. And, sure, it's true that the first opportunity for the Supreme Court to interpret this provision was in its decision this year. That was because the legislature had never before sought to repeal a government reform effort that the voters enacted pursuant to that right.

And as is obvious from the jurisprudence in this state requiring the Supreme Court to interpret and this Court to interpret the original public meaning of the phrase, this is a right that has existed since 1895. We're here today because the legislature sought for the first time to violate it.

And given that this is a fundamental right of the voters in the declaration of rights, as the Florida Supreme Court said in the Armstrong case, the Court needs to be extra vigilant in ensuring that the ballot language is not misleading voters into throwing away something that the framers of the constitution and the first Utahns to vote on the constitution selected to have it be the fundamental right of the people.

And, you know, I could -- I could go through individually and talk about all the particular legal claims. I don't really think that's necessary. The -- you know, it -- under Article 23 section 1, the amendment is not being submitted to the voters if what is described to them is literally not the amendment, the opposite of the amendment.

And even defendants have agreed that undue influence by the government is -- in the election process is a violation of the free elections clause. They cite, as an example, bribery. But although the government -- the legislature is not paying people to vote in its favor, it is exercising undue influence in how it describes what will happen if they vote "yes" or "no" and putting its thumb on the scale and, in that way, is also exercising viewpoint discrimination by preferring a particular viewpoint and using the voters as its pawns to have that outcome happen, to have that government-compelled speech occur in favor of the government's preferred position.

I'm going to move on to the publication issue. If your Honor has questions about the false and misleading, I can stop there.

THE COURT: I don't have any questions right now.

MR. GABER: Okay. Thanks. And now, with respect to the publication issue, the Supreme Court of Utah in the Snow case set out -- in that case, the provision was complied with, and a statute regarding posting the amendment's text in the polling station was -- had a minor noncompliance in one jurisdiction about the effective date. And what the Supreme Court said is it wasn't going to void that constitutional amendment in that instance because the legislature complied with the publication requirement. The legislature caused the -- at that time, the Secretary of State. Sorry. Caused

the Secretary of State to publish the text of the amendment in newspapers across the state for two months leading up to the election.

And this has been the history as best I can tell for the last 122 years, until the legislature changed the statute about publication to eliminate the newspaper requirement. And I spent evenings going through historic newspapers from the founding era and others where the legislature had no problem posting in the legal notices section of the newspapers across the state, every community newspaper across the state, the text of the amendment in every issue from the date of the first date of two months prior through the election.

In the Snow case in the Supreme Court said that they must do that, that that was required. And that was what saved the failure of the statute in that case from causing the initiative -- the constitutional amendment to be voided. The language of Snow doesn't leave any room for the conclusion that the legislature does not need to comply with Article 23 Section 1 of the constitution. It says it's mandatory and talks about why it's important. Because publication in the newspapers is how the voters, in a passive way, without having to exert any of their own ambition to try to go find the language, receive in their homes the language of the amendment for a period of time that the framers and the voters in 1895 determined was a sufficient time for the voters to sit with the language, see

the language itself rather than someone else's opinion about the language, a newspaper article's, you know, journalistic editorialization about the opinion -- about the amendment, and decide whether or not they thought that was something that they should vote for or against, whether it had merit or not.

And defendants, in their response brief, didn't cite the Snow case or talk about it. It's the only case in Utah that just speaks directly to this issue. I think it's quite important. And I think it dictates the outcome here. There's no factual dispute that publication has not occurred by the state -- by the legislature, and the newspapers has not occurred for two months prior to the election, has not occurred in one in each county. They recite in their response to kind of a smattering of online news articles where this dispute has been covered and where the special session of the legislature was covered, but they cite not a single article -- even if -- even if we set aside whether people in 1895 thought newspaper meant paper that they physically receive in their home, they cite not a single online news article where even the newspapers have published -- without the legislature causing it -- where either of the newspapers have published the full text of Proposed Amendment D. There's some snippets here and there of parts of it without the surrounding context of the rest of Article 6. Article 2 -- Article 1 Section 2's changes are nowhere in any of the articles that they've cited. There's a

couple instances where there's a hyperlink to the legislature's website.

None of that constitutes publishing the text of the amendment for the two-month period in a newspaper in every county of the state. And the legislature doesn't contend otherwise. Instead, they cite to the statutory change that happened in 2023 where these constitutional amendment's notice is now, by statute, to occur on the Utah Public Notice website and on the Lieutenant Governor's website. But obviously statute can't trump the constitution, and the constitution requires otherwise. And remarkably, they've -- they've not even said that they're trying to catch up now and do it and go around the state and pay to post a legal notice in the newspapers. There's just no effort to comply whatsoever.

And so in that regard, the argument that we saw this morning that there's been substantial compliance, citing to some states that have that standard, one, that isn't the standard in Utah. Utah's constitution under Article 1 Section 26 says that its provisions are mandatory or prohibitory unless expressed otherwise. Certainly there's nothing in Article 23 Section 1 that expresses otherwise. It says "The legislature shall." And then -- "shall publish it." And then it says "At which time, the amendment may be submitted to the electors for a vote."

And so it is a condition precedent, a mandatory

condition precedent. And so this Court shouldn't even look to the substantial compliance cases. But even if it does, the publication on obscure government websites that require voters of Utah to know that the government official they should be thinking about is the Lieutenant Governor -- now, if they go and look at the code and see that in Utah, the Lieutenant Governor is in charge of administering elections in Utah, perhaps they could figure that out. But the publication clause was written specifically so that voters would not have to go do library research to understand what the legislature was -- how the legislature was proposing to change the constitution.

And to suggest that they should be required to do that, they should be required to know it's the Lieutenant Governor, to figure out how to navigate www.utah.gov/pmn and go through the various task bars to figure out how to find this belatedly posted notice can't possibly constitute substantial compliance even if that were the standard. And one might have expected them to say that they, on Saturday, reached out to the newspapers and started posting it. That isn't what has happened either.

And, finally, the suggestion on publication that -- that newspaper editors might say to the state that, you know, they're refusing to publish this notice. And so therefore, they can't possibly be required to do this. They sort of say it as a legal proposition. They've done it for 122 years.

I've never heard of a newspaper rejecting a paid legal notice from the government of the state about what is proposed to the voters. So I don't really take that to be a serious argument that the Court should consider.

With respect to some of the other arguments they presented that would, they say, bar relief in this case, defendants suggest that the Lieutenant Governor is an insufficient defendant for the Court to afford relief. We cite a number of statutes on page 9 of our reply brief that talk about how the Lieutenant Governor has the power to direct the county clerks to take action, that they're required to follow her direction, that she is required to force them to come into compliance with law. This is -- I've seen a number of states' provisions about the duties and powers of their election officials. This is one of the strongest ones I've ever seen in terms of the power of the state election official to direct local election officials to do tasks and stands in stark contrast to the Florida statutes for the Jacobson case, the 11th Circuit and District of Florida case that was cited in the response brief where the Court specifically said that the Secretary of State didn't have that authority in Florida. But it is clear in Utah code that they do here.

And with respect to the question of whether this is a -- you know, disfavored mandatory injunction we're seeking or a prohibitory injunction, I think it misunderstands the nature

of returning to the status quo. The case law -- and we cite this in our reply brief -- says to look at what was the last peaceable event prior to the action that results in the request for an injunction? And so here, we, nor anyone else in Utah, did not know what the language was until it appeared on the certification order from the Lieutenant Governor. And so to suggest that Courts are disempowered to unwind that back to the status quo ex ante I think just fundamentally misunderstands what the legal requirements are with respect to an injunction. This Court can certainly tell -- direct the Lieutenant Governor to not certify Amendment D, to take us back to the status quo before that occurred, and to direct the county -- to direct the Lieutenant Governor to direct the counties likewise.

And as was stated at the status conference on Monday, the counties have not printed the ballot -- the ballots are not printed. There are proofs -- you know, I don't know if it's Microsoft Word or -- whatever the, you know, electronic file is that has the -- has Amendment D on there right now, it requires -- and this is the last thing on the ballot in all -- the constitutional amendments are always the last thing on the ballot. So this -- and this is the last constitutional amendment. So it literally requires deleting back up to where Amendment C starts, is the relief that we're seeking.

And telling the -- ordering the Lieutenant Governor to do these steps is prohibitory. It's going back to the

ex ante status quo before the unlawful action occurred. And that would similarly be the case with the, you know, sort of backup relief that we think is less favorable to the public interest of doing this after the fact. There again, it would be returning us to the status quo ex ante.

Now, with respect to the other injunction factors. And defendants lead with these in their opposition sort of as the -- from their perspective, the reason the Court should not grant relief. All flow in plaintiff's direction. Clearly there is irreparable harm from a false and misleading description being placed on the ballot. And it is heightened when the state is at the same time refusing to comply with the requirement to provide constitutionally prescribed notice of what the actual text would do so that voters could try at least to follow the state process and learn what the text is without having to hunt on a difficult state-run website to understand the text. And so there's -- I don't think there can be any doubt that that's irreparable harm to confuse the voters and trick them into giving up their fundamental constitutional right.

The defendants say that this is all -- there's no time, that, you know, we're untimely. And it seems as though we're, from their view, both too late and too close to the election. And so I don't know what the kind of Goldilocks spot was in which to file it, but certainly the first injunction

motion was filed a day and a half after the language was posted on the Lieutenant Governor's website, the certified ballot language. And as we say in our second motion, there's a number of potential meanings we think to the two-month provision. We gave the defendants the opportunity to come into compliance with any of the plausible definitions, and that time has passed too. We filed that motion on a weekend, one day after the passage of that time. And so as we say, it's not as though we slept on our rights. We actually didn't sleep at all.

And so the -- at the status conference and in their brief, the defendants cite the In re Cook case. And I think that's our case, not their case, because the basis of the Court's decision was that the plaintiffs there failed to act for 28 days. And here, we acted -- I don't know how we could have acted any faster to bring these claims before the Court.

And certainly, the defendants do not -- the state does not have any irreparable harm in complying with the constitution. And so I can't see how there's irreparable harm. The Lieutenant Governor cited the cost of -- I don't know what the cost would be of pressing "delete" a couple lines to get rid of Amendment D. I don't think that would be -- I don't even think that would cost money, but I don't want to be too flippant. There might be some contractor or something involved there. But the idea of irreparable harm is that it's harm that money can't fix. And so it cannot be the case that the state

having to spend some money to come into compliance constitutes irreparable harm.

And with respect to the public interest, I can't imagine how the public interest is served by having a ballot language -- and asking them to vote on something that tells them the exact opposite of what would happen if they vote in favor of an amendment to their declaration of rights in their constitution.

And certainly, as we've stated at the status conference, you know, we've asked for two potential forms of relief. We wanted to make clear that even if, you know, the Court couldn't do what it's -- what we thank the Court for doing here and scheduling this very expedited hearing, that if it had to wait until after the ballots were printed, that we could still get relief. But I do believe the public interest is best served by not having on the ballot an amendment that violates multiple -- perhaps all of the relevant provisions in the constitution with respect to the election.

And I want to note, too, the Purcell doctrine from federal court. Not a single Utah case that we could find relied on the Purcell doctrine. One of the things about the Purcell doctrine is that it's federal courts not wanting to interfere on federalism grounds with how state elections are run. And of course that sort of concern is not relevant when a state court is ruling with respect to state elections.

But the fundamental concern in the Purcell doctrine is avoiding voter confusion. And certainly, our substantive claim and the one I think we've proven clearly is that the text of the amendment proves when you just line it up next to the ballot language -- is that having the ballot -- having Amendment D on the ballot is what would be confusing to the voters.

And any suggestion that it's going to cost $3 million for the state to -- if this Court grants us relief today -- to come into compliance, I just don't think reflects what was in the declaration from the Lieutenant Governor's staff member. That was if the ballots were to be ordered to be reprinted after all of them had been reprinted. And that's certainly not at issue here.

So I think that I have, in my head, covered the waterfall of what I wanted to say. If your Honor has questions, I would take them.

THE COURT: I don't have any questions for you now.

MR. GABER: Okay.

THE COURT: I may when you return.

MR. GABER: Come back. Thank you, your Honor.

THE COURT: All right.

MR. GREEN: I'll take a turn if that's all right.

THE COURT: It -- of course. All right. Mr. Green.

MR. GREEN: Thank you, your Honor. Excuse me.

Well, I suppose if there's one thing that Mr. Gaber and I can agree on with respect to this case, it's that all of us have lost a little bit of sleep because of it. So I certainly understand where he's coming from there.

If I could, I think I would like to start with where Mr. Gaber left off and talk for just a few moments about the equities of the case here. And at the risk of stating the obvious, neither Mr. Gaber nor the plaintiffs is the Lieutenant Governor in the state. None of them is a county clerk in the state. None of them have been tasked or charged with the responsibilities of making sure the election is carried out the way elections are supposed to be carried out the way they historically have been in Utah.

So rather than just taking my word for it, I mean, all I'm going to do is point the Court back to the declaration that was filed from Ms. Jackson on Monday. Paragraph 27, "The cost of reprinting ballots is estimated to cost up to 3 million." But here's the important part after that. "Reprinting may not even be possible given all of the other jurisdictions in the country who are also printing ballots at the same time. Additionally, there are costs associated with recertifying, reprogramming ballot, and reproofing." All of those things would have to happen if this Court were to enter an order today striking Amendment D from the ballot, every single one of them.

And the natural consequence of that leads back up to this first question. Is it even possible -- or, excuse me -- to the first statement up in this paragraph. Is it -- can they even be done logistically, the mechanics of it? Can it even happen? Maybe the Lieutenant Governor has additional information on that that they can offer when it's their turn. I just don't know. All I know is what's in this declaration that as far as I know hasn't been contested.

Paragraph 28, it goes beyond that, though, the equities. "Altering the ballot on the eve of the election jeopardizes the state's ability to meet the UOCAVA deadline and to otherwise run an orderly election that protects Utahns' right to vote." And then finally, on paragraph 29. "Amendment D isn't the only item on the ballot during a general presidential election year." This is one of the -- I mean, every time we have an election, it seems you have people saying it might be the most important election in history. But with respect to what's actually on the ballot this election, your Honor, there's a presidential office with no incumbent running, so the president's on the ballot, all the way down -- all of our statewide executive officers are on the ballot. As you know, there's a number of other ballot issues, not just Amendment D. So it's the host of all of these things that are fundamentally at flux -- in flux and fundamentally at risk if the Court pulls Amendment D from the ballot today.

So with respect to the balance of the equities, I just don't -- I don't understand plaintiffs to contest anything from Ms. Jackson's declaration. And I think that actually gets us to I guess one of the other answers to what I think I heard Mr. Gaber say, which is that there's no -- nothing -- no Purcell equivalent in this state. And I understand his reading of Cook to be outside that lane. I just think maybe we fundamentally either misunderstand each other or one of us is misreading Cook.

If I could, I tried to point the Court to the language during the status conference, but I guess I'll try again hear to make sure that the record is clear. This is Cook from the Utah Supreme Court, 882 P.2d 656. There's no question that part of what was going on in Cook in the Supreme Court's view was a question about the timeliness of the suit, but I don't think there's also any question if you look at what happens and what the Supreme Court said at the end of its opinion. This is, again, page 6 -- 659.

"The overriding importance of the public's interest in the integrity of the election process and the breadth of a court of equity's discretion." I mean, if that -- there's -- maybe it's just me that misunderstands the text, but I think that's affirmatively what Purcell was about, and Cook has of course affirmed the Utah Supreme Court case. So to say that there's no Utah Supreme Court precedent that governs the

equities with respect to election issues and what happens when the election is right around the corner I think is just fundamentally false. I mean, it's right here in front of us. This is the last sentence of that opinion.

"Because petitioners failed to act with reasonable diligence" -- again, part of what the Court said -- "in prosecuting this petition and because any court-ordered alteration to the voter information pamphlet could work a substantial hardship on the state, county clerks, and citizens who have cast absentee ballots, we decline to enjoin the dissemination of the pamphlets."

And this was, again, in a case where the Court found earlier in that opinion there might well be some merit to the plaintiff's claims. I think the upshot of Cook, your Honor, is that sometimes plaintiffs just lose in election cases when the election is right around the corner. The equities weigh so heavily in favor of making sure that the election itself can happen and can happen in a way that doesn't undermine voter confidence and voter integrity is the Supreme Court's thumb on the scale the same way that Purcell does it in the federal courts.

THE COURT: So both parties are asking the Court to weigh the equities and to protect the integrity of the election process.

MR. GREEN: Sure.

THE COURT: With regard to equity, isn't it fair to say that the defendants are somewhat responsible for this timeline and why we have this urgent proceeding today? And the reason I ask is obviously it's very important -- and the Court's not suggesting that the legislature doesn't have any right to move forward with a constitutional amendment. Of course it does.

MR. GREEN: Sure.

THE COURT: But shorten the timeline for the proceeding, created a statute specifically so that this could be put on the ballot, determined that some processes were not going to be followed, and then just recently certified the ballot language on September 3rd. And today, it's September 11th.

So given that, don't the defendants bear some responsibility for why this is a last-minute urgent hearing and why this Court now has to balance equities between both parties who are arguing that I need to protect the integrity of the election process?

MR. GREEN: Yeah. Yeah. I think -- I think the answer to that is maybe most relevant or most readily available. The exhibits we filed as part of our brief today, your Honor, I would point the Court first to Exhibit-A and then also to Exhibit-B where you have petitions from 28 individual citizens of the state of Utah and five groups, followed by an

additional call from another group here locally to the legislature to do something with respect to a constitutional amendment. So, you know, the legislature acted based on the time of all the surrounding circumstances. Right? As you know, the legislature can't move on a time. It's a body. It takes, you know, votes. It's a little bit of cat herding. So I don't -- if the question is should the legislature have moved any faster, I don't -- I guess we could talk about whether that's also even something that's technically possible or could have happened.

What I will say, I guess, is that with respect to how these proceedings in this case have played out, as your Honor knows, last week, we were talking about a summary judgment briefing schedule, and those are the days when we only had one motion we had to worry about and figure out the schedule for that. At the same time that was happening is when all this other information was coming out, the ballot summary was released and the Lieutenant Governor certified the ballots.

So I don't think it was -- necessarily could have been a surprise to them. During the course of all this back and forth, it could have been -- I don't think it was a huge stretch for plaintiffs to call us or to call the Court or call both of us and say, "Hey, this is happening. We're not sure what it means, but we might be doing something in response to it." And honestly, the way that -- based on the way the

declaration reads from Ms. Jackson and the way that the conference happened on Monday, there's a world I guess it's theoretically conceivable where we could have briefed this over the weekend and our status conference on Monday could have been like the hearing on the merits. And I'm not trying to get super ticky-tack or technical about this, but what I'm saying is everyone's a little bit crunched for time. When that happens, there's -- I'm not trying to certainly diminish the interest that plaintiffs are putting forward. What I am trying to say is that there are 1.73 million Utahns who expect an election to be run the way it's always been run and fairly. And the relief that plaintiffs are asking for today fundamentally throws that into jeopardy.

THE COURT: All right. Thank you.

MR. GREEN: If I could speak for just a few minutes about the redressability point, this question of what does -- what order can this Court -- if it were to issue an order, what is the scope of that order? We have not found -- and I realize, your Honor, that we are sort of briefing this at light speed and everyone's moving, you know, relatively quickly. We haven't found in our research -- I don't -- we don't read any of plaintiff's cases to stand for the proposition that the Court can issue injunctive relief with respect to nonparties.

And to the extent the Court today were to issue an order pulling Amendment D off the ballot and all this sort of

recertification and reprinting and reprogramming that has to happen, I think the inescapable conclusion is that those things would be carried out not by the Lieutenant Governor, but by the county clerks, by the election officials in the county.

And I guess I understand why plaintiffs chose not to name all 29 of them. You can imagine what the Court would look like today if we had -- you know, from -- from Salt Lake City all the way up to Cache and, you know, down to Washington County would be even a little hairier than it is now. So as a sort of ease in way of getting to their preferred outcome, I understand it. But every case that we've seen from the Utah Supreme Court -- we've cited them in our brief for you -- says it is a fundamental error of jurisdiction for the Court to issue injunctive relief that reaches outside the named parties in the cases -- the named parties in the case.

THE COURT: So I have a couple statutes.

MR. GREEN: Yeah. Which I don't have in front of me, so yeah.

THE COURT: And I know this was -- I've actually got the language if you want. I printed it if you want to look at the actual language.

UNKNOWN SPEAKER: Can you shut the gate?

THE COURT: So for those of you who are appearing via WebEx, will you just make sure that you all stay on mute? Thank you. I want to make sure you understand that if you're

not on mute, you're interrupting a court proceeding. Thank you.

All right. So Utah Code 20A-1-403 (1) --

MR. GREEN: I'm sorry. Do you have a copy there? I don't --

THE COURT: I don't, but --

MR. GREEN: I'm happy -- may I approach?

THE COURT: Yes. You can approach.

MR. GREEN: Whatever works for you best, your Honor. I just -- I don't have it in front of me.

THE COURT: I will give all of these to you because I'm going to ask you a question about them. But here's my question. Let me set it up.

MR. GREEN: Okay.

THE COURT: So subpart (1) of 403 states "The election officer shall, without delay, correct any errors in ballots that the election officer discovers or that are brought to the election officer's attention if those errors can be corrected without interfering with the timely distribution of the ballots."

20A-1-102 (23) defines election officers to include both the Lieutenant Governor and also county clerks. And then Section 20A-1-105 provides the duties with regard to the Lieutenant Governor. And it states in here that the Lieutenant Governor can issue an order requiring that the clerks comply

with any violation and that that order is given full force of law.

So these are the statutes that I looked at to address that redressability issue. If you want to look at these. I don't know if you're familiar with them.

MR. GREEN: I don't know -- if they're not cited in plaintiff's -- may I approach? I'm sorry.

THE COURT: Yes. Absolutely. And I highlighted some of the sections if you want to take a second.

MR. GREEN: Okay. Great. Or we could -- you know, I'm happy to take a minute to read it when we're finished so we can talk about it then, if that --

THE COURT: However you would like to proceed. Given that we're on this topic, if you want to take a few minutes to look at that. My -- I guess my question for you is does that address the redressability issue? Because it appears, based on the statute, that the Lieutenant Governor does have the authority to request or even order that county clerks come into compliance if there's an error on the ballot.

MR. GREEN: Yeah. So I'll take a look. Maybe we could come back to this later on. At the risk of, you know, sort of winging it and giving you an incomplete answer at the time.

THE COURT: I know. Take a second, and then I'll let you address it.

MR. GREEN: And I will say -- I mean, as we cited in our brief, your Honor, there's also a statute that says the Lieutenant Governor can't perform the duties of the county clerks, right?

THE COURT: Right.

MR. GREEN: So to the extent there is an order from this Court -- I think this is a question about the scope of the Court's injunctive relief, as I understand it. Right? And what would that mean? I'm sure if the Court were to tell the Lieutenant Governor to do something, I assume the Lieutenant Governor is a good faith officer. She would of course, you know, do the order. But whether that actually would have the extent of binding nonparties, I think that's really the fundamental question that we're -- that we're worried about and we wanted to flag for the Court.

THE COURT: Okay.

MR. GREEN: And what these -- whether these -- and, again, I'll look through these. I guess we can talk about those a little bit later.

THE COURT: Okay.

MR. GREEN: With --

THE COURT: And I was just going to add one more thing.

MR. GREEN: Oh, sure.

THE COURT: It appears to me that under the statute,

the county clerks may have an independent obligation to comply and to address any errors that may be on the ballot as well. At least that's what the statute may say.

MR. GREEN: Okay. So I'll take a look at that.

THE COURT: Okay.

MR. GREEN: But whether, again, that is the effect of this Court's -- of an order from this Court directing them to do something or, you know, something that they've just become aware of or received notice of, I think those are -- that might be a distinction. But, again, I'll -- I would just take a look.

THE COURT: Okay.

MR. GREEN: With respect to the -- to the merits questions, your Honor, if we could take just a few minutes and talk about those.

One of the things that I think I heard Mr. Gaber say, which actually gets to the heart of our argument here -- I'm going to start with the publication requirement if I could, if that's all right.

As I heard Mr. Gaber arguing it, he said there was a requirement in the constitution that the legislature shall publish it, is what I think I heard him say. Maybe I'm wrong about that. But if that's what he said, I don't think -- that's actually not what the constitution says. The constitution says the legislature shall cause it to be

published. So there is an operative verb in there that was missing from that particular formulation. And as we understand it, that makes the legislature the "but for" cause of whatever ends up happening. And in this case, that thing being the publication of the text of the amendments.

And in our view, your Honor, that's exactly what the legislature did. When it had its special session in August, if you look at the very last line of the Senate Joint Resolution, that's where the legislature said -- directed the Lieutenant Governor to publish the text of the amendment as provided by law. So that's step one. The legislature did exactly what it was supposed to do. It was a "but for" cause of putting things in motion, the publication that happened after that.

There was nothing else the legislature could have at that point or should have done. It did everything that it was supposed to do. I think that's step one.

Step two --

THE COURT: Where was it published?

MR. GREEN: It was published -- they directed -- shall cause it to be published. So that's -- right?

THE COURT: Right. And so the legislature directed the Lieutenant Governor to publish it?

MR. GREEN: The Lieutenant Governor to publish it. Right.

THE COURT: Where did she publish it?

MR. GREEN: So on -- it happened on -- the Lieutenant Governor happened on Monday. There was a publication. The Lieutenant Governor put it up. I believe it's on her website.

THE COURT: Okay.

MR. GREEN: But independent from all of that, just related to the news coverage, the torrent of news coverage that we've cited to this Court and put in Exhibit-E of our brief, the text of the amendment actually was picked up by a number of different articles. And not just the text itself, but, as Mr. Gaber I think mentioned, there are hyperlinks to it.

And so the idea that -- if we take a step back and consider what the purpose of the publication requirement is, to make sure that voters are getting as much information as they can as readily as they can so that they can make an informed decision when they cast their ballots, I don't -- based on the declarations that we've submitted I think as -- I think -- I believe they're Exhibit-G to our filing today -- there are a number of citizens around the state who have said now to this Court -- I think the evidence is unrebutted -- we don't get our information about elections, candidates, issues -- those don't come from hard copy newspapers. They come now from online sources.

As the Court knows, this is of course the information age. Information has never been more readily available and more easily sent out to the public. The ability to disseminate

information out is I think higher than it's ever been before. So when the legislature caused it to be published, the Lieutenant Governor did that. And then, in fact, following after that, the news articles that we've cited to the Court picked it all up and provided the information to the voters. And now we have undisputed and unrebutted evidence from a number of voters from St. George up to Morgan who said to you, "Yes, we were able to find it. And yes, we read it. And yes, we understand what it means."

THE COURT: Given this Court's obligations with regard to constitutional interpretation, can the Court interpret that provision of the constitution that requires publication in a newspaper to be something other than publication in a newspaper?

MR. GREEN: Something -- I don't think something other than. It just means what -- what does it mean? How do you interpret it? Right? It's the same way that we're talking about -- it's the classic interpretive question that's been at the Supreme Court for a number of decades now, right?

THE COURT: Right.

MR. GREEN: What does the right to keep and bear arms mean? This has come up a number of times in a Second Amendment context. And we quoted to the Court in our brief some of the opinions from -- Justice Scalia I think was the author of those opinions -- the Heller case, where he said some people have

made the argument that that must mean that it only protects arms as they existed in 1791, but he called that argument bordering on the frivolous.

So if we're talking about a newspaper, a way of disseminating information, I don't -- I'd have to check the mechanics. I don't know, your Honor. If there were -- the hypothetical example of where someone were to buy an ad and put it in the Salt Lake Tribune as an example, is there a printed copy of that that I would get as the benefit of my bargain as the purchaser of an ad. If I wanted to buy something -- you know, an ad in the Deseret News, does it go out in printed hard copy or does it go online?

And so to the extent we're talking about newspapers as a mechanism for distributing information, the -- I don't think there's any real serious dispute that those -- that the online context is now firmly and definitively established as part of what it means to be a newspaper. So...

THE COURT: Would it require a constitutional amendment to change that, to make it clear that it's really just publication somewhere through some medium that is required?

MR. GREEN: I don't think so, your Honor, anymore than it would require an amendment to -- an amendment to the Second Amendment to say that, you know, a handgun is a protected arm because there were no -- you know, the absence of

handguns in 1791. Everyone was using muskets. For the same reason, I don't think so.

THE COURT: Okay. So plaintiffs cite to the 1948 Utah Supreme Court decision in Snow vs. Keddington to stand for the proposition that -- and this is the quote. "Under our constitutional requirements, notice must be carried in the newspaper."

I know -- I read through the opposition, and, I mean, it's clear that defendants are making an argument that the Court should consider substantial compliance because of what you're arguing, that this is out there. Right? It's been disseminated. It's been published in many different mediums. Is there a basis in Utah law for the Court to apply substantial compliance in this case?

MR. GREEN: So if I could just clarify the question on one point. I want to make sure -- we certainly are making the substantial compliance argument, but we are also making the actual compliance argument --

THE COURT: Okay.

MR. GREEN: -- based on our understanding of, again, this "but for" cause language, the legislature shall cause to be published. The legislature, in fact, complied with that requirement in August, well before any -- whatever the Court wants to consider as a two-month period. The special session was in August, and that's when the actual compliance occurred,

was on that day, when it caused to be -- when it said to the Lieutenant Governor -- when it directed the Lieutenant Governor in the last sentence of the bill, "Lieutenant Governor, you shall publish it according to law."

THE COURT: Okay.

MR. GREEN: So our position is not just substantial compliance, but also compliance -- but actual compliance.

THE COURT: Actual compliance.

MR. GREEN: Yeah.

THE COURT: Okay. Thank you.

MR. GREEN: But -- yes. But certainly, with respect to substantial compliance, I mean -- so our view, I guess -- if I could find the right case. I think this is the Nowers case as well, your Honor, that tells us to look at what's going on here with respect to -- if I could find the language. This is not, of course, like a directly -- the newspaper case, but it gets to the point of substantial compliance. "The ballot together with the immediately surrounding circumstances of the election must be such that a reasonably intelligent voter knows what the question is and where he must mark his ballot to indicate approval or disapproval."

So this notion of, again, dissemination and publication being a way to make sure voters know what they're voting on and can actually exercise their franchise intelligently and appropriately, however they deem -- whatever

they deem that to be, I think that's exactly what's happened here. And certainly with respect to all the news articles that we cited to the Court.

THE COURT: All right. Thank you.

MR. GREEN: Finally, I guess with respect to this notion of strengthen and clarify, what I understand to be plaintiff's disagreement with the use of those two verbs. I don't -- I think there's a couple of points that I want to make sure I make today before I sit down on those issues.

The question I don't think, your Honor, is whether I think the ballot language is misleading or whether the Court thinks the ballot language is misleading or whether Mr. Gaber think it is ballot language is misleading. I think the question is: Does the ballot summary as it exists violate any of the state constitutional provisions? I think that's really the key question that we have to look at here.

And to the extent -- this, I think, is again where Nowers is sort of spot on and directly on point. We're looking at all the surrounding circumstances of the election. Can a reasonably intelligent voter know what the question is and what he must do to indicate approval or disapproval? That's this notion -- almost a totality of the circumstances situation when we're talking about what does a voter have to consider?

And I think when the Court looks at what's happening with respect to a ballot summary itself, the first place we go

back to, again, is Exhibit-A, Exhibit-B. There was a call from Utah citizens for the legislature to do something. Those -- those came not just once, but twice. There were a number of calls for the legislature to do something. So it did something. And if you look at the specific text -- or, excuse me. If you look at the -- if you look at the language that's used in Exhibit-A and B in those articles, those -- people who call for it describe it as a request to strengthen and to clarify the initiative process.

And I think our exhibits that we've submitted as Exhibit- -- as Exhibit-G from the voters around the state are additional evidence that I think is unrebutted, that the language itself, both the language of the amendment and the language of the ballot summary, voters have found it to be not confusing and not misleading.

So there's -- there's that evidence, certainly, that I hope the Court would consider and weigh when it's deciding whether to deprive the supporters of Amendment D of their right to exercise their vote in favor of it.

THE COURT: May I ask?

MR. GREEN: Sure.

THE COURT: Is it accurate?

MR. GREEN: Is it accurate? Yes. And let me give you -- can I give the Court an example of why?

THE COURT: Yeah.

MR. GREEN: I think -- actually, I don't think the Court has to look any farther than this case and the underlying facts of this case to understand why.

If we go back to Proposition 4 itself -- let's go all the way back to the front of the train. Proposition 4 passed by about 6,000 votes. It was rejected in 25 of 29 counties. When it passed in the form it passed in, there were significant, significant constitutional problems and concerns. And I think we know that both from the face of the text itself, but more importantly, we know that by the history of what happened after it passed. Better Boundaries, the prime initiative sponsor, the ones most in favor of it, spent 15 months after the ballot -- after Proposition 4 passed negotiating with the legislature over amendments to it.

And I think one reason they did that was because when you have 500,000 people in the state of Utah voting against Proposition 4 and the proposition carried so many significant constitutional problems, it takes almost no imagination at all to think that one of those 500,000 opponents would have filed a lawsuit challenging Proposition 4 in its then-form and gotten the entire thing struck down.

So what the legislature did in response was not to wait around and see if some -- one of those opponents would have filed a lawsuit against Proposition 4, but actually worked hand in hand for months -- for more than a year, your Honor --

with the prime sponsors to make sure that the intent of that -- the overarching goal of Proposition 4 stayed in Utah law. And it turned out that they got to that point. And we know that because when SB 200, which is the amendment to Proposition 4, when that passed, Better Boundaries was at the senate hearing applauding the -- applauding SB 200, speaking in favor of it, saying what a great compromise bill it was, and was an overarching opponent of SB 200.

So given the choice between having a situation where a proposition -- and I think -- actually, I would point the Court to our Exhibit-B2 for more information about this. In the ordinary course of representing democracy, legislation and the legislative process is messy, there's tussles, there's back and forth. But after all of that compromise, there is chances to point out along the way, you know, "Hey, Senator," or "Hey, Representative. Your bill has this particular problem. Have you thought about this? What about this as a way to compromise and fix things?" Right? That's just the way legislation works.

It's inherent in the nature of direct democracy and these initiatives. That doesn't happen. The language is fixed. It's set. It is what it is. And then it's either up or down. And so what the legislature did by fixing the constitutional problems in Proposition 4 to maintain what the voters wanted through SB 200, as Better Boundaries itself said,

I don't think there's any way to describe that process other than as a way of strengthening the people's initiative rights, to make sure that the back and forth that happens during representative democracy that can't happen during -- during direct democracy happens afterward.

And to the extent we're talking about the -- there was some arguments in the brief about budgetary concerns. Well, your Honor, I don't -- I don't think the legislature is at all apologetic. The legislature has a constitutional obligation to balance the budget. And when information or bills are passed that affect that, it has to consider it. There's just -- there's simply no way around it.

So of course the legislature would make sure that it reserves to itself the ability to respond to any sort of direct democracy and initiative in ways that account for those important budgetary concerns that citizens in their day-to-day course and in whatever might happen with direct democracy don't necessarily think about, but also do so in a way that preserves -- again, as the contingent laws say -- sort of the essence of what's happening.

So I think, yes, it does strengthen it. It does clarify it. It takes us back to the point -- or makes the point that this Court's order -- its initial order on the motions to dismiss for the Grant vs. Herbert case. Right? This is the way everyone had understood this process to operate

in Utah.

Certainly the -- certainly we acknowledge the Supreme Court's opinion. There's a number of -- in this case, there's certainly some important questions we'll still be litigating and I'm sure having future discussions about here. But in response to calls from Utah citizens, Exhibit-A, Exhibit-B, the legislature acted the way they requested to strengthen and clarify those points. And so to describe it that way, the way the people themselves described it, I think is accurate. Yes.

THE COURT: But it omits something that's pretty important, and that's the fact that it relieves the legislature of having to establish a compelling state interest and make any amendments through narrowly tailored means. So it basically abrogates the Supreme Court's recent ruling in this case. And the summary does not explain that. And so does that omission make it inaccurate?

MR. GREEN: Your Honor, I don't think it does. I understand plaintiffs are insistent that it would be inaccurate, but for some word that it contains that it would describe it as eliminating something. I just don't think there is any obligation -- that's a -- that's a view certainly of a legal consequence. That's their view of what happens. But again, our view -- and we're going to talk about this more I think in our summary judgment briefing in this case.

THE COURT: Right.

MR. GREEN: There are a number of things still left open after the -- after the Supreme Court's opinion in this case. And so in response, again, to calls from citizens to strengthen and clarify it, no, I don't think it's inaccurate.

THE COURT: So you don't agree that this gives the legislature a little bit more power with regard to citizen initiatives and -- and weakens the citizens' ability to successfully move forward with an initiative?

MR. GREEN: I'm sorry to -- I don't think it does change the initiatives -- or the citizens' ability to move forward with it. I think it's the same --

THE COURT: Let me restate it. Does it increase the legislature's authority with regard to citizen initiatives? Let's just start there.

MR. GREEN: Does it increase the legislature's authority?

THE COURT: Does it give the legislature more authority with regard to laws that are successfully passed by citizen initiative?

MR. GREEN: No. I don't think it does, your Honor.

THE COURT: Okay.

MR. GREEN: What it does is -- what it does, I think, is what the ballot summary description says, which is strengthens and clarifies the way that the state's historical representative democracy path and direct democracy path were

always understood to operate.

THE COURT: So subpart (4) states "Notwithstanding any other provision of this constitution, the people's exercise of their legislative power as provided in Subsection (2) does not limit or preclude the exercise of legislative power."

MR. GREEN: Correct. Right.

THE COURT: So you're saying that doesn't give the legislature increased power over laws passed by citizen initiative?

MR. GREEN: I don't -- increased power, no, I don't think so, your Honor. It's the same --

THE COURT: Does it change? Does it change in any way the legislative -- legislature's authority with regard to laws that are successfully passed by citizen initiative?

MR. GREEN: Does it change it? I --

THE COURT: Post the decision that was recently issued.

MR. GREEN: Post the decision that was issued. Well, I think what it does is restate what I think everyone in this state, including this Court, understood the law to be, Grant vs. Herbert and everything that preceded it, with respect to how, again, the legislature and the citizens exercise their shared legislative power.

THE COURT: Okay. Thank you.

MR. GREEN: All right. Sorry. Any other questions

from the Court?

THE COURT: No. And I disrupted you, so please proceed with your argument.

MR. GREEN: That's fine. I think I'm about finished here, your Honor, other than I guess to ask the Court one more time just to consider the realities of the election calendar, the realities of the Lieutenant Governor and the county clerks with respect to ballot printing. I think -- and go back again to Cook, the Cook opinion. Cook has already effectively said to this Court the equities weigh so heavily in favor of making sure the election can go off without a hitch that, as we said in our brief, I think that by alone -- that by itself could be dispositive in this case, without any need to reach any of the merits questions.

THE COURT: Okay. Thank you very much.

MR. SORENSON: Good afternoon, your Honor. And thank you for your time on this case.

The Lieutenant Governor takes no position on the merits of the claims in the proposed supplemental complaint or on the likelihood of their success in this preliminary injunction motion. However, if the Court is inclined to grant some form of injunctive relief, then the LG would like to heard on the scope of that relief. And I'm happy to present those thoughts now as you're considering everything at once. Is that fair?

THE COURT: I think it would be really helpful.

MR. SORENSON: Okay. On the scope of the relief, if the Court determines that Amendment D should not be put before the voters or is inclined to grant some form of injunctive relief, the Lieutenant Governor's argument as the chief elections officer and preference as she's charged with administering the election would be to allow Amendment D on the ballot and then not count any votes toward it.

There are repercussions for any remedy, as we discussed on Monday. The potential repercussions for ordering it off the ballot altogether with the risk that the Utah Supreme Court might disagree with this Court and orders a reprinting of the ballots in a different way creates repercussions in terms of costs and time associated with reprogramming, reproofing, reprinting, and potentially remailing, which leads to other costs associated with reprinting, which is potential county and voter confusion, counties ending up with potentially two sets of ballots, making sure they're sending out the right ones. What if they send out ballots without Amendment D and then the Supreme Court orders ballots to go out with Amendment D? There's a real risk of voter confusion.

And though there may still be repercussions with allowing Amendment D on the ballot and then not counting it, it can happen. And the potential for voter confusion might still

be there, but it is less likely than in that first scenario. And it leaves slightly more time for appeal. And it is an alternative form of relief that plaintiffs requested. And that form of relief would also eliminate the need for a bond.

I wanted to be clear, because I don't think I was on Monday, about what the bond is there to do. And as Rule 65A says, "The Court shall issue a bond unless it appears that none of the parties will incur or suffer costs, attorney fees, or damage as the result of any wrongful order or injunction."

So that's what the Lieutenant Governor is trying to protect against, is issuing -- having an injunction go out that turns out to be wrongful and then reprinting ballots to the cost of potentially $3 million. So like I said, if the Court's inclined to grant some sort of injunctive relief, allowing Amendment D on the ballot and then not counting it would incur some perhaps de minimis cost, but it would eliminate the need for a bond.

Outside the scope of the relief, I just wanted to clarify the Lieutenant Governor's role in publication, which is governed by statute, which is 20A-7-103, which says "The Lieutenant Governor shall, not more than 60 days or less than 14 days" -- so there's this window -- "14 days before the date of the election, publish the full text of the amendment." And she complied with that responsibility under the statute.

Does the Court have any questions for the Lieutenant

Governor?

THE COURT: What will be available for voters between now and the day they show up to vote that will explain Amendment D? What will be provided?

MR. SORENSON: So to start with the statute, which I just cited, which is 20A-7-103, it directs publication of the amendment. And the Lieutenant Governor also publishes other ballot information. So -- and that goes up on her website. With respect to Amendment D, which I think is governed by 103.1 -- I don't have that one in front of me, but there is information published relating to arguments for and against that are drafted by sponsors of it, opponents of it, or their designees.

And if I can, since we're moving at lightning speed, just confer quickly with my client to see if there's anything else --

THE COURT: Of course.

MR. SORENSON: There's also voter information pamphlets that are published as well as signs in polling places, which -- the signs in the polling places contain the next of the amendment also.

THE COURT: When you say "published," "the voter pamphlets will be published," what does that mean? Where will they be published?

MR. SORENSON: They're published online.

THE COURT: Okay.

MR. SORENSON: I feel like my bird whispering in my ear.

THE COURT: That's okay. While you're going back, when will they be available?

MR. SORENSON: How are they published and when will they be available?

They're published online, not in hard form. And they're published as they're -- as information is received, which happens up to 14 days before the election. Amendment D has been published on the website, but not -- the voter information pamphlet is updated as more information is received.

THE COURT: So when the voter walks in to the polling location, what will they receive there?

MR. SORENSON: They receive a ballot.

UNKNOWN SPEAKER: A sample ballot.

MR. SORENSON: A sample ballot. Correct. And I don't think there's anything else. No.

THE COURT: And is the voter pamphlet available at the voting location?

MR. SORENSON: So the voter pamphlet is published only in electronic form. Not in hard form. So the answer to that is there's no hard form at the polling place.

THE COURT: So the only thing that the voters will

have when they go in to vote is the ballot language that we've been discussing that's Amendment D?

MR. SORENSON: Right. The text of the amendment is published in polling places on signs, but not on the ballot.

THE COURT: Okay. So you -- it's -- there -- it's going to be there available for voters to read?

MR. SORENSON: The text of the amendment is published in polling places on signs in the polling place.

UNKNOWN SPEAKER: Yes, and it should include strikeout language if there's any (inaudible).

MR. GREEN: The full text. Yes, your Honor.

MR. SORENSON: The full text.

MR. GREEN: That's right. We have the statutory cite for that somewhere in our brief. I could try to find it real quickly if it would be helpful. But the full text of the amendment language is published -- is available and printed and open at the voting places.

THE COURT: Okay. Anything else that we need to --

MR. SORENSON: I just want to make sure we're clear on our preferred form of injunctive relief if there is to be any. But other than that, I don't have anything else, your Honor.

THE COURT: Okay. I handed Mr. Green a stack of statutes that discusses the Lieutenant Governor's authority as the election officer. Can -- maybe you can provide some

additional information with regard to her relationship and interaction with county clerks.

MR. SORENSON: Sure. The Lieutenant Governor's relationship with clerks and election officers is governed by first 67-1a-2 (2), also 20A-1-105, which I think is the real operative provision. That provision has ten subparts, which the Court can read -- yes, "The Lieutenant Governor shall enforce compliance by election officers with all legal requirements relating to elections," and the Lieutenant Governor has a number of tools to compel compliance.

So, yes, the Lieutenant Governor will certainly abide by any order from this Court and then run the election according to law as it's provided in (1)(c) of Section 105.

THE COURT: Great. Thank you.

All right, Mr. Gaber.

MR. GABER: Thank you, your Honor. A few points in rebuttal. And I apologize, but they won't be in the most organized presentation.

I wanted to start with the In re Cook case and contrast it to the circumstances of this case. And this is by reference to the dates in the Supreme Court's decision in In re Cook describing what happened and why it would in that case have caused an interference with the administration of the election.

So on August 31st, 1994, the voter information

pamphlet was released, the text of it would be. On September 5th, 1994, the petitioner in the case sent a letter to the Lieutenant Governor suggesting that the text of the pamphlet was misleading. On September 16th, 1994, printing of the pamphlets and the ballots began. And on September 28th, 1994, petitioners filed their lawsuit challenging the misleading language.

And so what the Supreme Court was saying in that case is that trying to stop the pamphlet printing after it had already happened, you know, waiting until that happened and then filing the lawsuit, was the reason why equity in that case would not allow for the Court to order the pamphlets to be reprinted and resent to voters. Of course in this case, we are all here right now because of the status conference on Monday. Counsel told the Court that having this hearing now today and granting relief today would be the time at which the Lieutenant Governor and the county clerks could implement the Court's order and not interfere with the printing of the ballots.

And so the extent In re Cook has --

UNKNOWN SPEAKER: I'm listening.

THE COURT: Will you please make sure you're on mute? Everyone's who appearing?

UNKNOWN SPEAKER: You're welcome.

THE COURT: Sorry about that. Please continue.

MR. GABER: To the extent -- you know, obviously

Purcell arose in the early 2000s, I want to say, so I don't think the Utah Supreme Court was thinking about it at the time. But certainly, I think Mr. Green is right that there are elements of equity discussed in terms of the conduct of administration of elections in In re Cook. But none of those circumstances are present here. And as I said, we're here today because defendant said this is when the Court needed to have this hearing (inaudible) in order to get relief.

And so -- and at -- I would note, at the status conference, Mr. Green I believe took the position that it would be in the voters' best interest not to have it on the ballot because there would be -- you know, we would still be in potential litigation over whether it was lawful. There would be some voters who might think, "Well, I'm not even going vote on it now." Other voters would think, "I have to." And so that would cause some problems. This was Mr. Green's position.

And so I sense some tension with what the Lieutenant Governor's counsel said and what Mr. Green had said there, but it's plaintiff's position that the public interest is best served by addressing this issue now so that ballots don't have unlawful language on them.

With respect to whether or not the Court can issue an injunction that binds the clerks, I wanted to -- the Court -- the statutes that we cited in our reply brief that your Honor mentioned in argument here, but I also wanted to direct the

Court to Utah Code 67-1a-2 (2)(b), which says that "As the chief election officer, the Lieutenant Governor shall oversee all elections and functions relating to elections in the state; shall in accordance with Section 20A-1-105," which is I think what your Honor cited, "take action to enforce compliance by an election officer with legal requirements relating to elections."

And so I think that covers it. But more broadly, Rule 65A addresses this issue. Rule 65A(d) says that injunctions -- preliminary injunctions, injunctions that Courts issue are binding on the parties and they're binding on anyone acting in concert with the parties who receive notice of the injunction. And so the -- as the, you know, direct reports to the Lieutenant Governor under law, the county clerks are acting in concert with the Lieutenant Governor. And so long as the Court directs the Lieutenant Governor to provide notice of the injunction to the county clerks, they will be bound by it independently under Rule 65A.

And so I think that kind of -- on top of all the statutes, that resolves that question. And certainly, as I said, with much less robust supervisory statutes in states across the country, Courts have never had a problem directing changes to the ballots and injunctions in election law cases.

With respect to the -- some of the publication arguments, Mr. Green noted that there were unrebutted

declarations filed this morning. Of course we have not really had an -- I haven't had a chance to read them yet, let alone identify witnesses to rebut them. I think it probably goes without saying, though, that there are Utahns -- perhaps, in particular, elderly Utahns -- who do not have access to the internet or may not be as facile with using it and identifying where they could find the notice of the amendment's text on the PMN website or on the Lieutenant Governor's website, or, for that matter, as I'm hearing now, find the voter pamphlet, which will no longer be printed and sent to them as it had been in the past because apparently the legislature defunded that.

And so I don't think it takes a lot of evidence to know that this entire move online in violation of the constitution is not to the benefit of all -- of all Utahns. And they will not have access to it.

I don't quite understand the legislature's cause argument, the "but for" cause argument. The legislature has not caused the amendment to be published in at least one newspaper in every county of the state for two months preceding the election. That hasn't happened. To the extent their argument is that their obligation stops at telling the Lieutenant Governor that she needs to publish it, she hasn't. Now, I'm not -- the Lieutenant Governor is following the statute that the legislature passed. I think obviously all state officers have an obligation to comply with the

constitution. But inherent in the word "cause" is an element of making sure that it happens. I mean, that is actually the definition of the word "cause."

And so to the extent the Lieutenant Governor has not published in accordance with law, which is the language from SJR 401 -- I'm not entirely sure that's the right number -- it hasn't happened in accordance with law. And maybe it's happened in accordance with a statute, but it's not happened in accordance with the constitution, which is the most important law. And so I don't really quite even understand the argument that they have caused it to -- they've caused something to happen that they admit hasn't happened.

And to the extent that the argument is that, well, the legislature wrote the text and -- in a joint resolution and then approved that by a two-thirds vote, that that somehow constitutes publication, that would make the publication clause in Article 23 Section 1 entirely superfluous, because of course the amendment had to have been written down and adopted by the legislature. Otherwise, it wouldn't have -- it wouldn't have happened. That -- in 18 -- in 1900 in -- or 1901 when the first amendments happened, they weren't as -- you know, the internet didn't exist, but they were written down on paper and existed in the -- in the records of the legislature. And that didn't constitute publication.

And in any event, if I'm wrong about all of this and

somehow the legislature is -- has satisfied its obligation, the Lieutenant Governor is a defendant in this case, and the constitution requires the publication to happen in the newspapers for that period of two months.

I would say that the Snow court, the Utah Supreme Court in Snow, said that the newspaper publication was the critical publication, that it was the most important one, and it is what would guarantee that adequate notice happened. And so -- And, in fact, what it was saying in that case is that -- the fact that the poster is wrong in the voting booth, that's -- it's like -- excused that because the publication happened in the newspaper.

What I hear from defendants is that, well, because publication will happen in the voting/polling station, that will excuse the failure to publish it in the newspapers. That inverts Snow upside down and is the exact opposite of its holding.

More to the point, Utah is perhaps 90 percent a vote by mail state, as directed by the statutes of this state. And so certainly I don't think that posting the text of the amendment in polling stations is somehow going to ameliorate the failure to publish it in the newspapers for those voters, the 90 percent of Utahns, who, as your Honor learned in the quality, are only going to see the ballot language and nothing else unless they independently go out and try to go through

these websites and find it there. And so none of -- none of the in-person posting that happens on election day I think constitutes substantial compliance, certainly. And this state doesn't even have that rule. It has a mandatory constitutional compliance rule.

With respect to your Honor's question to Mr. Green about whether the amendment was accurate, I didn't -- I don't quite understand the relevance of the negotiations between Better Boundaries and SB 200. Of course it's our position that there were not constitutional violations in SB 200 that wouldn't have struck down the whole law. If there were, there was a severability clause in Proposition 4. And of course negotiations were happening with a super majority that was intent on repealing the law and the -- I think there was also reference that SB 200 left intact the intent of it. Of course we allege that there's a partisan gerrymander as a result of the repealing of that.

I don't want to spend -- I don't think -- that's all sort of a sideshow. We'll get to that when we have our summary judgment argument. But I didn't hear an answer as to why the ballot language -- and in particular, that last line about changing state law to establish requirements that the intent of the voters would be followed if voters voted in favor of this amendment, I didn't hear an answer to that. And I think that that's a critical point. It renders it entirely false. Not

just misleading. False.

I also want to address the Lieutenant Governor's last few points that were raised. Obviously we've stated our position that the -- and I think it was the position of the legislature's counsel on Monday -- that the public interest favors addressing this prior to the printing of ballots. There was reference to the appellate review that could happen perhaps if the relief were later. I would -- you know, obviously the Utah Supreme Court is available for emergency appellate relief if defendant -- if plaintiffs prevail and defendants seek it, or if defendants prevail and plaintiffs seek it. Utah Rule of Appellate Procedure 2 allows for the Court to waive all sorts of procedural rules that would otherwise apply in emergency circumstances. And so parties are -- you know, they can seek emergency relief from the Supreme Court if the Court issues relief today. And that can resolve the appellate issue.

I don't think that that is the overriding issue that the Court should adjudicate in the weighing of the factors. The Court has to look at the law and the equities here and determine what the right course is. And our position is that the best course is to ensure that ballots with confusing and misleading and inaccurate language that, as the Court elicited, would be the only thing that perhaps 90 percent or more of Utahns would ever see regarding this amendment do not get put on the ballot.

And I think -- unless your Honor has any questions, that's all I wanted to say.

THE COURT: I have no other questions.

MR. GABER: Thank you.

THE COURT: Thank you.

Mr. Green, did you want to address any of those statutes? If you do, I'll give you the opportunity to. If not --

MR. GREEN: You know, your Honor, they -- excuse me. I'll come to the podium. They -- on a very quick review, they may well get you there. They may -- they may answer our concern. I just don't know if it would be helpful to the Court. We could submit some supplemental briefing on this if it's going to be dispositive to whatever the Court's going to do and the time allows for it.

THE COURT: Okay. Thank you.

All right. Well, counsel, thank you very much for both the expedited briefing and oral argument. I'll take it under advisement. I'll issue a ruling tomorrow morning. I know that you need that. Is that --

MR. GREEN: We need it today.

THE COURT: You do need it today?

MR. GREEN: Yeah. We've already held off with the county clerks. They're going to -- they're going to send the ballots to the vendors and the printers, and then there will be

actual harm to the state.

THE COURT: Okay. So when you say today, before midnight? Will you actually read it?

UNKNOWN SPEAKER: I will. But the county clerks are all waiting for an e-mail from me. I told them at some point tonight, I would e-mail them if your Honor had made a decision.

THE COURT: Okay. I guess my practical question for you is, is there really going to be any difference if it's tonight or tomorrow morning at 8:00 a.m.?

UNKNOWN SPEAKER: I do think some of them would stay late to do it. I mean, it's up to your Honor. Our preference is tonight.

THE COURT: Okay. I'll do my best to issue something tonight. One of the limitations that I have is I don't have clerks who stay with me around the clock. I will be here, but I won't have any clerks. So I will see what I can do. Actually, here's one thing that you can do. And maybe let me ask my clerk.

Can you give me everybody's e-mail? Do you have access to it? Perhaps what I could do is an informal publication of the ruling by e-mail to everyone so that you'll have that information. And then we can officially issue it in the case tomorrow morning.

UNKNOWN SPEAKER: Yes. Thank you.

MR. GREEN: Yes. Thank you, your Honor. That's very

helpful.

THE COURT: Okay.

UNKNOWN SPEAKER: I think there were a handful of e-mails to your chambers -- or to your team today with the supplemental filings. And I believe that includes everybody on the case.

THE COURT: Is everybody on those e-mails? Okay. All right. If you have any question about whether or not you're on that e-mail, if you'll just write your e-mail down and hand it to my judicial assistant, then we'll make sure I get it. And I'll issue that later tonight. You're welcome.

All right. Counsel, is there anything else we need to address?

UNKNOWN SPEAKER: No, your Honor.

THE COURT: Okay. All right. Thank you all for your arguments today. Court is adjourned. And thank you for standing. You can remain seated. Thanks.

(Proceedings concluded.)

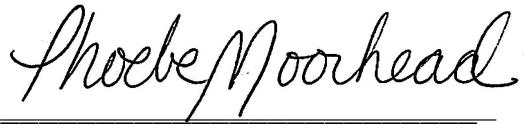
STATE OF UTAH)
)
COUNTY OF SALT LAKE)

I, PHOEBE S. MOORHEAD, Certified Shorthand Reporter for the State of Utah, certify:

That I received the audio recording and transcribed it to the best of my ability into typewriting; that a full, true, and correct transcription of said audio recording so recorded and transcribed is set forth in the foregoing pages.

I FURTHER CERTIFY that I am neither counsel for nor related to any party to said action nor in anywise interested in the outcome thereof.

Certified and dated this 12th day of September, 2024.



PHOEBE S. MOORHEAD, RPR, CRR
Certified Shorthand Reporter
for the State of Utah

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Addendum D

Nov. 22, 2022 Ruling and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (District Court Dkt. No. 140.)

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX, Plaintiffs, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**RULING AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS** Case No. 220901712 Judge Dianna M. Gibson

Before the Court is the Motion to Dismiss filed by Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator Stuart Adams (collectively, "Defendants")[1] on May 2, 2022 ("Motion"). The Court heard oral argument on August 24, 2022. On October 14, 2022, Defendants filed a Notice of Supplemental Authority Regarding Legislative Defendants' Motion to Dismiss and Memorandum in Support. Having considered the Motion, the memoranda submitted both in support and opposition to it, and the arguments of counsel at oral argument, the Court issued a Summary Ruling on October 24, 2022. The Court now issues the legal analysis supporting that Ruling.

BACKGROUND

Defendants move to dismiss this action for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the Utah Rules of Civil Procedure. In reviewing a motion to dismiss under Rule 12(b)(6), courts accept all the facts alleged in the Complaint as true. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226. Legal conclusions or opinions couched as facts are not "facts," and therefore are not accepted as true. *Koerber v. Mismash*, 2013 UT App 266, ¶ 3, 315 P.3d 1053.

With respect to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), when a defendant mounts only a "facial attack" to the court's jurisdiction, courts presume that "all of the factual allegations concerning jurisdiction are . . . true."[2] *Salt Lake County v. State*, 2020 UT 27, ¶¶ 26-27, 466 P.3d 158. Here, Defendants have mounted a facial

[1] Lieutenant Governor Deidre Henderson is not a party to this Motion.

[2] "Motions under rule 12(b)(1) fall into two different categories: a facial or a factual attack on jurisdiction." *Salt Lake County*, 2020 UT 27, ¶26. Because a factual challenge "attacks the factual allegations underlying the assertion of jurisdiction," courts do not presume the truth of plaintiff's factual allegations. *Id.* However, in a facial challenge, "all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id.*

attack on jurisdiction. Therefore, under Rule 12(b)(1) and 12(b)(6), the Court accepts the allegations in the Complaint as true in reciting the facts of this case. In addition, the Court views those facts and all reasonable inferences drawn from them in the light most favorable to Plaintiffs as the non-moving party." *Oakwood Vill. LLC.*, 2004 UT 101, ¶ 9. The facts recited below are taken from Plaintiffs' Complaint.

In November 2018, Utah voters passed Proposition 4, titled the Utah Independent Redistricting Commission and Standards Act, which was a bipartisan citizen initiative created specifically to reform the redistricting process and establish anti-gerrymandering standards that would be binding on the Utah Legislature. (Compl. ¶¶ 2, 73, 75.) Proposition 4 was presented to Utah voters as a "government reform measure invoking the people's constitutional lawmaking authority." (*Id.* ¶ 77.) Proponents of the measure argued "[v]oters should choose their representatives, not vice versa." (*Id.* ¶ 78.) Under then-existing laws, proponents maintained, "'Utah politicians can choose their voters' because 'Legislators draw their own districts with minimal transparency, oversight or checks on inherent conflicts of interest.'" (*Id.*)

Proposition 4 created the Independent Redistricting Commission, a seven-member bipartisan-appointed commission that would take the lead in formulating various state-wide redistricting plans. (*Id.* ¶¶ 2, 80-82.) The Independent Redistricting Commission was required to conduct its activities in an independent, transparent, and impartial manner, to apply "traditional non-partisan redistricting standards" to establish neutral map-making standards and to abide by certain listed redistricting standards. (*Id.* ¶¶ 83-84, 86.) Specifically, Proposition 4 provided that final maps must "abide by the following redistricting standards to the greatest extent practicable and in the following order of priority:" (a) "achieving equal population among districts" using the most recent census; (b) "minimizing the division of municipalities and counties across

multiple districts;" (c) "creating districts that are geographically compact;" (d) "creating districts that are contiguous and that allow for the ease of transportation throughout the district;" (e) "preserving traditional neighborhoods and local communities of interest;" (f) "following natural and geographic features, boundaries, and barriers;" and (g) "maximizing boundary agreement among different types of districts." (Compl. ¶ 86.)

In addition, all redistricting plans were to be open for public comment, considered in a public hearing, and voted on by the Legislature. (*Id.* ¶¶ 85, 88.) If the Legislature voted to reject the redistricting map, "Proposition 4 required the Legislature to issue a detailed written report explaining its decision and why the Legislature's substituted map(s) better satisfied the mandatory, neutral redistricting criteria." (*Id.* ¶ 88.) Proposition 4 also authorized "Utahns to sue to block a redistricting plan that failed to conform to the initiative's structural, procedural, and substantive standards." (*Id.* ¶ 89.) "A majority of Utah citizens from a range of geographic areas and across the political spectrum voted to approve Proposition 4 and enact it into law." (*Id.* ¶ 90.)

Sixteen months later, on March 11, 2020, Plaintiffs contend that the Legislature effectively repealed the Utah Independent Redistricting Commission and Standards Act and instead passed SB 200, which established new redistricting criteria. (*Id.* ¶ 93.) SB 200 effectively "eliminated all mandatory anti-gerrymandering restrictions imposed by the people on the Legislature as well as Proposition 4's enforcement mechanisms." (*Id.* ¶ 96.) While SB 200 retained the Independent Redistricting Commission, its role is now wholly advisory; the Legislature is not required to consider any recommended redistricting maps and in fact, the Legislature may disregard any recommended maps without explanation. (*Id.* ¶ 94.) "SB200 returned redistricting to the pre-Proposition 4, unreformed status quo where the Legislature could freely devise anti-democratic maps—as if the people had never spoken." (*Id.* ¶ 97.) SB200

eliminated neutral redistricting criteria, enforcement mechanisms and all transparency and public accountability provisions. (*Id.* ¶¶ 97-98.) In April 2021, the Utah Legislature formed its twenty-member Legislative Redistricting Committee (LRC). (*Id.* ¶¶ 142-143.)

Even after SB200's reforms, many legislators represented that the Legislature would honor the people's will to prevent undue partisanship in the mapmaking process. (*Id.* ¶ 99.) For example, Senator Curt Bramble, the chief sponsor of SB200 said he was "committed to respecting the voice of the people and maintaining an independent commission." (*Id.* ¶ 100.) Then-Senate Majority Leader Evan Vickers vowed that the Legislature would "meet the will of the voters" and reinstate in SB200 "almost everything they've asked for." (*Id.*) Representative Brad Wilson indicated the Legislature would leave Proposition 4's anti-gerrymandering provisions largely intact, and Representative Steinquist represented the Legislature would "make sure that we have an open and fair process when it comes time for redistricting." (*Id.* ¶ 101.)

Despite these representations, the LRC conducted a "closed-door" mapmaking process. (*Id.* ¶¶ 142-143.) The LRC did not publish the full list of criteria that guided its redistricting decisions, but instead offered a one-page infographic for public map submissions that stated three criteria the Legislature said it would consider: "population parity among districts, contiguity, and reasonable compactness." (*Id.* ¶ 145.) The LRC "did not commit to avoid unduly favoring or disfavoring incumbents, prospective candidates, and/or political parties in its redistricting process." (*Id.* ¶ 147.) The LRC solicited some public input about Utah's communities and voters' preferences during hearings, but Plaintiffs allege "the LRC does not appear to have used that testimony to guide its redistricting process." (*Id.* ¶ 148.)

Notwithstanding SB200, the Independent Redistricting Commission met thirty-two times from April to November 2021, and fulfilled its duties as originally contemplated under

Proposition 4. (*See generally id.* ¶¶ 104-126, 132-140.) Just before the Commission's final deadline, former Republican Congressman Rob Bishop abruptly resigned from the Commission. (*Id.* ¶ 127.) He cited the proposed map, which he believed would result in one Democrat being elected to Congress, as a reason for his resignation. (*Id.* ¶ 129.) He stated that "[f]or Utah to get anything done" in Congress, the State "need[s] a united House delegation . . . having everyone working together." (*Id.*) On November 1, 2021, the Independent Redistricting Committee presented three maps to the Utah Legislature's LRC and explained in detail the non-partisan process used to prepare the maps. (*Id.* ¶¶ 139-140.)

In early November 2021, the Legislature adopted its own map – the 2021 Congressional Plan ("Plan") – over the three maps created and proposed by the Independent Redistricting Committee. (*Id.* ¶¶ 141, 149.) Despite the Legislature's ostensible goal of hearing public input on the Plan at a public hearing scheduled on Monday, November 8, 2021, the LRC released the Plan publicly on Friday, November 5, 2021 around 10:00 pm, giving the public just two weekend days to review the Plan. (*Id.* ¶¶ 156, 159-60.) The LRC received significant public response at the public hearing and through comments on the LRC's website, hundreds of emails, protests at the Capitol, and a letter to the Legislature from prominent Utah business and community leaders. (*Id.* ¶¶ 161-65, 169.)

Notwithstanding significant public opposition to the LRC's map, on November 9, 2021, the Utah State House voted to approve the 2021 Congressional Plan. (*Id.* ¶¶ 171, 173.) Five House Republicans joined all House Democrats in voting against the Plan. (*Id.*) The next day, November 10, 2021, the Senate voted 21-7 to approve the Plan. (*Id.* ¶ 180.) One Republican Senator joined all Democratic Senators to vote against the Plan. (*Id.*) On November 12, 2021, Governor Cox signed the bill into law. (*Id.* ¶ 201.) While answering questions from the public

about the Plan, Governor Cox "acknowledged there was 'certainly a partisan bend' in the Legislature's redistricting process and conceded that 'Republicans are always going to divide counties with lots of Democrats in them, and Democrats are always going to divide counties with lots of Republicans in them.'" (*Id.* ¶ 200.) Governor Cox additionally "agreed that 'it is a conflict of interest' for the Legislature to 'draw the lines within which they'll run.'" (*Id.*)

The 2021 Congressional Plan splits both Salt Lake and Summit Counties, the two counties that typically oppose Republican candidates. (*Id.* ¶ 192.) The Plan "cracks" urban voters in Salt Lake County—Utah's largest concentration of non-Republican voters—dividing them between all four congressional districts and immersing them into sprawling districts reaching all four corners of the state. (*Id.* ¶¶ 192, 207.) It also divides Summit County into two. (*Id.* ¶ 192.) The Plan, however, leaves intact urban and suburban voters in both Davis and Utah counties, because those voters tend to support Republican candidates. (*Id.*) In addition, fifteen municipalities were divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities were divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty and up to three hundred miles away. (*Id.* ¶¶ 242-251.)

Proponents of the Plan maintain that the boundaries were drawn with the intent of ensuring a mix of urban and rural interests in each district. (*Id.* ¶ 158.) In a statement explaining the decision to divide Salt Lake County between all four districts, the LRC said, "[w]e are one Utah, and believe both urban and rural interests should be represented in Washington, D.C. by the entire federal delegation." (*Id.*) Notably, rural voters and rural elected officials opposed the

Legislature's urban-rural justification. Two reported commenters stated: "[a]s a voter in a rural area I'm entirely uncomfortable with my vote being used to dilute the power of another"; and "[a]s a Republican who lives in a more rural part of the state, I have the same complaint as those living in Salt Lake. Please do not dilute our vote by splitting us up between all four districts! I'm far more interested in having everybody fairly represented than I am in electing more people from my own party." (*Id.* ¶¶ 194, 195.) This sentiment was also echoed by Governor Cox, who "stated that he supports a redistricting process that focuses on preserving 'communities of interest,' such as the Commission's neutral undertaking, which he reaffirmed is 'certainly one area where that is a good way to make maps, try to keep people similarly situated together, communities together is something that I think is positive." (*Id.* ¶ 200.)

Plaintiffs assert that the "LRC's process was designed to achieve—and did in fact achieve—an extreme partisan gerrymander." (*Id.* ¶ 144.) Plaintiffs assert the Plan was intentionally created to maximize Republican advantage in all four congressional districts, not to ensure an urban-rural mix. (*Id.* ¶ 190.) Plaintiffs contend that "amplifying representation of rural interests at the cost of urban interests" is not a legitimate redistricting consideration, and the "purported need" to have rural interests represented in all four districts was "a pretext to unduly gerrymander the 2021 Congressional Plan for partisan advantage." (*Id.* ¶¶ 188, 189.)

Based on the 2021 Congressional Plan, each district contains a minority of non-Republican voters "that will be perpetually overridden by the Republican majority of voters in each district, blocking these disfavored Utahns from electing a candidate of choice to any seat in in the congressional delegation." (*Id.* ¶ 226.) While congressional plans from previous years had contained at least one competitive congressional district, all four districts under the 2021 Plan contain a substantial majority of Republican voters. (*Id.* ¶¶ 65, 175, 226, 232.) Notably, Senator

Scott Sandall admitted that political considerations affected the Legislature's redistricting decisions. (*Id.* ¶ 151.) He said the LRC "never indicated the legislature was nonpartisan. I don't think there was ever any idea or suggestion that the legislative work wouldn't include some partisanship." (*Id.*)

Some partisanship is inherent in the redistricting process. Here, however, Plaintiffs contend that the 2021 Congressional Plan subordinates the voice of Democratic voters and entrenches the Republican party in power for the next decade. (*Id.* ¶ 205, 206.) The Plan "protects preferred Republican incumbents and draws electoral boundaries to optimize their chances of reelection." (*Id.* ¶ 197.) And it converts "the competitive 4th District into a safe Republican district to enhance Republican Representative Burgess Owens' prospects to win reelection." (*Id.* ¶ 198.)

As a result, on March 17, Plaintiffs, including two organizational plaintiffs—the League of Women Voters of Utah and Mormon Women for Ethical Government—and seven individual plaintiffs, filed suit, alleging that Defendants violated Plaintiffs' constitutional rights by repealing Proposition 4 and adopting the intentionally-gerrymandered 2021 Congressional Plan. All Defendants, except for Defendant Lieutenant Governor Deidre Henderson, moved to dismiss Plaintiffs' Complaint.[3]

ANALYSIS

Defendants filed a Motion to Dismiss the action, in its entirety, arguing the Court lacks subject matter jurisdiction under Rule 12(b)(1) of the Utah Rules of Civil Procedure. In addition, they move to dismiss each of Plaintiffs' five claims for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Utah Rules of Civil Procedure. Essentially, Defendants

[3] Because Lieutenant Governor Henderson did not join in the Motion, any claims against her are unaffected by this Court's ruling.

contend that claims of partisan gerrymandering are not justiciable. And, if they are, partisan gerrymandering does not violate the Utah Constitution. Many of the issues raised in this case are matters of first impression, including whether partisan redistricting / gerrymandering presents a purely political question.

A motion to dismiss under Rule 12(b)(1) of the Utah Rules of Civil Procedure "is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Salt Lake County v. State*, 2020 UT 27, ¶ 26, 466 P.3d 158 (quoting *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993)). A motion under Rule 12(b)(6) challenges a plaintiffs' right to relief based on the alleged facts. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8, 104 P.3d 1226 (citation omitted). At this stage of the litigation, the Court's "inquiry is concerned solely with the sufficiency of the pleadings, and not the underlying merits of the case." *Id.* ¶ 8 (cleaned up).

I. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED. This Court Has Jurisdiction to Hear Plaintiffs' Redistricting Claims. Plaintiffs' Constitutional Claims are Justiciable.

Defendants argue that this Court lacks subject matter jurisdiction because Plaintiffs' redistricting claims (Counts One through Four) present nonjusticiable political questions. (Defs.' Mot. at 5.) The Court disagrees.

Under the political question doctrine, a claim is not subject to the Court's review if it presents a nonjusticiable political question. *See Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995). "The political question doctrine, rooted in the United States Constitution's separation-of-powers premise, prevents judicial interference in matters wholly within the control and discretion of other branches of government. Preventing such intervention preserves the integrity of functions lawfully delegated to political branches of government." *Id.* (cleaned up).

Political questions are those questions which have been wholly committed to the sole discretion of a coordinate branch of government, and those questions which can be resolved only

by making "policy choices and value determinations." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). When presented with a purely political question, "the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer." *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). In deciding whether a claim presents a nonjusticiable political question, the Court must consider two questions: (1) whether it "involve[es] 'a textually demonstrable constitutional commitment of the issue to a coordinate political department[]"or (2) whether there is "a lack of judicially discoverable and manageable standards for resolving it.'" *Matter of Childers-Gray*, 2021 UT 13, ¶ 64, 478 P.3d 96 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Defendants contend that Plaintiffs' claims involve political questions for both these reasons. For the reasons discussed below, Defendants are incorrect on both points.

A. Redistricting is not exclusively within the province of the Legislature.

Defendants first assert that Article IX, Section 1 of the Utah Constitution represents a "textually demonstrable constitutional commitment" of the redistricting power to the Legislature." (Defs.' Mot. at 6.) Article IX, Section 1 states, in relevant part: "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1. Defendants argue this provision delegates the responsibility for drawing congressional districts to the Legislature, and because no other provision in the Utah Constitution confers redistricting authority on any other branch or to the people, redistricting authority rests exclusively with the Legislature and is exempt from judicial review. (Defs.' Mot. at 7.)

The Utah Constitution does give the Legislature authority to "divide the state into congressional, legislative and other districts," but nothing in the Utah Constitution restricts that power to the Legislature or states that such power is exclusively within the province of the

Legislature. Even a cursory analysis reveals that the redistricting power is not exercised solely by the Legislature. While redistricting is primarily a legislative function, the governor and the people also exercise some degree of redistricting power. Redistricting laws and maps are submitted to the governor for veto like any other law under Article VII, Section 8 of the Utah Constitution. In addition, the Utah Constitution makes clear that "[a]ll political power is inherent in the people." Utah Const. art. I, § 2. In line with this authority, Utah's citizens have historically exercised power over redistricting through initiatives and referendums, including Proposition 4. *See also Parkinson v. Watson*, 291 P.2d 400, 403 (Utah 1955) (describing redistricting referendum proposing a constitutional amendment, which was submitted to the people in 1954 after the Legislature failed to reach a compromise regarding congressional district apportionment). And in the past, independent citizen redistricting committees have conducted redistricting. *See* 1965 Utah Laws, H.B. No. 8, Section 4, eff. May 11, 1965. At a minimum, because the executive branch and the people share in the redistricting power, both under the Utah Constitution and historically, this Court concludes that redistricting power is not solely committed to the Legislature.

Further, the constitutionality of legislative action is not beyond judicial review. Courts regularly review legislative acts for constitutionality. The United States Supreme Court in *Marbury v. Madison* famously stated that reviewing statutes to determine if they are constitutional is "the very essence of judicial duty" under our constitutional form of government. 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803). In fact, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Courts have a duty to review acts of the Legislature to determine whether they are constitutional. *Matheson v. Ferry*, 641 P.2d 674, 680 (Utah 1982) (stating courts cannot "shirk [their] duty to find an act of the Legislature

unconstitutional when it clearly appears that it conflicts with some provision of our Constitution."); *see also Skokos,* 900 P.2d at 541 ("If a claim involves the interpretation of a statute or questions the constitutionality of a particular political policy, courts are acting within their authority in scrutinizing such claims."). Courts also cannot "simply shirk" their duty by finding a claim nonjusticiable, merely because the case involves "significant political overtones." *Matter of Childers-Gray*, 2021 UT 13, ¶ 67 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230). Were it otherwise, the legislature would be the sole judge of whether its actions are constitutional, which is inconsistent with our Constitution, separation of powers, and longstanding principles of judicial review. *See, e.g.*, *Matheson*, 641 P.2d at 680; *Marbury*, 5 U.S. at 178; *see also Ritchie v. Richards,* 14 Utah 345, 47 P. 670, 675 (1896) (Batch, J., concurring) ("[t]he power to declare what the law shall be is legislative. The power to declare what is the law is judicial.").

Other constitutional provisions designate various duties to the Legislature—e.g., the compensation of state and local officers in art. VII, § 18; public education in art. X, § 2; and gun regulation in art. I, § 6—but that does not mean that the Legislature's power in those areas is beyond judicial review. For example, in the case of public education, the Utah Supreme Court has held:

> [t]he legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. . . . However, its authority is not unlimited. The legislature, for instance, cannot establish schools and programs that are not open to all the children of Utah or free from sectarian control . . . for such would be a violation of . . . the Utah Constitution.

Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 2001 UT 2, ¶ 14, 17 P.3d 1125. Even though the Utah Constitution explicitly grants authority over education to the Legislature, that authority must be exercised in a manner consistent with the Utah Constitution.

This principle equally applies to redistricting. As Defendants' counsel acknowledged during oral argument, the Legislature is bound to follow the United States and Utah Constitutions when engaging in the redistricting process. And outside the context of this litigation, Defendants have acknowledged that "[t]he redistricting process is subject to the legal parameters established by the United States and the Utah Constitutions, state and federal laws, and caselaw."[4] Given these acknowledgements, it follows that "the mere fact that responsibility for reapportionment is committed to the [Legislature] does not mean that the [Legislature's] decisions in carrying out its responsibility are fully immunized from any judicial review." *Harper*, 868 S.E.2d at 534. That proposition would be wholly inconsistent with this Court's obligation to enforce the provisions of the Utah Constitution. *See Matheson*, 641 P.2d at 680.

In addition, the Utah Supreme Court has previously reviewed the Utah Legislature's redistricting actions. In *Parkinson*, the plaintiffs challenged the Legislature's redistricting act alleging that it created districts with vastly unequal populations. *Parkinson*, 291 P.2d at 401. In its decision, the Utah Supreme Court initially expressed reluctance to interfere with the Legislature's redistricting actions given the importance that the three branches of government remain separate. *See id.* at 403. The Utah Supreme Court, however, did not dismiss the claim as a nonjusticiable political question. *Id.* at 400. Instead, it engaged in judicial review and reviewed the map for constitutionality, ultimately determining that congressional districts with unequal populations were not unconstitutional.

Notably, after previously reviewing partisan gerrymandering cases, the United States Supreme Court, in a 5 - 4 decision, recently concluded that such claims are nonjusticiable in

[4] Plaintiffs cited this quote from a report by Utah State Legislature on Utah's redistricting in 2001. Office of Legislative Research and General Counsel, 2001 Redistricting in Utah (Jan. 2022), le.utah.gov/documents/redistricting/redist.htm (last accessed May 25, 2022). The Court takes judicial notice of the report pursuant to Utah Rules of Evidence 201(b)(2).

federal courts. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506 (2019). While the United States Supreme Court has backed away from evaluating redistricting claims, it does not follow that such claims are nonjusticiable in Utah courts for several reasons. First and foremost, the *Rucho* Court specifically stated: "Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void.... Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507.

Utah courts also are not bound by the same justiciability requirements as federal courts under Article III. Several Utah cases have noted that, on matters like standing and justiciability, a lesser standard may apply. *See, e.g., Laws v. Grayeyes*, 2021 UT 59, ¶ 77, 498 P.3d 410 (Pearce, J., concurring); *Gregory v. Shurtleff*, 2013 UT 18, ¶ 12, 299 P.3d 1098; *Brown v. Div. of Water Rts. of Dep't of Nat. Res.*, 2010 UT 14, ¶¶ 17-18, 228 P.3d 747; *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).

Utah courts at times decline to merely follow and apply federal interpretations of constitutional issues. *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 27, 450 P.3d 1092. They "do not presume that federal court interpretations of federal constitutional provisions control the meaning of identical provisions in the Utah Constitution." *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935. They do not merely presume that federal construction of similar language is correct, *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106. And they recognize that federal standards are sometimes "based on different constitutional language and different interpretative case law." *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 45. Utah courts have also interpreted the Utah constitution to provide more protection than its federal counterpart when federal law was an "inadequate safeguard" of state constitutional rights. *Tiedmann*, 2007 UT 49, ¶¶ 33, 42-44.

While the *Rucho* majority decision conclusively resolved the issue justiciability for federal courts, given the split in the decision and the dissent authored by Justice Kagan, the issue was clearly not that cut and dry, even for the federal courts. Justice Kagan wrote that most members of the Supreme Court agree that partisan gerrymandering is unconstitutional. And four of the nine justices agreed that partisan gerrymandering is justiciable, judicially manageable standards exist, and the dissent discussed tests that exist and have been applied by the federal courts. *Rucho v. Common Cause*, 139 S. Ct. at 2509-2525 (Kagan, J., dissenting) (stating, in reference to the majority opinion, "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks it is beyond judicial capabilities."). Federal caselaw may prove helpful in this case as the litigation proceeds, but the majority's holding in *Rucho* – that partisan gerrymandering is not justiciable – is not binding on this Court and this Court declines to follow it.

B. Judicially discoverable and manageable standards exist.

Defendants argue that the Court lacks jurisdiction because there are no judicially discoverable or manageable standards for resolving redistricting claims because redistricting is a purely political exercise, based entirely on the Legislature's consideration and weighing of competing policy interests in deciding where to draw boundary lines. (Defs.' Mot. at 10.) The Court disagrees.

Plaintiffs' Complaint challenges the constitutionality of the 2021 Congressional Plan and the Utah Legislature's action. Determining whether the 2021 Congressional Plan violates the Utah Constitution involves no "policy determinations for which judicially manageable standards are lacking." *Baker*, 369 U.S. at 226. Instead, it involves legal determinations, the standards for which are provided both in the Utah Constitution and in caselaw. Utah courts have previously

addressed the Free Elections, Uniform Operation of Laws, Freedom of Speech and Association and the Right to Vote clauses of the Utah Constitution and, for some clauses, there are well-developed standards that have been applied by Utah courts in various scenarios.[5] And Utah courts are regularly asked to address issues of first impression, to interpret constitutional provisions and statutes for the first time and to apply established constitutional principles to new legal questions and factual contexts.[6] There is no reason why this Court cannot do the same here.

In reviewing Plaintiffs' redistricting claims, the Court will simply be engaging in the well-established judicial practice of interpreting the Utah Constitution and applying the law to the facts. The Utah Supreme Court has stated that "the Utah Constitution enshrines principles, not application of those principles," and it is the court's duty to determine "what principle the constitution encapsulates and how that principle should apply." *Maese,* 2019 UT 58, ¶ 70 n. 23. In applying constitutional principles to new types of claims, the Court uses "traditional methods of constitutional analysis," which starts with analyzing the plain language of the constitution and taking into consideration "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper

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[5] While the constitutional provisions Plaintiffs cite have never been applied by Utah courts for redistricting claims, they have been applied in a variety of other contexts. The following are examples, not an exhaustive list. The Utah Supreme Court has applied Article I, Section 17 of the Utah Constitution (Free Elections Clause, Plaintiffs' Count One) while analyzing the right of a political candidate to appear on a party's ticket. *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942). It has applied Sections 2 and 24 of Article I (Uniform Operation of Laws, Count Two) in the context of a citizen initiative. *Gallivan v. Walker,* 2002 UT 89, 54 P.3d 1069. It has applied Sections 1 and 15 of Article I in an obscenity case. *American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235. And the Utah Supreme Court has applied Article IV, Section 2 in a case in which a prison inmate challenged a residency requirement in registering to vote. *Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985).

[6] For example, in *State v. Roberts*, the Utah Supreme Court applied the Utah Constitution to determine whether a reasonable expectation of privacy exists for electronic files shared in a "peer-to-peer file sharing network." 2015 UT 24, ¶ 1, 345 P.3d 1226. *See also State v. Limb*, 581 P.2d 142, 144 (Utah 1978) (addressing automobile exception); *Dexter v. Bosko*, 2008 UT 29, ¶ 19 (unnecessary rigor provision applied to seatbelts); *State v. James*, 858 P.2d 1012, 1017 (Utah Ct. App. 1993) (due process applied to video recorded interrogations).

interpretation of the provision in question." *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921, n.6 (Utah 1993).

In addition, in addressing redistricting, Utah's court are not without judicially-discoverable or manageable standards. *Rucho* specifically recognized that "provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 139 S. Ct. at 2507. Here, the people of Utah passed Proposition 4, which codified into law the people's will to apply traditional redistricting criteria in congressional districting. *See supra* pp. 3-4. Other state courts have addressed claims involving partisan gerrymandering. In fact, seven state courts in North Carolina, Pennsylvania, Florida, Ohio, Maryland, New York, and Alaska have concluded that partisan gerrymandering claims are cognizable under their respective state constitutions.[7] Some have set forth criteria and factors that may be considered in such analyses. *See, e.g., League of Women Voters v. Commonwealth*, 645 Pa. 1, 118-21 (Pa. 2018) (discussing consideration of traditional redistricting criteria, including contiguity, compactness, and respect for political subdivisions, and establishing "neutral benchmarks" for evaluating gerrymandering claims). Federal courts have applied various tests to address partisan gerrymandering. *See, e.g., Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (discussing application of a three-part test, including consideration of intent, effects, and causation, and discussing generally other tests previously applied). Utah courts have historically relied on case law from other state and federal courts in addressing questions that arise under Utah law. *See, e.g., Am. Bush,* 2006 UT 40, ¶ 11; *Ritchie v. Richards*, 47 P. 670, 677-79 (1896).

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[7] *See Harper*, 868 S.E.2d at 558-60; *League of Women Voters v. Commonwealth*, 645 Pa. 1, 128 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371-72 (Fla. 2015); *Adams v. DeWine*, 2022 WL 129092 at *1-2 (Ohio Jan. 14, 2022); *Szeliga v. Lamone*, Nos. C-02-cv-21-001816 & C-02-CV-21-001773 at 93-94 (Anne Arundel Cnty. Cir. Ct. Mar. 25, 2022), https://redistricting.lls.edu/wp-content/uploads/MDSzeliga-20220325-order-granting-relief.pdf; *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022); *In the Matter of the 2021 Redistricting Cases*, S-18419 (Alaska May 24, 2022) (applying *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987)) (opinion forthcoming).

This Court can do the same here, taking into consideration material differences in our constitutions and state laws.

This case is in the beginning stages. The parties have not conducted discovery. No evidence has been presented and the parties have not yet presented their positions regarding appropriate tests or criteria that should be considered and applied. As this case proceeds through litigation and with specific input from both parties, this Court can determine what criteria or factors should be considered in this case, under Utah law. *See Harper*, 868 S.E.2d at 547-48 (stating specific standards for evaluating state legislative apportionment schemes should be developed in the context of actual litigation); *accord Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment.").

Utah courts, including this one, recognize the separation of powers. To be clear, this Court will not review the Legislature's legitimate weighing of policy interests. The judiciary is not a political branch of government; policy determinations are for the Legislature to decide. As the Utah Supreme Court has stated, "[i]t is a rule of universal acceptance that the wisdom or desirability of legislation is in no wise for the courts to consider. Whether an act be ill advised or unfortunate, if it should be, does not give rise to an appeal from the legislature to the courts." *Parkinson*, 291 P.2d at 403. However, even in cases involving political issues, the Court is bound to review the Legislature's actions, not to weigh in on policy matters, but to determine whether there has been a constitutional violation. *Matheson*, 641 P.2d at 680.

Judicial review of legislative action to determine constitutionality does not derogate from the primacy of the state legislature's role in redistricting. However, because redistricting is not wholly within the control of the Legislature, the constitutional claims presented here are not political questions, and because judicially discoverable and manageable standards exist to review constitutional challenges and redistricting claims, the Court concludes that it has jurisdiction in this case to review the Legislature's actions to determine if they are constitutional.

Therefore, Defendants' Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is DENIED.

II. Defendants' Motion to Dismiss the Committee and Individual Defendants is DENIED.

Defendants move to dismiss Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Senator J. Stuart Adams, and Representative Brad Wilson (collectively, Committee and Individual Defendants). (Defs.' Mot. at 14.) Defendants' Motion is based on two arguments. First, they argue that the Committee and Individual Defendants are immune from suit based on claims related to their actions as legislators. Second, the Committee and Individual Defendants assert they are unable to provide Plaintiffs' requested relief, and as such, should be dismissed. (*Id.*).

Regarding immunity, the Committee and Individual Defendants are correct that Utah law grants them immunity from certain lawsuits. However, that grant of immunity does not make them immune to all claims. To the contrary, Utah law only grants legislators immunity from claims of *defamation* related to their actions as legislators. Utah has adopted the common law legislative immunity and legislative privilege doctrines through its Speech or Debate Clause,[8]

[8] Utah's Speech or Debate Clause states: "[m]embers of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding

which Utah courts interpret as providing legislative immunity only from *defamation* liability. *See Riddle v. Perry*, 2002 UT 10, ¶ 10, 40 P.3d 1128. In *Riddle*, the Utah Supreme Court declined to provide absolute legislative immunity in all instances. It explained that the policy consideration behind the legislative immunity doctrine is "the importance of full and candid speech by legislators, even at the possible expense of an individual's right to be free from defamation." *Id.* ¶ 8. Here, Plaintiffs are not seeking relief from defamation. Under this limited view of legislative immunity,[9] the Committee and the Legislative Defendants are not immune.

The Committee and Individual Defendants also assert that they cannot provide the relief requested and that any order from this Court directed at them "would blatantly violate the separation of powers." (Reply at 15.) The Committee's and Individual Defendants' argument on this point is less than two pages. They do not cite any authority, legal or otherwise, to support that the Committee and the Defendants cannot provide *any* relief requested or that any order from the Court, directed at them, would violate the separation of powers.[10] Such unsupported arguments are insufficient to satisfy Defendants' burden on a motion to dismiss. *See Bank of Am. v. Adamson*, 2017 UT 2, ¶ 13, 391 P.3d 196 ("A party must cite the legal authority on which its

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each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place." Utah Const. art. VI, § 8.

[9] The *Riddle* Court explained the limits of the Utah's legislative immunity doctrine:

> In determining the contours of the legislative proceeding privilege, we adopt the privilege as set forth in section 590A of the Restatement (Second) of Torts: "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he [or she] is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding."

Id. ¶ 11 (alteration in original).

[10] Notably, Utah courts have allowed lawsuits against individual legislators to proceed. *See, e.g.*, *Matheson v. Ferry*, 657 P.2d 240, 244 (Utah 1982); *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978); *Rampton v. Barlow*, 23 Utah 2d 383, 384, 464 P.2d 378 (1970); *Romney v. Barlow*, 24 Utah 2d 226, 227, 469 P.2d 4497 (1970). This Court is not aware of any legal authority, either at the state or federal level, that prohibits all lawsuits naming legislators. If any legal precedent exists to justify the dismissal of any defendant, it is incumbent on the moving party to present that authority to the Court.

argument is based and then provide reasoned analysis of how that authority should apply in the particular case."). While Defendants certainly raise important issues that the parties and this Court will consider as this case proceeds,[11] the arguments made at this stage are simply insufficient to justify dismissing the Committee and the Individual Defendants. *See Gardiner v. Anderson*, 2018 UT App 167, ¶ 21 n.14, 436 P.3d 237 ("[I]t is not the district court's burden to research and develop arguments for a moving party.").

Regarding the Committee and Legislative Defendants' separation of powers argument, the Court has a duty to review the Legislature's acts if it appears they conflict with the Utah Constitution. *Matheson*, 657 P.2d at 244. Indeed, to hold otherwise would make the Legislature the ultimate arbiter of what is constitutional, which would in fact violate the separation of powers principle by intruding on this Court's constitutional role. *See id.* At this stage, it appears this Court can give Plaintiffs at least some of the relief requested without intruding on the Legislature's powers, which is sufficient to defeat Defendants' Motion to Dismiss.

Defendants' Motion to Dismiss the Committee and the Legislative Defendants is DENIED.

III. Defendants' Motion to Dismiss Counts One through Four is DENIED; Defendants' Motion to Dismiss Count Five is GRANTED.

Defendants' move to dismiss each of Plaintiffs' four constitutional challenges to the 2021 Congressional Plan asserting that Utah's Constitution, and specifically the Free Elections Clause, Equal Protection Clause, Free Speech and Association Clause and the Right to Vote Clause, does not expressly prohibit partisan gerrymandering. Defendants

[11] The precise relief that Plaintiffs seek and might be entitled to is not entirely clear at this stage of the litigation. Thus, any ruling the Court could make would be merely advisory and the Court declines to do so. *Salt Lake County v. State*, 2020 UT 27, ¶36, 466 P.3d 158 ("[W]e do not issue advisory opinions."). The Court recognizes, however, that the issues raised by Defendants are legitimate questions that the Court will address if and when the issues are fully ripe and briefed.

take the position that these provisions should be interpreted narrowly to protect *only* every citizen's right to cast a vote in an election. Nothing more. They argue generally that the 2021 Congressional Plan does not prohibit any citizen from voting in an election. New boundary lines do not prohibit each citizen from physically casting a vote or from freely speaking and associating with like-minded voters on political issues. Further, they argue that the Utah Constitution does not guarantee "equal voting power," a vote that is politically "equal in its influence," any political success, or a beneficial political outcome. In addition, Defendants move to dismiss Plaintiffs' fifth claim, asserting that the Utah Constitution does not prohibit the Legislature from either amending or repealing the Utah Independent Redistricting Commission and Standards Act, Title 20A, Chapter 19, of the Utah Code, which is the law that went into effect with the successful passage of Proposition 4.

Defendants' motion is made under Rule 12(b)(6) of the Utah Rules of Civil Procedure, asserting that Plaintiffs have failed to state a claim under the Utah Constitution.

> "The purpose of a rule 12(b)(6) motion is to challenge the *formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case*." *Van Leeuwen v. Bank of Am. NA*, 2016 UT App 212, ¶ 6, 387 P.3d 521 (cleaned up). Accordingly, "dismissal is justified *only* when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim." *Id.* (cleaned up).

Pioneer Homeowners Ass'n v. TaxHawk Inc., 2019 UT App 213, ¶ 19, 457 P.3d 393, *cert. denied sub nom., Pioneer Home v. TaxHawk, Inc.*, 466 P.3d 1073 (Utah 2020) (emphasis added). The Court's review of Defendant's Motion at this stage is limited to considering only "the legal viability of a plaintiff's underlying claim as presented in the pleadings." *Lewis v. U.S. Bank Tr. NA*, 2020 UT App 55, ¶ 9, 463 P.3d 694, 697 (internal quotation marks excluded).

Each of Plaintiffs' claims is based on the Utah Constitution. Constitutional interpretation starts with evaluating the plain text to determine "the meaning of the text as understood when it

was adopted." *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 18, 450 P.3d 1092 (discussing generally process of constitutional interpretation). "The goal of this analysis is to discern the intent[12] and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235. "While we first look to the text's plain meaning, we recognize that constitutional language is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." *Id.* ¶ 10. The Court's focus is on "how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." *Patterson v. State of Utah*, 2021 UT 52, ¶ 91, 405 P.3d 92.

In addition to analyzing the text, prior caselaw guides us to analyze "historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting.'" *Maese,* 2019 UT 58, ¶ 18 (quoting *Am. Bush*, 2006 UT 40, ¶ 12). The language of the text, in certain circumstances, may begin and end the analysis. However, "[w]here doubt exists about the constitution's meaning, we can and should consider all relevant materials. Often that will require a deep immersion in the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Maese,* 2019 UT 58, ¶ 23 (cleaned up) (explaining merely "asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact is not a recipe for sound constitutional interpretation.").[13] The Court may also

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[12] The Utah Supreme Court has explained that "[w]hile we have at times used language of 'intent' in discussing our constitutional interpretation analysis, our focus is on the objective original public meaning of the text, not the intent of those who wrote it. Evidence of framers' intent can inform our understanding of the text's meaning, but it is only a means to this end, not an end in itself." *Maese*, 2019 UT 58, ¶ 59 n.6.

[13] In interpreting the Utah Constitution, "we consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy. Our primary search is for intent and purpose. Consistent with this view, this court has a very long history of interpreting constitutional provisions in light

consider caselaw from sister states, with similar provisions made contemporaneously to the framing/ratification of Utah's Constitution, and federal caselaw interpreting similar provisions from the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 11.

Both parties have provided to the Court some relevant material to support their competing interpretations of the Utah Constitution, of which this Court may take judicial notice of under Rule 201 of the Utah Rules of Evidence. At this stage, the Court cannot consider factual matters outside the pleadings on a motion to dismiss without converting the motion into to one for summary judgment. Utah R. Civ. P. 12(b); *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 12, 104 P.3d 1226. Neither party has made such a request. Therefore, at this stage, the Court need only decide whether Plaintiffs have stated a claim, not whether Plaintiffs will succeed on those claims. Because each claim involves separate legal issues, the Court addresses each individually below.

a. Plaintiffs Sufficiently State a Claim under the Free Elections Clause (Count One).

Defendants assert that Plaintiffs have failed to, and cannot, state a claim under the Free Elections Clause. Defendants argue the plain language of the Free Elections Clause does not expressly prohibit partisan gerrymandering and that it guarantees only "the freedom to *cast a vote* without interference from civil or military power." (Defs.' Reply at 17 (emphasis added).) The Court disagrees.

The Free Elections Clause states: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah

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of their historical background and the then-contemporary understanding of what they were to accomplish. This case, like many others, proves the wisdom of the axiom that '[a] page of history is worth a volume of logic.'" *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 23, 450 P.3d 1092, 1098 (discussing and quoting *Society of Separationists v. Whitehead*, 870 P.2d 916, 920–21, and n. 6 (Utah 1993)).

Const. art. I, § 17. Defendants argue that this Court must interpret the provision as a whole, arguing that the second clause, which states that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," necessarily modifies or limits the first. (Defs.' Reply at 17.) The Court rejects this interpretation.

1. The Plain Meaning of "All *elections* shall be *free.*"

There are two express rights guaranteed by the Free Elections Clause, not just one. First and foremost, "all *elections* shall be *free*." The second, "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The clause is constructed as a compound sentence, separating two independent clauses by the conjunction "and." This sentence construction supports that these two clauses are to be given equal value. Nothing in the construction or choice of conjunction suggests to this Court that the second independent clause was intended to limit the first. Defendants also provide no authority, legal or otherwise, to support such interpretation.

What did the term "all *elections* shall be *free*" mean to the people of Utah in 1895, when the Utah Constitution was adopted? There is little historical information on Utah's Free Elections Clause. While the Clause was discussed during the Proceedings and Debates of the Convention Assembled to Adopt a Constitution for State of Utah, in Mar. 25, 1895,[14] the discussion provides no guidance as to what the clause was intended to protect or how to interpret the key words. The reported transcript of the proceedings reflects that the Free Elections Clause was passed with no debate. One modification was made to the final text. As originally proposed, the Free Elections Clause stated that "[a]ll elections shall be free and equal." A successful motion was made to remove "equal," but with no discussion. Defendants argue the removal is significant, revealing

[14] Found at le.utah.gov/documents/conconv/22.htm ("Convention Proceedings").

the drafter's intent to not guarantee "voting power." (Defs.' Mot. at 21, n.16.) Plaintiffs, on the other hand, argue that "equal" was removed because it was "superfluous," because the term "free," as defined in 1891, already contained an equality component. (Pls' Opp'n at 26.) Neither party, however, provided any authority to support their respective arguments.[15] And the debate regarding this clause is of little assistance.

There are no early Utah common law cases discussing the Free Elections Clause. There are no Utah cases from any time period defining the term "elections." Notably, neither party focused on this term nor provided a definition or any legal analysis of it.[16] The meaning of the term "elections," however, is critical to this analysis and critical to interpreting this clause.

An "election" is defined by Merriam-Webster as the "act or process of electing." *Election*, Merriam-Webster, https://www.merriam-webster.com/dictionary/elections (noting first known use of this term, with this definition, was the 13th century). To "elect" is "to select by vote for an office, position or membership." *Elect,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elect. Other dictionary sources define the term similarly: "An election is a process in which people vote to choose a person or group of people to hold an official position." *Election*, (noun), Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/election.[17]

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[15] The Court agrees with Defendants that the removal means something. But there is insufficient historical information before the Court to determine what was intended by the removal. The Court need not determine why it was removed; instead, the Court focuses on interpreting the clause as it is written.

[16] Notably, neither party provided a definition of "elections." Both parties focused primarily on and provided definitions for the word "free." Based on the Court's analysis, the definition of "elections" does not appear to have changed over time and it does not appear to be subject to widely different interpretations. This Court is not a linguistics expert and did not undertake independent scientific research, but it did resort to standard dictionary definitions to assist in interpreting the plain language of the Free Elections Clause. *See generally State v. Rasabout*, 356 P.3d 1258 (2015) (discussing generally interpretation methods under Utah law).

[17] "*Election* (noun), the act or process of choosing someone for a public office by voting." *Election*, Britannica Dictionary, https://www.britannica.com/dictionary/election. An "election" is "the process of choosing a person or a

"Election" also means the "right, power, or privilege of making a choice." *Election,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elections. Similar definitions were used in the late 1800s. *See e.g., State v. Hirsch,*[18] 125 Ind. 207, 24 N.E. 1062, 1063 (1890) (discussing various definitions of "election" and stating it "is not limited in its definition and meaning to the act or process of choosing a person for a public office by a vote of the qualified electors at the time, place, and manner prescribed by law.").

The term "free" as defined in the 1891 Black's Law Dictionary means: "[u]nconstrained; having power to follow the dictates of his own will;" "[e]njoying full civic rights;" and "[n]ot despotic; assuring liberty;[19] defending individual rights against encroachment by any person or class; instituted by a free people; said of governments, institutions, etc." *Free*, Black's Law Dictionary, 1st ed. 1891. (Pls.' Opp'n at 26-29; Defs.' Reply at 16-20). "Free" was also defined as "[o]pen to all citizens alike[.]" *Free,* Anderson, Dictionary of Law, 1889.

Two notable terms justify further analysis. First, "unconstrained" means "not held back or constrained." *Unconstrained*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unconstrained (noting definition first used in the 14th century). "Constrained" means "to force by imposed stricture, restriction or limitation;" "to force or produce in an unnatural or strained manner." *Constrained*, Merriam-Webster,

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group of people for a position, especially a political position, by voting." *Election (noun)*, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/election.

[18] In *State v. Hirsch*, 125 Ind. 207, 24 N.E. 1062, 1063 (Ind. 1890), the Indiana Supreme Court analyzed the meaning of the term "elections" to interpret a state statute prohibiting liquor sales on "election day." Notably, the Court recognized that "[u]nder our form of government we have a well-defined system of choosing or electing officers, regulated by law." *Id.*

[19] "Liberty" is defined as "the quality or state of being free; the power to do as one pleases; freedom from physical restraint; freedom from arbitrary or despotic control; the positive enjoyment or various social, political, or economic rights and privileges; the power of choice." *Liberty,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/liberty (noting the definition has been used since the 14th century).

https://www.merriam-webster.com/dictionary/constrain (noting definition used in the 14th century).

Second, "despotic" means "of, or relating to, or characteristic of a despot // a despotic government." *Despotic*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despotic#h1 (noting this term, with this definition, was first used in 1604). "Despot" in turn means "a ruler with absolute power and authority; one exercising power tyrannically; a person exercising absolute power in a brutal or oppressive way." *Despot*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despot (noting this definition came into being with the beginning of democracy at the end of the 18th century). The United States Supreme Court in 1866 explained what it means to be despotic: "In a despotism the autocrat is unrestricted in the means he may use for the defence of his authority against the opposition of his own subjects or others; and that is what makes him a despot." *Ex parte Milligan*, 71 U.S. 2, 81, 18 L. Ed. 281 (1866).

The first clause "all elections shall be free" guarantees to Utah's citizens an election *process* that is free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained process, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process to either ensure continued control or to attain an electoral advantage. This right given to Utah citizens, necessarily imposes a limit on the legislature's authority when overseeing the election process.

The second clause specifically provides that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. Art. I, § 17. This portion of the clause prohibits a civil or military power from interfering with the free exercise of the right of suffrage. It does not, however, expressly preclude a governmental power, like the

legislature, from providing "by law for the conduct of elections, and the means of voting, and the methods of selecting nominees." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942).

Anderson v. Cook is the only Utah case discussing the Free Elections Clause. In *Anderson,* a potential candidate submitted a petition to appear on a primary election ballot, but the acting county clerk refused to certify the nomination of the candidate for the primary election. *Id.* at 280. In affirming the county clerk's decision, the *Anderson* Court concluded that the petition was not timely filed, that the political party could not designate a candidate without an effective petition, and that the primary election laws did not provide for a "write in" candidate (while noting that general election laws did). *Id.* at 281-82. The candidate argued to deny him the right to appear on the ballot would violate the Free Elections Clause. *Id.* at 285. The *Anderson* Court did not fully interpret or analyze the clause. More importantly, it did not conclude that the Free Elections Clause did not apply to the issues presented. Rather, it held:

> While this provision guarantees the qualified elector the free exercise of his right of suffrage, it does not guarantee any person the unqualified right to appear as a candidate upon the ticket of any political party. It cannot be construed to deny the legislature the power to provide regulations, machinery and organization for exercising the elective franchise, or inhibit it *from prescribing reasonable methods and proceedings* for determining and selecting the persons who may be voted for at the election.

Anderson v. Cook, 102 Utah 265, 130 P.2d 278, 285 (1942) (emphasis added).

While the *Anderson* Court found no constitutional violation (i.e., because the candidate's petition was not filed in accordance with the law), the case does support that claims regarding the election *process* cannot be made under the Free Elections Clause. It supports that the Legislature necessarily has a role in providing "reasonable" regulation, machinery, and organization of the exercise of the right to vote. Additionally, the Legislature must "provide by law for the conduct

of elections, and the means of voting, and the methods of selecting nominees." *Anderson*, 130 P.2d at 285.

Based on the Court's analysis, and contrary to Defendants' arguments, Utah's Free Elections clause guarantees more than merely the right to vote.

2. Free Election Clauses and the English Bill of Rights

The history of free election clauses also supports that they were intended to prohibit tyrannical or despotic governmental manipulation of the election process to either ensure continued power or to attain electoral advantage. The first state free election clauses derived from a provision in the English Bill of Rights of 1689. *See Harper v. Hall*, 868 S.E.2d 499, 540 (N.C. 2022) (quoting historical sources discussing the origin of Free Elections Clauses in Virginia, Pennsylvania, and North Carolina). The original provision provided: "election of members of parliament ought to be free," and "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain electoral advantage." *Id.* (citing Bill of Rights, 1689, 1 W. & M. Sess. 2 c. 2 (Eng.)). The key principle driving these reforms was "avoiding the manipulation of districts that diluted votes for electoral gain." *Id.* North Carolina's free election clause was enacted following passage of similar provisions in Virginia and Pennsylvania, with the intent to "end the dilution of the right of the people to select representatives to govern their affairs," and to "codify an explicit provision to establish protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* (cleaned up). While not identical to Utah's, North Carolina's free election clause states simply: "All elections shall be free."

Defendants argue there is no evidence that Utah's Free Elections Clause, specifically, was based on the English Bill of Rights. This is true. Utah does not have the same well-

developed caselaw like North Carolina, specifically tracing the origin of this specific constitutional provision directly to the English Bill of Rights. However, the Utah Supreme Court has recognized that at least one provision in the Utah Constitution arose from the English Bill of Rights of 1689. *See, e.g.*, *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) (discussing Utah's cruel and unusual punishment clause), *abrogated by Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533; *see also State v. Houston*, 2015 UT 40, ¶¶ 166-170, 353 P.3d 55, 99-100 (Lee, J. concurring) (discussing English Bill of Rights and English origins of protection against "cruel and unusual punishment"). Based on *Bott*, the English Bill of Rights certainly had some influence on Utah's Constitution, as did other state constitutions and the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 31 (stating "the drafters of the Utah Constitution borrowed heavily from other state constitutions and the United States Constitution" and English common law.).

The history and evolution of our representative democracy in the United States was well known to the Utah Supreme Court in 1896, as it evaluated legislative action and various challenges to an election process. *See Ritchie v. Richards*, 14 Utah 345, 47 P. 670, 675 (1896) (stating elections should be "honest and fair"). In a concurring opinion, Justice Batch rejected the proposition that all legislative action is presumed constitutional and beyond judicial review. *Id.* at 675. Specifically, he rejected an interpretation of the Utah Constitution that would vest the legislature with "a power so arbitrary" that it likened it to "the parliament of Great Britain, under a monarchial form of government." *Id.*; *see also id.* at 681 (Miner, J., concurring in J. Batch's opinion).

Utah caselaw from 1891 reflects the strong sentiment at that time regarding the fundamental nature of the right to vote and the importance of protecting it from illegal acts of

election/government officials. *See Ferguson v. Allen,* 7 Utah 263, 26 P. 570, 574 (1891). The Utah Supreme Court in *Ferguson*, while analyzing allegations of election fraud, stated that the right to vote is fundamental and "[t]hat no legal voter should be deprived of that privilege by an illegal act of the election authorities is a fundamental principle of law." *Id.* at 573. The *Ferguson* court stated: "[a]ll other rights, civil or political, depend on the *free* exercise of this one, and *any material impairment* of it is, to that extent, a subversion of our political system." *Id.* at 574 (emphasis added). It further reasoned that the "rights and wishes of all people are too sacred to be cast aside and nullified by the illegal and wrongful acts of their servants, no matter under what guise or pretense such acts are sought to be justified." *Id.*

3. *Harper v. Hall* and Defendants' cited cases.

In line with the reasoning in *Ferguson*, the North Carolina Supreme Court in *Harper v. Hall* held that partisan gerrymandering is a cognizable claim under North Carolina's free elections clause, stating:

> partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. *Partisan gerrymandering prevents election outcomes from reflecting the will of the people* and such a claim is cognizable under the free elections clause.

Harper v. Hall, 868 S.E.2d 499, 542, *cert. granted sub nom. Moore v. Harper,* 142 S. Ct. 2901 (2022) (emphasis added).

Defendants cite two cases from Colorado and Idaho, suggesting that those states narrowly interpret their free elections clauses. They do not. In fact, in reviewing both cases, the Colorado

and Idaho courts apply their respective free elections clauses to address the "process" and not just merely the act of casting voting.

Defendants cite the Colorado case *Neelley v. Farr*, 158 P. 458 (Colo. 1916), stating that the Colorado Supreme Court interpreted Colorado's "free and open elections" provision to mean that "voters' right to the act of suffrage [be] free from coercion." *Id.* at 467. While that quote is part of the analysis, the *Neelley* court's decision does not support that the Court narrowly interpreted the Colorado free and open election clause to mean only that it protects against vote coercion. Notably, the case did not address redistricting. Rather, it addressed whether votes obtained from a "closed precinct," where the non-preferred candidates' party and voter information were prohibited (due to alleged industrial necessity), violated the free and open elections clause. The *Neelley* Court concluded that it did, and it excluded all votes cast, legal and illegal, from the precinct. *Id.* at 515.[20] While there are numerous quotes from the case regarding "free and open elections" that support that free and open elections means more than simply casting a vote, one quote is particularly instructive:

> There can be no free and open election in precincts where the legitimate activity of a political organization is interfered with and its members excluded either by private interests or public agencies or by the co-operation of both. So here a private, extrinsic agency, assisted by a public agency, the board of county commissioners, obtruded itself between a political organization and the electorate, and excluded one side to the controversy from the public territorial entity wherein the right of suffrage must be exercised.

Neelley v. Farr, 61 Colo. 485, 526, 158 P. 458, 472 (1916). This case supports that Colorado's free and open elections clause protects the *process*. In addition, congressional

[20] The *Neelley* court also stated: "under our form of government, if there is anything that should be held sacred, it is the ballot; and, if the aspirants for office, the election officials, and the party leaders so far forget themselves as to commit, or permit the commission of, gross frauds, so that the will of the legal electors cannot be determined, there is nothing left for the courts to do but to set aside the election in the precincts contaminated by such fraudulent conduct." *Neelley v. Farr*, 61 Colo. 485, 515, 158 P. 458, 468 (1916).

districts drawn through partisan gerrymandering to ensure one parties' election success to the exclusion of others does not meet the *Neelley* court's definition of a "free and open" election.

Defendants also cite *Adams v. Lansdon*, 110 P. 280 (Idaho 1910). *Adams* also does not deal with redistricting. Rather, the issue before the *Adams* court was whether requiring voters to vote for a first and second choice violated the portion of the Idaho's free and lawful elections clause, which stated: "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." *Id.* at 282. In rejecting the argument, the *Adams* court interpreted the provision to prevent only "civil or military officers" from "meddl[ing] with or intimidat[ing] electors" at polls; it ruled that imposing the requirement to vote for a first and second choice was a reasonable exercise of the legislature's power. *Id.* Notably, the *Adams* courts' ruling does not generally determine what "free elections" means. It also does not hold that a congressional map that predetermines elections is a reasonable exercise of the legislature's power and that such map does not meddle or interfere with the lawful exercise of the right to vote.

Based on the plain text of the Free Elections Clause, Utah caselaw, and decisions from other state courts, Utah's Free Elections Clause guarantees more than merely the right to cast a vote. It guarantees an election *process* free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained *process*, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process, including through redistricting, to either ensure continued control or to attain an electoral advantage. As such, this Court concludes that partisan gerrymandering is a cognizable claim under Utah's Free Elections Clause.

4. Application of Plaintiffs' "effects-based" test.

Plaintiffs assert that this Court should assess Plaintiffs' Free Elections Clause claim under an effects-based test, which evaluates whether: "(1) the Enacted Plan has the effect of substantially diminishing or diluting the power of voters based on their political views, and (2) no legitimate justification exists for the dilution." (Pls.' Opp. at 17, 29.) The Court notes that this is Defendants' Motion, but Defendants neither address nor object to Plaintiffs' proposed test. Under the circumstances, and without adequate briefing, the Court adopts Plaintiffs' test solely for the purposes of deciding the current motion.

Assuming the allegations in the Complaint to be true, the Court concludes that Plaintiffs have sufficiently pled a claim under Utah's Free Elections Clause. First, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan has the effect of substantially diminishing or diluting the power of democratic voters, based on their political views. Plaintiffs allege that the Plan achieves extreme and durable partisan advantage by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to diminish their electoral strength. (Compl. ¶ 207.) In doing so, the Plan makes it systematically harder for non-Republican voters to elect a congressional candidate. It entrenches a single party in power and will reliably ensure Republicans and Republican incumbents are elected in all of the State's congressional seats for the next decade, despite a compact and sizeable population of non-Republican voters that, in a partisan-neutral map, would comprise a majority of a district covering most of Salt Lake County. (*Id.* ¶¶ 6, 206-209, 226-231.)

Second, there is no legitimate justification to dilute Plaintiffs' vote, and the dilution cannot be explained by application of traditional redistricting principles. (*Id.* ¶¶ 187-98, 233-54.)

The only stated justification is that Defendants intended "to ensure a mix of urban and rural areas in each congressional district." (Defs.' Mot. at 5, 23, 26.) Defendants contend that explanation is nothing more than a pretext. (Compl. ¶¶ 128-130, 177-78, 180-81, 187-198.) At this stage, the Court cannot resolve any disputes of fact. Therefore, it must accept Plaintiffs' well-pled allegations as true.

Further, Plaintiffs allege that the Plan was enacted for partisan advantage, based on the nature of the boundary lines, lack of transparency in the redistricting process, and the actions and statements made by elected officials involved in approving the Plan. (*Id.* ¶¶ 3-5, 141-198, 200, 233-235, 254, 275.) Finally, seeking partisan advantage is neither a compelling nor a legitimate governmental interest, because it "in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government." *Harper*, 868 S.E.2d at 549.

Based on the facts alleged in the Complaint, and the Court's legal analysis above, the Court concludes that Plaintiffs have sufficiently stated a claim under the "effects-based" test for violation of Utah's Free Elections Clause.

This Court recognizes that there will always be incidental political considerations and partisan effects during redistricting, even when neutral and traditional redistricting criteria are applied. The United States Supreme Court recognizes that "[n]ot every limitation on the right to vote requires judicial intervention. Some administrative burdens on the franchise are unavoidable. But some so alter the nature of the franchise that they deny a citizen's 'inalienable right to full and effective participation in the political process.'" *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). "Because self-government is fundamentally predicated upon voters choosing winners and losers in the political marketplace, elections must reflect the voters' judgments and

not the state's." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J. concurring) ("In a free society the State is directed by political doctrine, not the other way around."). Key to the success of our government is "public confidence in the integrity of the electoral process," which ultimately "encourages citizen participation in the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). What is clear in a representative democracy, and under Utah's Free Elections clause, is that the way in which a government/legislature regulates, manages, provides for, and ultimately shapes the electoral process matters. As such, government/legislative action in this area should not be, and in this case is not, beyond constitutional challenge.

Plaintiffs should have the opportunity to present their case. Defendants' Motion to Dismiss Count One is DENIED.

b. **Plaintiffs Sufficiently State an Equal Protection Claim (Count Two)**.

Next, Defendants maintain that Plaintiffs fail to state an equal protection claim because the Congressional Plan does not impact any fundamental right or the right to vote because each voter can freely vote for the candidate of their choice. Defendants also argue the 2021 Congressional Plan doesn't create a suspect classification. And, Defendants argue, any "perceived inequality" is the "product of the imbalance in the political makeup in the state and the corresponding political outcomes that reflect that imbalance of political opinion." (Defs.' Mot. at 22; Defs.' Rep. at 21.) The Court disagrees. Based on the well-established three-part test set forth in *Gallivan v. Walker*, 2002 UT 89, ¶ 31, 54 P.3d 1069, Plaintiffs sufficiently state a claim for violation of Utah's Equal Protection Clause.

Plaintiffs' equal protection claim is based on their contention that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their equal protection rights

under the Uniform Operation of Laws Clause of the Utah Constitution. (Compl. ¶¶ 187-198, 271-82.) The Utah Constitution states that "all free governments are founded on their authority for their equal protection and benefit." Utah Const. art. I, § 2. The Uniform Operation of Laws Clause states that "[a]ll laws of a general nature shall have uniform operation." *Id.* art. I, § 24. Equal protection is inherent in the basic concept of justice. *Malan v. Lewis,* 693 P.2d 661, 670 (Utah 1984).

In comparing the federal Equal Protection Clause and Utah's equal protection guarantees (which are embodied in the Uniform Operation of Laws Clause), the Utah Supreme Court noted that both embody similar fundamental principles, generally that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Gallivan*, 2002 UT 89, ¶ 31 (internal quotation marks omitted). Utah courts have noted that Utah's constitutional protections are "in some circumstances, more rigorous than the standard applied under the federal constitution." *Id.* ¶ 33.[21] In other words, Utah's protections are "at least as exacting," *id.,* but in some cases more protective that its federal counterpart. *Blue Cross & Blue Shield of Utah v. State Tax Comm'n,* 779 P.2d 634, 637 (Utah 1989). For instance, "article I, section 24 demands more than facial uniformity; the law's *operation* must be uniform." *Gallivan*, 2002 UT 89, ¶ 37. The test applied

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[21] The *Gallivan* Court reasoned:

> Even though there is a similitude in the "fundamental principles" embodied in the federal Equal Protection Clause and the Utah uniform operation of laws provision, "our construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause," *Malan,* 693 P.2d at 670; *see also Ryan v. Gold Cross Servs., Inc.,* 903 P.2d 423, 426 (Utah 1995), and "[w]e have recognized that article I, section 24 ... establishes different requirements from the federal Equal Protection Clause." *Whitmer v. City of Lindon,* 943 P.2d 226, 230 (Utah 1997).

Gallivan v. Walker, 2002 UT 89, ¶ 33.

to determine compliance with the Uniform Operation of Laws Clause remains the same in all cases; however, the level of scrutiny given to legislative enactments varies. *Blue Cross*, 779 P.2d at 637 (stating this provision operates to restrain the legislature from "classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by the law").

Under Utah law,

> A law does not operate uniformly if persons similarly situated are not treated similarly or if persons in different circumstances are treated as if their circumstances were the same. In other words, [w]hen persons are similarly situated, it is unconstitutional to single out one person or group of persons from among the larger class on the basis of a tenuous justification that has little or no merit."

Id. ¶ 37 (cleaned up). The Uniform Operation of Laws Clause "protects against discrimination within a class and guards against disparate *effects* in the application of laws." *Id.* ¶ 38 (emphasis added). The courts have a responsibility to determine "whether a classification operates uniformly on all persons similarly situated within constitutional parameters." *Id.* Utah laws must not "operate unequally, unjustly, and unfairly upon those who come within the same class." *Blackmarr v. City Ct. of Salt Lake City,* 86 Utah 541, 38 P.2d 725, 727 (1934).

Gallivan v. Walker is not a redistricting case, however, the principles espoused in the context of apportionment are no less applicable here. Notably, the *Gallivan* Court stated: "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Gallivan*, 2002 UT 89, ¶ 72 (citing *Reynolds v. Sims,* 377 U.S. 533,

565–66, 84 S. Ct. 1362 (1964) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686 (1954))). *Gallivan* also recognized that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems just." *Id.*

Plaintiffs assert that the right to vote is fundamental, and therefore heightened scrutiny applies based on the test set forth in *Gallivan*, 2002 UT 89, ¶¶ 42-43. Defendants, on the other hand, argue that because no fundamental or critical right or suspect classifications are implicated, the "rational basis" test, set forth in *State v. Angilau,* 2011 UT 3, ¶ 12, 245 P.3d 745, applies. At this stage, the Court need not decide which test applies as a matter of law because Plaintiffs have alleged facts sufficient to satisfy both standards.

Plaintiffs sufficiently allege facts to support that heightened scrutiny should apply. Plaintiffs have alleged that the 2021 Congressional Plan affects their fundamental right to vote. (Compl. ¶¶ 2, 261-262, 276-277, 301-307.) They have alleged that their right to vote has been burdened, diluted, impaired, abridged and is effectively meaningless, solely because of their political views and past votes. (*Id.*) The *Gallivan* court recognizes the right to vote as fundamental, stating:

> [n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Id. (citing *Reynolds*, 377 U.S. at 560 (1964)).

Under the Uniform Operation of Laws analytical model set forth in *Gallivan*, at this stage, Plaintiffs must allege that (1) the challenged law creates a classification, (2) that the "classification is discriminatory" or "treats the members of the class or subclasses disparately," and that it is (3) reasonably necessary to further a legitimate legislative goal. *Id.* ¶¶ 42-43.

First, Plaintiffs allege that the 2021 Congressional Plan, like the multi-county signature requirement in *Gallivan*, operates to create classifications. (Pls.' Opp'n at 34.) Plaintiffs allege that the district boundary arbitrarily classifies voters based on partisan affiliation and geographic location. (Compl. ¶¶ 4, 207-227, 274-275.) *Gallivan* recognized that the multi-county signature requirement created two subclasses of registered voters based on where they lived, rural and urban voters. *Gallivan*, 2002 UT 89, ¶ 44. Defendants contend that party affiliation is not a "suspect classification." However, at this stage, Plaintiffs have alleged, and this Court accepts as true, that the 2021 Congressional Plan operates to classify voters by both partisan affiliation and geographic location.

Second, Plaintiffs allege that the 2021 Congressional Plan treats similarly situated voters disparately. (*Id.* ¶¶ 4, 15, 23, 29-33, 36, 130, 187-198, 271-276.) Plaintiffs allege that Utah's Republican and non-Republican voters are similarly situated for redistricting purposes because both groups are entitled to equally weighted votes. The same is true for voters living in both urban and rural settings. Plaintiffs allege that the 2021 Congressional Plan diminishes the voting strength of non-Republican and urban voters, while amplifying the strength of Republican and rural voters. (*Id.* ¶¶ 30-33, 36, 188, 265, 276.)

Third, Plaintiffs sufficiently allege that there is no "legitimate" legislative goal in seeking a partisan advantage through redistricting, which effectively pre-determines election outcomes, targets disfavored voters, dilutes their vote and shifts voting power from all the people to a subset of people. (*Id.* ¶¶ 270-82.) They also allege there is no legitimate interest in amplifying the interests of rural or suburban voters to the detriment of urban voters.[22] (*Id.* ¶ 280.) Plaintiffs

[22] The *Gallivan* Court held that the multi-county signature requirement did not further a legitimate legislative purpose because it "invidiously discriminates against urban registered voters in violation of the one person, one vote principle." *Gallivan*, 2002 UT 89, ¶ 49.

also allege that Defendants' stated justification for the placement of district boundaries, to ensure an urban/rural mix, was merely a pretext to ensure partisan advantage and dilution of non-Republican votes. (*Id.* ¶¶ 177, 187-197.) Accepting these facts and the facts in the Complaint as true, Plaintiffs have stated a claim for equal protection under the Uniform Operation of Laws Clause.

Defendants contend that no fundamental right is implicated, and that partisan affiliation is not a suspect classification. As such, they maintain the Court should apply the rational basis standard. Based on that standard, Defendants assert that "the Legislature voted on congressional district lines for the *reasonable* purpose of ensuring balance of urban and rural areas in each congressional district." (Defs.' Mot. at 26 (citing Compl. ¶ 187).). Defendants' argument goes to the merits of Plaintiffs' claim, rather than to whether they have sufficiently stated a claim. While the Complaint does reflect that proponents of the 2021 Congressional Plan represented that the district lines were "necessary" to balance urban and rural interests, it does not state that the purpose was reasonable. In addition, Defendants ignore paragraphs 188 to 198 of the Complaint, in which Plaintiffs allege that rationale was a pretext. On a motion to dismiss, this Court does not decide the merits. Rather, it assumes the well-pleaded facts in the Complaint to be true. Plaintiffs allege that Defendants' urban/rural justification is merely a pretext. For purposes of this motion, this Court assumes that fact to be true. This Court cannot, at this stage, resolve disputes of fact or make credibility determinations.

Even reviewed under the rational basis test, Plaintiffs' Complaint still states a claim. Under that standard, this Court considers: "(1) whether the classification is reasonable; (2) whether the objectives of the legislative action are legitimate, and (3) whether there is a

reasonable relationship between the classification and the legislative purpose."[23] *State v. Angilau*, 2011 UT 3, ¶ 21, 245 P.3d 745 (internal quotation marks omitted). Courts will "uphold a statute under the rational basis standard if [the statute] has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory." *Id.* ¶ 10 (internal quotation marks omitted) (second alteration in original) (emphasis added). Assuming factors one and three are established, the Complaint alleges sufficient facts to show that there is no legitimate legislative objective in either seeking partisan advantage through redistricting or in establishing districts to predetermine the outcome of elections and to ensure that incumbents continue to hold their seats.

For the reasons stated above, Plaintiffs have stated an equal protection claim under both a heightened scrutiny and rational basis standard. The Motion to Dismiss Count Two is DENIED.

c. Plaintiffs Sufficiently State a Claim for Violation of Plaintiffs' Right to Free Speech and Association (Count Three).

Defendants assert that the 2021 Congressional Plan and the congressional district boundaries established therein neither implicate nor violate Plaintiffs' Free Speech and Association rights. The Court disagrees.

Article I, Section 1 of the Utah Constitution states that "[a]ll persons have the inherent and inalienable right to . . . assemble peaceably, . . . petition for redress of grievances, [and to] communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, § 1. Article I, Section 15 states, in pertinent part, that "[n]o law shall be passed to abridge or restrain the freedom of speech." Utah Const. art. I, § 15. The Utah Supreme Court has explained that together, Sections 1 and 15 of Article I "prohibit laws which either directly

[23] The Court also notes that whether a classification is in fact "reasonable" or whether legislative objectives are "legitimate" are inherently factual determinations. At this stage, the Court cannot "find facts" nor decide if the classification is "reasonable" or if the legislative objectives are "legitimate," without a developed factual record. On a motion to dismiss, the only issue before the Court is whether Plaintiffs have alleged sufficient facts to state a claim under Utah's Uniform Operation of Laws Clause.

limit protected [free speech] rights or indirectly inhibit the exercise of those rights." *Am. Bush*, 2006 UT 40, ¶ 21 (noting drafter of Utah's Constitution borrowed heavily from other state constitutions and the United States Constitution and finds its roots in English common law). Notably, the United States Supreme Court has recognized a First Amendment interest in voting. *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)); *Burdick*, 504 U.S. at 438 (observing that "voters express their views in the voting booth.").

The role of free speech is central to our representative democracy. In *American Bush*, the Utah Supreme Court discussed the history of free speech in Utah. 2006 UT 40, ¶ 13. That court recognized that "[t]he framers of Utah's constitution saw the will of the people as the source of constitutional limitations upon our state government." *Id.* And, because "'[a]ll political power is inherent in the people,' only Utah's citizens themselves had the right to limit their own sovereign power to act through their elected officials." *Id.* ¶ 14 (citing Utah Const. art. I, § 2). "'Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.'" *Harper*, 868 S.E.2d at 545 (citing Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970)).

Plaintiffs allege that the 2021 Congressional Plan divides up the only two predominately Democratic counties in Utah. Salt Lake County is divided among the four congressional districts; Summit County is divided among two. Fifteen municipalities are divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities are divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Plaintiffs allege free

speech and association rights have in fact been burdened by these new boundaries. Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty to three hundred miles away. (*Id.* ¶¶ 242-251.) The proximity between voters discourages, burdens, or effectively impacts free speech and association. Plaintiffs allege that these predominately democratic communities were intentionally divided or "cracked" solely because of their political views and past votes. (*Id.* ¶¶ 192, 275.) The effect of the "cracking" is that their non-Republican views are subordinated, votes are diluted, voices are silenced, and Republican-advantage and control is locked in in all four congressional districts for the next decade. (*Id.* ¶¶ 36, 275, 293-94.)

Plaintiffs allege that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their free speech and association protections. They allege the 2021 Congressional Plan is both discriminatory and retaliatory and based solely on their protected political views and past votes. (Compl. ¶ 3-4, 36, 205-207. 209, 283-97.) Plaintiffs allege that the 2021 Congressional Plan burdens free speech and association in multiple ways. Specifically, it "restrains and mutes Plaintiffs' ability to express their viewpoints," "abridges the ability of voters with disfavored views to effectively associate with other people holding similar viewpoints," "impairs Plaintiffs' ability to recruit volunteers, secure contributions, and energize other voters to support Plaintiffs' expressed political views and associations," "retaliates against Plaintiffs for exercising political speech that Defendants disfavor," "prevent[s] [voters] from being able to associate and elect their preferred candidates who share their political views," divides Plaintiffs "to make their voices too diluted to be heard and guarantee they are not represented in any meaningful way because of

their disfavored views," and dilutes non-Republican votes. (*See generally* Compl., Compl. ¶¶ 289-294.)

Defendants assert that the Free Speech and Association Clauses do not apply to the redistricting process. (Defs.' Mot. at 26.) Defendants contend that the placement of a congressional district boundary "does not in any way restrict an individual's speech or impair an individual's ability to communicate," citing two federal district court cases, *Radogno v. Ill. State Bd. Of Elections*, No. 11-CV-04884, 2011 WL 5025251 (N.D. Ill. Oct. 21, 2011) and *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 487, but without any legal analysis. (Defs.' Reply at 26-27.)

In *Radogno*, the federal district court rejected Plaintiffs' First Amendment claims, holding that such rights were not burdened by the redistricting plan at issue. Specifically, the *Radogno* Court reasoned:

> Plaintiffs are every bit as free under the new redistricting plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression. Plaintiffs' freedom of expression is simply not burdened by the redistricting plan. It may very well be that Plaintiffs' ability to successfully elect their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights.

Radogno, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011).[24] *Radogno*'s First Amendment analysis of partisan political gerrymandering, under federal law, makes sense and is persuasive generally. However, that rationale may not apply to every case or to every fact scenario. In addition, it is not binding on this Court.

[24] Notably, the *Radogno* court did not dismiss outright plaintiffs' equal protection claim under the Fourteenth Amendment, but instead granted plaintiffs' leave to amend to plead a "workable test" or "reliable standard" to evaluate such claim. *Radogno*, 2011 WL 5025251, at *6 (discussing generally partisan gerrymandering cases under federal law, noting that some have reached the conclusion that they are justiciable, but not solvable).

In *Johnson v. Wis. Elections Comm'n*, the Wisconsin Supreme Court noted that in *Rucho v. Common Cause*, 204 L. Ed. 2d 931, 139 S. Ct. 2484, 2499–500 (2019), "[t]he United States Supreme Court recently declared there are no legal standards by which judges may decide whether maps are politically 'fair.'" *Johnson*, 2021 WI 87, ¶ 3, 399 Wis. 2d 623, 631. The *Johnson* court agreed that "fairness" is not a judicially manageable standard and that "deciding what constitutes 'fair' partisan divide . . . would encroach on the constitutional prerogatives of the political branches." *Id.* ¶ 45. The court emphasized that it would not decide whether the maps were fair but would fulfill its judicial role of "declaring what the law is and affording the parties a remedy for its violation." Like the *Johnson* court, this Court is not asserting that it has a role in deciding "fairness." And Plaintiffs here are not arguing that the 2021 Congressional Plan is unfair. They assert that it violates the Utah Constitution, and, as previously emphasized, the Court does not hesitate to engage in constitutional review.

Defendants also assert that the Free Speech and Association clauses of the Utah Constitution do not protect the redistricting process because "the framers of our [Utah] constitution . . . envisioned a limited freedom of speech." *Am. Bush*, 2006 UT 40, ¶ 42. The *American Bush* case, however, has only minimal relevance, if any, to this specific issue. *American Bush* did not involve redistricting, allegations of gerrymandering or voting rights. Instead, the *American Bush* court characterized the right to free speech as "limited" while discussing whether obscenity—in that case, nude dancing—was protected speech. *Am. Bush*, 2006 UT 40, ¶¶ 31-58. Consequently, the holding that the Utah Constitution's free speech protections do not extend to obscenity has little, if any, relevance to the issues at bar. Notably, unlike obscenity, voting is a fundamental right, and its exercise is a form of protected speech.

Laws v. Grayeyes, 2021 UT 59, ¶ 61 (stating "the right to vote is sacrosanct"); *Doe v. Reed*, 561 U.S. at 224 (recognizing a First Amendment interest in voting).

Defendants also assert there can be no First Amendment violation because Plaintiffs have no right to political success. *See Cook v. Bell*, 2014 UT 46, ¶ 34, 344 P.3d 634 (addressing whether the Legislature's limits on the right to initiative imposed severe restrictions on free speech and association). The Court does agree that "First Amendment jurisprudence . . . does not guarantee unlimited participation in political activity, nor does it establish a right to political success." *Id.* ¶ 57. However, it does protect "individuals from regulations that directly discourage or prohibit political expression." *Id.*

This Court notes there is a distinction between incidental political impacts that flow from neutral government action and government action aimed at discouraging, burdening, or prohibiting speech and association in order to secure an electoral advantage. Where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward," courts cannot and should not intervene in a neutrally administered electoral system. *New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S. Ct. 791 (rejecting argument that "one-party rule" demands application of First Amendment to ensure competition or a "fair shot at party endorsement"). But when a state takes steps, under either election laws or by redistricting, to grant its preferred party a durable monopoly, this deviation from neutrality undermines the competitive mechanism that undergirds the democratic process, and it burdens a voters' right to participate in a fair election. *See Williams v. Rhodes*, 393 U.S. 23, 31-32, 89 S. Ct. 5, 10-11 (1968) (holding Ohio's ballot-access laws, which favored the long-established Republican and Democratic parties, placed an unequal burden on the right to vote

and the right to associate to form a new political party).[25] "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. 185, 191, 134 S. Ct. 1434, 1444 (2014). As such, the government cannot and should not "restrict political participation of some in order to enhance the relative influence of others." *Id.*

In *Harper v. Hall*, the North Carolina Supreme Court recognized that there is a cognizable claim for violation of free speech and association rights based on partisan gerrymandering. *Harper v. Hall*, 868 S.E.2d 499, 546 (N.C. 2022). The North Carolina Supreme Court stated:

> When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny."

Id. (holding congressional map subject to strict scrutiny and requiring it to be "narrowly tailored to advance a compelling governmental interest"). This practice "distorts the expression of the people's will." *Id.* Under these circumstances, "[t]he diminution or dilution of voting power based of partisan affiliation . . . suffices to show a burden on that voter's speech and associational rights." *Id.* ¶ 161. This Court is persuaded that partisan gerrymandering that effectively entrenches a state's preferred party in office discriminates on the basis of viewpoint dilutes the

[25] In *Williams*, the State of Ohio asserted "that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . to choose a President and Vice President." *Williams*, 393 U.S. at 28–29. While noting that there "can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors," the Court stated: "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. *Id.*

non-favored party's vote, burdens / impairs the citizens' rights to exercise a meaningful vote and to associate. *See Vieth*, 541 U.S. at 314 (Kennedy, J, concurring); *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658.

Plaintiffs assert that heightened scrutiny applies to the free speech and association claims. Plaintiffs have also cited several cases in support of that assertion. *See, e.g., Reed v. Town of Gilbert*, Ariz., 135 S. Ct 2218, 2227 (2015); *Harper v. Hall*, 868 S.E.2d at 546. In their Reply, Defendants do not challenge that contention or seek to distinguish these cases with respect to this issue. Thus, in the absence of any contrary argument or authority, the Court assumes, for purposes of analyzing the motion at bar, that strict scrutiny applies to the free speech and association claims.[26] Based on the factual allegations in the Complaint, which this Court must accept as true, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan violates their rights to free speech and association because it discourages and burdens political expression, is discriminatory and retaliatory based on disfavored political views and past voting history, and it dilutes Plaintiffs' voting power. (*See generally* Compl.; Compl. ¶¶ 288-294.) Plaintiffs also allege that Defendants have "cracked" and "packed" the congressional voting districts to intentionally dilute the voting power of those who have disfavored views, namely Democrats.

Plaintiffs also have sufficiently alleged that there is no compelling or legitimate government interest in drawing congressional district boundaries to give Republicans an electoral advantage, to the detriment of non-Republican voters' right to free speech and association. (*Id.* ¶ 295.) Plaintiffs also allege the 2021 Congressional Plan is not narrowly

[26] By applying strict scrutiny for purposes of this Motion, the Court is not necessarily ruling that Plaintiffs' assertion is correct. But given the briefing and accepting the factual allegations in the Complaint as true, including that the Legislature intentionally drawing the maps to punish Plaintiffs for expressing disfavored views, the Court adopts this standard solely for the purpose of determining if Plaintiffs have stated a viable claim for relief.

tailored to serve any legitimate state interest. (*Id.* ¶ 296.) Plaintiffs have sufficiently stated a claim for violation of their Free Speech and Association rights.

For the reasons stated above, Defendants' Motion to Dismiss Count Three is DENIED.

d. Plaintiffs Sufficiently State a Right to Vote Claim (Count Four).

Defendants assert Plaintiffs fail to state a claim for violation of the Right to Vote Clause. Defendants also argue, without citation to any legal authority, that the Right to Vote Clause was intended to deal solely with voter qualifications and that there is no basis in Utah law to interpret the provision to guarantee anything other than the right to physically cast a ballot. Defendants also argue that the 2021 Congressional Plan does not prevent Plaintiffs or any other qualified Utah citizens from voting, therefore there can be no constitutional violation. (Defs.' Mot. at 27-28; Defs.' Rep. at 25-26.) The Court disagrees.

The Right to Vote Clause provides that "[*e*]*very citizen* of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, *shall be entitled to vote in the election.*" Utah Const. art. IV, § 2 (emphasis added).[27] Utah law unequivocally acknowledges that the right to vote is fundamental to our democracy and our representative form of government. *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).[28] In fact, it is said to be "more precious in a free country" than any other right. *Gallivan*, 2002 UT 89, ¶ 24 (quoting *Reynolds*, 377 U.S. at 560). If the right "of having a voice in the election of those who

[27] The Court notes that neither party presented any arguments regarding the plain meaning of this clause, historical evidence regarding the drafting or adoption of this clause or discussed any particular test to be applied.

[28] "The right to vote and to actively participate in its processes is among the most precious of the privileges for which our democratic form of government was established. The history of the struggle of freedom-loving men to obtain and to maintain such rights is so well known that it is not necessary to dwell thereon. But we re-affirm the desirability and the importance, not only of permitting citizens to vote but of encouraging them to do so." *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).

make the laws under which, as good citizens, we must live," is undermined, "[o]ther rights, even the most basic, are illusory. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right." *Id.*

Defendants argue that the Right to Vote Clause deals solely with voter qualifications, implying that it only applies when voter qualifications are at issue. While this clause includes qualifications required to exercise the right, the right to vote is nonetheless expressly guaranteed.

Defendants also assert that this clause guarantees only the right to physically cast a vote. Defendants cite no authority to support such a limited interpretation of this specific clause. To the contrary, when interpreting constitutional provisions, the Utah Supreme Court has stated that individual constitutional provisions

> cannot properly be regarded as something isolated and absolute but must be considered in the light of its background and the purpose it was designed to serve; and in relation to other fundamental rights of citizens set forth in the entire Constitution which are essential to the proper functioning of our democratic from of government. One of the principal merits of our system of law and justice is that it does not function by casting reason aside and clinging slavishly to a literal application of one single provision of law to the exclusion of all others. Its policy is rather to follow the path of reason in order to avoid arbitrary and unjust results and to give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions.

Shields v. Toronto, 16 Utah 2d 61, 63, 395 P.2d 829, 830 (1964) (interpreting Article VI, Section 7 of the Utah Constitution in reference to the right to vote).[29] In interpreting this provision, the Court should consider the entire Utah Constitution and its purpose, including the Free Elections Clause, the Equal Protection Clause, the Free Speech and Association Clauses and the long line

[29] Notably, the *Shields* Court recognized the historical and "continuing expansion of the right of suffrage in this country." *Shields v. Toronto*, 16 Utah 2d 61, 66 n. 12, 395 P.2d 829, 833 n. 12 (1964). While discussing the right to vote in the context of voting "freely for the candidate of one's choice," the Court stated that voting "is of the essence of a democratic society, and any restrictions on that right strike at the essence of a representative government." *Id.* Every citizen should have a "right to a vote free of arbitrary impairment by state action." *Id.*

of cases generally discussing the "right to vote." The plane language of the Right to Vote clause guarantees the right. But, read in light of the entire Utah Constitution, the right to vote clearly guarantees more than the physical right to cast a ballot.

Utah law has recognized that the right to vote must be "meaningful." *Shields*, 395 P.2d at 832-33 (explaining "[t]he foundation and structure which give [our democratic system of government] life depend upon participation of the citizenry in all aspects of its operation."). The right must not be "unnecessarily abridged" or "diluted." *Gallivan*, 2002 UT 89, ¶ 72 (stating "'[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.'" (quoting *Reynolds*, 377 U.S. at 565-66, 84 S.Ct.). And the right to vote "cannot be abridged, impaired, or taken away, even by an act of the Legislature." *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 237-38 (Utah 1904). The goal of an election "is to ascertain the popular will, and not to thwart it," and "aid" in securing "a fair expression at the polls." *Id.*[30]

Here, Plaintiffs allege that the Legislature drew the 2021 Congressional Map in a way to render Plaintiffs' votes meaningless. While they still can engage in the act of voting, Plaintiffs' votes no longer have any effect. Specifically, Plaintiffs allege that the 2021 Congressional Plan "achieves this extreme partisan advantage for Republicans primarily by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to eliminate the strength of their

[30] There is only one Utah case specifically addressing the Right to Vote Clause. *See Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985). In *Dodge*, a prison inmate challenged a law requiring him to vote in the county in which he resided prior to incarceration rather than in the county in which he was incarcerated. Plaintiff alleged that his right to vote under the Right to Vote Clause was in effect denied. *Id.* at 272-73. In analyzing that claim, the Utah Supreme Court stated, "Dodge made no contention that his right to vote was improperly burdened, conditioned or diluted." *Id.* at 273. The implication is that a claim under the right to vote clause may include an allegation that the right was "improperly burdened, conditioned or diluted."

voting power." (Compl. ¶ 207.) The result is that the 2021 Congressional Plan "draw[s] district lines to predetermine winners and losers." (Compl. ¶ 306.) Their disfavored vote is meaningless, diluted, impaired and infringed due to the intentional partisan gerrymandering. (*Id.* ¶ 304-06.) In addition, because the election outcomes are now predetermined for the next ten years, the true public will cannot be ascertained and is effectively distorted. (*Id.* ¶ 305-09.) Plaintiffs also allege that this impairment serves no legitimate public interest.[31] (*Id.*) Assuming these facts in the Complaint to be true, the Court concludes that Plaintiffs have properly stated a claim under the Right to Vote Clause.

Defendants' Motion to Dismiss Count Four is therefore DENIED.

IV. Plaintiffs Fail to State a Claim Under Count Five the "Unauthorized Repeal of Proposition 4."

Finally, Defendants assert that the fifth claim should be dismissed because the Legislature's amendment or repeal of Proposition 4 does not violate the Inherent Political Powers and Initiative Clauses of Utah Constitution. The Court agrees.

Plaintiffs' fifth claim alleges that when the Legislature replaced the citizen-enacted Proposition 4 with SB 200, the Legislature infringed on the people's inherent political powers and initiative rights under the Utah Constitution. (Compl. ¶¶ 315-17). The Initiative Clause of the Utah Constitution states, in relevant part: "The legal voters of the state of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute." Utah Const. art. VI, § 1(2)(a)(i)(A). The Inherent Political Powers Clause provides that "All political power is inherent

[31] The Court notes that neither party has addressed the appropriate standard to be applied in this case, i.e., strict scrutiny or rational basis, for Plaintiffs' Right to Vote claim. However, reviewing Plaintiffs' Complaint, the Court concludes that Plaintiff has sufficiently pled a claim under either standard.

in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Utah Const. art. I, § 2. Plaintiffs argue that the Legislature violated these clauses by passing SB 200, effectively repealing Proposition 4, which had been put in place via citizen initiative.

The Utah Supreme Court has explained that "[u]nder [Article I, Section 2], upon which all our government is built, the people have the inherent authority to allocate governmental power in the bodies they establish by law." *Carter v. Lehi City*, 2012 UT 2, ¶ 21, 269 P.3d 141. Under this authority, "the people of Utah divided their political power," vesting

> "The Legislative power of the State" in two bodies: (a) "the Legislature of the State of Utah," and (b) "the people of the State of Utah as provided in Subsection (2)." [Utah Const.] art. VI, § 1(1). On its face, article VI recognizes a single, undifferentiated "legislative power," vested both in the people and in the legislature. Nothing in the text or structure of article VI suggests any difference in the power vested simultaneously in the "Legislature" and "the people." *The initiative power of the people is thus parallel and coextensive with the power of the legislature*. This interpretation is reinforced by the history of the direct-democracy movement, by constitutional debates in states with constitutional provisions substantially similar to Utah's article VI, and by early judicial interpretations of those provisions.

Id. ¶ 22 (emphasis added). In further explaining this shared legislative power, the Utah Supreme Court has stated, "[t]he power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share equal dignity." *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069.

The Utah Constitution and Utah law unequivocally recognizes the importance of its citizens' right to initiate legislation to alter or reform their government. Utah Const. art. I, § 2; *Gallivan*, 2002 UT 89, ¶ 23; *Utahns For Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 2007 UT 97, ¶ 10. This is clear. The Constitution, however, does not restrict or limit, in any way, the Legislature's ability to amend or repeal citizen-initiated laws after they become effective.

Through their coequal power, both the Legislature and the people can enact, amend, and repeal legislation. The people can repeal legislation enacted by the Legislature through their referendum power, with some limitation. *See* Utah Const. art. VI, § (2)(a)(1)(B). The Utah Constitution, caselaw, and historical practice, however, shows that the Legislature can amend and repeal legislation enacted by citizen initiative, without limitation.

When we interpret the Utah Constitution, the starting point is the text itself. *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 19, 144 P.3d 1109 (internal quotation marks omitted). In evaluating legislative authority, the provisions in the Utah Constitution are construed as "limitations, rather than grants of power." *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955); *Shurtleff*, 2006 UT 51, ¶ 18 ("The Utah Constitution is not one of grant, but one of limitation."). Article VI of the Utah Constitution vests legislative authority in both the Legislature and the people. *See* Utah Const. art. VI, § 1(1). Notably, the text of article VI broadly confers legislative authority on the Legislature without any express limitation on the Legislature's ability to pass or repeal laws. *See id.* art. VI, § 1(a).

In contrast, the ability of the people to enact or repeal legislation, however, is specifically limited by the text of the Constitution.[32] *See id.* art. VI, § 1(b) (stating that "Legislative power" is "vested in ... the people of the State of Utah as provided in Subsection (2)"). In fact, subsection 2 of article VI explicitly restricts the people's referendum power—or the ability to repeal laws

[32] The citizens' right to legislate through the initiative process is also limited by the plain language of the Utah Constitution. *Gallivan v. Walker*, 2002 UT 89, ¶ 172, 54 P.3d 1069, 1118. Article VI, section (2)(a)(i)(A) states: "The legal voters of the State of Utah, in the numbers, *under the conditions, in the manner, and within the time provided by statute*, may 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.*" Utah Const. art. VI, § 2(a)(i)(A). Notably, it is the Legislature that establishes the statutory requirements to initiate, submit and vote on any citizen initiative. *See Sevier Power Co., LLC v. Bd. of Sevier Cty. Comm'rs*, 2008 UT 72, ¶ 10, 196 P.3d 583.

enacted by the Legislature—to laws that were passed with less than a 2/3 majority vote by the Legislature. *See id.* art. VI, § 2(a)(1)(B).

Given the absence of anything in the Utah Constitution that restricts the Legislature's ability to repeal laws enacted via initiative, there is a clear implication that the Legislature has broad authority to enact and repeal laws, including those enacted by citizen initiatives. Reading the Utah Constitution to limit the Legislature's authority to amend or repeal laws originally enacted via citizen initiative would require the Court to read something into the Constitution that is simply not there.[33] The Court declines to do so.

Moreover, Utah law also clearly indicates that the Legislature has power to amend and repeal laws that are passed via citizen initiative.[34] In explaining that the legislative powers of the Legislature and the people are coequal or "parallel," the Utah Supreme Court approvingly quoted the Oregon Supreme Court, which stated that "'[l]aws proposed and enacted by the people under the initiative . . . are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will.'" *Carter*, 2012 UT 2, ¶ 27 (quoting *Kadderly v.*

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[33] The Court further notes that Plaintiffs have not provided any facts from the historical record to suggest that such a restriction was intended. Rather, the historical practice and the caselaw indicate that such a restriction was not intended. In contrast to the Utah Constitution, the constitutions of ten other states expressly restrict their respective legislatures' authority to amend or repeal the statutes/law enacted from a successful citizen initiative. *See* Alaska (Alaska Const. art. XI, § 6); Arizona (Ariz. Const. art. IV, pt. 1, § 1(6)(B)-(C)); Arkansas (Ark. Const. art. V, § 1); California (Cal. Const. art. II, § 10); Michigan (Mich. Const. art. II, § 9; art. XII, § 2); Nebraska (Neb. Const. art. III, § 2); Nevada (Nev. Const. art. XIX, §§ 1-2); North Dakota (N.D. Const. art. III, § 8); Washington (Wash. Const. art. II, § 1); and Wyoming (Wyo. Const. art. III, § 52). Given the lack of any textual limitation, the history of the Legislature repealing citizen initiatives, and examples of other state constitutions that do contain express limits on their respective legislature's ability to make changes to citizen-initiated laws, it would clearly be improper for the Court to read such a limitation into Utah's Constitution.

[34] Utah law also specifically authorizes the Legislature to amend citizen-initiated or approved laws. Under Utah Code Ann. Section 20A-7-212(3)(b), "[t]he Legislature may amend any initiative approved by the people at any legislative session" and Subsection 20A-7-311(5)(b) provides that "[t]he Legislature may amend any laws approved by the people at any legislative session after the people approve the law." The Court agrees with Defendants that adopting Plaintiffs' argument *could* create certain practical challenges to the maintenance of the Utah Code in that the Legislature would be precluded from correcting typographical errors and making any changes, substantive or otherwise. Other than the authority provided in the above-cited statutes, there is no other process or procedure to manage changes to citizen-initiated laws.

City of Portland, 44 Or. 118, 74 P. 710, 720 (1903). Thus, the Utah Supreme Court has seemingly recognized that the Legislature may repeal initiative-enacted law.

Likewise, the Legislature's amendment or effective repeal of Proposition 4 / Title 20A, Chapter 19, Utah Independent Redistricting Commissions Standards Act is in line with historical practice. In 2018, Governor Herbert called a special session of the Utah Legislature to address citizen initiative Proposition 2, the Utah Medical Cannabis Act, the day before it was set to go into effect. *Grant v. Herbert*, 2019 UT 42, ¶ 5, 449 P.3d 122. The Legislature heavily amended the statute, changing many key aspects of the law. *Id.* In response, voters attempted to place the amended statute on the ballot through referendum but were not able to do so because the amendment had passed by a two-thirds vote in the Legislature, making it exempt from referendum. *Id.* ¶ 7. The Utah Supreme Court ultimately upheld Governor Herbert's decision to call the special legislative session which amended Proposition 2. *Id.* ¶¶ 21-24.

In view of the foregoing, including the text of the Utah Constitution, statutory language, the caselaw, and historical practice, the Legislature's exercise of its coequal legislative authority to repeal citizen initiatives does not violate the Citizen Initiative or Inherent Powers Clauses of the Utah Constitution. Therefore, even accepting the factual allegations as true, the Legislature did not act unconstitutionally by either substantially amending or effectively repealing Proposition 4. Plaintiffs' Fifth cause of action, therefore, does not state a valid claim for relief under Utah law. Accordingly, the Court GRANTS Defendants' Motion to Dismiss with respect to Count Five in the Complaint.

CONCLUSION

For the reasons stated above:

(1) The Court DENIES Defendants' Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

(2) The Court DENIES Defendants' Motion to Dismiss certain Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator J. Stuart Adams.

(3) The Court DENIES Defendants' Motion to Dismiss Count One (Free Elections Clause), Count Two (Equal Protection Rights), Count Three (Free Speech and Association Rights), and Count Four (Affirmative Right to Vote) of Plaintiffs' Complaint.

(4) The Court GRANTS Defendants' Motion as to Plaintiffs' Count Five. Therefore, Count Five, "Unauthorized Repeal of Proposition 4 in Violation of Utah Constitution's Citizen Lawmaking Authority to Alter or Reform Government" is DISMISSED, with prejudice.

DATED November 22, 2022.

BY THE COURT:

Dianna M. Gibson

DIANNA M. GIBSON
DISTRICT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 220901712 by the method and on the date specified.

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Signature

Addendum E

Utah Const. Art. XXIII, § 1

West's Utah Code Annotated
Constitution of Utah
Article XXIII. Amendment and Revision

U.C.A. 1953, Const. Art. 23, § 1

Sec. 1. [Amendments: proposal, election]

Currentness

Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, and if two-thirds of all the members elected to each of the two houses, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays taken thereon; and the Legislature shall cause the same to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the state for their approval or rejection, and if a majority of the electors voting thereon shall approve the same, such amendment or amendments shall become part of this Constitution.

The revision or amendment of an entire article or the addition of a new article to this Constitution may be proposed as a single amendment and may be submitted to the electors as a single question or proposition. Such amendment may relate to one subject, or any number of subjects, and may modify, or repeal provisions contained in other articles of the Constitution, if such provisions are germane to the subject matter of the article being revised, amended or being proposed as a new article.

Credits
Laws 1969, S.J.R. 1.

Notes of Decisions (13)

U.C.A. 1953, Const. Art. 23, § 1, UT CONST Art. 23, § 1
Current with laws through the 2024 Third Special Session. Some statutes sections may be more current, see credits for details

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Addendum F

Utah Const. Art. IV, § 2

West's Utah Code Annotated
Constitution of Utah
Article IV. Elections and Right of Suffrage

U.C.A. 1953, Const. Art. 4, § 2

Sec. 2. [Qualifications to vote]

Currentness

Every citizen of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, shall be entitled to vote in the election.

Credits
Laws 1969, S.J.R. 3; Laws 1975, H.J.R. 3.

Notes of Decisions (15)

U.C.A. 1953, Const. Art. 4, § 2, UT CONST Art. 4, § 2
Current with laws through the 2024 Third Special Session. Some statutes sections may be more current, see credits for details

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Addendum G

Utah Code § 20A-7-103

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Utah Code Annotated
Title 20a. Election Code
Chapter 7. Issues Submitted to the Voters
Part 1. General Provisions

U.C.A. 1953 § 20A-7-103

§ 20A-7-103. Constitutional amendments and other questions submitted by the Legislature--Publication--Ballot title--Procedures for submission to popular vote

Effective: May 1, 2024
Currentness

(1) The procedures contained in this section govern when the Legislature submits a proposed constitutional amendment or other question to the voters.

(2) The lieutenant governor shall, not more than 60 days or less than 14 days before the date of the election, publish the full text of the amendment, question, or statute for the state, as a class A notice under Section 63G-30-102, through the date of the election.

(3) The presiding officers shall:

(a) entitle each proposed constitutional amendment "Constitutional Amendment ___" and assign a letter to the constitutional amendment in accordance with the requirements of Section 20A-6-107;

(b) entitle each proposed question "Proposition Number ___" with the number assigned to the proposition under Section 20A-6-107 placed in the blank;

(c) draft and designate a ballot title for each proposed amendment or question submitted by the Legislature that:

(i) summarizes the subject matter of the amendment or question; and

(ii) for a proposed constitutional amendment, summarizes any legislation that is enacted and will become effective upon the voters' adoption of the proposed constitutional amendment; and

(d) deliver each letter or number and ballot title to the lieutenant governor.

(4) The lieutenant governor shall certify the letter or number and ballot title of each amendment or question to the county clerk of each county no later than 65 days before the date of the election.

(5) The county clerk of each county shall:

(a) ensure that the letter or number and the ballot title of each amendment and question prepared in accordance with this section are included in the sample ballots and official ballots; and

(b) publish the sample ballots and official ballots as provided by law.

Credits

Laws 1995, c. 340, § 20, eff. May 1, 1995; Laws 2001, c. 57, § 4, eff. April 30, 2001; Laws 2002, c. 127, § 1, eff. May 6, 2002; Laws 2007, c. 238, § 3, eff. April 30, 2007; Laws 2008, c. 225, § 11, eff. May 5, 2008; Laws 2008, c. 315, § 8, eff. May 5, 2008; Laws 2011, c. 327, § 11, eff. Jan. 1, 2012; Laws 2020, 5th Sp. Sess., c. 20, § 4, eff. June 29, 2020; Laws 2022, c. 170, § 11, eff. May 4, 2022; Laws 2022, c. 325, § 7, eff. May 4, 2022; Laws 2023, c. 435, § 136, eff. May 3, 2023; Laws 2024, c. 465, § 8, eff. May 1, 2024.

Notes of Decisions (2)

U.C.A. 1953 § 20A-7-103, UT ST § 20A-7-103
Current with laws through the 2024 Third Special Session. Some statutes sections may be more current, see credits for details

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