PARR BROWN GEE & LOVELESS
David C. Reymann (Utah Bar No. 8495)
Kade N. Olsen (Utah Bar No. 17775)
Tammy M. Frisby (Utah Bar No. 17992)
101 South 200 East, Suite 700
Salt Lake City, UT 84111
(801) 532-7840
dreymann@parrbrown.com
kolsen@parrbrown.com
tfrisby@parrbrown.com

ZIMMERMAN BOOHER
Troy L. Booher (Utah Bar No. 9419)
J. Frederic Voros, Jr. (Utah Bar No. 3340)
Caroline Olsen (Utah Bar No. 18070)
341 South Main Street
Salt Lake City, UT 84111
(801) 924-0200
tbooher@zbappeals.com
fvoros@zbappeals.com
colsen@zbappeals.com

CAMPAIGN LEGAL CENTER
Mark P. Gaber*
Aseem Mulji*
Benjamin Phillips*
Isaac DeSanto**
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200
mgaber@campaignlegalcenter.org
amulji@campaignlegalcenter.org
bphillips@campaignlegalcenter.org
idesanto@campaignlegalcenter.org

Annabelle Harless*
55 W. Monroe Street, Ste. 1925
Chicago, IL 60603
aharless@campaignlegalcenter.org
Attorneys for Plaintiffs

**Admitted Pro Hac Vice*
***Pro Hac Vice application forthcoming*

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, and JACK MARKMAN,

Plaintiffs,

v.

UTAH STATE LEGISLATURE, UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE MIKE SCHULTZ, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity,

Defendants.

PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT V AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT V

Case No. 220901712

Honorable Dianna Gibson

HEARING REQUESTED

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INTRODUCTION

Utahns decided in 2018 to reform their redistricting process. The Legislature responded by vetoing that reform in violation of the People's constitutional right to alter or reform their government. Two election cycles have now come and gone under an unlawful congressional map. The Court must ensure that Utahns' reform takes effect and that a lawful map is in place for the 2026 election.

The Court should grant Plaintiffs' motion for summary judgment and deny Defendants'. Defendants do not dispute that Proposition 4 ("Prop 4") was an initiative that sought to alter or reform the government. They offer only meager and unpersuasive arguments to contend that S.B. 200 did not impair Prop 4's reforms. And their proffered compelling justifications for gutting Prop 4's reforms have either already been rejected by this Court or are *post hoc* litigation positions that are in any event meritless. The Court should permanently enjoin enforcement of the unconstitutional aspects of S.B. 200, which would have the effect of making the provisions of Prop 4 identified in Plaintiffs' motion the governing law.

Defendants also concede that the current congressional map was not enacted in compliance with Prop 4's requirements. Given that concession, Prop 4 requires that the Court permanently enjoin implementation of the congressional map as well, which in turn requires the Court to conduct remedial proceedings described below. The Court should decline Defendants' invitation to further delay resolution of this case.

PLAINTIFFS' RESPONSE TO DEFENDANTS' ADDITIONAL STATEMENTS OF UNDISPUTED MATERIAL FACTS

Pursuant to Utah R. Civ. P. 56(a)(2), Plaintiffs below include a "verbatim restatement" of Defendants' asserted facts that are disputed "with an explanation of the grounds for the dispute supported by citing to materials in the record…" *Id.* Many of Defendants' facts, while undisputed,

are irrelevant and have no bearing on the legal claims at issue here. *See* Defs. Facts 5–8, 32, 36, 42, 44, 47, 51–52, 62, 65–66, 70, 85, and 86–88. In addition, Defendants include a sizeable category of facts that simply quote from transcripts or documents. In these instances, Plaintiffs do not dispute that the document includes the quotes but dispute the accuracy of the claims in the quotes (which are largely legal in nature), as explained in their Motion for Summary Judgment and Consolidated Response below. *See* Defs. Facts 3, 33–35, 38, 41, 45–46, 48-50, 54, 57–59, 63–64, 67–68, 70, 73. As Defendants admit (at 3), ultimately *none* of these factual disputes are material nor do they bar this Court from deciding the issue before it, which turns on questions of law.

Defs. Fact 1: In 2018, a citizens' initiative about Utah redistricting was on the ballot. Proposition 4's self-described intent was to stop "gerrymandering," install an "Independent Redistricting Commission," and impose mandatory redistricting requirements on the Legislature. **Exhibit A**, 2018 Voter Information Pamphlet ("VIP") at 76, Utah Office of the Lieutenant Governor.

Response: Disputed. Prop 4's intent was to invoke the People's rights under the Constitution's Alter or Reform Clause, Utah Const. art. I, § 2, via a government reform initiative to "'return[ ] power to the voters and put[ ] people first in [Utah's] political system.'" *LWVUT*, 2024 UT 21, ¶ 25 (quoting Def. Ex. A at 74, 76). Prohibiting partisan gerrymandering, creating an Independent Redistricting Commission, establishing redistricting criteria, and creating a private right of action were core reforms of Prop 4. Moreover, Prop 4 did not unlawfully "impose" requirements on Defendants, because under the Utah Constitution, the People equally share the ability to legislate regarding redistricting via initiative. *See, e.g.*, Utah Const. art. IX, § 1; art. I, § 2; art. VI, § 1; *LWVUT*, 2024 UT 21, ¶ 17; *Carter v. Lehi City*, 2012 UT 2, ¶¶ 79–80, 269 P.3d 141; *Lawyer v. Department of Justice*, 521 U.S. 567, 577 n.4 (1997).

Defs. Fact 2: The Voter Information Pamphlet explained that Proposition 4 would (1) "create[] a seven-member appointed commission to participate in the process of formulating redistricting plans," (2) "impose[] requirements on the Legislature's redistricting process," and (3) "establish[] standards with which redistricting plans must comply." **Exhibit A**, VIP at 74.

Response: Plaintiffs dispute this fact to the extent it represents that the above reforms were Prop 4's *only* reforms, as Defendants omit additional reforms contained in the Voter Information Pamphlet ("VIP"). *See, e.g.*, Ex. A at 74.

Defs. Fact 4: Out-of-state special-interest groups and labor unions provided $1.5 million of over $2 million raised by Proposition 4's sponsors.[1]

Response: Plaintiffs dispute this fact as it is unclear how Defendants define the phrase "out-of-state special-interest groups," or which donations they have classified as such. In addition, according to public disclosures, Better Boundaries raised more than $2.6 million dollars.[2] Without additional information, Plaintiffs are unable to verify this assertion.

Defs. Fact 6: Proposition 4's biggest donor was Houston-based Action Now Initiative, funded by Texans John and Laura Arnold, which contributed more than $1.1 million in actual and in-kind donations.[3]

Response: Disputed. $1.1 million is less than half of the $2.6+ million raised by Better Boundaries, and Defendants do not differentiate between actual and in-kind contributions, so the bulk of the money raised by Better Boundaries came from other donors (most of whom were individual Utahns).[4] To the extent that "biggest donor" means biggest individual donor, Plaintiffs do not dispute this fact, though it has no bearing on the claims at issue here.

Defs. Fact 14: If the commission failed to adopt plans, Proposition 4 empowered the Chief Justice to select "at least one and as many as three redistricting plans that the chief justice

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[1] Disclosure reports for Better Boundaries, registered as Utahns for Responsive Government, are publicly available at http://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414774.

[2] *See* Utahns for Responsive Government Disclosure, "2017 Year End" reporting $585,429.99 YTD total received; "2018 Year End" reporting $2,026,022.87 YTD received; and "2019 September 30th" reporting $13,488.90 YTD total received, for a total of 2.62+ million.

[3] Utahns for Responsive Government Disclosure, "2018 Convention Report Due 4/16/18"; Utahns for Responsive Government Disclosure, "2018 September 30th Report"; Utahns for Responsive Government Disclosure, "2018 General Report"; Utahns for Responsive Government Disclosure, "2018 Year End Report."

[4] For total amount raised by Better Boundaries and examples of the many individual Utah small donors, *see, e.g.*, *supra* note 2.

determine[d] divide the state … in a manner that satisfies the restricting standards" under Proposition 4. *Id.* § 20A-19-203(2)(b) (2018).

Response: Plaintiffs dispute the above paragraph as incomplete because it omits relevant steps of the process. Under Prop 4, "if the Commission fails to adopt a redistricting plan by the deadline…the Commission shall submit no fewer than two redistricting plans to the chief justice …" Utah Code § 20A-19-203(2)(a) (2018). Of these plans, at least one must be supported by the commissioner appointed by the leadership of the majority party in the house and senate, and at least one must be supported by the commissioner appointed by the leadership of the largest minority party in the house and senate. *Id.* § 20A-19-203(2)(c) (2018). Then, the Chief Justice "shall…select from the submitted plans at least one and as many as three redistricting plans" that satisfy Prop 4's standards "as the *Commission's recommended* redistricting plan or plans." *Id.* § 20A-19-203(2)(b) (2018) (emphasis added).

Defs. Fact 20: Proposition 4's principal feature was to impose binding redistricting rules on not only the commission but also on the Legislature. The impartial analysis in the Voter Information Pamphlet explained that one of Proposition 4's "main" features was to "impose[] requirements on the Legislature's redistricting process." **Exhibit A**, VIP at 74. It further explained that Proposition 4 "requires… Legislature-enacted redistricting plans" to follow Proposition 4's substantive criteria and that it "authorizes any Utah resident to file a lawsuit … to block implementation of a redistricting plan enacted by the Legislature that fails to conform to the standards and requirements established by Proposition 4." *Id.* at 75.

Response: Plaintiffs dispute the characterization of "impos[ing] binding redistricting rules" on Defendants as the "principal feature" of Prop 4. Prop 4 had several core reforms. Ex. A at 74–76, 78.

Defs. Fact 21: The keystone of Proposition 4 was its prohibition on so-called partisan gerrymandering. Proposition 4 prohibited the Legislature and the commission from "divid[ing] districts in a manner that purposefully or unduly favors or disfavors any incumbent elected official, candidate or prospective candidate for elective office, or any political party." Utah Code § 20A-19-103(3) (2018). The Voter Information Pamphlet's "argument in favor" explained that the prohibition on favoring or disfavoring any incumbent, candidate, and political party was Proposition 4's "[m]ost important[]" feature. **Exhibit A**, VIP at 76.

Response: Plaintiffs dispute the characterization of the partisan gerrymandering ban as the "keystone" of Prop 4, as Prop 4 had several core reforms. Ex. A at 74–76, 78. Plaintiffs also dispute this fact because the quoted material regarding the partisan gerrymandering ban omits material from the VIP, which in context shows the criteria was *one of* the most important reforms. *Id.* at 76.

Defs. Fact 22: Proposition 4 required the Legislature and the commission to follow these additional redistricting rules in the following "order of priority." Utah Code § 20A-19-103(2) (2018).

a. Adhering to federal law. *Id.* § 20A-19-103(2)(a) (2018).
b. Minimizing the division of municipalities and counties, in that order. *Id.* § 20A-19-103(2)(b) (2018).
c. Creating geographically compact districts. *Id.* § 20A-19-103(2)(e) (2018).
d. Creating contiguous districts. *Id.* § 20A-19-103(2)(d) (2018).
e. Preserving traditional neighborhoods and communities of interest. *Id.* § 20A-19-103(2)(e) (2018).
f. Following natural and geographic features. *Id.* § 20A-19-103(2)(f) (2018).
g. Maximizing boundary agreement. *Id.* § 20A-19-103(2)(g) (2018).

Response: Plaintiffs dispute this fact to the extent that it is incomplete. Defendants omit that the criteria had to be followed "to the greatest extent practicable," Utah Code § 20A-19-103(2) (2018), as well as that § 20A-19-103(2)(d) (2018) also requires districts to "allow for the ease of transportation throughout the district."

Defs. Fact 25: Under Proposition 4, the Legislature was permitted to redistrict only after receiving the Census data; after a change in the number of congressional, legislative, or other districts "resulting from an event other than" the Census; after a court issues a permanent injunction under Proposition 4; or to make minor technical adjustments. *Id.* § 20A-19-102(1)–(5) (2018).

Response: Plaintiffs dispute this fact because it omits several relevant parts of the statutory provision, including that redistricting under § 20A-19-102(1) and (2) would happen "no later than the first annual general legislative session after" receipt of the Census data, and a complete subsection of the provision, § 20A-19-102(4) (2018), which provides an additional

instance when redistricting can be performed under Prop 4 ("to conform with a final decision of a court of competent jurisdiction" besides that outlined in § 20A-19-102(3)).

Defs. Fact 27: Proposition 4 created a fee-shifting provision that required the government to "promptly pay reasonable compensation" for fees incurred by a plaintiff's attorneys, consultants, and experts, and other expenses incurred by any group engaged by the plaintiff, if the plaintiff "is successful in obtaining any relief." *Id.* § 20A-19-301(5) (2018).

Response: Plaintiffs dispute this fact to the extent that it does not accurately summarize the statutory provision. The provision requires "the defendant in the action" to "promptly pay reasonable compensation for actual, necessary services rendered…" *Id.* § 20A-19-301(5) (2018). Plaintiffs do not dispute that Prop 4 created a fee-shifting provision that allowed the entities identified in the statute to recover fees under the circumstances outlined in the statute.

Defs. Fact 31: This was not the first time the Legislature had reached a broad consensus to amend an initiative. In 2018, after a citizens' initiative legalized medical cannabis, the Governor convened a special session of the Legislature, which "amended many of the provisions" of the medical cannabis initiative. *Grant v. Herbert*, 2019 UT 42, ¶¶ 1, 5.

Response: Plaintiffs dispute this fact to the extent Defendants claim that a vague, "broad consensus to amend" existed in relation to Prop 4 or other initiatives. For example, Better Boundaries did not think Prop 4 had any constitutional issues. Ex. A at 78.

Defs. Fact 37: Jeff Wright, a co-chair of Better Boundaries, spoke next. He said that Better Boundaries was "satisfied that, through negotiations, [they] have a compromise and a legislative partner that together will make the process of redistricting more transparent, fair, and accountable." **Exhibit C**, Press Conf. Tr. 3:16–20.

Response: Plaintiffs dispute this fact to the extent Defendants imply that Jeff Wright was comparing S.B. 200 to Prop 4. Ex. C at 3:16–20.

Defs. Fact 39: Better Boundaries co-chair Wright explained that he had "a lot of late night phone calls" and "weekend phone calls" with Senator Curtis Bramble, a Republican, whom he described as an "honorable person" and "good-faith negotiator," to reach an agreement through a "multi-year" negotiation. **Exhibit C**, Press Conf. Tr. 5:3–22.

Response: Plaintiffs dispute that Mr. Wright was referring to S.B. 200 as a "'multi-year' negotiation," because he was referring to events leading up to S.B. 200, including the campaign for and passage of Prop 4. Ex. C at 5:15–6:5.

Defs. Fact 40: Better Boundaries co-chair Wright called S.B. 200 "a win for the citizens of Utah." **Exhibit C**, Press Conf. Tr. 6:4–5.

Response: Plaintiffs dispute this fact to the extent that in the quoted portion, Jeff Wright is referring to multiple events and not just the passage of S.B. 200, including the entire "multi-year process," of campaigning for and passing Prop 4 and "moving public opinion." Ex. C at 5:15–6:5.

Defs. Fact 41: Rebecca Chavez-Houck, Better Boundaries' executive director and a former Democratic representative, praised S.B. 200. She said that the commission under S.B. 200 is "so much more rigorous, so much more accountable, [and] does more than anything that [we] could have ever hoped for." **Exhibit C**, Press Conf. Tr. 7:2–6.

Response: Plaintiffs dispute the accuracy of the quote to the extent Defendants imply that Rebecca Chavez-Houck was comparing S.B. 200 to Prop 4. Ex. C at 7:2–6.

Defs. Fact 43: Better Boundaries Executive Director Chavez-Houck confirmed that "[t]he passage of this bill protects the core concept of Prop 4." **Exhibit C**, Press Conf. Tr. 7:11–13.

Response: Plaintiffs dispute that Prop 4 had one "core" concept, *see* Ex. A at 74–76. 78, as well as the accuracy of the claim as explained in their Motion for Summary Judgment and Consolidated Response below.

Defs. Fact 55: Senator Bramble also explained that how the commission's maps would be presented to the Legislature was "one of the sticking points" under Proposition 4, because Proposition 4 "would have required the maps to be presented in the Legislature and required each [legislator] to cast an up or down vote." **Exhibit D**, Senate Tr. 5:7–11.

Response: Plaintiffs dispute the second quote in the paragraph, which actually reads "in Proposition 4 it required the maps to be presented on the floor of this chamber and it required each of us to cast an up or down vote." Ex. D at 5:7–11.

Defs. Fact 56: As Senator Bramble explained, the inability of the Legislature to propose changes and amendments to the commission's maps under the Proposition 4 constitute "a direct

violation of [the] Legislature's constitutional prerogative." **Exhibit D**, Senate Tr. 5:17–19.

Response: Disputed. Under the Utah Constitution, Defendants do not have an exclusive "constitutional prerogative" to redistrict. Rather, the People equally share the ability to legislate regarding redistricting via initiative. *See, e.g.*, Utah Const. art. IX, § 1; art. I, § 2; art. VI, § 1; *LWVUT*, 2024 UT 21, ¶ 17; *Carter*, 2012 UT 2, ¶¶ 79–80, 269 P.3d 141; *Lawyer v. Department of Justice*, 521 U.S. 567, 577 n.4 (1997). As such, Prop 4 does not violate Article IX. Plaintiffs also dispute the assertion that Defendants' "inability" to "propose changes" to Commission maps violated the Constitution—under Prop 4 Defendants could still enact their own map, including a map implementing changes to a Commission map.

Defs. Fact 67: Democratic Representative Moss explained that S.B. 200 "honor[s] the public's decision on Prop 4," "preserve[s] they wanted in this proposition"—"in every way"—and allows the public to hold the commission and the legislators accountable. **Exhibit E**, House Tr. 16:7–10.

Response: Plaintiffs dispute the paragraph above because it does not accurately report the quote, and for relevance and accuracy, as explained in their Motion for Summary Judgment and Consolidated Response below. In the cited portion of the transcript, Rep. Moss actually says: "And I too want to say…*I* honor the public's decision and its proposition and their vote on it and I wanted to in every way *try* to preserve what they wanted in this proposition." Ex. E at 16:7–12 (emphasis added). The cited lines say nothing about holding legislators accountable.

Defs. Fact 69: Democratic Representative King lauded S.B. 200's prohibition on the commission's "taking into account favoring or disfavoring" incumbents, candidates, and political parties, which he viewed as "significant" and "important" features of the bill. **Exhibit E**, House Tr. 8:3–9. He explained that S.B. 200 was a "significant improvement over the status quo … in terms of insulating [redistricting] from political consideration." **Exhibit E**, House Tr. 8:13–9:2.

Response: Plaintiffs dispute the description and transcription of two of the quotes. In reference to "taking into account" incumbents, candidates and political parties, Rep. King said those are "important and significant components of what makes up an *independent*

recommendation," not S.B. 200 itself. Ex. E at 8:3–12 (emphasis added). The last quote from Rep. King is also missing the word "undue" before "political consideration." *Id.* at 9:1. Plaintiffs also dispute the relevance and accuracy of the claims as explained in their Motion for Summary Judgment and Consolidated Response below.

Defs. Fact 71: Representative Nelson explained that S.B. 200 clarified that the commission would be "advisory only" and ensure that the Legislature "retains the ultimate authority" over redistricting. **Exhibit E**, House Tr. 10:19–11:3.

Response: Plaintiffs dispute that S.B. 200 could "clarify" that the Commission was "advisory only," because Prop 4's text was already clear that it was "advisory only." Utah Code § 20A-19-204(1)(a)–(2)(a) (2018).

Defs. Fact 72: Representative Nelson said that "[r]ural representation … is so crucial" and that S.B. 200 safeguards that consideration. **Exhibit E**, House Tr. 12:6–10.

Response: Plaintiffs dispute that S.B. 200 "safeguards" rural representation. The result of S.B. 200 is that ultimately no interest is safeguarded in the redistricting process except that of partisan politicians. *See* S.B. 200, Utah Code § 20A-20-302 (removing Prop 4's criteria and allowing Legislature to gerrymander).

Defs. Fact 77: As part of S.B. 200, legislators voted to approve $1 million in appropriated funding for the commission and provided that the appropriation "would not lapse." S.B. 200, §13.

Response: Disputed only to the extent it is implied that this one-time appropriation is sufficient to adequately fund the Commission in future redistricting cycles.

Defs. Fact 85: After S.B. 200 became law, Better Boundaries praised S.B. 200 as "a reasonable approach to redistricting reform" that gives "the Legislature … the final say" while "preserv[ing] the independence of the Commission and maintain[ing] the public's voice in the redistricting process." **Exhibit F**, Better Boundaries, *Why is an independent redistricting commission good for Utah?* (last visited Oct. 15, 2024), perma.cc/GP6C-U334.

Response: Plaintiffs dispute this fact to the extent Defendants imply that S.B. 200 did not impair Prop 4's key reforms. Ex. F also states that S.B. 200 "didn't preserve all of Prop 4," and Better Boundaries did not believe Prop 4 had constitutional issues. *See* Ex. A at 74–76, 78.

Defs. Fact 89: Between August 16, 2021, and November 1, 2021, the Legislative Redistricting Committee held 17 public hearings across Utah "to gather input, listen to constituents and receive feedback." Legislative Redistricting Committee Public Hearing Schedule Updated, Utah Legislature, bit.ly/3CbySK7.

Response: Disputed. Plaintiffs dispute that the cited document contains the accurate number or dates of public hearings, because Defendants' own website lists at least some different dates.[5] In addition, numerous public hearings were canceled, including the first one listed in the document cited by Defendants and two of the three hearings scheduled after the LRC released its map. *Id.* Plaintiffs dispute that the LRC "gather[ed] input, listen[ed] to constituents and receiv[ed] feedback" at these hearings in any meaningful way, as the evidence shows the LRC ignored constituents' views, the vast majority of which identified the Enacted Plan as a partisan gerrymander and called for the adoption of a Commission-drawn congressional map.[6]

Defs. Fact 93: On November 8, 2021, the Legislative Redistricting Committee held a public hearing to consider and vote on the maps recommended by the Committee. Legislative Redistricting Committee (Nov. 8, 2021), bit.ly/3Chun0F. The Committee accepted public comments on each of the proposed maps. *Id.* The Committee unanimously voted to adopt the

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[5] *See* Legislative Redistricting Committee 2021, https://perma.cc/5G8T-6T5H.

[6] *See, e.g.*, Legislative Redistricting Committee (Nov. 8, 2021), https://perma.cc/WRN9-8WVP (audio recording of Nov. 8, 2021 LRC hearing); Robert Gehrke, *Utah's redistricting process was — as always — rigged from the start, Robert Gehrke writes*, Salt Lake Trib. (Oct. 29, 2021), https://perma.cc/FK36-EPDQ; Robert Gehrke, *Born in the dark, Utah's redistricting maps are the worst in decades, Robert Gehrke writes*, Salt Lake Trib. (Nov. 9, 2021), https://perma.cc/4UWC-9YVL; Carter Williams, *Utah business, community leaders call for Legislature, Cox to adopt nonpartisan voting maps*, KSL News (Nov. 8, 2021), https://perma.cc/884L-B2RBv; Kyle Dunphey & Cindy St. Clair, *Lawmakers received hundreds of emails in support of the independent redistricting commission. Why didn't they listen?*, KSL News (Jan. 19, 2022), https://perma.cc/M2T9-93AQ; Katie McKellar, *Utah lawmakers released their proposed redistricting maps. Accusations of gerrymandering swiftly followed*, Deseret News (Nov. 6, 2021), https://perma.cc/F4QX-SE9V; Ben Winslow, *Utah's legislature rejects every map proposed by independent redistricting committee*, Fox13 News (Nov. 8, 2021), https://perma.cc/VS7P-5LYJ.

proposed maps. *Id.*

Response: Plaintiffs dispute that the LRC "accepted" or considered public comments. Instead, the LRC ignored them and adopted its own maps the *same day*. LRC (Nov. 8, 2021, bit.ly/3Chun0F (audio recording of "public hearing").

Defs. Fact 96: The population changes required the Legislature to adjust existing congressional district lines to bring each congressional district to equal population. *See Wesberry*, 376 U.S. at 7–8.

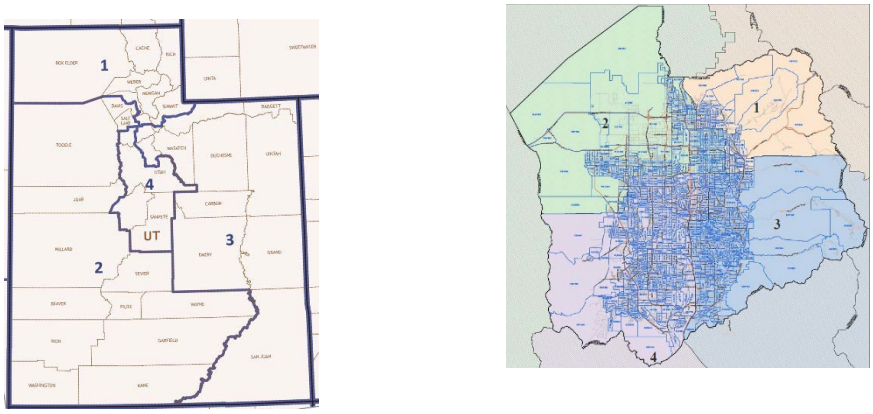

Figure 2 – 2021 Congressional District[7]

Response: Plaintiffs dispute to the extent Defendants represent that the particular district lines in Defendants' 2021 Enacted Plan were solely motivated by or necessary to comply with population equality requirements.

Defs. Fact 98: The redistricting committee chairs announced that Utah's four congressional districts would continue to include urban areas in the Wasatch Front along with rural areas, as past districts did. FAC (Doc. 297) ¶ 158; Answer (Doc. 127) ¶ 158.

Response: Plaintiffs dispute the validity and factual basis of this assertion, as it was a *post hoc* pretext for partisan advantage.[8] Plaintiffs do not dispute that it was announced.

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[7] *See* 118th Congressional District Wall Map, U.S. Census Bureau (2023), https://perma.cc/B5Y8-WJEZ; Salt Lake County District Maps, Salt Lake County Clerk (Jan. 2022), https://perma.cc/NU8W-H397.

[8] *See, e.g.*, Utah Legislative Redistricting Committee, Criteria, https://perma.cc/HUY9-KH66 (last accessed Nov. 22, 20224); Utah Legislative Redistricting Committee, Draft 2021 Redistricting

Defs. Fact 101: Count V of their complaint alleged that S.B. 200's redistricting reforms violated Plaintiffs' right to "alter or reform their government," Utah Const. art. I, §2, Compl. ¶¶ 310–19.

Response: Plaintiffs' complaint alleged in Count V that S.B. 200's *repeal of Prop 4* violated Plaintiffs' right to "alter or reform their government," under both Article I, Section 2 and Article VI, Section 1 of the Utah Constitution. First Am. Compl., ¶¶ 310-319 (emphasis added); Utah Const. art. I, § 2; art. VI, § 1.

Defs. Fact 103: Relying on *Grant v. Herbert*, 2019 UT 42, this Court observed that the Legislature's changes to Proposition 4 were "in line with historical practice." MTD-Op. at 59.

Response: To the extent this paragraph quotes the district court's MTD Opinion, that opinion speaks for itself and does not require a response. Plaintiffs dispute that Defendants have the unlimited ability to amend or repeal government reforms or that the changes were "in line with historical practice," and the Utah Supreme Court agreed. *LWVUT*, 2024 UT 21, ¶ 74–75.

Defs. Fact 106: The Court "retained jurisdiction" over Counts I thought IV. *Id.* ¶ 220. As for Count V, the Court "introduced [a] formulation for the first time" for Plaintiffs' claim. *Id.* ¶ 76.

Response: Plaintiffs dispute only to the extent the Court stated that "the elements we have outlined…are not intended to depart from the usual way in which we analyze a constitutional claim—determining whether the claim implicates the right or rights in question and whether the defendant violated those rights." *Id.*

Principles (May 18, 2021), https://perma.cc/S2JH-9T7L (adopting only population equality, contiguity, and reasonable compactness as official criteria); Robert Gehrke, *Utah's redistricting process was — as always — rigged from the start, Robert Gehrke writes*, Salt Lake Trib. (Oct. 29, 2021), https://perma.cc/FK36-EPDQ; Robert Gehrke, *Born in the dark, Utah's redistricting maps are the worst in decades, Robert Gehrke writes*, Salt Lake Trib. (Nov. 9, 2021), https://perma.cc/4UWC-9YVL.

ARGUMENT

I. Prop 4 is an initiative to alter and reform the government.

Defendants do not dispute that Prop 4 aimed to alter or reform the government within the meaning of the Alter or Reform Clause. Instead, they question the constitutionality of Prop 4's reforms. But whether Prop 4's reforms are ultimately constitutional (they are, as explained below), the passage of Prop 4 was unquestionably an exercise of the People's right to alter or reform their government through the initiative process.

As the Utah Supreme Court explained, Plaintiffs must establish that in passing Prop 4, "the people exercise[d], or attempted to exercise, their initiative power, and that the subject matter of the initiative contained government reforms or alterations within the meaning of the Alter or Reform Clause." *LWVUT*, 2024 UT 21, ¶ 74. Prop 4 said and did exactly that. Pls. Motion for Summary Judgment ("MSJ") at 8–12; Defs. Ex. A at 74–76, 78. Prop 4 did not purport to amend the state constitution; it enacted a series of statutory reforms governing the state's redistricting process.

Defendants do not dispute that the statutory provisions enacted by Prop 4 go to the very heart of Utah's structure of government, reforming the system by which representatives are elected to office and "return[ing] power to the voters and put[ting] people first in our political system." Defs. Ex. A at 74, 76. Defendants have not previously challenged Prop 4's status as an initiative seeking to alter or reform the government, *see LWVUT*, 2024 UT 21, ¶ 83, because they cannot. Defendants now attempt to argue that Prop 4 is not an initiative to alter or reform the government because *they think* it is unconstitutional. Prop 4 is constitutional; but even if it were not, it is an attempt to alter or reform the government.[9]

[9] Because Defendants' meritless constitutional arguments are not relevant to the first element of the test outlined by the Supreme Court, Plaintiffs address them *infra*, Section III.

II. S.B. 200 impaired Prop 4's reforms.

There is no genuine dispute that S.B. 200 "impaired the reform[s] contained in Proposition 4." *LWVUT*, 2024 UT 21, ¶ 73. Prop 4's purpose was to "return power to the voters and put people first in our political system," Defs. Ex. A at 74, 76, and it did so "comprehensively, by completely prohibiting [partisan gerrymandering], reforming the redistricting process as a whole, establishing neutral redistricting criteria, and providing an enforcement mechanism." *LWVUT*, 2024 UT 21, ¶ 225.

When the Supreme Court said that legislative changes that "facilitate or support" a reform do not impair it, the Court referred to changes like "grammatical corrections, helpful renumbering, or technical fixes necessary for the effective operation of the initiative." *LWVUT*, 2024 UT 21, ¶ 73. To "impair" means "to weaken, diminish, or relax, or otherwise affect in an injurious manner." Black's Law Dictionary (1st ed. 1891). There is no serious dispute whether S.B. 200 weakened or relaxed Prop 4's requirements. As Plaintiffs have explained, S.B. 200 impaired Prop 4's reforms by making the prohibition on partisan gerrymandering and the neutral redistricting criteria inapplicable to the Legislature, and by eliminating several other core provisions, including the requirement that the Legislature vote on the Commission's maps and publicly explain any rejection of them; the requirements for public review and comment before the Legislature enacts its own map; the requirement that the Legislature adequately fund the Commission; the prohibition on mid-decade redistricting; and the private right of action to enforce these substantive and procedural requirements. *See* MSJ at 12. These changes leave Defendants free to partisan gerrymander, ignore neutral redistricting standards, disregard the Commission's work without explanation, enact their own map without sufficient time for public review, and escape statutory

enforcement. In short, S.B. 200 is a stark departure from the "comprehensive and detailed" reforms that Utahns chose to end partisan gerrymandering. *LWVUT*, 2024 UT 21, ¶ 225.

These impairments are apparent on the face of S.B. 200. *See* MSJ at 12–13 (citing provisions). Defendants do not dispute S.B. 200's legal effects on Prop 4, noting (at 4–8, ¶¶ 3–13, 15-16), that the laws "speak for themselves." And the Supreme Court ruled that these undisputed contentions as to "how S.B. 200 impaired the reforms in Proposition 4" were sufficient to allege a violation of Plaintiffs' rights at "the second step of the analysis." *LWVUT*, 2024 UT 21, ¶¶ 85–87. Thus, Plaintiffs have shown, as a matter of law, that S.B. 200 impaired Prop 4's reforms.

Ignoring all this, Defendants provide several reasons they believe S.B. 200 does not impair Prop 4's reforms. None has merit.

First, Defendants point out (at 57–58) that S.B. 200 "retained" a Commission that "adopt[s] redistricting plans." But this understates S.B. 200's effect. A Commission still exists, but S.B. 200 trivialized the Commission's role in the redistricting process by repealing the mandatory legislative vote on its maps and the requirement to explain why if another map is enacted. Without these reforms, the Legislature can disregard the Commission's maps altogether, as happened in 2021. S.B. 200 also undermined the Commission by repealing the requirement to adequately fund its work. The Voter Information Pamphlet estimated that Prop 4 would cost "$1,015,500 *every 10 years*." Defs. Ex. A at 75 (emphasis added). Unlike Prop 4's adequate funding guarantee, S.B. 200's single non-lapsing appropriation provides no promise to fund the Commission's work in the future. These changes made the Commission a less effective bulwark in the redistricting process—and to make something less effective impairs it. The Commission was one of the initiative's core reforms, Defs. Ex. A at 76, meant to work in concert to return power to the People. By seriously weakening the Commission, S.B. 200 impaired it.

Second, Defendants repeatedly rely (at 57–58) on statements of Better Boundaries and individual legislators supporting S.B. 200 as evidence that the law did not impair Prop 4. These are immaterial "to the question before the court" and thus cannot preclude summary judgment for Plaintiffs. *Utah Stream Access Coal. v. VR Acquisitions*, LLC, 2023 UT 9, ¶ 44, 531 P.3d 195, 204–05. The question is not what opinion some individuals once held, but whether S.B. 200 in fact impairs Prop 4's reforms. The answer begins and ends with S.B. 200's text, which unambiguously repealed several substantive provisions of Prop 4. *See Scott v. Benson*, 2023 UT 4, ¶ 37, 529 P.3d 319, 326 ("[T]he best evidence of the legislature's intent is the plain language of the statute itself.").

In any event, none of the statements Defendants quote show that Better Boundaries or any initiative proponent preferred S.B. 200 to Prop 4, approved of eliminating its key provisions, or wanted Defendants to change Prop 4 in any way. *See* Defs. Ex. A at 78 (Better Boundaries explicitly stating that Prop 4 was constitutional). Plaintiffs certainly did not. Nor did the voters. *See* Bob Bernick, *Overwhelming number of Utahns want lawmakers to leave Prop. 4 alone*, Utah Policy (Aug. 26, 2019), perma.cc/82NG-N7VS (poll finding 63 percent of Utah voters did not want the Legislature "to change Prop 4 at all – not one sentence or comma"). Yet faced with the prospect that lawmakers would eliminate *all* of Prop 4, Better Boundaries (an initiative proponent *not* party to this suit) negotiated with Defendants to salvage whatever shreds of Prop 4 it could. *See* Defs.' Ex. H at 3. Defendants cannot genuinely dispute that S.B. 200 impaired Prop 4's reforms as a legal matter by pointing to a few nice things people said while their arms were being twisted.

Third, Defendants claim (at 59) that S.B. 200 "furthered" Prop 4's reforms by repealing its redistricting standards and giving the Commission discretion to adopt its own. Not so. In Prop 4, voters enacted redistricting criteria that all enacted maps in Utah must follow, whether drawn by

the Commission or the Legislature. Utah Code § 20A-19-103(1)–(2) (2018). These criteria were listed in priority order, which gives map drawers consistent rules of decision when the criteria inevitably come into tension with one another (*e.g.*, when following a natural feature would split a community of interest). Prop 4 also included a ban on partisan gerrymandering that applied to both the Commission and the Legislature and prohibited consideration of partisan data except to comply with this requirement. *Id.* § 20A-19-103(3) (2018). These reforms operated to improve the redistricting process and make it more responsive to the will of the People.

S.B. 200 reversed these requirements. Under S.B. 200, Defendants need not follow *any* redistricting criteria, let alone the same criteria as the Commission. Indeed, shortly after gutting Prop 4, Defendants enacted an extreme partisan gerrymander splintering communities for partisan advantage. Cutting out the heart of a statute certainly impairs it, and is not a technical fix necessary for its effective operation.

Fourth, Defendants note (at 60–61) that S.B. 200 still requires public meetings and comment. But the provision they cite does not require public meeting*s* (plural) as they claim, just one. *See* Utah Code § 20A-20-303(2)–(3) (2020). And Defendants fail to mention that this same section eliminated Prop 4's transparency and public comment provisions that applied if the Legislature chose to enact its *own* map. For instance, Prop 4 prohibited the Legislature from enacting or modifying a map unless it was made available online for at least 10 days in a format that enables the public to assess the plan for adherence to redistricting standards and that allows for public comment. *Id.* § 20A-19-204 (2018).

The result is that under S.B. 200, in 2021, the Legislative Redistricting Committee (LRC) released its congressional map at 10:00 pm on Friday, November 5, 2021, and scheduled a hearing the following Monday, allowing the public a total of two weekend days to assess the map and

submit comments, which it then promptly ignored.[10] The LRC voted that same day to approve its own map with slight adjustment and advanced it to the Legislature for a vote.[11] The House voted to approve the map the next day with minimal debate, and the Senate quickly did the same the day after that.[12] This process made a mockery of the transparency requirements of Prop 4.

Fifth, Prop 4 sensibly limited redistricting to once per decade after the Census and reapportionment, except when otherwise ordered by a court to correct a violation of law or to make minor technical adjustments. Utah Code § 20A-19-102 (2018). This reform reduced the risk that redistricting would be abused to further an improper purpose. Defendants nonsensically claim (at 61) that by repealing this provision, S.B. 200 somehow "furthers" Prop 4's anti-gerrymandering goal by allowing them to redistrict in response to changes in the state's partisan composition.[13] But without a prohibition on partisan gerrymandering, this change only *increases* Defendants' opportunities to gerrymander during each decade.

Finally, Defendants contend that removing "unconstitutional" aspects of Prop 4 is not an impairment of its reforms. They confuse the analysis. First of all, "all statutes"—a category that includes successful citizen initiatives—"are presumed to be constitutional." *Bingham v. Gourley*, 2024 UT 38, ¶ 41, 556 P.3d 53 (simplified). Defendants' assertion (at 66) that the Legislature should be provided "breathing room" to impair government reforms flips this presumption. The

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[10] Leg. Redistricting Cmte. Notice, https://perma.cc/UQ69-Y7DN; Bryan Schott, *Five things you need to know about the Utah Legislature's redistricting maps*, Salt Lake Trib. (Nov. 8, 2021), https://perma.cc/B9BT-VGTW.

[11] Katie McKellar, *Utah redistricting: Despite cries of cracking communities, lawmakers select their own maps over independent ones*, Desert News (Nov. 8, 2021), https://perma.cc/SAA4-T22X.

[12] H.B. 2004 Cong. Boundaries Designation, Floor Debates, https://perma.cc/5XEA-VXYB; Bryan Schott & Jordan Miller, *Proposed Utah congressional map awaits Gov. Cox's signature as protesters urge a veto at Wednesday night rally* (Nov. 10, 2021), https://perma.cc/7TVJ-FKXR.

[13] This also undermines Defendants' assertion (at 36) that partisanship cannot be measured.

breathing room belongs to Prop 4. While an impairment narrowly tailored to correct an *actual* constitutional infirmity may satisfy strict scrutiny, one based on a speculative (and incorrect) constitutional theory does not.

The Legislature's appeal to federal racial gerrymandering case law is not to the contrary. In *Cooper v. Harris*, the U.S. Supreme Court held that the "breathing room" standard did not apply where a "*legal* mistake" was the basis for the Legislature's action. 581 U.S. 285, 306 (2017) (emphasis added). Here too, the Legislature's "legal mistake" in identifying constitutional flaws with a government reform initiative cannot save it from failing strict scrutiny. A clear constitutional infirmity may provide a compelling justification to modify an initiative; a dubious one does not. And the constitutionality of a statute is a question for the Court to decide, not the Legislature.

There is no genuine dispute that S.B. 200 impaired Prop 4's reforms by repealing its key interventions, and as explained below, S.B. 200 cannot withstand strict scrutiny because Prop 4's reforms stand on firm constitutional footing.

III. S.B. 200 fails strict scrutiny.

Because S.B. 200 impairs the People's right to reform their government via initiative, it must withstand strict scrutiny. *LWVUT*, 2024 UT 21, ¶ 209. "The strict scrutiny standard is a stiff one." *Jones v. Jones*, 2015 UT 84, ¶ 27, 359 P.3d 603. To satisfy it, Defendants must provide a "compelling governmental interest" to justify their infringement on Plaintiffs' fundamental rights and must show that the infringing legislation is "narrowly tailored" to address that asserted interest. *Id.*; *LWVUT*, 2024 UT 21, ¶ 75. Furthermore, the asserted government interest must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *See United States v. Virginia*, 518 U.S. 515, 533 (1996). Defendants can make no such showing here. Defendants claim as a compelling interest that Prop 4 is unconstitutional in several ways and that this justified S.B. 200's

repeal of those provisions, but Defendants are wrong on all counts. Defendants also assert a grab-bag of additional interests, but none is compelling, nor is S.B. 200's complete repeal of Prop 4 narrowly tailored to address them. S.B. 200 thus fails strict scrutiny in all regards.

A. Prop 4 complies with the Utah and Federal Constitutions.

Defendants assert that Prop 4 violates several provisions of the Utah Constitution and federal law. These include that (1) Article IX precludes the People from enacting redistricting legislation, (2) the Federal Elections Clause precludes the same, (3) Prop 4 violates the Legislature's "prerogative" to make its own rules, (4) Prop 4's mandatory funding provision was an improper use of the initiative power, and (5) Prop 4's provisions involving the Chief Justice violate the distribution of powers or nondelegation doctrine. Plaintiffs address each of Defendants' arguments in turn below.

1. Article IX does not provide a basis for S.B. 200's repeal of Prop 4.

Defendants' main argument (at 31) is that Article IX of the Utah Constitution gives redistricting power "only" to the Legislature and thus "precludes 'the people of the State of Utah' from exercising initiative power under Article VI, Section 2 to impair that redistricting responsibility." But this Court already ruled that the "redistricting power is not solely committed to the Legislature," MTD Opinion ("MTD Op."). at 12. Article IX *limits* legislative discretion rather than bestowing exclusive legislative authority. The plain text and structure of the Utah Constitution, history, and precedent confirm that the Constitution imposes no limit on the People's power to enact redistricting legislation.

To begin, the text and structure of the Constitution preclude Defendants' arguments regarding the People's initiative power. The text of Article IX, Section 1 provides that "[n]o later than the annual general session next following the Legislature's receipt of the results of an

enumeration made by the authority of the United States, the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1.

First, Prop 4 does not remove from the Legislature the duty and authority to enact electoral maps—the Legislature may enact either the Commission's recommended redistricting plan or a redistricting plan other than a plan submitted by the Commission. Utah Code § 20-A-19-204(2)(a) (2018). Prop 4 merely provides procedures governing the exercise of that map-drawing authority, standards with which any enacted map must comply, and a legal mechanism to ensure enacted maps in fact comply with those standards.

Second, while Defendants repeatedly use modifiers such as "exclusively" and "only" to describe their discretion over redistricting (at 31, 34, 37), unlike other constitutional provisions, Article IX does not include those words. *Cf.* Utah Const. art. VI, § 17(1) ("The House of Representatives shall have the *sole* power of impeachment." (emphasis added)). As this Court concluded, "nothing in the Utah Constitution restricts that power to the Legislature or states that such power is exclusively within the province of the Legislature. . . . [B]ecause 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." MTD Op. at 11–12.

What the plain text of Article IX *doe*s include is a limit on legislative discretion, imposing an obligation and timing restriction on drawing new electoral maps after the Census. And Article IX's enumerated legislative power must be read "in harmony with the rest of the constitution," which includes further substantive restraints on the Legislature's redistricting power. *LWVUT*, 2024 UT 21, ¶ 9. For example, redistricting laws and maps are subject to gubernatorial review and veto. Utah Const. art. VII, § 8. The Constitution also mandates that "[a]ll political power is inherent

in the people," and guarantees that the People may "initiate *any* desired legislation." *Id.* art. I, § 2; art. VI, § 1(2)(a)(i)(A) (emphasis added). The Constitution thus does not bar the People initiating legislation related to redistricting, and limits Defendants' discretion in that arena.

Indeed, far from granting exclusive control of redistricting to Defendants, the reference to "the Legislature" in Article IX's text indicates a legislative function that is also subject to citizen initiatives. *Carter v. Lehi City*, 2012 UT 2, ¶¶ 79–80, 269 P.3d 141; *Mawhinney v. City of Draper*, 2014 UT 54, ¶¶ 15–18, 342 P.3d 262. The U.S. Supreme Court confirmed this interpretation in its review of a similar Florida constitutional provision. *Lawyer v. Department of Justice*, 521 U.S. 567, 577 n.4 (1997) (discussing Fla. Const. art. III, § 16). The Court rejected the argument that the provision "provides the exclusive means by which redistricting can take place," because "this article in terms provides only that the state legislature is bound to redistrict within a certain time after each decennial census, for which it may be required to convene." *Id.* The same reasoning applies here. As a result, both Defendants and the People (by initiative) hold the power to enact redistricting legislation by virtue of their status as the "Legislative Department" of the State. Utah Const. art. VI, § 1; *Carter*, 2012 UT 2, ¶ 22, 30–31 ("[A]rticle VI nowhere indicates that the scope of the people's initiative power is less than that of the Legislature's power.").

History also confirms that the Framers meant to limit the Legislature's discretion in relation to redistricting. Defendants claim (at 32–33) that the Convention Debates show that Utah's "founders vested redistricting functions in the Legislature" because "legislators are the experts on their respective districts." But nothing Defendants cite supports that the Constitution vested the

Legislature with exclusive redistricting power. Rather, Defendants' citations demonstrate that the Framers were *wary* of unchecked legislative discretion.[14]

The Utah Constitution was "motivated by a wariness of unlimited legislative power" arising from a Progressive Era desire "to limit legislative power and prevent special interest abuse." *Gregory v. Shurtleff*, 2013 UT 18, ¶ 32 n.18, 299 P.3d 1098 (quotations omitted). Utah's ratifiers viewed legislatures with "fear and distrust rather than [as] repositories of residual power." *See* Bruce Hafen, *The Legislative Branch in Utah*, 1966 Utah L. Rev. 416, 418 (1966). They understood the need to create "[a] government based upon the will of the people" that "must ever keep such authority within reach of the people's will," because "[l]egislatures are but the agents of the people*." United States v. Church of Jesus Christ of Latter-Day Saints*, 15 P. 473, 477 (Sup. Ct. Territory Utah 1887). And in the first constitutional amendment, they reserved the initiative power as a "vehicle by which the people can govern themselves" to "act[] as the people's check against the legislature." *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 94, 452 P.3d 1109 (Himonas, J., concurring); *LWVUT*, 2024 UT 21, ¶ 17 (via the "same sovereign authority" Utahns' exercised "to create the Utah Constitution," the "people amended the constitution to add the Initiative Provision, in which they took back an equal measure of legislative power, which they could exercise directly"). This history confirms the People's coequal power to legislate regarding redistricting.

[14] In support of their ipse dixit argument that Article IX gives them sole redistricting power, Defendants argue (at 32) that the Framers foresaw "'potential conflicts of interests between the rural and urban areas"' resulting in a "push[] for an apportionment system that would ensure each voter had a representative who would properly represent local interests." But this demonstrates that the Constitution was meant to serve as a *limit* on legislative discretion in redistricting. Moreover, Defendants elsewhere attempt (at 35) to justify their extreme congressional gerrymander as motivated by combining rural and urban interests. Defendants cannot have it both ways.

Defendants also argue (at 32-33) that Article IX bars redistricting legislation via initiative because a "Salt Lake City commission" cannot "duplicate" legislative redistricting. But as the Utah Supreme Court held, Prop 4 "did not take the authority to enact electoral maps from the Legislature and give it to the Independent Commission." *LWVUT*, 2024 UT 21, ¶ 197. Moreover, under both Prop 4 and S.B. 200, the Commission would not be a "Salt Lake City commission" unless Defendants made it so—legislative leaders themselves select almost all the Commissioners, and the Commission solicits feedback from across the state. As such, these arguments provide no support for their misreading of Article IX.

Defendants make a number of additional meritless arguments (at 34-39), including that Prop 4 violated Defendants' "exclusive" redistricting power under Article IX because it: (1) required prioritization of municipal and then county splits, (2) required application of substantive criteria in a particular order, (3) prohibited partisan gerrymandering, (4) required use of standards and data to assess a plan's compliance with Prop 4, and (5) created a private cause of action enforceable in court. Each fails for the same foundational reason outlined above—the Utah Constitution does not provide Defendants with exclusive redistricting authority, the People have coequal power to legislate regarding redistricting, and the Constitution limits Defendants' redistricting discretion. Utah Const. art. IX, § 1; art. VI, § 1; *LWVUT*, 2024 UT 21, ¶ 17; *Carter*, 2012 UT 2, ¶¶ 22, 30–31, 79–80; *Lawyer*, 521 U.S. at 577 n.4; MSJ at 20–24.

a. Municipal and county split prioritization.

Defendants argue (at 34, citing Utah Code § 20A-19-103(2)(b) (2018)) that Prop 4 violates Article IX because it "attempt[ed] to require the Legislature to exercise its sole discretion in a particular way" by prescribing "the Legislature to 'giv[e] first priority to minimizing the division of municipalities and second priority to minimizing the division of counties.'" This argument fails

at the outset because Defendants do not have "sole" redistricting power with unlimited discretion under the Utah Constitution, but share it with the People, as explained above. Prop 4's establishment of redistricting criteria and prioritization of subdivision splits thus does not impair any legislative function under Article IX.

Defendants also baselessly claim (at 34-35) that "Prop[] 4's practical effect would have been to require them to prioritize keeping cities within Salt Lake County whole over other small counties in areas of the State," and to "'purposefully' and 'unduly favor' Salt Lake City and its Democratic voters," curtailing their ability to "balance urban and rural interests." Defendants provide no evidence to support this claim.

First, Prop 4's text contains no such bias, as it requires minimizing splits of *all* cities over *all* counties regardless of partisanship, to the "greatest extent practicable," and subject to federal law. Utah Code § 20A-19-103(2) (2018). In addition, Defendants' desire to "balance" urban and rural interests was simply a pretext for partisan advantage. Regardless, Defendants cannot show that Prop 4's prioritization would result in undue burden. Defendants' 2021 Enacted Plan split five counties (Utah, Salt Lake, Summit, Davis, and Juab) and 15 municipalities.[15] In comparison, the Commission-proposed map, Public SH2, which was "intended to achieve a statewide balance of districts with both rural and urban areas," split only four counties (Salt Lake, Davis, Washington, and Sanpete) and seven municipalities.[16] Ex. 1 (UIRC Final Report at 57). Notably, the Enacted Plan divided more counties than Public SH2, including the smallest population county split by either of the plans (Juab), split more than twice the number of municipalities, and performed worse

[15] Dave's Redistricting, UT 2022 Congressional, https://perma.cc/E86P-RBTV
[16] Dave's Redistricting, Public_CD_SH2_FINAL, https://perma.cc/3DHY-MJ9D

on urban/rural balance.[17] But Defendants ignored Public SH2. This demonstrates that rural/urban balance was a pretext for partisan advantage, and disproves any notion that Prop 4's criteria regarding subdivision splits violates Utah's Constitution.

b. Order of priority for redistricting criteria.

Next, Defendants argue (at 35, citing Utah Code § 20A-19-103(2) (2018)) that Prop 4 violated their "full power" by "prescrib[ing] various substantive requirements" and "requir[ing] the Legislature to apply them in a particular 'order of priority.'" For the same reasons outlined above, this argument fails because Defendants do not have "sole" redistricting power under the Utah Constitution, and the People have coequal power to legislate regarding redistricting. MSJ at 20–24. In short, if the Legislature can establish redistricting criteria, so can the People via initiative. As a result, Prop 4's establishment of redistricting criteria and priority order cannot impair any legislative function under Article IX.

Defendants cite (at 36) *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955), for the proposition that legislators require "'plenty of room' to exercise their redistricting discretion" and "full power" to balance interests. But *Parkinson* concerned the interpretation of the phrase "on the basis of such enumeration" in Article IX, Section 2, and the Court nowhere held that Defendants have sole redistricting authority. The opposite is true. The Court noted that the *Constitutional Convention* had "full power to determine the basis of representation in the state legislature" whereas "the legislature being the representatives of the people…constitutional provisions are *limitations*, rather than grants of power." *Parkinson*, 291 P.2d at 405. (emphasis added). Indeed, "that was the reason for the grave concern and extensive debate upon the pattern to be set for

[17] For County population numbers demonstrating the size of Juab County, s*ee* 2020 Redistricting Data, OLRGC, at 6 (Aug. 16, 2021), https://perma.cc/5W5C-4RLB.

representation ….” *Id.* As such, Prop 4’s ordering of mandatory redistricting criteria does not violate Article IX.[18]

c. Prop 4’s ban on partisan gerrymandering.

Defendants also argue (at 36-37) that Prop 4’s restriction on them “purposefully or unduly favor[ing] or disfavor[ing] incumbents, candidates, or political parties” when drawing maps violates their “sole” redistricting authority and “improperly precluded [them] from considering” partisanship under Article IX. (citing Utah Code § 20A-19-103(3) (2018)). Not so. Once again, as explained above, the People have coequal power to legislate regarding redistricting, and thus Prop 4’s partisanship criteria cannot violate Article IX. MSJ at 20–24.

As an initial matter, Defendants make a series of unsupported factual assertions (at 36) about the nature of electoral data and voting patterns. But Defendants’ own extreme partisan gerrymander relies on verifiable voting patterns to reliably guarantee single-party control of the congressional delegation for a decade. Indeed, this is the whole point of gerrymandering—using granular voter data and actual voting patterns, and rapidly advancing mapping technology, to efficiently manipulate the electoral process.[19] *Rucho v. Common Cause*, 588 U.S. 684, 746–51 (2019) (Kagan, J., dissenting). And the same technologies and data used to gerrymander also make it possible to reliably evaluate the partisan bias of any plans. *Id.* at 736. As a result, map drawers,

[18] Defendants include a hypothetical (at 35-36) about legislators from South Jordan, Utah County, and a potential conflict between redistricting criteria. But the hypothetical is unpersuasive. Compliance with federal equal population requirements would *always* trump compliance with state redistricting criteria (Prop 4 or not) and *any* redistricting requires balancing criteria.

[19] Defendants’ attempt to raise factual questions about independent voters or party registration figures (at 36) is both misleading and irrelevant. They do not substantiate these claims, and partisan gerrymanders are often created by displaying election-result shading during the map-drawing process. That is likewise how they are assessed, using *actual election results*, not voter registration information. *Easley v. Cromartie*, 532 U.S. 234, 244–45 (2001); *Hunt v. Cromartie*, 526 U.S. 541, 550–51 (1999).

redistricting commissions, and courts routinely rely on measures of and expert testimony about past and likely future voting patterns to evaluate maps and resolve gerrymandering claims. *See, e.g.*, *LWVPA v. Commonwealth*, 178 A.3d 737, 769–79 (Pa. 2018); *Szeliga v. Lamone*, No. C-02-cv-21-001816, 2022 WL 2132194, at *31–34, *41 (Md. Cir. Ct. Mar. 25, 2022); *Adams v. DeWine*, 195 N.E.3d 74, 85–93 (Ohio 2022); *Matter of 2021 Redistricting Cases*, No. 18332, 2023 WL 3030096, at *35 (Alaska Apr. 21, 2023); *Harkenrider v. Hochul*, 197 N.E.3d 437, 453, n.14 (N.Y. Ct. App. 2022).

Defendants also argue (at 37) that they are the only body that can "resolve such political questions." But that is not what the Utah Constitution says. Defendants cite *Salt Lake City* v. *International Association of Firefighters*, *Locals 1645, 593, 1654, & 2064,* 563 P.2d 786, 790 (Utah 1977), but it does not help them. First, that case does not hold that Defendants have sole redistricting authority. Moreover, *International Association of Firefighters* involves the opposite situation from Prop 4. There, the Legislature delegated to a commission certain subjects that would insulate those policy areas from popular control in a manner that "may be antagonistic to the public interest." *Id.* at 789. Prop 4, by contrast, brought redistricting closer to the People's own legislative prerogative. Unlike the "final and binding" decisions from the *Firefighters* commission, Prop 4 created an *advisory* Commission, and mandated public access and redistricting criteria to retain the People's control against Defendants' excesses.

Finally, Defendants argue that Article IX gives them the prerogative to consider partisan objectives, and Prop 4 "improperly precluded" them from doing so. Prop 4 did not *preclude* Defendants from considering partisanship—rather, it *required* consideration of partisanship "to assess whether a proposed redistricting plan abides by and conforms to the redistricting standards" in Prop 4. Utah Code § 20A-19-103(4) (2018). And although Defendants argue that unfettered

"consideration of political objectives" is "proper" in legislative redistricting, partisan gerrymandering "reflect[s] no policy" at all, "but simply arbitrary and capricious action," *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring), and violates numerous provisions of the Utah Constitution. *See* First Am. Compl. In contrast, it *is* constitutionally acceptable for a state to guard against partisan bias in redistricting. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). As such, Prop 4's provision prohibiting partisan gerrymandering does not violate Article IX.

d. Use of standards and data to assess compliance with redistricting criteria.

Defendants next argue (at 37) that Prop 4's provision requiring evaluation of a plan's compliance with redistricting criteria using "judicial standards and the best available data and scientific and statistical methods, including measures of partisan symmetry," violates Article IX by replacing Defendants' "legislative . . . function" with a "'judicial'" one (citing Utah Code § 20A-19-103(4) (2018)). This argument lacks merit for several reasons. MSJ at 20–24.

To begin, Defendants misread Prop 4 if they believe that subsection 103(4) requires them to exercise a judicial function, such as adjudicating legal claims or ruling on the constitutionality of any map. Rather, Utah Code § 20A-19-103(4) (2018) requires assessment of relevant data, factual, and legal standards to determine whether a map complies with Prop 4's *redistricting criteria*. Defendants consider similar information all the time when drafting, debating, and voting on legislation. *See, e.g.*, *Policy 360 Briefings, Utah State Legislature,* https://perma.cc/JSX8-D7PJ (linking to numerous presentations to legislators that discuss data, laws and judicial standards, including in relation to marriage, divorce, immigration, health reform laws, and more). More fundamentally, Defendants *already* consider judicial standards and data when they redistrict, for example to comply with equal population requirements, the U.S. Constitution's ban on racial

gerrymandering, and the federal Voting Rights Act.[20] Prop 4 thus imposes no judicial role on Defendants and does not impair the legislative function shared by the People in Article IX.

Defendants next return to Prop 4's provision on partisan gerrymandering, this time arguing (at 38) that Prop 4's prohibition on "unduly favor[ing]" incumbents, candidates, and political parties," Utah Code § 20A-19-103(3) (2018), would "require courts to ultimately adjudicate Platonic notions of fairness," which impairs Defendants' "exclusive" authority to redistrict. But Prop 4 would require no such thing, as interpreting statutory language and evaluating whether statutes have been violated is a classic judicial function. *Timpanogos Planning & Water Mgmt. Agency v. Utah Water Conservancy Dist.*, 690 P.2d 562, 569 (Utah 1984) (core judicial function includes "the power to hear and determine controversies between adverse parties and questions in litigation"). *Any* law Defendants pass is subject to judicial review, and Defendants cannot show that there is a redistricting exception to the Utah Constitution. Indeed, Utah's Supreme Court has reviewed redistricting actions before. *Parkinson,* 291 P.2d at 402–03 (concluding that Court was "required to adjudicate the limitations upon the authority of other departments of government," rejecting any claim that Defendants have plenary, unreviewable control of redistricting).

Moreover, Prop 4 itself points to ways to evaluate whether a map has an undue effect, including using measures of partisan symmetry and statistical methods. Utah Code § 20A-19-103(3) (2018). State courts and map drawers across the country have used similar standards to protect against partisan gerrymandering, including relying on traditional redistricting criteria, expert opinion, and statistical evidence of partisan bias that reveal whether a map cracks and/or packs a disfavored party's voters to advantage the other party. *See, e.g.*, *LWVPA*, 178 A.3d at 769–

[20] *See, e.g.*, *Redistricting: The Legal Requirements*, Utah Office of Legislative Research and General Counsel (Oct. 20, 2010), https://perma.cc/8R5J-MY3D.

79; *Szeliga*, 2022 WL 2132194, at *31–34, 41; *Adams v. DeWine*, 195 N.E.3d at 85–93; *Matter of 2021 Redistricting Cases*, 2023 WL 3030096, at *35; *Harkenrider*, 197 N.E.3d at 453, n.14.[21] The U.S. Supreme Court also approvingly cited a Delaware statute with a standard similar to Utah's as a state redistricting solution. *Rucho*, 588 U.S. at 720 (citing "Del. Code Ann., Tit. xxix, § 804 (2017) (providing that in determining state legislative districts, no district shall "be created so as to unduly favor any person or political party")). Utah is no different, and Prop 4 does not infringe upon Article IX.

e. Prop 4's private right of action.

Finally, Defendants (at 38) claim that Prop 4 "impaired [their] Article IX power by creating a private cause of action making Proposition 4's substantive criteria mandatory…and enforceable in the courts." Just like their other Article IX arguments, this argument also fails at the threshold. *See* MSJ at 20–24.

Defendants' further arguments about the private right of action are irrelevant and incorrect. Defendants' claim (at 39) that to "'retain the power to make ultimate policy decisions,'" they "must be free to 'override decisions made by others,'" cannot be correct. At minimum, Utah courts have the power to review the legality of statutes. In any event, Defendants face no risk of "nullity," because Prop 4 "did not take the authority to enact electoral maps from the Legislature and give it to the Independent Commission." *LWVUT*, 2024 UT 21, ¶ 197. "Rather, it empowered the Independent Commission to create proposed maps, which the Legislature was required to consider." *Id.*

[21] In addition, many of these state courts did so applying general constitutional provisions, which do not contain the explicit standard for evaluating partisan gerrymandering found in Prop 4.

In addition, Defendants can hardly claim that Prop 4's private right of action impairs their Article IX power when they *have already* given Utah courts the ability to review redistricting challenges. The Supreme Court's jurisdictional statute, for example, provides that the Court "has original appellate jurisdiction" over disputes concerning the "reapportionment of election districts." Utah Code § 78A-3-102(4)(c). Further, in finding partisan gerrymandering claims nonjusticiable in federal court, the U.S. Supreme Court specifically stated that their decision did not "condemn complaints about districting to echo into a void" because "[p]rovisions in state statutes . . . can provide standards and guidance for state courts to apply." *Rucho*, 588 U.S. at 719–20 (approvingly citing several states that via state statute or constitution have "mandated at least some of the traditional districting criteria for [] mapmakers" or "outright prohibited partisan favoritism in redistricting"). Utah is no exception, and Prop 4 does not impair Defendants under Article IX.

2. The Federal Elections Clause does not provide a basis for S.B. 200's repeal of Prop 4.

Defendants now also claim (at 39–41), for the first time, that Prop 4 impairs the Legislature's authority under the U.S. Constitution's Elections Clause. This novel theory cannot justify S.B. 200 under any level of scrutiny because it directly contradicts controlling precedent.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the U.S. Supreme Court held that the Elections Clause permitted the people of Arizona to establish by voter initiative an independent commission to conduct redistricting. 576 U.S. 787, 813 (2015) ("*AIRC*"). The Court reasoned that "the Legislature" to which the Elections Clause confers authority means not only the state's representative body, but any entity empowered to legislate under the state constitution, including the people by initiative. *Id.* at 813–14. Because the Arizona Constitution vests power in the people to legislate "on equal footing with the representative legislative body,"

id. at 795, the Court ruled that the people's legislation delegating redistricting to an independent commission was a valid exercise of Elections Clause authority. *Id.* at 814 (citing Ariz. Const. art. IV, pt. 1, § 1).

Prop 4 is plainly permissible under *AIRC*. As in Arizona, the Utah Constitution vests "Legislative power" in "the people," permitting them to "initiate *any* desired legislation." Utah Const. art. VI, § 1(1)(b), (2)(a)(i)(A) (emphasis added). The people used this power to enact redistricting reform legislation in Prop 4, and as the Utah Supreme Court held, their power to do so "is equal to the Legislature's." *LWVUT*, 2024 UT 21, ¶ 2. Prop 4 is also consistent with other state constitutional provisions. *Supra* III.A. Thus, Prop 4 was a valid exercise of legislative authority under the federal Elections Clause. *See AIRC*, 576 U.S. at 813–14.

Defendants mangle *AIRC*'s straightforward holding. For one, they rely principally (at 40) on its dissent rather than majority opinion. Defendants also state—incorrectly—that *AIRC* "permitted a body that was *not* 'the Legislature'. . .to impair a legislature's redistricting responsibility." *Id.* (emphasis in original). *AIRC* rejects this premise, holding that when the People exercise their state constitutional authority to legislate redistricting reforms, they *are* "the Legislature" as that term is used in the Elections Clause. *See AIRC*, 576 U.S. at 813 (noting that founding era dictionaries "capaciously define[d] the word 'legislature'" to mean "[t]he power that makes the laws"). And when a state constitution grants the People power to make laws on equal footing with the institutional legislature, as it does in Utah, the use of that lawmaking authority does not "impair" that of the institutional legislature. *See id.* at 819 ("[T]he invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power."); *id.* at 824 ("[T]he Clause surely was not adopted to diminish a State's authority to determine its own lawmaking process."). Defendants also contend (at 40) that *AIRC*

construed the Elections Clause to cover "the people" in Arizona only because Arizonans enacted their redistricting reform by constitutional amendment. But this distinction nowhere figured into the Court's analysis. *See* 576 U.S. at 813–14. No matter the form of lawmaking, if a redistricting law is enacted "in accordance with the State's prescriptions for lawmaking"—as was Prop 4—it does not violate the Elections Clause's commitment of redistricting authority to "the Legislature." *Id.* at 808–09.

Defendants' reliance on *Moore v. Harper* to attack Prop 4 (at 41, 50–51) also does not help their case. To start, *Moore* was not appealed to the Supreme Court until 2022, so it could not have possibly generated doubts as to Prop 4's constitutionality when Defendants enacted S.B. 200 in 2021. At issue in *Moore* was whether the Elections Clause exempts laws related to federal elections enacted by state legislatures from review by state courts for compliance with state constitutions. 600 U.S. 1, 19 (2023). The Court held that state courts do retain judicial review authority under the Elections Clause so long as they do not "so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures." *Id.* at 37. In arriving at this conclusion, the Court looked to *AIRC* and other precedents, which made clear that the Elections Clause does not vest state legislatures with "exclusive and independent authority when setting the rules governing federal elections." *Id.* at 26. The Court also reaffirmed *AIRC*'s holding that "the Legislature" under the Elections Clause is not limited to a state's representative body alone when the state's constitution also vests legislative authority in voters acting by ballot initiative or in an independent redistricting commission. *See id.* at 25 ("[T]he Court in [*AIRC*] recognized that *whatever authority* was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution." (emphasis added)). Thus, while it could not have

possibly informed the passage of S.B. 200, *Moore* has only since reconfirmed Prop 4's constitutionality under the Elections Clause.

Finally, Defendants contend (at 41, 51) that any decision of this Court finding Prop 4 constitutional under Article IX, § 1 or Article VI, § 1 would "exceed the bounds of ordinary judicial review" and itself violate the Elections Clause. This makes scant sense. The People of Utah exercised the very legislative power identified in the Elections Clause to limit the ability of the Legislature to gerrymander and to specifically authorize the state court to enforce that limitation. A state court enforcing restrictions on legislative power in redistricting that were themselves enacted via a proper exercise of the legislative power pursuant to a cause of action voluntarily created by an exercise of legislative power cannot plausibly "exceed the bounds of ordinary judicial review" and intrude upon a state's legislative authority. *Id.* at 37. The U.S. Supreme Court explained that this is the precise type of statute that "can provide standards and guidance for state courts to apply." *Rucho*, 588 U.S. at 719. Defendants' claim that Prop 4 violates the federal Elections Clause cannot justify S.B. 200 under strict scrutiny.

3. Prop 4 does not intrude on the House's or Senate's prerogative to make their own rules.

Prop 4 neither violates nor even implicates the Legislature's power to set its own rules. Article VI, Section 12 of the Utah Constitution provides that "[e]ach house shall determine the rules of its proceedings and choose its own officers and employees." Defendants contend (at 43–50) that this provision provided a compelling justification to repeal the following of Prop 4's legislative requirements: (1) to vote upon the Commission's proposed maps, (2) to issue a report explaining how the Legislature's adopted map(s) better adhere to Prop 4's standards, (3) to accept public comment for at least 10 days, (4) to redistrict only once a decade, and (5) to adopt maps

only after receiving the Commission's proposed maps. Defendants' expansive interpretation of Article VI, Section 12 is mistaken.

Defendants are wrong to contend that Article VI, Section 12 prohibits initiatives that alter or reform how the Legislature operates. Like all constitutional provisions, Article VI, Section 12 must be interpreted in light of other relevant constitutional provisions. *See Am. Bush v. City of South Lake*, 2006 UT 40, ¶ 18, 140 P.3d 1235 (noting that "other provisions dealing generally with the same topic . . . assist us in arriving at the proper interpretation of the constitutional provision in question"); *Berry by and through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985) (explaining that a constitutional provision's meaning "must be taken not only from its history and plain language, but also from its functional relationship to other constitutional provisions"). The requirement that "[e]ach house shall determine the rules of its proceedings," Utah Const. art. VI, § 12, must therefore be construed in light of Article I, Section 2, which declares that "[a]ll political power is inherent in the people . . . and they have the right to alter or reform their government as the public welfare may require." Likewise, Article VI, § 12 must be interpreted in light of the People's power to "initiate *any desired legislation*," Utah Const. art. VI, § 1(2)(a)(i)(A) (emphasis added)—a power that the Supreme Court has explained is not "less than that of the Legislature's power" and "reaches to the full extent of the legislative power." *Carter v. Lehi City*, 2012 UT 2, ¶ 22, 30-31, 269 P.3d 141. Thus, while each chamber of the Legislature must adopt rules governing its procedures, the People are empowered to reform the operation of the Legislature and the rules adopted by the Legislature must be consistent with statutes adopted by initiative aimed at altering or reforming the Legislature. This reading gives harmony to all three provisions.

This is consistent with how the U.S. Supreme Court has interpreted the analogous provision of the U.S. Constitution, which provides that "[e]ach House may determine the Rules of its

Proceedings . . . ." U.S. Const. art. I, § 5, cl. 2. In *United States v. Ballin*, the Court reasoned that although "[t]he constitution empowers each house to determine its rules of proceedings[,] [i]t may not by its rules ignore constitutional restraints or *violate fundamental rights*, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." 144 U.S. 1, 5 (1892) (emphasis added). Beyond these "limitations," the Court explained that Congress was free to determine its rules. In Utah, the Framers and voters "enshrined a fundamental right of the people to alter or reform their government." *LWVUT*, 2024 UT 21, ¶ 104. *Ballin*—decided shortly before the Utah Constitution was drafted—illustrates the flaw in Defendants' broad interpretation of Article VI, Section 12. Legislative rules must coexist with fundamental rights. But Defendants' position would place the functioning of the Legislature beyond the reach of the People's Article I, Section 2 power to alter or reform their government. Nothing in the text of Article I, Section 2 or Article VI, Section 12 suggests that the Legislature is exempted from the People's broad right to alter or reform their government, or that only the executive and judicial branches are susceptible to the People's power to alter or reform how they operate. While initiatives must be "exercised in harmony with the rest of the constitution," *LWVUT*, 2024 UT 21, ¶ 157, the rest of the Constitution must be interpreted in harmony with the People's fundamental constitutional right to alter or reform their government by initiative.

Defendants rely primarily upon two out-of-state cases to support their argument, but neither is persuasive.[22] In *People's Advocates, Inc. v. Superior Court*, 181 Cal. App. 3d 316 (1986), an

[22] The only Utah authority Defendants cite is a selective quotation from a single footnote in *Gallivan v. Walker*, 2022 UT 89, ¶ 59 n.11, 54 P.3d 1069. But that footnote supports *Plaintiffs'* reading of Article VI, § 12 because the Court there reasoned that the Legislature's authority to set its rules cannot justify impairments to the initiative process, but initiatives *can* act as a

intermediate California appellate court invalidated an initiative that "regulat[ed] the internal workings of the houses," which the court concluded were "exclusively the province of the houses." *Id.* at 326–27. But the Court did not consider—and the parties apparently did not raise—how Article II, Section 1 of the California Constitution affects the interpretation of the legislature's power to adopt rules. *See* Cal. Const. art. II, § 1 ("[a]ll political power is inherent in the people . . . and they have the right to alter or reform [the government] when the public good may require"). In the absence of any consideration of the Alter or Reform Clause—the central issue is in this case—*People's Advocates* provides little insight into the meaning of the Utah Constitution.

Moreover, the Utah Constitution vests full legislative power coequally with the People and the Legislature, while the California Constitution does not. *Compare* Utah Const. art. VI ("The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah . . . .") *with* Cal. Const. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."). As the *People's Advocates* court noted, "[s]uch reserved powers are exclusively specified in article II, section 8 [of the California Constitution], and are limited to that which has been specifically delegated. They do not include the power to regulate the internal workings of the houses." 181 Cal. App. 3d at 327; *id.* (holding that the California initiative power does not "include[] the whole of the legislative power"). The Utah Constitution contains no such limitation on the People's legislative power, which is coextensive with that of the Legislature. Indeed, as Defendants themselves emphasize (at 44), "[t]he execution of internal rules

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constitutional check on the representative legislature. *Id.*; *see also* Pls. Resp. in Opp. to Defs. Mot. to Dismiss ("MTD Resp.") at Part I.B.

also implicates the substantive legislative power because it has always been inextricably identified with the legislative process." (cleaned up). Exactly. In Utah, the substantive legislative power rests with both the Legislature and the People. These fundamental differences make *People's Advocates* inapposite.

Defendants also rely upon *Alaskans for Efficient Government v. State*, 153 P.3d 296, 297 (Alaska 2007), where the Alaska Supreme Court reasoned that an initiative requiring tax legislation to be passed by a supermajority violated the Constitution's express provision requiring only a majority vote for legislation. In so holding, the court observed that "[b]y giving the legislature the duty to adopt procedural rules for enacting law, while spelling out the precise vote required to enact bills as law, [the provision] unmistakably signals that Alaska's constitutional framers intended the majority-voting provision to be a substantive requirement instead of a mere procedural rule." *Id.* at 300.[23] *Alaskans for Efficient Government* thus stands for two propositions, neither of which aid Defendants. First, an initiative cannot supersede an express contrary constitutional provision—an unremarkable proposition the Utah Supreme Court affirmed in this case and does not arise here. *See, e.g.*, *LWVUT*, 2024 UT 21, ¶ 104. Second, some requirements that might seem procedural are in fact substantive—a reality the U.S. Supreme Court has often observed. As the Court explained in *Moore*, "[t]he line between procedural and substantive law is hazy." 600 U.S. at 31 (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring in part)). "Many rules 'are rationally capable of classification as either.'" *Id.* (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)). "Procedure, after all, is often used as a vehicle to achieve substantive ends." *Id.*

[23] Alaska's Constitution does not contain an Alter or Reform Clause.

Prop 4's requirements at issue here—*e.g.*, the requirement to hold a vote on the Commission's map, to issue a report explaining why the Legislature's plan better accords with the redistricting standards than the Commission's map, to provide an opportunity for public input, and to refrain from mid-decade redistricting—are precisely the types of requirements that are "rationally capable of classification as either" procedural or substantive. *Id.* These provisions further Prop 4's substantive purpose of empowering independent, citizen-led map drawing; enforce Prop 4's redistricting standards, including its prohibition on partisan gerrymandering; and make map drawing more transparent and public. Each of the requirements has a substantive end, even if they contain procedural elements.

For this reason, even if Defendants were correct that purely procedural rules governing the Legislature are exempt from the People's power to alter or reform their government by initiative (they are not), that rule could not apply to initiative statutes that are capable of classification as either procedural or substantive, like those at issue here. A contrary conclusion would unconstitutionally foreclose the People from exercising their coequal legislative power, *see* Utah Const. art. VI, § 1(1)(b), by which they are empowered to "initiate *any desired legislation*," *id.* § 2(a)(i)(A) (emphasis). That necessarily includes all legislation capable of characterization as substantive, even if also capable of characterization as procedural.

Indeed, Prop 4's requirements are nothing like most matters addressed in the House and Senate Rules. For example, the House and Senate Rules outline how chambers are called to order, the election of the Speaker and Senate President, the daily schedule, scheduling guest speakers, proper decorum, standing committees, parliamentary procedure, etc. *See generally* Utah House Rules, https://perma.cc/J9BR-EGKM; Utah Senate Rules, https://perma.cc/Z537-X3S3. Prop 4's "procedural" requirements, on the other hand, are directed at substantive ends to prevent

gerrymandering and empower citizens in the map drawing process. To be sure, the Legislature's rules also address matters that are capable of characterization as substantive. *See, e.g.*, Utah House Rules, HR5-2-101, Lobbyist Code of Ethics ("A lobbyist, volunteer lobbyist, or government official may not . . . attempt to influence a representative . . . by means of deceit or by threat of violence or economic or political reprisal."). In that respect, the Rules illustrate the point that the Legislature's power to set rules overlaps with the People's power to adopt government reform initiatives. It would make no sense to contend that the voters could not enact an initiative regulating lobbying of the Legislature simply because the Legislature has adopted lobbyist regulations as part of its rules.

Moreover, the Legislature itself has repeatedly enacted statutes subject to approval of both chambers and the Governor and modifiable only by those same actors—rather than rules adopted individually by each chamber—regulating the operation of the Legislature. Title 36 of the Utah Code is titled "Legislature" and, by statute, regulates a large swath of the Legislature's operations. For example, § 36-2-2 provides that legislators' salaries are set by a committee unless the Legislature votes to reject or lower the recommended amounts; § 36-3-201 sets the beginning and end dates of the annual general session; § 36-12-10 prohibits members from voting on committees on which they are not members; § 36-12-12(2)(f) authorizes the Office of Legislative Research and General Counsel to correct technical errors in enacted laws; § 36-12-15.1(4) requires the Legislature to review an audit in evaluating an entity's request for a budget increase and its prior history of savings and efficiencies; § 36-27-102 provides that the Legislature may offer counsel to Utah's U.S. senators; and § 36-27-103 provides that this written report may be passed by a joint resolution of the Legislature or by issuing a written statement containing the signatures of a majority of the members of both chambers.

Other examples abound in Title 36. Moreover, the Legislature has enacted laws governing public transparency of its proceedings, including the Government Records Access and Management Act, which applies to the Legislature, *see* Utah Code § 63G-2-103(11)(a)(ii), and the Open and Public Meetings Act, which applies to the Legislature, requires open proceedings, and requires at least 24 hours' notice before legislative meetings, *see* Utah Code § 52-4-101, *et seq.* Indeed, S.B. 200 itself regulated—by statute—the Legislature's redistricting process. Under § 20A-20-303, the Legislature may not enact a redistricting plan before the Commission presents its recommended maps at a public committee hearing, must hold a public meeting on the proposed maps, and may vote on or adopt the Commission's proposed maps. These provisions are akin to Prop 4's 10-day public comment period provision that Defendants challenge as an improperly initiated statute. Under Defendants' theory that each chamber must have exclusive and unencumbered power to set and eliminate requirements about its operations, these statutes—which require the assent of both chambers and the Governor to have been enacted or to be repealed—would all be unconstitutional. That is not so.

Defendants' various objections to Prop 4's specific requirements are likewise unavailing and generally repeat the meritless arguments addressed above. If Defendants are concerned (at 46) about voting on the Commission's proposed maps because there may be no legislator who sponsors the Commission's proposals, the Legislature is free to set rules under Article VI, Section 12 to address the introduction and voting on the Commission's proposals. Defendants contend (at 48) that it is impractical to issue a report supporting the adoption of its own map because of the "difficulty of ascertaining the will of 104 individual legislators." But just as the Legislature has provided that it can adopt a written report making recommendations to Utah's U.S. Senators by either joint resolution or the signatures of a majority of each house, *see* Utah Code § 36-27-103, it

can likewise adopt such a rule or approach in complying with Prop 4.[24] Defendants also object (at 49) to Prop 4's prohibition on mid-decade redistricting, contending that Article IX leaves it free to conduct mid-decade redistricting and indeed would require it if the Legislature enacted a law changing the number of legislators mid-decade. But in compelling the Legislature to redistrict in its first general session following the federal Census, Article IX does not prohibit the Legislature or the People from exercising their plenary legislative power to enact a state law to preclude mid-decade redistricting.

4. Prop 4's mandatory funding provision is a proper use of the initiative power.

Defendants contend (at 41, 50) that Prop 4's mandatory funding provision "was not a proper exercise of the initiative power" because it "restricted the Legislature's discretion over appropriations." Implicit in Defendants' argument is the assumption that the legislative power of the People is either (1) limited in its substantive scope in a way that Defendants' is not, or (2) that it is subservient to Defendants' own legislative power.

As explained above, this argument and its underlying assumptions lack any foundation in the Utah Constitution, which provides that "[t]he Legislative power of the State shall be vested in . . . the Legislature . . . and the people of the State of Utah." Utah Const. art. VI, § 1(1)(a)–(b). In addition, this Court has repeatedly found that the People's legislative power is, at minimum, equal to that of the Legislature; no "discretion" is owed to the Legislature. *See id.*; *Sevier Power Co., LLC v. Bd. of Sevier Cnty. Commissioners*, 2008 UT 72, ¶ 7 ("[A]rticle VI, section 1 plainly contemplates an equivalent retention of power [to that of the Legislature] for direct action by

[24] Defendants' contention (at 48) that Prop 4's written report requirement somehow contravenes the Speech or Debate Clause is puzzling, because as this Court noted in its motion to dismiss order, that Clause protects against defamation liability for individual legislators, not an injunction against an unlawful redistricting map. *See Riddle v. Perry*, 2002 UT 10, ¶ 8, 40 P.3d 1128.

citizens."); MSJ at 20–24. The only limitation on the subject matter of an initiative that the Court has found is that it must be "legislative in nature." *LWVUT*, 2024 UT 21, ¶ 170. As Defendants themselves painstakingly point out (at 51), the appropriation of public funds is a "quintessentially legislative-political decision." As such, a provision requiring the funding of a public body, such as the one at issue here, is a proper use of the People's legislative power via the initiative process.[25]

Defendants also protest that Prop 4's funding provision will somehow interfere with their ability to balance the state's budget. But Defendants provide no proof for this claim and reality disproves it; as in S.B. 200, they set aside the money to fund the Commission for multiple years seemingly without issue. S.B. 200, §13(1)–(2).[26] Moreover, the estimated cost of funding the Commission is $1 million; Utah's budget for fiscal year 2025 alone is $29.4 billion. *Id.*[27] Thus, Defendants' speculation about Prop 4's budgetary impact is both unfounded and incorrect.

Defendants' cited case law also misses the mark. In *International Association of Firefighters*, the Court found that the Legislature could not surrender its legislative authority to an insulated, unaccountable private commission, appointed by private actors, that issued binding

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[25] Moreover, the Legislature has passed statutes via the legislative power *limiting its own discretion* over appropriations. *See, e.g.*, Utah Code § 63J-1-205.1 (requiring the Legislature to "appropriate money each fiscal year sufficient to pay the principal, premium, and interest due on the state's outstanding general obligation bonds before making any other appropriation in the fiscal year"); *id*. § 63G-9-201 (providing that the Legislature may not appropriate funds to pay for certain claims against the state or a political subdivision "without having been considered and acted upon by the Board of Examiners"); *id*. § 63A-5b-406 (prohibits the Legislature from authorizing certain new buildings or facilities or funding the design or construction of new capital development projects until the Legislature has made certain appropriations); *id*. § 73-28-404(3) (prohibiting the Legislature from appropriating any money from the Lake Powell Pipeline Project Operation and Maintenance Fund). If the Legislature can limit its discretion regarding appropriations using the legislative power, so can the People.

[26] The inclusion of language in S.B. 200 that the funding for the commission will "not lapse" for at least the next fiscal year also undercuts Defendants' argument (at 42) that a legislature "cannot bind a future legislature's hands . . . when it comes to budgetary decisions."

[27] *The Buck $tops Here: A Budget Summary of the 65th Legislature*, Utah State Legislature (March 1, 2024), https://perma.cc/9ZH2-HCHD.

determinations. 563 P.2d 786, 789–90 (Utah 1977). In contrast, the Commission is a *public* body, appointed by elected officials, that makes *advisory* recommendations in an effort to increase the accountability of the Legislature during the redistricting process.

Defendants also rely on *People's Advocates,* 181 Cal. App. 3d 316. There, the initiative in question restricted the operating budget of the Legislature itself in perpetuity using a specific numerical formula, and, in doing so, "divest[ed] [the Legislature] of the power to enact legislation" in violation of the California Constitution. *Id.* at 329. The Court found that because the Legislature itself "is denied such a statutory power, so are the people." *Id.* In contrast, the relevant provision in Prop 4 is not a sizeable limit on Defendants' operating budget, but a mandate to fund a public commission (even providing some legislative discretion as to the amount). This is well within the purview of the legislative power granted by the Utah Constitution to the Legislature and the People, and in no way interferes with Defendants' ability to enact legislation.

Finally, a finding in favor of Defendants' erroneous reading of the Utah Constitution would render the People's legislative power ineffective and toothless. The People's legislative power was created to "act[] as the people's check against the legislature." *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 94, 452 P.3d 1109 (Himonas, J., concurring). To presume, without any textual basis, that the initiative process excludes the ability to appropriate public funds would severely hinder this purpose. The power of the purse is the cornerstone of any legislative power; without it, the People's ability to initiate legislation or alter or reform their government is essentially useless.

5. Prop 4's provisions involving the Chief Justice do not violate distribution of powers or nondelegation doctrines.

Prop 4 does not violate distribution of powers or nondelegation principles. For a power or function to implicate the distribution of powers articulated in Article V, it must be "so inherent in a branch that it cannot be exercised by another." *In re Young*, 1999 UT 6, ¶ 13, 976 P.2d 581. As

explained previously, MSJ at 16–19, Prop 4 tasks the Commission and the Chief Justice with roles that are not inherently legislative. Rather, they make nonbinding recommendations to the Legislature, following statutory criteria that were legislatively enacted by the People. The Commission and the Chief Justice were not tasked with usurping any legislative role of voting to enact final maps. In any event, S.B. 200 is not narrowly tailored to address concerns about the Chief Justice's role. Defendants also claim that by involving the Commission and the Chief Justice in the redistricting process, Prop 4 improperly delegates power that belongs to them, in violation of Articles IX, VI, and V. The Article IX argument fails at the outset because whether power is delegated or not, the redistricting power was never the sole purview of the Legislature. Defendants' contention otherwise relies on the same erroneous reading of Article IX discussed *supra*, and which this Court has already rejected. Article IX simply does not vest the Legislature with sole redistricting responsibility, and so constitutionally enacted legislation by the People that establishes a role for the Commission or the Chief Justice does not violate Article IX.[28]

Defendants further argue that roles for the Commission and the Chief Justice violate Article V and Article VI by infringing on their (and the People's) power to initiate legislation. For support, Defendants cite *International Association of Firefighters*, where an arbitration panel was held to unconstitutionally engage in legislative actions. But that case differs importantly from this one. *See supra* III.A.1.c; III.A.4. Nor does *Matheson v. Ferry* help. *Matheson* concerned an effort by the Legislature to restrict the Governor's ability to appoint judges (a core executive function) by limiting the pool of judges from which the Governor could select a nominee. 641 P.2d 674, 678 (Utah 1982). This scheme was found unconstitutional because it threatened to render the

[28] It also does not violate the Federal Elections Clause, which Defendants raise in the context of their nondelegation arguments under state law. Defendants' flawed Elections Clause arguments are addressed *supra* III.A.2.

Governor's role "ineffective, subservient, and perfunctory" and controlled by another branch of government. *Id.* at 679. Here, Defendants can *reject* a Commission map and *draw their own map*, and no core legislative function is surrendered to another branch of government.

Defendants concede (at 55, citing *State v. Gallion*, 572 P.2d 683 (Utah 1977)) that they may rely on a "truly advisory commission" for redistricting responsibilities. But even in *Gallion*, the Utah Supreme Court differentiated between "essential legislative function[s]," which could not be transferred to others, and certain actions "upon which the effect or execution of [the legislature's] policy may be dependent." *Id.* at 687. A final vote on legislation is a "core legislative function," *Salt Lake City v. Ohms*, 881 P.2d 844, 848 (Utah 1994), but it can be conditioned on an antecedent procedural step, as required by Prop 4. At bottom, Defendants advance an argument that they have the sole power over all aspects of redistricting and must be able to draw maps—including partisan gerrymanders—without restriction. For all the foregoing reasons, this is not the law. The roles given to the Commission and the Chief Justice do not infringe on the core legislative powers retained by Defendants, and Prop 4 thus does not violate Article VI or Article V.[29]

B. Defendants' other justifications for infringement are not compelling.

Defendants' additional justifications for infringing Plaintiffs' fundamental rights are not compelling, nor is S.B. 200 narrowly tailored to achieve those asserted interests. Defendants claim three justifications for their impairment of the People's constitutional right: a desire for all Utahns to be represented in the redistricting process, the need to timely adopt new maps, and an effort to protect State money by shielding the State from redistricting litigation. None is compelling, and

[29] Nor is Prop 4's provision regarding the Chief Justice even relevant, as Plaintiffs do not contend that S.B. 200's elimination of the Chief Justice's role impaired Prop 4 and indeed seek to sever and retain that portion of S.B. 200.

all three are solely "hypothesized or invented *post hoc* in response to litigation." *See United States v. Virginia*, 518 U.S. 515, 533 (1996).

1. All Utahns are represented in the redistricting process under Prop 4.

Defendants assert (at 67) a compelling interest in "ensuring that all Utahns are represented when deciding how to divide the State into electoral districts." Defendants claim (at 68) that to do this, they, "rather than an independent, unelected commission," must make redistricting choices. But this conclusory and circular argument was invented by Defendants after the fact for litigation purposes, as evidenced by the fact that it ignores the reality of what Prop 4 requires (*i.e.*, more inclusion). Under Prop 4, all Utahns *are* represented in the process, and in multiple ways: members of the commission are appointed by legislators who represent diverse areas of the state, the mandatory public input and hearing process is specifically required to span the state geographically, and the Legislature is required to vote on the commission's maps, created through a transparent and participatory process. Furthermore, the Legislature is still the body that ultimately adopts a final map.

Defendants disregard all this and assert (at 68) a compelling interest in being the only body involved in redistricting. This is yet another iteration of their flawed Article IX argument. Moreover, Defendants' interest is not really in representing all Utahns as they say, but in picking and choosing whom to advantage and ignoring how a majority of Utah voters said they wanted redistricting to occur. Defendants make much (at 67) of the margin by which Prop 4 passed, and the counties that voted for or against it. But "of course, a citizen initiative, if approved by a majority of voters, becomes a statute." *LWVUT*, 2024 UT 21, ¶ 97. Defendants thus assert a compelling interest in ignoring a legally enacted statute because they agree with the minority who opposed the statute.

Furthermore, even if ensuring representation of all Utahns *was* the interest Defendants were asserting, S.B. 200 is not narrowly tailored to achieve that goal. There are ways that redistricting could have been made even more inclusive of all Utahns besides ignoring the will of the People and consolidating power for Defendants. Defendants' argument comes nowhere near the high bar that strict scrutiny requires.

2. S.B. 200 is not narrowly tailored to support timely enactment of maps.

Defendants next make the perplexing assertion (at 69) that S.B. 200 was enacted to ensure timely adoption of new maps. It is not at all clear how Prop 4 impaired this goal, nor how S.B. 200 was narrowly tailored to further it. Indeed, Defendants fabricated this asserted interest after-the-fact; after all, S.B. 200 was passed in March 2020—long before the Legislature drew maps in 2021, and almost a *year* before the U.S. Census Bureau even announced it would not comply with the usual Census deadline.[30] Moreover, in the strict scrutiny analysis, compelling government interests based on "speculation and conjecture" as opposed to concrete facts "cannot carry the day." *Kitchen v. Herbert*, 755 F.3d 1193, 1226 (10th Cir. 2014). Defendants assert that eliminating the requirements and timelines in Prop 4 advanced a compelling interest in timely adoption of maps, but they provide no factual showing that Prop 4 would actually impair timely maps. Prop 4 includes statutory deadlines that the Commission and Defendants must meet, precisely to *ensure* maps are timely adopted. Defendants present unfounded fears about at-large elections and recount the delays in the release of the 2020 Census data but fail to connect any of this to Prop 4. Defendants' failure to present a "real, as opposed to a merely speculative problem [for] the State"

[30] *See* James Whitehorne, *Timeline for Releasing Redistricting Data*, U.S. Census Bureau Feb. 12, 2021), https://perma.cc/3KRK-T8MA.

falls short of the high bar strict scrutiny requires. *See Bernal v. Fainter*, 467 U.S. 216, 227–28 (1984).

Defendants also complain (at 70) that Prop 4's authorization of lawsuits challenging illegal maps would create "chaos" that could delay adoption of a map. This too is speculative and baseless. Redistricting litigation in state and federal courts is commonplace in Utah and elsewhere, and courts are able to adjudicate those claims while also ensuring a map is in place for upcoming elections. This very case provides one such example: while the case has been pending, elections have proceeded under the enacted map in 2022 and 2024. Defendants do not explain how evading suit for illegal maps is a compelling interest, nor how S.B. 200 promotes—in a narrowly tailored fashion—their asserted interest in timely adoption of new maps.

3. Protection of the public fisc cannot justify S.B. 200.

Defendants next assert (at 71) a compelling interest in protecting the public fisc, which they argue was imperiled by Prop 4's requirement that the legislature appropriate "adequate funding" for the Commission, and by Prop 4's fee-shifting provisions. But again, this asserted interest was manufactured *post hoc* in response to litigation and these asserted interests do not meet strict scrutiny's high bar.

First, repealing the funding mechanism for the Commission is simply a backdoor way for Defendants to undermine the Commission itself, and their asserted authority to do so is simply a recycled version of their appropriations argument, addressed above. *Supra* III.A.4. The People, like the legislature, may pass legislation that requires the expenditure of funds. *See Carter*, 2012 UT 2, ¶ 22, 269 P.3d 141. Defendants cannot repeal Prop 4 simply because the government reform it enacted requires funding. Moreover, the actual amount needed to fund the Commission is paltry in comparison to the State's overall budget. *Supra* III.A.4. Defendants' concerns (at 71) about Prop

4 "jeopardizing the State's fiscal health," are speculative, unsupported, and do not rise to the level of a compelling interest. *See Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) (striking down state action under strict scrutiny where the asserted interest lacked "specific evidence").

Second, Defendants also advance (at 72) an interest in protecting the public fisc as justification for eliminating Prop 4's fee-shifting provisions. Defendants suggest that "potential" fees the State might have to pay because of redistricting litigation "could" jeopardize the fiscal health of the State. *Id.* However, the concern about the threat to the State's financial health is speculative and overblown, and "conservation of the taxpayers' purse is simply not a sufficient state interest to sustain" a significant restriction on a fundamental right. *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974). The fee-shifting provision is a core part of Prop 4's reforms to ensure that it can be enforced, and the possibility of litigation (and attendant costs) is not a sufficiently compelling interest to justify impairing this core reform.

Nor is the elimination of this provision narrowly tailored to protect State coffers. As the Voter Information Pamphlet explained, Prop 4 enacted common-sense redistricting standards, and a map that respects those standards "is unlikely to provoke baseless litigation, especially since the initiative also contains provisions to discourage frivolous lawsuits." Ex. A at 78. Risk of litigation can also be avoided in other ways—such as following the law.

IV. The Remedy Should Not Be Further Delayed.

The remedy for Count V should not be further delayed as Defendants suggest. Utahns deserve to vote under lawful maps drawn according to the standards they adopted in enacting Prop 4 six years ago, and the Court should expeditiously conduct remedial proceedings to ensure that a lawful map is in effect for the 2026 election.

Defendants' objections to proceeding to the remedial process are unfounded. The remedy for both the unconstitutional repeal of Prop 4 and the unlawful congressional map are ripe for adjudication now. As the Utah Supreme Court explained,

> Count V is the broadest claim, encompassing both matters at issue in this case: Plaintiffs' challenge to the redistricting process that led to the Congressional Map and their challenge to the Congressional Map itself. Specifically, Count V involves the parties' dispute over whether the citizen reform initiative, Proposition 4, or the Legislature's replacement of the initiative, S.B. 200, should govern the redistricting process. And consequently, it also encompasses the constitutionality of the Congressional Map that resulted from S.B. 200 and was not subject to Proposition 4's requirements.

LWVUT, 2024 UT 21, ¶ 61. Plaintiffs' motion for summary judgment on Count V likewise encompasses both issues, and Defendants have conceded (at 3, 8-10) that there are no disputed facts regarding either issue. As such, there is no reason to avoid remedying either violation.

A. Defendants have waived any argument regarding the proper remedy for the unconstitutionality of S.B. 200.

Defendants have waived any argument regarding the proper remedy for the unconstitutional aspects of S.B. 200. Plaintiffs' motion specifies the provisions of S.B. 200 that they contend are unconstitutional and must be enjoined from being given effect, the provisions of Prop 4 that would be revived as a result, and the provisions of S.B. 200 that they contend are severable. Although Defendants respond on the *merits* of the constitutionality of S.B. 200, they expressly decline to respond to Plaintiffs' arguments about the appropriate remedy if Plaintiffs are granted summary judgment. Instead, Defendants contend (at 74) that they "cannot adequately identify what provisions of current law are severable without first understanding the nature of any constitutional violation." But Defendants are required to respond to the arguments Plaintiffs presented. Otherwise, that response is waived. *See, e.g.*, *State v. Martinez*, 2021 UT App. 11, ¶ 27, 480 P.3d 1103 ("When a party fails to raise and argue an issue in the trial court, it has failed to

preserve the issue . . . .” (cleaned up)); *Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, ¶ 123 n.27, 299 P.3d 990 (“We may reject as inadequately briefed arguments that fail to provide meaningful legal analysis.” (cleaned up)). This Court made clear in granting Defendants a generous extended deadline for their brief (twice) that “Legislative Defendants have only one opportunity to provide a written response.” Sept. 5, 2024 Order (Doc. 330) at 2. The Court should deem the issue waived and adopt Plaintiffs’ severability analysis.

Defendants’ contention (at 74) that permanent injunctive relief may not be appropriate if the Court finds aspects of S.B. 200 unconstitutional is foreclosed by the Supreme Court’s decision in this case. “In the event Plaintiffs prevail on their claim that S.B. 200 violates the people’s right to alter or reform their government via citizen initiative, the act enacted by Proposition 4, Utah Code §§ 20A-19-101 to -301 (2018), would become controlling law.” *LWVUT*, 2024 UT 21, ¶ 222. Plaintiffs’ injury is irreparable (it cannot be cured by money damages), the hardships of enduring an unconstitutional electoral system plainly outweigh the hardship to Defendants in following the law, and the public interest plainly supports the People’s right to alter or reform their government being protected. A permanent injunction is warranted and necessary.

The Court should declare the portions of S.B. 200 identified in Plaintiffs’ motion unconstitutional, enjoin their further enforcement, and find the portions of S.B. 200 specified by Plaintiffs as severable to operate alongside the revived aspects of Prop 4.

B. The remedial process for the undisputed violation of Prop 4’s procedural requirements must start now.

1. The current congressional map must be permanently enjoined.

The remedial process for the undisputed violation of Prop 4’s procedural requirement must commence upon the Court’s resolution of Plaintiffs’ summary judgment motion, and Defendants must be enjoined from further enforcing H.B. 2004, the law enacting the current congressional

map. If the Court enjoins enforcement of S.B. 200's repeal of Prop 4's requirements and standards, those provisions of Prop 4 are governing law that the Legislature was obligated to follow in enacting its redistricting maps. *See LWVUT*, 2024 UT 21, ¶ 222. Prop 4 mandates that "[i]f a court . . . determines . . . that a redistricting plan fails to abide by or conform to the redistricting standards, *procedures*, and *requirements* set forth in this chapter, the court *shall issue a permanent injunction barring enforcement or implementation of the redistricting plan*." Utah Code § 20A-19-301(2) (2018) (emphasis added). Defendants do not dispute (at 8-10) that the current congressional map did not abide by or conform to the redistricting procedures and requirements of Prop 4, including the mandatory vote requirement, the public notice duration requirement, and the reporting requirement. Prop 4 thus *requires* the Court to permanently enjoin further implementation of that map. Defendants raise three points in response; none has merit.

First, Defendants say (at 76) that "the parties could not possibly debate" the propriety of a permanent injunction against H.B. 2004 (the law enacting the current congressional map) because the Court has not yet ruled on whether the Legislature violated Plaintiffs' Alter or Reform Clause rights in repealing aspects of Prop 4. But the Court can—and should—decide these questions all at once. If even *one* of Prop 4's procedural requirements is resurrected by the Court's disposition of Plaintiffs' motion, then there is nothing left to debate: Prop 4 *requires* the map to be permanently enjoined to remedy the *undisputed* violation of Prop 4's procedural requirements. Now was the opportunity—in its "one opportunity to provide a written response," Sept. 5, 2024 Order at 2—for the Legislature to provide any opposing arguments. It did not.

Second, Defendants contend (at 76) that a permanent injunction against enforcement of the congressional map is premature because "Plaintiffs still must prove their new claims." But as the Supreme Court explained, Count V encompasses Plaintiffs' claim that the current congressional

map failed to abide by Prop 4's requirements. *LWVUT*, 2024 UT 21, ¶ 61. Plaintiffs expressly moved for summary judgment on this aspect of Count V as well and Defendants do not dispute (at 8-10, 77) that the Legislature enacted the current congressional map without complying with Prop 4's requirements. The fact that Plaintiffs included the procedural violations of Prop 4 in two claims in their amended complaint—Counts V and VI—as Utah R. Civ. P. 8(e) allows, does not somehow require Plaintiffs to file summary judgment motions on the same substantive claim twice. *This* was the opportunity for Defendants to advance any argument that the congressional map complied with Prop 4's procedural requirements. They have not done so.

Third, Defendants contend (at 76) that "Legislative Defendants are entitled to test Plaintiffs' standing on those claims and to brief the merits after appropriate fact and expert discovery on those claims." Again, Count VI merely separately restates the same allegations that the Supreme Court has explained are encompassed within Count V. If Defendants wished to seek discovery regarding Plaintiffs' standing and summary judgment arguments regarding the Legislature's failure to comply with Prop 4's procedural requirements, they could have done so. *See* Utah R. Civ. P. 56(d)(2) ("If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to obtain affidavits or declarations or to take discovery"). They have not done so, despite three months elapsing since Plaintiffs' motion was filed. Plaintiffs have filed declarations with the Court asserting facts that establish they were injured by the Legislature's failure to comply with Prop 4's requirements. *See, e.g.*, Decl. of Malcolm Reid at ¶¶ 1-8 (attached to Doc. 342). Defendants do not say what their standing argument would be, and none is apparent. Plaintiffs are Utah voters who supported Prop 4, supported the Commission, opposed the gerrymandered congressional map, and live in the illegally drawn districts. At the very least, Prop 4 entitled them

to the information that the Legislature failed to produce by not issuing a report explaining how its map better satisfied Prop 4's standards than did the Commission's proposals. This alone suffices to satisfy standing. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 21, 24-25 (1998) (holding that plaintiffs had standing to sue where information required to be produced by statute is withheld and reasoning that "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific" to confer standing).

2. The Court must retain jurisdiction and set a remedial schedule that ensures a lawful map is in effect for the 2026 election.

The Court has a duty to ensure that a lawful congressional map is in place for the 2026 election if it permanently enjoins further implementation of H.B. 2004 for failing to comply with Prop 4's requirements. Prop 4 provides that "[u]pon the issuance of a permanent injunction, the Legislature *may* enact a new or alternative redistricting plan that abides by and conforms to the redistricting standards, procedures, and requirements of this chapter." Utah Code § 20A-19-301(8) (2018) (emphasis added). This provision requires this Court to retain jurisdiction and set a remedial schedule for two reasons.

First, the Legislature is not *required* to respond to a permanent injunction by enacting a new map to remedy the violation. And even if it attempts to do so, it may not succeed—either because of a disagreement among the chambers on the appropriate remedial map or gubernatorial veto. In this event, this Court *must* act to ensure that a lawful map is in place. As Plaintiffs explain in their opposition to Defendants' motion to dismiss Count VIII, once this Court permanently enjoins H.B. 2004's enforcement, the repeal of the 2011 congressional map is no longer effective and that map is revived. *See* MTD Resp. at I.D. It is undisputed that the 2011 map is unconstitutionally malapportioned and thus fails to satisfy the Utah Constitution's one-person,

one-vote requirement. *See* Utah Const. art. I, §§ 2 & 24.[31] This Court has broad equitable power—and indeed a duty—to impose a court-ordered redistricting map that complies with Utah law (both the one-person, one-vote requirement and Prop 4's separate requirements) if the Legislature fails to do so. As the U.S. Supreme Court has explained, "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Growe v. Emison*, 507 U.S. 25, 33 (1993) (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)). "[S]tate courts have a significant role in redistricting." *Id.* The potential that the Legislature may fail to act in response to a permanent injunction alone requires this Court to retain jurisdiction and schedule a process for the potential imposition of a court-imposed map.

Second, Prop 4 expressly provides that the Legislature's authority to enact a new or alternative map in response to a permanent injunction issued by this Court is limited to a map that "abides by and conforms to the redistricting standards, procedures, and requirements of [Prop 4]." Utah Code § 202A-19-301(8) (2018). This provision—housed in the statutory provision setting forth the private right of action and tied to the Court's issuance of a permanent injunction—thus subjects the Legislature's "new or alternative redistricting plan" to a judicial determination of its compliance with Prop 4's requirements. The Court must retain jurisdiction and schedule proceedings to ascertain whether any such legislatively adopted remedial map complies with Prop 4's requirements. If it fails to, then it too must be permanently enjoined. *See id*. § 20A-19-301(2)

[31] Even if Plaintiffs were wrong about the revival of the 2011 map, a permanent injunction against the current map would leave *no* map in place pending potential legislative adoption of a remedial map—a situation that likewise requires the Court to retain jurisdiction and potentially impose a remedial map.

(2018). At that point, the Court will again be faced with the revival of the malapportioned 2011 map or, alternatively, the *absence* of a map at all.

Under either scenario—whether the Legislature fails to enact a remedial map or enacts one that likewise violates Prop 4 and must be permanently enjoined—this Court would be required to impose a lawful map to ensure such a map exists to govern the 2026 election. Defendants are therefore wrong to contend (at 76-77) that this Court lacks the power under either current law or Prop 4 to impose a court-drawn map. The power of state courts to remedy malapportioned maps or to impose maps in the absence of a legislatively enacted map is well established and indeed occurs in state courts across the county every decennial redistricting cycle. *See, e.g.*, *Growe*, 507 U.S. at 33.

And even if Prop 4 did not itself articulate the authority of courts to do so, that is irrelevant because once the current map is permanently enjoined, to the extent a court-imposed map is necessary, it would be to remedy the revived 2011's map's undisputed malapportionment. Defendants point to no authority for the proposition that state courts lack the broad equitable power to impose redistricting maps to remedy unconstitutional malapportionment. *Growe* forecloses such an argument. And when remedying that malapportionment (or the complete absence of a map), this Court must not limit itself to balancing population among the districts but instead must ensure that the judicially imposed map complies with all aspects of Utah redistricting law—including Prop 4's standards. *See, e.g.*, *Clarke v. Wisconsin Elections Comm.*, 998 N.W.2d 370, 396-97 (Wis. 2023) (enjoining Wisconsin's legislative maps as violating state constitution's contiguity requirement but noting that "this court must consider other districting requirements, in addition to contiguity, when adopting remedial maps. Just as a court fashioning a remedy in an apportionment challenge must ensure that remedial maps comply with state and federal law, so too must this court

in remedying a different constitutional violation"). Contrary to Defendants' assertion (at 77), it is irrelevant whether the current map is permanently enjoined for procedural or substantive violations of Prop 4. The law requires that the Court ensure that a legislatively adopted or court-imposed remedial map complies with *all* of Prop 4's requirements. *See* Utah Code § 20A-19-301(8) (2018).

The upshot is that this Court must retain jurisdiction, and it must provide the Legislature a reasonable period of time to enact—if it so chooses—a new or alternative map. It should schedule a hearing to adjudicate whether any legislatively enacted remedial map complies with the requirement that it "abide[] by and conform[] to the redistricting standards, procedures, and requirements of [Prop 4]." *Id*. § 20A-19-301(8) (2018). And it should receive proposed maps and supporting expert reports from the parties to prepare for the substantial possibility that the Legislature (1) fails to enact a remedial map or (2) enacts a remedial map that the Court ultimately concludes violates Prop 4's standards and requirements.

Moreover, contrary to Defendants' contention (at 77), it is irrelevant to the remedial process whether the reason the current map is permanently enjoined is because it failed to comply with Prop 4's procedural requirements. Once the map is permanently enjoined, Prop 4 requires a legislatively adopted replacement map to comply with *all* of Prop 4's requirements, and so too must any Court-imposed map. *See id*. § 20A-19-301(8) (2018); *Clarke*, 998 N.W.2d at 396-97. Defendants cite (at 77) case law requiring *federal courts* to limit their alteration of district lines to that necessary to remedy the violation found by the court, but that is inapposite here for two reasons. First, that principle arises from federalism concerns of federal courts disrupting state policy—a concern not present here. *See, e.g.*, *Clarke*, 998 N.W. 2d at 396-97 (rejecting application of "least change" principle in adopting court-imposed remedial maps, and instead focusing on the state and federal redistricting requirements and traditional redistricting principles). Second, Prop

4 expressly forecloses such an approach by requiring a remedial map to abide by *all* of Prop 4's requirements—including its substantive prohibition on undue partisan benefit.

Finally, Defendants restate (again) their arguments that partisan gerrymandering and neutral requirements like limiting county splits are somehow nonjusticiable. This Court has already rejected these arguments, MTD Op. at 16-20, and Plaintiffs respond to them in full in their opposition to Defendants' motion to dismiss. MTD Resp. at I.C.1. Plaintiffs incorporate their response by reference here. And Defendants' contention (at 80) that it would somehow violate the Elections Clause of the U.S. Constitution for a state court to impose a map to remedy a malapportionment violation or to remedy the complete absence of a map runs headlong into the Supreme Court's longstanding *Growe* precedent requiring state courts to do just that.

The Court should adopt the remedial schedule set forth in Plaintiffs' motion to ensure timely and lawful relief for the 2026 election.

CONCLUSION

For all the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment on Count V, deny Defendants' cross-motion for summary judgment on Count V, enjoin Defendants from enforcing or implementing H.B. 2004, and schedule remedial proceedings to ensure that Utah voters can cast their ballots in the 2026 election pursuant to lawful maps.

RESPECTFULLY SUBMITTED this 22nd day of November 2024.

/s/ David C. Reymann

CAMPAIGN LEGAL CENTER
Mark P. Gaber*
Anabelle Harless*
Aseem Mulji*
Benjamin Phillips*
Isaac DeSanto**

*Admitted *Pro Hac Vice*
***Pro Hac Vice* application forthcoming

PARR BROWN GEE & LOVELESS
David C. Reymann
Kade N. Olsen
Tammy M. Frisby

ZIMMERMAN BOOHER
Troy L. Booher
J. Frederic Voros, Jr.
Caroline Olsen

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2024, I filed the foregoing **PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF SUMMARY JUDGMENT ON COUNT V AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** via electronic filing, which served all counsel of record.

/s/ David C. Reymann

EXHIBIT 1

UTAH INDEPENDENT
REDISTRICTING COMMISSION

REDISTRICTING REPORT

NOVEMBER 2021

PUBLIC SH CONGRESSIONAL 2

4
COUNTY SPLITS
(out of 29)

7
MUNICIPALITY SPLITS
(out of 252)

427
COMMUNITIES OF INTEREST PRESERVED
(out of 590)

49
Average Density
(people per square mile)

1029
CUT EDGES ON BLOCKS
(out of 182,780)

0.376
AVERAGE POLSBY-POPPER

DRAFTING NOTES

"According to the drafter, this map was intended to achieve a statewide balance of districts with both rural and urban areas. The drafter was cognizant of keeping different rural areas in separate districts where possible (e.g. the Uintah Basin, the Green River Basin, and the southwest area of the state). The map also avoids splitting Salt Lake County more than once, a goal mentioned in many public comments. An effort was made to keep each district accessible to representatives for coverage purposes and compact. The districts are coherent: District 1 is northern Utah: District 2 contains the core of the Salt Lake area plus the Uintah Basin; District 3. has the Utah County valley and southeastern Utah; and District 4 is the west side of the Salt Lake valley and western Utah. Each district has a well-balanced mix of urban and rural areas and zero population deviation."

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MAXIMUM NEGATIVE POPULATION DEVIAITON

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MAXIMUM POSITIVE POPULATION DEVIAITON