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**Pro hac vice*

In the Supreme Court of the State of Utah

League of Women Voters of Utah,
Mormon Women for Ethical Government,
Stefanie Condie, Malcom Reid, Victoria Reid,
Wendy Martin, Eleanor Sundwall,
Jack Markman, Dale Cox,

Plaintiffs-Respondents,

v.

Utah State Legislature, Utah Legislative
Redistricting Committee, Sen. Scott Sandall,
Rep. Brad Wilson, Sen. J. Stuart Adams,
Lt. Gov. Deidre Henderson,

Defendants-Petitioners.

No. ________________

Petition for Permission to Appeal an Interlocutory Order

(subject to assignment to the Court of Appeals)

On petition for permission to appeal an interlocutory order
from the Third Judicial District Court
Honorable Dianna M. Gibson
No. 220901712

TABLE OF CONTENTS

Table of Authorities ii
Introduction 1
Background 2
Issues Presented 9
Reasons why interlocutory appeal should be permitted 9
I. The ballot summary is not a basis for "voiding" Amendment D 10
II. The Legislature "cause[d]" Amendment D to be published 14
III. There is no equitable basis to order that Utahns' votes won't count 18
Interlocutory review materially advances the termination of this litigation 20
The Supreme Court should decide this matter 20
Conclusion 20
Certificate of Compliance 21
Certificate of Service 1

TABLE OF AUTHORITIES

CASES

Advisory Op.,
384 So. 3d 122 (Fla. 2024) 12

Am. Bush v. City of S. Salt Lake,
2006 UT 40, 140 P.3d 1235 16

Aquagen Int'l, Inc. v. Calrae Tr.,
972 P.2d 411 (Utah 1998) 18, 19

Armstrong v. Harris,
773 So. 2d 7 (Fla. 2000) 13

Bleazard v. City of Erda,
2024 UT 17, 552 P.3d 183 13

Breza v. Kiffmeyer,
723 N.W.2d 633 (Minn. 2006) 12

Commw. Tel. Co. v. Pub. Serv. Comm'n,
263 N.W. 665 (Wis. 1935) 11

Cooper v. Caperton,
470 S.E.2d 162 (W. Va. 1996) 16

District of Columbia v. Heller,
554 U.S. 570 (2008) 15

DNC v. Wis. State Leg.,
141 S. Ct. 28 (2020) 1

Dutton v. Tawes,
171 A.2d 688, (Md. 1961) 11, 13, 14

Grant v. Herbert,
2019 UT 42, 449 P.3d 122 10

In re Cook,
882 P.2d 656 (Utah 1994) 1, 18, 20

Kahalekai v. Doi,
590 P.2d 543 (Haw. 1979) 12

Knight v. Martin,
556 S.W.3d 501 (Ark. 2018) 12

League of Women Voters Minn. v. Ritchie,
819 N.W.2d 636 (Minn. 2012) 12

League of Women Voters of Utah v. Utah State Legislature,
2024 UT 21, —P.3d— 2, 4, 10

Martin v. Kristensen,
2021 UT 17, 489 P.3d 198 9

Matter of Childers-Gray,
2021 UT 13, 487 P.3d 96 15

Moore v. Lee,
644 S.W.2d 59 (Tenn. 2022) 18, 19

Nowers v. Oakden,
110 Utah 25, 39, 169 P.2d 108 (1946). 11, 19

Nowers v. Oakden,
169 P.2d 108 (Utah 1946). 13

Opinion of the Justices,
104 So. 2d 696 (Ala. 1958) 17

Opinion of the Justices, 275 A.2d 558 (Del. 1971) 16

Opinion of the Justices,
283 A.2d 234 (Me. 1971) 12

Osguthorpe v. SC Utah, Inc.,
2015 UT 89, 365 P.3d 1201 9

Peck v. Monson,
652 P.2d 1325 (Utah 1982) 19, 20

Purcell v. Gonzalez,
549 U.S. 1 (2006) 1, 19

Reno v. ACLU,
521 U.S. 844 (1997) 15

Rothfels v. Southworth,
11 Utah 2d 169, 356 P.2d 612 (1960) 1, 13

Snow v. Keddington,
195 P.2d 234 (Utah 1948) 16, 17

Wesberry v. Sanders,
376 U.S. 1 (1964) 1

Winter v. NRDC,
555 U.S. 7 (2008) 18, 19

Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n,
2023 WI 38, 990 N.W.2d 122 12

CONSTITUTIONAL PROVISIONS

Utah Const. art. I, §2 2

Utah Const. art. IV, §2 14

Utah Const. art. VI, §1(2) 10

Utah Const. art. XXIII, §1 14

STATUTES

Utah Code §20A-5-103(1)(a) 6
Utah Code §20A-7-103(3) 5, 7, 8, 13
Utah Code §20A-7-105(5)(a)(ii)(B) 5
Utah Code §20A-7-307(3)(a) 5
Utah Code §20A-7-311 5
Utah Code §20A-7-701(1) 6
Utah Code §20A-7-702.5 6
Utah Code §20A-7-705 5

OTHER AUTHORITIES

Peter Brien, *Voter Pamphlets: The Next Best Step in Election Reform*, 28 J. Legis. 87 (2002) 6
16 Am. Jur. 2d Const. L. §32 (2024) 17

INTRODUCTION

People decide elections; courts don't. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v.* Sanders, 376 U.S. 1, 17 (1964). Utah is no exception to that rule. "The history of the struggle of freedom-loving men" and women "to obtain and to maintain such rights is so well known that it is not necessary to dwell thereon." R*othfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612 (1960).

A handful of plaintiffs and special interest groups want to squelch that precious right. They went to court to stop all Utahns from voting on a proposed constitutional amendment, rather than fight their cause at the ballot box. And the court obliged. All Utahns' votes on proposed Amendment D will "not [be] counted." The amendment is "void." **Exhibit A-15**. The Utah Legislature seeks this Court's immediate interlocutory review of that unprecedented order. Without this Court's intervention, a single district court gets to decide for all Utahns whether their votes for or against Amendment D will count.

Time is of the essence. The district court's order has cast a shadow over the election—in particular, whether Utahns should be learning about, campaigning for, and voting on Amendment D. Hasty election-related orders like the one below create an intolerable "incentive to remain away from the polls" and destroy "[c]onfidence in the integrity of our electoral processes." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). It denigrates "[t]he overriding importance of the public's interest in the integrity of the election process and the breadth of a court of equity's discretion" to keep Utahns from voting. *In re Cook*, 882 P.2d 656, 659 (Utah 1994). "Even seemingly innocuous late-in-the-day judicial alterations" can have "unanticipated consequences." *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

To remove that shadow from the election as soon as practicable, the Legislature asks for this Court's immediate interlocutory review and has simultaneously filed an emergency Rule 23C motion to expedite proceedings. The Legislature requests that Plaintiffs respond by **September 17, 2024,** and that this Court vacate the preliminary injunction by **September 24, 2024**. That would leave six weeks before the election to reassure Utahns that their votes on Amendment D do in fact matter and will in fact count. It gives the State time to put Amendment D in Voter Information Pamphlets. And it gives supporters and opponents necessary time to campaign for and against Amendment D. In short, it gives the people the chance to debate and weigh in on their government through the Constitution, the very essence of the right to vote. These filings are abbreviated given the breakneck pace of Plaintiffs' extraordinary motions and proceedings below. But the stakes could not be clearer. Utahns have a fundamental right to vote—whether for or against Amendment D—and this Court's intervention is necessary to preserve that right.

BACKGROUND

1. In 2022, Plaintiffs sued, challenging Utah's four congressional districts as a "gerrymander." *See League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, ¶¶48-50, —P.3d— (*LWV*). This Court granted cross-petitions for an interlocutory appeal. *Id.* ¶57. In July, the Court announced it would retain jurisdiction over Plaintiffs' gerrymandering claims but remanded Plaintiffs' claim that redistricting legislation that amended an earlier citizens' initiative violated Plaintiffs' right to "alter or reform" their government. Utah Const. art. I, §2; *LWV*, 2024 UT 21, ¶¶76, 220.

2. After this Court's decision, Pro-Life Utah, Worldwide Organization for Women, Republicans, and local officials joined an open letter calling for a constitutional amendment in response to language in the Court's opinion about the nature of citizens' initiatives. **Exhibit**

C-53-55. The Sutherland Institute echoed their call. **Exhibit C-57-60**. They wrote that the *LWV* ruling "creates a rigid and unmanageable system that disrupts our republican form of government" and "leav[es] Utah vulnerable to the whims of special interests and fleeting majorities." *Id.* at 53.[1] They said, "The people of Utah should have the opportunity to vote on a constitutional amendment this fall that would *clarify the legislative powers* vested in the people as well as their elected representatives …." *Id.* at 60 (emphasis added).

In August 2024, the Utah Legislature answered that call and proposed an amendment. The enrolled copy of the legislation is attached at **Exhibit C-66-68**. The legislative proceedings were live-blogged,[2] the Legislature made the proposed amendment available on its website and it remains there today,[3] and newspapers have discussed the amendment, published its text, or hyperlinked to the Legislature's website with the text since August.[4]

Proposed Amendment D would revise Article VI as follows:

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[1] For example, the Proposition 4 at issue in *LWV* passed by a 0.6% margin, or a mere 6,944 votes. A majority of voters in 25 of Utah's 29 counties voted *against* it. *See* 2018 Election Results at 54, Utah Office of the Lieutenant Governor, vote.utah.gov/wp-content/uploads/sites/42/2023/09/2018-General-Election-Canvass.pdf. Out-of-state special-interest groups and California labor unions financed Proposition 4, providing $1.5 million of the $2 million raised. *See* Utahns for Responsive Government Disclosures, disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414774. Its biggest donor was Houston-based Action Now Initiative, funded by Texans John and Laura Arnold, contributing more than $1.1 million in actual and in-kind donations. *Id.*

[2] Ben Winslow, *BLOG: Utah legislature puts constitutional amendment on citizen initiatives on the November Ballot*, Fox 13 (Aug. 21, 2024), www.fox13now.com/news/politics/blog-utah-legislature-meets-in-special-session-on-citizen-ballot-initiatives.

[3] Utah S.J.R. 401, le.utah.gov/~2024S4/bills/static/SJR401.html.

[4] *See, e.g.*, Hanna Seariac, What to know about Utah's special session over changing state constitution, Deseret News (Aug. 21, 2024), www.deseret.com/politics/2024/08/21/utah-special-session-initiative-amendment/; Hanna Seariac, *Ballot language on Utah initiative constitutional amendment released*, Deseret News (Sept. 5 , 2024), www.deseret.com/politics/2024/09/05/amendment-d-utah/; Katie McKellar, *Opponents of Utah constitutional amendment on voter initiatives decry 'deceptive' ballot language*, Utah News Dispatch (Sept. 4, 2024), reprinted in Yahoo! News, www.yahoo.com/news/opponents-utah-constitutional-amendment-voter-231734615.html.

> **(3)(a) Foreign individuals, entities, or governments may not, directly or indirectly, influence, support, or oppose an initiative or a referendum.**
>
> **(b) The Legislature may provide, by statute, definitions, scope, and enforcement of the prohibition under Subsection (3)(a).**
>
> **(4) Notwithstanding any other provision of this Constitution, the people's exercise of their Legislative power as provided in Subsection (2) does not limit or preclude the exercise of Legislative power, including through amending, enacting, or repealing a law, by the Legislature, or by a law making body of a county, city, or town, on behalf of the people whom they are elected to represent.**

Utah S.J.R. 401 §2. The amendment would further revise Article I, §2 to state that the people "have the right to alter or reform their government **through the processes established in Article VI, Section 1, Subsection (2) or through Article XXIII** as the public welfare may require." Utah S.J.R. 401 §1.[5]

The Legislature charged the Lieutenant Governor to get the amendment to voters as "provided by law":

> The lieutenant governor is directed to submit this proposed amendment to the voters of the state at the next regular general election in the manner provided by law.

Utah S.J.R. 401 §3. The Legislature further assured that the Lieutenant Governor would have sufficient non-lapsing funds to cover the estimated $8,600 cost to do so.[6]

Along with the amendment, the Legislature passed legislation contingent on the amendment's passage. Utah S.B. 4003 §7 (2024). The legislation would amend Utah's existing statute governing citizens' initiatives as follows:

---

[5] Plaintiffs' motions target the language amending Article VI and do not discuss or appear to target the language amending Article I, §2, which simply reiterates this Court's repeated statements that citizens' initiatives cannot amend the Utah Constitution. *See LWV*, 2024 UT 21, ¶¶10 n.4, 68 n.16, 135-36, 157, 160-61.

[6] Utah Legislature, Fiscal Note – S.J.R. 401, le.utah.gov/~2024S4/bills/static/SJR401.html.

(3)(a) The governor may not veto a law adopted by the people.

~~(b) The Legislature may amend any initiative approved by the people at any legislative session.~~

(b) If, during the general session next following the passage of a law submitted to the people by initiative petition, the Legislature amends the law, the Legislature:

(i) shall give deference to the initiative by amending the law in a manner that, in the Legislature's determination, leaves intact the general purpose of the initiative; and

(ii) notwithstanding Subsection 3(b)(i), may amend the law in any manner determined necessary by the Legislature to mitigate an adverse fiscal impact of the initiative.

Utah S.B. 4003 §2 (amending §20A-7-212). The proposed legislation also extended deadlines for referenda. *See id.* §§1, 3, 4-6 (amending Utah Code §§20A-7-105(5)(a)(ii)(B), 20A-7-307(3)(a), §20A-7-311, 20A-7-705, 20A-7-706).

As required by Utah Code §20A-7-103(3), the Speaker of the House and the President of the Senate later submitted a ballot title and summary for Amendment D that states:

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

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

3. The Lieutenant Governor certified Utah ballots with the Amendment D summary.[7] She later issued a Class A Public Notice with the amendment text.[8] It remains the first item on the Lieutenant Governor's state website.

4. The State will publish the full text of Amendment D in Voter Information Pamphlets, which also include arguments for and against the amendment. *See* Utah Code §§20A-7-701(1), 20A-7-702.5. They are widely read. "[A]lmost nine out of ten voters" report that "they read all or part of [the Pamphlets] prior to the election." Peter Brien, *Voter Pamphlets: The Next Best Step in Election Reform*, 28 J. Legis. 87, 102 (2002).

At polling locations, the full text of proposed amendments must be posted. County clerks must display the full text of proposed amendments "on cards in large clear type with the changes." Utah Code §20A-5-103(1)(a).

5. Since the special session through today, there has been a deluge of news coverage about Amendment D. *See* **Exhibit C-14, 86-353**. Opponents have already held a "Vote No" rally at the capitol,[9] while other Utah voices have explained their support.[10] As a result, some voters are actively considering the amendment; they are not confused by it; and they see it as

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

[8] Public Notice, Full Text of Proposed Const'l Amendments, Utah Lt. Gov., ltgovernor.utah.gov/2024/09/09/public-notice-full-text-of-proposed-constitutional-amendments/.

[9] Saige Miller, *'Vote no' rally at the Utah capitol launches opposition to ballot initiative amendment*, KUER (Aug. 26, 2024), https://www.kuer.org/politics-government/2024-08-26/vote-no-rally-at-the-utah-capitol-launches-opposition-to-ballot-initiative-amendment; Katie McKellar, *'Vote no': Anti-gerrymandering groups launch campaign against Utah constitutional amendment*, Utah News Dispatch (Aug. 26, 2024), utahnewsdispatch.com/2024/08/26/utah-anti-gerrymandering-groups-campaign-against-constitutional-amendment/.

[10] Rob Bishop, *Voices: To prevent Utah from becoming California, we must pass the ballot initiatives amendment*, Salt Lake Tribune (Sept. 9, 2024), https://www.sltrib.com/opinion/commentary/2024/09/09/rob-bishop-prevent-utah-becoming/.

a chance to "alter or reform" their government as the Constitution promises, art. I, §2; *see* **Exhibit C-364-93**.

6. And still, late last week and over the weekend, Plaintiffs filed two emergency motions to take Amendment D off the ballot or deem it "void." Plaintiffs—Amendment D opponents—believe the ballot summary for Amendment D is misleading. And they believe that the Legislature failed to cause the amendment to be published. *See generally* **Exhibit B**.

The Lieutenant Governor's Office immediately responded, saying it was too late to take the amendment off already certified ballots. **Exhibit C.** The Legislature responded to Plaintiffs' motions early Wednesday. **Exhibit B.** The Court held oral argument Wednesday and issued a ruling yesterday. **Exhibit A.**

7. In the face of Plaintiffs' extraordinary motions, the Legislature took additional steps departing from its historical practice. The Legislature purchased advertising space "in 35 newspapers to publish the ballot title and full text of each proposed constitutional amendment" next week. **Exhibit C-398-99** (listing all newspapers). Explained below, those additional steps were not necessary to satisfy Article XXIII, but the Legislature still took them to try to keep a few plaintiffs and special interest groups from keeping Amendment D off the ballot for all voters. This is new ground, believed to be "the first time the Legislature has purchased space in a newspaper to publish a proposed constitutional amendment." **Exhibit C-400**.

7. As of today, Amendment D will remain on already-certified ballots, but Utahns' votes will not count. **Exhibit A-15**. The district court's order contains three rulings at issue here. ***First,*** the court ruled that Plaintiffs were likely to succeed on the claim that the ballot summary violated some combination of Article XXIII, Utah Code §20A-7-103(3), and Article IV, §2 because the verbs it used ("strengthen" and "clarify") were misleading. **Exhibit A-8-11**. The court said declarations from Utah voters stating they were not confused (**Exhibit-C-**

364-93) were "subjective[]" and didn't disclose whether the "average voter" was confused. **Exhibit A-10 n.9**. The court did not address the Legislature's arguments that courts generally reject such claims, that the standard is what the "reasonably intelligent voter" would think, and that §20A-7-103(3) provides no private right of action. *See* **Exhibit C-29-38**.

Second, the court said Amendment D was void because the Legislature did not comply with Article XXIII's requirement to "cause" amendments to be published in newspapers. **Exhibit A-12**. It was not enough that the Legislature directed the Lieutenant Governor to act in accordance with Utah law. *See* Utah S.J.R. 401 §4. Nor was extensive Amendment D news coverage or the Legislature's paying for ad space for Amendment D. And while the court acknowledged that some States require only "substantial compliance" with publication requirements, the court said "[n]o legal authority was submitted to support substantial compliance." *Id.* at 13 n.14. That's not true. The Legislature's brief said "Utah courts have never adopted a literal-compliance requirement" and provided a string cite of authorities requiring only substantial compliance, so as not to void amendments unnecessarily. **Exhibit C-46-47**.

Third, the court said that the equities supported a preliminary injunction to "void" Amendment D and to "ensure" votes "are not counted." **Exhibit A-15**. The court copied Plaintiffs' brief: "inaccurate ballot language would have Utahns unwittingly *eliminate* a fundamental constitutional right." *Id.* at 14; *compare* **Exhibit B-32**. The court then said passage of the amendment "will moot Plaintiffs' [Art. I, §2] claims on remand." **Exhibit A-14**. And the court asserted "Defendants will not be harmed by being unable to advance an inaccurate description of the proposed Amendment in the November 2024 election." *Id.* The court said nothing of the 1.73 million Utah voters who now cannot vote on Amendment D and decide for themselves their constitutional rights—not even those voters who submitted declarations to the Court about that substantial and irreparable harm.

ISSUES PRESENTED

1. Is the ballot summary a basis for voiding Amendment D?
2. Did "the Legislature" fail to "cause" Amendment D to be published as required by Article XXIII, §1?
3. If not, what equitable basis could justify a court order that Utahns' votes on Amendment D cannot be counted?

Preservation: The Legislature raised all issues in its opposition to Plaintiffs' preliminary injunction motions. *See generally* **Exhibit C**.

Standard of review: This Court reviews the district court's decision to grant a preliminary injunction for an abuse of discretion, *Osguthorpe v. SC Utah, Inc.*, 2015 UT 89, ¶37, 365 P.3d 1201, but questions of law are reviewed "de novo, affording no deference to the lower court['s] analysis," *Martin v. Kristensen*, 2021 UT 17, ¶19, 489 P.3d 198.

REASONS WHY INTERLOCUTORY APPEAL SHOULD BE PERMITTED

An interlocutory appeal may be granted when an order "involves substantial rights and may materially affect the final decision" or when immediate review "will better serve the administration and interests of justice." Utah R. App. P. 5(g). That standard is met. The district court's order implicates the substantial rights of every Utah voter. Without this Court's review, more than 1 million Utahns' votes will not be counted on Amendment D. Interlocutory review is the only way to obtain review before it is too late. Until yesterday, campaigns for and against Amendment D were underway. The district court has cast a shadow over those efforts. Voters do not know if their votes will count for Amendment D, or whether their First Amendment protected conduct is worth it. Ballots will be mailed to overseas voters in seven days; remaining ballots will be sent to voters in October. *See* **Exhibit D.** Confidence in the integrity of the forthcoming election must be restored as soon as practicable.

I. The ballot summary is not a basis for "voiding" Amendment D.

The district court ordered Amendment D removed from the ballot based on its conclusion that "ballot language does not fairly and accurately 'summarize' the issue to be decided." **Exhibit A-9**. The district court said "strengthen" and "clarify" were unacceptable verbs because, echoing Plaintiffs, Amendment D "eliminates" a right and would make "[t]he people's Legislative power … no longer co-equal to the Legislature" or local lawmakers. *Id.* at 9-10 (emphasis added). The court misread the amendment.[11] But more fundamentally, the court didn't grapple with the questions of law that decide Plaintiffs' claims.

The question here is not whether Utah courts, or Amendment D opponents, or anyone else would have written a different ballot summary, or whether Amendment D's text alters other rights in the constitution. The question is whether the ballot summary violates an actual constitutional right or statute in such a way that the amendment itself must be declared void. It does not.

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[11] Amendment D does not "eliminate" anything. Citizens may still "initiate any desired legislation." Utah Const. art. VI, §1(2). Amendment D does not tell citizens that they cannot legislate directly. All it says is that the Legislature may continue to legislate too. The powers are co-equal, *contra* **Exhibit A-9-10**. The amendment "clarifies"—as Utah citizens called for after *LWV* **(Exhibit C-53-60)** —and reflects how shared legislative power has long been understood. *E.g., Grant v. Herbert*, 2019 UT 42, ¶5, 449 P.3d 122 ("The bill amended many of the provisions of Proposition 2."). Amendment D "strengthens" the initiative process by ensuring that it is reserved for Utahns and not infected by "foreign influence" and triggering the replacement of the existing initiative statute with new provisions requiring deference to initiatives' intent. *Supra* pp. 4-5. The amendment's clarification is consistent with our form of representative democracy. Utahns have the right to "alter or reform" their government not only through citizens' initiatives but also through their elected legislators, or through constitutional amendments. *See LWV*, 2024 UT 21, ¶192. It should come as no surprise that the 49.7% of Utahns who voted against Proposition 4 in 2018 were interested in clarifying that their legislators retain a voice in the legislative process. *Supra* pp. 2-3 & n.1. Utahns consider a vote on Amendment D to be an exercise of their right to alter or reform their government, and they are not confused. *See* **Exhibit C-364-93**. Their rights are not second-class to Plaintiffs' rights.

A. Article XXIII, §1 presentment. There is no dispute here that amendments can be presented by ballot summary as they historically have been in Utah. **Exhibit A-8**. The question is instead whether Utah voters—presumed to be "reasonably intelligent"—understand what they are voting on based not only on the ballot summary but also all "the immediately surrounding circumstances of the election." *Nowers v. Oakden*, 110 Utah 25, 39, 169 P.2d 108 (1946). That question answers itself. It demeans the State and its voters to conclude that they cannot read, cannot think, and cannot ultimately cast an informed vote on Amendment D. Courts are loathe to assume that voters cannot understand the amendment. *Dutton v. Tawes*, 171 A.2d 688, 692 (Md. 1961) (refusing to "assume" that the "people who voted … did not understand the issue on which they voted" given extensive news coverage about a ballot measure); *Commw. Tel. Co. v. Pub. Serv. Comm'n*, 263 N.W. 665, 668 (Wis. 1935) (rejecting an election challenge when "information actually given to the electors by the notices … in other unofficial publications and circulars" was "undoubtedly" "widespread and ample").

The court had no basis for presuming—without any cited authority or evidence—that ballot summaries are the only information Utahns will see. **Exhibit A-10** (presuming "the only real knowledge a voter may have on an issue is when the voter enters the polling location and reads the description of the proposed amendment on the ballot"). That ignores what the Legislature has shown in these proceedings. The State will prepare Voter Information Pamphlets with the full text of amendments and statements from proponents and opponents. *Supra* pp.6-7. The Lieutenant Governor has issued a public notice with the full text of the amendment. *Id.* When a voter sits with her mail-in ballot, she has access to both, in addition to extensive news coverage. And when a voter comes to a polling place, the State will have posted the full text of amendments. *Id.* And if that all weren't enough, here Utahns submitted declarations that they've already been able to learn about Amendment D and read its full text with "virtually

no effort." *See* **Exhibit C-364-93**. They were not confused by the ballot summary and thought it fairly and accurately described the amendment. *Id.* Their knowledge of Amendment D is no surprise; there has been an onslaught of Amendment D news and no shortage of criticism from its opponents. *See* **Exhibit C-14 & n.18, 86-353**. It blinks reality to ignore those "surrounding circumstances," *contra Nowers*, 110 Utah at 39, and presume Utah voters will have no idea what they are voting on in November. Utah courts have *never* voided an amendment by assuming such a thing.

Neither this Court nor other state supreme courts would have reached the same decision as the district court. In *Nowers*, this Court observed that there was "no general legislative mandate as to how a proposition must be worded on the ballot." 110 Utah at 39. Other state supreme courts agree legislatures have "significant deference" "in explaining the proposal to the people." *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶53, 990 N.W.2d 122; *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 646-47, 648 (Minn. 2012) (giving the legislature "a high degree of deference" and requiring plaintiffs to meet a "rigorous standard"); *Knight v. Martin*, 556 S.W.3d 501, 507 (Ark. 2018) ("liberal construction" given to the legislature's summary); *Kahalekai v. Doi*, 590 P.2d 543, 549 (Haw. 1979) ("manifest beyond a reasonable doubt"); *Advisory Op.*, 384 So. 3d 122, 127 (Fla. 2024) ("'a deferential standard of review'"). Plaintiffs' cited cases *reject* claims challenging ballot summaries under this deferential review, which credits voters for being the reasonably intelligent people that they are. *Wis. Just. Initiative*, 2023 WI 38, ¶57; *Ritchie*, 819 N.W.2d at 651; *Knight*, 556 S.W.3d at 509; *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006); *Opinion of the Justices*, 283 A.2d 234, 236 (Me. 1971). In *Kahalekai*, 590 P.2d at 553-54, for example, the court examined "extensive coverage before the election" and whether ballot issues were "the subject of widespread publicity in the newspapers, and on radio and television"; whether voters could obtain the summary of the constitutional

convention; and whether the voter informational booklet "contained a digest of the amendments." *Id.* Even Florida law, cited by the district court as though it were Utah's **(Exhibit A-9)**, has changed. A more recent decision rejects a ballot-summary challenge, over the dissent's repeated invocation of *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), cited by the district court here. *See Advisory Op.*, 384 So. 3d at 137.

This Court should not make the same demeaning assumptions about Utahns. Utah voters read, think, and vote for themselves. Amendment D is no state secret. Its text has been widely published and will be reproduced in full in Voter Information Pamphlets and at polling places. And its effect has already been widely debated. The failure to credit "surrounding circumstances of the elections" and to appreciate Utahns as "reasonably intelligent voters[]"is reversible error. *Nowers*, 110 Utah at 39. No court should "assume" that Utahns will "not understand the issue." *Dutton*, 171 A.2d at 692.

B. Utah Code §20A-7-103(3). To the extent the district court concluded that the ballot summary violates §20A-7-103(3)—the opinion is not clear—that too was wrong and reversible error. Section 20A-7-103(3) tasks the Legislature's "presiding officers" to "summarize[] the subject matter of the amendment in question." The ballot summary did so by identifying "the initiative process" and specifying that it would "clarify[]" the Legislature's "ability to amend laws." *Supra* pp. 6. For all the reasons Plaintiffs' Article XXIII presentment claim fails, this statutory claim fails too. *Supra* I.A; *see Rothfels*, 11 Utah 2d at 176 (statutory "doubts should be resolved in favor of the right to vote"). And the statutory claim fails for another obvious reason. The statute contains no private right of action, nor did Plaintiffs cite any. *But see Bleazard v. City of Erda*, 2024 UT 17, ¶47, 552 P.3d 183 ("In the absence of language expressly granting a private right of action in the statute itself, the courts of this state are reluctant to

imply a private right of action based on state law."). The Legislature made this argument below. The district court never acknowledged it.

C. Article IV, §2. The district court, paradoxically, concluded that counting votes on Amendment D would violate Utahns' right to vote. **Exhibit A-11**. The constitution promises that "[e]very citizen of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, shall be entitled to vote in the election." Utah Const. art. IV, §2. There is no logic to the district court's conclusion that the status quo—holding a vote on Amendment D—denies qualified voters the opportunity to cast votes. But the injunction does. The district court just declared votes will "not count[]." **Exhibit A-15**. Actual voters had educated themselves and were ready to vote on Amendment D, and now they cannot. **Exhibit C-364-93**. Against that evidence, the district court presumed that Utahns' vote will not be "meaningful," perpetuating the same wrong assumption that Utahns don't understand. **Exhibit A-11**. That flies in the face of this Court's correct view of the Utah voter as "reasonably intelligent." *Nowers*, 110 Utah at 39; *accord Dutton*, 171 A.2d at 692.

II. The Legislature "cause[d]" Amendment D to be published.

The district court also voided Amendment D because of Article XXIII's publishing requirement. It states that "*the Legislature shall cause* the [amendment] to be published in at least one newspaper in every county of the state, where a newspaper is published, for two months immediately preceding the next general election." Utah Const. art. XXIII, §1 (emphasis added). The district court's order ignored that text and what the Legislature has done.

A. For starters, Article XXIII's term "newspaper" is not limited to physical newspapers that existed in 1895. And yet, Plaintiffs argued that—because the "internet did not exist in 1895"—"the original public meaning of 'newspaper' could only mean a physical, printed

newspaper." **Exhibit B-48**. That argument "border[s] on the frivolous." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). That's like saying the First Amendment doesn't protect the Salt Lake Tribune's First Amendment press or speech rights because the Tribune is now online and not on the framers' printing press. Or that the Second Amendment protects only muskets and firelocks because those were the only "arms" used in 1791. All those arguments fail because they assume constitutional language—"speech" or "press" or "arms" or "newspaper"—do not apply to modern forms of those nouns. "[W]e do not interpret" constitutions "that way." *Id.*; *see also Reno v. ACLU*, 521 U.S. 844, 849 (1997); *see, e.g., Matter of Gray*, 2021 UT 13, ¶31, 487 P.3d 96. Giving "newspaper" its natural meaning here, the Deseret News published—admittedly online—the text of Amendment D that Plaintiffs challenge as early as August. *Supra*, p. 3; *see* **Exhibit C-14, 86-353**. The public discourse on Amendment D has proliferated since, *id.*, all because the Legislature took steps to facilitate that discussion.

B. The more fundamental problem is that the court asked the wrong question with respect to Plaintiffs' publishing claim. Article XXIII asks what "the Legislature" has done—not what other government officials or the newspapers did. And Article XXIII asks what the Legislature has done to "cause" the amendment to be published—not whether the Legislature *itself* has published the amendment. It contains no "Legislature Must Publish Newspapers" Clause, or "Legislature Must Buy Ads in Newspapers" Clause. *Contra* **Exhibit A-12** (stating that the Constitution (mandates "that the *Legislative Defendants publish* the full text …" (emphasis added)). After all, the Legislature is running a government, not a newsroom. In simplest terms, Article XXIII asks the Legislature to take steps to make Amendment D available to the people in their newspapers—even if online ones (as they almost all now are). And the Legislature took those steps. The Legislature publicly announced it would hold a special session to consider the constitutional amendment. Legislators then introduced S.J.R. 401 with the full

text of that proposed amendment. Its full text has been available on the Legislature's website since then.[12] At any time, news outlets could—and did—publish the text and/or provide a link to the Legislature's website. **Exhibit C-14, 86-353**. What's more, the Legislature expressly "directed" the Lieutenant Governor on August 22, 2024, "to submit [Amendment D] to the voters of the state … in the manner provided by law," Utah S.J.R. 401, §3, and ensured sufficient funding to do so.[13] And she did, issuing a public notice to voters on September 9, 2024, which can be reproduced in newspapers across the state.[14]

Then the Legislature took additional and unprecedented steps. As of Wednesday, the Legislature has substantially complied with even the district court's gloss on Article XXIII—requiring the Legislature itself to publish, rather than take steps to "cause" others to publish—by buying ad space in 35 newspapers across the state. **Exhibit C-398-400**. The Legislature has never taken that step before, *id.*—compelling evidence that the court's read of the Legislature's particular Article XXIII duty is wrong. *See Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶65, 140 P.3d 1235 (grounding "constitutional construction" in "long histor[ical]" practice); *cf. Snow v. Keddington*, 195 P.2d 234, 235 (Utah 1948) (noting the Legislature "directed" the "secretary of state" to publish). The district court had no basis to conclude that the Legislature has not substantially complied (indeed, it has actually complied) with publication. And the Legislature told the district court that "substantial compliance" is the common rule with plenty of authorities, **Exhibit C-46-47**,[15] but the court missed it, **Exhibit A-13 n.14** ("No legal authority was

[12] Utah Legislature, S.J.R. 401 (2024), le.utah.gov/~2024S4/bills/static/SJR401.html

[13] Utah Legislature, Fiscal Note – S.J.R. 401, le.utah.gov/~2024S4/bills/static/SJR401.html.

[14] *See* Public Notice, Full Text of Proposed Constitutional Amendments, Utah Lieutenant Governor, ltgovernor.utah.gov/2024/09/09/public-notice-full-text-of-proposed-constitutional-amendments/

[15] *E.g.*, *Opinion of the Justices*, 275 A.2d 558, 561 (Del. 1971) ("mandatory" publication requirement "subject to substantial compliance rule"); *see also Cooper v. Caperton*, 470 S.E.2d 162, 173-74 (W. Va. 1996) ("untimely publications [do] not warrant declaring the amendment

submitted”).[16] After Wednesday, the district court had no evidentiary basis to declare a violation of Article XXIII and strip Utahns of their right to vote on Amendment D.

C. The district court cited *Snow*, 195 P.2d 234, but *Snow* only illustrates the foregoing arguments. In *Snow*, this Court considered whether voters could be presumed not to understand an amendment's effective date because the notice at the polling place was defective. *Id.* at 238. The Court said no because the publishing requirement was enough to ensure that voters understood, despite the error. *Id.* The Court observed the “importance” that amendments are published “in the newspapers prior to the general election” because “that permits the voter time to consider the merits or demerits of the proposed change.” *Id.* at 238. Utahns have already had that opportunity to learn about and consider Amendment D's merits and demerits in droves, with “virtually no effort.” *E.g.*, **Exhibit C-365**. Utah news outlets with statewide reach are replete with Amendment D coverage. And now, the Legislature itself will have paid for more in apparently unprecedented fashion. **Exhibit C-398-400**. No Utahn can claim that Amendment D is a state secret. There is no justification for *voiding* its effect without considering those “immediately surrounding circumstances of the election” and crediting the voter as a “reasonably intelligent” one. *Nowers*, 110 Utah at 39.

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unconstitutional” if there's “substantial compliance”); *Opinion of the Justices*, 104 So. 2d 696, 698 (Ala. 1958) (“a proposed constitutional amendment is validly adopted when there has been substantial compliance with” the publication requirement); 16 Am. Jur. 2d Const. L. §32 (2024) (only “[s]ubstantial compliance” is required; “a failure to make publication during a small portion of the prescribed period or in every county will not necessarily invalidate the amendment”).

[16] As for the declaration itself, the district court said it only “noticed” the filing at 5:00 a.m. Thursday. **Exhibit A-13 n.14**. But the Court has been communicating with the parties rapidly by email during these expedited proceedings. And the Legislature both emailed and filed the declaration to chambers before 7:00 p.m. Wednesday, about two hours after the lengthy afternoon hearing ended.

Plaintiffs' publication claim is a Trojan horse. And the district court just opened the gates not just for Amendment D but for others. Contrary to what Plaintiffs led the district court to believe, Utahns do not live under a rock. Utahns are not confused. And Utahns are not waiting to read Amendment D on largely defunct newsprint. The Legislature has made Amendment D available to the world, enough to "cause" it to be published. Plaintiffs' claims are no basis for ordering all Utahns' votes "not counted." **Exhibit A-15**.

III. There is no equitable basis to order that Utahns' votes won't count.

The district court's conclusion that Plaintiffs showed likely success is a reversible abuse of discretion. *See Aquagen Int'l, Inc. v. Calrae Tr.*, 972 P.2d 411, 413 (Utah 1998). So too is the district court's wholly inadequate discussion of the equities and the public interest, which are not an afterthought. *See, e.g.*, *Cook*, 882 P.2d at 659 (denying an injunction in a ballot-related case based on the "overriding public interest"); *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (vacating injunction based on equities and public interest).

The district court never grappled with the effect of its order: depriving 1.7 million Utahns from voting on Amendment D. Amendment D's opponents took a short cut. They used a court case to cancel an election, rather than let the vote on Amendment D happen at the ballot box. The district court opinion is *silent* on those ramifications. It is *silent* on Utahns' declarations explaining that their fundamental rights are violated by the order. **Exhibit C-365, 368, 371, 374, 377, 380, 383, 386, 389, 392** (removing Amendment D will "deprive me of my opportunity to express my political and policy views" and "my right to alter or reform the government"). A court cannot simply ignore that "robust defense evidence of the harm" before issuing an injunction like the district court did here. *Moore v. Lee*, 644 S.W.2d 59, 67 (Tenn. 2022); *see Winter*, 555 U.S. at 27, 29 (rebuking lack of "serious consideration" to, and "ignor[ing]," the public-interest concerns described in the Navy's declarations).

More perniciously, the district court's order erodes "the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. By declaring Amendment D void, the injunction "incentiv[izes]" Utah voters "to remain away from the polls." *Id.* at 5; *accord Moore*, 644 S.W.2d at 67. Voters don't know if they should be learning about, campaigning for, and voting on Amendment D. Leaving "voters"—in particular Amendment D supporters—"unsure" leading up to Election Day is manifestly "contrary to the public interest." *Peck v. Monson*, 652 P.2d 1325, 1328 (Utah 1982) (Oaks, J., concurring). So is leaving Utah voters "feel[ing] disenfranchised." *Purcell*, 549 U.S. at 4; **Exhibit C-365, 368, 371, 374, 377, 380, 383, 386, 389, 392**.

Nothing on Plaintiffs' side of the ledger justifies an injunction affecting all Utah voters. Had the district court properly applied this Court's "reasonably intelligent" voter standard and properly considered the "surrounding circumstances of the election," *Nowers*, 110 Utah at 39, it would have concluded Plaintiffs' likely success is anything but "substantial." *Contra* Utah R. P. 65A(e)(1); *see Aquagen*, 972 P.2d at 413. For related reasons, Plaintiffs made no adequate showing of irreparable harm. Plaintiffs' conjecture about what other Utahns might "unwittingly" do, *supra*, is belied by declarations and other "surrounding circumstances" of the election. *Nowers*, 110 Utah at 39; *see, e.g.*, *MAID v. State*, 2024 MT 200, ¶19 (mere "'*possibility*'" of harm insufficient to outweigh the public interest (quoting *Winter*, 555 U.S. 22)); *compare* **Exhibit A-14** (speculating voters "may" vote "without being fully informed"), *with* **Exhibit C-365, 368, 371, 374, 377, 380, 383, 386, 389, 392** (testifying they are "not confused"). And still, the district court simply lifted Plaintiffs' conjecture word-for-word from Plaintiffs' brief. *See* **Exhibit A-14**; *compare* **Exhibit B-27** (same sentence).

Plaintiffs' worry that they will lose an election (or this case) does not save them. **Exhibit A-14**. It simply exposes their Trojan horse. They proposed canceling the vote on Amendment D and elaborate remedies like forcing county clerks "to mail notices along with the

ballots informing that the Court has ordered Amendment D void" **(Exhibit B-57 n.5)**, but no remedy to effectively allow the vote. Courts are not a political opponent's or legal adversary's tool to stop elections. *Cf. Peck*, 652 P.2d at 1328 (Oaks, J., concurring); *see also Cook*, 882 P.2d at 659. Furthermore, Amendment D is not just about Plaintiffs' one court case, but a question for the voters on all initiatives. Litigation by a few cannot cancel the votes of all.

INTERLOCUTORY REVIEW MATERIALLY ADVANCES THE TERMINATION OF THIS LITIGATION

For the reasons explained in the Rule 23C motion, this Court's immediate interlocutory review is necessary given the election timing. This Court's review will also conclude litigation over Plaintiffs' novel claims—all intended to stop the rapidly impending vote that will soon occur, or not, on Amendment D.

THE SUPREME COURT SHOULD DECIDE THIS MATTER

For the reasons explained in the simultaneously filed Rule 23C motion, there is no time to proceed any other way. Every Utahn deserves this Court's final word about whether their votes will be counted. The election is weeks away. Building in an additional layer of review by the Court of Appeals will effectively preclude the opportunity for appellate review. The only course is for this Court to decide definitively the questions presented in this interlocutory appeal, including deciding definitively whether Utahns' votes can be ignored.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for permission to appeal and vacate the preliminary injunction. All Utahns should be heard on Amendment D.

Dated: September 13, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This petition does not exceed 20 pages, excluding any tables or attachments, in compliance with Utah Rule of Appellate Procedure 5(d).
2. This petition has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Garamond font in compliance with the typeface requirements of Utah Rule of Appellate Procedure 27(a).
3. This brief contains no non-public information and complies with Utah Rule of Appellate Procedure 21(h).

/s/ Tyler R. Green

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2024, a true, correct and complete copy of the foregoing Petition for Permission to Appeal from an Interlocutory Order was filed with the Court and served via United States Mail or electronic mail to the following:

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Attachments

(A) Preliminary Injunction Order & Opinion

(B) Plaintiffs' First and Second Preliminary Injunction Motions

(C) Legislature's Response to Plaintiffs' Preliminary Injunction Motions

(D) Utah Lieutenant Governor's Response to Plaintiffs' Preliminary Injunction Motion & Declaration of Shelly Jackson