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Attorneys for Legislative Defendants-Petitioners

**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. _____

**Rule 23C Emergency Motion for Expedited Consideration of
Petition for Interlocutory Review**

(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

The Utah Legislature files this Rule 23C emergency motion for expedited consideration of its contemporaneously filed petition for interlocutory review of a preliminary injunction. That injunction—issued yesterday—declares void a proposed constitutional amendment that has been certified for and will appear on Utah’s 2024 general election ballot. The injunction order is attached as **Exhibit A**. Without this Court’s immediate intervention, all Utah voters will lose their rights to vote and to alter or reform their government through the proposed amendment in November.

The Legislature respectfully asks this Court to enter the following expedited briefing schedule on the Legislature’s petition for interlocutory review:

- Plaintiffs’ opposition brief due on **September 17, 2024**; and
- The Legislature’s reply brief due on **September 19, 2024**.

The Legislature also asks the Court to treat the parties’ briefs on the Legislature’s petition for review as merits briefs and to decide the case on those briefs.

Finally, the Legislature asks this Court to **issue a ruling granting or denying the Legislature’s petition, and—if it grants review, resolving this appeal on the merits—no later than Tuesday, September 24, 2024** (even in the form of a summary ruling with an opinion to follow later). *See* Utah R. App. P. 2.

The circumstances here leave no time for this Court’s review in the ordinary course. The district court’s injunction has created an intolerable cloud over the proposed constitutional amendment. Election Day is less than two months away. Utah voters will receive ballots and can start casting votes well before Election Day. Counties will mail overseas ballots in *seven* days, and the rest will be mailed in October. *See* **Exhibit D**. The injunction eliminates every incentive for the amendment’s supporters to engage in protected First Amendment activity to secure its passage. That harm started when the injunction issued and will continue as

long as the injunction remains in place. The injunction also invites voter confusion about which votes they cast will ultimately count. And it destroys confidence in our electoral system, where issues are decided by the people and not by courts.

The very point of our State’s constitutional system is to let Utah’s 1.7 million voters decide what to do with the proposed amendment. As things stand, they cannot. This Court should not preclude Utah’s voters from having the final say on an issue of great statewide and constitutional importance. And the only way for this Court to grant effective relief from the district court’s ruling is by expediting its consideration of the Legislature’s petition.

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*). After the district court granted the Legislature’s motion to dismiss in part, this Court granted cross-petitions for interlocutory review. *Id.* ¶57. This Court decided the interlocutory appeal in July 2024. The Court retained jurisdiction over Plaintiffs’ “partisan gerrymandering” claims and remanded Plaintiffs’ Article I, §2 claim. *Id.* ¶220; see *id.* ¶76 (describing new “formulation” to apply on remand for the Article I, §2 claim).

2. Following the decision, Pro-Life Utah, Worldwide Organization for Women, Republicans, and many local officials joined an open letter calling for a constitutional amendment to “safeguard” and “strengthen” our laws and rights. See **Exhibit C-53-55**. The Sutherland Institute echoed their call for an “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.” See **Exhibit C-57-60** (emphasis added).

3. In August 2024, the Legislature responded to those calls, convened a special session, and proposed “Amendment D” that clarifies how the people and elected officials share legislative power. Utah S.J.R. 401, §1. And the Legislature “directed” the Lieutenant

Governor to “submit this proposed amendment to the voters of the state.” Utah S.J.R. 401, §3.

4. On September 3, 2024, the Lieutenant Governor certified the ballot to be used in the 2024 November Election and for the county clerks to prepare, proof, and print. *See Exhibit D.*

5. Late on Thursday, September 5, 2024, Plaintiffs filed an unexpected and extraordinary motion for preliminary injunction to cancel the election on Amendment D. They alleged that Amendment D’s ballot summary was misleading and moved for a preliminary injunction, asking the district court to strike Amendment D from the ballot for being misleading or to declare it void if the ballot gets sent to any voter with Amendment D on it. **Exhibit B-6.** On Saturday, September 7, 2024, Plaintiffs filed yet another supplemental complaint and new claim, alleging that the Legislature didn’t sufficiently cause Amendment D’s text to be published in a newspaper. **Exhibit B-41.** Plaintiffs initially asked the court to order Defendants to respond by Thursday, September 12, 2024.

6. On Monday, September 9, 2024, the district court held a status conference at 1:00 PM, where it ordered the Legislature to respond to Plaintiffs’ motions by 10:30 AM on Wednesday, September 11, 2024. The Legislature did so. The district court held a hearing on Plaintiffs’ motions at 3:00 PM the same day.

7. Just after 9:00 AM yesterday, the district court issued an order granting Plaintiffs’ motions for preliminary injunction. **Exhibit A.** The district court allowed the ballots to be printed as they are, which means that the voters will see Amendment D on the ballots. **Exhibit A-15.** Nonetheless, the district court declared Amendment D “void” and that it “shall be given no effect.” **Exhibit A-15.** And the district court further ordered the Lieutenant

Governor “to ensure” that the votes in favor or against Amendment D are “not counted.”

Exhibit A-15.

8. In a simultaneously filed petition for interlocutory review, the Legislature seeks this Court’s review of the district court’s unprecedented order based on Plaintiffs’ novel claims.

9. In these circumstances, there is no time for appellate review in the ordinary course. Election Day is less than two months away. Utah voters will soon receive ballots and can start voting well before Election Day in November. Utah voters need to know now whether Amendment D—which will appear on the ballot—is valid.

10. The weeks immediately preceding Election Day are irreplaceable moments in an election cycle. Between now and Election Day, voters will begin or continue to educate themselves on the candidates and issues on the ballot. Proponents and opponents of a host of candidates and issues will engage in First Amendment protected activity to persuade their fellow citizens how to vote.

11. But the district court’s order creates intolerable uncertainty for some and disengagement for others over Amendment D and potentially other parts of the ballot right now. That tramples the First Amendment rights of Amendment D’s proponents. They have no reason to speak in support of it, raise money for it, or persuade their fellow citizens to support it if their votes will not count. And the injunction raises a host of questions for voters educating themselves about the issues on Utah’s general election ballot. Without certainty that their vote will count, they might not educate themselves about the pros and cons of Amendment D, voice support for Amendment D, or even mark “For” or “Against” on the ballot. To effectively clear that cloud of doubt, appellate review must occur now. Thus this Court must resolve these questions quickly on the briefs to preserve the people’s right to engage in

protected First Amendment activities and exercise their fundamental right to alter or amend their government. If this Court adjudicates the Legislature’s petition in the ordinary course, those rights will be lost.

12. These questions will soon become moot once the election is here. In normal cases, a preliminary injunction does not conclude the litigation. “[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less than complete than in a trial on the merits.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *cf. id.* (“it is generally inappropriate” for a court to “give a final judgment on the merits” “at the preliminary-injunction stage”). A preliminary injunction is assessed only on the “likelihood” of success. Utah R. Civ. P. 65A(e)(1). And the “conclusions of law made by a court granting a preliminary injunction are not [even] binding at trial on the merits.” *Camenisch*, 451 U.S. at 395. But once ballots are sent next month—let alone once Election Day ends—so too will the chance for voters to learn about, speak in support of, and vote for Amendment D. And there will be no way to undo the district court’s preliminary injunction at trial (or on subsequent merits appeal) if *this* interlocutory proceeding unfolds in the ordinary course.

13. Only this Court’s expedited consideration of the petition for interlocutory review can guarantee the people’s confidence in this year’s election and bring certainty to 1.7 million voters who will see Amendment D on the ballot in November.

14. Rule 23C allows parties to seek emergency relief from this Court in extraordinary circumstances. Utah R. App. 23C(a). A “single justice” may “act upon” on this emergency motion for expedited consideration. Utah R. Civ. P. 23C(g).

15. Rule 2 further contemplates suspension of ordinary rules. “In the interest of expediting a decision,” this Court may “suspend the requirements or provisions any of [the]

rules ... and may order proceedings in that case in accordance with its direction.” Utah R. App. P. 2.

16. The Legislature’s emergency request for this Court’s expedited consideration of its petition for interlocutory review fits comfortably within Rule 2 and Rule 23C. The Court should grant the Legislature’s petition for interlocutory review. It should also treat that petition as the Legislature’s opening brief.

17. The Court should order the following briefing schedule: Plaintiffs should respond to the Legislature’s petition / opening brief on **September 17, 2024**. The Legislature should file its reply brief on **September 19, 2024**.

18. Given the extraordinary and exigent circumstances, and to ensure certainty for Utah’s 1.7 million voters, the Legislature respectfully requests that the Court resolve this appeal on those briefs by **September 24, 2024**. Doing so will leave Amendment D’s supporters and opponents six weeks before Election Day to engage in protected First Amendment activity that furthers 1.7 million Utah voters’ right to alter or reform their government—rather than letting a court deprive all Utah voters of that right. The Legislature requests a ruling by that date even if the Court issues only a summary ruling vacating the preliminary injunction on September 24, with a written opinion to follow later.

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For these reasons, the Legislature respectfully asks this Court to enter the following expedited briefing schedule on the Legislature’s simultaneously filed petition for interlocutory review:

- order Plaintiffs to respond to the Legislature’s petition **on September 17, 2024**,
- order the Legislature to reply **by September 19, 2024**.

The Court should also treat the parties' briefing on the Legislature's petition for interlocutory review as their merits briefs and decide these issues on those briefs.

And the Court should **grant or deny the Legislature's petition for interlocutory review—and, if it grants the petition, resolve this appeal on the merits—no later than September 24, 2024, in a preliminary order vacating the preliminary injunction, with an opinion to follow later.**

Dated: September 13, 2024

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This petition does not exceed 15 pages, excluding any tables or attachments, in compliance with Utah Rule of Appellate Procedure 23C(b).
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 Rule 23C Emergency Motion for Expedited Consideration of Petition for Interlocutory Review was filed with the Court and served via United States Mail or electronic mail to the following:

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Attachments

- (A) The Third District Court's September 12, 2024, Preliminary Injunction Order.
- (B) Plaintiffs' First and Second Preliminary Injunction Motions
- (C) Legislature's Response to Plaintiffs' Preliminary Injunction Motions
- (D) The Lieutenant Governor's Response to Plaintiffs' First Preliminary Injunction Motion