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Counsel for Legislative Defendants

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX,

Plaintiffs,

v.

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

Defendants.

LEGISLATIVE DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Case No.: 220901712

Honorable Dianna Gibson

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INTRODUCTION

Plaintiffs ask this Court to remove proposed constitutional Amendment D from Utah voters' ballots. The Lieutenant Governor has already certified those ballots and sent them to Utah's 29 counties for printing. Plaintiffs suggest, falsely, that the language of Amendment D is a state secret. Its text has been and will continue to be widely published, including in the Utah Voter Information Pamphlet. Plaintiffs demean the State and its voters by suggesting that they are incapable of considering the amendment. Plaintiffs also say, paradoxically, that the ballot is a "suppression tactic." The only suppression tactic is Plaintiffs' demand to deny 1.73 million Utahns the right to vote. Litigation by a few cannot preclude voting by all in Utah. Plaintiffs' eleventh-hour motion is a dangerous invitation to sow confusion and destroy confidence in the election. It must be denied.

Legislative Defendants ask the Court to **order during today's hearing** that Amendment D will remain on the ballot**.** The alternative—an order to remove Amendment D—would inject confusion and potential catastrophic errors into the nearly final ballot-printing process. Such an order would also almost certainly preclude appellate review. Ballot printing starts tomorrow; an order striking Amendment D would leave virtually no recourse for Utah's 1.73 million registered voters. Should the Court need additional time to consider Plaintiffs' alternative requested remedy—allowing Amendment D to remain on the ballot but ignoring Utahns' votes cast on Amendment D—Legislative Defendants ask the Court to enter an order on that request **by Friday, September 13, 2024.** That timing is necessary to allow an immediate and expedited appeal, if necessary, to remove any cloud of doubt over the election and to give Utahns the confidence that their votes matter and will count.

BACKGROUND

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.[1]

Out-of-state special-interest groups and labor unions financed Proposition 4, providing $1.5 million of the $2 million raised by Proposition 4's sponsors.[2] Contributions from Washington-based organizations including the National Education Association,[3] California-based labor and other organizations,[4] and other East Coast groups including the ACLU[5] totaled more than $400,000. 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.[6]

Proposition 4 passed by a 0.6% margin. A majority of voters in 25 of Utah's 29 counties voted *against* it. The proposition carried only in Salt Lake, Summit, Grand, and Carbon counties.[7] Statewide,

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[1] 2018 Utah Voter Information Pamphlet at 78, Utah Office of the Lieutenant Governor, vote.utah.gov/wp-content/uploads/sites/42/2023/09/2018-VIP.pdf.

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

[3] Contributions came from NEA, Independent Lines Advocacy, Ballot Initiative Strategy Center, and Election Reformers Network. *See* Utahns for Responsive Government Disclosure, "2018 Convention Report Due 4/16/18," disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414774; Utahns for Responsive Government Disclosure, "2018 September 30th Report"; Utahns for Responsive Government Disclosure, "2018 General Report."

[4] Contributions came from SEIU United Healthcare Workers, Southwest Regional Council of Carpenters, Operating Engineers Local Union No. 3, and Campaign for Democracy. *See* Utahns for Responsive Government Disclosure, "2018 Convention Report Due 4/16/18," disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414774; Utahns for Responsive Government Disclosure, "2018 General Report"; Utahns for Responsive Government Disclosure, "2018 Year End Report."

[5] Utahns for Responsive Government Disclosure, "2018 Convention Report Due 4/16/18," disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414774; Utahns for Responsive Government Disclosure, "2018 Primary Report"; 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."

[6] Utahns for Responsive Government Disclosure, "2018 Convention Report Due 4/16/18," disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414774; 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."

[7] 2018 Election Results at 54, Utah Office of the Lieutenant Governor (Nov. 26, 2018), vote.utah.gov/wp-content/uploads/sites/42/2023/09/2018-General-Election-Canvass.pdf.

more than 512,000 Utahns voted against Proposition 4, or 49.7% of votes cast.[8] A mere 6,944 more Utahns voted in favor of it, or 50.3% of votes cast.[9]

2. In 2020, the Legislature passed Senate Bill 200 with further redistricting reforms. SB200 was the product of 15 months of negotiation with Proposition 4's proponent, Better Boundaries.[10] It was described as a "compromise" bill that kept the redistricting commission while "preserv[ing] the constitutional prerogatives of the Legislature to do the redistricting consistent with [its] constitutional mandate" by converting mandatory provisions in Proposition 4 to discretionary provisions.[11] It was widely supported—including by Better Boundaries.[12] No senator voted against SB200.[13] Only four house members—three from Salt Lake area districts—voted against it.[14]

3. In November 2021, the Legislature redistricted. 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.[15]

4. In March 2022, Plaintiffs sued the Utah Legislature. Counts I through IV of their complaint alleged that the congressional districts were unconstitutionally "gerrymandered." 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, through initiatives, art. VI, §1. Defendants moved to dismiss. This Court denied the motion with respect to Counts I through IV but dismissed Count V. *See* Doc. 140, MTD-Op. (Nov. 22, 2022). Relying on *Grant v. Herbert*, 2019 UT 42, 449 P.3d 122, this Court

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[8] *Id.*

[9] *Id.*

[10] *See* Utah Sen. Floor Debate at 36:39-37:17, 2020 Gen. Sess. (2020) (Sen. Bramble); House Floor Debate at 1:32:20-1:33:55, 2020 Gen. Sess. (2020) (Rep. Moss).

[11] Utah Sen. Floor Debate at 35:44-36:38, 2020 Gen. Sess. (2020) (Sen. Bramble).

[12] Bethany Rodgers, Utah Lawmakers, Better Boundaries Explain How They've Compromised on the Anti-Gerrymandering Law (Feb. 28, 2020), perma.cc/PY4D-MRPH.

[13] Vote Status, Utah Legislature (Mar. 3, 2020), le.utah.gov/DynaBill/svotes.jsp?sessionid=2020GS&voteid=932&house=S

[14] Vote Status, Utah Legislature (Mar. 3, 2020), le.utah.gov/DynaBill/svotes.jsp?sessionid=2020GS&voteid=1039&house=H

[15] Doc. 1, Compl. ¶158 (Mar. 17, 2022). The 2001, 2011, and 2021 plans are available at gis.utah.gov/data/political/political-districts.

observed that the Legislature's changes to Proposition 4 were "in line with historical practice." MTD-Op. at 59.

5. In January 2023, the Utah Supreme Court granted the parties' cross-petitions for an interlocutory appeal of all issues. In July 2024, the Utah Supreme Court decided the interlocutory appeal. *See League of Women Voters of Utah v. Utah State Legis.*, 2024 UT 21, --- P.3d --- ("*LWV*"). 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' Article I, §2 arguments. *Id.* ¶76. The Court held that when a citizens' initiative is one to "alter or reform" government, the Legislature may amend such initiatives but cannot "impair" them, *id.* ¶162, unless the Legislature satisfies strict scrutiny, *id.* ¶215. Many times over, the Court repeated that initiatives are *not* constitutional amendments, *id.* ¶161, that initiatives "cannot violate any other provision of the constitution," *id.*, that initiatives must be "within the bounds of the constitution," *id.* ¶¶157, 160, that initiatives must be "exercised in harmony with the rest of the constitution," *id.* ¶157, and so on. *See also id.* ¶¶10 n.4, 68 n.16, 135-36 (same). The Court issued a limited remand for the parties and this Court to apply that new "formulation." *Id.* ¶76.

6. Following the decision, Pro-Life Utah, Worldwide Organization for Women, many local officials, and Republican party officials joined an open letter calling for a constitutional amendment. *See* **Exhibit A**.[16] The Sutherland Institute echoed their call. *See* **Exhibit B**.[17] They wrote that the 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." **Exhibit A at 1.** They said, "The people of Utah should have the opportunity to vote on a constitutional

[16] Letter to Governor Spencer Cox, President J. Stuart Adams, and Speaker Mike Schultz (Aug. 16, 2024), utgop.org/wp-content/uploads/2024/08/Open-Letter-Regarding-Utah-Ballot-Initiatives_Updated-1.pdf.

[17] Rick B. Larsen & Scott Anderson, "Opinion: Call for Utah constitutional amendment is about safeguarding checks and balances in lawmaking," Deseret News (Aug. 24, 2024), www.deseret.com/opinion/2024/08/24/utah-constitutional-amendment-safeguards-checks-balances/ (reprinted on Sutherland Institute's website, sutherlandinstitute.org/call-for-utah-constitutional-amendment-is-about-safeguarding-checks-and-balances-in-lawmaking/).

amendment this fall that would clarify the legislative powers vested in the people as well as their elected representatives ….” **Exhibit B at 4.**

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

The enrolled copy of the proposed amendment is attached as **Exhibit C.** It has been readily available on the Legislature’s website since August. *See* Utah S.J.R. 401, le.utah.gov/~2024S4/bills/static/SJR401.html. The amendment would revise Article VI of the Utah Constitution as follows:

> **Article VI, Section 1. Power vested in Senate, House, and People—Prohibition on foreign influence on initiatives and referenda.**
>
> (1) The Legislative power of the State shall be vested in:
>
> (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and
>
> (b) the people of the State of Utah as provided in Subsection (2).
>
> (2)(a)(i) The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:
>
> (A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute; or
>
> (B) require any law passed by the Legislature, except those laws passed by a two-thirds vote of the members elected to each house of the Legislature, to be submitted to the voters of the State, as provided by statute, before the law may take effect.
>
> (ii) Notwithstanding Subsection (2)(a)(i)(A), legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of

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

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

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

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

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

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

Exhibit C at 2-3 (Utah S.J.R. 401 §2).

The amendment would revise Article I, §2 as follows:

Article I, Section 2. All political power inherent in the people.

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

Exhibit C at 2 (Utah S.J.R. 401 §1).

The joint resolution proposing the amendment contains the following charge to publish the amendment:

Section 3. Submittal to voters.

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.

Exhibit C at 3 (Utah S.J.R. 401 §3).

Along with the amendment, the Legislature passed related legislation contingent on the amendment's passage. *See* Utah S.B. 4003 §7 (2024), le.utah.gov/~2024S4/bills/static/SB4003.html. The enrolled copy of the legislation is attached as **Exhibit D.** It has been readily available on the Legislature's website since August. *Id.* That legislation would amend Utah's existing statute governing citizens' initiatives as follows:

> **20A-7-212. Effective date of initiative – Deference given to law passed by initiative.**
> …
> (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.**

Exhibit D at 8-9 (Utah S.B. 4003 §2). That legislation also extended deadlines for referenda. *See id.* §§1, 3 (amending Utah Code §20A-7-105(5)(a)(ii)(B) from 40 days to 60 days and amending Utah Code §20A-7-307(3)(a) to give the Lieutenant Governor a corresponding extension of time). And the legislation advanced internal deadlines and processes for state officials in response to referenda and proposed amendments. *See id.* §§5-6 (amending deadlines in Utah Code §20A-7-705 and -706); *id.* §4 (adding deadline in §20A-7-311 to require Lieutenant Governor to report on referenda signatures). **Exhibit D at 10-15** (Utah S.B. 4003 §2).

7. Statewide news outlets covered the amendment's proposal and passage beginning in August—and they have covered it extensively ever since. A non-exhaustive compilation of press

coverage is attached as **Exhibit E** and is also publicly available online.[18] National sites including Ballotpedia also reported on the amendment and reprinted its full text.[19] The Deseret News reproduced

[18] *See* Hanna Seariac, *Utah legislators considering a constitutional amendment on ballot initiatives*, Deseret News (Aug. 16, 2024), www.deseret.com/politics/2024/08/16/utah-constitutional-amendment-ballot-intiatives/; Hanna Seariac, *Constitutional amendment over ballot initiatives would help Utah avoid 'nightmare scenario,' says Derek Monson*, Deseret News (Aug. 17, 2024), www.deseret.com/politics/2024/08/17/ballot-initiatives-constitutional-amendment/; Hanna Seariac, *Utah majority leaders say amendment needed so Utah doesn't become California*, Deseret News (Aug. 20, 2024), www.deseret.com/politics/2024/08/20/utah-constitutional-amendment-intiatives/; Robert Gehrke, *Legislative leaders say fear of California-style laws, foreign influence cause to rush constitutional amendment*, Salt Lake Tribune (Aug. 20, 2024), www.sltrib.com/news/politics/2024/08/20/why-legislature-is-rushing-amend/; 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; Robert Gehrke, *GOP lawmakers vote for power to amend, repeal ballot initiatives. Now Utahns get final say*, Salt Lake Tribune (Aug. 21, 2024), www.sltrib.com/news/politics/2024/08/21/utah-republicans-pass/; Hanna Seariac, *Constitutional amendment will now go to Utah voters*, Deseret News (Aug. 21, 2024), www.deseret.com/politics/2024/08/21/what-is-utah-constitutional-amendment-on-initiatives/; Clayre Scott & Becky Bruce, *Cox signs measure, voters to decide on ballot initiative changes in November*, KSL (Aug. 21, 2024), kslnewsradio.com/2128577/special-session-ballot-initiative/; Saige Miller & Sean Higgins, *GOP supermajority votes for more power over ballot initiatives, sends it to Utah voters*, KUER 90.1 (Aug. 21, 2024), www.kuer.org/politics-government/2024-08-21/gop-supermajority-votes-for-more-power-over-ballot-initiatives-sends-it-to-utah-voters; 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/; Emily Anderson Stern, *How Utah lawmakers voted on a constitutional amendment to gut voter initiative power*, Salt Lake Tribune (Aug. 21, 2024), www.sltrib.com/news/politics/2024/08/21/how-utah-lawmakers-voted/; Jackie Mitchell, *Utah voters to decide on constitutional amendment granting legislature power to amend or repeal initiatives and banning foreign influence on ballot measures*, Ballotpedia News (Aug. 23, 2024), news.ballotpedia.org/2024/08/23/utah-voters-to-decide-on-constitutional-amendment-granting-legislature-power-to-amend-or-repeal-initiatives-and-banning-foreign-influence-on-ballot-measures/; 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/; Saige Miller, *'Vote no' rally at the Utah capitol launches opposition to ballot initiative amendment*, KUER 90.1 (Aug. 26, 2024), www.kuer.org/politics-government/2024-08-26/vote-no-rally-at-the-utah-capitol-launches-opposition-to-ballot-initiative-amendment; Ethan Rice, *Utah constitutional amendment would allow Legislature to repeal initiatives to prohibit foreign influence*, Ballotpedia News (Aug. 27, 2024), news.ballotpedia.org/2024/08/27/utah-constitutional-amendment-would-allow-legislature-to-repeal-initiatives-prohibit-foreign-influence/; Hanna Seariac, *The cases for and against a Utah constitutional amendment*, Deseret News (Sept. 2, 2024), www.deseret.com/politics/2024/09/02/what-is-initiative-amendment-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; Robert Gehrke, *'Deceptive' and 'misleading': Ballot language to limit voters' initiative power thrashed by critics—including Republicans*, Salt Lake Tribune (Sept. 4, 2024), www.sltrib.com/news/politics/2024/09/04/ballot-language-limit-voters/; 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/; Bridger Beal-Cvetko, *Critics say text of proposed Utah constitutional amendment is 'misleading*,' KSL.com (Sept. 5, 2024), www.ksl.com/article/51118655/critics-say-text-of-proposed-utah-constitutional-amendment-is-misleading; Bridger Beal-Cvetko, *Groups sue to block 'misleading' constitutional amendment from being put on the ballot*, KSL.com (Sept. 6, 2024), www.ksl.com/article/51120781/groups-sue-to-block-misleading-constitutional-amendment-from-being-put-on-the-ballot; Katie McKellar, *'Orwellian doublespeak': Lawsuit asks judge to scrap 'misleading' Utah constitutional amendment*, Utah News Dispatch (Sept. 6, 2024), utahnewsdispatch.com/2024/09/06/lawsuit-asks-judge-scrap-misleading-utah-constitutional-amendment-d/; Rob Bishop, *Voices: To prevent Utah from becoming California, we must pass the ballot initiatives amendment*, Salt Lake Tribune (Sept. 9, 2024), www.sltrib.com/opinion/commentary/2024/09/09/rob-bishop-prevent-utah-becoming/; "Utah Amendment D," Ballotpedia, ballotpedia.org/Utah_Amendment_D,_Provide_for_Legislative_Alteration_of_Ballot_Initiatives_and_Ban_Foreign_Contributions_Measure_(2024).

[19] *See* Ex. E at 134-36 (Jackie Mitchell, *Utah voters to decide on constitutional amendment granting legislature power to amend or repeal initiatives and banning foreign influence on ballot measures*, Ballotpedia News (Aug. 23, 2024), news.ballotpedia.org/2024/08/23/utah-voters-to-decide-on-constitutional-amendment-granting-legislature-power-to-amend-or-repeal-initiatives-and-banning-foreign-influence-on-ballot-measures/); Ex. E at 151-54 (Ethan Rice, *Utah constitutional*

the Article VI amendment text—the target of Plaintiffs' preliminary injunction motions—on August 21, 2024, along with proponents' and opponents' commentary,[20] and again on September 5, 2024.[21] Similarly, Fox 13, Ballotpedia, and other entities hyperlinked or reproduced the amendment text in August and September.[22]

8. The Speaker of the House and the President of the Senate submitted a ballot title and summary for the proposed Amendment D, as required by Utah Code §20A-7-103(3). The summary states[23]:

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

9. The Lieutenant Governor certified Amendment D for ballot printing, along with all candidates and other ballot issues, to county clerks on Tuesday, September 3, 2024. *See* Doc. 339,

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amendment would allow Legislature to repeal initiatives to prohibit foreign influence, Ballotpedia News (Aug. 27, 2024), news.ballotpedia.org/2024/08/27/utah-constitutional-amendment-would-allow-legislature-to-repeal-initiatives-prohibit-foreign-influence/); Ex. E at 254-68 ("Utah Amendment D," Ballotpedia, ballotpedia.org/Utah_Amendment_D,_Provide_for_Legislative_Alteration_of_Ballot_Initiatives_and_Ban_Foreign_Contributions_Measure_(2024)).

[20] *See* Ex. E at 47-52 (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/).

[21] *See* Ex. E at 218-25 (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/).

[22] *See, e.g.*, Ex. E at 96-119 (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); Ex. E at 254-68 ("Utah Amendment D," Ballotpedia, ballotpedia.org/Utah_Amendment_D,_Provide_for_Legislative_Alteration_of_Ballot_Initiatives_and_Ban_Foreign_Contributions_Measure_(2024); Ex. E at 192-204 (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); Ex. E at 210-14 (Bridger Beal-Cvetko, *Critics say text of proposed Utah constitutional amendment is 'misleading*,' KSL.com (Sept. 5, 2024), www.ksl.com/article/51118655/critics-say-text-of-proposed-utah-constitutional-amendment-is-misleading); Ex. E at 230-33 (Bridger Beal-Cvetko, *Groups sue to block 'misleading' constitutional amendment from being put on the ballot*, KSL.com (Sept. 6, 2024), www.ksl.com/article/51120781/groups-sue-to-block-misleading-constitutional-amendment-from-being-put-on-the-ballot).

[23] 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.

Decl. of Shelly Jackson ¶12. After the Lieutenant Governor certifies the ballot, it is up to Utah's 29 counties to proceed with preparing, proofing, printing, and mailing ballots. *Id.* ¶¶13-19.

Plaintiffs contend that the Lieutenant Governor's certification was not available on the website until "mid-day September 4, 2024." 1st-Mot. 5. Defendants have not had sufficient time to investigate or verify that statement.

10. Late into the evening on September 5, without any prior notice to Defendants or to the Court, Plaintiffs filed a motion for preliminary injunction to take Amendment D off the ballot. Plaintiffs' motion "seek[s] to enjoin Defendants from placing proposed Amendment D on the November 2024 election ballot and if any ballots are issued to voters that include proposed Amendment D, seek for the Court to declare and enjoin Amendment D as void." 1st-Mot. 1. Plaintiffs raised the following claims:

- The ballot violates the Utah Constitution's amendment provision, art. XXIII, §1, because of the "misleading and false" summary of Amendment D. 1st-Mot. 6-17.

- The ballot summary violates Utah Code §20A-7-103(3)(c) because it "fails to disclose the actual subject matter of the amendment," which Plaintiffs say is "eliminating a voter's fundamental constitutional right to alter or reform their government without infringement." 1st-Mot. 17-18.

- The ballot summary violates the Utah Constitution's Free Elections Clause, art. I, §17, because "the language exerts undue influence and coercion upon Utah's voters by omitting the central effect of the amendment" and "misleading voters." 1st-Mot. 18-21.

- The ballot summary violates the Utah Constitution's free speech and expression provisions, art. I, §§1, 15, because it "tricks Utahns into voting *for* the proposed amendment by presenting a false image of the Amendment." 1st-Mot. 21-24.

- The ballot summary violates the Utah Constitution's right to vote provision, art. IV, §2, because "the ballot summary would deceptively cause voters to cast ballots contrary to their true will and will unduly influence the election outcome." 1st-Mot. 24-25.

- The ballot summary violates Utah Constitution art. I, §2's text that "all free governments are founded on their authority for [the people's] equal protection and benefit" and art. I, §27's similar text because the "government is not 'free' if its Constitution is amended by deception." 1st-Mot. 25-26.

Then on Saturday, September 7, Plaintiffs filed a second preliminary motion raising an additional claim:

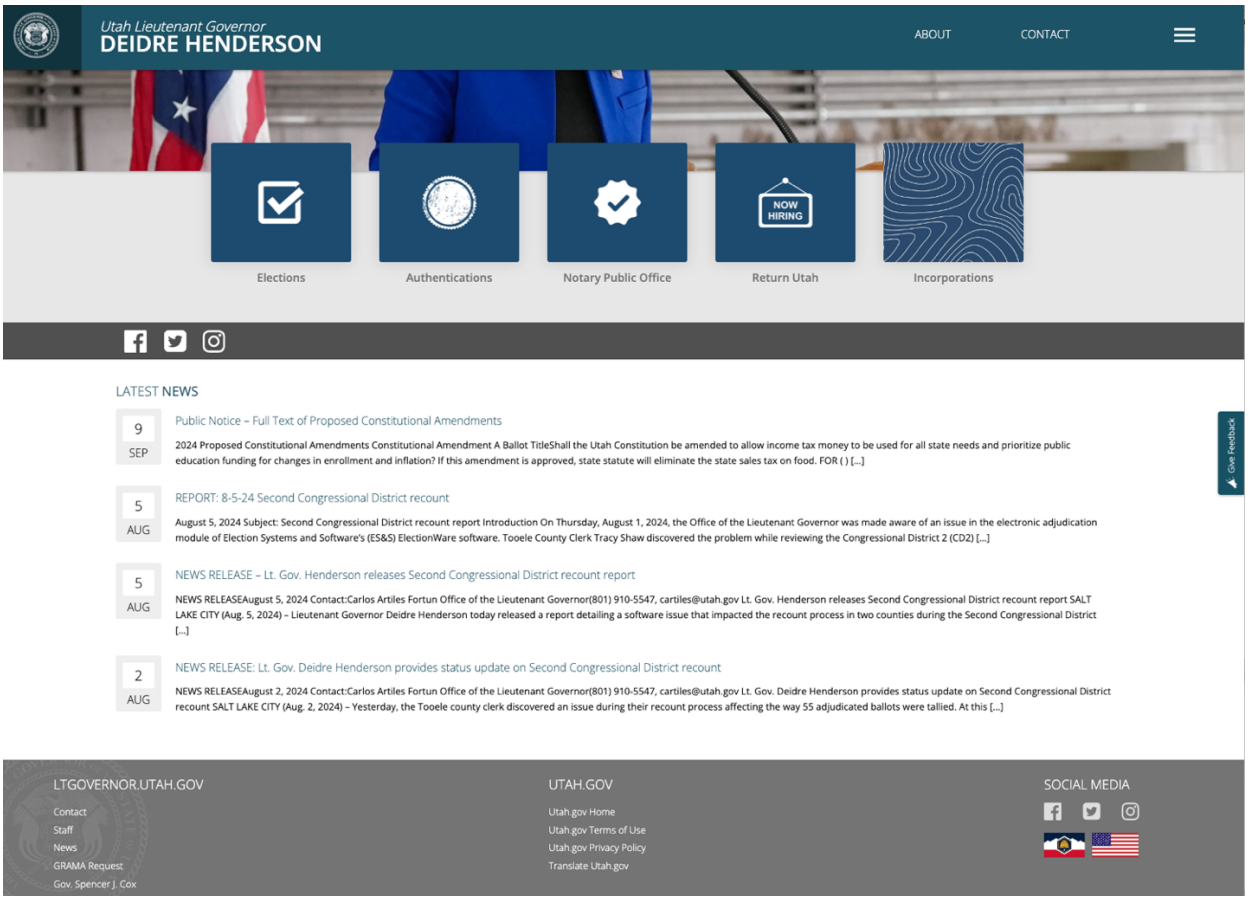
- The ballot violates the Utah Constitution art. XXIII, §1's text regarding publication because the amendment text was not printed in "a physical, printed newspaper" in "the full two calendar months of September and October." 2d-Mot. 5-15.

Both motions contend that the equities favor an injunction because the ballot will cause irreparable harm by leading voters to vote for Amendment D. 1st-Mot. 26-27. They also contend that "[i]ncreasing the likelihood of Amendment D being approved by the voters through deceit in turn irreparably harms Plaintiffs by threatening their chances of success in the underlying litigation." 2d-Mot. 16. Plaintiffs contend that "Defendants are not harmed by being unable to advance a false description of the proposed Amendment in the November 2024 election." 1st-Mot. 27. Plaintiffs contend that the serious timing concerns raised by their motion, *infra*, and any resulting harms were of the State's "own making" and speculated that there was enough time for "briefly delaying." 2d-Mot. 16. And Plaintiffs contend that the public interest favors an injunction because, without an injunction, "a fundamental constitutional right that has existed since 1895 would be in jeopardy." 1st-Mot. 27.

Noted above, both motions ask the Court to "enjoi[n] Defendants from placing proposed Amendment D on the November 2024 election ballot." 1st-Mot. 28. Alternatively, they ask the Court to keep the amendment on the ballot but to forbid counting the votes: "if any ballots are issued to voters that include proposed Amendment, Amendment D is declared void and enjoined." *Id.*; *see* 2d-Mot. 17. For either form of relief, they ask the Court to order "the Lieutenant Governor to notify all County Clerks of the injunction such that they are bound by its terms." 1st-Mot. 28; *see also* 2d-Mot. 17 n.5 ("the Court could order the Lieutenant Governor to direct county clerks to post notices at polling places and to mail notices along with the ballots informing voters that the Court has ordered Amendment D void"). Plaintiffs did not name even one of Utah's 29 county clerks as a defendant.

11. The Lieutenant Governor's office immediately responded to Plaintiffs' first preliminary injunction motion with a declaration about the timing exigencies and the disruption that Plaintiffs' motion would cause. The declaration explained Utah's decentralized process for ballot printing and elections administration, whereby Utah counties prepare and print ballots. Jackson Decl. ¶¶13-19. The declaration explained that the Lieutenant Governor had already certified the ballot on September 3 and sent it to the counties for printing. *Id.* ¶12. The declaration explained that counties use designated printing vendors who "collectively print ballots for over 160 counties throughout the United States," *id.* ¶15, that "reprinting ballots is estimated to cost up to $3 million," *id.* ¶27, and that "[r]eprinting may not even be possible given all of the other jurisdictions in the country who are also printing ballots at the same time," *id.*, to say nothing of the "costs associated with re-certifying, re-programming ballots, and re-proofing," *id.* The declaration stated that "[a]ltering the ballot on the eve of an election jeopardizes the State's ability to meet the UOCAVA deadline"—a nonnegotiable federal deadline that requires the States to mail ballots no later than September 20, 2024—"and to otherwise run an orderly election that protects Utahns' right to vote." *Id.* ¶28. The declaration emphasized that Amendment D is not the only item on the ballot in this presidential election year and that "[a]ltering the ballot, after all of these things have already been certified for the ballot, jeopardizes the orderly election for all candidates and issues, not just Amendment D." *Id.* ¶29.

12. On September 9, 2024, the Lieutenant Governor posted the full text of all constitutional amendments, including Amendment D. A copy of the public notice is attached as **Exhibit F.** It is also readily available online. *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/. Shown below, the public notice currently appears as the first item in the "Latest News" section on the Lieutenant Governor's homepage:



Utah Lieutenant Governor, ltgovernor.utah.gov/ (last visited Sept. 9, 2024). As of September 10, 2024, the public notice is the first Google search result when searching "Utah amendment D full text."

13. Leading up to the election, the State will publish Utah's Voter Information Pamphlet. Plaintiffs have relied on past Voter Information Pamphlets already in this remanded litigation. *See* Doc. 293, Pls.' Mot. for Summ. J. at 4, 10, 11, 14 (citing *Proposition 4*, Utah Voter Information Pamphlet (Sept. 3, 2018), vote.utah.gov/wp-content/uploads/sites/42 /2023/09/2018-VIP.pdf). The Voter Information Pamphlet will include the full text of Amendment D and arguments for and against the amendment. *See* Utah Code §§20A-7-701(1), 20A-7-702.5. The Voter Information Pamphlets are widely read and familiar to Utah Voters. According to the most recent available study, "almost 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).

13. On September 9, this Court granted Plaintiffs' request for a status conference and ordered responses no later than Wednesday, September 11, 2024, at 10:30 A.M. Counsel for the Legislative Defendants agreed to the expedited schedule with the reservation that the schedule would not afford Defendants enough time to research and exhaust all arguments to Plaintiffs' seven new claims.

STANDARD OF REVIEW

Preliminary injunctions are an extraordinary remedy. They are an exception, not the rule. Plaintiffs must prove (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm, and that (3) the balance of the equities and (4) the public interest favor them. Utah R. Civ. P. 65A(e). In elections cases such as this one, the Court must be cognizant of "[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." *In re Cook*, 882 P.2d 656, 659 (Utah 1994). Even if a court "find[s] merit" in a claim, a preliminary injunction must nonetheless be denied if it will "cause a 'serious disruption of election process,' including risk of interference with the rights of absentee and other voters." *Id.* at 658-59 (quoting *Williams v. Rhodes*, 393 U.S. 23, 35 (1968)). And where, as here, Plaintiffs seek a "disfavored" mandatory preliminary injunction that would "mandat[e] action" by the Lieutenant Governor (and county election officials who are not even parties to this case), "chang[e] the status quo," and "gran[t] all the relief [Plaintiffs] would expect from a trial win," Plaintiffs face "a heavier burden on the likelihood-of-success and the balance-of-harms factors." *FTN-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019).[24] "A mandatory injunction will never be granted where it might operate inequitably or oppressively." *Salt Lake County v. Kartchner*, 552 P.2d 136, 140 (Utah 1976).

[24] *See PPAU v. State*, 2024 UT 28, ¶86, —P.3d— ("Since we borrowed the preliminary injunction standards from the Tenth Circuit, we look to Tenth Circuit caselaw for guidance.").

SUMMARY OF ARGUMENT

I. This Court can deny Plaintiffs' motions without reaching the merits. An order to remove Amendment D from the ballot will "cause a 'serious disruption of election process,' including risk of interference with the rights of absentee and other voters." *Cook*, 882 P.2d at 659 (quoting *Williams*, 393 U.S. at 35). Any such relief would undercut "[t]he overriding importance of the public's interest in the integrity of the election process." *Id.* That alone is grounds for denying relief, even if claims have some "merit." *Id.* at 658-59.

II. The motions must also be denied for Plaintiffs' failure to name county officials. The Court lacks jurisdiction to order those non-parties to remove Amendment D from their soon-to-be-printed ballots, or alternatively order them not to count votes. *See Carlton v. Brown*, 2014 UT 6, ¶¶30-32, 323 P.3d 571.

III.A. Even if the Court were to reach the merits, Plaintiffs cannot show likely success. Plaintiffs' various claims related to the ballot summary are subjective and one-sided, contrary to other evidence, and contrary to law. Those claims require this Court to assume that Utah voters live under a rock—that Utahns are oblivious to extensive press coverage about the amendment and that they are unable to read the amendment, which has been widely publicized, will be reprinted in Utah's 2024 Voter Information Pamphlet, and will be posted in voting precincts.

B. Likewise, Plaintiffs' claim that the amendment has not been properly published fails. Plaintiffs never answer the right constitutional question: did "*the Legislature*" comply with its obligation to "*cause*" the amendment to be published? Utah Const. art. XXIII, §1 (emphasis added). The Legislature complied beginning in August, making the amendment text widely accessible on its own website and directing the Lieutenant Governor to submit the proposed amendment to the voters "in the manner provided by law." **Exhibit C at 3** (Utah S.J.R. 401 §3). Plaintiffs cannot seriously maintain that a proposed amendment is "void" unless the Legislature insists that it be reprinted for two continuous

months in hard-copy newspapers that no longer exist. Nor can Plaintiffs seriously maintain that the proposed amendment is a state secret when it has been widely published in newspapers and online since the August special session.

IV. Plaintiffs give this Court no basis for taking the extraordinary action of removing an amendment from the ballot. Such an order would deny 1.73 million registered voters their right to vote. Defendants request that this Court so order **by today** to avoid "jeopardiz[ing] the State's ability to meet the UOCAVA deadline and to otherwise run an orderly election that protects Utahns' right to vote." Jackson Decl. ¶¶28-29. Nor do Plaintiffs give this Court any basis for concluding that Utahns' votes shouldn't count. Defendants request that this Court so order **by today or no later than Friday, September 13.** Plaintiffs' litigation by a few cannot suppress the votes of all Utahns. Given "[t]he overriding importance of the public's interest in the integrity of the election process," *Cook*, 882 P.2d at 659, the baseless shadow Plaintiffs have cast over Utah's 2024 election must be cleared immediately.

ARGUMENT

I. The equities alone preclude an order removing Amendment D from nearly final ballots.

A. Plaintiffs seek an eleventh-hour change to 1.73 million ballots. Preliminary injunctions are always "extraordinary and drastic." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). And where, as here, Plaintiffs are halting the orderly election processes, there are "considerations specific to election cases" that will foreclose injunctive relief. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (rejecting last-minute election changes while expressing "no opinion" on the merits). This is referred to as the *Purcell* principle in federal courts. And that same rule is firm in Utah courts too.

"The overriding importance of the public's interest of the election process" will command denial of injunctive relief regardless of the "merit" of a plaintiff's claim. *Cook*, 882 P.2d at 259. In *Cook*, plaintiffs challenged ballots in September after the ballot preparation process was well underway. *Id.* at 258-59. The Utah Supreme Court refused to "halt the distribution of the voter information

pamphlets in current form" or change ballots even though there was "merit to petitioners' claims." *Id.* at 258-59. Likewise in *Williams v. Rhodes*, 393 U.S. 23 (1968)—relied upon by the Utah Supreme Court in *Cook*—plaintiffs established a serious constitutional violation. *Id.* at 34 (holding Ohio laws restricting third-party candidates "impose[] a burden on voting and associational rights, which we hold is an invidious discrimination, in violation of the Equal Protection Clause"). Nonetheless, the U.S. Supreme Court refused to require last-minute changes to ballots because that would cause a "serious disruption of election process." *Id.* at 35. The Court relied on the State's representation to the Court that changing the ballots was no longer possible. *Id.* at 34-35. The Court concluded that "it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots." *Id.* at 35. The Court emphasized that "the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters." *Id.*

Defendants have established that the same risk of "serious disruption" will occur here if the Court orders Amendment D removed from nearly final ballots. The election process has already begun. *See* Jackson Decl. ¶¶10-23. The Lieutenant Governor already certified the ballots to county clerks for printing on September 3. *Id.* ¶10. As the Lieutenant Governor's counsel explained at the status conference, ballot preparation and proofing is occurring in real time *today* and ballot printing starts *tomorrow*. That timing is required because county clerks must finalize all ballots for all counties so all UOCAVA ballots statewide can be mailed in 9 days. Missing that deadline violates federal law, with disastrous consequences. *Id.* ¶¶19-23. Simply put—the ballots are no longer even in the Lieutenant Governor's hands. *Id.* ¶13. They are with Utah's 29 counties. *Id.* ¶14. Counties are submitting ballot proofs to three "extremely busy" ballot printers who service the entire United States and have fixed deadlines. *Id.* ¶¶15-19. Removing Amendment D would require coordination among all of the counties and their separate printers, cost the State "up to $3 million," risk serious violations of federal law, and otherwise "jeopardiz[e] the orderly election for all candidates and issues, not just Amendment D." *Id.*

¶¶17-29. Ballots are already certified, proofs are already out and, after tomorrow, "[r]eprinting may not even be possible given all of the other jurisdictions in the country who are also printing ballots at the same time." *Id.* ¶¶12, 20, 25.

Cook requires deference to the Lieutenant Governor's conclusion: "Altering the ballot on the eve of an election jeopardizes the State's ability to meet the UOCAVA deadline and to otherwise run an orderly election that protects Utahns' right to vote." *Id.* ¶28. There is simply not sufficient time to order Amendment D removed from nearly final ballots.

B. Plaintiffs' response forgets that we are in Utah. *See* 2d-Mot. 16-17. And in Utah, when an injunction would "cause 'a serious disruption of election process,' including the risk of interference with the rights of absentee and other voters," it must be rejected. *Cook*, 882 P.2d at 259. Plaintiffs do not grapple with Utah law, nor with analogous federal *Purcell* principles, which the Utah Supreme Court has relied upon, *see id.*, nor with other States abiding by the same election integrity standards. *See, e.g., League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020) (applying *Purcell* principle); *All. for Retired Americans v. Sec'y of State*, 240 A.3d 45, 50 (Me. 2020) (same); *Fay v. Merrill*, 256 A.3d 622, 638 n.21 (Conn. 2021) (same); *Moore v. Lee*, 644 S.W.3d 59, 65-66 (Tenn. 2022) (same). Plaintiffs instead rely on two out-of-state decisions that are inapplicable. *See* 2d-Mot. 16-17. The first case said that "*Purcell* is inapplicable" in that state "when the relief sought is *not injunctive*," and it was inapplicable in that case where the plaintiffs did not seek injunctive relief. *State ex rel. DeMora v. LaRose*, 217 N.E.3d 715, 725 (Ohio 2022) (emphasis added). Here, of course, Plaintiffs seek a mandatory injunction: take Amendment D off the ballot and don't count any Amendment D votes. *See* 1-Mot. 28. Plaintiffs' second case involved the State's refusal to remove a candidate from the ballot well before the state-law deadline for candidates to request removal from the ballot, *see* N.C.G.S. §163-113, and "neither party in this case dispute[d]" that "a vote for plaintiff in this election will not count," *Kennedy v. N.C. State Bd. of Elections*, No. 235P24 (N.C. Sept. 9, 2024). Neither decision is a basis for

ignoring Utah's concern for the "overriding importance of the public's interest in the integrity of the election process." *Cook*, 882 P.2d at 259.

C. Nor can Plaintiffs distinguish *Cook* based on its particular facts. In *Cook*, plaintiffs waited a month to challenge language in voter information pamphlets. 882 P.2d at 658. Here, Plaintiffs will say they waited less. But the concern in *Cook* was a concern about "serious disruption," and that concern is dispositive here. The Lieutenant Governor has established that an order to remove Amendment D from the ballot will jeopardize "an orderly election." Jackson Decl. ¶¶28-29.

Cook, moreover, requires that "one who seeks to challenge the election process must do so *at the earliest possible opportunity*." 882 P.2d at 659 (citing *Clegg v. Bennion*, 247 P.2d 614 (Utah 1952)) (emphasis added). Plaintiffs did not do so here. Press coverage about the ballot language, including critical coverage, was immediate.[25] But Plaintiffs did not alert either Defendants or the Court to the possibility of a preliminary injunction motion. Their refusal to do so is especially baffling when the parties were engaged in ongoing negotiations and briefing about scheduling issues. Plaintiffs instead waited until late on Thursday—after this Court rejected Plaintiffs' arguments about the summary judgment briefing schedule—to demand that Amendment D be removed from already-certified ballots that had been sent to the counties. Then they surprised Defendants with a second preliminary injunction motion Saturday evening—*after* the Lieutenant Governor advised it was too late to make changes.

D. Finally, an order removing Amendment D from the ballot would effectively deprive 1.73 million Utah voters from any further review. Once ballot printing begins tomorrow, returning Amendment D to the ballot would entail up to $3 million in costs and risk violating federal law. Jackson Decl. ¶¶27-28. Given those unrebutted timing constraints, Plaintiffs cannot insist on an order today that

[25] Ex. E at 180-88 (Robert Gehrke, *'Deceptive' and 'misleading': Ballot language to limit voters' initiative power thrashed by critics—including Republicans*, Salt Lake Tribune (Sept. 4, 2024), www.sltrib.com/news/politics/2024/09/04/ballot-language-limit-voters/); Ex. E at 218-25 (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/).

would deny 1.73 million Utahns their fundamental right to vote on Amendment D without any further recourse. Granting such relief would create a "cascade of election chaos" in the eyes of the public. *Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194, 227 (4th Cir. 2024). As the attached declarations establish, Plaintiffs do not represent all voters. *See* **Exhibit G** (Declarations of Kimball Willard, Jody Valantine, Bonnie Hyer, Alexis Ence, Eugene Domingo Garate, Chad Saunders, Lesa Sandberg, Vernita Brown, Richard Hyer, Stafford Palmieri Sievert). Far from it. Other Utahns are ready to vote on Amendment D in the forthcoming election. **Exhibit G at 1, 5, 7, 10, 13, 16, 19, 22, 25, 28.** They are not confused by Amendment D. **Exhibit G at 2, 5, 8, 11, 14, 17, 20, 23, 26, 29.** They do not find the ballot summary to be misleading. **Exhibit G at 2, 5, 10, 11, 14, 17, 20, 23, 26, 29.** And they have their own fundamental right to "alter or reform" their government by voting on Amendment D. **Exhibit G at 2, 5-6, 8, 11, 14, 17, 20, 23, 26, 29.** Removing Amendment D from the ballots today—leaving no real meaningful opportunity for further judicial review—will undoubtedly undermine "[c]onfidence in the integrity of our electoral processes." *Purcell*, 549 U.S. at 4. "Popular election[s]" are "[t]he great source of free government." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 795 (1995). Yet here, Plaintiffs insist on canceling it.

*

Defendants ask this Court to deny that Plaintiffs' request to remove Amendment D from 1.73 million ballots as soon as practicable. Any changes to the already certified and nearly final ballots "jeopardizes the State's ability to meet the UOCAVA deadline and to otherwise run an orderly election that protects Utahns' right to vote." Jackson Decl. ¶28. That threat of "serious disruption" alone is sufficient grounds for denying Plaintiffs' motion. *Cook*, 882 P.2d at 258.

II. Plaintiffs' failure to name county officials as defendants makes Plaintiffs' requested relief a nonstarter.

Plaintiffs cannot establish that their alleged harms will be "'redressable by a favorable ruling.'" *Carlton*, 2014 UT 6, ¶31 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). That

redressability requirement is jurisdictional. *Id.* ¶30. Here, because of Utah's de-centralized elections processes, even if a court "were to agree with" plaintiffs, it "could not grant the relief [they] request." *Id.* ¶32. As Plaintiffs acknowledge, they want the Court to change *the counties'* behavior. *See* 1st-Mot. 1-2; 2d-Mot. 17. The Lieutenant Governor certified the ballots two days before Plaintiffs' first preliminary injunction motion. Jackson Decl. ¶12. Ballots are in the counties' hands, not the Lieutenant Governor's. *Id.* ¶¶13-14. And by Plaintiffs' own choice, neither the counties nor county officials are parties here.

That fatal redressability problem is analogous to *Carlton*. There, a putative biological father—who belatedly learned that his putative daughter was given up for an adoption without his knowledge—challenged the Utah Adoption Act's constitutionality and sought to overturn the adoption and reinstate his parental rights. *Id.* ¶¶1, 4-11, 32. The Supreme Court concluded that the biological father lacked standing "because his injury—the termination of his parental rights—is not redressable by a favorable ruling from [the] court." *Id.* ¶32. The named defendants (the biological mother and the adoption agency) didn't have "any rights to relinquish," and the adoptive parents were "not parties to [the] proceedings." *Id.* The Court held "[b]ecause of the Adoptive Parents' absence, [it] cannot grant the relief that [the plaintiff] seeks." *Id.* Similarly, in *Jacobson v. Florida Secretary of State*, voters and organizations sued the Florida Secretary of State to challenge "the order in which candidates appear on the ballot in Florida's general elections." 974 F.3d 1236, 1241 (11th Cir. 2020) (en banc). Plaintiffs failed to make "the 67 county Supervisors of Elections" parties and still asked the court to stop them "from preparing ballots in accordance with [Florida's] law." *Id.* The Eleventh Circuit held that plaintiffs could not establish redressability. *Id.* at 1253-54. An injunction against the Secretary, who was only responsible for certifying, would "not bind the [county] Supervisors who [were] not parties to [the] action." *Id.* at 1253-54 (cleaned up).

Nor can Plaintiffs overcome the redressability problem by asking this Court to "orde[r] the Lieutenant Governor to notify all County Clerks such that they are bound by [an injunction's] terms." *Contra* 1st-Mot. 28. In *Jacobson*, the appellate court contemplated such an order and concluded it did not overcome the redressability problem. 974 F.3d at 1254. This "'notice' theory of redressability contravene[d] the settled principle that it must be the effect of the court's judgment on the defendant—not an absent third party—that addresses the plaintiff's injury." *Id.* (cleaned up). It wasn't enough that an injunction against the Secretary would have "the persuasive effect … on the nonparty Supervisors." *Id.* "If a plaintiff sues the wrong defendant, an order enjoining the correct official who has not been joined as a defendant cannot suddenly make the plaintiff's injury redressable." *Id.* at 1255.

The same principles apply here. Plaintiffs' claimed harms are that the ballot summary misleads, and Amendment D hasn't been adequately published. They ask this Court to "enjoin Defendants from placing proposed Amendment D on the November 2024 election ballot and if any ballots are issued to voters that include proposed Amendment D, … to declare and enjoin Amendment D as void." 1st-Mot. 1. But Legislative Defendants do not prepare, print, or mail ballots. Plaintiffs don't allege otherwise. The Lieutenant Governor also "does not prepare, print, or mail ballots to voters." Jackson Decl. ¶13. And while she has statutory authority to "exercise oversight, and general supervisory authority, over all elections," Utah Code §67-1a-2(2)(a), she "may not assume the responsibilities assigned to the county clerks," *id.* §67-1a-2(2)(b)(iii), such as providing the ballots for respective counties, *id.* §20A-5-405(1)(h). As the Lieutenant Governor's office has plainly explained, in Utah, elections are run at the county level. Jackson Decl. ¶14. And an injunction against Defendants will not bind nonparty county clerks to stop ongoing preparation, proofing, printing, mailing, or counting the ballots. This Court cannot "infringe upon" Utah's 29 counties' ballot printing, preparation, or counting processes "since they are not parties to this proceeding." *Carlton*, 2014 UT 6, ¶32; *see id.* ¶28; *Jacobson*, 974 F.3d at 1254;

Fink v. Miller, 896 P.2d 649, 654 n.6 (Utah Ct. App. 1995) (the "trial court exceeded the bounds of its authority by directing the actions of a nonparty").

Plaintiffs' contrary arguments—that this Court can order the Lieutenant Governor to "notify all County Clerks of the injunction such that they are bound by its terms," 1st-Mot. 28—would "direct[] the actions of a nonparty" and "exceed[] the bounds of" this Court's "authority." *Fink*, 896 P.2d at 654 n.6; *see also Jacobson*, 974 F.3d at 1254. And it is contrary to Utah law to make the Lieutenant Governor "assume the responsibilities assigned to the county clerks." Utah Code §67-1a-2(2)(b)(iii). This Court simply "'cannot enjoin the actions [of] any person or entity which has not been properly served or made a party to this matter.'" *Karren v. Karren*, 2012 UT App. 359, ¶3, 293 P.3d 1100.

III. Plaintiffs cannot show they are likely to succeed on the merits.

In their first motion, Plaintiffs raise five constitutional claims and one statutory claim that all depend on Plaintiffs' contention that ballot summaries are "mislead[ing]." 1st-Mot. 1. In the second motion, Plaintiffs raise an additional constitutional claim that the Legislature did not properly publish the proposed constitutional amendment. 2d-Mot. 1. Even if the Court were to reach the merits of those claims, Plaintiffs cannot show likely success required for a preliminary injunction.

A. Plaintiffs' claims regarding the ballot summary will likely fail.

Plaintiffs contend that the ballot summary violates Article XXIII, Utah Code §20A-7-103, the Free Elections Clause, the Free Speech and Expression Clauses, the Voter Qualification Clause, and the Free Government Clause. *See generally* 1st-Mot. Plaintiffs describe each claim as turning on their contention that Amendment D's ballot summary is "misleading" or "deceptive." *See* 1st-Mot. 6-26. Legislative Defendants address each claim's failings in turn.

1. The ballot summary does not violate Article XXIII (Count 9).

When the Legislature proposes a constitutional amendment, the Constitution requires the Legislature to submit it "to the electors of the state for their approval or rejection." Utah Const. art.

XXIII, §1. Plaintiffs concede that "Article XXIII can be interpreted as flexible enough to permit a summary of the amendment as opposed to the text of the amendment itself" to appear on the ballot. 1st-Mot. 8. That happens now under state law: "the presiding officers" of the House and the Senate "summarize[] the subject matter of the amendment" and "deliver" the "ballot title to the lieutenant governor" to be placed on the ballot, Utah Code §20A-7-103(3)(a), (d).

To Defendants' knowledge, no Utah court has removed an amendment from the ballot before an election—or invalidated votes for that amendment after an election—because the ballot summary was allegedly false and misleading. Nor would there be any basis to do so with respect to Amendment D. Plaintiffs' contrary arguments **(a)** are undermined by their cited cases, including one from the Utah Supreme Court; **(b)** ignore the actual language of the ballot summary; and **(c)** assume that the full text of Amendment D is a state secret. Given those shortcomings, **(d)** Plaintiffs' declarations deserve no weight. And **(e)** declarations submitted with Legislative Defendants' opposition brief confirm that the ballot summary is clear, in plain English, and not confusing or misleading.

a. As Plaintiffs concede (at 8), no Utah court has ever understood Article XXIII to allow courts to line-edit or strike a ballot summary for a constitutional amendment for being misleading. The best Plaintiffs could do is a case involving a county ordinance—which *rejected* a ballot-summary challenge. *Nowers v. Oakden*, 169 P.2d 108 (Utah 1946). In *Nowers*, the Utah Supreme Court observed that there was "no general legislative mandate as to how a proposition must be worded on the ballot." *Id.* at 116. The Court only asked whether "[t]he ballot together with the immediately surrounding circumstances of the election must be such that a reasonably intelligent voter knows what the question is and where he must mark his ballot in order to indicate his approval or disapproval." *Id.* This wasn't a hard test to meet: The Court approved the ballot summary—which said only "Fence Yes" and "Fence No"—after "considering all the surrounding circumstances." *Id.*

Other states' cases reinforce *Nowers*. Plaintiffs' cited cases show that legislatures receive "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"); *see also 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. *Wis. Just. Initiative*, 2023 WI 38, ¶57 (challenge "do[es] not succeed"); *Ritchie*, 819 N.W.2d at 651 ("have not met their burden"); *Knight*, 556 S.W.3d at 509 ("has not met his burden"); *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006) ("ballot question is not misleading"); *Opinion of the Justices*, 283 A.2d 234, 236 (Me. 1971) ("the language of the amendment … is not in conflict with the language of the question placed before the voters"); *cf. Kahalekai*, 590 P.2d at 332 ("disagree[ing]" that "that form of the ballot was so irregular as to require the invalidation of the election," and only finding a handful of amendments that were omitted from the ballot and informational booklet defective). Even Plaintiffs' Florida cases have been subsequently limited by a more recent decision rejecting a ballot-summary challenge. *Advisory Op.*, 384 So. 3d at 137 (limiting *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), to challenges presenting counterfactual ballot summaries and rejecting a challenge over the dissent's repeated citation to *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000)); *cf.* 1st-Mot. 8-10 (relying on *Askew* and *Armstrong*).

Plaintiffs' cited cases set an exceptionally high bar. They say summaries cannot be "fundamentally counterfactual," *Wis. Just. Initiative*, 2023 WI 38, ¶51. For instance, a ballot summary cannot say that the amendment would "prohibit something" when it would, in reality, "permit" it. *Advisory Op.*,

384 So. 3d at 137 (cleaned up) (quoting *Askew*, 421 So. 2d at 153). Or that the government would be mandated to do something when "'the actual amendment … has no such mandate at all.'" *Wis. Just. Initiative*, 2023 WI 38, ¶44 (quoting *Thompson v. Zimmerman*, 60 N.W.2d 416, 423 (Wis. 1953)). Thus a ballot summary was fundamentally counterfactual when it told voters that an amendment would make executive officials' terms "limited" to four years when the amendment would, in reality, "extend[] [them] from the then period of two years." *Lane v. Lukens*, 283 P. 532, 533 (Idaho 1929). So too a ballot summary that said a proposed amendment would "provide a debt limitation" when it would in fact "remove" it. *Ex parte Tipton*, 93 S.E.2d 640, 644 (S.C. 1956). So too here—Amendment D's ballot summary is not counterfactual. It identifies Amendment D's "'chief features.'" *Contra* Mot. 12 (citing *Dacus v. Parker*, 466 S.W.3d 820, 823, 826 (Tex. 2015))—limiting foreign influences and clarifying the people's and elected representatives' respective legislative powers. There is no basis to invalidate it because Plaintiffs would have said it differently. *See Wis. Just. Initiative*, 2023 WI 38, ¶51; *Advisory Op.*, 384 So. 3d at 137.

b. At bottom, Plaintiffs fault the ballot summary for not saying that Amendment D "eliminates" a constitutional right. 1st-Mot. 13-14. They fault the summary for using verbs like "strengthen" and "clarif[y]" instead. *Id.*

The ballot summary is not required to say it "eliminates" a constitutional right. Plaintiffs' subjective view that Amendment D "eliminates" a right is not grounds for removing or voiding the amendment. Courts refuse to "strike a proposal from the ballot based upon an argument concerning 'the ambiguous legal effect of the amendment's text rather than the clarity of the ballot title and summary.'" *Advisory Op.*, 384 So. 3d at 134; *see also Ritchie*, 819 N.W.2d at 650-51 ("the effects of the amendment at issue" need not be "included on the ballot" "as a condition of upholding the ballot question"). The summary was not required to take Plaintiffs' view. *See Wis. Just. Initiative*, 2023 WI 38, ¶54 (rejecting argument that the proposed amendment "could reduce the rights of the accused" where

"voters were told [the rights] would be left intact"). Nor is Plaintiffs' view accurate. *Infra* 27-28 (discussing use of "clarif[y]").

The ballot summary permissibly uses the verb "strengthen." Plaintiffs' contrary arguments contradict their own cited cases, giving legislatures "significant deference." *Wis. Just. Initiative*, 2023 WI 38, ¶53; *see Ritchie*, 819 N.W.2d at 646-47, 648; *Knight*, 556 S.W.3d at 507; *Kahalekai*, 590 P.2d at 549. Plaintiffs' critique ignores that, if approved, Amendment D will necessarily strengthen the initiative process by prohibiting "foreign individuals, entities, or governments" from "influenc[ing], support[ing], or oppos[ing] an initiative or a referendums." **Exhibit C at 2** (S.J.R. 401, §2). Plaintiffs don't dispute this fact. Limiting foreign influence will "strengthen the initiative process" by ensuring that Utahns' voices in direct democracy aren't drowned out. 2024 General Election Certification at 34-35. The amendment would also "strengthen" how the initiative process had long been understood. State law had said that initiatives could be amended freely by the Legislature. *See* Utah Code §20A-7-212(3)(b) (2019); *cf. Grant*, 2019 UT 42, ¶23. If Amendment D passes, state law will be expressly changed to "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." **Exhibit D at 8-9** (S.B. 4003, §4). Plaintiffs cannot dispute that the passage of Amendment D will alter express provisions in state law to "strengthen" initiatives.

The ballot summary permissibly uses the verb "clarif[y]." Describing the amendment to "clarify" is more accurate than describing the amendment to "eliminate" any right. *Contra* 1st-Mot. 14. Because the inquiry is whether "[t]he ballot together with the immediately surrounding circumstances of the election" disclose to "a reasonably intelligent voter" "what the question is and where he must mark his ballot in order to indicate his approval or disapproval," context is critical. *Nowers*, 169 P.2d 116. That includes the Supreme Court's recent decision in *LWV*, which "introduced" a new "formulation" regarding the initiative power "for the first time in [that] opinion." 2024 UT 21, ¶76. The Court

acknowledged its prior decision in *Grant*, in which the Legislature substantially amended a citizens' initiative. *Id.* ¶94 n.18; *see also* MTD-Op. 59 (applying settled understanding of initiative power). And the Court "d[id] not resolve"—but has left open—the questions about whether elected representatives can amend certain initiatives without implicating strict-scrutiny review, *LWV*, 2024 UT 21, ¶70, and others that will be resolved by further litigation in this Court. The Court said its decision did not apply to initiatives with "no reform element." *Id.* ¶63 n.15. It declined to say that the Initiative Clause "cannot form the basis of stand-alone claims" and "[left] that issue for another day." *Id.* ¶70. And still the Court insisted repeatedly that initiatives must be "within the bounds of the constitution." *Id.* ¶92; *see id.* ¶¶10 n.4, 68 n.16, 135-36, 157, 160-61. Following that decision, the Legislature responded to Utahns' call for clarity. *See* **Exhibit A & B**. Amendment D does that.

c. Most fundamentally, Plaintiffs' quibbling with the ballot summary ignores that voters have full and unfettered access to the full amendment text now, in the forthcoming 2024 Voter Information Pamphlet, and posted at voting precincts. That is a reason for rejecting Plaintiffs' invitation to line-edit the summary. Again, *Nowers* requires examining not just the ballot summary, but also "all the surrounding circumstances" to see whether "a reasonably intelligent voter knows what the question." 169 P.2d at 116.

Other States agree. *See Dacus*, 466 S.W.3d 827 ("pre-election notices" can "ensur[e] the voters were 'familiar with the amendments and its purposes'" (quoting *R.R. Comm'n v. Sterling Oil & Refin. Co.*, 218 S.W.2d 415, 418 (Tex. 1949)). One of Plaintiffs' cited cases is instructive and undermines their claim. In *Kahalekai*, 590 P.2d at 340, the court examined whether the amendments at issue "were given extensive coverage before the election"; whether they were "the subject of widespread publicity in the news papers, 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.* This Court should refuse to "assume" that Utahns will "not understand the issue," as other

courts have done. *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" when there was extensive news coverage in major news outlets 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" were "undoubtedly" "widespread and ample").

Here, the "surrounding circumstances" confirm that Amendment D's summary is valid. *Nowers*, 169 P.2d at 116; *see also Kahalekai*, 590 P.2d at 340. Utah voters have full access to the full text of Amendment D. The text has been available on the Legislature's website at least since August 2024. Utah Legislature, S.J.R. 401, le.utah.gov/~2024S4/bills/static/SJR401.html (attached as **Exhibit C**). The Legislature's widely publicized special session kicked off extensive and continuous press coverage regarding Amendment D. Major news outlets reported on Amendment D, hyperlinked or reproduced its text, and gave arguments for and against its passage in great detail. *See supra* 7-10. On September 5, 2024, the Deseret News published Amendment D's amendment to Article VI, which Plaintiffs are faulting here. *See* **Exhibit E at 218-25** (Hanna Seariac, *Ballot language on Utah initiative constitutional amendment released*, Deseret News (Sept. 5, 2024), perma.cc/T634-BCLX ("What the text of the proposed amendment says")). The Deseret News also included arguments for and against the Amendment, the context in which the Legislature proposed the Amendment, and ballot summary in full. *Id.* On September 4, 2024, Utah News Dispatch published an article that included Amendment D's text, a link to the Legislature's website pertaining to the Amendment, ballot summary, and arguments for and against the Amendment. Katie McKellar, *Opponents of Utah constitutional amendment on voter initiatives decry 'deceptive' ballot language*, Utah News Dispatch (Sept. 4, 2024), perma.cc/QE3T-GDR8; *see also* **Exhibit E at 192-99** (reprinted on Yahoo! News). And in covering Plaintiffs' latest maneuver in this case, Utah News Dispatch—on September 6, 2024—again published an article that described Amendment

D and the accompanying law in great detail, extensively quoted the Amendment's language, included a link to its text, explained the arguments for and against the Amendment, and posted the ballot summary. **Exhibit E at 237-42** (Katie McKellar, *'Orwellian doublespeak': Lawsuit asks judge to scrap 'misleading' Utah constitutional amendment*, Utah News Dispatch (Sept. 6, 2024), perma.cc/88KV-CHH8). On September 5, 2024, KSL similarly published an article that included a link to the Amendment's full text, quoted the Amendment extensively, provided the context of the Amendment, and included arguments for and against it. **Exhibit E at 210-14** (Bridger Beal-Cvetko, *Critics say text of proposed Utah constitutional amendment is 'misleading'*, KSL.com (Sept. 5, 2024), perma.cc/JPU4-DNXH). Ballotpedia similarly published an extensive analysis that included Amendment D's full text, ballot summary, context of the Amendment, and arguments for and against the Amendment. **Exhibit E at 254-68** ("Utah Amendment D," Ballotpedia, perma.cc/M9RT-FD3A). And on September 9, 2024, the Lieutenant Governor issued a public notice with the full text of the Amendment. **Exhibit F.**

In addition, the Lieutenant Governor will soon prepare a Voter Information Pamphlet, which will include the full text of the Amendment, an analysis of the Amendment, and any arguments for or against its adoption. *See* Utah Code §§20A-7-701(1), (7), 20A-7-702.5. Voter Information Pamphlets have been used in Utah since 1917 to inform the voters about ballot measures and proposed constitutional amendments. *See* 1917 Utah Laws 202, §2 (requiring pamphlets to contain "a complete copy of all constitutional amendments"); *see also* Utah Lt. Governor, Historical Voter Information Pamphlet, vote.utah.gov/historical-voter-information-pamphlets-2/. Voter Information Pamphlets serve an important function in informing Utah voters. According to the most recent available study, "almost nine out of ten voters" report that "they read all or part of [the Pamphlets] prior to the election." Brien, *Voter Pamphlets*, 28 J. Legis. at 102. Utah voters don't just "[take] a cursory glance through the pamphlet or pa[y] minimal amount of attention to [them]." *Id.* Voter Information Pamphlets will be accessible for every Utahn online, and the Lieutenant Governor may make them available at

"location[s] frequented by a person who cannot easily access" the internet. Utah Code §20A-7-702.5; *see also Kahalekai*, 590 P.2d at 343 (finding amendments to be "validly ratified" to the extent "the informational booklet … fairly and sufficiently advised the voter of the substance and effect of the proposed amendment").

Furthermore, the full text of Amendment D will be available to Utah voters at their precincts. "Whenever a constitutional amendment is submitted to a vote of the people for their approval or rejection," county clerks must display "in large clear type" the amendment's full text, showing "the original section of the constitution" and "indicat[ing] … any language proposed." Utah Code §20A-5-103(1)(a). Utahn voters have full access to—and are already intimately familiar with—the text, context, effect, and arguments for or against Amendment D and its accompanying law. Plaintiffs' claims that Utah voters will somehow be misled is unfounded.

d. Plaintiffs' declarations, asserting they are confused, deserve no weight. *See State v. Wallace*, 2005 WL 1530798, at *2 (Utah Ct. App. June 30) ("self-serving affidavits are insufficient"). The Amendment's text is widely available now and its effect will continue to be debated in the press and in forthcoming Voter Information Pamphlets. *Supra* 28-29. Plaintiffs' Declarants say they have "read" the ballot summary; it strains credulity that they cannot also "read" Amendment D, the full text of which has been publicly available on the Legislature's website since August.

e. Legislative Defendants submit with this brief declarations confirming that Amendment D's ballot summary isn't misleading, Those declarants—registered Utah voters—explain that that they intend to vote on Amendment D and have had no trouble finding and reading the full text and considering its implications. **Exhibit G at 1, 5, 7, 10, 13, 16, 19, 22, 25, 29.** Nor did they find the ballot summary to be misleading or confusing. **Exhibit G at 2, 5, 10, 11, 14, 17, 20, 23, 26, 29.** These voters also explain that they found the ballot summary to be "in clear and in plain English" and they were "not confused by either Amendment D's text or the summary description." **Exhibit G at 2, 5, 8, 11,**

14, 17, 20, 23, 26, 29. The voters' declarations confirm that Amendment D's ballot summary was "framed with such clarity as to enable [them] to express their will." *Nowers*, 169 P.2d at 116.

2. The ballot summary does not violate §20A-7-103(3)(c) (Count 10).

a. Utah Code §20A-7-103(3)(c) directs the Speaker of the House and Senate President to:

> (c) draft and designate a ballot title for each proposed amendment or question submitted by the Legislature that:
>
> (i) summarizes the subject matter of the amendment or question; and
> (ii) for a proposed constitutional amendment, summarizes any legislation that is enacted and will become effective upon the voters' adoption of the proposed constitutional amendment

Plaintiffs contend that the ballot summary does not lawfully summarize the "subject matter" "because it fails to disclose the actual subject matter of the Amendment: eliminating voter's fundamental constitutional right to alter or reform their government without infringement." 1st-Mot. 18. For all the reasons argued in Part III.A.1, the amendment was not required to say it "eliminates" a constitutional right to comply with §20A-7-103(3)(c).

b. Additionally, Plaintiffs' statutory claim fails because §20A-7-103 does not create a private right of action, nor do Plaintiffs cite any. *See* 1st-Suppl.-Comp. ¶¶67-77 in 1st-Mot.-Suppl. (Sept. 5, 2024); *see also 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.").

3. The ballot summary does not violate the Free Elections Clause (Count 11).

For the reasons argued in Part III.A.1, the ballot summary is not misleading, let alone in a way that would implicate other constitutional provisions, including the Free Elections Clause. That Clause states that "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, §17.

Plaintiffs claim fails because the Free Elections Clause is not self-executing. The Utah Supreme Court already held that this Clause is "not … self-executing" and "requires the legislature to provide by law for the conduct of elections, and the means of voting, and the methods of selecting nominees [for offices]." *Anderson v. Cook*, 130 P.2d 278, 285 (Utah 1942). By the same token, the Clause requires the Legislature to create an enforcement mechanism. But Plaintiffs cite to no private right of action that allows them to enforce the Free Elections Clause.

Even if it were enforceable, Plaintiffs' claim fails. The Free Elections Clause prohibits intimidation of and undue influence (i.e., bribery) upon voters. *See Adams v. Lansdon*, 110 P. 280, 282 (Idaho 1910) (the free elections clause prohibited only "officers, civil or military," from "meddl[ing] with or intimidat[ing] electors"); *see also* 1 Blackstone, *Commentaries on the Laws of England* 172 (the free-elections analogue in English common law prohibited "executive magistrate[s]" from "employ[ing] the force, treasure, and offices of the society, to corrupt the representatives"). Amendment D's ballot summary does none of that. Plaintiffs' ballot-summary claim also fails even under this Court's test in the motion-to-dismiss opinion. Plaintiffs' voting power isn't "dilut[ed]" by the ballot summary. MTD-Op. 36. And the Utah voters' declarations confirm that they are able to participate in the election freely with full knowledge of the Amendment's text and summary. *See* **Exhibit G at 1-2, 5-6, 7-8, 10-11, 13-14, 16-17, 20, 23, 26, 28-29.**

4. The ballot summary does not violate Free Speech or Association rights (Count 12).

For the reasons argued in Part III.A.1, the ballot summary is not misleading, let alone in a way that would implicate Free Speech or Association rights. The ballot summary doesn't compel Utahns to vote altogether or vote in a certain way. The ballot summary imposes "no restrictions on speech, association, or any other [protected] activities." *Rucho v. Common Cause*, 588 U.S. 684, 713-14 (2019). As continuous press coverage exemplifies (*see generally* **Exhibit E**), Plaintiffs remain "free to engage in [free speech or free association] activities no matter what the effect" of the ballot summary "may be."

Id.; *cf. Rivera v. Schwab*, 512 P.3d 168, 192 (Kan. 2022) (no violation of "a stand-alone right to vote, the right to free speech, or the right to peaceful assembly" found by a redistricting legislation).

5. The ballot summary does not violate the Voter Qualification Clause (Count 13).

For the reasons argued in Part III.A.1, the ballot summary is not misleading, let alone in a way that would implicate the Voter Qualification Clause. This Clause simply governs what qualifies a voter to vote (U.S. citizenship, age of 18 or older, and Utah residence)—nothing more. *See Earl v. Lewis*, 77 P. 235, 238 (Utah 1904) (the Clause "entitles" qualified voters "to vote in the election"). The ballot summary does not prevent a qualified voter from casting his vote. *See Dodge v. Evans*, 716 P.2d 270 (Utah 1985) (a right to vote not violated when the plaintiff could have "received an absentee ballot and cast his vote"). Though Plaintiffs suggests (at 25) that Utahns' vote will not be "'meaningful,"' they simply "assume" erroneously that Utahns would "not understand the issue on which they [will] vot[e]." *Dutton*, 171 A.2d at 692. And again, the Utah voters' declarations show that the voters can cast their ballot in a meaningful way with the full knowledge of Amendment D's text and summary. In fact, they are concerned that removing Amendment D off the ballot, as Plaintiffs want, "will deprive [them] of [their] ability to express [their] support for Amendment D even though both the amendment's text and the summary of it are clear and not misleading." **Exhibit G at 2, 5-6, 8, 11, 14, 17, 20, 23, 26, 29.**

6. The ballot summary does not violate the Free Government Clause (Count 14).

For the reasons argued in Part III.A.1, the ballot summary is not misleading, let alone in a way that would implicate the Free Government Clause. Additionally, the Free Government Clause is not self-executing. It "identifies only a general principle with no justiciable standard or means for putting it into effect." *Tesla Motors UT, Inc. v. Utah Tax Comm'n*, 2017 UT 18, ¶53, 398 P.3d 55 (rejecting claims based on the Free Market Clause). Fundamentally, the Free Government Clause cannot be used to weaponize the judicial process to impede the constitutional-amendment process in the way Plaintiffs

seek to do here. It is Plaintiffs who are seeking to impede Utahns from having a chance to exercise their right to alter and reform through an up-or-down vote on a constitutional amendment. The Utah voters' declarations confirm this point. They want to exercise their right to alter or reform the government by voting on Amendment D. **Exhibit G at 2, 5-6, 8, 11, 14, 17, 20, 23, 26, 29.** Removing Amendment D from the ballot would deprive the voters of their right to alter or reform the government and to a free government.

7. Entertaining Plaintiffs' assertions raises serious justiciability questions.

Time and again, the Utah Supreme Court has confirmed that the exercise of judicial power is not something broadly defined by "preference or whim," "regardless of how interesting or important the matter presented for [the Court's] consideration." *Utah Transit Auth. v. Loc. 382 of Amalgamated Transit Union*, 2012 UT 75, ¶20, 289 P.3d 582 ; *accord Ogden City v. Stephens*, 21 Utah 2d 336, 445 P.2d 703, 705 (1968) (concluding dispute was a "political question"); *State ex rel. Skeen v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 P. 120, 126 (1910) (directing district court to dismiss dispute "to be regulated by the Legislature"). Only some disputes are "efficiently and effectively resolved through the judicial process." *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983); *see Utah Transit Auth*, 2012 UT 75, ¶26 (court must "vigilantly … with particular care and all humility" assure itself that matter before it is within its jurisdiction). Plaintiffs' desire to line-edit the Amendment D summary is not a dispute to be resolved by courts—denying the 1.73 million registered voters any say in the matter. To Defendants' knowledge, Utah courts have never adjudicated such a claim.

There are no judicially manageable standards for Plaintiffs' request for a line-level edit of the ballot summary. Plaintiffs' attack on the language—despite extensive and continuous press coverage about Amendment D and forthcoming Voter Information Pamphlets—is entirely subjective. Proponents of the amendment immediately described the amendment as one that would clarify the legislative

powers vested in the people as well as their elected representatives.[26] The ballot summary uses the same language. *Supra* 9. Other voters have now submitted declarations saying they are not confused or misled. *See* **Exhibit G at 2, 5, 10, 11, 14, 17, 20, 23, 26, 29.** There are no judicially manageable standards to second-guess that summary and decide one set of voters' views is right and the others' are wrong. *See Goldwater v. Carter*, 444 U.S. 996, 1003-04 (1979) (plurality op.); *see also Ogden City*, 21 Utah 2d at 339 (refusing to resolve dispute that would require judicial policymaking). Particularly problematic here, there is no way to assess whether the ballot summary would have any material effect on voters in ways that implicate Plaintiffs' claims when Utah (1) disseminates Voter Information Pamphlets with the full amendment language and (2) posts the full amendment language at precincts—to say nothing of the deluge of press coverage about the amendment text and copious criticism by Plaintiffs themselves and their counsel. *Supra* 8-9. Nor can Plaintiffs ask the Court to second-guess a task committed to a different branch of government, as the ballot summaries are. *See* Utah Code §20A-7-103(3); *see, e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849).[27]

B. Plaintiffs' publication claim will likely fail.

Plaintiffs contend that the Legislature violated the constitutional requirement that it "shall cause" a proposed amendment to be published:

> … 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. In Plaintiffs' telling, Amendment D—and any other proposed amendment—is void unless the Legislature insists the amendment is published in "a physical, printed newspaper" continuously for "full two calendar months." Mot. 8-9. Plaintiffs' argument is baseless

[26] *See* Ex. B at 4.

[27] Utah's standard for determining whether a controversy presents a non-justiciable political question mirrors the federal standard. *See Matter of Childers-Gray*, 2021 UT 13, ¶64, 487 P.3d 96 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

1. Article XXIII's term "newspaper" is not limited to physical newspapers.

Plaintiffs contend that, because the "internet did not exist in 1895," "the original public meaning of 'newspaper' could only mean a physical, printed newspaper." 2d-Mot. 8. 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 exclusively online and the framers in 1791 and 1896 (for obvious reasons) could not have understood "speech" or "press" to include online publications. 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 a specific word—"speech" or "press" or "arms" or "newspaper"—do not apply to modern forms of those nouns. "[W]e do not interpret" constitutions "that way." *Heller*, 554 U.S. at 582; *see also Reno v. ACLU*, 521 U.S. 844, 849 (1997); *see, e.g.*, *Matter of Childers-Gray*, 2021 UT 13, ¶31, 487 P.3d 96 (explaining that "while sex-change petitions were not specifically contemplated at the time of statehood, the judicial power nonetheless includes the power to hear such petitions because they 'resemble other matters our state courts handled at the time of statehood'"). The existence of "a new and different medium for communication" by traditional newspapers matters here. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011). What's more, the current version of Article XXIII was readopted in 1969. S.J.R. (1969). During that period, "newspaper" meant "[a] publication … intended for general circulation," "usually in sheet form," but not always. *Newspaper*, Black's Law Dictionary (4th rev. ed. 1968). So the phrase "published in … [a] newspaper," Utah Const. art. XXIII, §1, naturally encompasses publishing in, for example, the Salt Lake Tribune, Deseret News, or the Utah News Dispatch. These are publications of general circulation under any fair reading of that term. All these news outlets have published stories about the Amendment, including its text, links to it, and analysis. *See generally* **Exhibit E.**

2. Article XXIII asks what "the Legislature" has done, not what others have done.

Plaintiffs' more fundamental problem is that they fail to answer the right question. They contend, for example, that Amendment D has not appeared in third parties' public notices and that the Lieutenant Governor's website is too hard to navigate. *See* 2d-Mot. 3-4, 12. But to establish a violation of Amendment XXIII, Plaintiffs must identify what "*the Legislature*" failed to do to "cause" the amendment to be published. Art. XXIII, §1; *see* Cause, *Webster's Third New Int'l Dictionary* (1966) (defining "cause" as "to serve as a cause … of"); *accord* Cause, *Black's Law Dictionary* (4th rev. ed. 1968). Plaintiffs cannot do so.

a. The Legislature took steps to "cause" Amendment D to be published from day one. The Legislature publicly announced it would hold a special session to consider a constitutional amendment that would "[r]estore and strengthen the long-standing practice that voters, the Legislature, and local bodies may amend or repeal legislation."[28] 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. *See* Utah Legislature, S.J.R. 401, le.utah.gov/~2024S4/bills/static/SJR401.html. The enrolled resolution with the final language remains on the Legislature's website today. *Id.* At any time, news outlets could—and did—publish the text and/or provide a link to the Legislature's website. *Supra* 8-9.

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." **Exhibit C at 3** (S.J.R. 401, §3). That directive fully complied with the requirement to "cause" Amendment D to be published. Utah law, in turn, requires the Lieutenant Governor to publish a proposed amendment in "Class A notice." Utah Code §20A-7-103(2). She did so on September 9, 2024. *See* Lt. Governor, 2024 Election Information, vote.utah.gov/current-election-information/ ("Class A Notice

[28] "Lawmakers to Convene to Restore and Strengthen the Initiative Process," Utah State Legislature (Aug. 19, 2024), house.utleg.gov/wp-content/uploads/August-2024-Special-Session-Statement_Press-Release.pdf.

for 2024 Proposed Constitutional Amendments"); *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/. That Class A notice will notify the public about various state and local matters, as Plaintiffs acknowledge (*see* 2d-Mot. 12). *See, e.g.*, Utah Code §17-27a-1204 (zoning); *id.* §11-17-16 (bond issuance); *id.* §§10-9a-204, 17-27a-404 (public meetings and hearings); *id.* §17C-1-1003 (interlocal agreements); *id.* §10-9a-208 (public streets); *id.* §10-3-711 (adoption of ordinances).

Furthermore, the Legislature confirmed that the Lieutenant Governor's office had sufficient non-lapsing funds available in its budget to cover the estimated $8,600 cost "to submit the proposed amendment to voters." Utah Legislature, Fiscal Note – S.J.R. 401, le.utah.gov/~2024S4/bills/static/SJR401.html.

b. Plaintiffs' contrary arguments—that the Legislature did not sufficiently "cause" Amendment D to be published because of the Lieutenant Governor's timing or newspapers' (un)willingness to publish—ignore Article XXIII's text. That text is directed at the Legislature, and it asks about what "the Legislature" did—not about what others beyond the Legislature's control did. That is—did the Legislature adequately set the Amendment's publishing into motion? Yes. It announced the intent of the special session; it posted the proposed amendment on its website; and it "directed" the Lieutenant Governor to submit Amendment D to the people. **Exhibit C at 3** (S.J.R. 401 §3).

Plaintiffs cannot seriously argue that an Amendment is void if it does not print in newspapers. *See* 2d-Mot. 1. The Legislature has no way to force an unwilling publisher to post the proposed amendment because doing so would constitute compelled speech under the First Amendment. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2402 (2024) ("The editorial function is an aspect of speech" (cleaned up)). Surely, a constitutional amendment doesn't get "defeat[ed]" just because "a newspaper publisher" either "intentionally" refuses or "negligently" fail to publish. *Bd. of Fund Comm'rs v. Holman*, 296

S.W.2d 482, 495 (Mo. 1956). And although the Lieutenant Governor *has* published Amendment D in a Class A Notice, Plaintiffs' critique of her actions are not arguments that can invalidate Amendment D. Even her noncompliance wouldn't "thwart" the Amendment. *Morgan v. O'Brien*, 60 S.E.2d 722, 727 (W. Va. 1948); *cf. id.* at 727-28 (compliance with publication doesn't depend on executive branch officials who may fail to act "through inadvertence" or seek to defeat an amendment for "personal or political reasons").

c. For similar reasons, Plaintiffs' arguments about the requirement to publish for "full two calendar months of September and October," 2d-Mot. 9, also fail. The Legislature made Amendment D's text available as early as August. And on August 22, 2024, the Legislature directed the Lieutenant Governor to publish the amendment. Meanwhile, the Deseret News published articles quoting or linking to the proposed Amendment's text, plus analysis as early as August 2024. *See* **Exhibit E at 47-52, 75-86.** Other major news outlets made the text of the Amendment—and arguments for and against it—accessible in early September and continue to do so. *See supra* 8-9.

3. The Court cannot declare an amendment void because the Lieutenant Governor's notice issued on September 9, 2024, versus on September 6, 2024.

Defendants anticipate Plaintiffs will argue that the amendment is void because the Lieutenant Governor's public notice with the full text of the amendment issued on September 9, 2024, not on September 6, 2024. For the foregoing reasons, what the Lieutenant Governor did does not answer whether "the Legislature" complied with Article XXIII's requirements of "the Legislature." Even if the Court disagrees with those arguments, Plaintiffs' claim still fails.

Utah courts have never adopted a literal-compliance requirement. "States across this country "generally agre[e] that it is sufficient if there is substantial compliance with such publication requirements" in their states' constitutions. *Opinion of the Justices*, 275 A.2d 558, 561 (Del. 1971); *see also, e.g.*, *Cooper v. Caperton*, 470 S.E.2d 162, 173 (W. Va. 1996) ("untimely publications [do] not warrant declaring

the amendment unconstitutional" if there's "substantial compliance"); *Holman*, 296 S.W.2d at 495 ("substantial compliance is sufficient"); *State v. State Bd. of Educ. of Fla.*, 467 So. 2d 294, 296 (Fla. 1985) ("Publication of proposed amendments" is "not an essential element" for "amending the Florida Constitution," and "substantial compliance" is sufficient."); *Lucas v. Berkett*, 98 So. 2d 229, 232 (La. 1957) ("a substantial compliance … is sufficient"); *Opinion of the Justices*, 104 So. 2d 696, 668 (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"). Thus, the substantial-compliance rule is "the prevailing view among other state courts." *Caperton*, 470 S.E.2d at 175.

Applied here, the Lieutenant Governor's public notice constitutes more than substantial compliance. On September 9, 2024, she issued Class A Notices on the Election Information website and a separate public notice on her official website. *Supra* 38. The public notice will be available "for two months immediately" before the November 5, 2024, election. Utah Const. art. XXIII, §1. In addition, Voter Information Pamphlets will soon be published, which will include the full text of the Amendment and the arguments for and against its adoption. Utah Code §20A-7-702.5. And each precinct will also have the text of the Amendment available. *Id.* §20A-5-103(1)(a). All the while, press coverage has been voluminous and continuous. *See generally* **Exhibit E**; *see Kahalekai*, 590 P.2d at 340 (considering "widespread publicity in the news papers, and on radio and television"). Whatever minor deviations Plaintiffs allege, they are harmless based on "information actually given to the electors" and the "widespread and ample" news coverage of Amendment D and its text. *Commw. Tel. Co.*, 263 N.W. at 668; *see also State Bd. of Educ.*, 467 So. 2d at 296 (finding amendment valid because any "error" was "harmless"). Indeed, no Plaintiff asserts they had any trouble finding the Amendment's full text. The attached declarations from Utah voters remove any doubt that Utahns can find Amendment D's text and

consider its implications. **Exhibit G at 2, 5, 10, 11, 14, 17, 20, 23, 26, 29.** Plaintiffs cannot demand that a constitutional amendment be declared void based on the demeaning assumption that Utah voters live under a rock and cannot "understand the issue on which they [will] vot[e]." *Dutton*, 171 A.2d at 692. Plaintiffs' publication claim is likely to fail on the merits and is no basis for Plaintiffs' extraordinary preliminary-injunction request.

IV. The Court must refuse Plaintiffs' request to declare Amendment D votes "void" because the balance of the equities and public interest weights strongly against that extraordinary remedy.

In the light of the foregoing, there is no conceivable basis for ordering Amendment D removed from the ballot now. *Supra* Part I. Also in the light of the foregoing, there is no equitable basis to declare Amendment D—and all Utahns' votes—"void" later. *Contra* 1st-Mot. 28.

Plaintiffs request, as alternative relief, that "if any ballots are issued to voters that include proposed Amendment D, Amendment D is declared void and enjoined … post-election." 1st-Mot. 28. They claim that the Court "could order the Lieutenant Governor to direct county clerks to post notices at polling place and to mail notices along with the ballots informing voters that the Court has ordered Amendment D void…." 2d-Mot. 17 n.5. Simply put, Plaintiffs want this Court to order state and local officials to *ignore* up to 1.73 million Utahns' votes on Amendment D.

Plaintiffs cannot establish the stringent preliminary injunction standard is met for that extraordinary relief. *See* Utah R. Civ. P. 65A(e). Plaintiffs face "a heavier burden" on those factors because of the mandatory injunction they seek. *FTN-Fort Collins*, 916 F.3d at 797. On Plaintiffs' side of the ledger, they have not established likely success on the merits. *Supra* Part III. Nor can they establish irreparable harm based on the same arguments about alleged "deception." *Contra* 1st-Mot. 26.[29] To conclude

[29] Plaintiffs' second motion adds that they will be irreparable harmed because "the likelihood of Amendment D being approved by the voters through deceit … irreparably harms Plaintiffs by threatening their chances of success in the underlying litigation." 2d-Mot. 16. That argument exemplifies the overarching flaw in Plaintiffs' motion—they want litigation by a few to preclude voting by all Utahns.

otherwise assumes Utahns are unable to read, unable to read news, unable to use the internet, and unable to think for themselves. *E.g. supra* Part III.A.1.c-d; *see generally* **Exhibit E**; *see also, e.g.*, *Dutton*, 171 A.2d at 692 (refusing to "assume" such things about Maryland voters).

On the other side of the ledger, the election interference that Plaintiffs seek undermines "the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. It would destroy "[c]onfidence in the integrity of our electoral processes," *id.*, especially for those voters who are ready to cast an informed vote on Amendment D. *See* **Exhibit G at 1, 5, 7, 10, 13, 16, 16, 19, 22, 25, 28.** A court order that creates any uncertainty that Utahns' votes will not count creates an intolerable "incentive to remain away from the polls." *Purcell*, 549 U.S. at 4. "Even seemingly innocuous late-in-the-day judicial alterations ... can interfere ... and cause unanticipated consequences." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). There is no basis for such a catastrophic blow to Utah's election. Amendment D has been widely published and widely debated, and there is no basis for presuming reasonably intelligent Utah voters will be confused. *Supra* III.A.1. The balance of harms and public interest demand leaving Amendment D on the ballot and counting Utahns' votes.

Tellingly, Plaintiffs propose no remedy other than *canceling* the vote on Amendment D—either by removing it from ballots pre-election or ignoring votes post-election. They would deny Utahns their fundamental right to vote in "election[s]"—"[t]he great source of free government." *U.S. Term Limits*, 514 U.S. at 795. Plaintiffs are willing to propose elaborate mandatory injunctions "order[ing] the Lieutenant Governor to direct county clerks" to "post notices at polling places and to mail notices along with the ballots" explaining the procedural history of this case. 2d-Mot. 17-18 n.5. But they propose nothing to effectively *allow* the vote. Nothing could more undermine "the public's interest in the integrity of the election process," *Cook*, 882 P.2d at 659, than denying Utahns their fundamental right to vote on Amendment D.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motions for preliminary injunction.

Dated: September 11, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: September 11, 2024 */s/ Tyler R. Green*