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Attorneys for Plaintiffs

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

LEAGUE OF WOMEN VOTERS OF
UTAH, *et al.*,

Plaintiffs,

v.

UTAH STATE LEGISLATURE, *et al.*,

Defendants.

**STATEMENT OF DISCOVERY ISSUES
RE: PURPORTED LEGISLATIVE
PRIVILEGE**

Civil Action No. 220901712

Honorable Dianna Gibson

A. Relief Sought and Rule 37(a)(2) Certifications. Plaintiffs submit this Statement of Discovery Issues in response to the Legislative Defendants’ invocation of “legislative privilege” as a shield from discovery—a privilege never recognized by any Utah court. Legislative Defendants have asserted legislative privilege in their initial disclosures, other filings, and in conversations with Plaintiffs’ counsel regarding their forthcoming responses to Plaintiffs’ discovery requests,¹ which were promptly served after the recent scheduling conference. (Exs. A, B, C.) Although Legislative Defendants’ formal written responses are due at the end of this month, Plaintiffs file this SODI now to ensure a speedy resolution of the legal question surrounding the existence and scope of legislative privilege in Utah given the accelerated case schedule and the upcoming legislative session.

Plaintiffs met and conferred with the Legislative Defendants by telephone on December 15, 2022, asking basic, elementary questions: (1) whether the Legislative Defendants will withhold materials responsive to Plaintiffs’ discovery requests based on an invocation of legislative privilege, and (2) if so, what they contend the privilege’s scope to be. The purpose of the call was to crystalize this issue for this Court to resolve without further delay. Counsel for Legislative Defendants contended that it was premature to discuss the legal issues surrounding their invocation of legislative privilege because their written discovery responses are due at the end of the month. Because the question involves predicate legal issues that need not await Legislative Defendants’ written discovery responses, and given the accelerated case schedule, Plaintiffs file this SODI now

¹ See Ex. D at 1-3; Ex. E at 15-16; Defs.’ 2nd Stay Mtn., Doc. 131 at 3, 14; Defs.’ 2nd Stay Reply Br., Doc. 151 at 2, 6-7, 11.

so the Court can determine if Utah recognizes a legislative privilege and, if so, its qualifications and scope.

B. Grounds for Relief. No Utah court has ever recognized a special “legislative privilege” to refuse to engage in discovery in a civil case, especially when the Legislature and its members have been found to be proper parties. They are no different than any other litigant, subject to the same rules. This Court has already found as much. As this Court held in its motion to dismiss decision, whatever federal courts have said about federal legislators, Utah law “only grants legislators immunity from claims of *defamation* related to their actions as legislators.” MTD Op. at 20-21 (citing *Riddle v. Perry*, 2002 UT 10, ¶ 10). And if legislators are not immune to suit under Utah law, they cannot refuse basic discovery obligations when they find themselves in court.

Were that not enough, the Legislative Defendants have themselves served a host of discovery requests on Plaintiffs. If not an outright waiver, allowing legislators to resist discovery while serving with their own requests turns the litigation process on its head. In partisan gerrymandering cases, applying a broad privilege “is an invitation to [defendants] to avail themselves of this abuse of power in the future.” *Neiman v. LaRose*, 2022-Ohio-2471, ¶ 77 (Brunner, J., concurring). Limiting discovery undermines the Court’s ability to “meaningfully judge” the Legislature’s “arguments about what they designed a plan to do” and “test[]” those claims “by evidence in the record” rather than “simply post hoc rationalization.” *Id.* Meanwhile, the use of discovery as a sword and shield “would enable [defendants] to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined.” *Singleton v. Merrill*, 576 F. Supp. 3d 931, 940 (N.D. Ala. 2021) (quoting *Powell v. Ridge*, 247

F.3d 520, 522 (3d Cir. 2001)). The Legislature is not entitled to reap the benefits of discovery but simultaneously shirk its most basic reciprocal obligations.

Moreover, even if federal common law somehow applied here², any legislative privilege in redistricting cases “is, at best, one which is qualified.” *LULAC v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1 (5th Cir. May 20, 2022) (quoting *Jefferson Cmty. Health Care Centers, Inc. v. Jefferson Par. Gov’t*, 849 F.3d 615, 624 (5th Cir. 2017)). It “must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” *Jefferson*, 849 F.3d at 624. “Redistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege” due to questions of unlawful intent. *Bethune-Hill v. Va. State Bd. of Election*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015). Accordingly, federal courts in redistricting challenges apply a *limited* evidentiary privilege and require disclosure following a five-factor test.³ That analysis favors Plaintiffs:

(1) The requested discovery is relevant. *McMaster*, 584 F. Supp. 3d at 164. Plaintiffs allege that Defendants devised the Plan out of public view for partisan advantage and in disregard of the Commission’s neutral proposals. Compl. ¶¶ 144-98. Discovery will prove these facts.

² It does not. In Utah, unlike federal courts and many other states, evidentiary and discovery privileges are not governed by the evolving common law, but rather by express rules of evidence enacted by the Utah Supreme Court. See Utah R. Evid. 501 (“there are no non-rule, non-statutory privileges” (Comm. Note)); Utah Const. art. VIII, § 4. No such special “legislator discovery privilege” exists in the Utah Rules of Evidence (or anywhere else).

³ See, e.g., *Bethune-Hill*, 114 F. Supp. 3d at 337; *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 161 (D.S.C. 2022); *Benisek v. Lamone*, 263 F. Supp. 3d 551, 553 (D. Md.), *aff’d*, 241 F. Supp. 3d 566 (D. Md. 2017); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014); *Favors v. Cuomo*, 285 F.R.D. 187, 209-10 (E.D.N.Y. 2012); *Comm. for a Fair & Balanced Map*, No. 11-cv-5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003).

(2) While the circumstantial evidence of partisan effect and intent is obvious enough, Plaintiffs “need not confine their proof to circumstantial evidence alone.” *McMaster*, 584 F. Supp. 3d at 164. Plaintiffs are entitled to the direct evidence they seek of partisan intent and effect.

(3) The “seriousness of the litigation” undoubtedly favors getting to the truth of this matter. “[E]very redistricting case litigated in the federal courts demonstrates that at some juncture, state interests give way when they conflict with the constitutionally guaranteed fundamental right to vote,” and thus “[t]he third factor weighs in favor of disclosure.” *Id.* at 165.

(4) The role of individual legislators also supports limiting any privilege. This is “not a case where individual legislators are targeted by a private plaintiff seeking damages.” *Id.* Rather, Plaintiffs seek to enjoin the Plan that dilutes their electoral opportunity on a partisan basis. “This factor suggests the legislative privilege ought to yield to Plaintiffs’ attempt to enforce a substantial public right.” *Id.*

(5) Discovery will not impede legislative action. *See id.* While the “denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function,” *U.S. v. Gillock*, 445 U.S. 360, 373 (1980), any potential burdens during the legislative session is a reason to resolve privilege questions now.⁴

This Court should not be the first ever in Utah to recognize this so-called special “legislator privilege” for a legislator to refuse to engage in discovery. Legislative Defendants should be compelled to respond to Plaintiffs’ proper discovery requests and subpoenas.

⁴ State courts have reached the same conclusion. *See LWV of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 148 (Fla. 2013) (privilege does not preclude discovery).

Date: December 16, 2022

RESPECTFULLY SUBMITTED,

/s/ David C. Reymann

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of December 2022, I filed the foregoing
**STATEMENT OF DISCOVERY ISSUES RE: PURPORTED LEGISLATIVE
PRIVILEGE** via electronic filing, which served all counsel of record.

/s/ David C. Reymann

EXHIBIT A

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**Pro Hac Vice*

**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.

**PLAINTIFFS' RULE 34
FIRST SET OF REQUESTS FOR
PRODUCTION TO LEGISLATIVE
DEFENDANTS**

Civil Action No. 220901712

Honorable Dianna Gibson

Pursuant to Rules 26 and 34 of the Utah Rules of Civil Procedure, Plaintiffs, by and through their undersigned counsel, hereby serve the following Requests for Production of Documents to be answered by Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator J. Stuart Adams (collectively, “Legislative Defendants”) and Lieutenant Governor Deidre Henderson and served upon counsel for Plaintiffs on or before twenty-eight (28) days at the offices of Parr, Brown, Gee & Loveless, 101 South 200 East, Suite 700, Salt Lake City, Utah 84111, or at such a place or in such a manner mutually agreed upon by counsel for Plaintiffs and Defendants.

The grounds for objecting to these Requests for Production must be stated with specificity. Any ground not stated in a timely objection is waived unless the Court, for good cause, excuses the failure.

DEFINITIONS

For purposes of these requests only, Plaintiff uses the definitions set forth below. Any terms not defined shall be given their ordinary meaning.

1. “2021 Congressional Plan” refers to the statewide redistricting plan for congressional districts in the State of Utah, adopted in House Bill 2004, H.B. 2004, 64th Leg., 2d Spec. Sess. (2021).

2. “Communication(s)” means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfer of information via email, (whether from an official or personal account), email attachment, phone, voicemail message, any other recorded conversation, text message, social media message, message on any internet or phone app (whether on a publicly paid or personal device), letter, postcard, fax, written memorandum, note, summary, complaint, and any other means.

3. “Concern,” “concerning,” or “regarding” shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

4. “Document,” whether singular or plural, is used here in the broadest sense to mean anything which may be considered to be a document or tangible thing within the meaning of Utah Rule of Civil Procedure 34. This definition includes, but is not limited to, each and every writing of whatever nature, and shall mean the original and any draft or copy that differs in any way from the original in any written or graphic matter, however produced or reproduced, and shall mean, without limitation, each and every tangible thing from which information can be processed or transcribed from disk, diskette, compact disc, tape, or any other electronic media or data computations. The term includes, but is not limited to, communications, letters, emails, and any attachments, messages, facsimile transmissions, telegrams, telex messages, reports, books, agreements, correspondence, contracts, financial statements, instruments, ledgers, journals, accountings, minutes of meetings, payrolls, studies, calendar and diary entries, notes charts, schedules, tabulations, maps, work papers, brochures, evaluations, memoranda of telephone conversations, audio and video tape recordings, internal communications, bills, tapes, computer printouts, drawings, designs, diagrams, exhibits, photographs, reproductions, data, spreadsheets, maps, shapefiles, geojson files, block assignment files, and any marginal comments appearing on any document and copies of documents which are not identical duplicates of the originals (e.g., because handwritten or “blind copy” notes or notations appear thereon or are attached thereto).

The term “document(s)” includes the defined term “Electronically Stored Information,” which is defined below. The term “document” specifically seeks the production of Electronically Stored Information in native format.

5. “Electronically Stored Information” or “ESI” includes, but is not limited to, any and all electronic data or information stored on a computing device and/or electronic platform. Information and data is considered “electronic” if it exists in a medium that can only be read through the use of computing device. This term includes but is not limited to databases; all text file and word processing documents (including metadata); presentation documents, shapefiles, geojson files, block assignment files, data, code, spreadsheets; graphics, animations, and images (including but not limited to “JPG, GIF, BMP, PDF, PPT, and TIFF files); email, email strings, and instant messages (including attachments, logs of email history and usage, header information and “deleted” files) and any real-time text, audio, picture, or video transmissions through the internet as well as any text, audio, picture, or video transmissions between mobile phones and/or fixed or portable devices, including server, network, desktop, laptop, or tablet computers whether private or public; email attachments; calendar and scheduling information; cache memory; Internet history files and preferences; audio; video, audiovisual recordings; voicemail stored on databases; networks; computers and computer systems; computer system activity logs; servers; archives; back-up or disaster recovery systems; hard drives; discs; CD’s; diskettes; removable drives; tapes; cartridges and other storage media; printers; scanners; personal digital assistants; computer calendars; handheld wireless devices; cellular telephones; pagers; fax machines; and voicemail systems. This term includes but is not limited to onscreen information, system data, archival data, legacy data, residual data, and metadata that may not be readily viewable or accessible, and all file fragments and backup files.

6. “Legislator” refers to any past or present elected member of the Utah House of Representatives (“Utah House”) or the Utah Senate, including such members’ past or present employees, legislative office staff, district office staff, committee staff, caucus staff, campaign staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, or other persons or entities acting or purporting to act on the member’s behalf, subject to the member’s control.

7. “Member of Congress” refers to any past or present elected member of the United States House of Representatives or the United States Senate, including such members’ past or present employees, legislative office staff, district office staff, committee staff, caucus staff, campaign staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, or other persons or entities acting or purporting to act on the member’s behalf, subject to the member’s control.

8. “Redistricting” means any consideration of the alignment of district boundaries for a legislative body or congressional delegation, a single legislative or congressional district, or districts within a geographic area.

9. “Utah Independent Redistricting Commission” and “UIRC” refers to the independent redistricting commission created in Section 20A-20-201 of the Utah Code for the purpose of developing redistricting plans for Utah’s congressional delegation, the Utah State Senate, State House, and School Board, and all past and present commission members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

10. “You” and “your” mean Legislative Defendants and/or Lieutenant Governor Diedre Henderson and any of their employees, agents, or representatives, including any person or entity acting or purporting to act on their behalf, at their direction, or under their supervision.

11. All references in these requests to an individual person include any and all past or present employees, staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, predecessors in office or position, and all other persons or entities acting or purporting to act on the individual person’s behalf or subject to the control of such a person. All references in these requests to an entity, governmental entity, or any other type of organization include its past or present officers, executives, directors, employees, staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, and all other persons or entities acting or purporting to act on behalf of such an organization or subject to its control.

12. In construing these Requests for Production, apply the broadest construction, so as to produce the most comprehensive response. Construe the terms “and” and “or” either disjunctively or conjunctively, as necessary, to bring within the scope of the request all responses that might otherwise be construed to be outside that scope. Words used in the singular shall include the plural. Words or terms used herein have the same intent and meaning regardless of whether the words or terms are depicted in lowercase or uppercase letters.

INSTRUCTIONS

1. You are required when answering these Requests, to furnish all requested information, not subject to valid objection, that is known by, possessed by, available to, or subject to reasonable access or control by you or any of your attorneys, consultants, representatives, investigators, agents, and all others acting on your behalf or under your supervision. Without limiting the term “control,” a document is deemed to be within your control

if you have the right to secure the document or copy thereof from any persons or public or private entity having physical control thereof.

2. If you object to responding to any of these Requests, in whole or in part, you must state your objection(s) with specificity and all factual and legal bases for the objection(s). If you object to a portion of a Request, you must specify the part to which you object and respond to the remainder.

3. If, in responding to or failing to respond to any of these discovery requests, you invoke or rely upon privilege of any kind, state specifically the nature of the privilege(s), the bases on which you invoke, rely upon, or claim the privilege(s), including statutory or decisional reference, and identify all documents or other information, including contacts and communications, which you believe to be embraced by the privilege(s) invoked. If you withhold any information based on the attorney-client privilege, the attorney work-product immunity, or any other privilege or immunity, you must identify the document or information withheld and provide the following information: (i) a description of the document or information, including the nature of the document or information (e.g., email, letter, database, etc.); (ii) the author(s) and/or creator(s) of the document or information; (iii) the recipient(s) or addressee(s) of the document or information; (iv) the date of the document or information; (v) the subject matter of the document or information; (vi) the nature of all privileges or immunities claimed; and (vii) all such additional information as is necessary for Plaintiffs to understand and challenge (if appropriate) the withholding of the document or information.

4. If you contend that it would be unduly burdensome to obtain and provide all of the information or documents called for in response to any Request or part thereof, then in response to the appropriate request: (a) produce all such information or documents as are

available without undertaking what you contend to be an unduly burdensome request; (b) describe with particularity the efforts made by you or on your behalf to produce such information or documents; and (c) state with particularity the grounds upon which you contend that additional efforts to produce such information or documents would be unduly burdensome.

5. These requests are continuing in nature. Pursuant to the duty of supplementation under Utah Rule of Civil Procedure 26(d), your response must be supplemented, and any additional responsive material disclosed if responsive material becomes available after you serve your response. You must also amend your responses to these requests if you learn that a production is in some material respect incomplete or incorrect.

6. If any requested document or other potentially relevant document is subject to destruction under any document retention or destruction program, the documents should be exempted from any scheduled destruction and should not be destroyed until the conclusion of this lawsuit or unless otherwise permitted by court order.

7. If a responsive document has been destroyed or has passed out of your possession, custody, or control, please provide the following information with respect to each such document: its title, date, author(s), sender(s), recipient(s), subject matter, the circumstances under which it has become unavailable, and, if known, its current location and custodian.

8. Documents are to be kept in their original format as they are kept by you, provided that documents or records shall be produced as described hereinafter, and hard-copy documents may be produced in electronic format. Documents should be produced in their entirety, without abbreviation, redaction, or expurgation; file folders with tabs or labels identifying documents responsive to these requests should be produced intact with said documents; and documents attached to each other should not be separated. Please produce any electronically stored

information (“ESI”) in native format files and bates numbered individual PDF files, with a corresponding load file preserving all native metadata. Each document produced should be categorized by the number of the request for which it is produced.

9. For documents produced in PDF format that originated in electronic form, metadata shall be included with the data load files described above, and shall include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the document (that is, the custodian from whom the document was collected or, if collected from a shared drive or server, the name of the shared drive or server); and MD5 hash value. In addition, for email documents, the data load files shall also include the following metadata: sent date; sent time; received date; received time; “to” name(s) and address(es); “from” name(s) and address(es); “cc” name(s) and address(es); “bcc” name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files must be named or put in folders in such a manner that all records can be imported without modification of any path or file name information.

10. Unless otherwise specified, all Requests for Production concern the period of time from January 1, 2020, to the present.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1:

Produce any and all drafts of the enacted 2021 Congressional Plan, or any other potential congressional plan or configuration of congressional districts that was not adopted, including but not limited to shapefiles, geojson files, and/or block assignment files.

RESPONSE:

REQUEST FOR PRODUCTION NO. 2:

Produce any and all analyses, data, and/or code related to the enacted 2021 Congressional Plan, drafts of the 2021 Congressional Plan, or any potential congressional plan or configuration of congressional districts that was not adopted.

RESPONSE:

REQUEST FOR PRODUCTION NO. 3:

Produce any and all documents and communications with any past or current Member of Congress and their agents, staff, or attorneys, related to the planning, negotiation, drafting, consideration, or enactment of the 2021 Congressional Plan.

RESPONSE:

REQUEST FOR PRODUCTION NO. 4:

Produce any and all documents and communications to, from, or shared with any past or current Legislator and their agents, staff, or attorneys, related to the planning, negotiation, drafting, consideration, or enactment of the 2021 Congressional Plan.

RESPONSE:

REQUEST FOR PRODUCTION NO. 5:

Produce any and all documents and communications to, from, or shared with Governor Cox and his agents, staff, or attorneys, related to the planning, negotiation, drafting, consideration, or enactment of the 2021 Congressional Plan.

RESPONSE:

REQUEST FOR PRODUCTION NO. 6:

Produce any and all documents and communications, including partisan voting patterns, election results, partisan indexes, assessments of candidate performance, uniform swing analyses, voting age population, citizen voting age population, or any other data considered, viewed, or used to assess the partisan performance of draft or final Utah congressional districts or district maps.

RESPONSE:

REQUEST FOR PRODUCTION NO. 7:

Produce any and all documents and communication, including memoranda, reports, communications, data, or analyses, concerning any redistricting criteria or objectives that Legislative Defendants considered, or decided not to consider, in developing the 2021 Congressional Plan.

RESPONSE:

REQUEST FOR PRODUCTION NO. 8:

Produce any all documents related to the designation of areas of the state of Utah as urban or rural in the drafting, consideration, or enactment of the 2021 Congressional Plan and any draft congressional plans or districts.

RESPONSE:

REQUEST FOR PRODUCTION NO. 9:

Produce any and all documents and communications concerning redistricting with any consultants, experts, or any persons or entities associated with the Republican National Committee, including but not limited to Adam Foltz, Adam Kincaid, and any representatives of the National Republican Redistricting Trust.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10:

Produce any and all communications with the Utah Independent Redistricting Commission, including but not limited to commissioners and staff, concerning redistricting or the 2022 congressional election.

RESPONSE:

DATED this 2nd day of December, 2022.

BY: PARR BROWN GEE & LOVELESS, P.C.

/s/ David C. Reymann

PARR BROWN GEE & LOVELESS

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**Pro Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December 2022, I served the foregoing

PLAINTIFFS' RULE 34 FIRST SET OF REQUESTS FOR PRODUCTION TO

LEGISLATIVE DEFENDANTS via email on the following:

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EXHIBIT B

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Attorneys for Plaintiffs

**Pro Hac Vice*

**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.

**PLAINTIFFS' RULE 33
FIRST SET OF INTERROGATORIES**

Civil Action No. 220901712

Honorable Dianna Gibson

Pursuant to Rules 26 and 33 of the Utah Rules of Civil Procedure, Plaintiffs, by their undersigned counsel, hereby serve the following Interrogatories to be answered by Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator J. Stuart Adams (collectively, Legislative Defendants"), and Lieutenant Governor Deidre Henderson, who shall answer each Interrogatory separately and fully in writing and under oath and serve a copy of the answers and objections, if any, by electronic mail to Plaintiffs' counsel within twenty-eight (28) days. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the Court, for good cause, excuses the failure.

DEFINITIONS

1. "2021 Congressional Plan" refers to the statewide redistricting plan for congressional districts in the State of Utah, adopted in House Bill 2004, H.B. 2004, 64th Leg., 2d Spec. Sess. (2021).

2. "Communication(s)" means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfer of information via email, (whether from an official or personal account), email attachment, phone, voicemail message, any other recorded conversation, text message, social media message, message on any internet or phone app (whether on a publicly paid or personal device), letter, postcard, fax, written memorandum, note, summary, complaint, and any other means.

3. "Concern," "concerning," or "regarding" shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying,

projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

4. “Describe” means to state all facts, information, and opinions known and held regarding, relating to, concerning, and pertinent to the Interrogatory.

5. “Identify” means to give, to the extent known, the person’s full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment and title. Once a person has been identified in accordance with this subparagraph, the name of that person need only be listed in response to subsequent discovery requesting the identification of that person.

6. “You” and “your” mean Legislative Defendants and/or Lieutenant Governor Deirdre Henderson and any of their employees, agents, or representatives, including any person or entity acting or purporting to act on their behalf, at your direction, or under their supervision.

7. All references in these Interrogatories to an individual person include any and all past or present employees, staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, predecessors in office or position, and all other persons or entities acting or purporting to act on the individual person’s behalf or subject to the control of such a person. All references in these Interrogatories to an entity, governmental entity, or any other type of organization include its past or present officers, executives, directors, employees, staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, and all other persons or entities acting or purporting to act on behalf of such an organization or subject to its control.

8. In construing these Interrogatories, apply the broadest construction, so as to produce the most comprehensive response. Construe the terms “and” and “or” either disjunctively

or conjunctively, as necessary, to bring within the scope of the Interrogatory all responses that might otherwise be construed to be outside that scope. Words used in the singular shall include the plural. Words or terms used herein have the same intent and meaning regardless of whether the words or terms are depicted in lowercase or uppercase letters.

INSTRUCTIONS

1. Responses to these Interrogatories should be made in the manner prescribed by Utah Rule of Civil Procedure 33.

2. If you object to any part of an Interrogatory, respond to all parts of the Interrogatory to which you do not object, and separately state with specificity the part of each Interrogatory to which you are objecting and the ground for each objection.

3. If the answer to any of these Interrogatories in whole or in part is refused because of a claim of privilege or protection, please state in a written response all of the circumstances and facts upon which your assertion of privilege is based, including:

- a. The Interrogatory or part thereof to which the communication, document, or information relates;
- b. The type of privilege claimed, or other reason for withholding the at-issue communication, document, or information;
- c. The type of communication, document, or information at issue (e.g., oral, written, electronic, etc.);
- d. A description of the communication, document, or information sufficient to identify it without revealing the information for which privilege is claimed;

- e. A description of the subject matter of the communication, document or information in sufficient detail to allow the Court to adjudicate the validity of the claim of privilege; and
 - f. The name of each participant to the at-issue communication, document, or information, including but not limited to persons who prepared, produced or reproduced, or who were the recipients of such communication, document, or information; and, for each such participant or person, their title, occupation, and employer, if applicable.
4. Any Interrogatory propounded in the disjunctive should also be read as if propounded in the conjunctive and vice versa.
5. Any Interrogatory propounded in the singular should also be read as if propounded in the plural and vice versa.
6. Any Interrogatory propounded in the present tense should also be read as if propounded in the past tense and vice versa.
7. The fact that an Interrogatory calls in part for information which You claim to be privileged is not a basis for You to fail to identify and produce fully all information called for by the Interrogatory as to which no privilege is claimed.
8. These Interrogatories are continuing in nature, so as to require You to reasonably notify the Plaintiffs and to supplement responses hereto in the event that any additional responsive information is discovered during the pendency of these proceedings. Supplemental responses shall be served promptly upon discovery of such information and undertaken in accordance with Utah Rule of Civil Procedure 26(d).

9. Where necessary, translate information maintained by electronic or other non-tangible means into a reasonably useable form, such as printouts, graphs, or summaries.

10. No Interrogatory is to be left unanswered. If the answer to an Interrogatory or any part thereof is “none” or “unknown,” please so specify in writing in your response. If the question is not applicable, please specify “not applicable” in writing in your response, as well as the reasons for the alleged inapplicability.

11. Unless otherwise specified, all Interrogatories continue into the future with the duty to supplement.

INTERROGATORIES

INTERROGATORY NO. 1: Describe the complete and detailed timeline of events that comprise the 2021 congressional redistricting process in the Utah Legislature, including, but not limited to, the viewing and presentation of draft and final maps, and unofficial and official votes on draft or final maps.

ANSWER:

INTERROGATORY NO. 2: Identify all persons and/or entities whom you have consulted, retained, or contracted regarding the redistricting of Utah’s congressional districts, including but not limited to with regard to the potential Republican or Democratic performance of any draft or final Utah congressional district plans.

ANSWER:

INTERROGATORY NO. 3: Identify any person(s) or entities who drew the 2021 Congressional Plan and any draft Utah congressional redistricting plans provided to or considered by the Redistricting Committee or individual legislators from January 1, 2020 to the present.

ANSWER:

INTERROGATORY NO. 4: For each person and entity identified in response to Interrogatory No. 4, describe the process, data, methods, tools, computer programs, and mapping software used to draw the 2021 Congressional Plan and any draft congressional redistricting plans or districts.

ANSWER:

DATED this 2nd day of December, 2022.

BY: PARR BROWN GEE & LOVELESS, P.C.

/s/ David C. Reymann

PARR BROWN GEE & LOVELESS

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**Pro Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of December 2022, I served the foregoing
PLAINTIFFS' RULE 33 FIRST SET OF INTERROGATORIES via email on the following:

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Counsel for Legislative Defendants

/s/ Aseem Mulji
Aseem Mulji

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EXHIBIT C

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IN THE THIRD JUDICIAL DISTRICT COURT

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,

vs.

UTAH STATE LEGISLATURE, *et al.*,

Defendants.

**SUBPOENA FOR PRODUCTION
OF DOCUMENTS TO
STEPHEN HANDY**

Case No. 220901712

Judge Dianna Gibson

**TO: Stephen Handy
1355 East 625 North
Layton, Utah 84040**

YOU ARE COMMANDED, pursuant to Rule 45 of the *Utah Rules of Civil Procedure*, to copy the documents and electronically stored information described on the attached Exhibit A that are in your possession, custody or control and mail or deliver those copies no later than January 4, 2023 after service to the following attorneys responsible for issuing this subpoena:

David C. Reymann
PARR BROWN GEE & LOVELESS
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
dreymann@parrbrown.com

Pursuant to Rule 45(a)(1)(E) of the *Utah Rules of Civil Procedure*, you are hereby advised that the Notice to Persons Served with a Subpoena is attached hereto and incorporated herein as Exhibit B.

DATED this 14th day of December, 2022.

PARR BROWN GEE & LOVELESS

/s/ David C. Reymann
David C. Reymann

CAMPAIGN LEGAL CENTER

Mark Gaber*
Hayden Johnson*
Aseem Mulji*
Annabelle Harless*

ZIMMERMAN BOOHER

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

Attorneys for Plaintiffs
*Pro Hac Vice

EXHIBIT A

DEFINITIONS

For purposes of these requests only, Plaintiffs use the definitions set forth below. Any terms not defined shall be given their ordinary meaning.

1. “2021 Congressional Plan” refers to the statewide redistricting plan for congressional districts in the State of Utah, adopted in House Bill 2004, H.B. 2004, 64th Leg., 2d Spec. Sess. (2021).

2. “Communication(s)” means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfer of information via email, (whether from an official or personal account), email attachment, phone, voicemail message, any other recorded conversation, text message, social media message, message on any internet or phone app (whether on a publicly paid or personal device), letter, postcard, fax, written memorandum, note, summary, complaint, and any other means.

3. “Concern,” “concerning,” or “regarding” shall mean having any connection, relation, or reference to and include, by way of example and without limitation, discussing, identifying, containing, showing, evidencing, describing, reflecting, dealing with, regarding, pertaining to, analyzing, evaluating, estimating, constituting, comprising, studying, surveying, projecting, recording, relating to, summarizing, assessing, criticizing, reporting, commenting on, referring to in any way, either directly or indirectly, or otherwise involving, in whole or in part.

4. “Exchanged” shall mean communicated, transferred, given, shared, or provided to You, from You, or including You in any way, either directly or indirectly.

5. “Document,” whether singular or plural, is used here in the broadest sense to mean anything which may be considered to be a document or tangible thing within the meaning of Utah Rule of Civil Procedure 34. This definition includes, but is not limited to, each and every writing of whatever nature, and shall mean the original and any draft or copy that differs in any way from the original in any written or graphic matter, however produced or reproduced, and shall mean, without limitation, each and every tangible thing from which information can be processed or transcribed from disk, diskette, compact disc, tape, or any other electronic media or data computations. The term includes, but is not limited to, communications, letters, emails, and any attachments, messages, facsimile transmissions, telegrams, telex messages, reports, books, agreements, correspondence, contracts, financial statements, instruments, ledgers, journals, accountings, minutes of meetings, payrolls, studies, calendar and diary entries, notes charts, schedules, tabulations, maps, work papers, brochures, evaluations, memoranda of telephone conversations, audio and video tape recordings, internal communications, bills, tapes, computer printouts, drawings, designs, diagrams, exhibits, photographs, reproductions, data, spreadsheets, maps, shapefiles, geojson files, block assignment files, and any marginal comments appearing on any document and copies of documents which are not identical duplicates of the originals (e.g., because handwritten or “blind copy” notes or notations appear thereon or are attached thereto). The term “document(s)” includes the defined term “Electronically Stored Information,” which is defined below. The term “document” specifically seeks the production of Electronically Stored Information in native format.

6. “Electronically Stored Information” or “ESI” includes, but is not limited to, any and all electronic data or information stored on a computing device and/or electronic platform. Information and data is considered “electronic” if it exists in a medium that can only be read

through the use of computing device. This term includes but is not limited to databases; all text file and word processing documents (including metadata); presentation documents, shapefiles, geojson files, block assignment files, data, code, spreadsheets; graphics, animations, and images (including but not limited to “JPG, GIF, BMP, PDF, PPT, and TIFF files); email, email strings, and instant messages (including attachments, logs of email history and usage, header information and “deleted” files) and any real-time text, audio, picture, or video transmissions through the internet as well as any text, audio, picture, or video transmissions between mobile phones and/or fixed or portable devices, including server, network, desktop, laptop, or tablet computers whether private or public; email attachments; calendar and scheduling information; cache memory; Internet history files and preferences; audio; video, audiovisual recordings; voicemail stored on databases; networks; computers and computer systems; computer system activity logs; servers; archives; back-up or disaster recovery systems; hard drives; discs; CD’s; diskettes; removable drives; tapes; cartridges and other storage media; printers; scanners; personal digital assistants; computer calendars; handheld wireless devices; cellular telephones; pagers; fax machines; and voicemail systems. This term includes but is not limited to onscreen information, system data, archival data, legacy data, residual data, and metadata that may not be readily viewable or accessible, and all file fragments and backup files.

7. “Legislator” refers to any past or present elected member of the Utah House of Representatives (“Utah House”) or the Utah Senate, including such members’ past or present employees, legislative office staff, district office staff, committee staff, caucus staff, campaign staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, or other persons or entities acting or purporting to act on the member’s behalf, subject to the member’s control.

8. “Member of Congress” refers to any past or present elected member of the United States House of Representatives or the United States Senate, including such members’ past or present employees, legislative office staff, district office staff, committee staff, caucus staff, campaign staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, or other persons or entities acting or purporting to act on the member’s behalf, subject to the member’s control.

9. “Redistricting” means any consideration of the alignment of district boundaries for a legislative body or congressional delegation, a single legislative or congressional district, or districts within a geographic area.

10. “Utah Independent Redistricting Commission” and “UIRC” refers to the independent redistricting commission created in Section 20A-20-201 of the Utah Code for the purpose of developing redistricting plans for Utah’s congressional delegation, the Utah State Senate, State House, and School Board, and all past and present commission members, agents, advisors, representatives, attorneys, consultants, contractors, or other persons or entities acting on its behalf or subject to its control.

11. “You” and “your” mean Stephen Handy and any of your employees, agents, or representatives, including any person or entity acting or purporting to act on your behalf, at your direction, or under your supervision.

12. All references in these requests to an individual person include any and all past or present employees, staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, predecessors in office or position, and all other persons or entities acting or purporting to act on the individual person’s behalf or subject to the control of such a person. All references in these requests to an entity, governmental entity, or any other type of

organization include its past or present officers, executives, directors, employees, staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, agents, and all other persons or entities acting or purporting to act on behalf of such an organization or subject to its control.

13. In construing these Requests for Production, apply the broadest construction, so as to produce the most comprehensive response. Construe the terms “and” and “or” either disjunctively or conjunctively, as necessary, to bring within the scope of the request all responses that might otherwise be construed to be outside that scope. Words used in the singular shall include the plural. Words or terms used herein have the same intent and meaning regardless of whether the words or terms are depicted in lowercase or uppercase letters.

INSTRUCTIONS

1. You are required when answering these Requests, to furnish all requested information, not subject to valid objection, that is known by, possessed by, available to, or subject to reasonable access or control by you or any of your attorneys, consultants, representatives, investigators, agents, and all others acting on your behalf or under your supervision. Without limiting the term “control,” a document is deemed to be within your control if you have the right to secure the document or copy thereof from any persons or public or private entity having physical control thereof.

2. If you object to responding to any of these Requests, in whole or in part, you must state your objection(s) with specificity and all factual and legal bases for the objection(s). If you object to a portion of a Request, you must specify the part to which you object and respond to the remainder.

3. If, in responding to or failing to respond to any of these discovery requests, you invoke or rely upon privilege of any kind, state specifically the nature of the privilege(s), the bases on which you invoke, rely upon, or claim the privilege(s), including statutory or decisional reference, and identify all documents or other information, including contacts and communications, which you believe to be embraced by the privilege(s) invoked. If you withhold any information based on the attorney-client privilege, the attorney work-product immunity, or any other privilege or immunity, you must identify the document or information withheld and provide the following information: (i) a description of the document or information, including the nature of the document or information (e.g., email, letter, database, etc.); (ii) the author(s) and/or creator(s) of the document or information; (iii) the recipient(s) or addressee(s) of the document or information; (iv) the date of the document or information; (v) the subject matter of the document or information; (vi) the nature of all privileges or immunities claimed; and (vii) all such additional information as is necessary for Plaintiffs to understand and challenge (if appropriate) the withholding of the document or information.

4. If you contend that it would be unduly burdensome to obtain and provide all of the information or documents called for in response to any Request or part thereof, then in response to the appropriate request: (a) produce all such information or documents as are available without undertaking what you contend to be an unduly burdensome request; (b) describe with particularity the efforts made by you or on your behalf to produce such information or documents; and (c) state with particularity the grounds upon which you contend that additional efforts to produce such information or documents would be unduly burdensome.

5. These requests are continuing in nature. Pursuant to the duty of supplementation under Utah Rule of Civil Procedure 26(d), your response must be supplemented,

and any additional responsive material disclosed if responsive material becomes available after you serve your response. You must also amend your responses to these requests if you learn that a production is in some material respect incomplete or incorrect.

6. If any requested document or other potentially relevant document is subject to destruction under any document retention or destruction program, the documents should be exempted from any scheduled destruction and should not be destroyed until the conclusion of this lawsuit or unless otherwise permitted by court order.

7. If a responsive document has been destroyed or has passed out of your possession, custody, or control, please provide the following information with respect to each such document: its title, date, author(s), sender(s), recipient(s), subject matter, the circumstances under which it has become unavailable, and, if known, its current location and custodian.

8. Documents are to be kept in their original format as they are kept by you, provided that documents or records shall be produced as described hereinafter, and hard-copy documents may be produced in electronic format. Documents should be produced in their entirety, without abbreviation, redaction, or expurgation; file folders with tabs or labels identifying documents responsive to these requests should be produced intact with said documents; and documents attached to each other should not be separated. Please produce any electronically stored information (“ESI”) in native format files and bates numbered individual PDF files, with a corresponding load file preserving all native metadata. Each document produced should be categorized by the number of the request for which it is produced.

9. For documents produced in PDF format that originated in electronic form, metadata shall be included with the data load files described above, and shall include (at a minimum) the following information: file name (including extension); original file path; page

count; creation date and time; last saved date and time; last modified date and time; author; custodian of the document (that is, the custodian from whom the document was collected or, if collected from a shared drive or server, the name of the shared drive or server); and MD5 hash value. In addition, for email documents, the data load files shall also include the following metadata: sent date; sent time; received date; received time; “to” name(s) and address(es); “from” name(s) and address(es); “cc” name(s) and address(es); “bcc” name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files must be named or put in folders in such a manner that all records can be imported without modification of any path or file name information.

10. Unless otherwise specified, all Requests for Production concern the period of time **from January 1, 2020, to the present.**

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Produce any and all drafts of the enacted 2021 Congressional Plan, or any other potential congressional plan or configuration of congressional districts that was not adopted, including but not limited to shapefiles, geojson files, and/or block assignment files.

2. Produce any and all analyses, data, and/or code related to the enacted 2021 Congressional Plan, drafts of the 2021 Congressional Plan, or any potential congressional plan or configuration of congressional districts that was not adopted.

3. Produce any and all notes or communications concerning meetings of the Legislative Redistricting Committee, other Legislative Committee, and Legislature that relate to the 2021 Congressional Plan, drafts of the 2021 Congressional Plan, or any potential congressional plan or configuration of congressional districts that was not adopted.

4. Produce any and all minutes, agendas, notes, and communications from any Republican Caucus meeting or other non-public meeting of Republican legislators concerning the 2021 Congressional Plan, drafts of the 2021 Congressional Plan, or any potential congressional plan or configuration of congressional districts that was not adopted.

5. Produce any and all documents and communications exchanged with any past or current Member of Congress and their agents, staff, or attorneys, related to the planning, negotiation, drafting, consideration, or enactment of the 2021 Congressional Plan.

6. Produce any and all documents and communications exchanged with any past or current Legislator and their agents, staff, or attorneys, related to the planning, negotiation, drafting, consideration, or enactment of the 2021 Congressional Plan.

7. Produce any and all documents and communications exchanged with Governor Cox and his agents, staff, or attorneys, related to the planning, negotiation, drafting, consideration, or enactment of the 2021 Congressional Plan.

8. Produce any and all documents and communications exchanged with Lieutenant Governor Henderson and her agents, staff, or attorneys, related to the planning, negotiation, drafting, consideration, or enactment of the 2021 Congressional Plan.

9. Produce any and all documents and communications exchanged with the Utah Independent Redistricting Commission, including but not limited to commissioners and staff, concerning redistricting, the UIRC's processes or operation, or the 2022 congressional election.

10. Produce any and all documents and communications concerning the partisan performance of districts in the 2021 Congressional Plan or any drafts thereof, including partisan voting patterns, election results, partisan indexes, assessments of candidate performance, uniform

swing analyses, voting age population, citizen voting age population, or any other data considered, viewed, or used to assess partisan performance.

11. Produce any and all documents and communication, including memoranda, reports, communications, data, or analyses, concerning any redistricting criteria or objectives that the Legislature considered, or decided not to consider, in developing the 2021 Congressional Plan and any draft congressional plans or districts.

12. Produce any and all documents related to the designation of areas of the state of Utah as urban or rural in the drafting, consideration, or enactment of the 2021 Congressional Plan and any draft congressional plans or districts.

13. Produce any and all documents and communications concerning redistricting with any consultants, experts, or any persons or entities associated with the Republican National Committee, including but not limited to Adam Foltz, Adam Kincaid, and any representatives of the National Republican Redistricting Trust.

EXHIBIT B

Notice to Persons Served with a Subpoena

(1) Rights and responsibilities in general. A subpoena is a court order whether it is issued by the court clerk or by an attorney as an officer of the court. You must comply or file an objection, or you may face penalties for contempt of court. If you are commanded to produce documents or tangible things, the subpoena must be served on you at least 14 days before the date designated for compliance. If you are commanded to appear at a trial, hearing, deposition, or other place, a one-day witness fee must be served with this subpoena. A one-day witness fee is \$18.50 plus \$1.00 for each 4 miles you have to travel over 50 miles (one direction). When the subpoena is issued on behalf of the United States or Utah, fees and mileage need not be tendered. The witness fee for each subsequent day is \$49.00 plus \$1.00 for each 4 miles you have to travel over 50 miles (one direction).

(2) Subpoena to copy and mail documents. If the subpoena commands you to copy documents and mail the copies to the attorney or party issuing the subpoena, you must organize the copies as you keep them in the ordinary course of business or organize and label them to correspond with the categories in the subpoena. The party issuing the subpoena must pay the reasonable cost of copying the documents. You must mail with the copies a Declaration of Compliance with Subpoena stating in substance:

- (A) that you have knowledge of the facts contained in the declaration;
- (B) that the documents produced are a full and complete response to the subpoena;
- (C) that originals or true copies of the original documents have been produced; and
- (D) the reasonable cost of copying the documents.

A Declaration of Compliance with Subpoena form is part of this Notice; you may need to modify it to fit your circumstances.

(3) Subpoena to appear. If the subpoena commands you to appear at a trial, hearing, deposition, or for inspection of premises, you must appear at the date, time, and place designated in the subpoena. The trial or hearing will be at the courthouse in which the case is pending. For a deposition or inspection of premises, you can be commanded to appear in only the following counties:

- (A) If you are a resident of Utah, the subpoena may command you to appear or to produce documents, electronic records or tangible things or to permit inspection of premises in the county:

- in which you reside;
 - in which you are employed;
 - in which you transact business in person; or
 - in which the court orders.

(B) If you are not a resident of Utah, the subpoena may command you to appear or to produce documents, electronic records or tangible things or to permit inspection of premises in the county:

in which you are served with the subpoena; or
in which the court orders.

(4) Subpoena to permit inspection of premises. If the subpoena commands you to appear and to permit the inspection of premises, you must appear at the date, time, and place designated in the subpoena and do what is necessary to permit the premises to be inspected.

(5) Subpoena to produce documents or tangible things. If the subpoena commands you to produce documents or tangible things, you must produce the documents or tangible things as you keep them in the ordinary course of business or organize and label them to correspond with the categories in the subpoena. The subpoena may require you to produce the documents at the trial, hearing, or deposition or to mail them to the issuing party or attorney. The party issuing the subpoena must pay the reasonable cost of copying and producing the documents or tangible things. You must produce with the documents or tangible things a Declaration of Compliance with Subpoena stating in substance:

- (A) that you have knowledge of the facts contained in the declaration;
- (B) that the documents produced are a full and complete response to the subpoena;
- (C) that originals or true copies of the original documents have been produced; and
- (D) the reasonable cost of copying the documents.

A Declaration of Compliance with Subpoena form is part of this Notice; you may need to modify it to fit your circumstances.

(6) Objection to a subpoena. You must comply with those parts of the subpoena to which you do not object. You may object to all or part of the subpoena if it:

- (A) fails to allow you a reasonable time for compliance (If you are commanded to produce documents or tangible things, the subpoena must be served on you at least 14 days before the date designated for compliance.);
- (B) requires you, as a resident of Utah, to appear at a deposition or to produce documents, electronic records or tangible things or to permit inspection of premises in a county in which you do not reside, are not employed, or do not transact business in person, unless the judge orders otherwise;
- (C) requires you, as a non-resident of Utah, to appear at a deposition or to produce documents, electronic records or tangible things or to permit inspection of premises in a county other than the county in which you were served, unless the judge orders otherwise;

- (D) requires you to disclose privileged or other protected matter and no exception or waiver applies;
- (E) requires you to disclose a trade secret or other confidential research, development, or commercial information;
- (F) subjects you to an undue burden; or
- (G) requires you to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(7) How to object. To object to the subpoena, serve the Objection to Subpoena on the party or attorney issuing the subpoena. The name and address of that person should appear in the upper left corner of the subpoena. You must do this before the date for compliance. An Objection to Subpoena form is part of this Notice; you may need to modify it to fit your circumstances. Once you have filed the objection, do not comply with the subpoena unless ordered to do so by the court.

(8) Motion to compel. After you make a timely written objection, the party or attorney issuing the subpoena might serve you with a motion for an order to compel you to comply and notice of a court hearing. That motion will be reviewed by a judge. You have the right to file a response to the motion, to attend the hearing, and to be heard. You have the right to be represented by a lawyer. If the judge grants the motion, you may ask the judge to impose conditions to protect you.

(9) Organizations. An organization that is not a party to the suit and is subpoenaed to appear at a deposition must designate one or more persons to testify on its behalf. The organization may set forth the matters on which each person will testify. URCP 30(b)(6).

My Name

Address

City, State, Zip

Phone

Email

In the ☐ District ☐ Justice ☐ Juvenile Court of Utah

_____ Judicial District _____ County

Court Address _____

Plaintiff/Petitioner

v.

Defendant/Respondent

Objection to Subpoena

Case Number

Judge

Commissioner

Instructions: URCP 45 limits the grounds for an objection. For each of the grounds other than (2) or (3) please provide a full explanation. Attach additional sheets as necessary.

I have been served with a subpoena in this case, and I object because the subpoena:

(1) ☐ Fails to allow me a reasonable time in which to comply.

(2) ☐ Requires me, a resident of Utah, to:

☐ appear at a deposition;

☐ produce documents, electronic records or tangible things; or

☐ permit inspection of premises in a county in which I do not reside, am not employed, and do not transact business in person.

(3) ☐ Requires me, a non-resident of Utah, to:

☐ appear at a deposition;

☐ produce documents, electronic records or tangible things; or

☐ permit inspection of premises in a county other than the county in which I was served.

(4) ☐ Requires me to disclose privileged or other protected matter and no exception or waiver applies. (If you object to the subpoena for these grounds, you must describe the nature of the document or thing with sufficient specificity to enable the party or attorney to contest your objection.)

(5) ☐ Requires me to disclose a trade secret or other confidential research, development, or commercial information. (If you object to the subpoena for these grounds, you must describe the nature of the document or thing with sufficient specificity to enable the party or attorney to contest your objection.)

(6) ☐ Subjects me to an undue burden.

(7) ☐ Requires me to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(8) ☐ Other.

I declare under criminal penalty of Utah Code Section 78B-5-705 that this Objection to

Subpoena is true and correct.

Date _____ Sign here ► _____
Typed or printed name
Person subject to subpoena []
Attorney for person subject to subpoena [] _____

| Certificate of Service | | | |
|--|---|------------------------|---------------------|
| I certify that I served a copy of this document on the following people. | | | |
| Person's Name | Method of Service | Served at this Address | Served on this Date |
| (Other Party or Attorney) | <input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Fax (Person agreed to service by fax.) <input type="checkbox"/> Email (Person agreed to service by email.) <input type="checkbox"/> Left at business (With person in charge or in receptacle for deliveries.) <input type="checkbox"/> Left at home (With person of suitable age and discretion residing there.) | | |
| (Clerk of Court) | <input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Electronic File | | |
| | <input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Fax (Person agreed to service by fax.) <input type="checkbox"/> Email (Person agreed to service by email.) <input type="checkbox"/> Left at business (With person in charge or in receptacle for deliveries.) <input type="checkbox"/> Left at home (With person of suitable age and discretion residing there.) | | |

| Certificate of Service | | | |
|--|---|------------------------|---------------------|
| I certify that I served a copy of this document on the following people. | | | |
| Person's Name | Method of Service | Served at this Address | Served on this Date |
| | <input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Fax (Person agreed to service by fax.) <input type="checkbox"/> Email (Person agreed to service by email.) <input type="checkbox"/> Left at business (With person in charge or in receptacle for deliveries.) <input type="checkbox"/> Left at home (With person of suitable age and discretion residing there.) | | |

Date _____

Sign here ► _____

Typed or printed name

My Name

Address

City, State, Zip

Phone

Email

In the ☐ District ☐ Justice ☐ Juvenile Court of Utah

Judicial District _____ County
Court Address _____

| | |
|--|---|
| _____ Plaintiff/Petitioner v. _____ Defendant/Respondent | Declaration of Compliance with Subpoena _____ Case Number _____ Judge _____ Commissioner |
|--|---|

- (1) I have knowledge of the facts contained in this declaration.
- (2) The documents or tangible things copied or produced are a full and complete response to the subpoena.
- (3) The documents or tangible things are
☐ the originals.
☐ copies that are true copies of the originals.
- (4) The reasonable cost of copying or producing the documents or tangible things is \$_____.

I declare under criminal penalty of Utah Code Section 78B-5-705 that this Declaration of Compliance with Subpoena is true and correct.

Date _____ Sign here ► _____
Typed or printed name
Custodian of the records ☐ _____

Attorney for the custodian of the records []

| Certificate of Service I certify that I served a copy of this document on the following people. | | | |
|---|---|------------------------|---------------------|
| Person's Name | Method of Service | Served at this Address | Served on this Date |
| (Other Party or Attorney) | <input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Fax (Person agreed to service by fax.) <input type="checkbox"/> Email (Person agreed to service by email.) <input type="checkbox"/> Left at business (With person in charge or in receptacle for deliveries.) <input type="checkbox"/> Left at home (With person of suitable age and discretion residing there.) | | |
| (Clerk of Court) | <input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Electronic File | | |
| | <input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Fax (Person agreed to service by fax.) <input type="checkbox"/> Email (Person agreed to service by email.) <input type="checkbox"/> Left at business (With person in charge or in receptacle for deliveries.) <input type="checkbox"/> Left at home (With person of suitable age and discretion residing there.) | | |

| | | | |
|--|---|--|--|
| | <input type="checkbox"/> Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Fax (Person agreed to service by fax.) <input type="checkbox"/> Email (Person agreed to service by email.) <input type="checkbox"/> Left at business (With person in charge or in receptacle for deliveries.) <input type="checkbox"/> Left at home (With person of suitable age and discretion residing there.) | | |
|--|---|--|--|

Date _____ Sign here ► _____

Typed or printed name _____

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Counsel for Legislative Defendants

** Pro hac vice application forthcoming*

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

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

Plaintiffs,

v.

UTAH STATE LEGISLATURE; UTAH LEGISLA-
TIVE REDISTRICTING COMMITTEE; SENA-
TOR SCOTT SANDALL, in his official capacity;
REPRESENTATIVE BRAD WILSON,
in his official capacity; SENATOR J. STUART AD-
AMS, in his official capacity; and LIEUTENANT
GOVERNOR DEIDRE HENDERSON, in her offi-
cial capacity,

Defendants.

**LEGISLATIVE DEFENDANTS'
INITIAL DISCLOSURES**

Case No. 220901712

Honorable Dianna Gibson

Pursuant to Utah Rule of Civil Procedure 26(a)(1), the Utah State Legislature on behalf of all Legislative Defendants submits the following initial disclosures. These initial disclosures are preliminary and are based upon information acquired to date and reasonably available at this time. The disclosures are submitted without waiver of any applicable objections, including relevance and applicable privileges or immunities. Defendants reserve the right to object to the production and/or introduction into evidence of any document or evidence within the categories described herein or testimony by any of the disclosed witnesses on the basis of privilege, relevance, or otherwise, as appropriate. Defendants reserve the right to add to or amend these disclosures as appropriate and necessary, including to include information later acquired based upon further discovery, trial preparation, and analysis. Finally, the Legislature notes that the Utah Rules of Civil Procedure require an initial disclosure of “discoverable information supporting its ... defenses,” Utah R. Civ. P. 26(a)(1), which necessarily excludes information that is “privileged,” Utah R. Civ. P. 26(b)(1). As such, the Legislature excludes any legislatively privileged information from its initial disclosures, which without waiver of the legislative privilege, would not be discoverable.

1. The name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, and each fact witness the party may call in its case-in-chief.

Legislative Defendants list the following individuals likely to have discoverable information and also incorporate by reference all persons listed in Plaintiffs’ initial disclosures, without waiving any objections as to relevance, applicable privilege or immunities, the unnecessary burden imposed by seeking discovery of information already publicly available, or other applicable objections. Any individuals in the Legislature or employed by the Legislature are to be contacted solely through Defendants’ counsel, just as counsel for Defendants understand that counsel will contact Plaintiffs solely through Plaintiffs’ counsel. Legislative Defendants reserve the right to call and cross-examine any

witnesses listed by any other party and, consistent with the Utah Rules, do not list any individual for impeachment purposes.

| Name | Subjects that the individual is likely have information about |
|--|---|
| League of Women Voters of Utah | In addition to topics listed by Plaintiffs, likely to have information relevant to standing, justiciability and cognizability of Plaintiffs' claims, voter behavior and elections, congressional representation, campaign activities, and other political speech and associational activities continuing in Utah. |
| Mormon Women for Ethical Government | Same as above. |
| Stefanie Condie | Same as above. |
| Malcolm Reid | Same as above. |
| Victoria Reid | Same as above. |
| Wendy Martin | Same as above. |
| Eleanor Sundwall | Same as above. |
| Jack Markman | Same as above. |
| Dale Cox | Same as above. |
| Office of Legislative Research and General Counsel | Subject to all applicable privileges and immunities and other applicable objections, representative(s) from the Office are likely to have information regarding the legislative record, which is also publicly available. |
| The Office of the Lieutenant Governor | Subject to all applicable privileges and immunities and other applicable objections, representative(s) likely to have election-related information including election results, which are also publicly available and judicially noticeable. |
| County Clerks | Subject to all applicable privileges and immunities and other applicable objections, likely to have information relating to election results, voting, and voter registration. |

As discovery proceeds, Legislative Defendants anticipate that additional individuals will be identified through discovery and reserve the right to supplement these disclosures and/or to include on any future witness list accordingly.

2. A copy of all documents, data compilations, electronic information, and tangible things in the possession or control of the disclosing party that the party may offer in its case-in-chief.

Documents in Legislative Defendants' possession or control that are plausibly relevant and not privileged are publicly available and judicially noticeable documents creating the legislative record, publicly available and judicially noticeable census numbers or election results, and other similarly publicly available and judicially noticeable information. Because these documents are publicly available, the parties need not reproduce. If the parties jointly or the Court deems that reproduction necessary, the parties can work together to reproduce such documents.

As discovery proceeds, Legislative Defendants reserve the right to supplement any documentary disclosures, including documents obtained in discovery.

3. Computation of each category of damages claimed by the disclosing party.

Plaintiffs do not seek monetary damages in this action.

4. Insurance.

Legislative Defendants state that there are no insurance agreements under which an insurance business may be liable to satisfy all or part of a possible judgment against Legislative Defendants in this action.

5. A copy of all documents to which a party refers in its pleadings.

Legislative Defendants state that their Answer and Affirmative Defenses respond only to Plaintiffs' Complaint and do not depend on any documents other than those publicly available or already disclosed by Plaintiffs.

Respectfully submitted,

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*Pro hac vice application forthcoming

In the Supreme Court of the State of Utah

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

Plaintiffs-Petitioners,

v.

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

Defendants-Respondents.

No. 2022-0998-SC

**Legislative Defendants' Response to Plaintiffs'
Petition for Permission to Appeal an Interlocutory Order**

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

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INTRODUCTION

Plaintiffs’ petition argues mainly that this Court should “*deny*” Legislative Defendants’ petition and let “the matter go forward in district court.” Pls. Pet. 3; *see also id.* at 4 (“This Court should deny interlocutory review and permit the district court proceedings to progress on an expedited track.”); Pls. Reply Mem. in Support of Mot. for Am. Sched. Order at 2 (Nov. 23, 2022), Doc. 141 (“Legislative Defendants’ brief misrepresents the purpose of Plaintiffs’ interlocutory appeal petition. Contrary to Legislative Defendants’ suggestion, Plaintiffs’ petition urged the Supreme Court to *deny* Defendants’ petition for interlocutory review”) (citation omitted).¹ But Plaintiffs argue alternatively that if the Court grants one petition it should grant them both because “[n]o interest would be served by this court’s reviewing challenges to different portions of the same order at different stages of this litigation.” *Id.* at 3. Legislative Defendants (“the Legislature”) have no quarrel with Plaintiffs’ second argument, but Plaintiffs’ main one only confirms why this Court should grant the Legislature’s petition.

Take those arguments in reverse order. The Legislature does not oppose this Court’s simultaneous review of the district court’s entire opinion (released after the Legislature filed its petition) on the motion to dismiss. That includes the part of the opinion dismissing Count Five—Plaintiffs’ claim that Article I, §2 somehow bars the Legislature from amending legislation enacted by initiative. *See* Op. 55-59 (Nov. 22, 2022), Doc. 140 (Ex. A). The district court correctly concluded that *Carter v. Lehi City*, 2012 UT 2, ¶27, 269 P.3d 141, bars Count Five. *See* Op. 59. This Court could also grant Plaintiffs’ petition and reiterate this point from

¹ All references to “Doc.” numbers refer to the entries in the district court docket.

Carter (and related cases). Doing so will provide critical guidance to district courts and avoid similar time- and resource-wasting claims in the future.

As for Plaintiffs’ main argument that “[t]his case should proceed in the district court” before any interlocutory review, Pls. Pet. 1, that is nothing short of an invitation to build a plane while flying it. Don’t take the Legislature’s word for it. The district court’s opinion itself—which the Legislature could not discuss before now, since it had not yet been released when the Legislature’s petition was due—acknowledges that “[m]any of the issues raised in this case are matters of first impression, including whether partisan redistricting / gerrymandering presents a purely political question.” Op. 10. “[T]he constitutional provisions Plaintiffs cite have *never* been applied by Utah courts for redistricting claims.” *Id.* at 17 n.5 (emphasis added). But rather than have this Court address the questions of justiciability and separation of powers *before* discovery and any trial—thereby potentially saving hundreds of thousands of taxpayer dollars—Plaintiffs and the district court would proceed to trial now and only later conclusively determine the judicially manageable standards: “*As this case proceeds through litigation* and with specific input from both parties,” according to the district court, “this Court can determine what criteria or factors should be considered in this case, under Utah law.” *Id.* at 19 (emphasis added).

There is no reason to proceed merely hoping that this case won’t become Wilbur and Orville’s early 1900s gliders. These novel, unsettled questions—the justiciability and cognizability of, and any implied constitutional standards governing, partisan gerrymandering claims—are, like Plaintiffs’ question, “legal questions” (Pls. Pet. 3) readily reviewable by this Court *now*. And this Court should indicate as soon as possible whether it intends to review

them *now*. For just last week, the district court denied the Legislature’s motion to stay this case pending this Court’s decisions on these petitions and entered an accelerated scheduling order with the effect of immediately starting both fact and expert discovery. So at 7:02 p.m. last Friday night Plaintiffs propounded a host of discovery requests to the Legislature. Again, this all occurred while this Court remains poised to imminently decide whether Plaintiffs’ claims are *even justiciable or cognizable*, and if so, what implied constitutional standards govern.

At bottom, then, Plaintiffs’ demand only confirms that this case is the archetype for why Rule 5 exists. “‘The purpose ... [of] an interlocutory appeal is to get directly at and dispose of the issues as quickly as possible consistent with thoroughness and efficiency in the judicial administration of justice.’” *Houghton v. Dep’t of Health*, 2008 UT 86, ¶14, 206 P.3d 287. This Court “will grant interlocutory review ... ‘if there is a high likelihood that the litigation can be finally disposed of on such an appeal’” or “‘if it appears essential to adjudicate principles of law or procedure in advance as a necessary foundation upon which the trial may proceed.’” *Id.*; *see also* Utah R. App. P. 5(g). This case readily satisfies those standards. If this Court agrees with the Legislature that none of Plaintiffs claims is justiciable or cognizable, this appeal will “finally dispose[]” of this litigation altogether. *Houghton*, 2008 UT 86, ¶14. And if Plaintiffs’ claims are justiciable and cognizable, it is essential for the parties, the district court, and the public fisc to receive this Court’s definitive guidance on what implied constitutional standard governs those claims “in advance as a necessary foundation upon which the trial” of Plaintiffs’ novel implied constitutional claims “may proceed.” *Id.*; *see* Legis. Pet’n 19-20. The Court should grant both petitions.

REASONS FOR GRANTING THE PETITIONS

Rule 5 empowers this Court to grant immediate review if an interlocutory order “involves substantial rights and may materially affect the final decision” or when immediate review “will better serve the administration and interests of justice.” Utah R. App. P. 5(g); *see also Houghton*, 2008 UT 86, ¶14 *Powell v. Cannon*, 2008 UT 19, ¶13 n.17, 179 P.3d 799 (noting that interlocutory appeal is appropriate when “it appears likely that the appeal will dispose of the issue”). As noted, Plaintiffs’ petition principally urges this Court to “*deny*” interlocutory review.” Pls. Pet. 3. Alternatively, Plaintiffs argue that “if this [C]ourt grants interlocutory review” of the Legislature’s petition, then “it also should grant interlocutory review” of Plaintiffs’ petition because “[n]o interest would be served by this court’s reviewing challenges to different portions of the same order at different stages of this litigation.” *Id.* at 3. The Legislature agrees with Plaintiffs’ second argument but disagrees with their first one. The Legislature will respond to them in reverse order.

I. This Court could grant Plaintiffs’ petition for interlocutory review along with the Legislature’s petition for interlocutory review.

The district court properly dismissed Plaintiffs’ Count Five, a claim contending that Article I, §2 prevents the Legislature from amending laws enacted by initiative. *See* Op. 55-59. As the district court correctly recognized, that claim is meritless and barred by this Court’s precedents. *See* Op. 58-59 (citing *Carter*, 2012 UT 2, ¶27, and *Grant v. Herbert*, 2019 UT 42, ¶5, 449 P.3d 122). But for the sake of finality and judicial efficiency, the Court should grant the Legislature’s petition and could also grant Plaintiffs’ petition to affirm the dismissal of Count Five.

The Utah Constitution vests “[t]he Legislative Power” in the Legislature *and* “the

people of the State of Utah.” Utah Const. art. VI, §1. The Initiative Clause of the Utah Constitution states that “[t]he legal voters ... may: initiate any desired legislation and cause it to be submitted to the people for adoption” *Id.* §1(2)(a)(i)(A). As this Court explained, “[t]he initiative power of the people is ... parallel and coextensive with the power of the legislature.” *Carter*, 2012 UT 2, ¶22. Critically, however, “[t]he laws proposed and enacted by the people under the initiative ... may be amended or repealed by the Legislature at will.” *Id.* ¶27; *cf. Grant*, 2019 UT 42, ¶¶21-34 (approvingly discussing the Legislature’s amendment to Proposition 2 (Medical Cannabis Act)).

In this way, the Utah Constitution differs markedly from the constitutions in several other States, which expressly prohibit their legislatures from repealing or amending laws enacted through popular initiatives. *Op.* 58 n.33 (collecting citations from ten state constitutions). The Utah Constitution places no such restrictions upon the Legislature. “In the absence of any such limitation, the legislature can immediately render such laws ineffective by amendment.” *Statutes subject to amendment—Acts enacted by initiative and referendum*, 1A Sutherland Statutory Construction §22:6 (7th ed.).

Against this weight of authorities, Plaintiffs alleged in Count Five that the Legislature “exceeded its constitutionally granted power when it repealed Proposition 4 and negated the people’s government reform measure.” Compl. ¶317, Doc. 1. Not so. The Legislature amended Proposition 4 to retain its constitutional responsibility to redistrict and made the proposals from the Independent Redistricting Commission advisory. *See* Utah Code §20A-20-303(5) (“[T]he Legislature may, but is not required to, ... adopt a map submitted ... by the

commission.”); *see also* Utah Const. art. IX, §1 (“[T]he Legislature shall divide the state into congressional ... districts accordingly.” (emphasis added)).

The district court correctly dismissed this claim for failure to state a claim. Op. 55-59. But because the district court has not yet “certifie[d] [the] order as final under rule 54(b) of the Utah Rules of Civil Procedure,” Plaintiffs cannot appeal the dismissal of Count Five as of right. *Powell*, 2008 UT 19, ¶13. For the reasons further discussed in the next section, the Court should grant the Legislature’s petition for interlocutory appeal—which likely will dispose of this litigation or at least substantially streamline it—and when it does so there is no reason to delay reviewing the district court’s order on Count Five. The Legislature agrees with Plaintiffs that “[n]o interest would be served by this [C]ourt’s reviewing challenges to different portions of the same order at different stages of this litigation.” Pls. Pet. 3.

II. Plaintiffs’ primary argument—that this Court should deny the Legislature’s petition—is wrong.

Plaintiffs principally assert that “*denying* interlocutory review will materially advance the termination of this litigation.” Pls. Pet. 3; *see also* Pls. Reply Mem. at 2 (“the purpose of Plaintiffs’ interlocutory appeal petition” is to “urge[] the Supreme Court to *deny* Defendants’ petition for interlocutory review”). That bald assertion was wrong when written and is even more so now, read in light of the district court’s opinion issued after the Legislature filed its petition. In fact, the district court’s opinion confirms that this Court’s immediate review is now indispensable to “better serv[ing] the administration and interests of justice.” Utah R. App. P. 5(g).

A. Justiciability. Now that the district court has released its opinion, it’s even plainer to see how accepting Plaintiffs’ invitation to “*deny*[] interlocutory review” (Pls. Pet. 3) of the

Legislature’s justiciability questions will inevitably prolong this litigation and drive up litigation costs borne by taxpayers. The district court itself acknowledged that “[m]any of the issues raised in this case are matters of first impression, including whether partisan redistricting / gerrymandering presents a purely political question.” Op. 10. It nevertheless concluded that “nothing in the Utah Constitution restricts that [redistricting] power to the Legislature or states that such power is exclusively within the province of the Legislature.” *Id.* at 11-12. And it answered the Legislature’s political-question arguments with the generalized assertion that “the constitutionality of legislative action is not beyond judicial review.” *Id.* at 12.

The first conclusion cannot be reconciled with the text of the Separation of Powers Clause in Article V, §1, or Article IX’s vesting of redistricting power in the Legislature, or this Court’s political-questions doctrine caselaw. *See* Legis. Pet’n 6-11; *Matter of Childers-Gray*, 2021 UT 13, ¶62, 487 P.3d 96. And the second conclusion is question begging because nonjusticiable political questions *by definition* are beyond judicial review. On that score, the district court’s opinion never grapples either with the fact that redistricting is “root-and-branch a matter of politics,” *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.), or the reality that courts cannot decide “How much [partisanship] is too much?” and related questions “unguided and ill suited to the development of judicial standards,” *Rucho v. Common Cause*, 139 S.Ct. 2484, 2501 (2019) (quoting *Vieth*, 541 U.S. at 296)). Nothing in the Utah Constitution’s express text or in this Court’s precedents suggests otherwise.

Nor does the Utah Constitution contain express or implied judicially manageable standards to resolve Plaintiffs’ partisan-fairness claims. A lack of such standards is a tell-tale sign of a political question. *Matter of Childers-Gray*, 2021 UT 13, ¶64; *see also* Legis. Pet. 8-10;

Rucho, 139 S.Ct. at 2507 (observing that “[j]udicial review of partisan gerrymandering” is not governed by “standard,” “rule,” or “reasoned distinctions found in the Constitution or laws” (emphases removed)); *Johnson v. Wis. Elections Comm’n*, 2021 WI 87, ¶41, 967 N.W.2d 469 (observing that “[t]he lack of standards by which to judge partisan fairness is obvious” and holding that partisan fairness is a political question); *Rivera v. Schwab*, 512 P.3d 168, 187 (Kan. 2022) (similar).

The district court’s opinion does not answer those arguments. It suggests that judicially manageable standards exist, *see* Op. 16, but does not identify them. Without this Court’s interlocutory review, the parties will be making it up as they go along. The district court has stated that it will “determine what criteria or factors should be considered in this case, under Utah law,” as “this case proceeds through litigation and with specific input from both parties.” *Id.* at 19. That admittedly standardless tack will result in scores of fact discovery disputes about what is and is not relevant, unfocused expert discovery, and tens or hundreds of thousands of dollars in related costs borne by taxpayers—all of which might prove wholly unnecessary. Given those alternatives to interlocutory review, granting the petitions plainly “will better serve the administration and interests of justice.” Utah R. App. P. 5(g).

At bottom, and despite 60 pages of analysis, the district court’s opinion leaves unanswered the first question of any partisan-gerrymandering test: “[H]ow much is too much? And are there any manageable and neutral judicial standards by which judges can decide that question without resort to our own partisan biases?” *Rivera*, 512 P.3d at 183; *see also* Legis. Pet’n 8-10. Contrary to Plaintiffs’ suggestion, denying interlocutory review—and leaving that question unanswered until after a trial—will not “materially advance the termination of the

litigation.” Pls. Pet. 3. Only this Court can dispositively resolve the bedrock separation-of-powers and justiciability questions presented and thereby “dispose of” this litigation. *Powell*, 2008 UT 19, ¶13 n.17. It should do so.

B. Cognizability. Compounding that problem, “*denying* interlocutory review,” Pls. Pet. 3, would leave the parties without definitive answers about *what specific constitutional claims* in Plaintiffs’ complaint are cognizable, and under what rules of decision. On interlocutory review, this Court might “dispose of” this litigation, *Powell*, 2008 UT 19, ¶13 n.17, by deciding that some or all of the constitutional provisions invoked in Plaintiffs’ complaint do not contain a cognizable implied claim. *See* Legis. Pet’n 11-18. (Plaintiffs’ claims must be based on an implied constitutional right, for not one of the constitutional provisions they cite *expressly* precludes partisan gerrymandering.) Here too, the district court’s acknowledgment that “the constitutional provisions Plaintiffs cite have *never* been applied by Utah courts for redistricting claims” is further support for interlocutory review. Op. 17 n.5 (emphasis added).

All this confirms that Plaintiffs have it exactly backwards. Immediate review is “essential to adjudicate principles of law or procedure in advance as a necessary foundation upon which the trial may proceed.” *Houghton*, 2008 UT 86, ¶14. Consider the course this case will take if the parties press ahead now without knowing those principles of law and governing standards. To start, each partisan-gerrymandering case presents the threshold question of whether the alleged (implied) constitutional ban on partisan gerrymandering means *any* partisan considerations are prohibited—or whether *some* partisan considerations are permitted, just not *too much*. Compare Op. 44 (“There is no legitimate legislative objective in ... seeking partisan advantage through redistricting”), with *Rucho*, 139 S.Ct. at 2497 (explaining some

partisan considerations are necessarily permissible), *and Rivera*, 512 P.3d at 185 (similar). An answer to that question of constitutional law will necessarily affect not only the trial but also the course of discovery.

Consider also the effect it has on the parties' resources. If the Constitution (impliedly) makes partisan considerations *entirely* impermissible, discovery could be streamlined, potentially excluding costly expert discovery about what is "fair" altogether. But if *some* partisan considerations are permissible, how ought discovery proceed without knowing how much partisanship in redistricting is *too much*? See, e.g., *Rucho*, 139 S.Ct. at 2499-2501.

And once the parties know the (implied) judicially manageable standard for "fairness," is the right "test" a "mean-median difference" analysis? An "efficiency gap" analysis that measures "wasted" votes? A "lopsided margins test"? A "partisan symmetry" analysis? Rough proportionality? Or something else altogether? Compare *Harper v. Hall*, 868 S.E.2d 499, 547-49 (N.C. 2022) (endorsing various tests), with *Rucho*, 139 S. Ct. at 2499 (rejecting proportionality), and *Gill v. Whitford*, 137 S. Ct. 1916, 1933 (2018) (criticizing efficiency gap); see also *Rucho*, 139 S. Ct. at 2500 ("There is a large measure of 'unfairness' in any winner-take-all system. Fairness may mean a greater number of competitive districts"; or perhaps "a 'fairer' share of seats ... is most readily achieved by ... engaging in cracking and packing, to ensure each party its 'appropriate' share of 'safe' seats"; or perhaps it is "measured by adherence to 'traditional' districting criteria" (quotation marks omitted)).

And then, under those tests, how ought the partisanship of a district be appropriately measured in a court proceeding (versus by a political pollster)? How, for example, should courts categorize independents, split-ticket voters, and non-voters? And how should courts

assure that redrawn districts are “fair”? Is it necessary for a court to guarantee the Plaintiffs’ preferred political party will win, lest their votes be “meaningless” (Op. 54-55)?

The district court’s opinion leaves all those questions open. So much for Plaintiffs’ contention that “*denying* interlocutory review will materially advance the termination of the litigation.” Pls. Pet. 3. If this Court were to decide these questions *after* discovery and a trial in a way that keeps Plaintiffs’ claims alive, the Legislature would have every right to go back and retry the case based on those after-the-fact standards. It is a waste of time and resources, and fundamentally unfair, to have the Legislature defend against Plaintiffs’ claims *first* and only find out *later* what the rules are.

One brief final note on cognizability: the district court’s opinion analyzing each of Plaintiffs’ four surviving claims—under the Free Elections Clause, art. I, §17; the Qualifications Clause, art. IV, §2; the Uniform Operations Clause, art. I, §24; and the Free Speech and Association Clauses, art. I, §§1, 15—contains a number of legal errors first apparent to the Legislature only after it filed its petition (because the opinion had not yet been released). *See* Op. 25-55. Rather than address them all here, the Legislature highlights one problem common to them all that by itself justifies this Court’s interlocutory review.

Under this Court’s precedents, constitutional interpretation “seek[s] to ascertain and give power to the meaning of the [constitution’s] text as it was understood by the people who validly enacted it as constitutional law.” *Richards v. Cox*, 2019 UT 57, ¶13, 450 P.3d 1074; *see also Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶95, 416 P.3d 663 (holding that Utah constitutional analysis is an “originalist inquiry” that aims to “ascertain[] the ‘original public meaning’ of the constitutional text”). This inquiry’s “focus is on the objective original public

meaning of the text, not the intent of those who wrote it.” *S. Salt Lake v. Maese*, 2019 UT 58, ¶19 n.6, 450 P.3d 1092. That is, a court’s interpretive “task is to understand what” a constitutional provision “meant to those who voted to approve the Utah Constitution”—to discern “what the general public understanding was at the time of statehood.” *Id.* ¶21 & n.7; *see also Neese*, 2017 UT 89, ¶96 (stating original public meaning inquiry asks “what principles a fluent speaker of the framers’ English would have understood a particular constitutional provision to embody”).

Denying the Legislature’s petition here would all but render those precedents a nullity in one of the most important separation-of-powers cases to reach Utah’s courts in decades. Nowhere in the opinion does the district court purport to conclude that the voters who ratified those constitutional provisions in 1896 understood *even one* of them to guarantee Platonic notions of partisan “fairness” in redistricting. That the constitutional inquiry occurs at that level of specificity is the lesson of *American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235. There, the Court stated that the “first step in our analysis must be to determine whether nude dancing is a protected right under the freedom of speech clauses of the Utah Constitution.” *Id.* ¶8; *see also, e.g., id.* ¶23 (“We must therefore consider the text in its historical context in order to discern if the constitution’s framers intended to limit the government’s power to regulate nude dancing.”); *id.* ¶54 (“There remains, however, the specific question of whether nude dancing falls within the unprotected category of obscenity or whether the citizens of Utah intended to protect it under its free speech provisions.”).

Just as *American Bush* focused on whether, at the time of ratification, *nude dancing specifically* was an (impliedly) protected component of constitutional free speech, so too must

the analysis here focus on whether *prohibiting or limiting considerations of partisanship in redistricting specifically* was a generally (though impliedly) understood purpose of the Free Elections, Qualifications, Uniform Operations, or Free Speech and Association Clauses. But no conclusion or holding on this question appears anywhere in the district court’s analysis as to any one of Plaintiffs’ invoked provisions. The opinion comes closest to this when analyzing the Free Elections Clause, *see* Op. 25-35, but even there the district court did not purport to conclude that this clause’s original public meaning included an (implied) ban *specifically on considering partisanship in redistricting*. The analysis of the other three invoked provisions does not contain any original-public-meaning analysis at all.

This Court’s original-public-meaning precedents are both correct and well established. They’re worth preserving and following. Yet the district court’s opinion does neither. “[P]ermit[ting] the district court proceedings to progress on an expedited track,” Pls. Pet. 4, despite those failures makes those precedents hardly worth the paper they’re printed on. This Court should grant the Legislature’s petition if only to confirm that those cases really do mean what they say.

* * *

If, on interlocutory appeal, this Court agrees with the Legislature that the Free Elections, Qualifications, Uniform Operations, and Free Speech and Free Association Clauses give courts no warrant to act as a super-legislature to facilitate Plaintiffs’ preferred partisan outcomes, *see* Legis. Pet’n 11-18, then interlocutory review will “dispose of” this case altogether, *Powell*, 2008 UT 19, ¶13 n.17. And even if Plaintiffs’ claims are justiciable and cognizable, it is “essential to adjudicate principles of law” governing Plaintiffs’ novel claims

““in advance as a necessary foundation upon which the trial may proceed.”” *Houghton*, 2008 UT 86, ¶14. So whether this Court holds that Plaintiffs fail to state a claim, or provides definitive standards to govern discovery and trial, either outcome will—contrary to Plaintiffs’ protestations, *see* Pls. Pet. 3-4—“materially advance the termination of the litigation” and greatly serve judicial economy. Utah R. App. P. 5(c)(1)(D).

Nor are Plaintiffs correct to suggest that “a factual record” is necessary for this Court’s immediate review. Pls. Pet. 1. Questions involving the meaning of the “term[s] ... used in the Utah Constitution” and the “threshold question of justiciability” are “question[s] of law,” that this Court can resolve now. *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 2019 UT 7, ¶25-27 439 P.3d 593. The same is true of whether Plaintiffs state cognizable claims: a Rule 12(b)(6) motion “challenges the plaintiff’s right to relief based on [the] facts” “alleged in the complaint” and constitutes “a question of law” that does not require a factual record. *Christiansen v. Harrison W. Constr. Corp.*, 2021 UT 65, ¶10, 500 P.3d 825.

III. Extraordinary separation-of-powers concerns and the interests of judicial economy cry out for this Court’s prompt resolution of the petitions for interlocutory review.

This Court’s prompt resolution of the pending petitions is necessary to “better serve the administration and interests of justice.” Utah R. App. P. 5(g). On November 30, 2022, the district court held a scheduling hearing, resulting in two orders relevant here.

First, the Legislature had moved to stay proceedings in the district court pending this Court’s resolution of the petitions for interlocutory appeal. That motion was based on the significant impact to the public fisc that time- and cost-intensive fact and expert discovery are certain to have—even though this Court is on the precipice of deciding whether to grant

interlocutory review and decide whether Plaintiffs’ claims are even justiciable or cognizable. At the November 30 hearing, however, the district court denied the Legislature’s motion to stay. *See* Order Denying Stay 2 (Dec. 2, 2022), Doc. 162 (Ex. C). But the district court noted that it “will reconsider if the Utah Supreme Court grants [the Legislature’s] petition for interlocutory appeal.” *Id.*

Second and simultaneously, the district court granted Plaintiffs’ request to amend the scheduling order, starting fact and expert discovery *now*. Am. Sched. Order at 2, Doc. 163 (Ex. B). Under this schedule, fact discovery has already begun. And Plaintiffs’ expert reports are due on January 18, 2023; Defendants’ expert reports are due on February 17, 2023; Plaintiffs’ rebuttal expert reports are due on March 3, 2023; and discovery closes on March 15, 2023. *Id.* The extent and cost of expert litigation in redistricting cases is significant: In similar litigation, plaintiffs and defendants have offered expert opinions from multiple experts on each side, including mathematical scientists and statisticians, political scientists, demographers, and more.² The cost for typical expert discovery in a redistricting case will exceed tens of thousands of dollars *per expert* and can often exceed \$100,000 for certain types of experts. (Those substantial costs would multiply if there were a remand.)

Besides yielding wasted costs, pressing ahead without interlocutory review has serious separation-of-powers ramifications. Last Friday at 7:02 pm, Plaintiffs served their first set of

² In addition to offering traditional expert opinions on demography or political science, Plaintiffs have approached recent redistricting cases by enlisting experts who can generate thousands or millions of computer-simulated redistricting plans as comparators to the Legislature’s human-enacted plan. *See, e.g., Harper*, 868 S.E.2d at 516-22 (describing plaintiffs’ 5 experts and defendants’ 3 experts); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 770-81 (Pa. 2018) (detailing petitioners’ 4 experts and respondents’ 2 experts).

fact discovery requests on the Legislature, including requests for production of documents and interrogatories. Portions of those discovery requests plainly implicate potential legislative immunity and privilege issues under the Speech or Debate Clause and common law. *See, e.g.,* Utah Const. art. VI, §8; *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977) (legislative testimony “frequently will be barred by privilege”); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (showing the historical “taproots” of “[t]he privilege of legislators to be free from ... civil process”); *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015) (quashing document production subpoenas issued to legislators); *In re Perry*, 60 S.W.3d 857, 861-62 (Tex. 2001) (barring testimony of the Legislative Redistricting Board members performing legislative functions).

And it turns out that the Legislature is not Plaintiffs’ only target. Earlier today, Plaintiffs sent subpoenas to two out-of-state entities and one out-of-state individual (via those persons’ attorney in Washington, D.C.) seeking documents and setting a non-party deposition for January 17, 2023. *Nonparties across the country* thus now must incur actual expenses because of fact discovery in this case—even though no binding precedent from this Court confirms that Plaintiffs’ claims are justiciable and cognizable.

The upshot of the district court’s orders from the November 30 scheduling hearing is that both fact and expert discovery are fully underway, with the Legislature’s discovery responses due before the end of the calendar year. All this despite significant unanswered questions about what rules even govern this case, and new questions about legislators’ immunities and privileges implicated by Plaintiffs’ ongoing discovery.

But as noted, the district court has expressly invited the Legislature to renew its motion to stay the proceedings in that court if this Court grants the petitions for interlocutory review. The Legislature intends to accept that invitation if given the chance, and to seek further relief from this Court should those efforts fail to address the Legislature's constitutional concerns. Those motions would be necessary not just to protect the Legislative Defendants' constitutional privileges and immunities, but to vindicate their rights under Utah Rule of Civil Procedure Rule 1. After all, there would be nothing "just" or "inexpensive" about conducting tens or hundreds of thousands of dollars of fact and expert discovery on claims in district court if this Court were to grant the petitions and thus simultaneously decide the predicate question of whether those *same claims* are justiciable or cognizable in the first place. Because a decision from this Court on the interlocutory petitions is a necessary precursor to a renewed motion, the Legislature respectfully urges this Court to grant or deny the petitions as soon as practicable.

CONCLUSION

The Court should grant both the Legislature's and Plaintiffs' petitions for interlocutory review, and enter an order on the petitions as soon as practicable.

DATED: December 6, 2022

/s/ Tyler R. Green

Tyler R. Green

Counsel for Legislative Defendants

CERTIFICATE OF COMPLIANCE

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

/s/ Tyler R. Green

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2022, a true, correct and complete copy of the foregoing was filed with the Court and served via electronic mail as follows:

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Attachments

(A) The district court's Opinion (Nov. 22, 2022), Doc. 140

(B) The district court's Amended Scheduling Order (Dec. 2, 2022), Doc. 163

(C) The district court's Order Denying Stay (Dec. 2, 2022), Doc. 162