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Counsel for Legislative Defendants

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

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX, *Plaintiffs*, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, *Defendants*.	**LEGISLATIVE DEFENDANTS' OBJECTION TO PLAINTIFFS' STATEMENT OF DISCOVERY ISSUES RE: LEGISLATIVE PRIVILEGE** Case No. 220901712 Honorable Dianna Gibson

Imagine that a party asked this Court to weigh in on "predicate legal issues" about the "qualifications and scope" of the attorney-client privilege or state sovereign immunity. SODI at 1-2. This Court could not entertain that request, for Utah courts "do not 'decide abstract questions.'" *Salt Lake Cnty. v. State*, 2020 UT 27, ¶37, 466 P.3d 158. Rather, in Utah courts, requests for court decisions are "unripe unless a court's legal determination" can "be applied to specific facts in the case." *Id.* ¶20. "This is true even where we have 'no[] doubt' that the factual circumstances in which the legal determination would be applied will 'arise at some future time.'" *Id.*

Ignoring *Salt Lake County*, Plaintiffs' counsel ask this Court for an advisory opinion about legislative immunity and privilege outside the context of a specific discovery dispute. Plaintiffs' Statement of Discovery Issues is premature. It circumvents the Court's scheduling order and the Utah Rules of Civil Procedure. And it misstates principles of legislative immunity and privilege, and speculates as to how the Legislative Defendants will respond to pending discovery requests without allowing them to answer those requests in the normal course. Under *Salt Lake County*, the Court should deny Plaintiffs' request outright. But if it does not, it should allow additional and adequate briefing on the scope of legislative immunity and privilege, including under the Utah Constitution's Speech or Debate Clause, so that the parties can properly brief, and the Court properly decide, these critical questions.

A. Plaintiffs' request is not ripe. When this Court denied Legislative Defendants' motion to dismiss, the Court acknowledged that the Speech or Debate Clause "issues raised by Defendants are legitimate questions that the Court will address *if and when* the issues are *fully ripe and briefed*." Op. 22 n.11 (Nov. 22, 2022), Doc. 140 (emphasis added). Plaintiffs' counsel then served discovery requests on all Legislative Defendants on December 2. SODI Ex. A (RFPs); Ex. B (Interrogatories). Legislative Defendants have until December 30 to respond. *See* Utah R. Civ. P. 33(b), 34(b)(2); Doc. 163, Order (Dec. 2, 2022). But on December 15—more than two weeks before that deadline—Plaintiffs' counsel initiated a call. In Plaintiffs' telling, counsel wished to ask only "basic, elementary questions" to

"crystalize" the parties' disagreement over the scope of legislative immunity and privilege. SODI at 1. In reality, Plaintiffs' counsel wanted Legislative Defendants' counsel to proceed through and respond verbally to each individual document request and interrogatory. Legislative Defendants' counsel explained they would serve their responses and objections by December 30, not two weeks early by phone, and that motions practice before then was premature and a waste of the parties' resources.

Plaintiffs' SODI subverts the normal process for resolving discovery disputes. This Court has acknowledged that any disputes over legislative immunity and privilege would be considered once "fully ripe and briefed." Op. 22 n.11. For that to happen, Legislative Defendants must first serve their responses and objections—within the time allotted by the rules—and then the parties will meet and confer to clarify and narrow the scope of any disagreements. If a motion to compel discovery is still necessary, it should follow that process, not precede it, as Plaintiffs urge here. There is no basis to exempt this case from that normal process for resolving discovery disputes. After all, this case is already proceeding on a compressed schedule following expedited briefing and argument on scheduling issues (and a resulting agreed-upon scheduling order following the Court's ruling). If Plaintiffs had wanted further exceptions from the normal rules, they could have sought them then. They didn't.

Plaintiffs' request exemplifies why courts refuse to entertain unripe discovery disputes. Plaintiffs suggest, for example, that all Legislative Defendants will "refuse to engage in discovery," SODI at 2, even though Legislative Defendants explained on December 15 that issues of legislative privilege necessarily depend on the particulars of each request and to whom it is directed. Deciding abstract legal questions created by Plaintiffs' speculation now, versus waiting until any actual discovery disputes are ripe, would result in "rendering advisory opinions on matters that may not impact the parties to a case." *Carter v. Lehi City*, 2012 UT 2, ¶93, 269 P.3d 141. Worse yet, deciding issues of legislative immunity and privilege under Article VI, §8 before they are ripe and fully briefed "intrud[es] on legislative functions by unnecessarily ruling on sensitive constitutional questions." *Id.*

B. Plaintiffs err on the merits. On the merits, Plaintiffs ignore the relevant law that would apply to any legislative immunity and privilege dispute.[1] The claims here arise under Utah law and are pending in a Utah court. Attendant legislative immunity and privilege issues are thus governed in part by Utah's Speech or Debate Clause. Utah Const. art. VI, §8. *But Plaintiffs' SODI never cites the Speech or Debate Clause*. Worse, Plaintiffs contend that the Speech or Debate Clause's protections are "privilege[s] never recognized by any Utah court." SODI at 1. That's an unexpected assertion from a firm that represented the State in one of at least four previous cases where Utah courts did just that.[2]

Those prior Utah decisions comport with U.S. Supreme Court holdings interpreting the U.S. Constitution's express Speech or Debate Clause to confer robust immunity and privilege for congressmembers and staff in civil cases,[3] and with other States' supreme court decisions interpreting their express speech or debate clauses to confer similarly robust immunity and privilege. *See, e.g.*, *Edwards v. Veiind*, 292 Va. 510, 528-29 (2016) (relying on Virginia Speech or Debate Clause to quash discovery of "communications or acts integral to the sphere of legitimate legislative activity"); *In re Perry*, 60 S.W.3d 857, 859-60 (Tex. 2001) (relying on Texas Speech or Debate Clause to bar discovery). Plaintiffs counter with a Florida Supreme Court decision, SODI at 4 n.4, but that does Plaintiffs no good. In the words of the Florida Supreme Court, "Florida *stands apart* from many other states in lacking a constitutional Speech or Debate clause."[4] In short, the express Speech or Debate Clause in Utah (like

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[1] Legislative Defendants cannot properly address the merits of their legislative immunity and privilege arguments in two pages of briefing but briefly address Plaintiffs' more erroneous claims and omissions.
[2] *See, e.g.*, Order, *Alpine Realty, Inc. v. AmericanWest Bank*, No. 100404356 (Fourth Dist. Ct. Apr. 2, 2014) (quashing a third-party subpoena to a legislator) & Mot. to Quash (Ex. A); Order, *Utah Pub. Emps. Ass'n v. State*, No. 050911548-mi (Third Dist. Ct. Nov. 14, 2005) (same) (Ex. B); Order, *Vasiliou v. Ray*, No. 090905576 (Third Dist. Ct. June 30, 2009) (dismissing suit against a legislator because he is "immune from suit" under Art. VI, §8) (Ex. C); Order, *Ivie v. State*, No. 030400804 (Third Dist. Ct. Oct. 15, 2003) (dismissing suit against legislators because they are "absolutely immune from suit") (Ex. D).
[3] *See, e.g.*, *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973); *Gravel v. United States*, 408 U.S. 606, 615-17, 625 (1972); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967).
[4] *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 151-52 (Fla. 2013) (emphasis added). Likewise, Plaintiffs again misread *Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128. That

in Virginia and Texas) is the defining feature of Legislative Defendants' arguments. By refusing to cite or grapple with that clause (or others like it), Plaintiffs ignore the dispositive issue.

That alone distinguishes the proper immunity and privilege analysis here from the analyses in Plaintiffs' cherry-picked, out-of-state federal district court decisions purporting to apply federal common law. *See* SODI at 3-4 & n.3. Plaintiffs' preferred balancing test—a bespoke test for redistricting-related discovery that originated in the Eastern District of New York[5]—does not govern here. Nor should it. It has evaded federal appellate review and is contrary to decisions by federal courts of appeals, including in redistricting cases.[6] In practice, Plaintiffs' bespoke test imposes no more limits on discovery of legislators than the existing rules for relevant and proportionate discovery. *See* Utah R. Civ. P. 26. More to the point, no federal court can limit the parameters of a State's speech or debate clause. *See* Fed. R. Evid. 501 (applying federal privilege law for federal causes of action).

Finally, there is no "waiver." SODI at 2. Legislative Defendants have been involuntarily sued, making Plaintiffs' reliance on cases in which legislators *voluntarily* intervened inapposite. Because the Court denied Legislative Defendants' requests to dismiss and stay the case, they have no choice but to propound discovery. If Plaintiffs want to avoid Defendants' discovery, they can dismiss their suit.

The Court should deny Plaintiffs' request for an advisory opinion on these substantial constitutional questions. At a minimum, further briefing—and an actual discovery dispute—are necessary (but still-absent) predicates to any decision about the scope of Utah's Speech or Debate Clause.

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case does not *constrain* legislative immunity and privilege; it *extends* those protections beyond legislators and staff to members of the public. *Id.* ¶¶7-8.

[5] *See Favors v. Cuomo*, 285 F.R.D. 187, 209-10 (E.D.N.Y. 2012).

[6] Plaintiffs omit federal courts of appeals decisions limiting discovery on legislative immunity or privilege grounds. *See, e.g.*, *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018) ("we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances'"); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 80-81 (1st Cir. 2021) (granting advisory writ of mandamus to bar depositions of former governor, former speaker, and former legislator); *In re Hubbard*, 803 F.3d 1298, 1307-08 (11th Cir. 2015) (quashing subpoenas for documents).

Dated: December 23, 2022

Respectfully submitted,

/s/ *Tyler R. Green*
Tyler R. Green
Counsel for Legislative Defendants-Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true, correct and complete copy of the foregoing document was e-filed which notifies all registered counsel.

/s/ *Tyler R. Green*

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Attorneys for Representative Gage Froerer

IN THE FOURTH JUDICIAL DISTRICT COURT,
IN AND FOR UTAH COUNTY, STATE OF UTAH

ALPINE REALTY, INC., a Utah Corporation, Plaintiff, vs. AMERICANWEST BANK, f/k/a/ FAR WEST BANK, a Washington Corporation, Defendant	**PROPOSED ORDER GRANTING REPRESENTATIVE GAGE FROERER'S MOTION TO QUASH SUBPOENA AND DENYING AMERICANWEST'S MOTION TO COMPEL** Case No: 100404356

	Judge: STEVEN L. HANSEN
AMERICANWEST BANK, f/k/a/ FAR WEST BANK, a Washington Corporation, Counter-Plaintiff vs. ALPINE REALTY, INC., a Utah Corporation, Counter-Defendant	

Upon consideration of Representative Gage Froerer's ("Rep. Froerer") Motion to Quash Subpoena, submitted to the court on September 6, 2013, AmericanWest Bank's Motion to Compel Attendance of Gage Froerer at a Deposition and to Produce Documents, submitted on October 9, 2013, the parties' supporting and opposing memoranda, and the oral arguments presented by counsel on January 13, 2013 and subsequent supplemental memoranda, the Court entered a Memorandum Decision on March 17, 2014, and ORDERS, ADJUDGES, and DECREES that:

1. Representative Gage Froerer's Motion to Quash Subpoena is hereby GRANTED, and
2. AmericanWest Bank's Motion to Compel Attendance of Gage Froerer at a Deposition and to Produce Documents is hereby DENIED.

Dated this ____ day of _____, 2014.

Hon. Judge Steven L. Hansen

Fourth Judicial District Court

Copies to:

Elaine A. Monson, AmericanWest Bank
Steven W. Call, AmericanWest Bank
Aaron R. Harris, Alpine Realty, Inc.
Stephen Quesenberry, Alpine Realty, Inc.

CERTIFICATE OF SERVICE

I certify that on March 31, 2014, a true and correct copy of the foregoing Proposed Order Granting Representative Gage Froerer's Motion to Quash Subpoena and Denying AmericanWest's Motion to Compel was served on the following by having been submitted for electronic filing:

Elaine A. Monson, American West Bank
Steven W. Call, American West Bank
Aaron R. Harris, Alpine Realty, Inc.
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/s/ Kristen Ricks

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IN THE FOURTH JUDICIAL DISTRICT COURT,
IN AND FOR UTAH COUNTY, STATE OF UTAH

ALPINE REALTY, INC., a Utah Corporation, Plaintiff, vs. AMERICAN WEST BANK, f/k/a/ FAR WEST BANK, a Washington Corporation, Defendant	**REPRESENTATIVE GAGE FROERER'S MOTION TO QUASH SUBPOENA** Case No: 100404356
AMERICAN WEST BANK, f/k/a/ FAR WEST BANK, a Washington Corporation, Counter-Plaintiff vs. ALPINE REALTY, INC., A Utah Corporation, Counter-Defendant	Judge: STEVEN L. HANSEN

Pursuant to Rule 45(e)(3) of the Utah Rules of Civil Procedure, Representative Gage Froerer, by and through his counsel Eric Weeks and RuthAnne Frost of the Office of Legislative

Research and General Counsel, submits this motion to quash a subpoena directed to him in this case. This motion is based on the ground that legislative immunity provides Rep. Froerer with a testimonial privilege and a protection against inquiry into his motives as a legislator.

Rep. Froerer is the legislative sponsor of H.B. 290, Division of Real Estate Amendments, which is the subject of this subpoena. His testimony is privileged under the legislative testimonial privilege provided in Article VI, Section 8 of the Utah Constitution and common law. Furthermore, the doctrine of legislative immunity should be extended to documents that reveal the motivations and deliberations behind legislation. Therefore, a subpoena for his testimony and documents is inappropriate.

Rep. Froerer has provided an affidavit in response to the subpoena that acknowledges some of the documents requested by the Defendant/Counter-Plaintiff are public documents, provides electronic access to those documents, and indicates that Rep. Froerer has no recollection of conversations with any of the people described in the subpoena. He requests that the subpoena be quashed and he be released from any further obligation to produce records of appear for testimony pursuant to the subpoena.

This motion is more fully supported by the accompanying memorandum.

Respectfully submitted this 6th day of September, 2013.

/s/ RuthAnne Frost
RuthAnne Frost
Eric N. Weeks
Attorneys for Rep. Gage Froerer

CERTIFICATE OF SERVICE

I certify that on September 6, 2013, a true and correct copy of the foregoing Motion to Quash Subpoena was served on the following by having been submitted for electronic filing:

Elaine A. Monson, American West Bank
Steven W. Call, American West Bank
Aaron R. Harris, Alpine Realty, Inc.
Stephen Quesenberry, Alpine Realty, Inc.

/s/ Jennifer Christopherson

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Attorneys for Representative David Clark

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

UTAH PUBLIC EMPLOYEES ASSOCIATION and ROES 1 through 5, Plaintiffs, vs. STATE OF UTAH, Defendant.	ORDER GRANTING REPRESENTATIVE DAVID CLARK'S MOTION TO QUASH SUBPOENAS Civil No. 050911548 mi Judge William W. Barrett

Representative David Clark's Motion to Quash Subpoenas came for hearing before the above-entitled court, the Honorable William W. Barrett presiding, on November 1, 2005. Benson L. Hathaway and Christopher S. Hill of Kirton & McConkie appeared on behalf of plaintiffs; Clark Waddoups and Heidi E.C. Leithead of Parr, Waddoups, Brown, Gee & Loveless appeared on behalf of defendant; and M. Gay Taylor and Robert H. Rees of the Office of Legislative Research and General Counsel appeared on behalf of Representative David Clark.

After considering the written memoranda and oral arguments of counsel, the court concludes that the Speech or Debate Clause of Article VI, Section 8 of the Utah Constitution

provides a testimonial privilege that prevents a legislator from being compelled to testify regarding legislative activities. The court finds that the testimonial privilege applies in this case, preventing Representative Clark from being required to testify concerning his legislative activities with respect to H.B. 213, which is the subject of this action.

Accordingly, the court hereby orders as follows:

1. The motion of Representative David Clark to quash the subpoena commanding him to testify in deposition on November 2, 2005 and the subpoena commanding him to testify at the evidentiary hearing on November 7, 2005 is hereby granted.

2. Those subpoenas are hereby quashed, and Representative Clark is excused from any obligation to testify under those subpoenas.

Dated this 14 day of November, 2005.

BY THE COURT:

William W. Barrett
Third District Court Judge

APPROVED AS TO FORM:

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Christopher S. Hill
Kirton & McConkie
Attorneys for plaintiffs

Clark Waddoups
Heidi E.C. Leithead
Parr, Waddoups, Brown, Gee & Loveless
Attorneys for defendant

CERTIFICATE OF DELIVERY

I hereby certify that on the 8th day of November, 2005, a true and correct copy of the foregoing Order Granting Representative David Clark's Motion to Quash Subpoenas was hand delivered to the following:

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Clark Waddoups
Heidi E.C. Leithead
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and was sent by first class mail, postage prepaid to the following:

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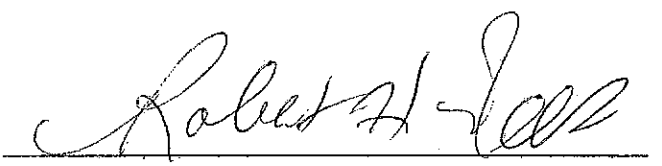

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TOM VASILIOU,	)	ORDER AND
	)	JUDGMENT OF DISMISSAL
Plaintiff,	)	
vs.	)	
	)	
REPRESENTATIVE PAUL RAY,	)	Case No. 090905576
	)	
Defendant.	)	Judge Robert K. Hilder

On May 11, 2009, defendant Representative Paul Ray filed a motion to dismiss plaintiff's complaint. The court issued a ruling dated May 30, 2009 concluding that defendant Representative Paul Ray is immune from suit and that the plaintiff lacks standing. Based upon that ruling, the plaintiff's complaint is dismissed with prejudice.

Dated this 30th day of June, 2009.

Robert K Hilder
Third District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF DELIVERY

I hereby certify that on the 11 day of June, 2009, a true and correct copy of the Order and Judgment of Dismissal was sent by first class mail, postage prepaid, to the following:

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Emily Brown

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Attorneys for defendants Senator John William Hickman and Representative Stephen H. Urquhart

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

RONALD REX IVIE, Plaintiff, vs. STATE OF UTAH, THE UTAH DEPARTMENT OF HEALTH, SEN. JOHN WILLIAM HICKMAN, REP. STEPHEN H. URQUHART, Defendants.	)	ORDER GRANTING LEGISLATIVE DEFENDANTS' MOTION TO DISMISS Case No. 030400804 Judge Michael K. Burton

On June 30, 2003, defendants Senator John W. Hickman and Representative Stephen H. Urquhart ("legislative defendants") filed a motion to dismiss plaintiff's verified complaint. On September 23, 2003, the court, having considered the legislative defendants' motion and the arguments of counsel for all parties, issued a minute entry dated September 23, 2003. Pursuant to the court's ruling in the minute entry that the legislative defendants are absolutely immune from suit for the claims

asserted by plaintiff, the court hereby orders that plaintiff's verified complaint against the legislative defendants be and is hereby dismissed with prejudice and on the merits.

Michael K. Burton 10/15/03

Michael K. Burton,
Third District Court Judge

CERTIFICATE OF DELIVERY

I hereby certify that on the 29 day of September, 2003, a true and correct copy of the foregoing Order Granting Legislative Defendants' Motion to Dismiss was sent to the following:

By first class mail, postage prepaid:

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Cassandra Bauman