In the Supreme Court of the State of Utah

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

v.

Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Brad Wilson, Sen. J. Stuart Adams,
Defendants-Petitioners.

No. 20220991-SC

On interlocutory review from the Third Judicial District Court
Honorable Dianna M. Gibson
No. 220901712

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INTRODUCTION AND SUMMARY OF ARGUMENT

Article I, §2 captures a foundational principle of all American governments: that "government is not a thing imposed upon the people from above, but rather it is an organization created *by* the people." *Duchesne County v. State Tax Comm'n*, 104 Utah 365, 140 P.2d 335, 339 (1943). Utah was thus "founded on" the people's "authority." Utah Const. art. I, §2. And because "'[a]ll political power is inherent in the people,' Utah Const. art. I, §2, only Utah's citizens themselves had the right to limit their own sovereign power to act through their elected officials." *Am. Bush v. City of South Salt Lake*, 2006 UT 40, ¶14, 140 P.3d 1235. Today, the Constitution vests legislative power in the Legislature and in the people directly. *See Carter v. Lehi City*, 2012 UT 2, ¶20, 269 P.3d 141. When legislators act as the representatives of the people or when the people initiate legislation directly, the people's right to alter or reform their government is realized so long as the statute is a proper exercise of legislative power. *Id.*

At bottom, what constitutes a proper exercise of legislative power is a structural question. *See id.* ¶¶32-35. This Court takes an originalist approach to such questions, asking whether the challenged law exceeds the relevant constitutional provision as informed by its text, structure, and history. *See id.* Levels of scrutiny are a poor fit here: a structural violation is a structural violation, no matter how narrowly tailored.

Under any standard, including under any level of scrutiny, S.B. 200 is constitutional. Proposition 4 amended the Utah Code; it did not add new constitutional text, nor could it. Proposition 4 was thus like any other statute—subject to amendment or repeal by the people or their elected representatives through a statute that properly exercised legislative power. S.B. 200 did just that. It was properly "legislative" in nature and furthered the redistricting power

that the people have vested in the Legislature under Article IX. The district court's dismissal of Plaintiffs' Article I, §2 claim should be affirmed.

ARGUMENT

I. The appropriate constitutional analysis is examination of text, structure, and history, not levels of scrutiny.

The Court should interpret Article I, §2 using the same original-public-meaning analysis it applies to other constitutional provisions. *E.g.*, *Patterson v. State*, 2021 UT 52, ¶91, 504 P.3d 92; *South Salt Lake City v. Maese*, 2019 UT 58, ¶18, 450 P.3d 1092. Especially for the Constitution's structural provisions like Article I, §2, that analysis relies on text, structure, and history, *not* on "levels of scrutiny."

A. Constitutional analysis that selects between levels of scrutiny should not be extended to Article I, §2.

1. Levels of scrutiny are a relatively new innovation in American constitutional analysis. "Reasonableness" review emerged in the *Lochner* era and then was replaced by more deferential rational-basis review. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1286-89 (2007). Strict judicial scrutiny emerged in the late 1950s at the U.S. Supreme Court for alleged First Amendment violations. *See* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, Nat'l Affairs (Fall 2019); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal Hist. 355, 361-92 (2006); Fallon, *supra*, at 1284 ("Before 1960 … inquiries into whether infringements of constitutional rights are necessary or narrowly tailored to promote compelling governmental interests [] did not exist.").

This Court's cases track that history. As late as 1988, this Court still had "not expressly addressed the question" whether "legislative classifications affect[ing] fundamental liberties or

involv[ing] suspect classes" triggered "strict scrutiny" under the Utah Constitution. *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 888 n.3 (Utah 1988). Not until 1989, when applying the Uniform Operation Clause, did this Court expressly hold that "the level of scrutiny we give legislative enactments varies." *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989). Modern levels-of-scrutiny analysis in those types of cases entails a "balancing test" that looks at whether a legislative "classification is reasonable," "legislative objectives are legitimate," and the "relationship between the two" is "reasonable." *See, e.g.*, *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 426 (Utah 1995); *see also* Fallon, *supra*, at 1289.

But federal and Utah cases implicating structural questions do not entail balancing.[1] Consider *McCulloch v. Maryland*, 17 U.S. 316 (1819). Asked to decide whether Congress could by statute create a federal bank, the Supreme Court refused to "inquire into the degree of [the law's] necessity," which "would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.* at 423. The Court instead examined "common usage" of the Constitution's terms defining Congress's power and reasoned that so long as the "law is not prohibited" based on that usage, "and is really calculated to effect any of the objects entrusted to the government," that was the end of the matter. *Id.* at 414, 423.

This Court similarly eschewed balancing in *Carter v. Lehi City*—even though that case implicated Article I, §2, *see* 2012 UT 2, ¶21. The Court instead analyzed the scope of the people's initiative power based on "text, structure, and history." *Id.* ¶20; *see id.* ¶¶21-31. It also

[1] Even in cases involving fundamental individual rights, courts have found levels of scrutiny inapplicable. Most recently, the Supreme Court rejected levels-of-scrutiny analysis for the Second Amendment. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127 (2022). The Court resolved the alleged Second Amendment violation based on text, history, and tradition alone. *Id.* at 2129-30.

rejected any analysis that would depend on "balancing 'policy elements'" of an initiative against other factors. *Id.* ¶60; *see id.* ¶¶51-53, 60-64. "The constitution leaves no room" for such balancing: "As judges, our role is to interpret the meaning of the legislative power afforded to the people under the text of article VI. We have no business questioning the wisdom or efficiency of the exercise of the people's constitutional authority, least of all on the ground that the people may not be sophisticated enough to use their power intelligently or efficiently." *Id.* ¶61; *accord Parkinson v. Watson*, 4 Utah 2d 191, 196-97, 291 P.2d 400 (1955).

So too in *Grant v. Herbert*, 2019 UT 42, 449 P.3d 122. There, petitioners argued that Article VI limited the Legislature's power to amend initiative statutes, contending that the "constitutional provision[] precluding a referendum on laws passed by two-thirds of both houses of the legislature (Two-Thirds Provision[]) should not apply to legislation that originated as a citizen initiative." *Id.* ¶26. The Court rejected that argument because the plain text of Article VI's Two-Thirds Provision "d[id] not contain language to suggest" that the provision was "limit[ed] … to legislation that did not amend a citizen initiative." *Id.* ¶30. The Court never weighed the State's "interest" in amending Proposition 2, or considered how "tailored" the amendments in H.B. 3001 were to those interests. And instead of looking to the precise nature of those amendments to determine how closely to scrutinize them, it merely "highlight[ed]" some of the substantive amendments only "[f]or context." *Id.* ¶5 n.2; *see also Salt Lake City v. Int'l Ass'n of Firefighters*, 563 P.2d 786, 789-90 (Utah 1977) (invoking text and tradition of Art. I, §2 and Art. VI to invalidate labor law that authorized "binding determinations" by private arbitrators on the "wages, hours, and other conditions of employment of fire fighters," because "[t]he power conferred on the panel of arbitrators" was "designed to insulate

the decision-making process and the results from accountability within the political process; therefore, it is not an appropriate means of resolving legislative-political issues").

2. The people's right to "alter or reform their government" is a structure-of-government question, making a levels-of-scrutiny analysis a particularly poor fit for analyzing whether that right has been infringed. *See, e.g.*, *See Carter*, 2012 UT 2, ¶22; *Int'l Ass'n of Firefighters*, 563 P.2d at 790. Article I, §2 expresses the people's "inherent authority to allocate governmental power in the bodies they establish by law," *Carter*, 2012 UT 2, ¶21—including their choices about the bounds of legislative power they've vested in the Legislature and in the people directly. In other cases involving constitutional structure, this Court ordinarily does not engage in interest-balancing. *Compare, e.g.*, *id.* ¶¶60-64, *with Matter of Adoption of K.T.B.*, 2020 UT 51, ¶42, 472 P.3d 843 (weighing parental rights against "a number of 'compelling [state] interest[s] in the adoption process'"). Instead, it asks whether the constitutionally ordained allocation of power has been maintained. *See, e.g.*, *Injured Workers Ass'n of Utah v. State*, 2016 UT 21, ¶13, 374 P.3d 14 (Article V "'establishes that there may be exceptions to the separation-of-powers doctrine, but any exception must be found within the Utah Constitution.'" (quoting *State v. Drej*, 2010 UT 35, ¶25, 233 P.3d 476)); *see also id.* ¶¶17-34 (surveying constitutional history to hold that statutory attorney-fee schedule violated Article V).

For identical reasons, deciding whether a legislative act—by the Legislature or the people—offends Article I, §2 should not turn on interest balancing. Suppose, for example, the people tried to "alter or reform their government" through a direct initiative that exercises *executive* power. This Court would not permit such an initiative even if it were supported by a "compelling government interest." *See Carter*, 2012 UT 2, ¶17; *Sevier Power Co. v. Bd. of Sevier*

Cnty. Comm'rs, 2008 UT 72, ¶13, 196 P.3d 583 (2008) (initiatives may present "[o]nly matters of a legislative nature"). Likewise, no compelling government interest could justify the Legislature's vesting this Court with police power to legislate new criminal statutes and prosecute violators without involving either the legislative or executive departments. *Cf. Injured Workers Ass'n of Utah*, 2016 UT 21, ¶43 (one branch "cannot delegate the power" within its "exclusive authority" to another branch). In short, this Court has always looked to text, structure, and history to answer disputes about whether governmental actions fall within the constitutional boundaries set by the people; it has never looked to how "reasonable" or "compelling" the reasons for the breach are. After all, to paraphrase Theodor Geisel, a structural violation is a structural violation, no matter how small or narrowly tailored. *Cf.* Dr. Seuss, *Horton Hears a Who!* (Random House 1954).

In sum, a case implicating Article I, §2 should turn on text, structure, and history, and additional means-ends analysis is one step too many. As *Carter* explained when considering whether an initiative exceeded the people's power, "[t]he people's initiative power reaches to the full extent of the legislative power, but no further." 2012 UT 2, ¶31. *Carter* then "refer[red] to historical uses of similar government power" to determine whether an initiative was appropriately "legislative." *Id.* ¶78. For identical reasons, whether a statute passed by the Legislature exceeds the people's power to "alter or reform their government" depends on whether the statute was appropriately "legislative" in view of the constitutional text, structure, and history.

B. Text, structure, and history show that Article I, §2 allows for legislative amendment of initiative statutes.

1. "[T]he text is generally the best place to look for understanding" of a constitutional provision, but constitutional text cannot be read in a vacuum. *Maese*, 2019 UT 58, ¶23. It must

be read in context with other constitutional provisions. *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P.2d 161, 167 (1933). And "historical sources" beyond the text "can be *essential* to [the Court's] effort to discern and confirm the original public meaning of the language." *Maese*, 2019 UT 58, ¶23 (emphasis added). There need not be a "textual ambiguity" to consider that essential history. *Id.* Finally, text and history must be understood in light of tradition, including relevant constitutional practice in federal and other States' courts. *See, e.g.*, *id.* ¶¶34-67.

Applying those guideposts here, Article I, §2 says: "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." In a vacuum, that text could be misread to confer a power to "alter or reform their government" that's virtually unlimited. But read in context, that power is checked by other constitutional provisions that were themselves prescribed by the people. Consider: The people cannot "alter or reform their government" by amending the Constitution through citizen-sponsored initiatives. Utah Const. art. XXIII, §§1-2. The people cannot "alter or reform their government" by abolishing through initiative the office of the Governor and instituting instead a fifteen-member privy council to exercise all powers vested in the executive department. *Id.*, art. VII, §1(1). And the people cannot "alter or reform their government" by an initiative that removes all current members of this Court and shrinks its future membership to three Justices each selected by partisan statewide election. *Id.*, art. VIII, §§2, 8. As those examples confirm, it would be a grievous error to read Article I, §2's broad language in isolation from surrounding constitutional provisions, or from history and tradition. *See Am. Bush*, 2006 UT 40, ¶22 ("A text's meaning cannot be separated from its speaker, its audience, its

genre—from its context."); *see also, e.g.*, *Maese*, 2019 UT 58, ¶24 (rejecting that Constitution's seemingly categorical text answered the scope of the jury-trial right when history and tradition told a more nuanced story).

After all, the Constitution—all of it—is "ordain[ed] and establish[ed]" by "the people of Utah." Utah Const. pmbl. Article I, §2 itself begins with the premise that "[a]ll political power is inherent in the people," and that "all free governments are founded on [the people's] authority for their equal protection and benefit." What follows in the rest of the Constitution are manifestations of the people's sovereign authority to alter or reform their government—structural provisions by which the people vested power in the Legislature, art. VI, §1(1)(a); designed an initiative process, *id.* §1(2)(a); and prescribed an amendment process (lacking direct citizen initiatives), art. XXIII, §1-2. Each provision represents the people's choice about their form of government—both those in which the people retain a direct role and those in which the people act solely through their elected representatives.

Tradition confirms as much. Article I, §2 evinces this American principle: "government is not a thing imposed upon the people from above, but rather it is an organization created *by* the people for their own purposes, to-wit, for governmental purposes." *Duchesne County*, 140 P.2d at 339. That theory of government is distinct "from another era, when there was a single man at the head of the government, who *was* the state." *Id.* For Americans, that era ended on July 4, 1776. Because "'[a]ll political power is inherent in the people,' Utah Const. art. I, §2," the people at the founding exercised their right to determine what "limit[s]" to put on "their own sovereign power to act through their elected officials." *Am. Bush*, 2006 UT 40, ¶14.

Article I, §2 is thus a *starting* point, not an *ending* point. It must be considered alongside the provisions in Utah's Constitution—all of which the people, using their inherent power, prescribed for their government. *See Carter*, 2012 UT 2, ¶21. That understanding is consistent with every instance of this Court's analyzing the people's right "to alter or reform their government." This Court has always considered that clause *in conjunction with* another particular constitutional provision that the people prescribed and ratified to limit their government or dictate how it will function.[2]

Here, Article I, §2 must be read in conjunction with provisions by which the people divided the government's power "into three distinct departments" and required that "no

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[2] *See Sevier Power Co.*, 2008 UT 72, ¶¶6-7 (noting Art. I, §2 was "[o]f significance to" case involving Article VI, §1); *Am. Bush*, 2006 UT 40, ¶¶13-15 (considering Art. I, §2 with Art. I, §§1, 15); *Council of Holladay City v. Larkin*, 2004 UT 24, ¶19, 89 P.3d 164 (consider Art. I, §2 with Art. V and XXIII); *Gallivan v. Walker*, 2002 UT 89, ¶¶22-23, 54 P.3d 1069 (considering Art. I, §2 with Art. VI, §1); *Utah Tech. Fin. Corp. v. Wilkinson*, 723 P.2d 406, 415 (Utah 1986) (considering Art. I, §2 with Art. V, §1 and Art. VI, §1); *Kearns-Trib. Corp., Publisher of Salt Lake Trib. v. Lewis*, 685 P.2d 515, 521 (Utah 1984) (noting Art. I, §2 is "implemented in part by Article I, §15"); *In re J.P.*, 648 P.2d 1364, 1372 (Utah 1982) (discussing Art. I, §2 with Art. I, §25); *Matter of City of West Valley*, 616 P.2d 604, 606 (Utah 1980) (considering Art. I, §2 with Art. VI, §1); *Baker v. Matheson*, 607 P.2d 233, 254 (Utah 1979) (considering Art. I, §2 with Art. I, §24); *Int'l Ass'n of Firefighters*, 563 P.2d at 790 (considering Art. I, §2 with Art. VI, §1); *Hansen v. Barlow*, 23 Utah 2d 47, 49, 456 P.2d 177 (1969) (considering Art. I, §2 with Art. VII, §1); *Provo City v. Anderson*, 12 Utah 2d 417, 423-24, 367 P.2d 457 (1961) (considering Art. I, §2 with Art. VI, §1); *Bigler v. Greenwood*, 123 Utah 60, 64 & n.3, 254 P.2d 843 (1953) (considering Art. I, §2 with Art. VI, §29); *Duchesne County*, 140 P.2d at 340 (considering Art. I, §2 with Art. V, §1 and Art. VI, §§1, 26-31); *Openshaw v. Halfin*, 24 Utah 426, 68 P. 138, 139 (1902) (considering Art. I, §2 with Art. I, §1 and Art. VI, §26).

The Court has even rejected a stand-alone Article I, §2 challenge to a statute providing for establishment of water conservancy districts, ultimately upholding the statute because "the legislature had the power to create a water conservancy district by its own fiat. It need not have given any individual or group the right to petition for the creation of a district." *Patterick v. Carbon Water Conservancy Dist.*, 106 Utah 55, 145 P.2d 503, 512 (1944), *overruled on other grounds by Timpanogos Plan. & Water Mgmt. Agency v. Cent. Utah Water Conservancy Dist.*, 690 P.2d 562 (Utah 1984).

person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." Utah Const. art. V, §1 (1895). For the legislative department, the people created a Legislature divided into a Senate and House of Representatives. *Id.*, art. VI, §1. The people required their Legislature to pass all bills and joint resolutions by a majority of both houses after being read three times. *Id.* §22. The people precluded the Legislature from passing bills containing more than one subject. *Id.* §23. The people required the Legislature to enact "general law[s]" whenever it could and forbade "private or special laws" granting a divorce, punishing crimes, granting privileges or immunities, and a range of other subjects. *Id.* §26. They forbade their Legislature to "authorize any game of chance" or "lottery" and to delegate certain municipal powers to "any special commission." *Id.* §§28-29. In all these ways, "the citizens of Utah circumscribed the limits beyond which their elected officials may not tread." *Am. Bush*, 2006 UT 40, ¶14. Governmental actions exceeding those constitutional limits flout the people's right to alter or reform their government under Article I, §2.

At the same time the people declared "the right to alter or reform their government," they ratified rules for changing their Constitution. Article XXIII prescribes the specific methods for amending it. That means the power to "alter or reform" government in Article I, §2 is not a free-floating right that can be read apart from or to trump Article XXIII's amendment provision. The Founders would have understood the terms "alter or reform" as consonant with "amending." *Compare, e.g.*, *Amend*, Black's Law Dictionary (1891) ("To improve; to make better by modification"), *with Alter*, Black's Law Dictionary (1891) ("To make a change in; to modify;" describing "amend" as a "synonym[]" except insofar as "[t]o 'amend' implies that the

modification made in the subject improves it, which is not necessarily the case with an alteration"); *Reform*, Black's Law Dictionary (1891) ("To correct, rectify, amend, remodel").

Then in 1900, using the very amendment process they'd prescribed, the people "alter[ed] or reform[ed] their government" by changing their Constitution to return to themselves some power to legislate directly. Utah Const. art. VI, §1(2) (1900); *see Carter*, 2012 UT 2, ¶¶22-24. But the people placed express constitutional limits on that power: they had to exercise the initiative power in the "conditions," "time," and "manner" "provided by law," and they could not invoke their referendum power for any law that passed both houses of the Legislature by a two-thirds vote. Utah Const. art. VI, §1(2)(a) (1900). Notably, the people did not adopt in the Constitution any mirror-image express limits on the Legislature's ability to amend or repeal a statute passed by initiative.[3] Nor did the people amend Article XXIII to give themselves the power to propose constitutional amendments by direct initiative.[4]

Read together, these provisions establish at least three principles relevant here about the original meaning of Article I, §2. First, if a statute passed by initiative constitutes an exercise of that right "to alter or reform" government, then statutes passed by the Legislature must be too, for "[t]he initiative power of the people is parallel to and coextensive with the power of the state legislature." *Carter*, 2012 UT 2, ¶20. Second, the people knew that the only way they could alter or reform governmental structures prescribed by the Constitution, such as the legislative power in Article VI, §1, was through the constitutional amendment process the people

[3] *Cf., e.g.*, Alaska Const. art. XI, §6; Ariz. Const. art. IV, pt. I, §1(6)(B); Ark. Const. art. V, §1; Cal. Const. art. II, §10; Neb. Const. art. III, §2; Nev. Const. art. XIX, §§1-2.
[4] *Cf., e.g.*, Ariz. Const. art. XXI, §1; Cal. Const. art. II, §8; Or. Const. art. IV, §1(2)(a); S.D. Const. art. XXIII, §1.

chose in 1895 and left unchanged in 1900 (by opting not to allow constitutional amendment by direct initiative). Third, the people knew how to place limits or conditions on their ability to "alter or reform their government," and in fact did so for certain aspects of their direct lawmaking power: refusing to authorize constitutional amendments by initiative; making the initiative process subject to conditions imposed by the Legislature; prohibiting referenda on laws passed by a two-thirds vote in both houses. But they did *not* expressly limit the Legislature's power to amend or repeal statutes passed by initiative.

All this to say: Article I, §2 is vindicated when the Legislature and the people abide by the Article VI structure the people first created (or amended), nothing more and nothing less. *See Gallivan v. Walker*, 2002 UT 89, ¶22, 54 P.3d 1069; *Carter*, 2012 UT 2, ¶21. Were the judiciary to invoke Article I, §2 to strike a new balance between the people and the Legislature, that would itself violate the people's power to prescribe the terms of their government. As part of their right to organize their own government, the people both "limited the actions of their elected officials in certain areas but" also "left them free in other areas to exercise their judgment in representing their constituents." *Am. Bush*, 2006 UT 40, ¶14. And if the judiciary were to "substitute their own wisdom" for those legislative acts, then that "deni[es] political powers to the citizens of Utah." *Id.*; *accord Carter*, 2012 UT 2, ¶60 ("judicial evaluation of the propriety of an initiative is not a matter of balancing 'policy elements'"); *Parkinson*, 4 Utah 2d at 196.

Consider how this Court applied that principle to a redistricting question in *Parkinson*. Because the people ratified a Constitution that left it to the Legislature to prescribe "ratios" for the reapportionment of legislative districts, Utah Const. art. IX, §2 (1895), the Court refused to question the Legislature's ratios unless "wholly unreasonable and arbitrary." 4 Utah

2d at 203. It recognized that "the wisdom or desirability of legislation" committed to the Legislature was not for courts to reconsider: "Whether an act be ill advised or unfortunate, if such it should be, does not give rise to an appeal from the legislature to the courts." *Id.* at 196.

2. Applying the original public meaning of Article I, §2 here, initiatives by the people and statutes by the Legislature are both the product of the people's right to organize their government. When the Legislature enacted S.B. 200, it exercised the legislative power the people themselves entrusted to their representatives. To say otherwise is to ignore the constitutionally enshrined balance of power that the people put in place when they exercised their inherent political power to organize their government.

In this way, this case is the foil to *Sevier Power*'s rejection of the Legislature's attempt to limit the substantive scope of the people's initiative power: "Unless and until the people give the legislature the constitutional authority to suspend or forbid the use of the initiative power, it cannot be done by statute." *Sevier Power Co.*, 2008 UT 72, ¶11. So too here: Unless and until the people by constitutional amendment strip the Legislature of its constitutional authority to legislate over certain matters, such limits cannot be imposed by statute or by judicial fiat. No other rule "bear[s] in mind that our Constitution is not one of grant, but one of limitation," so "it is imperative that the Legislature be restricted expressly or by necessary implication by the Constitution itself." *Univ. of Utah v. Bd. of Examiners of State of Utah*, 4 Utah 2d 408, 426, 295 P.2d 348 (1956). That is especially so when the legislation concerns redistricting, for the "constitutional mandate" to redistrict expressly belongs to "the legislature." *Parkinson*, 4 Utah 2d at 196; Utah Const. art. IX, §1. Article IX itself is a manifestation of the people's inherent political power described in Article I, §2 to reform their government.

That S.B. 200 amended statutes enacted by an initiative does not change that conclusion. Again, "the initiative power of the people is *parallel to and coextensive with* the power of the state legislature." *Carter*, 2012 UT 2, ¶20 (emphasis added). Both types of legislating are one of the people's chosen means of altering or reforming aspects of their government by statute. *Id.* ¶21. Consistent with the form of government that the people organized, the Legislature cannot by statute withdraw the people's constitutional power to initiate legislation; and *vice versa*, a majority of the people, by initiative, cannot withdraw the power to enact legislation that the people gave the Legislature in the Constitution. *See Sevier Power Co.*, 2008 UT 72, ¶¶10-11. The default rules obtain: laws passed by initiative do not have constitutional permanence; only constitutional amendments do. And "[n]o rule of law is better settled throughout the United States than that a state Legislature has absolute power to enact, that is, pass, amend, or repeal, any law whatsoever it pleases, unless it is prohibited from doing so either by the state or federal Constitutions." *State v. Whisman*, 154 N.W. 707, 709 (S.D. 1915). No wonder this Court already said that "'[l]aws proposed and enacted by the people under the initiative … are subject to the same constitutional limitations as other statutes, *and may be amended or repealed by the Legislature at will*.'" *Carter*, 2012 UT 2, ¶27 (quoting *Kadderly v. City of Portland*, 74 P. 710, 720 (Or. 1903)) (emphasis added). For the initiative power and the Legislature's power to continue to be "parallel" and "coextensive," as the people's constitutional text anticipates, one cannot supersede the other absent a constitutional limitation. *See, e.g.*, Utah Const. art. VI, §1(2)(a)(i)(B) (precluding referenda for laws enacted by a two-thirds vote of the Legislature).

Giving an initiative-passed statute a "super legislation" or constitutional amendment–like status would itself violate Article I, §2. Doing so would enlarge the power the people

reserved to themselves at the expense of the power the people entrusted to their elected representatives. *See Carter*, 2012 UT 2, ¶31 ("The people's initiative power reaches to the full extent of the legislative power, but no further."); *see also* Utah Code §20A-7-212(3)(b) ("The Legislature may amend any initiative approved by the people at any legislative session."). It would work a particular harm on the 500,000+ voters who voted No on Proposition 4 and assumed their elected representatives remained a constitutional safeguard. And among *those* voters are hundreds of thousands of people whose elected representatives voted *for* S.B. 200 (which passed 25-0-4 in the Senate and 67-4-4 in the House); those people relied on their representatives to "alter or reform their government" as *they* wanted. How can they vindicate *their* Article I, §2 rights, by passing laws like S.B. 200, if Proposition 4 is effectively off limits?[5]

II. Even if levels of scrutiny applied, the Court should review for reasonableness, and S.B. 200 would satisfy it.

A. *Carter* employed an originalist approach to the legislative power, not levels of scrutiny, but from time to time this Court has spoken in terms of levels of scrutiny in other election-related matters. In *Parkinson*, the Court reviewed the Legislature's reapportionment legislation "with the highest possible degree of understanding of the multifarious problems the legislative process is fraught with," "realiz[ing] that there is plenty of room within the framework of the Constitution for legislation with which we might not agree, were we legislators."

[5] If this Court were to entertain Plaintiffs' argument in this elections context, it would also violate the Federal Elections Clause to the extent this argument unconstitutionally divests the Legislature of its power to redistrict. *See Moore v. Harper*, 143 S. Ct. 2065, 2090 (2023) ("[S]tate courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution."); *accord id.* at 2090 (Kavanaugh, J., concurring) (framing as "whether the state court 'impermissibly distorted' state law 'beyond what a fair reading required'").

4 Utah 2d at 196. On the other end of the spectrum, *Gallivan v. Walker* applied "heightened scrutiny" because the signatures requirement in that case created a "discriminatory classification" with a "burden on fundamental rights." 2002 UT 89, ¶42 (requiring statutory classification to be "reasonable," with "more than a speculative tendency to further the legislative object and, in fact, actually and substantially furthers a valid legislative purpose," and "reasonably necessary to further a legitimate legislative goal").

And most recently in *Utah Safe to Learn*, the Court confirmed that cases implicating the initiative right are not always subject to heightened scrutiny. *Utah Safe to Learn-Safe To Worship Coal., Inc. v. State*, 2004 UT 32, ¶34, 94 P.3d 217. It distinguished *Gallivan*'s application of heightened scrutiny because *Gallivan* involved a law imposing "a discriminatory classification." *Id.* ¶32. And subjecting every initiative regulation to heightened scrutiny "would tie the hands of [s]tates seeking to assure that elections are operated equitably and efficiently" and "is neither required nor appropriate." *Id.* ¶34 (cleaned up). *Utah Safe to Learn* instead asked whether the Legislature's laws setting "the conditions," "the manner," and "the time" required for initiatives, a legislative power now located in Utah Const. art. VI, §2(a)(i), "unduly burden" the initiative right by looking to whether those laws are "reasonable" and "reasonably tend to further a legitimate legislative purpose." *Id.* ¶¶35, 61.

Parkinson, *Gallivan*, and *Utah Safe to Learn* establish this rule: heightened scrutiny will apply if there is a discriminatory classification, but otherwise, the Legislature's enactments are entitled to great deference. This approach accords with the longstanding and "axiomatic" presumption of constitutionality accorded to the Legislature's enactments. *Utah Safe to Learn*, 2004 UT 32, ¶35. This Court "seek[s] to resolve doubts about a statute's validity in favor of

constitutionality, and will not declare a legislative enactment invalid unless it clearly violates a constitutional provision." *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶12, 449 P.3d 31. Suspect classifications are the narrowly drawn exception to this rule, for they reflect that while "[m]ost … classifications are permissible," there remain a "handful of classifications"—such as race and gender—which "are so generally problematic (and so unlikely reasonable) that they trigger heightened scrutiny." *State v. Chettero*, 2013 UT 9, ¶20, 297 P.3d 582. For instance, heightened scrutiny would apply here if S.B. 200 permitted only voters of one race or sex to participate on the advisory commission. But S.B. 200 contains no such discriminatory classifications. Indeed, it does not classify individual Utah citizens or voters at all. Heightened scrutiny would therefore only infringe upon the presumption of constitutionality owed to S.B. 200, and the Court should reject it.

At most, reasonableness review should apply here, presuming S.B. 200 is constitutional and with great deference to the Legislature's redistricting-related enactment. *See Parkinson*, 4 Utah 2d at 196 (reviewing redistricting law with the "highest possible degree of understanding of the multifarious problems the legislative process is fraught with"); *see also id.* at 197 ("no act should be declared unconstitutional unless it is clearly and palpably so"). Withholding that presumption or imposing higher scrutiny is contrary to *Parkinson*. *Utah Safe to Learn*'s "undue burden" gloss, for example, was specific to Article VI, §2(a)(i)'s text about the conditions for placing initiatives on the ballot. 2004 UT 32, ¶¶28-29. And applying reasonableness review here, the constitutional text and history explored in Part I.B necessarily inform that analysis. That text and history confirm that S.B. 200 was a more than reasonable exercise of the Legislature's coextensive legislative power, entitled to the presumption of constitutionality. S.B.

200's purpose was "legislative" in nature, consistent with Article VI, and in furtherance of the Legislature's Article IX redistricting power. *See Carter*, 2012 UT 2, ¶¶34-39; *Parkinson*, 4 Utah 2d at 196. That S.B. 200 amends statutory provisions enacted by an initiative changes nothing, because the people vested the Legislature with coequal and concurrent authority to legislate on their behalf. *Supra*, 13-14. Giving an initiative constitutional amendment–like status would itself offend Article I, §2 and Article XXIII. *Supra*, 14-15.

B. Even if heightened scrutiny applied, S.B. 200 satisfies it. The legislation, which passed nearly unanimously, "actually and substantially furthers a valid legislative purpose" and is "reasonably necessary" to that goal. *Gallivan*, 2002 UT 89, ¶42. It advanced the valid legislative purposes of retaining Article IX's redistricting power in the people's representatives and avoiding constitutional problems, which were indisputably a concern raised by Proposition 4. The impartial analysis of Proposition 4 presented to voters plainly outlined three potential constitutional problems. *See* Pls.' Opening Br. (No. 20220998-SC), Addendum J; *see also, e.g.*, *Int'l Ass'n of Firefighters*, 563 P.2d at 790 (rejecting delegation of legislative power to commission). To further those goals, it was "reasonably necessary" to make the commission an advisory one, while still retaining it and leaving in place provisions providing public hearings. Thus even Proposition 4's sponsors celebrated S.B. 200 as a compromise bill that "would resolve lawmakers' concerns over the redistricting law while preserving the spirit of the 2018 voter initiative." Bethany Rodgers, *Utah Lawmakers, Better Boundaries Explain How They've Compromised on the Anti-Gerrymandering Law*, Better Boundaries (Feb. 28, 2020), https://perma.cc/PY4D-MRPH; *see* Leg.Br. at 8-10 (No. 20220998-SC).

III. The legal framework does not vary based on the nature of changes to an initiative statute, absent a discriminatory classification.

A. To summarize, if the Court were to apply levels of scrutiny to Article I, §2, then the only basis for varying tiers of scrutiny would be the presence of a discriminatory classification in legislation. *Supra*, 16-17. But levels of scrutiny are a poor fit for the structural question here. *Supra*, 2-6. Take, for example, a statute that purported to be immune from the people's referendum power, regardless of whether it received two-thirds-majority support in both houses. That extreme indifference to Article VI would be unconstitutional however balanced with whatever purported interest it served—because the "plain language" of the Constitution forbids it. *Grant*, 2019 UT 42, ¶30; *see also Sevier Power Co.*, 2008 UT 72, ¶¶8-11; *Carter*, 2012 UT 2, ¶20.

B. Levels of scrutiny would be improper for one final, fundamental reason: if Proposition 4 were an exercise of the people's Article I, §2 power, then so was S.B. 200. Acts of the Legislature, just as much as popular initiatives, exercise the people's power delegated via the Constitution. *See Int'l Ass'n of Firefighters*, 563 P.2d at 790 ("The political power, which the people possess under Article I, Sec. 2," is "confer[red] on their elected representatives" and "is to be exercised by persons responsible and accountable to the people"); *Carter*, 2012 UT 2, ¶21 (Article I, §2 is a "basic premise, upon which all our government is built," including the "allocat[ion]" of "governmental power in the bodies [the people] establish by law."). In fact, when the original Constitution (including Article I, §2) was ratified, the people had no initiative power; their only means to "alter or reform" their government was to elect representatives who would enact their preferred laws or propose constitutional amendments. Today, S.B. 200 is a product of the people's choice to be represented through elected officials: The people's

representatives passed it, exercising legislative power vested in them by the people via Article VI. Assuming *arguendo* that the people exercised their fundamental right to "alter or reform" the government by passing Proposition 4, then they did so again by enacting S.B. 200's amendments through their elected representatives—and by a near-unanimous, bipartisan vote hailed as a success by Proposition 4's sponsors.

That is an exercise of the "political power … inherent in the people," Art. I, §2, not an infringement of it. Both Proposition 4 and S.B. 200 express the people's will—one directly and one through the representative democratic process. Any distinction between those two legislative enactments must rest on principles of political philosophy. Whatever else might be said about the relative merit of direct and representative democracy as ways to express the people's will, such questions cannot be resolved by tools of *legal* interpretation. Under the Constitution—the people's ultimate expression of their right to "alter or reform their government," *id.*—S.B. 200 was validly enacted. It is consistent with the people's chosen representative democracy. *Am. Bush*, 2006 UT 40, ¶14. That S.B. 200 amended and partially repealed a statute enacted by a direct initiative is not an infringement of the people's power, but an expression of it.

CONCLUSION

Under any framework, the Legislature, in passing S.B. 200, acted comfortably within its legislative power conferred by the people.

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Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. This brief does not exceed 20 pages, excluding the cover page, tables, and certificates, in compliance with this Court's July 13, 2023, Order.
2. This brief 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 July 31, 2023, a true, correct, and complete copy of the foregoing **Supplemental Brief of Legislative Petitioners** was filed with the Utah Supreme Court and served via electronic mail as follows:

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