In the Supreme Court of the State of Utah

League of Women Voters of Utah, et al., *Appellees and Cross-Appellants*, v. Utah State Legislature, et al., *Appellants and Cross-Appellees*.	No. 20220991-SC

Supplemental Brief of Amicus Curiae Governor Spencer J. Cox in Support of Appellants and Cross-Appellees and Affirming the Dismissal of Plaintiffs' Fifth Cause of Action

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On interlocutory appeal from the Third Judicial District Court
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Identity and interest: This brief is submitted by Utah Governor Spencer J. Cox, who took an oath of office to defend the Utah Constitution. Utah Const. art. IV, § 10. The Governor's interests include seeing that the constitution's allocation and balance of authority, powers, and rights from and among the people to the branches of government are followed. In this case, that means allowing the legislature to exercise its constitutionally granted legislative power to amend or repeal legislation, including citizen initiatives, and draw congressional maps. The Governor recognizes and has an interest in defending the people's ability to "alter or reform their government." But elevating initiatives exercising that right beyond the legislature's reach—in this or future cases—would fundamentally change our constitutional republic form of government.

Notice: Counsel for the parties received timely notice of this amicus brief under rule 25(a).

Consent: Consent to file this amicus brief is not required under rule 25(b). But to avoid potential disputes, Governor's counsel requested and received consent from all parties.

Contributions: The Governor is not an amicus curiae that must make the rule 25(e)(6) statements. But to avoid potential disputes, Governor's counsel states that no party, party's counsel, or other person authored or

contributed money meant to fund preparing or submitting the brief, in whole or in part.[1]

Argument

For the Governor, the importance of this case and the Court's supplemental briefing order is not about defending the specific redistricting maps being challenged. From the start, the Governor said the maps would have looked different if he could have drawn them. *See, e.g.,* Bryan Schott, *Utah Gov. Spencer Cox says vetoing redistricting maps would be a "fool's errand,"* Salt Lake Tribune (Nov. 18, 2021).[2] But he can't do that—nor can anyone else in the Executive Branch, the Judicial Branch, or even the people of the State of Utah. Rather, the state constitution assigns the legislature the power to draw congressional districts. Utah Const. art. IX, § 1. Using its own legislative power, the legislature had the authority to amend the people's initiative, Proposition 4, and enact new congressional districts under article IX. This is what the Governor defends—the legislature's ability to use its constitutionally delegated power as part of our republican system of government.

A. The Governor recognizes and agrees that "[a]ll political power is inherent in the people; and all free governments are founded on their authority." Utah Const. art. I, § 2; *see also City of Eastlake v. Forest City*

[1] The Office of the Utah Attorney General also represents the Lieutenant Governor in this matter. But she is not actively participating in this appeal. And her counsel, Assistant Solicitor General Sarah Goldberg and Assistant Attorneys General David Wolf and Lance Sorenson, are not involved in representing the Governor.

[2] https://www.sltrib.com/news/politics/2021/11/18/utah-gov-spencer-cox-says/

Enters., 426 U.S. 668, 672 (1976) (noting "all power derives from the people, who can delegate it to representative instruments which they create"); *Carter v. Lehi City*, 2012 UT 2, ¶ 21, 269 P.3d 141 ("The government of the State of Utah was founded pursuant to the people's organic authority to govern themselves." (internal quotation marks omitted)). Even so, the people for the most part did not choose to exercise their power directly by creating a pure democracy form of government. *See, e.g.,* The Federalist No. 10 (James Madison) (explaining how a republic cures problems of pure democracy); *Rampton v. Barlow*, 464 P.2d 383, 389 (Utah 1970) (noting large populations made pure democracy impractical).

Instead, the United States Constitution guarantees to every state, and the Utah Constitution establishes, a republican form of government. U.S. Const. art. IV, § 4; Utah Const. art. VI, §§ 3-4 (election of state legislators); *id.* art. VII, § 2 (election of executive statewide officeholders). The state charter delegates and balances powers and responsibilities to and among three "departments"—executive, legislative, and judicial, *id.* art. V, § 1, while preserving rights of the people, *see, e.g. id.* art I, §§ 1-30; *see also Carter*, 2012 UT 2, ¶ 22 ("Acting through the state constitution, the people of Utah divided their political power, vesting it in the various branches of government.").

This case highlights some of those rights and delegated powers. The people have "the right to alter or reform their government." Utah Const. art. I, § 2. And the constitution vests the "Legislative power" with both "the Legislature of the State of Utah" and "the people of the State of Utah as provided" in article VI, section 1(2). *Id.* art. VI, § 1. That section (article VI,

section 1(2)) outlines the people's "qualified" rights to initiative and referendum. *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 43, 452 P.3d 1109. Later, the state constitution expressly assigns to "the Legislature"—not "the people" referred to in article I, section 2 or article VI, section 1—the right and authority to "divide the state into congressional" districts. Utah Const. art. IX, § 1 ("No later than the annual general session next following the Legislature's receipt of the results of an enumeration made by the authority of the United States, the Legislature shall divide the state into congressional, legislative, and other districts accordingly.").

B. Plaintiffs assert they exercised their rights to initiative and to "alter or reform" the government when Proposition 4 was presented to and approved by the voters. Suppl. Br. Order at 1 (July 19, 2023); R. 79-80. They claim the legislature violated these rights by enacting SB 200, amending Proposition 4 and drawing new congressional districts. Suppl. Br. Order at 1-2; R. 79-80. The Court's supplemental briefing order essentially asks how these seemingly competing rights and powers should be analyzed and balanced against each other—whether legislation *by initiative* that arguably "alter[s] or reform[s]" the government forever trumps legislation *by the legislature* or constitutional grants of power.[3]

The Governor rejects that notion based on constitutional text and principles. First, article VI vests the "Legislative power of the State" in both

[3] The premise of the Court's supplemental order—a fundamental right to alter or amend the government—raises serious questions. Even if article I, section 2 is self-executing, fundamental rights must be properly construed within the context and framework of the constitution and its original public meaning. Otherwise, the right to alter or reform government could include civil war,

"the Legislature" and "the people" as expressed through the initiative and referendum procedures outlined in the constitution and statutes. Utah Const. art. VI, § 1. And this Court has emphasized that the legislature's and the people's power are co-equal, coextensive, concurrent, and share equal dignity. *See, e.g., Carter*, 2012 UT 2, ¶ 22; *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069. This only makes sense. In a republic, the legislative power of the people is delegated to and manifests itself in the people's representatives in the legislative branch. The people and the legislature are not different branches exercising different powers. They both share the same "Legislative power." Utah Const. art. VI, § 1. The legislature embodies the inherent power of the people. Their shared legislative power must therefore be treated the same. *See generally Carter*, 2012 UT 2, ¶¶ 24-27.

Because the legislature, or the people by initiative, can amend the legislature's enactments, it follows under the equal-dignity principle that the legislature can amend or repeal laws enacted through the initiative process too. The legislature will always have the power to amend legislation passed by initiative and the people's initiatives will always have the power to amend legislation passed by the legislature subject to the limitations in article VI, section 1. That precept dates back at least to the same era when the initiative power became part of the Utah Constitution and has been approvingly cited by this Court as background to understanding the initiative power's scope. *See Carter*, 2012 UT 2, ¶ 27 (reciting Oregon Supreme Court's holding that

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terrorism, political assassinations, disrupting normal government operations and proceedings, or the ability to essentially amend the constitution by initiative.

citizen initiative and legislature's powers are parallel and initiatives "'are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will'" (quoting *Kadderly v. City of Portland,* 44 Or. 118, 74 P. 710, 720 (1903)); *see also Earth Island Inst. v. Union Elec. Co.,* 456 S.W.3d 27, 35 (Mo. 2015) (stating "once a statute is adopted by initiative or referendum, then the legislature is free to amend or repeal it as it would any other statute").[4]

Second, and relatedly, it is a settled aspect of legislative power that one legislature cannot bind future legislatures by preventing subsequent amendments or repeal. *See, e.g., Manigault v. Springs*, 199 U.S. 473, 487 (1905); *see also* C.J.S. *Statutes* § 11 ("Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its lawmaking power."). The same principle necessarily applies to initiatives—they cannot be made immune to amendment or repeal by the legislature.

Third, prohibiting legislative amendments to Proposition 4 or any other initiative would cloak them with super-statute or quasi-constitutional status where they would remain unamendable and untouchable by normal legislative action. But article VI's text does not place initiatives beyond the legislature's reach. In fact, "[n]othing in the text or structure of article VI suggests any difference in the power vested simultaneously in the 'Legislature' and 'the people.'" *Carter*, 2012 UT 2, ¶ 22.

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[4] What's more, the legislature has express statutory authority to "amend any initiative approved by the people at any legislative session." Utah Code § 20A-7-212(3)(b). The Plaintiffs have not directly challenged this statute.

Nothing in article I, section 2 does so either. Recognizing a right to alter or reform the government does not mean, as Plaintiffs essentially argue, that citizen initiatives approved by a simple majority of voters take on quasi-constitutional-amendment status. That would effectively bypass and largely obviate the actual constitutional amendment and revision processes. Utah Const. art. XXIII, §§ 1-2. The amendment process wisely requires both a super-majority of the people's representatives *and* a majority vote of the people themselves. *Id.* art XXIII, § 1. Just as the legislature by itself cannot change the constitution, the people cannot functionally do so through their co-equal initiative power by invoking article I, section 2. *See, e.g., Salt Lake Cnty. v. Tax Comm'n ex rel. Good Shepherd Lutheran Church*, 548 P.2d 630, 631 (Utah 1976) ("It is beyond the constitutional powers of the legislature to amend or to modify the provisions of the Constitution.").

Finally, and apart from the legislature's general authority to amend or repeal its own laws or initiatives, the legislature certainly has the power to enforce and legislate pursuant to its explicit grant of redistricting authority under article IX, section 1. *See, e.g., Kimball v. City of Grantsville City*, 57 P. 1, 4–5 (Utah 1899) (the legislature "has plenary power for all purposes of civil government. . . . [and] in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of the government"). The constitution cannot get plainer than assigning "the Legislature" to "divide the state into congressional . . . maps." Utah Const. art. IX, § 1; *see also Patterson v. State*, 2021 UT 52, ¶ 91, 504 UT 52 (Court looks to "plain language" of the text to interpret constitution). And that

specific delegation "reserves that authority exclusively to the legislature" unless it "delegates that power to another governmental entity." *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 21, 144 P.3d 1109.

C. As noted, the State of Utah is primarily a republic—the people exercise their political power through their elected representatives. The people's initiative and referendum rights provide an important check on the legislature and potentially other branches of government. But that does not change the fact that Utah is primarily a republic in which the people delegated their power to and among the legislative, executive, and judicial branches. Reading article VI, section 1 or article I, section 2 as superseding the legislature's power would fundamentally alter the balance of powers and rights the state constitution sets forth and move our form of government from a republic more towards direct democracy. That seismic a shift to the foundations of our government can happen only through actual constitutional amendment, not judicial decree.[5]

Ultimately, if the people disagree with their representatives' use of legislative powers, the people can and should elect different representatives. The Governor understands voters' frustration with the legislature's amendments to initiatives. While the legislature has the power to routinely

[5] Similarly, Plaintiffs (and many voters) may not like the constitution's express delegation of district-drawing to the legislature. Utah Const. art. IX, § 1. Even the Governor would prefer that power belonged to his office. But it doesn't, nor does it belong to "the people" through their initiative power. And the only way to change the plain language reading of article IX, section 1 is to change the section's plain language—by constitutional amendment, not citizen initiative.

amend enacted initiatives, it does so at its own peril. It would be better, in the Governor's view, for the legislature to restrain itself at times for its own (and the State's) long-term institutional health and credibility with citizens. But if the legislature chooses otherwise, the remedy is not judicial creation of a new super-legislation initiative right. Instead, voters can kick their unresponsive representatives out of office. Voting is and always will be the most important way for "the people" to hold their representatives accountable and alter or reform the government in our constitutional republic.[6] *Gallivan v. Walker*, 2002 UT 89, ¶ 24 (stating "'[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964)).

D. The parties' dispute about the redistricting maps presents less of a concern to the Governor. What troubles him more is the fundamental ways Plaintiffs' arguments and the (premise behind the) Court's supplemental questions could change the existing allocation and balance of powers in the state's republican form of government. Treating the people's ability to "alter

[6] Some might counter that it's hard to vote state legislators out of office when they can draw their own districts and essentially pick their own voters. That response would carry more weight if Plaintiffs were challenging the maps the legislature created for the state representatives' own house and senate districts. But Plaintiffs have not challenged the state legislative districts and do not assert an inability to vote for their desired state representatives. Plaintiffs are challenging only the maps their state legislators drew for *other* elected officials—Utah's members of the United States House of Representatives. Even if those congressional maps were politically motivated or unwise, the solution is not litigation inventing new rights. The remedy would be campaigning and voting against the state legislators for failing to represent the people.

or reform their government" as a free-floating fundamental right that creates super-legislation or quasi-constitutional provisions that alters existing delegations of power poses serious risks. The people could functionally amend the constitution through any initiative that arguably alters or reforms the government. That would move the State from a constitutional republic toward a pure democracy and the ills to which that system of government is always vulnerable. *See, e.g.*, The Federalist No. 10 (James Madison). Indeed, if a bare majority of voters (generally a minority of the overall populace) can—through an initiative invoking article I, section 2—trump the legislature's power to legislate, amend, repeal, or in this case redistrict, it's hard to see where the safeguards of a constitutional republic remain to protect against pure democracy's problems. The legislature must retain its power to amend or repeal legislation, whether enacted through the legislative process or initiative.

Conclusion

For the foregoing reasons, the Court should analyze Plaintiffs' article I, section 2 claims and SB 200 in a way that preserves and respects Utah's constitutional republic form of government and existing delegations of power among the people and branches of government.

Respectfully submitted,

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Certificate of Compliance

1. This brief is 10 pages or less in keeping with the general rules allowing amicus curiae half the pages/words allocated to the parties (who were allowed up to 20 pages by the Court's supplemental briefing order).

2. This brief complies with rule 27's size, margin, and typeface requirements.

3. This brief complies with rule 21 because it does not contain any private or non-public information.

/s/ *Stanford Purser*

Certificate of Service

I hereby certify that on 31 August 2023, a true, correct, and complete copy of the foregoing Brief of Amicus Curiae Governor Spencer J. Cox was filed with the Court and served on the parties as follows:

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