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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, and JACK MARKMAN, Plaintiffs, v. UTAH STATE LEGISLATURE, UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE MIKE SCHULTZ, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF PRELIMINARY INJUNCTION MOTIONS** Case No. 220901712 Honorable Dianna Gibson

INTRODUCTION

The voters of Utah are entitled to vote in elections with truthful ballot questions that do not mislead. They are entitled to official, lawful notice—consistent with the Constitution's requirements—of the text of proposed amendments to the Constitution. Defendants must be enjoined from presenting Amendment D because they have failed to provide the voters with these constitutional rights.

Defendants only meekly contest the merits of Plaintiffs' claims. Instead, the thrust of their response seems to be that because they withheld the challenged ballot language until the last minute, it is simply too late to comply with the Constitution. That assertion is wrong on the facts—it is not too late, as Defendants conceded at this week's status conference—and the law. Courts do not allow a Constitution-free zone in the lead up to elections—not least of all where Plaintiffs have acted with urgency to seek relief in advance of any ballot printing and in advance of the election.

The process to amend the Constitution is supposed to be serious, studied, and sober—with citizen participation from start to finish. The Legislature's process here was sloppy and rushed—with hastily drafted text to change over a century of fundamental rights, followed by deceptive ballot language and a failure to publish the Amendment's text. The situation we find ourselves in today is of Defendants' making. It is not how free and fair elections are run.

ARGUMENT

I. There is a substantial likelihood that Plaintiffs will succeed on the merits of their claims.

A. Plaintiffs are likely to prevail on the merits of their claims regarding the false and misleading ballot language (Counts 9-14).

Plaintiffs are likely to succeed on the merits of their claims regarding the false and misleading ballot summary Defendants have certified for proposed Amendment D. As the Utah

Supreme Court has held, ballot language is not "legally sufficient" if a "reasonably intelligent voter [would be] misled as to what he was voting for or against." *Nowers v. Oakden*, 110 Utah 25, 39, 169 P.2d 108, 116 (1946). The Court explained that ballot questions must be

> [f]ramed with such clarity as to enable the voters to express their will. The proposition to be voted on must, of course, be placed on the ballot in such words and in such form that the voters are not confused thereby. The ballot together with the immediately surrounding circumstances of the election must be such that a reasonably intelligent voter knows what the question is and where he must mark his ballot in order to indicate his approval or disapproval.

Id. As state supreme courts across the country have held, this is necessary in order for the amendment at issue to be properly "submitted to the electorate." Utah Const. art. XXIII, § 1. And it is necessary in order that the government not exercise undue influence on the outcome of the election, in violation of the rights to free elections, free speech, and free government.

Defendants contend that some state supreme court's require proof that the ballot language be "counterfactual" in order for the amendment to be voided. Resp. at 25-26. But the Utah Supreme Court has not adopted that narrow conception. *See Nowers*, 169 P.2d at 116. Instead, its discussion tracks the approach of the Florida Supreme Court in *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982) and *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), which focus on whether the language is misleading. In any event, the ballot language for proposed Amendment D *is* counterfactual. It advises that if the amendment is approved, "state law would [] be changed to . . . [e]stablish requirements for the legislature to follow the intent of a ballot initiative." Mot. for Prelim. Inj. on First Supp. Comp. at 5. That is false. The proposed amendment itself *eliminates* the pre-existing constitutional requirement that the Legislature do so with respect to government reform initiatives. It expressly states that "[n]othwithstanding any other provision of this Constitution, the people's exercise of their Legislative power as provided in Subsection (2) does not limit or preclude the exercise of Legislative power, including through amending, enacting or repealing a law, by the

Legislature . . . .” S.J.R. 401, Proposal to Amend Utah Constitution – Voter Legislative Power, 65th Leg., 2024 4th Spec. Sess. (Utah 2024). In other words, the amendment changes the Utah Constitution such that the people’s enactment of an initiative does not “limit” the Legislature’s power to, *inter alia*, “*repeal*” it. *Id.*

Defendants cite to the companion conditional statute that provides that in just one general session following the adoption of an initiative, the Legislature is to defer to its determination of the purpose of an initiative if it “*amends*” it—and that applies only if money is not at stake. S.B. 4003, Statewide Initiative and Referendum Amendments, 65th Leg., 2024 4th Spec. Sess. (Utah 2024). But that *statute* is flatly contradicted by proposed Amendment D. Moreover, even that statute does not purport to block the Legislature from *repealing* the initiative. And an action repealing an initiative is certainly not one that follows “the intent of a ballot initiative.”

The law in Utah—and everywhere else—is that the Constitution is the supreme organic law of the state. The Legislature cannot change the *Constitution* to eliminate a requirement that it defer to the intent of voter-passed initiatives and contend that by passing that same amendment “state law would [] be changed” to “[e]stablish requirements for the legislature to follow the intent of ballot initiatives.” Mot. for Prelim. Inj. on First Supp. Comp. at 5.

If the voters were to adopt Amendment D, the only operative change in state law would be to expressly *eliminate*—as a matter of constitutional law—any such requirement on the Legislature to adhere to the intent of the voters’ initiative. As such, even if Defendants were correct in their strained interpretation of the requirement to accurately submit proposed constitutional amendments to the voters (they are not), the ballot language for proposed Amendment D is plainly counterfactual. It says that passing the Amendment will achieve the precise opposite legal effect that the Amendment’s text commands.

Moreover, the cases that Defendants cite show the scope of the violation here. Defendants rely upon cases in which courts have found ballot language to satisfy the accuracy requirement, but the dispute in those cases was about omission of certain details, and only underscores how false and affirmatively misleading the language is of proposed Amendment D. *See League of Women Voters Minnesota v. Ritchie*, 819 N.W.2d 636, 648-51 (Minn. 2012) (upholding ballot language despite minor omissions and technical differences from proposed amendment and where "essential purpose" of amendment is still communicated); *Donaldson v. Dep't of Transp.*, 414 S.E.2d 638, 640 (Ga. 1992) (declining to invalidate ballot language because of lack of completeness or omission of history and where language was not "affirmatively misleading."); *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 990 N.W.2d 122, 127 (Wis. 2023) (upholding ballot language where "minor deficiencies" or "lack of precision" in ballot summary did not render language counterfactual).

Defendants have certified ballot language that misleadingly tells voters that adopting Amendment D will strengthen an initiative process that the Amendment neuters, have hidden the major purpose of the Amendment—overturning voters' right to alter or reform their government without the government having an unfettered veto—with a vague reference to a "clarifying" purpose, and have flatly told voters the Amendment will achieve the opposite outcome of its text: respect for the intent of the voters. By doing so, Defendants have failed to submit proposed Amendment D to the voters and have violated voters rights to free elections, free speech, free government, and the right to vote by exercising undue influence to dupe voters into expressing the government's viewpoint in order to surrender a constitutional right.[1]

[1] Counts 9-14 all turn on the false and misleading nature of the language. Plaintiffs do not address the claims separately here because of the time constraints before today's hearing, but note that relief is the same under any of them. Notably, Defendants wrongly contend that the Free Elections

Remarkably, Defendants contend that the Court should ignore the misleading and demonstrably false language on the ballot because the voters can look elsewhere to overcome the government's deceitful language. Resp. at 28-32. That is not their burden. *See Nowers*, 169 P.2d at 116. In any event, although Defendants overload their response with citations to online news articles about the special session and this litigation, *not a single one* includes the full text of proposed Amendment D.[2] And the argument is ironic in light of Defendants' admitted failure to publish the text of the Amendment pursuant to the Publication Clause's requirements.

By any standard, proposed Amendment D is so misleading and counterfactual as to fail to constitute submission to the electorate and fails to provide for free and fair elections as multiple constitutional provisions require.

B. Plaintiffs are likely to succeed on the merits of their Publication Clause claim.

Plaintiffs are likely to succeed on the merits of their Publication Clause claim. The most important takeaway from Defendants' brief is that they do not dispute that they have not complied with the literal text of the Publication Clause. The Legislature has not "caused" the text of proposed Amendment D to be published in at least one newspaper in every county of the state for two months preceding the election. And they do not even announce any plans *to make it happen* belatedly. While they cite a smattering of online news articles in which *reporters* have presented snippets of the text, they cite none in which the full text appears. And that is, in any event, not the constitutional

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Clause is not self-executing; the Utah Supreme Court rejected that claim in its decision in this case. *See League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, ¶ 186 n.39. And Defendants' justiciability argument flies in the face of *Nowers* and all the state supreme court decisions from sister states adjudicating these claims.

[2] At times in their response they acknowledge that their main citation to an online only Deseret News article includes a snippet of the text the amendment would add to Article VI. But it does not include the surrounding portions for context and it excludes entirely the amendment's changes to Article I—the *Declaration of Rights.*

requirement even if a journalist had happened to print the full text in a single article one time. For that reason, Defendants' discussion (at 37) about whether the Constitution requires publication in a print or online edition of a newspaper is beside the point. They've done neither.

Next, Defendants (at 38-39) twist the text of the Constitution to contend that the Legislature *has* "caused" proposed Amendment D to be "published" because the language is on its *own* website and the proposed Amendment itself directs the Lieutenant Governor to publish it in accord with law. But the Constitution commands it to be published *in newspapers across the state for two months*. Under no definition have the Legislature or the Lieutenant Governor—both Defendants here—caused proper publication of the text of the proposed amendment. Because the Legislature did *nothing* to cause the text to be published in newspapers as the Constitution commands, it has not "adequately set the Amendment's publishing into motion." Resp. at 39. There has been no motion whatsoever.

Defendants next take on the Sisyphean argument that they cannot be required to publish the amendment in newspapers because "an unwilling publisher" may refuse. Resp. at 39-40. For *one hundred and twenty-two years*, the Legislature caused the text of proposed constitutional amendments to be published as legal notices in newspapers across the State as the Publication Clause requires. Defendants cite *no example* of a newspaper ever refusing a paid legal notice from the State. This is the first time they have failed to comply with the Constitution's text because in 2023, the Legislature—blind to the Constitution's contrary command—amended the publication *statute* to eliminate the newspaper publication requirement. Defendants cannot evade the Constitution by passing an unconstitutional statute and then following that statute instead.

Defendants next contend that strict compliance with the Constitution is not necessary and that substantial compliance suffices. But the cases adopting a "substantial compliance" rule for

constitutional publication requirements are inapposite here. For starters, Article I, Section 26 of the Utah Constitution states the "[t]he provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Utah Const. art. I, § 26. In contrast, the constitutions in states with only a substantial compliance requirement have no comparable "mandatory and prohibitory" provision. *See, e.g.,* Del. Const.; W. Va. Const.' Ala. Const.; La. Const.; Fla. Const. As such, those cases are distinguishable because the plain language of Utah's Constitution requires strict compliance with Article XXIII, Section 1's publication requirements. *See, e.g., State ex rel. Montana Citizens for the Preservation of Citizens' Rights v. Waltermire*, 738 P.2d 1255 (Mont. 1987) (voiding constitutional amendment violating "mandatory" publication requirement because "the rule which gives to the courts and other departments of the government a discretionary power to treat a constitutional provision as directory, and to obey it or not…is fraught with great danger to the government") (internal quotations omitted); *Walmsley v. McCuen*, 318 Ark. 269, 273 (Ark. 1994) (adopting strict compliance for constitutional six-month publication requirement because "[The Court] must…interpret language of the Constitution according to its plain and common meaning"); *Watland v. Lingle*, 85 P.3d 1079, 1091 (Haw. 2004) (adopting strict compliance for constitutional publication requirement because requirement is "not merely directory, but mandatory"); *Westerfield v. Ward*, 599 S.W.3d 738 (Ky. 2019) (adopting strict compliance for constitutional publication requirement because "our constitution is too important and valuable to be amended without the full amendment ever being put to the public").

Moreover, cases applying a substantial compliance rule for publication limit its application and hold that it applies only where voters have not been deceived. *See, e.g., Opinion of the Justices*, 275 A.2d 558, 561 (De. 1971) ("Literal compliance is not generally required so long as it is clear

that the electorate has not been misled…"); *State ex rel. Morgan v. O'Brien*, 134 W.Va. 1, 12, 13 (W.Va. 1948) (applying substantial compliance rule where "it did not appear that electorate had been defrauded or misled"). The exact opposite is true here. Defendants' misleading ballot language, in conjunction with no publication of the full text of the amendment in any newspaper in any county, misinforms and tricks voters regarding the contents of the amendment and its impact. As a result, in addition to failing strict compliance with Article XXIII, Section 1, Defendants' deceptive combination misleads voters and would also violate a substantial compliance rule.

In any event, Defendants have *not* substantially complied with the Publication Clause. The text of Amendment D has still not been published in any newspaper in any county of the State. Rather, it has been uploaded to obscure government websites that require voters to know that the Lieutenant Governor is the government official posting the text. Whereas the Publication Clause ensures that voters subscribing to newspapers will receive the text of proposed amendments delivered to their home for two months without needing to take any affirmative steps of their own, Defendants require voters to have internet access, know somehow that they should search for postings by the Lieutenant Governor, and then navigate complex websites. Defendants have neither strictly nor substantially complied with the Publication Clause, a critical problem in light of the deceptive nature of the ballot language.

Indeed, any suggestion that a "public notice website" is equivalent to a "newspaper" is belied by multiple provisions in the Utah Code, which does not use those terms interchangeably. *See, e.g.*, Utah Code § 45-1-101(1)(a)(i) ("public legal notice website or in a newspaper"); *id.* § 11-13-531(3) (requiring notices on "public notice website" and in "newspapers"); *id*. § 40-8-13(6)(c) (requiring notices in "newspapers" and on a "public legal notice

website); *id.* § 20A-2-104(10)(c) (alternative notices in a "newspaper" or the "public notice website"); *id.* § 59-2-919(6) (requiring different notices "in a newspaper" and "electronically" on public notice website under § 45-1-101).

Defendants admit they have not complied with the Publication Clause. And they announce no plans to try to. Plaintiffs are thus likely to succeed on the merits of that claim.

II. Defendants' claims are redressable by the existing defendants without joining every county clerk.

Defendant's claims are redressable by the existing defendants and the county clerks are not necessary parties. Defendants' contrary argument has no merit. As Plaintiffs alleged, under Utah law, Defendant Lt. Governor Henderson is the Chief Election Officer of the state, certifies the ballot title and language to county clerks, and has "*direct authority* over the conduct of elections for…statewide or multicounty ballot propositions…" Utah Code § 67-1a-2(1)(c), (2)(a)(ii); 20-7-103.1(2) (emphasis added). As part of that direct authority, the law requires Defendant Henderson to "in accordance with Section 20A-1-105, take action to enforce compliance by an election officer with legal requirements relating to elections." Utah Code § 67-1a-2(2)(b)(ii); 20A-1-105(1). Under state law, an "election officer," includes all county and municipal clerks, whom the statute requires "shall fully assist, and cooperate with the lieutenant governor in ... fulfillment" of her election responsibilities. Utah Code § 20A-1-102; 20A-1-105(3). Moreover, Section 20A-1-106 requires that "a clerk shall ... comply with ... federal and state law; federal and state rules; and *the policies and direction of the lieutenant governor*." Utah Code § 20A-1-106(2) (emphasis added). As such, Plaintiffs claims are redressable because any injunction applicable to Defendant Henderson, including to direct county clerks with respect to ballot printing, would provide Plaintiffs all the relief that they seek. Moreover, ballots are not out of Defendant Henderson's "hands," Resp. at

21—Defendant Henderson can be ordered to amend the ballot certification for proposed Amendment D, which is submitted to each county clerk.

Defendants argue that Defendant Henderson cannot "assume the responsibilities assigned to county clerks ... by Title 20A, Election Code." But the relief Plaintiffs request does not require any such assumption. As outlined above, Utah law makes clear that Defendant Henderson has direct authority over county clerks and the conduct of elections for multicounty ballot propositions, must direct clerks to do their work in accordance with Utah law, and that Defendant Henderson certifies the proposed Amendment's title and language to county clerks. Utah Code § 67-1a-2(2)(a)(ii), (2(b)(ii); 20A-1-105(1); 20A-1-106(2); 20-7-103.1(2). Title 20A also requires that if Defendant Henderson "determines that [a county clerk] is in violation of [state law]," she *shall* consult with the clerk. Utah Code § 20A-1-105(4). If the violation continues, she *shall*, among other things, "issue a written order" that "directs [the clerk] to remedy and cease the violation" and dictate "specific actions [the clerk] must take to comply with the order." *Id.* at (5). Her order "has the force of law." *Id.* at (6).

Defendant Henderson's direct authority over the election for multicounty ballot propositions and county clerks also makes this case inapposite to *Jacobson v. Florida Secretary of State*, where election officials were "not subject to the Secretary [of State]'s control." 974 F.3d 1236, 1253 (11th Cir. 2020) (en banc). As such, Defendants' contrived minimization of Defendant Henderson's authority vis-a-vis county clerks cannot be squared with Utah law, and Plaintiffs claims are redressable.

Moreover, Utah Rule of Civil Procedure 65A(d) states that every injunction is "binding only upon the parties to the action….and upon those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of the order." URCP 65A(d).

These conditions are met here, where the county clerks are working together with Defendant Henderson in carrying out the election for proposed Amendment D and will receive notice of the order through Defendant Henderson.

III. The remaining factors favor entry of a preliminary injunction.

The balance of equities favors enjoining the submission of Amendment D to voters in this upcoming general election. As Plaintiffs have explained, the Amendment's misleading and inaccurate ballot language—compounded by the Legislature's inexplicable failure to notice the Amendment's text as the Constitution directs—will inflict irreparable harm on Plaintiffs by depriving them of several core constitutional rights. *See Elrod v Burns*, 427 U.S. 347, 373 (1976) ("The loss of [constitutional] freedoms, for even minimal periods of time unquestionably constituted irreparable injury."). The Utah public also has a strong—even overriding—interest in ensuring that any proposed change to the governing document of their state is presented honestly and in strict compliance with the Constitution's substantive and procedural requirements for amendment. Defendants suffer no injury from having to pump the brakes on their eleventh-hour rush to place this proposal on this general election ballot. Constitutional amendments merit careful consideration, honest presentation, and robust deliberation. Nobody is harmed by maintaining the constitutional status quo and giving the Legislature to time reconsider the wisdom of submitting such a consequential derogation of constitutional rights to voters at the next general election. Defendants' arguments to the contrary are unavailing.

First, Plaintiffs' request to enjoin Amendment D's placement on the 2024 general election ballot would not "halt[] the orderly election processes." Resp. at 16. Monday, counsel for the Lt. Governor confirmed that her preferred deadline for county clerks to get ballot proofs to printers is tomorrow at 11:59 p.m. Tr. at 9-10. As of Monday, some counties were "still proofing." *Id.* at 10.

Ballots have, in other words, not yet been finalized. And counsel for Defendants confirmed that a ruling today would "give county clerks time to reconfigure ballots by Thursday." *Id.* at 16. To be clear, this would only require deleting the last entry on the certified ballot, which cannot plausibly constitute serious disruption. Defendants also claim that it would cost the state "up to $3 million" to remove Amendment D from the ballot but that figure refers to the purported cost of removing the Amendment from ballots that have already been printed. As Defendants conceded yesterday, ballots have not yet been printed.

Second, Defendants point to *In re Cook* for the broad proposition that even meritorious claims must fail if they will cause "serious disruption" to the election process. Resp. at 18. But no disruption would be required here—ballots have not yet been printed and deleting one entry (appearing at the end of the ballot) before they are printed is not a significant disruption. Moreover, the reasoning in that case supports Plaintiffs, not Defendants. *In re Cook* concerned a petition to enjoin the printing and distribution of ballots because the analysis of an initiative in the voter information pamphlet was not "fair" and "impartial" as required. 882 P.2d 656, 658 (Utah 1994). In denying petitioners relief despite finding their claims meritorious, the Court based its judgment on the fact that the petitioners had waited *twenty-eight days* after obtaining the challenged language to file the petition, and that in the intervening time, the ballots and voter pamphlets were sent to the printer, and distribution had begun. *Id. a*t 659. The Court thus denied relief "*because* petitioners failed to act with reasonable diligence" in bringing their petition. *Id*. (emphasis added). In contrast, Plaintiffs here have been nothing if not vigilant, filing their first supplemental complaint *two days* after the misleading ballot language was certified, and filing their second supplemental complaint just *one day* after the legislature missed the last conceivable opportunity to comply with the

publication requirement. Plaintiffs have not slept on their rights in bringing these claims—indeed they have hardly slept at all.

Third, Defendants provide no support for their claim that the so-called *Purcell* principle applied by *federal* courts is applicable here. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). Not a single Utah case cites *Purcell*. Nevertheless, *Purcell* would not bar an injunction in this case. "*Purcell* is a consideration, not a prohibition, and it is just one among other 'considerations specific to election cases' that we must weigh for injunctive relief." *Kim v. Hanlon*, 99 F.4th 140, 160 (3d Cir. 2024) (quoting *Democratic Nat'l Comm. v. Wis. State Legislature*, —— U.S. ——, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring)). Under *Purcell*, federal courts generally avoid ordering last-minute changes to election rules if doing so would "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. But the interest in avoiding voter confusion often compels judicial intervention. For example, in *Kim v. Hanlon*, the Fourth Circuit affirmed a federal district court's preliminary injunction enjoining New Jersey's longstanding ballot structure and ordering counties to fully redesign their ballots shortly before the state's 2024 primary election because the court's order would itself "reduce, if not eliminate voter confusion" generated by the state's existing ballot structure. *Kim*, 99 F.4th at 160. Here, similarly, an injunction would *prevent* voter confusion resulting from *Legislature*'s last-minute effort to rush a misleading and confusing constitutional amendment proposal on the ballot without having provided constitutionally required notice of the amendment's text.

IV. The injunction Defendants seek is properly characterized as prohibitory, not mandatory, but is warranted under either characterization.

Defendants characterize Plaintiffs' requested relief as a "mandatory injunction" because it would require "tak[ing] Amendment D off the ballot." Resp. at 18. An injunction is mandatory, however, if the requested relief "affirmatively require[s] the nonmovant to act in a particular way,

and as a result ... place [s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *Schrier v. University of Co.*, 427 F.3d 1253 , 1261 (10th Cir. 2005) (emphasis added) (cleaned up). No "ongoing supervision" by the court is required here—and Defendants have not argued that the Lt. Governor will not follow this court's orders short of ongoing court supervision. Plaintiffs do not seek a disfavored mandatory injunction.

Nor do Plaintiffs seek to alter the status quo. The ballots are not yet printed (hence the timing of this briefing and hearing), and Plaintiffs request only the restoration of the status quo prior to the certification of the misleading language. An injunction that preserves rather than changes the status quo is not the kind disfavored mandatory injunction that triggers a heightened standard. *See Johnson v. Cache Cnty. Sch. Dist.*, 323 F. Supp. 3d 1301, 1312 (D. Utah 2018). And "[t]he appropriate time to determine the status quo is 'the last uncontested status between the parties which preceded the controversy.'" *Planned Parenthood Ass'n of Utah v. State*, 2024 UT 28, ¶ 226 (citation omitted). That status existed *before* Defendants certified misleading ballot language which they revealed only *in the certification document itself*. Plaintiffs ask that Defendants be prohibited from placing that misleading language on the ballot. *See Trial Laws. Coll. v. Gerry Spence Trial Laws. Coll. at Thunderhead Ranch*, 23 F.4th 1262, 1276 (10th Cir. 2022) (characterizing as "prohibitory" order that Defendant not "mak[e] statements that could create further confusion). Additionally, because of Plaintiffs' exceedingly strong showings, it is not necessary to definitively decide which standard applies in this case, as Plaintiffs are likely to succeed under both a heightened preliminary injunction standard and a lower one. *See Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797–98 (10th Cir. 2019).

Plaintiffs request that the improper language not be placed on the ballot, or in the alternative, if the language *is* on the ballot, that the proposed amendment be rendered void because of the constitutional defects in the substance and procedure of placing it on the ballot. Mot. at 28. Post election invalidation is a proper remedy "when a defect goes to the very heart of the amendment," as the language does here and "it is impossible to say with any certainty what the vote of the electorate would have been 'if the voting public had been given the whole truth.'" *See Armstrong v. Harris*, 773 So. 2d 7, 21 (Fla. 2000). Defendants provide no direct rebuttal to the cases that provide for post-election voiding of an improper amendment. Instead, Defendants claim that Plaintiffs have not satisfied the requirements of Utah R. Civ. P. 65A(e) because they cannot establish likelihood of success and irreparable harm. Resp. at 42. But if the misleading language remains on the ballot and Utahns vote in favor of proposed Amendment D who would have voted against it if they had seen the full and accurate text, Utah citizens will be deprived of a constitutional right by deception. It is hard to imagine a more irreparable injury. *See Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) ("the violation of a constitutional right must weigh heavily in that [irreparable harm] analysis").

Nevertheless, the public interest is best served by avoiding a ballot containing unconstitutional ballot questions. The Court should act to prevent that from occurring.

V. The Lieutenant Governor's request for a monetary bond from private citizens to comply with the Utah Constitution should be rejected.

At the Monday status conference, the Lieutenant Governor remarkably requested a monetary bond from Plaintiffs—private citizens and nonpartisan organizations—to cover some unstated cost in programming the ballots to comply with the Utah Constitution. Utah Rule of Civil Procedure 65A grants the Court discretion to dispense with security for injunctions where a substantial reason to do so exist. Here, Plaintiffs are private citizens and nonpartisan organizations

advancing the public interest in a lawful election process consistent with fundamental constitutional rights. "Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right." *Grayeyes v. Cox*, No. 4:18-CV-00041, 2018 WL 3830073, at *9 n.8 (D. Utah Aug. 9, 2018) (quoting *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009)); *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 n.193 (D. Utah 2017) (same); *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009) ("Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right."); *See also Foy v. Fla. Comm'n on Offender Rev.*, No. 4:24CV140-MW/MAF, 2024 WL 3543771, at *11 (N.D. Fla. July 25, 2024) (holding same); *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1186 (N.D. Fla. 2022), *aff'd sub nom. Honeyfund.com Inc. v. Governor*, 94 F.4th 1272 (11th Cir. 2024) (same).

CONCLUSION

For the foregoing reasons, the Court should grant the preliminary injunction, enjoin the certification that includes Amendment D, order the Lieutenant Governor to issue a new certification that removes Amendment D, and order the Lieutenant Governor to direct all county clerks to comply with the Court's injunction by ensuring Amendment D is not printed on the ballots for the November 2024 election. Plaintiffs are otherwise entitled to an injunction that Amendment D is void. These forms of relief are consistent with how Courts have addressed these violations in other cases.

September 11, 2024

Respectfully submitted,

/s/ David C. Reymann

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CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. Civ. P. 7(q)(3), I hereby certify that the foregoing **PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF PRELIMINARY INJUNCTION MOTIONS** complies with the word limits in Utah R. Civ. P. 7 because it contains 5,147 words, excluding the items identified in Utah R. Civ. P. 7(q)(2).

/s/ David C. Reymann

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of September, 2024, I filed the foregoing **PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF PRELIMINARY INJUNCTION MOTIONS** via electronic filing, which served all counsel of record.

/s/ David C. Reymann