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Counsel for Legislative Defendants

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

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, 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.

LEGISLATIVE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Case No.: 220901712

Honorable Dianna Gibson

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INTRODUCTION

Legislative Defendants' motion demonstrates that Plaintiffs' Count V fails under the three-step test from *League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21 ("*LWV*"). In response, Plaintiffs misconstrue *LWV*, mischaracterize Legislative Defendants' arguments, ignore record evidence, raise erroneous legal arguments, and request a remedy that is premature and improper. Plaintiffs fail at each step of the *LWV* merits test. At step one, Plaintiffs argue that whether Proposition 4 was constitutional doesn't matter, and even if Proposition 4 was *unconstitutional*, it still constitutes an exercise of the initiative power to reform the government. Plaintiffs' other arguments about Proposition 4's constitutionality under the Utah Constitution and the federal Elections Clause also lack merit. At step two, Plaintiffs cannot show that S.B. 200—a law enacted after protracted, careful negotiations between legislators and Proposition 4's sponsors—impaired Proposition 4's reforms. And at step three, rather than responding with legal arguments to Legislative Defendants' showing that S.B. 200 satisfies strict scrutiny, Plaintiffs argue that Legislative Defendants' arguments are post hoc justifications. But this assertion ignores the record evidence showing the Legislature's contemporaneous concerns. More to the point, Plaintiffs fail to dispute that S.B. 200's reforms were narrowly tailored.

As to remedy, Plaintiffs ask for a severability ruling, a permanent injunction against the 2021 Congressional Plan, and a *post-remedy* remedial hearing. But at this juncture, neither party knows if and to what extent S.B. 200 is problematic; it's premature to talk solutions before there's even a confirmed problem. And Plaintiffs' waiver assertions are backwards—Legislative Defendants need not brief unripe severability issues, but Plaintiffs have failed to adequately brief their request to resurrect Proposition 4. What's more, their request for a permanent injunction against the 2021 Congressional Plan puts the Count VI cart before the Count V horse. Count V doesn't encompass Count VI, as Plaintiffs assert, and Count VI still is at the motion-to-dismiss stage and needs to be litigated in full. And Plaintiffs' talk of a post-remedy remedial hearing is doubly premature and not authorized under Utah law.

The Court should grant Legislative Defendants' cross-motion for summary judgment.

ARGUMENT

I. Plaintiffs fail to demonstrate that Proposition 4 was a proper exercise of the power to alter or reform the government by statute.

A. Proposition 4's constitutionality is an essential element at step one of the *LWV* test.

LWV's first step requires this Court to assess whether Proposition 4 was a proper exercise of the initiative power to enact statutory reforms. *See* Leg.-Defs. Cross-MSJ 29-30. In answering the Legislature's first-step arguments, Plaintiffs contend that the constitutionality of Proposition 4's provisions is "not relevant to the first element of the test outlined by the Supreme Court." Pls. Resp. 13 n.9. Plaintiffs contend they can satisfy *LWV*'s first element "even if [the Proposition 4 provisions] were not" constitutional. *Id.* at 13. This upends *LWV*, for whether Proposition 4 comported with state and federal constitutional limitations is an essential part of the first-step inquiry.

LWV's three-step test analyzes whether a "plaintiff's claim" under the Initiative and Alter-or-Reform Clauses "actually implicates the right in question" and whether "the government has done something that violates the right." *LWV*, 2024 UT 21, ¶71. The right at issue in Count V is the "right to reform [the] government by enacting *statutory* government reforms." *Id.* ¶10 (emphasis added). The "scope" of this right is circumscribed. *Id.* ¶161. "Initiatives, including those that reform the government, are limited to enacting 'legislation.'" *Id.* The "reforms enacted through the initiative process must be statutory—in other words, capable of being accomplished through legislation." *Id.* ¶10 n.4. This limit is indispensable; the Utah Constitution does not authorize amendments by citizen initiative or statutory reforms "in disregard of"—or "in a manner that violates"—"other provisions of the constitution." *Id.* ¶9. The only way to enact reforms that "would require a change to the constitution" is through "the constitutional amendment process, not the initiative process." *Id.* ¶10 n.4. Thus, Proposition 4's proponents could have "exercised, or attempted to exercise, their initiative power" to reform the government only insofar as they sought to enact reforms that are "capable of being accomplished through legislation." *Id.* ¶¶10 n.4, 74.

All this means: Count V implicates the constitutional right to reform the government through initiatives only to the extent Proposition 4's reforms were "capable of being accomplished through

legislation." *Id.* ¶10 n.4. Conversely, Count V fails at the first step of the *LWV* test if Proposition 4 "disregard[ed]" constitutional limitations, "violat[ed] other provisions of the constitution," or sought to enact reforms that can only be accomplished by a constitutional amendment. *Id.* ¶9, ¶10 & n.4. Plaintiffs' assertion that even *unconstitutional* initiatives can satisfy *LWV*'s first element would allow initiatives to effectively amend the Utah Constitution, thereby nullifying *LWV*'s holding and Article XXIII's amendment procedure. *LWV* "does not establish" such a right. *Id.* ¶9. *LWV*'s first step therefore requires this Court to assess whether Proposition 4's provisions conformed to constitutional limitations.

B. Proposition 4 constrained the Legislature's substantive discretion over redistricting.

1. Article IX.

Plaintiffs contend that Proposition 4's substantive constraints did not impermissibly restrict the Legislature's redistricting discretion under Article IX. *See* Pls. Resp. 20-31. Plaintiffs are wrong. Article IX states that "the Legislature shall divide the state into congressional, legislative, and other districts." Utah Const. art. IX, §1. Article IX does not, as Plaintiffs suggest, limit the Legislature's discretion. *See* Pls. Resp. 20. Instead, Article IX expressly "grant[s] the Legislature authority to enact legislation setting congressional boundaries." *LWV*, 2024 UT 21, ¶198. In fact, it "does more" than grant that power. *Id.* Article IX's "explicit vesting" of redistricting power in the Legislature "is an implicit prohibition against any attempt to vest" that same power "elsewhere," *Salt Lake City v. Ohms*, 881 P.2d 844, 849 (Utah 1994), or to otherwise by statute "limit the … discretion" given under it, *Evans & Sutherland Comput. Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 443 (Utah 1997). *See* Leg.-Defs. Cross-MSJ 31, 39. Plaintiffs fail to address the firmly established principle that a "specific" constitutional "provision" that explicitly vests authority in one body "must be considered as a limitation on the power … to place … the power" elsewhere or to limit it by statute. *Evans*, 953 P.2d at 442. Article IX's "explicit vesting" of redistricting responsibilities in the Legislature means that the Legislature must retain full discretion in discharging those responsibilities. *Ohms*, 881 P.2d at 849.

Plaintiffs suggest that, notwithstanding Article IX, a statute can restrict the Legislature's redistricting discretion because this Court already held that "redistricting power is not solely committed to the Legislature." Pls. Resp. 20 (quoting MTD Op. 12). But Plaintiffs miss the point. This Court's motion-to-dismiss opinion addressed whether Plaintiffs' various claims were nonjusticiable; that issue remains pending before the Utah Supreme Court, which left open the question of what Article IX permits or prohibits. *LWV*, 2024 UT 21, ¶198. In any event, the relevant question for Count V isn't whether other processes under the Utah Constitution—such as the governor's veto (Article VII, §8), veto by referendum (Article VI, §1(2)(a)(i)(B)), or judicial review (where permitted, such as for malapportionment claims under the federal and Utah constitutions or the federal Voting Rights Act)—touch on redistricting.[1] Those processes, unlike Proposition 4's substantive constraints, are all prescribed by the Utah Constitution or the U.S. Constitution's Supremacy Clause. Here, the relevant question is whether an initiative-enacted *statute* can separately "limit" the "discretion" to redistrict that Article IX explicitly vests in the Legislature. *Evans*, 953 P.2d at 443. The answer is no. *Id.*

As explained before and below, Proposition 4's substantive constraints restricted the Legislature's redistricting discretion. *See* Leg.-Defs. Cross-MSJ 33-39; *infra* at 5-11. Such constraints on discretion are especially problematic in redistricting because redistricting is necessarily "a zero sum game." *Smith v. Cobb Cnty. Bd. of Elections & Registrations*, 314 F. Supp. 2d 1274, 1304 (N.D. Ga. 2002). If the Legislature must prioritize one factor, as Proposition 4 required, then it must de-prioritize other factors. For instance, Proposition 4's requirement that the Legislature prioritize minimizing splitting municipalities meant that the Legislature could not prioritize other factors such as minimizing splitting counties and ensuring an urban-rural mix.

Plaintiffs don't dispute that Proposition 4 constrained the Legislature's substantive discretion. Instead, Plaintiffs respond only with their unproven allegation that the Legislature's desire to keep the urban-rural mix across districts in the 2021 Congressional Plan was pretextual. *See* Pls. Resp. 25; *but see Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 11 (2024) (the legislature is entitled to the

[1] Legislative Defendants do not concede that partisan-gerrymandering claims are justiciable, and those issues also remain pending before the Utah Supreme Court.

presumption of good faith in redistricting, which requires clearing a "stringent" "evidentiary burden" to overcome). If that allegation is relevant at all, it is relevant only to Count VII, not Count V. Under *LWV* step one, the relevant question for Count V is whether Proposition 4 constrained the Legislature's Article IX discretion. Plaintiffs don't dispute that it did.

What's more, Plaintiffs' only supposed evidence—the commission's Public SH2 proposed plan—demonstrates how Proposition 4 would have restricted the Legislature's discretion. Although the commission's plan purported to "achieve a statewide balance of districts with both rural and urban areas," it did so only "where [it was] possible" consistent with S.B. 200's substantive constraints. Ex. 1 to Pls. Resp. By contrast, the Legislature could have rationally determined that maximizing the urban-rural mix—not merely ensuring the urban-rural mix only where it was feasible—was the key priority in drawing congressional boundaries. *See Parkinson v. Watson*, 4 Utah 2d 191, 200 (1955). Proposition 4's rigid priority list limited the Legislature's discretion on that issue and its discretion to decide which municipalities and counties should be split, how they should be split, what those districts should look like, and so on.

Plaintiffs' response about Proposition 4's specific provisions fares no better.

Municipality and County Splits. Legislative Defendants explained how Proposition 4 sought to constrain the Legislature's Article IX discretion by requiring the Legislature to "giv[e] first priority to minimizing the division of municipalities and second priority to minimizing the division of counties." Utah Code §20A-19-103(2)(b) (2018); *see* Leg.-Defs. Cross-MSJ 34-35. Plaintiffs don't dispute that. *See* Pls. Resp. 24-25. But Article IX commits to the Legislature the discretion as to whether and how to redistrict across political subdivisions, expressly requiring the Legislature to divide "the state" with no constraints as to political subdivisions. Utah Const. art. IX, §1. Plaintiffs' argument that an initiative can "establish[] … prioritization of subdivision split," Pls. Resp. 25, runs headlong into Article IX's explicit vesting of redistricting discretion in the Legislature—a constitutional choice that precludes "limit[ing]" that "discretion" by statute. *Evans*, 953 P.2d at 443.

Plaintiffs' only other response disputes the practical effect of Proposition 4's constraints. *See* Pls. Resp. 25-26. As Legislative Defendants explained (at 34-35), the effect of Proposition 4's

requirement to prioritize minimizing municipalities was to purposefully and unduly favor Salt Lake City and its Democratic voters over Republican voters who reside in Salt Lake County and elsewhere. That would have required, by statute, the Legislature to exercise its constitutional discretion in a particular way—ironically, in a way inconsistent with Proposition 4's partisan-gerrymandering ban. *See* Leg.-Defs. Cross-MSJ 34-35. Plaintiffs disagree, asserting that there's "no evidence" supporting that fact. Pls. Resp. 25. But that fact is so well supported by the distribution of Utah voters that Plaintiffs themselves relied on the same distribution in their complaint. *See* FAC ¶¶4-8, 208-09, 212, 218, 237.

Order of Priorities. Plaintiffs don't dispute (Pls. Resp. 26-27) Legislative Defendants' showing that Proposition 4's rigid order of priorities constrained the Legislature's discretion. *See* Leg.-Defs. Cross-MSJ 35-36; Utah Code §20A-19-103(2) (2018). Plaintiffs simply assert (at 26) that an initiative could establish the order of priorities, again ignoring the principle that a constitutionally vested discretion cannot be limited by statute, *see Evans*, 953 P.2d at 443. Plaintiffs also fail to answer *Parkinson*'s holding that the Legislature has the "full power"—and must have "plenty of room"—to weigh competing interests when redistricting. 4 Utah 2d at 196, 199. They try to distinguish *Parkinson* by cabining its significance to the issue of setting the ratio of representation in the Legislature. *See* Pls. Resp. 26. But *Parkinson* broadly establishes the Legislature's discretion in redistricting. *Parkinson* recognized that the Constitutional Convention "had full power to determine the basis of representation in the state legislature." 4 Utah 2d at 199. It also recognized that the Legislature "would succeed to such power except as such restrictions as the Constitution should specifically prescribe." *Id.* Because Article IX gives the Legislature authority over redistricting, the Legislature has the full discretion to determine the basis for congressional representation as well, except as otherwise specifically limited by the Constitution. A statute cannot limit that discretion. *See Evans*, 953 P.2d at 443.

Ban on partisan considerations. Redistricting is an "inescapably political enterprise." *Alexander*, 602 U.S. at 6; Leg.-Defs. Cross-MSJ 37. And ultimately, because redistricting is a zero-sum game, partisan and incumbency interests are unavoidable factors in line-drawing. *See* Leg.-Defs. Cross-MSJ 36-37; *supra* at 4-5. Article IX entrusts the Legislature with discretion to make those political judgments and to balance the "competing" political interests. *Carter v. Lehi City*, 2012 UT 2, ¶34; *Parkinson*, 4 Utah

2d at 199; *Harper v. Hall*, 886 S.E.2d 393, 420-21 (N.C. 2023). Proposition 4, however, constrained the Legislature's discretion to weigh the competing political interests by prohibiting it from "purposefully or unduly favor[ing] or disfavor[ing]" incumbents, candidates, or political parties. Utah Code §20A-19-103(3) (2018). Those purported limits on the Legislature's discretion would have prohibited any maps that would have had the *effect* of favoring or disfavoring incumbents, candidates, and political parties—regardless of the maps' intent or purpose. Leg.-Defs. Cross-MSJ 36-37. And because voters are not uniformly dispersed throughout the State and because political affiliation is not an immutable characteristic, *see Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) (plurality op.); *id.* at 343 (Souter, J., dissenting), how best to draw maps that do not "unduly" favor a political party will always be open to debate and ultimately require the exercise of discretion, *see Rucho v. Common Cause*, 588 U.S. 684, 715-16 (2019).

Plaintiffs don't dispute that Proposition 4 constrained the Legislature's discretion to resolve such issues. Instead, they embrace that outcome. Plaintiffs also argue that voting patterns, not voter-registration information, should be the barometer for measuring partisan bias and drawing maps under Proposition 4 (a requirement not even found in Proposition 4), thereby further seeking to require the Legislature to exercise its discretion in a particular way. Pls. Resp. 27. All this runs headlong into Article IX's vesting of that discretion to make political judgments in the Legislature. *See supra* at 3-5.

Requirement to use judicial standards. Requiring the Legislature to use "judicial standards and the best available data and scientific and statistical methods … to assess whether a proposed redistricting plan abides by and conforms to" Proposition 4's "redistricting standards" impermissibly constrains the Legislature's redistricting discretion. Utah Code §20A-19-103(4) (2018); Leg.-Defs. Cross-MSJ 37-38. Redistricting is a legislative act "fraught with" "multifarious problems," requiring the balancing of a "variety of interest[s]," *Parkinson*, 4 Utah 2d at 196, and calling for "political compromises," *Alexander*, 602 U.S. at 44 (Thomas, J., concurring). Such policymaking and political-decisionmaking are often not reducible to judicial standards but instead turn on political judgment and discretion. *See* Leg.-Defs. Cross-MSJ 38. But by requiring the Legislature's redistricting decisions to be based on so-called "judicial standards" and certain types of data and methods, Proposition 4 improperly constrained the Legislature's political and policymaking discretion. *Id.* at 37-38.

Plaintiffs' response misses the point. They say that because the Legislature has previously used certain types of factual data or sometimes consulted the existing legal landscape, as informed by case law, to inform various legislative choices, an initiative can require the Legislature to base its redistricting decisions on a particular set of facts and judicial standards. Pls. Resp. 29. But it's one thing for the Legislature *by its own choice* to consider in redistricting certain factual and legal information. It's quite another to *require* the Legislature *by statute* to exercise its discretion based on particular information, as Proposition 4 would have done. Plaintiffs also argue that because some courts have used certain "measures of partisan symmetry and statistical methods" in partisan-gerrymandering cases, it's okay to require the Legislature to use them in redistricting. Pls. Resp. 30-31. This is wrong. As a threshold matter, there's no uniform agreed-upon or manageable measures for partisan symmetry. *Rucho*, 588 U.S. at 710. And as North Carolina's experience confirms, such measures are unworkable even for courts. *See Harper*, 886 S.E.2d at 341-43 ("no one—not even the four justices who created it—could apply [the means-median difference, efficiency gap test] to achieve consistent results."). And the fact that some courts in other States have used such information to discharge their responsibilities sheds no light on whether an initiative-passed statute like Proposition 4 can require the Utah Legislature to base its discretion on such information when discharging its Article IX redistricting responsibilities. *See Evans*, 953 P.2d at 443.

Private right of action. Plaintiffs don't dispute the Legislature's showing that Proposition 4's private right of action impaired the Legislature's discretion. *See* Leg.-Defs. Cross-MSJ 38-39; Pls. Resp. 31-32. Instead, they contend that Proposition 4's substantive criteria were somehow not binding on the Legislature because the Legislature can reject the commission's maps and draw its own maps. *See* Pls. Resp. 31-32. This assertion is wrong and the Legislature addresses it in detail later. *See infra* at 16-18; Leg.-Defs. Cross-MSJ 54-55. Here, the important and unrebutted point is that Proposition 4 threatens the Legislature with lawsuits for failing to abide by those substantive constraints. Plaintiffs also argue that because the Legislature gave "original appellate jurisdiction" to the Utah Supreme Court to hear apportionment claims, Utah Code §78A-3-102(4)(c), that justifies Proposition 4's constraint on the Legislature's discretion. But the jurisdictional statute merely regulates the appellate

court's jurisdiction over cases that Utah courts can adjudicate, such as malapportionment or federal Voting Rights Act claims. It does not suggest that the Legislature's substantive redistricting discretion can be cabined by a private right of action. And the fact that other States have adopted statutes governing redistricting, *see* Pls. Resp. 32, does not show that Article IX allows initiative-passed statutes to limit constitutionally vested discretion. *See, e.g.*, *Evans*, 953 P.2d at 443.

2. Federal Elections Clause.

Proposition 4's substantive provisions impermissibly intrude on the Legislature's responsibility under the federal Elections Clause to redistrict. *See* Leg.-Defs. Cross-MSJ 39-41. Under the Elections Clause, the constraints on the Legislature's redistricting authority must be "the ordinary constraints on lawmaking in the state constitution," not extra-constitutional constraints found in an initiative-passed statute. *Id.* at 41 (quoting *Moore v. Harper*, 600 U.S. 1, 29-30 (2023)). Because Proposition 4's substantive constraints were statutory—and not "ordinary" constitutional constraints on lawmaking—those constraints impermissibly intruded on the Legislature's ability to discharge a federal constitutional function. *Id.*

Plaintiffs incorrectly argue that the constraints on the Legislature's redistricting function under the federal Elections Clause don't have to come from the state constitution and that Proposition 4 was a valid initiative under the Elections Clause. *See* Pls. Resp. 33-34. Plaintiffs err. The Elections Clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, §4. It thus "expressly vests power to carry out its provision in 'the Legislature' of each State," a "deliberate choice" made by the Framers of the Constitution. *Moore*, 600 U.S. at 34. Under that constitutional design and the Supremacy Clause, "the people of a single state" lack the ability to limit the powers "given" to the Legislature "by the people of the United States." *McCulloch v. Maryland*, 17 U.S. 316, 329 (1819). And "the exercise of such authority in the context of the Elections Clause is subject to the ordinary constraints on lawmaking in the state constitution." *Moore*, 600 U.S. at 29-30. So a governor's veto would constitute an "ordinary constraint[] on lawmaking," *id.* at 30, "where the state Constitution so

provide[s]" and invites the governor's "participation as part of the process of making laws," *Smiley v. Holm*, 285 U.S. 355, 368, 370 (1932). The same is true of a veto by referendum if the State's constitution provides for one. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916). And an "ordinary exercise of state judicial review" constitutes an ordinary constraint on lawmaking if the state constitution allows for it.[2] *Moore*, 600 U.S. at 23.

But Plaintiffs fail to explain how Proposition 4's substantive constraints on the Legislature constituted "ordinary constraints on lawmaking" under the Utah Constitution. Nor could they. As they must, Plaintiffs concede that an initiative can enact only "legislation" under Article VI. Pls. Resp. 33. Proposition 4's substantive constraints thus are not "constraints on lawmaking in the state constitution." *Moore*, 600 U.S. at 30. Nor are Proposition 4's substantive provisions "ordinary" constraints on lawmaking. Unlike the governor's veto, veto by referendum, or ordinary judicial review (where constitutionally permitted), Proposition 4's substantive provisions are not constitutionally based. That's why Plaintiffs' reliance on *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), fails. In Arizona, the people amended the Arizona Constitution by initiative to move congressional redistricting power from the Arizona Legislature to an independent commission. In rejecting a challenge to that initiative, the U.S. Supreme Court expressly relied on the fact that the people of Arizona had "placed both the initiative power *and* the [commission's] redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority." *Id.* at 816-17 (emphasis added). And the U.S. Supreme Court later read *Arizona State Legislature* to be grounded in the fact that the independent commission was based in the State's constitution. *See Moore*, 600 U.S. at 25 (observing that "[v]oters 'amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission'"). Plaintiffs thus err by contending that *Arizona State Legislature* does not distinguish between constitutional and statutory constraints on lawmaking. Pls. Resp. 34. And unlike in Arizona, in Utah an initiative cannot amend the Constitution.

[2] Again, Legislative Defendants do not concede that the Utah Constitution permits judicial review of partisan-gerrymandering claims.

Thus reading the Utah Constitution to allow Proposition 4's statutory standards to override the Legislature's constitutional discretion would "transgress the ordinary bounds of judicial review" in violation of the federal Elections Clause. Leg.-Defs. Cross-MSJ 41 (quoting *Moore*, 600 U.S. at 36). Plaintiffs' answer—that *Moore* "could not have possibly generated doubts as to Prop 4's constitutionality when Defendants enacted S.B. 200 in 202[0]," Pls. Resp. 34—misses the point. Under *Moore*, this Court cannot *now* "transgress the ordinary bounds of judicial review" when interpreting the Utah Constitution, 600 U.S. at 36, especially given the Utah Supreme Court's holding that an initiative cannot amend the Utah Constitution, *LWV*, 2024 UT 21, ¶161. Plaintiffs' repeated argument (at 35) that Proposition 4's statutory provisions could override the Legislature's constitutionally vested discretion cannot overcome the Utah Supreme Court's holding that an initiative cannot amend the Utah Constitution and must be exercised in harmony with the rest of the Constitution. *LWV*, 2024 UT 21, ¶¶9, 161. A holding that Proposition 4 could override constitutional provisions would "exceed the bounds of ordinary judicial review." *Moore*, 600 U.S. at 37; Leg.-Defs. Cross-MSJ 41.

C. Proposition 4 constrained the Legislature's discretion over appropriations.

Proposition 4's mandatory-funding provision that required the Legislature to "appropriate adequate funds for the Commission … as the Commission may reasonably request," Utah Code §20A-19-201(12)(a) (2018), impermissibly impaired the Legislature's responsibility over appropriations. Leg.-Defs. Cross-MSJ 41-43. Plaintiffs' contrary arguments lack merit. *See* Pls. Resp. 43-45. To start, Plaintiffs don't dispute that the Legislature has the constitutional obligation to balance the budget. Pls. Resp. 44; *see* Leg.-Defs. Cross-MSJ 41-42. Balancing the budget is a zero-sum game that requires the exercise of "legislative-political" discretion. *Salt Lake City v. Int'l Ass'n of Firefighters*, 563 P.2d 786, 790 (Utah 1977). Despite Plaintiffs' nonchalance toward the State's coffers, *cf.* Pls. Resp. 44-45, any money the Legislature appropriates for the commission must be met with corresponding reductions in other governmental spending or increased taxes. *See* Utah Const. art. XIII, §5. By requiring the Legislature to appropriate funds for the commission, Proposition 4's mandatory-funding provision constrained the Legislature's budgeting and taxing discretion. *See* Leg.-Defs. Cross-MSJ 42-43. Worse yet, that

provision failed to define "adequate funding" and put the commission in the driver's seat when determining and "request[ing]" what constituted adequate funding. Utah Code §20A-19-201(12)(a) (2018); *see* Leg.-Defs.-Cross-MSJ 42-43.

Plaintiffs argue that such constraints posed no problem because an initiative exercises a coequal, legislative power and budgeting is a legislative decision. Pls. Resp. 44. But under *LWV*, an initiative must be "exercised in harmony with the rest of the constitution." 2024 UT 21, ¶157. That means that an initiative must be exercised in harmony with the constitutional process by which the Legislature appropriates funds and the balanced-budget requirement. An initiative cannot displace that process and "divest[] [the Legislature] of the power" to appropriate funds. *People's Advocs., Inc. v. Superior Ct.*, 181 Cal. App. 3d 316, 329 (1986). *LWV* also "emphasize[d]" that an initiative can enact those reforms "capable of being accomplished through legislation." 2024 UT 21, ¶10 n.4. Legislative Defendants do not suggest that the initiative power is "subservient" or "limited," as Plaintiffs suggest. *Cf.* Pls. Resp. 42. The initiative power "reaches to the full extent of the legislative power, but no further." *Carter*, 2012 UT 2, ¶31. And because the Legislature cannot bind succeeding legislatures to appropriate through legislation, neither can an initiative.[3] *See People's Advocs.*, 181 Cal. App. 3d at 329; 82 Corpus Juris Secundum §11.

Plaintiffs also largely abandoned Count V to the extent it concerns Proposition 4's mandatory-funding provision. In their summary-judgment motion, Plaintiffs initially argued that S.B. 200 allegedly "undermined the role of the Commission by removing the statutory requirement for the Legislature to appropriate adequate funds for the Commission's work." Pls. MSJ 14. But in their combined reply and response, Plaintiffs now say that Proposition 4 already gave the Legislature "discretion as to the amount" to be appropriated to the commission. Pls. Resp. 45. If all Proposition 4 required the Legislature to do was fund the commission at an amount within the Legislature's discretion, S.B. 200 continues to do the same thing. S.B. 200 states that the commission would fulfill its duties

[3] Plaintiffs misunderstand appropriations law when they argue that because the Legislature previously has various laws limiting or committing to appropriations, an initiative-enacted statute can similarly bind the Legislature. *See* Pls. Resp. 44 & nn.25-26. "Any [appropriations] provision that does not take initial effect during the ensuing fiscal year is intended to function only as an authorization—an intention to appropriate." *Frederick v. Presque Isle Cnty. Cir. Judge*, 476 N.W.2d 142, 148 (Mich. 1991). Those pieces of legislation do not forever bind succeeding legislatures.

"[w]ithin appropriations from the Legislature." Utah Code §20A-20-201(12) (2020). Thus, S.B. 200 expressly contemplates that the Legislature would fund the commission at levels within its discretion—just as it would under Plaintiffs' apparent new reading of Proposition 4. *See id.*

It's not clear what dispute remains after Plaintiffs' pivot. Perhaps Plaintiffs now contend that the "adequate funding" language should be revived and ensure sufficient funding so as not to render the commission "ineffective." *Cf.* Pls. Resp. 45. But Proposition 4 was problematic because it made the commission rather than the Legislature the arbiter of funding sufficiency. *See supra* at 12. And whether funding is adequate or governmental bodies are effective are nonjusticiable political questions textually committed to the Legislature and lacking any judicially manageable standard. *Matter of Childers-Gray*, 2021 UT 13, ¶62. In such cases, Plaintiffs would lack—and have not pointed to—a cause of action to argue that a particular governmental body's funding is inadequate. More to the point, the Legislature, in enacting S.B. 200, did fund the commission with the exact amount estimated under Proposition 4. For all these reasons, the Court should hold that Proposition 4's mandatory-funding provisions was not a proper exercise of the initiative power.

D. Proposition 4 displaced the Legislature's constitutional prerogative to determine its own procedural rules.

Proposition 4's various procedural provisions impermissibly displaced each house of the Legislature's ability to set its own procedural rules under Article VI, §12 and the federal Elections Clause. *See* Leg.-Defs. Cross-MSJ 43-51. Under Article VI, §12, "[e]ach house shall determine the rules of its proceedings." These "'rules of … proceedings' include 'those rules having to do with the process the legislature uses to propose or pass legislation.'" *League of Women Voters of Wis. v. Evers*, 929 N.W.2d 209, 220 (Wis. 2019). Proposition 4 sought to displace the Legislature's constitutional prerogative to determine its own rules of proceedings by (1) requiring the Legislature to take a mandatory up-or-down vote on the commission's maps, without any sponsoring legislator and without any amendments, Utah Code §20A-19-204(2)(a) (2018); (2) displacing each house's internal calendar and scheduling rules, *id.* §§20A-19-204(3)-(4) (2018); (3) requiring the Legislature to adopt a post-enactment

report, *id.* §20A-19-204(5)(a) (2018); and (4) prohibiting mid-decade redistricting, *id.* §20A-19-102 (2018). *See also* Leg.-Defs. Cross-MSJ 47-50.

Plaintiffs' responses do not cure those ills. To start, Plaintiffs insist that an initiative's procedural provisions can displace the Legislature's own internal procedural rules. *See* Pls. Resp. 36. Plaintiffs assert that initiatives can do so by requiring that each house's rules "be consistent with statutes adopted by initiative." Pls. Resp. 36. But Plaintiffs' argument contravenes the plain text and import of Article VI, §12. Plaintiffs have no response to the fact that the "maxims" and "method of proceeding[] rest entirely in the breast" of the Legislature and "are not defined and ascertained by any particular stated laws." 1 Blackstone Commentaries 159. Nor do Plaintiffs have any response to cases holding that the power to set internal procedural rules is "exclusive" in the Legislature. *Pa. AFL-CIO v. Commonwealth*, 563 Pa. 108, 120 (2000); *see also Evers*, 929 N.W.2d at 222-23. An initiative "cannot preempt or estop a house from employing its *substantive* [rulemaking] powers." *People's Advocs.*, 181 Cal. App. 3d at 325. This is because each house's ability to set its own procedural rules derives from Article VI, §12 and is "constitutionally established." *Gallivan v. Walker*, 2002 UT 89, ¶59, n.11.

Plaintiffs' effort (at 37) to distinguish *People's Advocates* on the ground that initiatives are different if they involve reform elements conflicts with *LWV*'s holding that an initiative is "capable" of enacting only reforms that can be "accomplished through legislation." 2024 UT 21, ¶10 n.4. And a statute cannot displace each house's ability to set its own rules. *See* Leg.-Defs. Cross-MSJ 43-45. Plaintiffs' view that the Legislature's own rules promulgated under Article VI, §12 should give way to Proposition 4 because it is an initiative that implicates Article I, §2, would imbue initiatives with a constitutional-amendment-like status that *LWV* expressly rejects.

Plaintiffs' view of Article VI, §12 is also unworkable. For instance, if Plaintiffs were right that an initiative can displace each house's ability to determine its own rules, it would mean that an initiative could also categorically bar the Legislature from proposing or considering *any* amendments for *any* bill introduced in any session. *See* Utah Code §20A-19-204(2)(a) (2018) (prohibiting the Legislature from amending commission maps). That would not only displace the House's and Senate's current rules that plainly let legislators propose amendments or substitute bills, *see, e.g.*, Utah S.R. 3-2-309, 3-2-404,

3-2-406, 3-2-407, 4-3-201, 4-3-301, but also grind the legislative process to a halt, crippling the Legislature from performing its constitutional function to enact laws.

Plaintiffs' cited statutory examples don't show that an initiative can displace each house's ability to set its own rules or that courts can be empowered to police alleged violations thereof. *See* Pls. Resp. 41. "[A] statute may not control a rule of internal proceeding" of each house in a binding and irrevocable manner. *People's Advocs.*, 181 Cal. App. 3d at 325. One house of the Legislature can't set the rules for the other house. Though the two houses often coordinate and enact procedural rules as statutes, such statutory rules are enacted voluntarily by both houses, and in "coordination with" each other, to "facilitate the exercise of a power allocated" to each house. *Zivotofsky v. Kerry*, 576 U.S. 1, 50 (2015) (Thomas, J., concurring in judgment in part). "The *form* (statute or rule or resolution) chosen by a house to exercise its rulemaking power cannot preempt or estop a house from employing its *substantive* [rulemaking] powers." *People's Advocs.*, 181 Cal. App. 3d at 325. And whatever might be said about the Legislature's creating "self-imposed statutory … rules" for itself, it's entirely different to suggest that an initiative-enacted statute can displace the Legislature from making such decisions and empower courts to "invalidate laws as a consequence" of such violations. *Evers*, 929 N.W.2d at 223.

As a last-ditch effort, Plaintiffs try to evade Article VI, §12 by saying that Proposition 4's requirements to hold a mandatory vote on the commission's maps, to adopt a post-enactment report, to accept public input for a specified number of days, and to refrain from mid-decade redistricting were actually "substantive"—not procedural—requirements on the Legislature. Pls. Resp. 40. Their attempted recategorization fails. Plaintiffs themselves have categorized those (except for the restriction on mid-decade redistricting) as procedural requirements. *See* FAC ¶¶321-26. And those are precisely the type of rules of proceedings that govern the legislative process. The Legislature's rules carefully prescribe how a bill may be presented to the committee and on the floor for a vote and how the bill can be amended or substituted. *See supra* at 13-15; *see also, e.g.*, Utah S.R. 4-3-101-S.R. 4-4-202. Proposition 4 (however characterized) displaced each house's ability to set its own rules of proceedings. The control of the legislative calendar—during the time-limited legislative sessions—is unquestionably a matter of each house's rules of proceedings. *See, e.g.*, Utah S.R. 4-3-101-S.R. 4-3-102. Proposition 4

displaced the Legislature's ability to set its own calendar. So too for the requirement to adopt a post-enactment report explaining why the Legislature's map is better than the commission's maps. Such a requirement is not mandated by the Utah Constitution, and any rule that a post-enactment report must be adopted for a bill to pass must come from each house's own rules. *See* Leg.-Defs. Cross-MSJ 47-48. Proposition 4's prohibition on mid-decade redistricting also displaced each house's ability to set its own rules governing what matters the Legislature considers. *See, e.g.*, Utah S.R. 1-5-103.

Plaintiffs' remaining arguments also fail. Plaintiffs argue that an initiative can require the Legislature to adopt a post-enactment report explaining why the Legislature's map is better than the commission's maps because the Legislature already issues a written report making recommendations to Utah's U.S. Senators. Pls. Resp. 42-43 (citing Utah Code §36-27-103). But that is not lawmaking, nor does Legislature divulge in that report its decisionmaking process or purposes behind the law that it has passed. *See* Leg.-Defs. Cross-MSJ 48. And Plaintiffs largely fail to address Legislative Defendants' federal Elections Clause arguments. *See* Leg.-Defs. Cross-MSJ 50-51. Proposition 4's displacement of the Legislature's own rules of proceedings was not an "ordinary constraint[] on lawmaking in the state constitution." *Moore*, 600 U.S. at 29. To hold that a statute can displace the Legislature's constitutional prerogative to set its own rules of proceedings would exceed the bounds of ordinary judicial review in violation of the federal Elections Clause. *Id.* at 36.

E. Proposition 4 effectively transferred and delegated redistricting responsibilities to the commission and the Chief Justice.

Proposition 4 impermissibly transferred and delegated redistricting functions to the commission and the Chief Justice in violation of Article IX, Article VI, Article V, and the federal Elections Clause. Leg.-Defs. Cross-MSJ 51-56. Plaintiffs' contrary arguments do not save it from those problems. To start, Plaintiffs insist that, under Proposition 4, the commission's or the Chief Justice's proposals were mere "nonbinding recommendations" such that Proposition 4 did not transfer or delegate to the commission and the Chief Justice the Legislature's redistricting powers. Pls. Resp. 46. Not so. Under Proposition 4, the commission's or the Chief Justice's proposals were effectively binding on the Legislature. *See* Leg.-Defs. Cross-MSJ 54-55. Proposition 4 required the Legislature to take a

mandatory vote on those proposals without changing them. And though Proposition 4 purported to permit the Legislature to adopt its own map, it also made adopting an alternative map as difficult as possible, and with potentially serious consequence. The Legislature not only would have had to follow Proposition 4's rigid substantive constraints but also would have had to explain why its plan better satisfied those requirements than the commission's or the Chief Justice's plans—all under threat of lawsuits. To say that the Legislature was free to "reject a Commission map and draw [its] own map" under these constraints, Pls. Resp. 47, is akin to saying that the governor in *Matheson v. Ferry* was free to pick his own judges—a notion that the Utah Supreme Court rejected, 641 P.2d 674, 678-79 (Utah 1982). In *Matheson*, the Court examined whether the effect of the "addition" of the judicial-nominating commission selected by the Legislature and the advice-and-consent provision gave "an offensive control of the power of appointment to the Legislature." *Id.* at 679. The Court held that it did and "severely curtailed" the governor's appointment power, making that power "ineffective, subservient, and perfunctory." *Id.* It was that "combination" of various features restraining the governor's appointment power that violated "the principle of separation of powers." *Matheson v. Ferry*, 657 P.2d 240, 241 (Utah 1982) (Stewart, J., concurring). So too here: Proposition 4's combined—and intended—effect was to transfer and delegate to the commission and the Chief Justice the redistricting duties. *See* Leg.-Defs. Cross-MSJ 54-55.

Plaintiffs also incorrectly contend that "no core legislative function [was] surrendered" under Proposition 4. Pls. Resp. 47. In their view, there's no non-delegation or separation-of-powers problem because the Legislature retained a "final vote" on the commission's or the Chief Justice's maps. *Id.* But as explained, the commission's and the Chief Justice's maps were effectively binding and the final vote was largely illusory. And Plaintiffs urge an erroneously narrow view of the legislative process. The legislative steps before a bill's final passage are also core legislative functions. "[T]he decision whether or not to introduce legislation is one of the most purely legislative acts that there is." *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1063 (11th Cir. 1992). Proposition 4 displaced that decision by requiring the Legislature to take a mandatory vote on the commission's or the Chief Justice's maps. Amending bills is also a core legislative function; Proposition 4 displaced it. And in redistricting, exercising

the legislative discretion to prioritize one factor over another is a core legislative function; Proposition 4 displaced that with its substantive constraints. Proposition 4 "severely curtailed" the Legislature's powers, turning its legislative role, 641 P.2d at 679, into a mere "ratifying" role, *Moore*, 600 U.S. at 28. Proposition 4 also violates the federal Elections Clause by transferring or delegating the Legislature's redistricting function to another body by statute. Leg.-Defs. Cross-MSJ 55-56.

II. S.B. 200 did not impair the people's right to alter or reform the government through an initiative.

Even if Proposition 4 were a proper exercise of the alter or reform right, S.B. 200's changes to it did not impair its core reforms. *See* Leg.-Defs. Cross-MSJ 56-63. Plaintiffs concede that S.B. 200 retained the advisory commission, which was Proposition 4's beating heart. Pls. Resp. 15; **Exhibit A**, VIP 74. Plaintiffs nevertheless argue that the reform was impaired because S.B. 200 removed "several other provisions" including the substantive constraints, the mandatory vote by the Legislature, the post-enactment report requirement, and the mandatory-funding provision. Pls. Resp. 14. S.B. 200 survives those arguments.

First, Plaintiffs downplay the statements of Better Boundaries who supported S.B. 200. *See* Pls. Resp. 16. But Better Boundaries' statements about S.B. 200 are highly relevant to assessing whether S.B. 200 continues Proposition 4's core. *See LWV*, 2024 UT 21, ¶162 (amendments pose no problem if they "furthered or facilitated the reform, or at least did not impair it"). As Legislative Defendants showed, Better Boundaries and the bipartisan legislative negotiating team engaged in careful negotiations over 15 months to reach a compromise bill that would both preserve Proposition 4's core reforms while addressing constitutional problems. *See* Leg.-Defs. Cross-MSJ 58, 62-63. After all that, Better Boundaries agreed that S.B. 200 "protect[ed] the core concept of Prop 4." **Exhibit C**, Press Conf. Tr. 7:11-13. Plaintiffs also write off those statements as "a few nice things people said while their arms were being twisted." Pls. Resp. 16. That view finds no support in the record. Better Boundaries' co-chair described S.B. 200 as a "good compromise," called Republican Senator Bramble an "honorable person" and "good-faith negotiator," believed the Legislature to be a "partner" in enacting S.B. 200, and considered S.B. 200 to be "a win for the citizens of Utah." Leg.-Defs. Statement

of Add'l Undisputed Facts ¶¶37-40. Plaintiffs' effort to discount Better Boundaries' statements regarding S.B. 200 is inconsistent with their own reliance on Better Boundaries' statements about Proposition 4 to support their own assertions about the initiative's purpose and intent in the Voter Information Pamphlet. *See* Pls. MSJ 4-5. Because Better Boundaries was Proposition 4's sponsor, its statements about S.B. 200 are highly relevant to assessing whether S.B. 200 preserves Proposition 4's core reforms. Those statements are nothing like Plaintiffs' citation to a poll showing a majority of Utah voters did not want the Legislature to change Proposition 4 in 2019 *before* Better Boundaries and legislative leaders struck a compromise and S.B. 200 was enacted. That pre-S.B. 200 poll sheds no light on whether S.B. 200 impaired Proposition 4's core reforms.

Second, Plaintiffs concede that the commission still exists, but they argue that S.B. 200 impairs the commission by eliminating the requirements for the Legislature to explain why its map is better than the commission's maps and to adequately fund the commission. Pls. Resp. 15. But despite those changes, neither Better Boundaries nor the Democratic legislators who supported the bill thought that S.B. 200 "trivialized" the commission. Pls. Resp. 15. To the contrary, Better Boundaries' executive director said that S.B. 200's commission is "so much more rigorous, so much more accountable, [and] does more than anything that [she] could have ever hoped for." Leg.-Defs. Statement of Add'l Undisputed Facts ¶41. And the Legislature funded the commission with the exact amount of money that Proposition 4's fiscal estimates calculated. *Id.* ¶77. Yet Plaintiffs complain that S.B. 200's funding provision was "a single non-lapsing appropriation" with "no promise to fund the Commission's work in the future." Pls. Resp. 15. But the commission does not work unless there's redistricting to be done. And since redistricting is done, the Legislature had no reason to continue funding the commission. Besides, S.B. 200 plainly contemplates that the Legislature will appropriate funds for the commission. *See* Utah Code §20A-20-201(12) (2020). Plaintiffs' fears are unfounded and insufficient to overcome the presumption of legislative good faith.

Third, Plaintiffs argue that S.B. 200 impaired Proposition 4's reforms because it imposed the redistricting criteria only on the commission, but not on the Legislature. Pls. Resp. 16-17. But even with that change, Better Boundaries supported S.B. 200, explaining that the "contrast" between "what

[map] moves forward and what does not" carried out Proposition 4's key idea. **Exhibit C**, Press Conf. Tr. 20:13-14. S.B. 200 allows Utahns to compare the commission's maps to the Legislature's so that the public can check the Legislature's work. Because that contrast still exists, letting the people hold the Legislature accountable, S.B. 200 retains and did not impair Proposition 4's core reform.

Fourth, Plaintiffs contend that S.B. 200 impaired Proposition 4 by changing the public-meeting and comment requirements. Importantly, though, Plaintiffs concede that S.B. 200 still requires meetings and that the process for passing H.B. 2004 included time for the public to comment on the maps. Pls. Resp. 17-18. And Plaintiffs provide no evidence to support their repeated assertions that the Legislature "ignored" public comments. *Id.* More to the point, Plaintiffs merely assume that the availability of public comment necessarily translates into action implementing or corresponding to those comments. Even under Proposition 4, for instance, the commission must allow public comments, but nothing requires the commission to implement changes responsive to them. In fact, as an unelected body, the commission is *less* accountable to the people than the Legislature. Regardless, as Plaintiffs concede, S.B. 200 allows for public comment and public accountability, and thus did not impair this goal of Proposition 4.

Fifth, Plaintiffs argue that the repeal of Proposition 4's once-a-decade limitation impaired its reforms. Plaintiffs claim that this "only *increases* Defendants' opportunities to gerrymander." Pls. Resp. 18. On its face, that's false: mid-decade redistricting could be used to correct what's being viewed as a gerrymander, "making the party balance more congruent to statewide party power." *LULAC v. Perry*, 548 U.S. 399, 419 (2006). S.B. 200's removal of the mid-decade redistricting ban did not impair Proposition 4's reforms.[4] *See* Leg.-Defs. Cross-MSJ 61.

Sixth, Plaintiffs err by arguing that removing unconstitutional provisions did not further Proposition 4's reforms. Plaintiffs concede that a "clear constitutional infirmity may provide a compelling justification to modify an initiative." Pls. Resp. 19. And they similarly concede that some of

[4] Plaintiffs mischaracterize Legislative Defendants' argument as agreeing with them that "partisanship" can be measured. Pls. Resp. 18. n.13. Just because some concrete facts—seats in the Legislature and the House or voter registrations—can be ascertained does not mean that "partisan symmetry" or "partisan fairness" can be defined or measured or judicially managed.

Proposition 4's provisions were defective and thus do not seek to revive them. But Plaintiffs again fail to address Legislative Defendants' evidence showing that legislators saw constitutional concerns right away and sought help from Proposition 4's sponsors to fix them. For example, Representative Francis Gibson explained at a press conference about S.B. 200 that Better Boundaries and legislators worked for over a year to "address some of the constitutional concerns that were in Prop 4." **Exhibit C**, Press Conf. Tr. 2:18-20. And Democratic Senator Gene Davis explained that "some of the problems that we faced with the Prop 4 proposition" included that it "didn't fit" with "the legislative process," *id.* at 9:22-10:4, and that it raised "separation of powers issues," **Exhibit D**, Senate Tr. 6:14. And Senator Curtis Bramble similarly explained during Senate debate on the bill that some provisions of Proposition 4 interfered with the Legislature's "constitutional prerogative." *Id.* 5:19.

Rather than engage with Defendants' constitutional arguments in this section, Plaintiffs argue only that Proposition 4 should be presumed constitutional, and that its actual constitutionality should not factor into the analysis. This is not the law. Legislators bear no duty to presume that an initiative is constitutional. Legislators swear an oath to uphold the Constitution and have a duty to correct what they view to be unconstitutional statutes. Here, they did so while (as Better Boundaries agreed) upholding Proposition 4's core reforms. And Legislative Defendants have amply shown why Proposition 4 was not a proper exercise of the initiative power. *Supra* at 3-18; Leg.-Defs. Cross-MSJ 28-56.

Plaintiffs also mischaracterize Legislative Defendants' argument as contending that the Legislature is entitled to "breathing room" in attempting to facilitate and further Proposition 4. Pls. Resp. 18-19. Plaintiffs confuse Legislative Defendants' strict scrutiny analysis with *LWV*'s step-2 analysis. The former should allow the Legislature breathing room to fix likely constitutional infirmities; the latter (as Plaintiffs concede) allows Legislative Defendants to facilitate Proposition 4's reforms. That includes facilitating those reforms by removing constitutional infirmities. Legislative Defendants never argued that they can win at step 2 by addressing "speculative" constitutional issues. *Contra* Pls. Resp. 19. Legislative Defendants' point was that they still satisfy strict scrutiny even if Plaintiffs passed step 1 and step 2, and even if the court ultimately disagreed with some of Legislative Defendants'

constitutional arguments. Thus, as the Legislature showed, S.B. 200 facilitated Proposition 4's key reforms by fixing actual constitutional infirmities. Plaintiffs fail to pass *LWV*'s step 2.

III. S.B. 200 satisfies strict scrutiny.

In contending that Legislative Defendants cannot satisfy strict scrutiny, Plaintiffs do not specifically argue that Defendants lack a compelling interest in ensuring the constitutionality of Proposition 4's reforms, in ensuring all Utahns were represented, and in timely enacting maps after the Census. Instead, they first argue that each of Legislative Defendants' interests was invented post hoc in response to litigation. Pls. Resp. 19, 48. Not true. Each of those interests was a genuine concern of legislators who passed S.B. 200. ***First***, Proposition 4's compliance with the Constitution was a top concern of the sponsors of S.B. 200. As one legislator summarized, S.B. 200's goal was to "address some of the constitutional concerns that were in Prop 4." **Exhibit C**, Press Conf. Tr. 2:18-20. ***Second***, legislators were concerned about Proposition 4 removing their ability to adequately represent their districts. For example, Senator Bramble explained his concern that under Proposition 4, "each of us, we represent our district and we would have to go back to the citizens that elected us and … tell them, your voice cannot be heard on the floor of the Senate. If you have a problem with [a redistricting] bill, we can offer no amendment." **Exhibit D**, Senate Tr. at 5:14-18. ***Third***, the Legislature clearly intended to address concerns about flexibility on timing; it made changes including creating contingencies if Census data was received late, Utah Code §20A-20-301(3) (2020), requiring the commission to submit its maps to the Legislature within 14 days after completing its public meetings, *id.* §20A-20-303(1) (2020), and removing Proposition 4's 10-day waiting period before the Legislature could act, *id.* §20A-20-303(4) (2020) (requiring only that the Legislature "not enact a redistricting plan before" holding a public meeting on the commission's maps). *See Castro v. Lemus*, 2019 UT 71, ¶17 ("[T]he best evidence of the legislature's intent is the plain language of the statute."). ***Finally***, legislators specifically mentioned the desire to avoid being sued and the chaos that would cause, and clearly made changes to lower and clarify the cost burden on the state. **Exhibit E**, House Tr. at 10:8 (the "private right of action … would have resulted in endless chaos"); **Exhibit H**, Better Boundaries at 4 ("Legislative

leaders argued it would be nearly impossible to prove the commissions maps passed these legal standards, potentially leaving the state at risk if someone sued."). Put simply, ample evidence shows that each of these four concerns was genuine, not invented post hoc for litigation purposes. Plaintiffs present no evidence supporting their contrary view.

Here, each of the interests the Legislature put forward shows S.B. 200 satisfies strict scrutiny. ***First***, as discussed, *supra* at 20-22, S.B. 200 ensured the constitutionality of Proposition 4's reforms. And as Legislative Defendants explained, even if the Court disagrees that a given reform was strictly necessary to comply with either the federal or Utah Constitutions, Legislative Defendants may still satisfy strict scrutiny. *See* Leg.-Defs. Cross-MSJ 66-67. Plaintiffs disagree, citing *Cooper v. Harris*, 581 U.S. 285 (2017), and contending that a "legal mistake" as to whether the constitution requires a given reform would not satisfy strict scrutiny. Pls. Resp. 19. But the North Carolina Legislature's legal mistake in *Cooper* was invoking its desire to comply with §2 of the Voting Rights Act as a basis to justify a racial classification—despite a complete failure of evidence on one element of a §2 claim, thus giving "the State no reason to think that the VRA required" the Legislature's actions. 581 U.S. at 301, 303. In other words, in *Cooper* the Legislature had no basis to argue that it needed to discriminate based on race to avoid a statutory violation. In contrast, here the Legislature made no such legal mistake. The Legislature's constitutional concerns were correct, compelling, persuasive, and, at the very least, arguable. Even if the Legislature's attempted compliance with the Utah Constitution was imperfect, they are afforded "breathing room" and can still satisfy strict scrutiny. *Id.* at 293.

Second, Plaintiffs do not dispute, and thus concede, that Legislative Defendants have a compelling interest in ensuring the representation of all Utahns. This concern obviously motivated legislators. *See, e.g.*, **Exhibit D**, Senate Tr. at 5:14-18. Yet Plaintiffs contend that Proposition 4 required "more inclusion" than S.B. 200 because commissioners were appointed by representative legislators, the commission was required to hold public meetings and allow for public comments, and the Legislature was required to vote on the commission's maps. Pls. Resp. 48. But saying that a commission is representative because its members are appointed by elected officials is like saying that United States Supreme Court Justices are representative and accountable to the people because they are appointed

and confirmed by a President and Senators who are popularly elected. It's just not so. And just because the commission holds public meetings and takes public comments does not make it politically accountable to the people. Nothing in Proposition 4 required the commission to implement the will of public commenters, or gave public commenters a mechanism for ensuring the commission would follow through on their goals. Legislators, in contrast, are directly accountable—through the election process. If the people disagree with how the Legislature handles redistricting, they can hold them accountable at the ballot box. Finally, that Proposition 4 required the Legislature to give the commission's maps an up-or-down vote does not make the process representative. As Senator Bramble explained, if his constituents had a problem with a commission map, he could "offer no amendment" to address their concern. **Exhibit D**, Senate Tr. at 5:18. An up-or-down vote on the commission's maps—without any ability to amend those maps to better suit constituents' needs—does not allow legislators to adequately represent the concerns of Utah citizens in the redistricting process. Therefore, the commission was not adequately representative of all Utahns, and Legislative Defendants had a compelling interest in ensuring that redistricting took all Utahns' views into account.

Plaintiffs make only a passing argument as to narrow tailoring on this interest. Without giving examples, they merely assert that "[t]here are ways that redistricting could have been made even more inclusive of all Utahns besides ignoring the will of the people." Pls. Resp. 49. S.B. 200 was narrowly tailored to this goal. The commission was retained in an advisory function. The Legislature could consider the commission maps, but S.B. 200 allowed legislators to propose amendments and consider other redistricting factors that may be important to their constituents. So S.B. 200 retained the heart of Proposition 4, while giving the Legislature the ability to adequately ensure the will of all Utahns was represented in the redistricting process.

Third, Plaintiffs' arguments about the timely enactment of redistricting maps lack merit. Plaintiffs argue that Proposition 4 furthered the goal of ensuring timely enactment of maps because it "included statutory deadlines that the Commission and Defendants must meet." Pls. Resp. 49. But in 2021, many of those deadlines were blown because the federal government was late to release Census data. *See, e.g.*, Utah Code §20A-19-202(11) (2018) ("The commission must hold the public hearings …

by … the earlier of the 120th calendar day after the Legislature's receipt of the results of a national decennial enumeration made by the authority of the United States or August 31st of that year."). This demonstrates exactly why the repeal of this provision was necessary to allow the Legislature the flexibility to redistrict in a timely fashion and in response to changed circumstances. *See* Leg.-Defs. Cross-MSJ 69-70. And in 2021, the commission's maps were released to the Legislative Redistricting Committee in the beginning of October and the Legislature passed its maps in mid-November. The Legislature worked flexibly to ensure maps were ready to meet election deadlines, and therefore did not follow the precise procedural timelines that Proposition 4 would have required. All this confirms: these are not "speculative" concerns. *Contra* Pls. Resp. 49-50. Removing procedural timing requirements was narrowly tailored to ensuring maps were created in a timely fashion.

Fourth, Plaintiffs again do not dispute, and thus concede, that Legislative Defendants' desire to safeguard the State's fiscal health is a compelling interest. Instead, they claim that this is a post-hoc rationalization—as explained above, it wasn't, *see supra* at 22-23—and that the interest is too speculative. For this they cite *Wisconsin v. Yoder*, but that's inapposite. There, Wisconsin defended a law that required Amish students to attend school for one to two additional years past what their religion allowed. 406 U.S. 205, 224 (1972). Wisconsin asserted it had an interest in ensuring Amish children who left the church would "be in the position of making their way in the world." *Id.* The Court discounted this interest as "highly speculative" because Wisconsin made no showing as to "the loss of Amish adherents by attrition," nor that they "with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings." *Id.* Put simply, Wisconsin put forward no evidence that there actually was such a problem. Legislative Defendants, on the other hand, put forward plenty of evidence of the enormous costs of redistricting legislation, showing that it was a real concern justifying removing the fee-shifting provision. Plaintiffs also argue that Proposition 4 is "unlikely to provoke baseless litigation." Pls. Resp. 51. But redistricting litigation—with or without merit—is costly for the State. Thus, removing the cause of action and fee-shifting provisions, and appropriating a set amount to the commission, was narrowly tailored to protecting the public fisc.

Legislative Defendants had compelling interests justifying S.B. 200's changes to Proposition 4, and they narrowly tailored S.B. 200 to serving those interests. Plaintiffs have not shown otherwise.

IV. Plaintiffs' remedial arguments are premature.

A. Plaintiffs' severability arguments are premature and erroneous.

Contrary to Plaintiffs' assertion, any remedy for Count V should be further litigated, and it's premature to do so now. *See* Leg.-Defs. Cross-MSJ 74-75. The propriety and appropriate scope of Plaintiffs' requested remedy—enjoining certain aspects of S.B. 200 and reviving certain provisions of Proposition 4—is nowhere as clear as Plaintiffs presume. To start, the severability analysis requires first understanding the nature of the constitutional violation. *See, e.g.*, *Gallivan*, 2002 UT 89, ¶88; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513 (2010); *Seila L. LLC v. CFPB*, 591 U.S. 197, 234-35 (2020) (Op. of Roberts, C.J.). At this point, neither party knows to what extent S.B. 200 did or did not violate the Utah Constitution. *See* Leg.-Defs. Cross-MSJ 74-75. For that reason, it's common for courts to request additional briefing on severability after finding a violation. *See, e.g.*, *Texas v. United States*, 2016 WL 7852331, at *4 (N.D. Tex. Oct. 18).

Contrary to Plaintiffs' arguments, Legislative Defendants have not waived severability arguments; parties need not brief unripe issues. But Plaintiffs have failed to brief the propriety of resurrecting Proposition 4 as remedy for any alleged violations caused by S.B. 200. In their summary-judgment motion, Plaintiffs merely asserted that the "end result" would be "that some provisions of Proposition 4 are revived." Pls. MSJ 25. Legislative Defendants responded that the appropriate "judicial remedy would entail, at most, an injunction barring the enforcement of certain provisions of [S.B. 200]." Leg.-Defs. MSJ 75. Indeed, courts cannot "erase" statutes, Jonathan F. Mitchel, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 935-37 (2018), or "make even an unconstitutional statute disappear," *Steffel v. Thompson*, 415 U.S. 452, 469 (1974). Even more tenuous is a court's ability to revive a previous statute amended or repealed by a later one. Indeed, the revival of the former statute is inappropriate "where the Legislature clearly intended the prior statute to be repealed even if the substituted statute were invalidated." *In re J.P.*, 648 P.2d 1364, 1378 n.14 (Utah 1982). Here, although S.B. 200

amended various aspects of Proposition 4, S.B. 200 also repealed (and sometimes also replaced) several provisions of Proposition 4, such as the private right of action, the provision applying substantive constraints on the Legislature, the requirement to take a mandatory vote on the commission's maps, the prohibition on amending the commission's maps, and the requirement to issue a post-enactment report. *See, e.g.*, Utah Code §§20A-19-103, -204, -301 (2018). And S.B. 200's sponsors and supporters expressed a clear intent to do so. *See* Leg.-Defs. Statement of Add'l Undisputed Facts ¶¶50, 54, 64 (concerns about substantive constraints on the Legislature); ¶¶55, 57-58 (mandatory vote); ¶56 (prohibition on amending commission maps); ¶59 (report requirement); ¶73 (private right of action).

Plaintiffs make much of the fact that *LWV* says that "[i]n the event Plaintiffs prevail" on Count V, then Proposition 4 "would become controlling law." 2024 UT 21, ¶222; *see* Pls. Resp. 53. But the issue of remedy for Count V was not before the Court. And the Court did not "intend to suggest what should transpire next in the district court." *LWV*, 2024 UT 21, ¶200. Rather, the Court remanded Count V to be litigated. To prevail—and for Proposition 4 to become controlling law—Plaintiffs have to prevail not only on the liability issue but also on remedy on Count V. Here, Plaintiffs' severability and revival arguments are not only doubtful based on their inadequate briefing so far but also premature. To the extent this Court finds violations under Count V, it should instruct the parties to submit briefing on the appropriate remedy.

B. Plaintiffs' request for relief on Count V to enjoin the 2021 Congressional Plan and to retain jurisdiction is improper.

Plaintiffs continue to put the Count VI cart before the Count V horse. Plaintiffs argue that "[t]he remedial process for the undisputed violation of Prop 4's procedural requirement must commence upon the Court's resolution of Plaintiffs' summary judgment motion," even though the parties' pending cross-motions concern only Count V. Pls. Resp. 53. Specifically, Plaintiffs ask this Court to permanently enjoin the use of the 2021 Congressional Plan based on allegations of Proposition 4's procedural provisions (encompassed in Plaintiffs' Count VI), allow the Legislature to draw a new map, retain jurisdiction to assess whether that new map is compliant, and impose a court-drawn map if necessary. Pls. Resp. 53-57. Plaintiffs' request is improper for three reasons.

First, Count V does not encompass Count VI. Counts V and VI are not, as Plaintiffs contend, the "same substantive claim." Pls. Resp. 55. The only claim at issue in these cross-motions for summary judgment is Plaintiffs' Count V, which asks whether S.B. 200 properly amended Proposition 4. FAC ¶¶310-19. As this Court already held, under Count V, "[t]he sole legal issue is whether the Utah Legislature's repeal of Proposition 4 violated the people of Utah's constitutional right to alter or reform government." Order Denying Intervention at 2. At most, any victory for Plaintiffs on Count V on liability and remedy means only that some of the Proposition 4 provisions *might* become governing law. *LWV*, 2024 UT 21, ¶222. The resolution of Count V, however, doesn't automatically resolve Counts VI. Plaintiffs themselves conceded that Count V alone wouldn't be enough; they represented to the Utah Supreme Court that they separately needed to add (and ultimately prove) violations under Proposition 4. *See id.* ("Plaintiffs have suggested they may bring [procedural claims] as an amended claim on remand in the event that Count V is reinstated."); *see also* Pls. Suppl. Br. 19, *LWV v. Utah State Legislature*, No. 20220991-SC (July 31, 2023) ("If certain aspects of Proposition 4 become operative, Plaintiffs will amend their complaint to allege the statutory private right of action contemplated under Proposition 4."). That's why they added Counts VI-VIII separately on remand, anticipating further litigation after the resolution of Count V. *See* FAC ¶¶320-61. Now, Plaintiffs try to reimagine Count V as already encompassing Count VI. But that's not what Count V alleges. *See* FAC ¶¶310-19. If Count V already encompassed Count VI, Plaintiffs would not have needed to amend the complaint to separately add Count VI. And contrary to Plaintiffs' assertion (at 52), the Supreme Court never held that Count V automatically resolves Count VI. The Supreme Court simply opined that it's "likely"—"if the facts alleged by Plaintiffs are true"—that the 2021 Congressional Map could be found invalid under Proposition 4. *LWV*, 2024 UT 21, ¶222. Though the Court described Count V as being the "broadest" among Plaintiffs' original five claims, that was in the context of comparing it to Counts I-IV, which did not challenge "the redistricting process that led to the Congressional Map." *Id.* ¶61.

Second, Count VI still needs to be litigated in full. Count VI is still at the motion-to-dismiss stage. In that posture, this Court asks only whether a plaintiff has stated a claim, accepting the complaint's allegations as true. *See* Utah R. Civ. P. 12(b)(6); *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT

101, ¶9. A motion to dismiss "is not an opportunity for the trial court to decide the merits of the case"; nor are the parties expected to litigate the full case at the motion-to-dismiss stage. *Williams v. Bench*, 2008 UT App 306, ¶20. And a permanent injunction—which Plaintiffs seek under Count VI—should "[o]rdinarily" be "granted only after a full trial on the merits." *Birch Creek Irrigation v. Prothero*, 858 P.2d 990, 993-94 (Utah 1993). Here, Legislative Defendants, like all litigants, are still entitled to a fair opportunity to fully litigate Count VI on the merits, including their constitutional and standing arguments, after discovery. Plaintiffs' assertion that this Court should permanently enjoin the 2021 Congressional Map based on Count V—without actually litigating Count VI—turns these procedures upside down. Leg.-Defs. Cross-MSJ 76-80.

For instance, Plaintiffs incorrectly suggest that there are no "apparent" standing issues with Count VI such that they can skip over litigating Count VI. Pls. Resp. at 55. This is wrong. Standing is a threshold, jurisdictional requirement. *Carlton v. Brown*, 2014 UT 6, ¶29. Plaintiffs bear the burden to demonstrate standing at every stage of litigation, and that burden increases at each "successive stage[] of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the motion-to-dismiss stage, a plaintiff is required only to "claim" or "allege" facts showing a legal injury. *S. Utah Wilderness All. v. San Juan Cnty. Comm'n*, 2021 UT 6, ¶14 n.11. "But where plaintiffs' factual, standing-related allegations are in dispute at later stages, plaintiffs must show or prove standing by satisfying the applicable burden of proof." *Id.* And Plaintiffs can "no longer rest on … 'mere allegations'" to support standing. *Lujan*, 504 U.S. at 561. As part of litigating Count V now, Legislative Defendants do not need to fully litigate any merits issues or Plaintiffs' standing to assert Count VI (which is subject to a motion to dismiss). Nor, while litigating Count V, do Legislative Defendants need to "say what their standing argument would be" at later stages of litigating Count VI. Pls. Resp. 55. Nevertheless, Legislative Defendants point out that, at the appropriate point, Plaintiffs' standing to seek relief under Count VI appears ripe for challenge. For instance, the only standing theory Plaintiffs offer for Count VI is the supposed "informational injury" stemming for the lack of a post-enactment report. *See* Pls. Resp. 55-56. But to support standing, informational injury requires "'downstream consequences' from failing to receive the required information." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 442 (2021); *see also FEC v. Akins*,

524 U.S. 11, 21 (1998) (describing downstream consequences such as the inability to "evaluate candidates for public office" and "to evaluate the role that [a political committee's] financial assistance might play in a specific election"). "An asserted information injury that causes no adverse effects" cannot satisfy standing. *TransUnion*, 594 U.S. at 442. Not a single allegation in the first amended complaint—or the declarations that Plaintiffs submitted while seeking to void Amendment D—explains the downstream harm that Plaintiffs suffered because the Legislature didn't adopt a post-enactment report or how permanently enjoining the 2021 Congressional Map would redress such an injury. Legislative Defendants are entitled to keep developing their standing arguments, dispute Plaintiffs' standing "at later stages," and require Plaintiffs to "prove standing by satisfying the applicable burden of proof." *S. Utah Wilderness All.*, 2021 UT 6, ¶14 n.11. And Legislative Defendants are entitled to continue developing their constitutional defenses in addition to any standing arguments. Plaintiffs' request to skip over Count VI by granting a permanent injunction based on their completely different Count V claim would cut short the litigation procedure that Legislative Defendants are entitled to.

Third, Plaintiffs' request for this Court's retention of jurisdiction and to schedule a remedial hearing is similarly premature. Count VI (or Counts VII-VIII) still needs to be litigated further and, if appropriate, the remedy for those counts decided. Plaintiffs' request for a *post-remedy* remedial hearing is entirely premature and not authorized under Utah law. Even under Proposition 4, Plaintiffs' best-case scenario is a permanent injunction. Then the Legislature would be the one to redraw maps that comply with this Court's order. There's no statutory mechanism for this Court to draw its own map. Nor would a court-drawn map be constitutionally permissible; Article IX vests the Legislature with the redistricting power, and Article V's separation-of-powers command forbids any "person charged with the exercise of powers properly belonging to one of" Utah's "departments" to "exercise any functions appertaining to either of the others." Utah Const. art. V, §1.

CONCLUSION

For these reasons, the Court should grant Legislative Defendants' cross-motion for summary judgment, deny Plaintiffs' motion for summary judgment, and enter judgment for Defendants.

Dated: December 6, 2024

Respectfully submitted,

/s/ Tyler R. Green

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CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: December 6, 2024 */s/ Tyler R. Green*