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In the Supreme Court of the State of Utah

Bart Grant, et al., *Petitioners*, v. Governor Gary R. Herbert, et al., *Respondents*.	No. 20180997-SC

Response to Petition for Extraordinary Relief

Respondents Governor Gary R. Herbert, Lieutenant Governor Spencer Cox, and Director of Elections Justin Lee, respectfully request that the Court

deny Petitioners' petition for extraordinary relief.

Background

Petitioners are frustrated that the Governor called a special legislative session at which a supermajority of both the Utah House and Senate enacted H.B. 3001, Utah Medical Cannabis Act, amending a recently approved statewide initiative known as Proposition 2.

So, the same day H.B. 3001 passed, Petitioners submitted a referendum application to the Lieutenant Governor's Office to begin the process of putting H.B. 3001 on the ballot for voter approval or rejection. *See* Petition for Extraordinary Relief, Exhibit C.

The next day, the Lieutenant Governor's Office rejected the Petitioners' application for two reasons. First, under both the Utah Constitution and Utah Code, voters have no right to referendum on a law like H.B. 3001 that was passed by at least two-thirds of the House and Senate. Utah Const. art. VI, § 1(2)(a)(i)(B); Utah Code § 20A-7-102(2). Second, at least one of the application sponsors failed to meet the statutory criteria because he had not voted in a regular general election in Utah within the last three years. Utah Code § 20A-7-302(2)(b)(ii). *See* Pet., Exhibit L.

Petitioners then filed a petition for extraordinary relief and a motion for emergency relief in this Court. Other individuals have since joined the

petition. And some additional documents have been filed to support Petitioners' arguments.

Petitioners Have Not Shown Why They Need Extraordinary Relief From This Court

The Court has discretion to deny or grant an extraordinary writ. *Krejci v. City of Saratoga Springs*, 2013 UT 74, ¶ 10, 322 P.3d 662. The Court exercises its discretion based not just on the merits but also on whether a petitioner has other adequate means and fora in which to seek relief. That's because the Court "typically limits itself to addressing only those petitions that *cannot be decided in another forum*." *Carpenter v. Riverton City*, 2004 UT 68, ¶ 4, 103 P.3d 127 (per curiam) (emphasis added). To that end, Petitioners must show that "no other plain, speedy, or adequate remedy exists" and, if so, why "it is impractical or inappropriate to [first] file the petition for a writ in district court." Utah R. App. P. 19(b)(4)-(5). And Petitioners must satisfy their burden even though they're proceeding pro se. *See, e.g., Lundahl v. Quinn*, 2003 UT 11, ¶ 3, 67 P.3d 1000 (per curiam); *see also Bell v. Bell*, 2013 UT App 248, ¶ 27, 312 P.3d 951 ("Even though appellate litigants are generally lenient with pro se litigants, those litigants must still follow the appellate rules.").

Petitioners failed to make these mandatory threshold showings. *Zont v. Pleasant Grove City*, 2017 UT 71, ¶ 3, 416 P.3d 360 (per curiam) ("Rule

19 expressly requires that a petition explain why the petitioners could not have filed a petition in the district court."). In fact, their petition addresses only one of them. Early on, Petitioners baldly claim that as registered voters, "no other means is available . . . other than through an Extraordinary Writ before this Court." Pet. at 5. Then, at the end of the petition, they assert the "only redress for Citizens is for them to redo the initiative," and that the referendum application and signature-gathering deadlines are relatively quick. Pet. at 22. These statements fall far short of showing why the petition belongs in this Court. Rule 19's requirements are "more than an exercise in ensuring [Petitioners] incant[] magic words." *Zont*, 2017 UT 71, ¶ 3 (internal quotation marks omitted). Petitioners must actually explain why, not just assume that, their claims require *extraordinary relief* from *this Court*.

Merely relying on short deadlines does not suffice. The Court has noted that "many ballot disputes will present tight timelines that will make it either impractical or inappropriate to file in the district court," yet a petitioner must still explain any "practical obstacles to filing in the district court immediately after the" challenged action or decision, "followed by an expedited appeal." *Zont*, 2017 UT 71, ¶ 5 (internal quotation marks omitted).

Petitioners' unspoken assumption that district court proceedings will delay resolution by this Court is inadequate. *Id.* ¶ 4 (stating the Court

"understand[s] the petitioners' perception that a district court proceeding will only slow their path to our court"). The Court has expressed confidence that district courts can "appropriately expedite these petitions in a fashion that contemplates, and allows time for, appellate review" before short deadlines expire. *Id.* This is what the rules of civil and appellate procedure require. *Id.* So the Court "insist[s] that parties comply with" these rules "not because the issues" the parties "raise are not important, but because they are. Adherence to the Rules promotes better and more efficient resolution of disputes and a party, like the [P]etitioners here, needs to convince [the Court] to depart from them." *Id.*

Petitioners have not done so, and their petition should therefore be denied. *Id.* ¶ 5 (finding pro se petitioners had failed to show they had no plain, speedy, or adequate remedy other than filing a petition directly with the Court).

Petitioners' Claims Do Not Warrant Extraordinary Relief

Besides failing to show that normal remedies or extraordinary writ proceedings in district court are somehow inadequate, Petitioners have not demonstrated that their claims demand extraordinary relief from this Court. Petitioners' claims either directly contravene relevant constitutional or statutory provisions, or are inadequately briefed, or moot. Either way, they

provide no basis upon which the Court should or could grant the requested relief.

A. Petitioners claim the Governor's calling a special session, without "exigent circumstances," to consider amending Proposition 2 amounts to an illegal gubernatorial veto over a voter-approved initiative in violation of Utah Code section 20A-7-212(3)(a). Petition at 10-12. But the differences between the Governor's veto authority, Utah Const. art. VII, § 8(1), and his authority to call the legislature into session, Utah Const. art. VII, § 6(1), to potentially amend a statute (or voter-approved initiative) are too plain for argument. So the fact that he cannot *unilaterally* veto a voter-approved initiative, Utah Code § 20A-7-212(3)(a), says nothing about his constitutional authority to convene the legislature, particularly when the legislature has express authority to "amend any initiative approved by the people at any legislative session." *Id.* § 20A-7-212(3)(b).

Petitioners' claim also implies that the Governor improperly convened the special session in which the legislature approved H.B. 3001 because there were no "exigent circumstances." Pet. at 10, 13. Petitioners are apparently referring to the Governor's constitutional authority to "convene" the legislature on "extraordinary occasions." Utah Const. art. VII, § 6(1)(a). But

Petitioners never discuss or analyze what "extraordinary occasions" means or why the special session in question would not qualify.

And even if Petitioners had adequately briefed the issue, the propriety of calling a special session is probably not a question this Court should reach considering the serious separation of powers concerns it raises. *See*, *e.g.*, *Meza v. State*, 2015 UT 70, ¶ 42, 359 P.3d 592 (doctrine of "political question" has long limited the availability of judicial review to certain types of claims); *Carlton v. Brown*, 2014 UT 6, ¶ 30, 323 P.3d 571 (concept of "justiciability implicates various categories of cases and doctrines that impose limits on our jurisdiction, including . . . political questions"); *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995) ("political question doctrine, rooted in the United States Constitution's separation-of-powers premise, prevents judicial interference in matters wholly within the control and discretion of other branches of government" (citing *Baker v. Carr*, 369 U.S. 186, 210-11 (1962); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803)).

In short, nothing in Petitioners' "first cause for relief" supports granting any remedies requested in the wide-ranging "first prayer for relief." Pet. 10-13.[1]

[1] For example, Petitioners also assert, without authority or analysis, that the process to enact H.B. 3001 violated the 1st, 10th, and 14th amendments to the United States Constitution. Pet. at 12. And they also request, without supporting argument, that the Court compel the legislature to pass laws "to

B. Petitioners also claim that the Lieutenant Governor wrongly denied their application because they should have an absolute right to referendum on any law amending a citizen initiative. Petition at 21-22. But that argument is expressly refuted by the Utah Constitution. It allows legal voters to "require any law passed by the Legislature, *except those laws passed by a two-thirds vote of the members elected to each house of the Legislature*, to be submitted to the voters of the State, as provided by statute, before the law may take effect." Utah Const. art. IV, § 1(2)(a)(i)(B) (emphasis added). Petitioners do not dispute that H.B. 3001 passed by more than a two-thirds vote of the members in each house, nor do they explain how this constitutional provision could possibly be read—under any accepted interpretive approach—as not applying to H.B. 3001. *See, e.g., State v. Tulley*, 2018 UT 35, ¶ 80, 428 P.3d 1005 ("When asking this court to interpret constitutional language, a party should analyze the plain meaning of the constitutional text, our prior case law, the interpretation other courts have given to similarly worded provisions in their state constitutions, and what lessons might be gleaned from the historical context." (internal quotation marks omitted)).

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grant the People the co-equal right for 'special sessions,'" and suspend the rules for "Citizens to put constitutional amendments on the ballot." *Id.* at 13.

Ignoring the straightforward text, Petitioners' theory—that the constitution's limitation on the laws subject to referenda does not apply to statutes amending voter-approved initiatives—relies on the notion that the people's co-equal right to legislate through initiative has "superior advantages" to the legislature. Pet. at 18, 19. But that theory has at least two problems. It overreads a phrase from an old concurring opinion that this Court has more recently suggested means that the Governor can veto a legislature-passed bill (which must be presented to the Governor before it becomes law, Utah Const. art. VII, § 8(1)), but not a voter-enacted initiative (which is not similarly presented to the Governor). *Carter v. Lehi City*, 2012 UT 2, ¶ 22 n.10, 269 P.3d 141 (citing *Utah Power & Light Co. v. Provo City,* 74 P.2d 1191, 1202 (Utah 1937) (Larson, J., concurring)). And, more importantly, Petitioners' interpretation (and the underlying premise of their petition) would elevate voter-approved initiatives to essentially constitutional status where they would remain unamendable and untouchable by normal legislative action. That's not what the constitution requires.

Rather, our state charter vests legislative authority in both the Utah Legislature and the people as expressed through the initiative and referendum procedures outlined in the constitution and statutes. Utah Const. art. VI, §§ 1, 2. And this Court has repeatedly held that the legislature's and

the people's power are co-equal, coextensive, concurrent and share equal dignity. *See, e.g., Carter*, 2012 UT 2, ¶ 22; *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069. So because the legislature can amend the laws it enacts, it follows under the equal-dignity principle that the legislature can amend laws enacted through the initiative process too. And those laws, whether originating in the legislature or through the initiative process as amended by the legislature, are equally subject to the constitutional prohibition against referendum on statutes passed by two-thirds of each house. Utah Const. art. VI, § 1(2)(a)(i)(B).

In short, initiatives are not amendment-proof, and legislatively-amended initiatives are not an exception to the constitutional limits on referenda. Petitioners' "third cause for relief" does not justify any relief requested in their "third prayer for relief." Pet. at 16-22.

C. Petitioners' other primary claim—that the Lieutenant Governor's Office improperly rejected their referendum application because one of the sponsors did not vote in in a general election within the last three years, Petition at 15—is moot given the constitutional bar to their referendum attempt. The claim also fails on the merits.

Petitioners first argue that the statutory criteria requiring each sponsor to have voted in a regular Utah general election within the last three

years, Utah Code § 20A-7-302(2)(b)(ii), violates the Utah Constitution's provision allowing "legal voters" a right to initiative and referendum, Utah Const. art. VI, § 1(2)(i). But the constitution does not expressly define "legal voters" to mean any eligible or registered voters as Petitioners seem to suggest. Legal voters could also mean people who actually vote. And the statutory requirement captures that definition—if someone has not voted in a general election for over three years, that person has not been a "legal voter" for at least one general election. In any event, as the parties challenging the statute's constitutionality, Petitioners bear the burden of persuasion to show that the phrase "legal voters" should be read as broadly as they suggest. *See, e.g., State v. Angilau*, 2011 UT 3, ¶ 7, 245 P.3d 745. Their petition does not sufficiently analyze that question to pass that test.

More importantly, the same constitutional provision Petitioners rely on subjects the initiative and referendum rights of "legal voters"—whoever they are—to the "conditions," "manner," and "time provided by statute." Utah Const. art. VI, § 1(2)(a)(i). The vote-within-the-last-three-years requirement is merely a statutorily-provided "condition" on the referendum right. Petitioners assert without authority or explanation that the legislature cannot restrict these rights, and that doing so disenfranchises voters and

serves no legitimate purposes. Pet. at 14. But that ignores this Court's precedent.

The Court has explained that "the ability to legislate through the initiative process is solely a state-created right and would not exist in the absence of a state provision creating the right." *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 2004 UT 32, ¶ 28, 94 P.3d 217. While Utah's constitutional right to initiative (and referendum) is "fundamental," it "is not unfettered, but comes with a built-in limitation." *Id.* ¶ 28. In other words, "the right to initiative [and referendum] in Utah is a qualified right, subject to legislative regulation." *Cook v. Bell*, 2014 UT 46, ¶ 12, 344 P.3d 634. "Thus, while residents of Utah may not be statutorily deprived of the right to initiative [or referendum], the legislature does possess the power to define the boundaries surrounding its practice, which may have the effect of rendering the ballot-initiative [or referendum] process more difficult." *Id.* Petitioners' argument that the legislature cannot prescribe how voters exercise their initiative or referendum rights is therefore wrong.

The only relevant constitutional question, which Petitioners do not address, is whether the sponsor-voting requirements place an undue burden on the referendum right. *Cook*, 2014 UT 46, ¶¶ 10-12; *Safe to Learn*, 2004 UT 32, ¶ 35; *Gallivan*, 2002 UT 89, ¶ 28. And Petitioners do not, and could not,

claim—especially given the number of people who have joined their petition over the past week—that it is too hard to find five application sponsors who have voted in a general election within the last three years. The Court should reject Petitioners' constitutional challenge.

Next, Petitioners argue that the Lieutenant Governor's Office has no authority to review or reject a referendum application for compliance with the sponsor-voting requirement. Pet. at 14. They're wrong. The Lieutenant Governor is the State's chief elections officer with authority to, among other things, "exercise general supervisory authority over all elections" and "exercise direct authority over the conduct of . . . statewide or multicounty ballot propositions." Utah Code § 67-1a-1-2(2)(a)(i)-(ii). He would be abdicating his duties if he allowed deficient or illegal referendum applications to proceed and potentially reach the ballot. *Cf. White v. Welling*, 57 P.2d 703, 705 (Utah 1936) (secretary of state not required to act on initiative applications about matters not contemplated by the initiative and referendum laws). Petitioners' argument also raises the question why sponsors must file an application with the Lieutenant Governor in the first place, or why have application requirements at all, if he can't verify whether the applications are legally compliant?

Petitioners' argument would lead to absurd consequences where untold time, money, and other resources are wasted on a patently illegal referendum effort until someone files suit challenging the referendum's validity. For this reason too, the Court should reject Petitioners' claim even if it were plausible. *Oliver v. Labor Comm'n*, 2017 UT 39, ¶ 27, 424 P.3d 22 ("The absurd consequences canon instructs that when a statute is ambiguous, we resolve[ ] [that] ambiguity by choosing the reading that avoids absurd consequences." (internal quotation marks omitted)).

Third, Petitioners assert that the lack of "an independent way or separate system held by the people to verify who voted in the previous three years . . . . violates the separate and equal footing." Pet. at 15. Respondents are unclear what Petitioners mean. Regardless, the argument is not meaningfully briefed and will not be addressed.

Alternatively, Petitioners ask the Court to declare that the referendum timelines are unconstitutional. Pet. at 15. But they have not supported this request with any meaningful argument that the deadlines unduly burden the referendum right and therefore cannot meet their heavy burden to invalidate the provisions. *See, e.g., Angilau*, 2011 UT 3, ¶ 7.

Conclusion

For the foregoing reasons, the Court should deny Petitioners' request for extraordinary relief.

Respectfully submitted,

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Certificate of Service

I hereby certify that on 19 December 2018 a true and correct copy of the foregoing Response to Petition for Extraordinary Relief was filed with the Court and served electronically on the following:

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