Yoram K. Bauman (pro se)
Dave Carrier (pro se)
Dennis J. Mullen (pro se)
Michael J. McAinsh (pro se)
Ava Curtis (pro se)
PO Box 522468, Salt Lake City, UT 84152
info@DarnAir.org
(801) 882-7419

IN THE SUPREME COURT OF UTAH

Yoram K. Bauman, an individual, David Carrier, an individual, Dennis J. Mullen, an individual, Michael J. McAinsh, an individual, Ava Curtis, an individual, Petitioners, v. DEIDRE M. HENDERSON, as Lieutenant Governor of the State of Utah, Respondent.	**PETITION FOR EXTRAORDINARY RELIEF** Case No. _______________________

TABLE OF CONTENTS

INTRODUCTION **5**

STATEMENT OF INTERESTED PERSONS **6**

ISSUE PRESENTED **6**

RELIEF SOUGHT **7**

STATEMENT OF FACTS **7**

ARGUMENT: THE SAME-OR-SIMILAR BAN IS UNCONSTITUTIONAL **10**

1. The Same-or-Similar Ban is not a reasonable restriction on initiatives **12**

A. The Same-or-Similar Ban is not reasonable because the state legislature is unwilling to subject itself to a similar ban **12**

B. The Same-or-Similar Ban is not reasonable because it is too vague **13**

C. The Same-or-Similar Ban is not reasonable because it invites gamesmanship **15**

2. The Same-or-Similar Ban has no legitimate legislative purpose **17**

A. The Same-or-Similar Ban is a product of anti-initiative sentiment, which is not a legitimate legislative purpose **17**

B. Legislative history suggests the Same-or-Similar Ban was motivated by anti-initiative sentiment and so has no legitimate legislative purpose **18**

C. The fact that the legislature has not imposed a Same-or-Similar Ban on itself is evidence that it has no legitimate legislative purpose **20**

3: The Same-or-Similar Ban does not reasonably tend to further a legitimate legislative purpose 21

A. The Same-or-Similar Ban has no legitimate legislative purpose 21

B. The Same-or-Similar Ban places a significant burden on the initiative right 21

4. The Same-or-Similar Ban fails a simplified version of the Undue Burden test 23

A. This Court's case law has laid the foundation for a simplified version of the Undue Burden test that applies when there is a clear parallel between the initiative process and the state legislature's process 24

B. The Same-or-Similar Ban fails this simplified version of the Undue Burden test 25

C. The Court should consider formalizing this simplified version of the Undue Burden test 26

STATEMENT OF WHY NO OTHER PLAIN, SPEEDY, OR ADEQUATE REMEDY EXISTS 30

STATEMENT OF WHY DISTRICT COURT PROCEEDINGS ARE IMPRACTICAL 31

CONCLUSION 31

Addendum 1: 2024 Initiative Application Letter 33

Addendum 2: Lieutenant Governor Rejection Letter 34

Addendum 3: Utah Code § 20A-7-202(5) 35

Certificate of Compliance 36

Certificate of Service 37

TABLE OF AUTHORITIES

Cases

Brown v. Board of Education, 347 U.S. 483, (1954) 26

Carter v. Lehi City, 2012 UT 2 .... 25-26, 28-30

Count My Vote, Inc. v. Cox, 2019 UT 60 .... 23, 28

Gallivan v. Walker, 2002 UT 73 31

Gallivan v. Walker, 2002 UT 89 .... 5, 11-12, 18, 20, 24, 26, 29

Kolender v. Lawson, 461 U.S. 352, 357 (1983) 14

Owens v. Hunt, 882 P.2d 660, 661 (Utah 1994) 30

Utah Safe to Learn-Safe to Worship Coalition v. State, 2004 UT 32 11, 21, 30

Statutes

Joint Rules of the Legislature § JR4-1-203 27

Joint Rules of the Legislature § JR4-2-403 27

Utah Code § 20A-7-105 .... 8-9, 22-23

Utah Code § 20A-7-202 .... 5-7, 9, 13, 15-17

Utah Code § 20A-7-202.5 27

Utah Code § 20A-7-212 27

Other Authorities

Utah Constitution, article VI, section 1 .... 10, 29

Utah Constitution, article VI, section 2 11

Utah Constitution, article VI, section 22 28

Petitioners Yoram Bauman, David Carrier, Dennis Mullen, Michael McAinsh, and Ava Curtis, (collectively, the "Clean the Darn Air Parties" or "CTDA Parties") respectfully petition this Court for extraordinary relief under Article VIII, section 3 of the Utah Constitution, Rule 65B of the Utah Rules of Civil Procedure, and Rule 19 of the Utah Rules of Appellate Procedure, as follows:

INTRODUCTION

This Court has ruled that "[t]he right to vote on an initiative cannot exist without the voters' unfettered right to legislate through initiative, which necessarily begins with the circulating and signing process." *Gallivan v. Walker*, 2002 UT 89, ¶ 26, 54 P.3d 1069. But, in fact, the voters' initiative right begins even before the circulating and signing process. It begins with the filing process, and for Petitioners that is where their rights have ended. Citing the "Same-or-Similar Ban" in Utah Code § 20A-7-202(5)(a)(v), the Lieutenant Governor has rejected Petitioners' initiative filing.

We ask the Court to declare the Same-or-Similar Ban to be unconstitutional and to order the Lieutenant Governor to accept Petitioners' initiative filing.

We also ask the Court to make an expedited decision as soon as possible, ideally by the end of June—including full briefing and argument. This is because the Same-or-Similar Ban infringes on Petitioners' access to what this Court has called "sacrosanct and a fundamental right." *Gallivan*, 2002 UT 89, ¶ 27. Moreover, the CTDA Parties anticipate they may need to engage in further litigation to challenge other statutes

affecting the people's initiative power. An expedited decision in this case will help ensure that all these issues can be resolved in a timely fashion.

STATEMENT OF INTERESTED PERSONS

1. Petitioners Yoram K. Bauman, David Carrier, Dennis J. Mullen, Michael J. McAinsh, and Ava Curtis are registered voters in the State of Utah.

2. Each petitioner is a sponsor and member of Clean The Darn Air, a Utah non-profit that was formed to support and advance the Clean the Darn Air Initiative "CTDA Initiative."

3. Respondent is Deidre Henderson, in her official capacity as Lieutenant Governor of the State of Utah.

ISSUE PRESENTED

Does the "Same-or-Similar Ban" in Utah Code § 20A-7-202(5)(a)(v) unduly burden the people's constitutional right to initiate legislation by requiring the Lieutenant Governor to reject an initiative application if it is "identical or substantially similar to a law proposed by an initiative for which signatures were submitted to the county clerks and lieutenant governor for certification within two years preceding the date on which the initiative application for the new initiative is filed"?

RELIEF SOUGHT

Pursuant to Utah Constitution Article VIII, section 3, Petitioners ask this Court to:

1. Declare that Utah Code § 20A-7-202(5)(a)(v) places, and in this instance placed, an unconstitutional burden on the right to initiate legislation; and
2. Compel the Lieutenant Governor to accept the initiative petition filed by the Petitioners.

STATEMENT OF FACTS

The Clean The Darn Air Initiative

This Petition is about a statewide ballot initiative proposed in 2024. The main thrust of the initiative is to eliminate the state sales tax on grocery store food, allocate $100 million a year to local clean air programs, and pay for it all with a carbon tax on the fossil fuels that are the main source of local air pollution and global climate change.

Supporters of the CTDA Initiative believe that global climate change is a threat to all of humanity, including everyone in Utah, through related issues such as increasing wildfires, wildfire smoke, and risks to the Great Salt Lake. They also believe that increasing funding for local clean air programs is the best way to significantly reduce local air pollution, which harms the economy of Utah and the health and well-being of children, the elderly, and all people in Utah.

Supporters of the CTDA Initiative want Utah to set an example for the nation and for the world by adopting a market-based climate policy like a carbon tax, which economists agree is the single most important step we can take to effectively and

efficiently address climate change. Utah can tackle local air pollution and global climate change in a pocketbook-friendly way by offsetting the financial impacts of a carbon tax with the elimination of the state sales tax on grocery store food, i.e., by taxing pollution instead of taxing potatoes.

The 2019 and 2023 versions of the Clean The Darn Air Initiative

Petitioners, as members and sponsors of Clean The Darn Air, proposed similar initiatives in 2019 and 2023, with grassroots campaigns that gathered a combined total of approximately 60,000 signatures with a total budget of well under $100,000. Both efforts failed to gather enough signatures to qualify for the ballot. The measure in 2023 was filed on January 10, 2023, and signature-gathering began on approximately February 17, 2023, in an attempt to qualify for the ballot in November 2024. Signature packets were submitted through approximately September 1, 2023.[1] (In accordance with Utah Code § 20A-7-105(6), county clerks have 21 days after packets are submitted to verify the valid signers for each packet and submit the names of signers to the Lieutenant Governor's office. The last verification date listed by that office is September 18, 2023.)

The 2024 version of the Clean The Darn Air Initiative

Clean The Darn Air filed the 2024 CTDA Initiative with the Lieutenant Governor's office on April 2, 2024. (*See* Addendum 1.)

---

[1] https://vote.utah.gov/initiatives-and-referenda/

On April 22, 2024, the Lieutenant Governor rejected the petition based on the Same-or-Similar Ban codified in Utah Code § 20A-7-202(5)(a)(v) (*see* Addenda 2 and 3). That provision provides that "The lieutenant governor shall reject an initiative application…and not issue signature sheets if…the proposed law… is identical or substantially similar to a law proposed by an initiative for which signatures were submitted to the county clerks and lieutenant governor for certification within two years preceding the date on which the initiative application for the new initiative is filed."

Had the Lieutenant Governor approved Clean The Darn Air's initiative filing, CTDA would have had 316 days from the filing date to collect signatures and qualify for the ballot in November 2026. *See* Utah Code § 20A-7-105(5).

By rejecting the filing, the Lieutenant Governor has made it much harder for CTDA to qualify for the ballot in November 2026. Signatures for the 2023 version of the CTDA Initiative were submitted through approximately September 1, 2023. Applying the two-year Same-or-Similar Ban in Utah Code § 20A-7-202(5)(a)(v) means that CTDA cannot file a similar measure until approximately September 2, 2025. Taking into consideration the time needed for the fiscal note, public hearings, and other requirements in Utah Code § 20A-7 (Part 2), it is probable that CTDA would not be able to begin collecting signatures until October 2025. In order to qualify for the ballot in November 2026, Utah Code § 20A-7-105(5) requires all signatures to be turned in on or before February 15, 2026.

Therefore, the end result of the Lieutenant Governor's rejection is to force CTDA into a narrow signature-gathering window of approximately October 2025 through

February 2026 in order to qualify for the 2026 ballot. By contrast, without the Same-or-Similar Ban, CTDA would have many other options, including a window of approximately May 2024 through January 2025 (if the Lieutenant Governor had accepted CTDA's current filing) or a window of approximately March 2025 through November 2025 (if the Lieutenant Governor were to accept a filing from CTDA in February 2025).

Compared to these alternative options, the window of approximately October 2025 through February 2026 (1) is many months shorter, roughly 5 months instead of 9 months; (2) centers on cold and dark winter months when signature-gathering is much more difficult in much of the state than during other times of year; (3) prevents CTDA from gathering during the summer months, when teachers and college students often have more free time and when volunteer signature-gathering is often easier and more productive because of concerts and other outdoor gatherings; and (4) eliminates CTDA's ability to choose a signature-gathering window that adapts to the many life circumstances (relating to jobs, child-bearing, child- and elder-care, etc.) that affect key volunteers' ability to participate in a signature-gathering campaign.

ARGUMENT: THE SAME OR SIMILAR BAN IS UNCONSTITUTIONAL

Article VI, section 1 of the Utah Constitution guarantees the people's right to enact legislation. Specifically, the Constitution vests co-equal "Legislative power" with the Utah Legislature and "the people of the State of Utah." Utah Const. art. VI, § 1. Accordingly, "[t]he legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may . . . initiate any

desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute." *Id.* art. VI, § 2(a)(i)(A).

This Court has described the people's initiative power as "sacrosanct and a fundamental right." *Gallivan*, 2002 UT 89, ¶ 27. And it has made clear that "Utah courts must defend it against encroachment and maintain it inviolate." *Id.* (collecting cases).

To protect the people's initiative right against unconstitutional encroachment, this Court has applied an Undue Burden test. As this Court has explained:

> The essential task for a court in conducting an article VI, section 1 analysis is to determine whether the enactment unduly burdens the right to initiative. In making this determination, a court should assess whether the enactment is reasonable, whether it has a legitimate legislative purpose, and whether the enactment reasonably tends to further that legislative purpose. In evaluating the reasonableness of the challenged enactment and its relation to the legislative purpose, courts should weigh the extent to which the right of initiative is burdened against the importance of the legislative purpose.

Utah Safe to Learn-Safe to Worship Coalition v. State, 2004 UT 32 ¶ 35, 94 P.3d 217.

Our first three points below consider, in order, the three points raised by the Undue Burden test: first, whether the Same-or-Similar Ban is reasonable; second, whether it has a legitimate legislative purpose; and third, whether the enactment reasonably furthers its legitimate legislative purpose, by weighing the extent of the burden against the importance of the legitimate legislative purpose. We show that the Same-or-Similar Ban fails the Undue Burden test.

Our fourth point advances a novel argument: that this Court's case law has laid the foundation for a simplified version of the Undue Burden test. We describe the basis for this argument and we respectfully ask the Court to consider formally adopting this simplified version of the Undue Burden test. We also show that that the Same-or-Similar Ban fails this simplified version of the Undue Burden test. In other words, our fourth point reaches the same conclusion in short that our first three points reach at length.

Point 1: The Same-or-Similar Ban is not a reasonable restriction on initiatives

The Undue Burden test first asks whether the enactment is reasonable.

1A: The Same-or-Similar Ban is not reasonable because the state legislature is unwilling to subject itself to a similar ban

This Court has ruled that "[t]he power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share equal dignity." *Gallivan*, 2002 UT 89, ¶ 23 (internal quotation marks omitted).

As such, in considering whether an enactment is reasonable *in the context of initiatives*, it makes sense to consider whether there is a clear parallel *in the context of the state legislature's process* and, if so, whether the state legislature is subject to a similar enactment. If there *is* a clear parallel but the state legislature *is not* subject to a similar enactment, the enactment should be considered unreasonable.

The current Petition fits this argument perfectly. The Same-or-Similar Ban prevents the reintroduction of certain "same-or-similar" bills in the context of initiatives, so the clear parallel is to inquire about the existence of a similar restriction in the context of the state legislature's process: Is there an enactment preventing the reintroduction of "same-or-similar" bills in the state legislature?

The answer is No. In fact, legislative bills often do come back year after year. One example is that 2024's HJR14 appears to be identical to 2023's HJR17. A second example is that 2024's HB284 is similar to 2023's HB242. A third example is that 2024's HB185 is similar to 2023's HB393, which in turn was referred to by the *Salt Lake Tribune* as 2023's "manifest[ation]" of "[t]he annual attempt by lawmakers to weaken the SB54 compromise" (Bryan Schott, "Elections audits and restrictions for changing parties: Here's how voting systems will change in Utah", March 14, 2023). These examples show that there is no Same-or-Similar Ban that applies to the state legislature.

To paraphrase *Gallivan* (see Points 2C and 4A below), if the repeated introduction of same-or-similar bills is reasonable in the context of the state legislature, it is hard to discern why deterring the repeated introduction of same-or-similar bills is reasonable in the context of initiatives.

1B: The Same-or-Similar Ban is not reasonable because it is too vague

The Same-or-Similar Ban requires the Lieutenant Governor to reject an initiative application if it "is identical to or substantially similar to a law proposed" previously. Utah Code § 20A-7-202(5)(a)(v).

The statute does not define how "substantially similar" an initiative must be in order to trigger the ban. As such, it is so vague as to be unreasonable. The Lieutenant Governor has too much discretion to approve or reject initiative filings based on whether or not they are deemed "similar" to previous measures.

Although our argument here focuses on the Undue Burden test's assessment of whether an enactment is "reasonable," we note that this claim mirrors the "void-for-vagueness doctrine" that the U.S. Supreme Court has established for criminal law:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that *ordinary people* can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender v. Lawson, 461 U.S. 352, 357 (1983) (emphasis added).

This analogy is especially apt because the initiative right in the Utah Constitution is intended to be accessible to "ordinary people"; as with criminal law, the relevant statutes should be understandable to non-experts.

The end result of the Same-or-Similar Ban is that initiative sponsors (and potential initiative sponsors) cannot know *ex ante* whether their initiative application will be rejected as too similar to a prior initiative proposal if the initiative is not identical. This vagueness is likely to discourage some applicants, especially "ordinary people," from engaging in the initiative process altogether.

1C: The Same-or-Similar Ban is not reasonable because it invites gamesmanship

The Same-or-Similar Ban also invites gamesmanship into the initiative process. A hypothetical illustrates the problem:

Consider a group called Keep The Air Dirty that is opposed to clean air and climate action. Such a group could attempt to derail Clean The Darn Air's initiative effort by pre-emptively filing an initiative petition for a piece of legislation that was arguably "similar" but nonetheless flawed in some important way. (For example, it might lack the carbon tax exemptions that the CTDA Initiative provides for off-road diesel used on farms, or the phase-in of the carbon tax that the CTDA Initiative provides for energy-intensive trade-exposed manufacturers.) Keep The Air Dirty could then gather and submit a handful of signatures for their initiative before "giving up," anticipating that their "poison pill" would require the Lieutenant Governor to use the Same-or-Similar Ban to reject an initiative filing from CTDA for at least the next two years, and potentially three or more years. (The Same-or-Similar Ban in Utah Code § 20A-7-202(5)(a)(v) applies to any initiative proposal that is "identical or substantially similar to a law proposed by an initiative for which signatures were submitted to the county clerks and lieutenant governor for certification within two years preceding the date on which the initiative application for the new initiative is filed." By gathering and submitting a handful of signatures at the *end* of their 316-day window as well as at the *beginning*, Keep The Air Dirty could impinge on CTDA's right to initiative for almost three years. And there would be nothing to stop Keep The Air Dirty from re-filing a new poison-pill measure when the two-year window was up.)

Keep The Air Dirty could even disrupt CTDA's right to initiative by submitting an initiative proposal with legislative language that was not just similar to the CTDA proposal but in fact *exactly the same* as the CTDA proposal. (CTDA is a grassroots group that makes a great deal of information available on their website, including their proposed legislative language.) Keep The Air Dirty could find that language, pre-emptively file an initiative petition with that same language, and then gather and submit a few signatures before "giving up." The Same-or-Similar Ban would then force the Lieutenant Governor to reject an identical initiative filing from CTDA for at least the next two years.

Such gamesmanship, even with *identical* language, would harm Clean The Darn Air in at least three important ways. First, Utah Code § 20A-7-202(2)(g) requires initiative filings to include "a statement indicating whether persons gathering signatures for the initiative petition may be paid for gathering signatures." Keep The Air Dirty could inform the Lieutenant Governor that their campaign would (or would not) allow signature-gatherers to be paid, thereby preventing CTDA from filing, for at least the next two years, an initiative making the opposite choice.

Second, Utah Code § 20A-7-202(2)(c) requires initiative filings to include "a statement indicating whether the initiative will be presented to (i) the Legislature... or (ii) a vote of the people." Keep The Air Dirty could inform the Lieutenant Governor that their initiative was to be presented to the legislature (or, alternatively, to the people), thereby preventing CTDA from filing, for at least the next two years, an initiative making the opposite choice.

Finally, Keep The Air Dirty would have established the contours of the 316-day signature-gathering window, potentially to the detriment of CTDA. For example, Keep The Air Dirty could file in early August, in which case the 316-day window would end in mid-June of the following year, preventing CTDA from having the entire summer season to gather signatures. (See Statement of Facts above and Point 3B below for a fuller discussion of the harms relating to this timing issue.)

Point 2: The Same-or-Similar Ban has no legitimate legislative purpose

The Undue Burden test next asks whether the enactment has a legitimate legislative purpose.

2A: The Same-or-Similar Ban is a product of anti-initiative sentiment, which is not a legitimate legislative purpose

This Court has ruled that initiative restrictions must serve a *legitimate* legislative purpose, and that anti-initiative sentiment is not a legitimate legislative purpose:

> The legislature can impose restrictions — such as requiring a particular form of petition, setting reasonable time frames to ensure the efficiency of the process, or requiring signers to be registered voters — which would have the effect of making it more difficult to get initiatives on the ballot, but only to the extent that those restrictions comport with article VI, section 1 of the Utah Constitution, do not violate other constitutional provisions, and further legitimate legislative purposes such as deterring fraud, ensuring the efficiency of the process, or ensuring a modicum of numerical support for an initiative. All of these legislative purposes could support restrictions on the initiative right that could, conceivably, have the effect of making it more difficult to place an initiative on the ballot and could be consistent with the provision of article VI, section 1 that requires the legislature to

> enact legislation enabling the initiative right. The legislature may not, however, impose discriminatory restrictions on the initiative right by making it "not so easy" to get initiatives on the ballot simply for the sake of making it harder to do so and restricting the initiative power.

Gallivan, 2002 UT 89 ¶ 53, 54.

The Same-or-Similar Ban does not fulfill any of the legitimate legislative purposes identified in *Gallivan*. It does nothing to deter fraud. It does not contribute to the efficiency of the process. And it is unrelated to whether or not there is "a modicum of numerical support." (In fact, the 60,000 signatures gathered by CTDA during its 2019 and 2023 efforts are evidence that there *is* considerably more than "a modicum of numerical support" for the CTDA Initiative.)

There is no plausible legislative purpose underlying the Same-or-Similar Ban except anti-initiative sentiment. Restricting the frequency with which the people can gather signatures for a particular proposal serves no legitimate administrative function within the Legislature's power. Instead, the Ban appears to be animated by a view that the people should not be exposed to the same initiative proposal over and over—which is ultimately an anti-initiative viewpoint.

2B: Legislative history suggests the Same-or-Similar Ban was motivated by anti-initiative sentiment and so has no legitimate legislative purpose

The legislative history confirms that the Same-or-Similar Ban was motivated by anti-initiative sentiment.

The legislative sponsor of SB28, the 2003 bill that created the Same-or-Similar Ban, stated on Senate Floor Audio on February 6, 2003, that the goal of the Same-or-Similar Ban was to prevent initiatives from "coming back and coming back and coming back," noting that "fluoridation is a classic example."[2]

Although preventing initiatives from "coming back and coming back and coming back" is clearly a *legislative purpose*, this Court ruled in *Gallivan* that it is not a *legitimate* legislative purpose. Whatever our state legislators (or anyone else) may think of fluoridation—or any other topic that is a legitimate topic for legislation—this Court has ruled that blocking the initiative power of the people is not a legitimate legislative purpose under the Utah Constitution.

Perhaps the Lieutenant Governor or the Court itself can identify a legitimate legislative purpose that can be reasonably imputed to the legislative body. It seems unlikely. But even if such a legitimate legislative purpose could be imputed, that does not end the inquiry. The importance of that legislative purpose would still need to be weighed against the significant burden it places on the initiative right. (See Statement of Facts above and Point 3B below.) Clean The Darn Air and its members, however, are aware of no such legitimate legislative purpose, and we turn now to an argument suggesting that the Court should come to the same conclusion based on its past reasoning.

[2] The relevant audio clip can be found at https://le.utah.gov/av/videoClip.jsp?meetingType=floor&stream=https://stream1.utleg.gov/vodsenate/mp4:8467.mp4/playlist.m3u8&offset=2595&endTime=2679. The entire audio clip can be found at https://le.utah.gov/av/floorArchive.jsp?markerID=35313.

2C: The fact that the legislature has not imposed a Same-or-Similar Ban on itself is evidence that it has no legitimate legislative purpose

Point 1A above shows that the state legislature has not imposed a Same-or-Similar Ban on itself, i.e., that state legislators are allowed to (and often do) re-introduce same-or-similar bills year after year.

This Court's previous case law suggests that this fact should be considered as evidence that the Same-or-Similar Ban has no legitimate legislative purpose. This is clear from the Court's decision in *Gallivan*, where it considered whether the avoidance of "localized legislation" (i.e., legislation that may disproportionately favor one area of the state) was a legitimate legislative purpose:

> If the avoidance of localized legislation were a legitimate legislative purpose or goal, one would presume that the legislature would tailor its own legislative processes and procedures to advance that goal or purpose. This, however, is not the case. The legislature is free to pass localized legislation. If the passage of localized legislation is permissible in the context of the enactment of laws via the constitutionally established legislature, it is hard to discern why the deterrence of potential localized legislation should be advanced as a legitimate legislative purpose in the context of the enactment of laws that unduly burden the people's right to initiative via the constitutionally established initiative power.

Gallivan, 2002 UT 89 ¶ 57.

To paraphrase *Gallivan*: if the repeated introduction of same-or-similar bills is permissible in the context of the state legislature, it is hard to discern why deterring the repeated introduction of same-or-similar bills serves a legitimate legislative purpose in the context of initiatives.

Point 3: The Same-or-Similar Ban does not reasonably tend to further a legitimate legislative purpose

The Undue Burden test next asks whether the enactment reasonably tends to further its legislative purpose: "In evaluating the reasonableness of the challenged enactment and its relation to the legislative purpose, courts should weigh the extent to which the right of initiative is burdened against the importance of the legislative purpose." *Utah Safe to Learn*, 2004 UT 32 ¶ 35.

3A: The Same-or-Similar Ban has no legitimate legislative purpose

As explained above, the Same-or-Similar Ban has no legitimate legislative purpose. The only apparent purpose is anti-initiative, i.e., the idea that voters should not be allowed to sign an initiative petition for a proposed law that is the same as or similar to a proposed law that was the subject of a previous initiative petition during the preceding two years. That purpose is ultimately anti-initiative, and it is illegitimate under this Court's case law.

3B: The Same-or-Similar Ban places a significant burden on the initiative right

As noted above (see Statement of Facts), the Same-or-Similar Ban makes it much harder for CTDA to qualify for the ballot in November 2026 by forcing CTDA into a narrow signature-gathering window of approximately October 2025 through February 2026. By contrast, without the Same-or-Similar Ban, CTDA would have many other options, including a window of approximately May 2024 through January 2025 (if the

Lieutenant Governor had accepted CTDA's current filing) or a window of approximately March 2025 through November 2025 (if the Lieutenant Governor were to accept a filing from CTDA in February 2025).

As noted above, these alternative windows have many advantages. By foreclosing these other options and forcing CTDA into a narrow signature-gathering window of approximately October 2025 through February 2026, the Lieutenant Governor is imposing a significant burden on CTDA's right to initiative.

Although the burden on CTDA imposed by the Same-or-Similar Ban is significant, it could easily have been much worse. CTDA stopped submitting signatures on approximately September 1, 2023—because they realized they were unlikely to qualify for the November 2024 ballot—but they could have continued submitting signatures for almost two additional months before reaching the 316-day limit established in Utah Code § 20A-7-105(5). If they had continued to submit signatures through the end of November 2023, the Same-or-Similar Ban would have prevented CTDA from filing again until the end of November 2025, limiting them to at most a two-month signature-gathering window—mid-December 2025 through February 15, 2026—in order to qualify for the ballot in November 2026.

Indeed, the burden imposed by the Same-or-Similar Ban could have been so weighty as to entirely foreclose CTDA's right to initiative for the election in November 2026. Had CTDA filed in May 2023, they could have submitted signatures through February 15, 2024, in which case the Same-or-Similar Ban would have prevented them from filing again until February 16, 2026, which is past the deadline established in Utah

Code § 20A-7-105(5) for consideration for the election in November 2026. Although such a burden is purely hypothetical for CTDA, it is as a matter of fact the exact circumstances facing the proponents of the Restoring the Utah Flag Initiative: they filed on May 2, 2023, submitted (an apparently insufficient number of) signatures through February 15, 2024, and now appear to be prevented by the Same-or-Similar Ban from re-filing their measure and attempting to qualify for the ballot in November 2026.[3]

Finally, we note that the gamesmanship discussed in Point 1C above could potentially exacerbate the burdens discussed here.

Point 4: The Same-or-Similar Ban fails a simplified version of the Undue Burden test

This Court has made clear that it has not fully articulated the contours of the Undue Burden test:

> But we have not yet had occasion to specify the manner and means by which a party may carry its burden of establishing the nature and extent of any burden on the initiative right. Nor have we had the opportunity to explain exactly how the degree of any such burden is to be balanced or weighed "against the importance of the legislative purpose" of the statutory provisions in question.

Count My Vote. V. Cox, 2019 UT 60, ¶ 46, 452 P.3d 1109.

This Court's case law has, however, laid the foundation for a simplified version of the Undue Burden test that can relieve some of this uncertainty in certain circumstances, including the present Petition.

[3] See https://vote.utah.gov/initiatives-and-referenda/.

4A: This Court's case law has laid the foundation for a simplified version of the Undue Burden test that applies when there is a clear parallel between the initiative process and the state legislature's process

This Court has employed a simple technique in previous cases concerning whether an initiative regulation constituted an undue burden: it has compared the initiative process and the state legislature's process. In doing so, it has laid the foundation for the establishment of a simplified version of the Undue Burden test.

This simple technique is most obvious in *Gallivan*, where (as noted in Point 2C) the Court examined whether the avoidance of "localized legislation" was a legitimate legislative purpose:

> If the passage of localized legislation is permissible in the context of the enactment of laws via the constitutionally established legislature, it is hard to discern why the deterrence of potential localized legislation should be advanced as a legitimate legislative purpose in the context of the enactment of laws that unduly burden the people's right to initiative via the constitutionally established initiative power.

Gallivan, 2002 UT 89 ¶ 57.

The inference here is obvious: in order to determine whether an enactment serves a legitimate legislative purpose (or, more directly, whether an enactment imposes an undue burden) *in the context of initiatives*, the Court should consider whether there is a clear parallel *in the context of the state legislature's process*. If, as in *Gallivan*, there *is* a clear parallel, but the state legislature is not subject to a similar enactment, then the Court should look skeptically on the claim that the enactment serves a legitimate legislative

purpose in the context of initiatives (or, more directly, the Court should conclude that the enactment is an undue burden on the people's initiative right).

This simplified version of the Undue Burden test was also suggested by this Court in *Carter v. Lehi City,* 2012 UT 2, 269 P.3d 141. The Lehi City Council attempted to exclude two initiatives from the ballot because they were not "legislative" in nature. This Court rejected Lehi City's arguments, noting that "article VI nowhere indicates that the scope of the people's initiative power is less than that of the legislature's power," and in fact that "[t]he people's initiative power reaches to the full extent of the legislative power." *Carter*, 2012 UT 2, ¶ 30-31. In other words, in order to determine whether a bill should be rejected *in the context of initiatives*, this Court examined the clear parallel *in the context of the legislature*. Finding that such bills were permissible in the context of the legislature, the Court concluded that such bills should be permissible in the context of initiatives, i.e., that Lehi City's initiative restriction imposed an undue burden.

4B: The Same-or-Similar Ban fails this simplified version of the Undue Burden test

To apply this simplified version of the Undue Burden test to the current Petition, we simply note (as shown in Point 1A above) that there are no restrictions to prevent same-or-similar bills from being reintroduced in the state legislature, and that in fact legislative bills can and often do come back year after year.

4C: The Court should consider formalizing this simplified version of the Undue Burden test

We conclude by respectfully encouraging the Court to formalize this simplified version of the Undue Burden test, perhaps stating it as follows, in reference to this Court's conclusion that "the people's legislative power is *parallel* to that possessed by the state legislature." *Carter*, 2012 UT 2 ¶ 56 (emphasis added):

> *When there is a clear parallel between the initiative process and the state legislature's process, the procedures and restrictions that apply to initiatives should not be more onerous than the procedures and restrictions that apply to the state legislature's process.*

Should the Court be interested in such a formalization, we offer up four notes.

First, this simplified version of the Undue Burden test has an obvious connection to this Court's ruling that "[t]he power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share equal dignity." *Gallivan*, 2002 UT 89, ¶ 23 (internal quotation marks omitted). The Lieutenant Governor may wish to claim that the provisions that govern the initiative process and those that govern the state legislature's process are "separate but equal," and in principle such an outcome might be fine. But in practice we believe that this claim rings as hollow as it did in *Brown v. Board of Education*, 347 U.S. 483 (1954). That the current provisions for bills introduced by the people and bills introduced by state legislators are not equal—not coequal, not coextensive, not concurrent, and not sharing of equal dignity—is evident from Petitioners' need to file this Petition.

Second, we believe this simplified version of the Undue Burden test will help the Court adjudicate an important subset of cases. We suggest the following examples.

Example One is that the initiative process and the state legislature's process both have standard rules for the effective dates of bills that are passed. The simplified version of the Undue Burden test would suggest that the rules for standard effective dates should not be more onerous for initiatives than for legislative bills, and that (for example) it would be an undue burden on the people's initiative right if bills passed by the legislature (say, during the 2025 legislative session) had a standard effective date in May 2025, but bills passed by the people in November 2024 (i.e., even *earlier* than the 2025 legislative session) could not take effect until January 2026. (We offer this Example One only as a hypothetical, but the Court is welcome to compare Joint Rules of the Legislature § JR4-1-203 with Utah Code § 20A-7-212(2)(b).)

Example Two is that the initiative process and the state legislature's process both require a fiscal analysis of proposed bills. The simplified version of the Undue Burden test would suggest that the rules governing the content and process for these fiscal analyses should not be more onerous for initiatives than for legislative bills, and that (for example) it would be an undue burden on the people's initiative right if there were a standard 3-day fiscal note process for a legislative bill but a standard 25-day fiscal note process for an initiative. (Again, we offer this Example Two only as a hypothetical, but the Court is welcome to compare Joint Rules of the Legislature § JR4-2-403 with Utah Code § 20A-7-202.5(3).)

Example Three is that the initiative process and the state legislature's process both have content restrictions, for example "single subject" requirements to ensure that pieces of proposed legislation do not violate Article VI, Section 22 of the Utah Constitution. The simplified version of the Undue Burden test would suggest—in accordance with this Court's decision in *Carter*—that such content restrictions should not be more onerous for initiatives than for legislative bills, and that (for example) it would be an undue burden on the people's initiative right if the scope of the people's initiative power were less than that of the legislature's power. (This example is *not* offered as a hypothetical. In fact, it is exactly the topic under consideration regarding the Same-or-Similar Ban: the legislature has imposed content restrictions on initiatives that it has not imposed on itself.)

Third, formalizing this simplified version of the Undue Burden test would help address at least some of the concerns that this Court has expressed about the Undue Burden test. Those concerns were expressed by this Court in the quotation that came at the beginning of this Point 4, which continues as follows:

> This is a matter of *great significance* under the Utah Constitution. Different members of this court, moreover, may have differing views on how best to frame this element of the test. And the parties' briefing in this matter has not proposed a basis for clarifying or illuminating the as-yet unspecified terms of our test.

Count My Vote, 2019 UT 60, ¶ 47 (emphasis added).

Fourth and finally, we note that this is indeed a matter of *great significance*. This Court has ruled that "the constitutional power of the people to initiate legislation... is a fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, 2012 UT 2 ¶ 3. In arguing that "the people and the legislature hold parallel and coextensive

legislative power," this Court has eloquently described the historic thought process that led Utah to become the second state in the Union to adopt initiatives: "Only by wielding the legislative power [directly through initiatives] could the people govern themselves in a democracy unfettered by the distortions of representative legislatures." *Carter*, 2012 UT 2 ¶ 19, 23.

It is in this context—in the context of initiatives serving as "a fundamental guardian of liberty" amidst the "distortions of representative legislatures"—that this Court has emphasized the role it must play to "defend [the people's right to initiative] against encroachment and maintain it inviolate." *Gallivan*, 2002 UT 89, ¶ 27 (collecting cases). Such a defense is especially important because, for reasons that were perhaps unavoidable, Article VI, Section 1 of the Utah Constitution gives the *state legislature* power to determine the procedures and restrictions that apply to the *people's initiatives*, meaning that in some sense the fox has been put in charge of the henhouse.

It is the role of this Court to protect the hens from the foxes, i.e., to prevent the legislature from unduly burdening the people's "fundamental guardian of liberty." This Court has done so with the Undue Burden test, and we propose that the Court may clarify this test by formally adopting a simplified version. At the risk of mixing our avian metaphors, we believe this simplified version of the Undue Burden test is based on an equally simple idea: *what's good for the goose is good for the gander.*

We hasten to add that this does not mean that the goose and the gander must be treated identically. They may have different dietary needs, and if ganders made as much noise as roosters, then it would be reasonable for there to be restrictions on their presence

in urban areas. But there are many commonalities between the goose and the gander—in particular, they both need to be protected from foxes—and it is with regard to these commonalities that this simplified version of the Undue Burden test would apply. In other situations, it would not apply, notably where there is no clear parallel between the initiative process and the state legislature's process. This is likely to be true for many of the rules governing "the conditions, the manner, and the time" for signature-gathering (quoting *Owens v. Hunt*, 882 P.2d 660, 661 (Utah 1994)).

If the Court *is not* interested in this simplified version of the Undue Burden test, we note that Points 1-3 above show that the Same-or-Similar Ban violates the original (*Utah Safe to Learn*) version of the Undue Burden test. If the Court *is* interested in this simplified version of the Undue Burden test, we respectfully suggest calling it the "goose-gander" test, or perhaps the "parallel" test in reference to this Court's conclusion that "the people's legislative power is *parallel* to that possessed by the state legislature." *Carter*, 2012 UT 2 ¶ 56 (emphasis added).

STATEMENT OF WHY NO OTHER PLAIN, SPEEDY, OR ADEQUATE REMEDY EXISTS

The Lieutenant Governor has rejected CTDA's initiative filing, thereby preventing CTDA supporters from accessing the initiative process, which this Court has called "a fundamental guardian of liberty and an ultimate protection against tyranny." *Carter*, 2012 UT 2 ¶ 3. As explained above, every day that goes by further restricts CTDA supporters

from choosing a signature-gathering window that best enables them to avail themselves of the initiative right.

On multiple occasions, this Court has recognized the "flexibility of extraordinary writs," particularly when considering "the exigencies dictated by timing in an election-related case." *Gallivan v. Walker*, 2002 UT 73, ¶ 4 (citing *Nelson v. Miller*, 25 Utah 2d 277, 480 P.2d 467 (1971)) (internal quotation marks omitted).

Here, the exigencies of timing warranting this Court's immediate review of the petition, without the need for trial proceedings or further factual development. We note that, as in *Gallivan*, the questions involved in this case are strictly legal, so there is no downside to the Court granting this petition.

STATEMENT OF WHY DISTRICT COURT PROCEEDINGS ARE IMPRACTICAL

Given the claims and requested relief at issue, there is no adequate remedy available other than having this Court address the matter. As noted above, every day that goes by further restricts CTDA supporters from choosing a signature-gathering window that best enables them to avail themselves of the initiative right.

CONCLUSION

The CTDA Parties respectfully request that the Court grant this Petition, declare that Utah Code § 20A-7-202(5)(a)(v) places an unconstitutional burden on the right to

initiate legislation, and issue an order compelling the Lieutenant Governor to accept the initiative petition filed by the Petitioners.

DATED this 29th day of April, 2024.

/s/ Yoram K. Bauman

/s/ David Carrier

/s/ Dennis J. Mullen

/s/ Michael J. McAinsh

/s/ Ava Curtis

Deidre M. Henderson
Utah Lieutenant Governor's Office

April 2, 2024

Re: Clean The Air Carbon Tax Act initiative application

Enclosed please find the Clean The Air Carbon Tax Act initiative petition application.

The intent of our policy is to put $100m a year into local air quality programs and $50m a year into rural economies, eliminate the state sales tax on grocery store food and expand the state's Earned Income Tax Credit match for low-income working families, and pay for it all with a modest carbon tax on the fossil fuels that are the main source of local air pollution and global climate change. In other words, as summarized on our website (CleanTheDarnAir.org): "tax pollution instead of potatoes, and use the money that's left over to Clean The Darn Air."

This measure is similar to the measure we filed in January 2023, but since we didn't get enough signatures we intend to try again. **We understand that this may violate 20A-7-202(5)(a)(v) but we believe that section is unconstitutional; if necessary we intend to challenge it in court.**

Thank you for your attention to this matter and for supporting Utah's democracy.

Sincerely,

Yoram Bauman, Dave Carrier, Dennis Mullen, Ava Curtis, Michael McAinsh, and other supporters of the Clean The Darn Air campaign.

Per 20A-7-202(2)(f): Although we plan to gather signatures only with volunteers, for maximum flexibility we state that persons gathering signatures for the petition may be paid for doing so.

Per 20A-7-202(2)(e) and following conversations with your office over the past years: This initiative petition proposes the creation of a new carbon tax.

Per 20A-7-202(2)(d), the title of this proposed law is the Clean The Air Carbon Tax Act. Over 99% of the total costs associated with the proposed law will be funded by the carbon tax created by the proposed law. Some minor costs, totaling less than 1% of costs—for example, those associated with tax administration, enforcement, and collection—will be funded from existing sources, including the Transportation Fund and the Transportation Investment Fund of 2005.

STATE OF UTAH
OFFICE OF THE LIEUTENANT GOVERNOR

DEIDRE M. HENDERSON

LIEUTENANT GOVERNOR

April 22, 2024

Mr. Bauman,

In accordance with UCA §20A-7-202(5), the Office of the Lieutenant Governor is required to conduct a legal review of all initiative applications and reject an initiative application if: the law is patently unconstitutional; the law is nonsensical; the law could not become law if passed; the law contains more than one subject in accordance with the Utah Constitution, Article VI, Section 22; the law is the same or substantively similar to a law proposed by an initiative within the last two years; or the subject of the proposed law is not clearly expressed in the law's title.

As noted in your submission letter, the "Clean the Air Carbon Tax Act" initiative "is similar to the measure… filed in January 2023." Given the statutory requirement that the proposed law cannot be "substantially similar to a law proposed by an initiative for which signatures were submitted… within two years preceding the date on which the initiative application for the new initiative is filed," (UCA §20A-7-202(5)(a)(v)) the Lieutenant Governor's Office has determined the proposed initiative must be rejected. The Legislative Fiscal Analyst's Office has been notified to cease preparing a fiscal impact statement, and the initiative will not move forward.

Sincerely,

Ryan Cowley - Director of Elections

Utah Code § 20A-7-202(5)

(5) The lieutenant governor shall reject an initiative application or an initiative application addendum filed under Subsection 20A-7-204.1(5) and not issue signature sheets if:

(a) the proposed law:

(i) is patently unconstitutional;

(ii) is nonsensical;

(iii) could not become law if passed;

(iv) contains more than one subject as evaluated in accordance with Subsection (6); or

(v) is identical or substantially similar to a law proposed by an initiative for which signatures were submitted to the county clerks and lieutenant governor for certification within two years preceding the date on which the initiative application for the new initiative is filed; or

(b) the subject of the proposed law is not clearly expressed in the law's title.

Certificate of Compliance

I hereby certify that:

1. This petition complies with the word limits set forth in Utah R. App. P. 19(i) because this petition contains 6,939 words, excluding the parts exempted by the rule.

2. This petition complies with Utah R. App. P. 21(h) regarding public and non-public filings.

DATED this 29th day of April, 2024.

/s/ Yoram K. Bauman

Certificate of Service

This is to certify that on the 29th day of April, 2024, I caused the Petition for Extraordinary Relief to be served via email to Brody Bailey, Election Coordinator, Office of the Lieutenant Governor, babailey@utah.gov.

Pursuant to Utah Rule of Appellate Procedure 25A, service is also being provided to the Utah Attorney General at notices@agutah.gov.

/s/ Yoram K. Bauman