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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

COALITION FOR A SAFE AND HEALTHY UTAH, d/b/a DRUG SAFE UTAH, a Utah non-profit corporation, DR. BRUCE H. WOOLEY, WALTER J. PLUMB III, ARTHUR BROWN, and BRUCE F. RIGBY, resident and taxpayers of Utah, and parents and grandparents of Utah residents, on behalf of those similarly situated, Plaintiffs, v. SPENCER J. COX, in his official capacity as Lieutenant Governor of Utah, Defendant, and UTAH PATIENTS COALITION, Intervenors.	**DEFENDANT SPENCER J. COX'S MOTION TO DISMISS** Case No. 2:18-cv-00405-CW Judge Clark Waddoups

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MOTION

Defendant Spencer J. Cox ("Lt. Governor"), pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) and District of Utah Local Rule 7-1(a), submits this Motion to Dismiss and Supporting Memorandum. Plaintiffs lack standing and their claims are not ripe for review. Accordingly, the Court lacks jurisdiction over this matter and must dismiss this case. Dismissal is also appropriate here because Plaintiffs have failed to state a claim upon which relief may be granted. There is no private right of action to challenge the Lt. Governor's determination that the initiative petition is sufficient to be placed on the ballot. And, the Lt. Governor has fully complied with the election code's requirements for determining that an initiative is sufficient to be placed on the ballot. Accordingly, Defendant requests that Plaintiffs' Second Amended Complaint be dismissed.

MEMORANDUM

INTRODUCTION

Plaintiffs ask this Court to declare the Utah Medical Cannabis Act ballot initiative (the "Initiative") unconstitutional before it becomes law or is even put to a vote. Plaintiffs' claims should be dismissed because Plaintiffs lack standing and their claims are not ripe for adjudication. Plaintiffs lack standing because they have not been injured by the mere presence of the Initiative on the ballot. Plaintiffs' claims are not ripe because the voters may reject the Initiative. And, Plaintiffs' claims fail because there is no private right of action to challenge the Lt. Governor's determination that the Initiative petition is sufficient to be placed on the ballot, and there is no private right of action under the Controlled Substances Act ("CSA") to challenge the Initiative on preemption grounds. To the extent the Court finds standing exists, concludes Plaintiffs' claims are ripe for review, and further determines that a private right of action exists,

Plaintiffs' claims are still untenable because the Lt. Governor has not violated the election code's requirements for determining that an initiative is sufficient to be placed on the ballot.

Plaintiffs' contentions that the Initiative is "patently unconstitutional" and "could not become law if passed" is incorrect as a matter of law. Plaintiffs contend that if the Initiative becomes law it would be preempted by federal law and is thus unconstitutional under the Supremacy Clause. But the Utah statutes upon which Plaintiffs rely do not require the Lt. Governor to definitively determine whether the Initiative, if passed, would be constitutional or whether a court might subsequently strike the Initiative down on some other grounds. Instead, the statutes require the Lt. Governor to conduct a preliminary review of the Initiative sponsors' application and petition to determine, *inter alia*, if the proposed law is plainly, obviously, and patently unconstitutional and could not become law if passed. Plaintiffs have not pled facts plausibly showing that the Lt. Governor did not comply with this statutory requirement.

Plaintiffs are not the first parties to argue that medical marijuana initiatives are preempted by federal law and, specifically, by the terms of the CSA. Plaintiffs concede that a significant number of courts have concluded that other states' medical marijuana initiatives are not preempted by federal law. *See* Doc. 14-3, Pls' Mem in Support of Mot. for Emergency Relief, pp. 17-18 (citing cases upholding Connecticut, Michigan, California and Arizona's medical marijuana laws.) Accordingly, the Court should not set aside the Lt. Governor's determination that the Initiative would not be patently unconstitutional and could become law if passed. Instead, the Court should dismiss Plaintiffs' Second Amended Complaint, without prejudice, and allow the voters to decide whether to adopt the Initiative. If the Initiative becomes law, Plaintiffs may choose to reassert their claims.

LEGAL STANDARDS

I. RULE 12(b)(1) AND RULE 12(b)(6)

A 12(b)(1) motion to dismiss allows defendants to challenge a court's subject matter jurisdiction both facially and factually. *United States v. Rodriguez–Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001). A facial challenge targets the adequacy of the allegations in the complaint. *Id*.; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Because federal courts have limited jurisdiction, they presume they lack jurisdiction unless plaintiffs plead sufficient facts to establish it. *Mocek v. City of Albuquerque*, 813 F.3d 912, 932 (10th Cir. 2015) (citation omitted); *Full Life Hospice, LLC v. Sebelius,* 709 F.3d 1012, 1016 (10th Cir. 2013).

When presented with a facial challenge, courts (1) identify the allegations in the complaint entitled to an assumption of truth and (2) evaluate whether these allegations plausibly support an entitlement to relief. *Iqbal*, 556 U.S. at 680; *Valdez v. National Security Agency*, 228 F.Supp.3d 1271, 1279, & n.24, 27 (D. Utah 2017) (noting *Iqbal* pleading standards apply to 12(b)(1) motions). To be entitled to an assumption of truth, allegations must be "well-pleaded," which means, at a minimum, they cannot be legal conclusions, bare assertions, or "formulaic recitations" of the elements of a claim. *Valdez*, 228 F.Supp.3d at 1279 (citation omitted). In resolving a factual challenge to a court's subject matter jurisdiction, the court "does not presume the truthfulness of the complaint's factual allegations, but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.* at 1279 & n.24 (citation omitted).

To withstand a rule 12(b)(6) motion to dismiss, a complaint must include sufficient factual allegations to state a claim that is plausible, not merely conceivable. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S.

544, 570 (2007)). As is the case with a 12(b)(1) motion, in determining whether the complaint validly states a claim, courts disregard mere labels and conclusions, and "formulaic recitation[s] of the elements of a cause of action." *Id*. at 1190-91.

II. STANDING AND RIPENESS

Standing is required for there to be a justiciable case or controversy under Article III of the U.S. Constitution. *Lujun v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The essence of the standing inquiry is whether plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc*., 438 U.S. 59, 72 (1978) (citation omitted). Because standing is "not dispensed in gross," a plaintiff must demonstrate standing "for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citations omitted).

A plaintiff has standing only when (1) she has suffered an injury in fact that is (2) fairly traceable to (caused by) the alleged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision. *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). Plaintiffs have the burden of establishing the elements of standing. *Id.* To satisfy this burden at the pleadings stage, a party's complaint must include well-pleaded allegations of fact demonstrating each element of standing. *Id*. (citation omitted).

Allegations of possible future injuries fail to establish the injury in fact element. *Clapper v. Amnesty Int'1 USA*, 568 U.S. 398, 409 (2013). Rather, a threatened injury must be "certainly impending" to constitute an injury in fact. *Id* (citation omitted).

Standing embodies the concept of ripeness. Ripeness is essentially "standing on a timeline". *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1157-58 (10th Cir. 2013) ("*SUWA*"). A case is not constitutionally ripe if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id*. at 1160; *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation omitted).

Under the foregoing principles, courts generally refuse to conduct pre-election review of a potential law's substantive validity on ripeness grounds.[1] The ripeness requirement prevents judicial review when future events may affect a case, thus making later adjudication more appropriate.[2] The ripeness doctrine is justified by constitutional and institutional considerations similar to those justifying the ban on advisory opinions: the lack of a concrete situation and a clear factual record to assure informed and narrow adjudication,[3] the desire to avoid making unnecessary decisions about difficult constitutional issues, and the need to conserve judicial resources by deciding only those questions necessary to resolve real controversies.[4]

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[1] *See e.g.*, *Diaz v. Board of County Comm'rs*, 502 F. Supp. 190, 194 (S.D. Fla. 1980); *City of Rocky Ford v. Brown*, 293 P.2d 974, 976 (Colo. 1956) (en banc); *Slack v. City of Salem*, 201 N.E.2d 119, 121 (Ill. 1964); *State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. 1983) (en banc); *Anderson v. Byrne*, 242 N.W. 687, 692 (N.D. 1932); *State ex rel. O'Connell v. Kramer*, 436 P.2d 786, 787 (Wash. 1968) (en banc).

[2] Correspondence of the Justices, Letters from Chief Justice John Jay and the Associate Justices to President George Washington (August 8, 1793); L. Tribe, AMERICAN CONSTITUTIONAL LAW 73 (2d ed. 1988), p. 77; *see also Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-97 (1981); *Poe v. Ullman*, 367 U.S. 497 (1961); *Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

[3] "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Int'l Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954).

[4] *See* L. Tribe, *supra* note 3, at 77-82.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIMS AGAINST THE LT. GOVERNOR

A. All Claims that are Contingent on the Enactment of the Initiative Should be Dismissed on Standing and Ripeness Grounds

Plaintiffs allege that the Initiative, if enacted, will (a) be preempted under federal law, specifically the Controlled Substances Act ("CSA") (Count 1); (b) violate the provision of the Utah Constitution that acknowledges that the "Constitution of the United States is the supreme law of the land," (Count 4); (c) violate the provision of the Utah Constitution that forbids "granting irrevocably any franchise, privilege, or immunity," (Count 5); (d) violate the provision of the Utah Constitution that places enforcement of the law in the hands of the executive branch (Count 6); (e) violate the Utah Constitution's Open Court's Clause (Count 7); (f) be preempted under U.S. treaties (Count 8); (g) be preempted under the Agricultural Act of 2014 (Count 9); and (h) violate the U.S. and Utah Constitutions (Count 10).

These causes of action are not ripe because they rest upon a contingent future event, namely, the possible adoption of the Initiative, which "may not occur at all." *SUWA*, 707 F.3d at 1158. The adoption of the Initiative may not occur because voters may reject it, as occurs with the majority of initiatives.[5] Even if public opinion polls report that a particular initiative enjoys majority support, polls are sometimes flawed, and passage will depend on such variables as campaign strategies, spending, and voter turnout. In many contested initiatives a significant

[5] *2015 Ballot Propositions*, Council for State Governments, http://knowledgecenter.csg.org/kc/content/2015-ballot-propositions (last visited June 15, 2018) (stating in 2015 "the approval rate of 40 percent [for initiatives] was equal to the long-run historical average.")

opinion change occurs during the campaign.[6] No justiciable threat is posed by a ballot initiative that may never be enacted. Pre-election review of a ballot proposal's substantive validity addresses hypothetical legal questions not involving any existing law or actual threat of enforcement, and therefore is not ripe.

Because it is impossible to predict the outcome of the vote on the Initiative, Plaintiffs' claims under federal law and the Utah Constitution are speculative and conjectural, and therefore not ripe. *See Capeheart v. Terrell*, 695 F.3d 681, 685 (7th Cir. 2012) (holding that a pre-enactment challenge to a proposed policy was conjectural and unripe because the "proposed policy may never come into force and, even if it does, it could well change during the process that takes it from a possible rule to an actual one."); *Carter v. Lehi City*, 2012 UT 2, ¶¶ 91-95, 269 P.3d 141 ("Pre-enactment review of a ballot initiative presents a particularly stark ripeness problem. Not only is the initiative not yet enforced, it is not yet enacted. Until proposed legislation becomes law, we could only review a hypothetical law and issue an advisory opinion.").

1. Plaintiffs' Alleged Harms or Costs do not Establish Standing

For similar reasons, Plaintiffs lack standing to challenge the Initiative based on harms or costs they have allegedly incurred or may incur in response to the *possibility* the Initiative may be adopted. In this regard Plaintiffs allege that,

- "budgetary, insurance, training and education [actions] must be undertaken now to prepare for the *possibility* that the initiative will pass," (doc. 17, ¶ 5) (emphasis added);

[6] David Magleby, *Opinion Formation and Opinion Change on Statewide Ballot Propositions*, in Manipulating Public Opinion: Essays on Public Opinion as a Dependent Variable (Michael Margolis & Gary A. Mauser eds., 1989)

- Plaintiff Walter Plumb, as a landlord of property, "must currently determine whether he must accommodate current lessees who *may* obtain medical cannabis cards," (*id*., ¶ 10) (emphasis added);

- law enforcement members of Defendant Coalition for a Safe and Healthy Utah (the "Coalition") are "being required to incur additional costs in current budgets" to "train officers in the complex rules to legally obtain and possess a cannabis card provided in" the Initiative and prepare for "increases in crime that will result from additional growth and possession of marijuana," (*id*., ¶ 83);

- "emergency room budgets" of medical and physician members of the Coalition "must be increased in current budgets to address the additional load for marijuana-use related emergency visits," and "funds must presently be diverted from [their] existing budgets . . . to cover projected costs of *anticipating* the *possibility* that the [Initiative] will be accepted," (*id*., ¶ 88) (emphasis added);

- "hospitals and medical staffs" must "begin now to train and obtain guidance regarding training for physicians related to necessary conditions to issue cannabis recommendations and to comply with the law," (*id.*, ¶ 89), and divert time and money addressing issues of drug interactions, secondary use dangers and complications, medical indications or dosages," (*id.*, ¶ 90).

Under *Clapper*, Plaintiffs lack standing to challenge the Initiative because these claimed costs or harms are not fairly traceable to the Initiative. In *Clapper*, the U.S. Supreme Court overturned the Second Circuit's ruling that plaintiffs had demonstrated standing because they "established that they suffered *present* injuries in fact—economic and professional harms—stemming from a reasonable fear of *future* harmful government conduct." 568 U.S. at 415-16. In so doing, the Supreme Court held that plaintiffs could *not* establish standing by "making an expenditure based on a nonparanoid fear" or "asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not 'fanciful, paranoid, or otherwise unreasonable.'" *Clapper*, 568 U.S. at 416 (citation omitted). In other words, any

"contention that [plaintiffs] have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing." *Id.* Thus, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.*

Rather, to have standing, the costs and burdens allegedly expended must be fairly traceable to the challenged action and be redressed by the requested relief. *Id.* at 409. Costs and burdens are fairly traceable to the challenged action only if the action has actually occurred or is certainly impending, and not if the occurrence of the action rests on conjecture or a "speculative chain of possibilities." *Id.* at 410.

The presence of an "independent decisionmaker" in the chain, by itself, breaks the chain of causation. *Id.* at 412-14 (stating that even if respondents could show that the earlier events in the chain of causation would occur, "respondents can only speculate as to whether that court will authorize such surveillance"). In fact, the U.S. Supreme Court has historically "been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 414; *cf. Whitmore v. Arkansas*, 495 U.S. 149, 159–60 (1990) ("It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case.").

Under *Clapper*, the costs and harms that Plaintiffs have alleged relate to the *possibility* the Initiative will pass, (*e.g.*, doc. 17, ¶¶ 5, 10, 83, 88-90), and, thus, are not fairly traceable to the Initiative. *Clapper* mandates this conclusion because it is speculative to assume that the independent decisionmakers in the chain of causation, i.e., the voters, will necessarily adopt the Initiative.

2. Plaintiffs' Generalized Allegations of Harm do not Establish Standing

Equally deficient are Plaintiffs' generalized allegations of harm that citizens of Utah will allegedly suffer if the Initiative becomes law. *See* doc. 17, Pls' Sec. Am. Compl. ¶¶ 4, 73, 86 (listing health and safety risks allegedly caused by marijuana use). Plaintiffs attempt to build a "slippery slope" by speculating that allowing individuals access to medical marijuana will lead to legalizing recreational marijuana. In Plaintiffs' words, "[c]ultural acceptance of violating federal drug laws will increase even if the initiative fails, creating a permanent and likely irreversible cultural shift in Utah." *Id*. ¶ 73. Similarly, Plaintiffs speculate that "legalization would leave in its wake an ocean of human lives shattered by addiction, and a mountain of additional costs to be borne by Utah's taxpayers and families," *id*. ¶ 4, and individual Plaintiffs, their relatives, and citizens will inevitably suffer because of the increased (illegal) use of recreation marijuana." *Id*. ¶ 86.

These alleged harms are far too speculative to establish standing. With the exception of the conclusory "[c]ultural acceptance" allegation, *id*. ¶ 73, all of these allegations of harm presuppose the Initiative will pass. As shown previously, it is speculative to assume the Initiative will pass. As for the conclusory "[c]ultural acceptance allegation," it fails to establish standing because it is a conclusory and a speculative attempt to predict the future. Plaintiffs fail to set forth facts plausibly showing that a "permanent and likely irreversible cultural shift in Utah" of "violating federal drug law" would occur even if the Initiative fails.

Further, Plaintiffs' allegations of harm to Utah citizens are too generalized to establish standing. Standing requires a concrete and particularized invasion of a legally protected interest in the dispute. *Lujan*, 504 U.S. at 560. Plaintiffs have failed to meet this requirement. The harms and costs that Plaintiffs claim are associated with marijuana use are not borne by Plaintiffs

alone or even necessarily by Plaintiffs in a disproportionate amount. Instead, these harms, whatever they may be, are distributed throughout the citizens of the State.

Plaintiffs' status as citizens or taxpayers does not give them standing. *Higganbotham v. Oklahoma ex rel. Oklahoma Transp. Comm'n*, 328 F.3d 638, 642 (10th Cir. 2003) (stating "test to determine whether a taxpayer has standing to sue" requires, *inter alia*, the taxpayer show the "challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power . . . ."); *Penk v. Cohen*, 145 F.3d 1346, *1 (10th Cir. 1998) ("The district court correctly concluded that petitioner's status as a citizen and a taxpayer is insufficient by itself to confer standing in this case.") (unpublished); *Jenkins v. Swan*, 675 P.2d 1145, 1151 (Utah 1983) (declining to grant standing to a plaintiff who relied on his "general status as a taxpayer and citizen and [did] nothing to distinguish him[self] from any member of the public at large").

Instead, Plaintiffs must assert a particularized injury they suffer which is distinct from harms suffered by all citizens of the state. *See Lujan*, 504 U.S. at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy" and therefore lacks standing.); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) ("[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share.").

3. Plaintiffs' Alleged Harms or Costs to Third Parties do not Establish Standing

Plaintiffs further contend they have a "concrete interest in the litigation," that stems from "other consequences of legalized medical marijuana." *See* doc. 17 at ¶ 41. Specifically, Plaintiffs assert that the Initiative 1) requires the Utah State Department of Agriculture to issue licenses and permits in violation of federal law; 2) allows individuals to distribute marijuana in violation of federal law; 3) allows physicians to prescribe marijuana in violation of federal law; 4) prevents counties and cities within Utah from acknowledging federal law; and 5) limits the ability of the Utah Highway Patrol and other executive branch agencies to enforce federal law. *Id*. at ¶¶ 40, 45, 66, 68, 72. Thus, it is clear from the allegations in the Second Amended Complaint that the rights Plaintiffs claim are affected by the Initiative belong, not to the Plaintiffs, but to State agencies and other unidentified individuals. Under the doctrine of prudential standing, individual Plaintiffs cannot bring suit to enforce the rights of others. *See VR Acquisitions, LLC v. Wasatch Cnty.*, 853 F.3d 1142, 1146 (10th Cir. 2017). Accordingly, Dr. Bruce Wooley, Walter J. Plumb III, Arthur Brown and Bruce F. Rigby are not proper parties to this action.[7]

Moreover, while an association may bring suit on behalf of its members, it can only do so if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." *Thiebaut*

[7] Plaintiffs' contention that they "are appropriate parties to bring this action because they have the interest necessary to effectively assist the Court in developing and reviewing all relevant and legal factual questions and no one has a greater interest in the outcome than the Plaintiffs," doc. 17, ¶ 8, is an erroneous legal conclusion that this Court should disregard. *Ashcroft v. Iqbal*, 556 U.S. 680 (2009); *Valdez*, 228 F.Supp.3d at 1279, & n.24, 27.

v. Colo. Springs Utils., 455 Fed. Appx. 795, 801 (10th Cir. 2011); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009); *SUWA*, 620 F.3d at 1246. Plaintiffs assert,

> The Coalition for a Safe and Healthy Utah, d/b/a Drug Safe Utah, is a Utah nonprofit corporation dedicated to safe drug use in the State of Utah. Members of the Coalition include the Utah Medical Association, Utah Eagle Forum, Sutherland Institute, Utah Prevention Coalition Association, Behavioral Health groups, law enforcement agencies, concerned citizens, Utah Narcotics Officers Association, Utah Chiefs of Police, and others.

Doc 17. ¶ 7.

But Plaintiff have failed to show that the Coalition has associational standing. Specifically, Plaintiffs' Second Amended Complaint does not plead facts plausibly showing that any member of the Coalition has "standing to sue in [its] own right." *Theibaut*, 455 Fed. App. At 801. In fact, as shown previously, Plaintiffs have failed to demonstrate that anyone has standing.

Due to these defects in standing and ripeness, Plaintiffs are improperly seeking advisory opinions in Counts 1, 4-10. The Court should therefore dismiss these causes of action. *Tilson v. Mofford*, 737 P.2d 1367 (Ariz. 1987) (holding that "the legality of the substance of an initiative cannot be reviewed until the initiative is adopted by the electorate and is later at issue in a specific case."); *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) ("Governmental officials have no power to prohibit the exercise of the initiative by prematurely passing upon the substantive merits of the initiated measure. Nor may the courts interfere with the exercise of this right by declaring unconstitutional or invalid a proposed measure before the process has run its course and the measure is actually adopted."); *Associated Taxpayers of Idaho, Inc. v. Cenarrusa*, 725 P.2d 526, 526 (Idaho 1986) ("Only if the lottery initiative passes, will its subject matter then become subject to constitutional challenge."); *Barnes v. Paulus*, 588 P.2d 1120, 1123 (Or. Ct. App. 1978); *State ex rel. Althouse v. City of Madison*, 255 N.W.2d 449, 456 (Wis. 1977) ("There

is no such thing known to the law as an unconstitutional bill. A court cannot deal with the question of constitutionality until a law has been duly enacted and some person has been deprived of his constitutional rights by its operation.") (citation omitted).

B. Plaintiffs also Lack Standing to Assert a Claim Under Utah Code § 20A-7-202

Plaintiffs also lack standing to challenge the Lt. Governor's determination that the Initiative is not "patently unconstitutional" and could become law if passed under Utah Code § 20A-7-202(5). (*See* doc. 17, Second & Third Claims). The Lt. Governor's determination that Initiative is not "patently unconstitutional" and could become law if passed simply permitted the proponents of the Initiative to begin gathering signatures. *See* Utah Code § 20A-7-202(5). It did not guarantee the proponents would gather enough signatures to be placed on the ballot and certainly does not guarantee that the Initiative will garner enough votes to become law. And Plaintiffs' Second Amended Complaint fails to allege facts plausibly showing that Plaintiffs suffered any particularized harm as a result of the Lt. Governor's approval of the Initiative for signature-gathering. Thus, Plaintiffs' lack standing to challenge the Lt. Governor's determinations under Utah Code § 20A-7-202(5), and their Second and Third Claims should be dismissed.

Still, Plaintiffs contend that they "are appropriate parties to challenge the placement of the initiative on the November 2018 ballot due to its constitutional deficiencies and the issues addressed are of utmost public importance." *See* doc. 17, ¶ 5. But the public importance exception is a "state-court theory" and "cannot establish standing under Article III" as is required in federal court. *See Welch v. Welch*, No. 2:16-CV-00287-RJS, 2016 WL 3661239, at *5 (D. Utah July 5, 2016) (unpublished); *Doyle v. Jewell*, No. 2:13-CV-861-CW, 2015 WL 1609132, at *4 (D. Utah Apr. 10, 2015).

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM

A. Plaintiffs Do Not Have a Private Right of Action to Challenge the Lt. Governor's Decision to Approve the Initiative for Signature Gathering

Plaintiffs have not cited any authority, and Defendant is unaware of any, providing Plaintiffs a private right of action to challenge the Lt. Governor's decision to approve the Initiative under Utah Code § 20A-7-202(5).[8] The absence of a private right of action is fatal to Plaintiffs' claims. *Buckner v. Kennard*, 2004 UT 78, ¶ 43, 99 P.3d 842, 853 ("Utah courts have rarely, if ever, found a Utah statute to grant an implied private right of action."); *Shah v. Wilco Sys., Inc.*, 126 F. Supp. 2d 641, 653 (S.D.N.Y. 2000) (stating "because plaintiffs have no private right of action, that portion of plaintiffs' eighth claim requesting an injunction is dismissed pursuant to Rule 12(b)(6).") Nothing in Title 20A, Chapter 7 of the Utah Code provides either an express or implied right of action to challenge the Lt. Governor's decision to approve the sponsor's application to circulate the initiative petition under Utah Code § 20A-7-202(5).

In the absence of a private right of action, Plaintiffs' request for injunctive relief constitutes an equitable action seeking an extraordinary writ of mandamus. *Cf. Career Serv. Review Bd. v. Utah Dep't of Corr.*, 942 P.2d 933, 940 (Utah 1997) (noting that because "enforcement action was brought under the statutory authority" allowing agency to seek civil enforcement and injunctive relief in the district courts, it was not a "suit in mandamus but an action at law."); *Shah*, 126 F. Supp. 2d at 654 (holding plaintiff who failed to show he had private right of action also failed to show he had a right to the "common law writ of mandamus….").

[8] In contrast, Utah law allows any voter to apply to the Utah Supreme Court for an extraordinary writ if the Lt. Governor determines an initiative petition is legally insufficient to be placed on the ballot. *See* Utah Code § 20A-7-207(4)(a).

But mandamus relief will not assist Plaintiffs here because it "may not direct the exercise of judgment or discretion in a particular way" or allow a court to substitute its own judgment for that of an officer, such as the Lt. Governor. *Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206, 218 & n. 7 (1930) (noting that mandamus relief "is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either" and collecting further authorities in support of this position); *Rose v. Plymouth Town*, 173 P.2d 285, 286 (Utah 1946). Thus, Plaintiffs may not obtain an injunction overruling the Lt. Governor's decision to allow the Initiative sponsors to circulate the petition.

B. Plaintiffs Do Not Have a Private Right of Action to Assert Claims under the CSA

Plaintiffs hypothesize that the CSA "grants and creates substantive protections to the citizens of the United States to protect themselves against State law . . . ." (doc. 17, ¶ 34). Plaintiffs also allege that the CSA's purpose cannot be achieved "unless the CSA is recognized to create substantive rights in citizens to vindicate such interests when proposed State laws would interfere with this purpose." *Id.*, ¶ 92).

These allegations contradict precedent from the Tenth Circuit establishing that citizens do not have a private right of action to enforce the CSA against state law. *See Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 914 (10th Cir. 2017) ("The majority declares that even if state and local law is preempted by the Controlled Substances Act (CSA), the plaintiffs cannot seek injunctive relief against those laws under the federal courts' equity powers because neither the CSA nor any other federal law bestows on them a substantive private right.") (Hartz, J., concurring); *id.* at 898-905. Lacking a substantive private right of action under the CSA,

Plaintiffs cannot seek injunctive relieve premised on the theory that the CSA preempts the Initiative.

C. The Initiative is Not Patently Unconstitutional

In their Second Claim for Relief, Plaintiffs allege the Lt. Governor should not have approved the Initiative for signature-gathering because it is patently unconstitutional within the meaning of Utah Code § 20A-7-202(5)(a). Plaintiffs' claim fails because the Initiative is not "patently unconstitutional."

The Initiative is *patently* unconstitutional only if it is clearly and obviously unconstitutional. *People v. Alcozer*, 948 N.E.2d 70, 76 (Ill. 2011) (*citing* Webster's Third New International Dictionary 1654 (1993); Black's Law Dictionary 1147 (7th ed. 1999). The Initiative is not clearly and obviously unconstitutional.

One strong indicator that the Initiative is not clearly and obviously unconstitutional is the widespread adoption of medical marijuana initiatives and laws. Thirty states, the District of Columbia, Guam and Puerto Rico have laws in force providing for the use of marijuana for medical purposes.[9] An additional 16 states "allow use of 'low THC, high cannabidiol (CBD)' products for medical reasons in limited situations or as a legal defense."[10] Thus, all told, "nearly ninety per cent of States, . . ., allow the limited possession of marijuana for medical treatment."[11]

[9] *See* National Conference of State Legislatures , State Medical Marijuana Laws (2018), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx, (last visited June 12, 2018).
[10] *Id*.
[11] *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37, 42 (Mass. 2017) ("Like Massachusetts, nearly ninety per cent of States, as well as Puerto Rico and the District of Columbia, allow the limited possession of marijuana for medical treatment") (citing Congressional Research Service, The Marijuana Policy Gap and the Path Forward 7 (Mar. 10, 2017)).

And eight states and the District of Columbia have laws allowing the recreational use of marijuana.[12]

Further, in determining whether the Initiative was patently unconstitutional, the Lt. Governor could take into account that courts (1) apply a presumption of constitutionality to the "work of a state's citizenry acting through a ballot initiative," *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 636 (10th Cir. 1998), (2) do not "lightly infer preemption," *State v. Sterkel*, 933 P.2d 409, 412 (Utah Ct. App. 1997) (*quoting International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987)), (3) assume that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947), *rev'd on other grounds*, 331 U.S. 247, 256, (1947), and (4) "construe a statute to avoid constitutional infirmities whenever possible." *State v. Lindquist*, 674 P.2d 1234, 1237 (Utah 1983); *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988) (stating the "Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid."). Predicting how courts would apply these principles is neither clear nor obvious.

1. *The Initiative is not Clearly and Obviously Preempted by the Controlled Substances Act*

Moreover, the absence of any controlling authority on point from the U.S. Supreme Court, Tenth Circuit, or Utah appellate courts, and the split of authority on the question of the whether the CSA preempts state laws allowing for the medical use of marijuana, also supports the Lt. Governor's determination that the Initiative is not patently unconstitutional under the

[12] *See* National Conference of State Legislatures, Marijuana Overview (2017) http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (last visited June 12, 2018).

federal Supremacy Clause or Article I, section 3 of the Utah Constitution. (Doc. 17 ¶¶ 118, 119). In this regard, Plaintiffs admit that several prominent courts have concluded that other states' medical marijuana laws are not preempted by federal law. *See* doc. 14-3, p. 17-18 (citing cases upholding Connecticut, Michigan, California and Arizona's medical marijuana laws.) This unresolved split of authority and the legal uncertainty it creates further supports the conclusion that the Initiative is not patently unconstitutional.

Still, Plaintiffs allege that the Initiative is patently unconstitutional because it is "irreparably at odds" with and preempted by the CSA by "(1) forcing the Utah Department of Agriculture to authorize the distribution and manufacture of cannabis in violation of federal law; and (2) compelling cities and the state to refrain from revoking licenses based on non-compliance with federal law." (Doc. 17, ¶¶ 103-104).[13] Plaintiffs are mistaken.

Turning to the first of these allegations, it is far from clear and obvious that the Initiative forces the Utah Department of Agriculture to authorize any violation of federal law. In fact, the Initiative expressly states: "For purposes of ***state law***, except as otherwise provided in this section, activities related to cannabis shall be considered lawful and any cannabis consumed shall be considered legally ingested, as long as the conduct is in accordance with" the Initiative. *See* doc. 14-2, Ex. A, § 58-37-3.6b (3) (emphasis added). Providing limited state law immunity for activities related to the medical use of marijuana is not equivalent to authorizing violations of federal law. *See Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014) (holding that "limited state-law immunity" for medical use of marijuana "does not frustrate the CSA's

[13] Notably, to attempt to show that the CSA preempts the Initiative in their motion for emergency relief, Plaintiffs required over 10 pages of argument. *See* Doc. 14-3, pp. 13-24. If over 10 pages of argument is required, it is difficult to conclude that the Lt. Governor should have known the Initiative is *patently* unconstitutional.

operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished.")

Based on the reasoning in *Ter Beek* and other cases,[14] the Initiative is not clearly preempted by the CSA. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). If the federal statute contains a clause expressly addressing preemption, courts "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce v. Whiting* 507 U.S. 658 (2011) (internal quotations omitted). Section 903 of the CSA defines Congress' preemptive intent as follows:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including penalties to the exclusion of any State law or the same subject which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

A positive conflict exists between the CSA and the Initiative if it is "impossible to comply with both" or if the Initiative stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the CSA. *Ter Beek*, 846 N.W.2d at

[14] *See Joe Hemp's First Hemp Bank v. City of Oakland*, No. C15-05053 WHA, 2016 WL 375082, at *3 (N.D. Cal. Feb. 1, 2016) (holding that CSA did not preempt California's recreational marijuana law); *Reed-Kaliher v. Hoggatt*, 332 P.3d 587, 591 (Ariz. Ct. App. 2014) (holding that CSA does not preempt Arizona's Medical Marijuana Act ("AMMA") where status under probation based on conviction of crime of possession was governed by state law and not addressed by CSA); *White Mountain Health Center Inc. v. County of Maricopa*, 2012 WL 6656902 (Ariz. Super., Dec. 3, 2012) (holding that zoning authority regarding placement of marijuana dispensaries under the AMMA is not preempted by CSA); *Nofsinger v. SSC Niantic Operating Co.*, 273 F.Supp.3d 326 (D. Conn. 2017) (holding that CSA does not preempt Connecticut's medical marijuana laws for purposes of prohibiting employers from firing employees due to marijuana use).

537; *In re Rent-Rite Super Kegs West LTD.*, 484 B.R. 799, 804 (D. Colo. 2012) (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64) (2002)). There is not a clear and obvious positive conflict between the CSA and Initiative.

It is not patently impossible to comply with both the CSA and the Initiative. Such impossibility exists only if the Initiative clearly and obviously requires what the CSA forbids, or vice versa. *See Ter Beek*, 846 N.W.2d at 537 (finding impossibility preemption inapplicable because the Michigan Medical Marihuana Act "does not require anyone to commit [a federal] offense, "and does not purport to prohibit federal criminalization of, or punishment for, that conduct."). The Initiative does not require what the CSA forbids, and vice versa. While the CSA forbids the manufacture, distribution, or possession of marijuana, the Initiative does not clearly and obviously *require* anyone to engage in any of this forbidden conduct. *Id*. at 536. Rather, if individuals choose to engage in the production of marijuana, they must obtain a license from the Utah Department of Agriculture, which license does not purport to grant immunity from "federal criminalization of, or punishment for, that conduct." *Id*. at 537. To the contrary, section 68 of the Initiative evinces the intent to supplant only state law, but not federal law, when it states:

> The bill overrides, replaces, takes precedent over, and otherwise governs in place of any conflicting or contradictory legislation passed during a general session of the Utah legislature before enactment of the law.

Likewise, it is not clear and obvious the Initiative would stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the CSA. *Ter Beek*, 846 N.W.2d at 537. As noted by the Michigan Supreme Court, the U.S. Supreme Court has stated that the "main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Id*. at 539 (*citing*

Gonzales v. Raich, 545 U.S. 1, 29 (2005). And the Michigan Supreme Court held that a law allowing a limited class of individuals to engage in the medical use of marijuana "does not frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished." *Id.* While Plaintiffs may disagree, this is a matter on which reasonable minds may differ. Accordingly, the Court should not disturb the Lt. Governor's determination that the Initiative is not patently unconstitutional.

Turning to the second allegation, the CSA does not clearly and obviously preempt the Initiative on the basis that the Initiative allegedly compels cities and the state to refrain from revoking licenses based on non-compliance with federal law. There is no conflict or preemption because the CSA does not and cannot require cities or states to enforce its prohibitions. *See Ter Beek*, 846 N.W.2d at 538 (*citing Printz v. United States*, 521 U.S. 898, 924 (1997)).[15]

2. The Act does not Clearly and Obviously Violate Article I, § 23 of the Utah Constitution

The Initiative also does not clearly and obviously violate Article I, § 23 of the Utah Constitution, which provides, "[n]o law shall be passed granting irrevocably any franchise, privilege or immunity." "What is prohibited by article 1, § 23, is not the granting of any privilege, franchise, or immunity within the exercise of the police power of the state, but the granting *irrevocably* of any franchise, privilege, or immunity." *Utah Mfrs.' Ass'n v. Stewart*, 23 P.2d 229, 232 (1933) (emphasis added). If the Initiative becomes law, licenses to operate a cannabis production establishment would not be irrevocable because they would be subject to

[15] Although Plaintiffs allege that the Initiative, if passed, would be preempted by U.S. Treaties and the Agriculture Act in their Eighth and Ninth Claims, respectively, Plaintiffs do not allege in their Second Claim that the Initiative is patently unconstitutional/preempted under U.S. Treaties or the Agriculture Act, and therefore neither is addressed in this section. (*See* doc. 17, Second Claim, ¶¶ 102-109).

amendment and revocation by the Legislature. *Id*. ("If it be assumed that the Legislature has granted a franchise or privilege to the warehouse manager, yet it is not an irrevocable grant. It is not one which may not be altered, revoked, or repealed."); Utah Code Ann. § 20A-7-212(3)(6) ("The **Legislature may amend any initiative** approved by the people at any legislative session.") (emphasis added).

3. The Initiative does not Clearly and Obviously Violate Article VI of the Utah Constitution

Article VI of the Utah Constitution vests the "Legislative Power of the State" in the Utah Legislature and, through initiates and referenda, in the people of Utah. In the Second Amended Complaint, Plaintiffs allege, in conclusory terms, that the Initiative is patently unconstitutional because it "invades the Executive Branch of the State of Utah" in violation of Article VI of the Utah Constitution. (Doc. 17, ¶ 106). The Court should reject this conclusory allegation of law.

Even if the Court is willing to consider the less conclusory arguments in Plaintiffs' motion for an emergency injunction, Plaintiffs' claim under Article VI fails. In that motion, Plaintiffs argue that section 58-37-3.8 of the Initiative is not a valid exercise of this legislative power because it "purports to direct the way in which the police powers of the law enforcement officers may execute their duties with respect to the State's marijuana laws." (Doc. 14-3, at p. 31). Plaintiffs are mistaken.

Section 58-37-3.8 (1) prohibits a state law enforcement officer from effecting an arrest or seizure of cannabis as a violation of federal law if the officer believes the activity complies with state law, and Section prohibits state agencies from taking adverse action against persons providing services to a cannabis dispensary or production establishment solely on the basis of a violation of federal law if the person has not violated state marijuana law. These provisions are

valid exercises of legislative power because they (1) reflect "general policy concerns rather than individual circumstances" and (2) govern all future cases and not just specified individuals. *Carter v. Lehi City*, 2012 UT 2 at ¶ 52. At the very least, it is not clear and obvious that these provisions are not legislative in nature.

4. The Initiative does not Clearly and Obviously Violate Article I, § 11 of the Utah Constitution

Plaintiffs claim that section 26-60b-108 of the Initiative patently violates the Open Courts provision of the Utah Constitution. (Doc. 17, ¶ 106). Section 26-60b-108 provides that a physician who recommends treatment with cannabis or a cannabis product may not be subject to liability under Utah law based on that recommendation. (Doc. 2-3, Ex. A, p. 13). The Initiative does not clearly and obviously violate the Open Courts provision because it is unclear whether section 26-60b-108 provides a narrow or broad exemption to liability. For example, it is unclear whether a physician is exempt from liability merely because she recommended cannabis (narrow exemption) or whether she is also exempt from liability even if she recommended or prescribed cannabis in an amount or for a duration that is inappropriate for a particular patient (broad exemption).

If section 26-60b-108 is susceptible to the narrow construction, as it appears to be, the situation with respect to liability would be like that of other medications, and the Initiative would not violate the Open Courts clause. In the absence of a judicial interpretation rejecting the narrow construction, section 26-60b-108 does not patently violate the Open Courts clause.

Further, as Plaintiffs acknowledge, under the Utah Supreme Court's holding in *Berry ex rel. Berry v. Beech Aircraft Corp*,[16] the Open Courts provision permits an abrogation of a remedy

[16] 717 P.2d 670, 680 (Utah 1985)

or cause of action if "there is a clear social or economic evil to be eliminated" and the abrogation is "not an arbitrary or unreasonable means for achieving the objective." (Doc. 14-3, at p. 29). There is currently a public debate over the costs and benefits of medical marijuana, with people of good faith on each side.[17] The questions raised by *Berry*'s balancing test have not been clearly and obviously resolved in favor of either side of the debate.

D. The Initiative Could Become Law if Passed

In the Third Claim for Relief, Plaintiffs allege the Lt. Governor should not have approved the Initiative for signature-gathering because it is preempted and, thus, violates the Supremacy Clause. *See* doc. 17 ¶ 112-113. Therefore, Plaintiffs contend the Initiative "could not become law if passed" under subsection 20A-7-202(5)(c) for essentially the same reasons that the Initiative is "patently unconstitutional" under subsection 20A-7-202(5)(a). Plaintiffs' claim fails.

By alleging that the Lt. Governor should have rejected the Initiative for the same reason under both the "patently unconstitutional" and the "could not become law if passed" conditions, Plaintiffs are suggesting these statutory phrases are either synonymous and redundant or that one of the phrases is broader than and "swallows" the other condition. Plaintiffs' suggestion is dubious. *Monarrez v. Utah Dep't of Transp.*, 336 P.3d 846 2016 UT 10, ¶ 11 (stating courts should avoid any interpretation which renders parts or words in a statute inoperative or superfluous in order to give effect to every word of a statute).

In fact, the phrase "could not become law if passed" does not mean the same thing as "patently unconstitutional." Instead, the phrases are mutually exclusive and serve different

[17]Evan Halper, *Trump says he's likely to supporting ending of blanket federal ban on marijuana* LA Times (June 08, 2018 2:10 PM), http://www.latimes.com/politics/la-na-pol-trump-marijuana-20180608-story.html.

purposes. This conclusion follows directly from precedent from the Utah Supreme Court. In *Salt Lake on Track v. Salt Lake City*, 939 P.2d 680, 682 (Utah 1997), the Utah Supreme Court noted the Utah legislature codified the decisions in *White v. Welling* and *Keigley v. Bench*, 89 P.2d 480, 481-82 (Utah 1939) by promulgating section 20A-7-202(5). In *White*, the Supreme Court distinguished a situation where an initiative was "unquestionably and palpably on its face" unconstitutional (i.e., patently unconstitutional) from the situation where the initiative did not have the "semblance of a law," e.g., "(a) **something merely calling for their opinion** or other belief; or (b) something which, if voted on favorably by the people, would **not have any of the characteristics or attributes of a law**." *White*, 57 P.3d at 705 (emphasis added). Elaborating on what it means for an initiative to have the semblance of law, the Utah Supreme Court stated:

> Under (a) above, there could not be submitted to the people the question as to whether they liked or disliked a certain poem, or whether or not they believed in prohibition. Under (b) above, there could not be submitted to the people something with a content which had none of the characteristics of a law; that is, something which did not lay down a regulation or a rule of conduct, or did not impose a duty or confer a right or prohibit some acts or conduct, or which did not affect, change, or create a status or relationship, or which did not repeal or amend an already existing law.

Id. at 705-06.[18]

An initiative that merely states an opinion and has none of the characteristics of a law "could not become law if passed," as set forth in Section § 20A-7-202(5)(c). Plaintiffs' claim that the Initiative is patently unconstitutional is incompatible with the position that the Initiative

[18] The *White* court also noted that an initiative might be "so unintelligible, incomprehensible, incoherent, or meaningless that it will not permit of a determination as to whether or not, if passed, it would be a law." *Id*. at 705. This situation was codified in subsection 20A-7-202(5)(b), which requires the Lt. Governor to reject an application if the "law proposed by the initiative is nonsensical." U.C.A. 1953 § 20A-7-202(5)(b).

could not become law if passed. To be patently unconstitutional, an initiative must, at a minimum, become a law if passed. Mere opinions or statements having none of the characteristics of a law cannot be patently unconstitutional. Because it is undisputed that the Initiative would establish regulations, impose duties, and confer rights if passed, it necessarily would become law if passed. Accordingly, the Court should dismiss Plaintiffs' Third Claim for Relief.

E. The Lt. Governor Otherwise Complied with Section 20A-7-202

Plaintiffs allege the "Lieutenant Governor Cox failed to comply with Utah law by [not] obtaining a competent legal opinion that the initiative was not 'patently unconstitutional' and that it 'could become law if passed.' Utah Code Ann. § 20A-7-202(5) (a), (c)." (Doc. 17, ¶ 78). But Utah Code § 20A-7-202 does not require Lt. Governor Cox, who happens to have a J.D. degree, to obtain a legal opinion on whether an initiative is patently unconstitutional or could become law if passed. In fact, Section 20A-7-202 does not specify any procedures or requirements the Lt. Governor must follow in making these determinations.

The common law likewise does not require the Lt. Governor to obtain a legal opinion. In *White v. Welling*, which was decided before the adoption of Section 20A-7-202, the Utah Supreme Court held that the Secretary of State — who, at the time, had a role analogous to that of Lt. Governor under Section § 20A-7-202(5) — could not "pass upon constitutionality of any proposed law" and refuse to proceed with an initiative on that basis. 57 P.2d 703, 705 (Utah 1936). If the Secretary of State nonetheless refused to proceed, the *court* would refuse to issue mandamus if "the proposed law showed unquestionably and palpably on its face that it was unconstitutional" on the "theory that it would not compel the secretary of state to do something

which would in the end be unavailing." *Id*. Thus, the common law did not require the executive officer in charge of administering initiative procedures to pass on the constitutionality of a proposed initiative. *A fortiori* the common law likewise did not require he or she obtain a legal opinion on whether an initiative was constitutional or not.

III. THE COURT SHOULD NOT INTERFERE WITH THE INITIATIVE PROCESS.

In general, courts have articulated a policy of deference toward direct legislation processes. For example, in an early case the United States Supreme Court declined to review a challenge asserting that an initiative is inconsistent with the federal constitutional guarantee of a republican form of government,[19] declaring the issue a nonjusticiable political question.[20] A well-known statement by the California Supreme Court further reflects judicial deference toward direct legislation:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard the right of the people,' the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.' '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'[21]

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[19] U.S. CONST. art. IV, § 4.
[20] *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150-51 (1912).
[21] *Ass'd Home Builders v. City of Livermore*, 557 P.2d 473, 477 (CA. 1976) (citations and footnotes omitted).

Applying these well-established principles to this case, the Court should not strike the Initiative from the ballot and instead should allow the people to vote on the Initiative.

CONCLUSION

The Court should not provide a pre-election review of the ballot initiative. Doing so would result in issuing an advisory opinion, violate ripeness and standing requirements, undermine the policy of avoiding unnecessary constitutional questions, and constitute unwarranted judicial interference with an important legislative process. Defendant respectfully requests that the Court dismiss Plaintiffs' Second Amended Complaint, without prejudice.

DATED: June 20, 2018.

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CERTIFICATE OF MAILING

I certify that on **June 20, 2018**, I electronically filed the foregoing, **DEFENDANT SPENCER J. COX'S MOTION TO DISMISS**, using the Court's electronic filing system and I also certify that a true and correct copy of the foregoing was sent by email to the following:

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