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IN THE 7TH JUDICIAL DISTRICT COURT OF GRAND COUNTY STATE OF UTAH

RUTH DILLON, MARCY CLOKEY-TILL, AND ELIZABETH TUBBS Plaintiffs-Petitioners v. GRAND COUNTY, Defendants-Respondents	**GRAND COUNTY RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND MEMORANDUM IN SUPPORT THEREOF** Judge Don Torgerson Case No. 200700047

Defendant Grand County (the "County"), by and through the County Attorney Christina R. Sloan, hereby files this Response to Plaintiffs-Petitioners' Petition for Extraordinary Relief pursuant to URCP 65B and Memorandum in Support thereof and states in support the following:

I. INTRODUCTION

The Plaintiffs-Petitioners ("Plaintiffs") frame this case around the question of whether or not recent amendments made by the legislative body to the Grand County Plan for Government, including two amendments which also must be approved by the voters on November 3, 2020 are legal under Chapter 52a, Title 17.[1] In reality, this case is about much more.

This is a case about the structure of our governmental institutions. This is a case about legislative function and exercise of public authority by legislative bodies. This is a case about separation of powers, not just between the executive and legislative branches under the form of

[1] All references to chapters in this Answer shall refer to the chapters in Title 17 (Counties), and all references to parts shall refer to parts of Chapter 52a (Changing Forms of County Government), unless otherwise noted.

government debate, but also between the legislature and judiciary. This is also a case about governmental efficiency with taxpayers' dollars. And, possibly most importantly, this is a case about choice – the people's right to choose their form of government.

Arguably as far back as 1877, when Grand County was permanently settled by Euro American pioneers, Grand County has been known for its engaged and resilient citizenry. Through the many decades since, Grand County citizens have educated themselves and actively participated in all aspects of local government. And, since 1992, Grand County citizens endorsed their current form of government three times at the ballot box.[2] Yet another form of government fight is underway – this time initiated by the Utah Legislature, not the Grand County citizens. In 2018, the Utah Legislature passed House Bill 224, which requires Grand County to update its form of government consistent with current statute by December 31, 2020. In the event Grand County fails to comply, H.B. 224 mandates that Grand County must convert to the default three person commission form of government described therein.

The Plaintiffs argue that H.B. 224 allows Grand County citizens only one option: approve the proposed Study Committee Optional Plan or die (the Moab community's perception of life under a three-person commission). The County argues that this result is unconstitutional, and H.B. 224 must be interpreted to allow the two distinct pathways to change a form of government set out in Parts 3 and 4 (adoption of alternate form) and Part 5 (plan amendment) to run

[2]In November 1993, the local republican party supported an attempt to recall all of the newly elected, non partisan council members (all but the one registered republican), which recall attempt failed by losing the popular vote. In 2004, ballot questions approved via a citizen-initiated process to reduce the council seats to 5 and eliminate council districts lost the popular vote 2,350 to 1,530 in the general election. In 2012, four registered republicans petitioned to initiate a study committee process to study the form of government and the Council adopted a ballot question asking voters whether a study committee should be formed to study the form of government, which study committee process was rejected by the voters 2,198 to 1,634 in the general election.

simultaneously.

Accordingly, on August 21, 2020, Grand County's legislative body, then named the Grand County Council, now the Grand County Commission (the "Commission"), amended its Plan for Government (the "1992 Plan") to remove non-partisan elections, term limits, and recall elections, as allowed under the terms of the 1992 Plan and Utah Statute by unanimous vote (the "FOG Amendment"). The Commission also approved additional amendments to the 1992 Plan, subject to voter's approval at the November 3, 2020 general election, to reduce the number of Commission seats from seven to five and eliminate Commission Districts. These additional amendments to are now known as Propositions 16 and 17 and will run alongside Proposition 10, a proposal to approve an alternate form of government, the Council-Manager form, as recommended by the Grand County Study Committee ("Study Committee Plan").

If the Study Committee Plan is approved by a majority of the registered voters voting on November 3, 2020, then its recommended change in form of government trumps all amendments to the existing plan, whether such amendments were adopted by the legislature or the people.

Regardless, Plaintiffs argue that court intervention is necessary "to clear up confusion prior to the election." Memorandum, p4. However, it does not make sense that perceived confusion over one of the community's most passionate subjects is driving this litigation. What makes sense is that Plaintiffs are scared their preferred alternate form of government – the council-manager form – will not win the day at the ballot box.

Of course, it is not the Courts' business to enable a particular choice in the form of government. And the Courts have long declined interference with local government legislative functions. Here, this Court's support of the County's recent legislative action means the voters will have the following meaningful choice at the general election: do the people favor the

County's long-standing expanded commission form of government, now compliant with statute, or the Study Committee's recommended alternate form, the council-manager form of government?

If the Court is persuaded by the Plaintiffs' argument and interpretation of H.B. 224 then this Court must also decide the constitutionality of various problematic provisions of H.B. 224, including Utah Statute § 17-52a-103(3).[3] However, the Court need not reach these constitutional questions if it upholds the County's legislative action and lets the voters decide.

II. FORM OF GOVERNMENT ("FOG") FACTUAL BACKGROUND Since always, Grand County's plan for government has adopted and operated as a commission form of government with executive and legislative power consolidated in the governing body. This did not change with the adoption of the 1992 Plan, as a careful reading of the 1992 Plan and the 1992 version of Chapters 4 (County Corporate Powers), 5 (County Commissioners) and 35a (Optional Plans for County Government) show. *See also* ***Exhibit A*** (1992 Plan) and ***Exhibit B*** (Chapter 35a (1992)).

The big changes in Grand County's form of government in 1992 related not to the distribution of powers or the "management structure," which remained a commission form by its express terms,

but to: 1) renaming the governing body, from commission to council (to reflect its structural arrangement); 2) increasing the number of Council seats, from three to seven; 3) creating election districts; and 4) introducing non-partisan elections, term limits, and recall elections.[4]

Note that the County's consolidation of powers, number of seats, and districts are not unusual provisions in county plans of government throughout the state of Utah. In fact, the

[3] All statutory references in this Answer shall be to Utah Statute unless otherwise noted. [4] Recall election are still permitted by statute for narrow reasons, such as criminal conviction. The Utah Legislature prohibited political recall in 2000 but protected Grand County's provision until 2018.

commission form of government is and has always been the express default form of government under Title 17 since at least 1953. However, as of 2018, the non-partisan elections, terms limits, and recalls elections were found only in one other county plan for government – in Morgan County.

Utah's Form of Government statute has evolved through the years, especially for rural Utah (fifth and sixth class counties). Historically, since at least 1953, Title 17's default "structural and management arrangement" for county government was a three-person commission form of government with consolidated legislative and executive power. *See* ***Exhibit C*** (Chapters 4 and 5 (1992) (powers of the county can be exercised only by the board of county commissioners; each county shall have a board of county commissioners consisting of three members) and ***Exhibit D*** (§ 20A-1-102(17)(a) (1993) (county executive means the county commission in the traditional management arrangement)).[5]

Chapters 4 and 5 (1992) do not discuss legislative versus executive power of the commission. Instead, the commission's power is total: "the counties have all the powers specified in this title and such other powers as are necessarily implied," § 17-4-1 (1992), and those powers "can be exercised only by the board of county commissioners or by agents and officials acting under authority of the board or authority of law." § 17-4-2 (1992). While executive power is not specified by name in the historical versions of Chapter 5, it is described by function:

> 17-5-19 Powers of commissioners – Supervision of other officers.
> They may supervise the official conduct of all county officers and officers of all precincts, districts, and other subdivisions of the county (except municipal corporations); see that they faithfully perform their duties, direct prosecutions for delinquencies, and

> when necessary required them to renew their official bonds, make reports and present their books and accounts for inspection.

[5] Exhibits C and D note historical passage of each section of these chapters, most of which date back to 1953, including relevant §§ 17-4-1, 17-4-2, 17-5-1, and 17-5-19.

§ 17-5-19 (1992), *noting* 1953 passage.

As of 1973, to allow counties to "modernize" their form of government to "conform more closely to the needs and desires of their citizens," the Utah Legislature allowed counties to pick between the traditional commission form of government, one of four "optional forms of structural arrangement," and one of four "optional forms of management arrangement" – or a combination of any of them. *See e.g.* Chapter 35a (1992), §§ 17-35a-1 (legislative intent) (1992), 17-35a-7(1) (optional plan – provisions to be included) (1992).[6]

In 1998, the Utah Legislature amended Chapter 35a to eliminate all historical references to "management arrangements" and require counties to pick one of five forms of government while still permitting counties to choose one of four additional structural forms of government if they desired. *See* § 17-35a-402 (1998). In 2000, the Utah Legislature replaced Chapter 35a with 52 (Forms of County Government) and increased the permitted forms of government to six, including the newly defined expanded commission form, while preserving the allowance for counties to choose one of four structural forms of government if they desired. *See* § 17-52-402 (2000).

In 2018, the Utah Legislature replaced Chapter 52 with 52a (Changing Forms of County Government), decreased the permitted forms of government to four, prohibited dueling study committee processes,[7]and eliminated reference to the structural forms of government (but which are still codified in Chapter 35b). *See* § 17-52a-405 (2018). And in 2020, the Utah Legislature amended Chapter 52a further to reduce the permissible forms of government for rural Utah

counties to two: commission form and expanded commission form. *See* § 17-52a-405 (2020).

Thus, the historical "management arrangements" have evolved into the current

[6] Exhibit B notes historical passage of each of these section as 1973 and 1990, respectively. [7] As set forth in § 17-52a-302, the legislative history of which is discussed in Section III below.

permissible forms of government – and the structural forms of government evolved into permissive extras before being eliminated altogether.

The 1992 Plan expressly adopts both the traditional commission "management arrangement" and the optional county (modified) structural form of government in § 2.04.010:

> Pursuant to Article XI, Section 4, Utah Constitution and Chapter 35a of Title 17, Utah Statutes (the "Optional Plan Statute"), this plan (the "plan") establishes the "general county (modified) *structural form of government* as provided in Section 17-35a-9, Utah Statutes, within Grand County, Utah (the "county"). The governing body of the county shall be the county council (the "council") as provided in Article II of this plan. *The **management arrangement** for the county shall remain as provided by Title 17, Utah Statutes, or other general laws applicable to county government*.

1992 Plan, § 2.04.010 (emphasis added). And, critically, in § 2.04.030, the 1992 Plan integrates Chapters 4 and 5 (1992) by providing that "the governing body of Grand County shall have all powers and duties provided by general law for board of county commissioners." As discussed above and as shown in Exhibits C and D, the powers of county commissions in 1992 was total and encompasses what is now known as both legislative and executive powers.

In addition to Chapters 4 and 5 (1992), the language and terms used in the 1992 Plan are derived directly from § 17-35a-7(1) (1992) which states:

> (1) An optional plan may include, and shall be in conformity with:
> (a) One of the optional forms of structural arrangements provided in Section 17-35a 8,[8] joined with one of the optional forms of management arrangements provided in Section 17-35a-12;[9]
> (b) The structural arrangements for county government that are provided by Title 17, or other general laws applicable to county government, joined with one of the optional forms of management arrangements provided in Section 17-35a-12;
> (c) *One of the optional forms of structural arrangements provided in Section 17-35a*

8, joined with the management arrangement for county government provided by Title 17, or other general laws applicable to county government; or

(d) Both the structural and management arrangements for county government provided by Title 17, or other general laws applicable to county government,

[8] § 17-35a-8 (1992) structural forms are: general county (modified) form; the urban county form; the community council form; and the consolidated city and county form.
[9] § 17-35a-12 (1992) management forms are: the county executive and chief administrator officer-council form; the county executive-council form; the council-manager form; and the council-county administrator officer form.

without the inclusion of any optional form specified in Section 17-35a-8 or 17- 35a-12.

(emphasis added); *see also* § 20A-1-102(17)(a) (1993) ("county executive" means the "county commission in the traditional management arrangement")[10]. Thus, when reading the 1992 Plan together with Chapter 35a (1992), it is plain that the 1992 Plan adopted the proposal set forth in § 17-35a-7(1)(c) – an optional structural form with the default management arrangement, aka the commission form of government. *See also* §§ 17-35a-8 (listing the optional structural arrangement forms); -9 (defining the general county (modified) structural form); -12 (listing the optional management arrangement forms).

The definition for the general county (modified) structural form of government has not changed since the 1992 Plan was adopted: it vests legislative power in the governing body, vests the county with all other general powers and duties vested in counties under law, establishes a governing body of not less than 3 members, and permits elections of those members at large or from districts. *See* Utah Statute § 17-35b-301 (2020); *cf*. Utah Statute § 17-35a-9 (1992). Note that the definition of this structural form of government does not address executive power – nor did the Utah Legislature intend for it to do so.

Instead, historically, the management arrangement was the tool to address executive power. And the 1992 Plan expressly adopts the default management arrangement, which is and has

always been the commission form of government with vests executive power in the governing body. The authors of the 1992 Plan did not select one of the management arrangements which would have placed executive authority in an appointed manager bound by qualifications, time and manner of employment, term of office, compensation, and removal provisions expressly set forth in the optional plan. *See* §§ 17-35a-15, -15.5 (1992). Instead, the

[10] House Bill 63 (1993) amended the 1953 version of the Election Code to add the definition of "county executive" to the Election Code for the first time.

authors of the 1992 Plan (and therefore the voters) chose the default management arrangement, the commission form of government, and a governing body vested with executive power. Chapter 52a sets forth two procedurally distinct pathways for updating a form of government: 1) adoption of an alternate form via a Study Committee process (Parts 3 and 4) or 2) amendments to an existing optional plan for government (Part 5). In 2018, Grand County initiated the Study Committee process to study a change to an alternate form of government, which concluded in January 2020 with the recommended Study Committee Plan.[11] And on August 21, 2020, the Grand County Council unanimously voted to amend the 1992 Plan under the amendment process set forth in § 17-52a-504 (the "FOG Amendment"), thereby bringing Grand County's form of government into conformance with Chapter 52a. Specifically, the FOG Amendment eliminated the provisions for non-partisan elections, term limits, and recall elections now prohibited by Utah Statute § 17-52a-405. It also updated the name of the governing body from a council to a commission to be consistent with its management structure and modern usage of those terms in Utah Statutes.

The FOG Amendment did not amend the size (seats) or makeup (districts) of the governing body, the distribution of legislative and executive powers, or the part-time versus full time

status of the governing body. Thus, under statute, the FOG Amendment could be approved by a super majority of the legislative body. In fact, the FOG Amendment garnered bipartisan support and was approved unanimously by the Grand County Council. By its terms, the FOG Amendment was effective immediately.

In the same public meeting, the newly renamed Commission approved two additional

[11] The Study Committee process was initiated under the prior County Attorney who did not have civil expertise and did not study whether the 1992 Plan was compliant with the Chapter 52a permissible forms of government. Regardless, whether or not the process was necessary is irrelevant – the Study Committee process is complete, constitutes an important study of the effectiveness of the current county government, and has provided a recommended an alternate form of government for the citizens' consideration on November 3, 2020.

amendments to the FOG Amendment, subject to voter approval at the next general election, to reduce the number of Commission seats from seven to five (Proposition 16) and eliminate Commission Districts (Proposition 17).

Accordingly, Grand County voters will decide three ballot questions on November 3, 2020, as follows:

> **Proposition 10**: shall the voters adopt the alternate form of government known as the Council-Manager Form pursuant to the Optional Plan for Grand County Government that the Study Committee has recommended?
>
> **Proposition 16**: shall the Grand County Plan for Government be amended to change the composition of the Commission from seven members to five?
>
> **Proposition 17**: shall the Grand County Plan for Government be amended to remove district seats and elect all members at-large?

To repeat, if the Study Committee Plan is approved by a majority of the registered voters voting on November 3, 2020, then its recommended change in form of government trumps all amendments to the existing plan, whether such amendments were adopted by the legislature or the people.

III. ARGUMENT

a. THE COUNTY MAY NOT RUN TWO STUDY COMMITTEE PROCESSES AT THE SAME TIME, BUT IT MAY RUN PLAN AMENDMENTS TO AN EXISTING PLAN OF GOVERNMENT ON THE SAME BALLOT AS THE STUDY COMMITTEE'S OPTIONAL PLAN

The Parties agree that the County cannot run an alternative optional plan to *adopt a new form of government* on the same ballot with the Study Committee Plan – and the County has not attempted to do so. Instead, the County has approved ballot questions to amend the current plan of government, which questions will run alongside Proposition 10 (approval of the Study Committee Plan). This is not prohibited by Chapter 52a as such a prohibition would be unconstitutional, as further discussed in Section III(d) below.

In their Petition, Plaintiffs confuse the process to adopt a new form of government with the process to amend an existing plan of government, which procedures are set forth in different parts of Chapter 52a. Parts 3 and 4 establish the procedure for adopting an "an optional plan proposing an alternate form of government," including the study committee process. *See e.g.* Utah Code § 17-52a-301(1); 402-406 (study committees are triggered where there is a proposed change in the form of government).

Part 5, by contrast, addresses implementation and amendment of existing plans, once adopted. Specifically, Utah Code § 17-52a-504 allows general amendments to a plan for government by an affirmative vote of 2/3rds of the legislative body. If the amendment changes the size and makeup of the legislative body, redistributes executive and legislative powers between branches of government, or changes the status of the executive or legislative branches as full- or part-time, then the amendment must be approved by the legislative body and submitted to the voters at an election. *Id*.

Competing study committee processes are expressly prohibited in Part 3:

> [*I*]*f the process to adopt an optional plan is initiated* under Laws of Utah 1973, Chapter 26, Section 3, 4, or 5, or Section 17-52a-302 or 17-52a-303, or under a provision described in Subsection 17-52a-104(1)(b) or (2)(b), *the county legislative body may not initiate the process again under Section 17-52a-302*, and registered voters may not initiate the process again under Section 17-52a-303, until (i) the first initiated process concludes with an election under Section 17-52a-501.

Utah Statute § 17-52a-301(3)(a) (emphasis added). As highlighted, simply, Section 301 prohibits the County from initiating a second process to adopt an alternate optional plan via Study Committee under Section 302.[12] This public policy makes sense – there is significant investment of public and county resources involved in the study committee process which involves

[12] "Alternate" is not defined in Chapter 52a but commonly means "constituting an alternative," Merriam-Webster Dictionary. "Alternative" is commonly defined as "offering or expressing a choice," or "different from the usual or conventional," Merriam-Webster Dictionary.

membership appointment, volunteered service, open houses, public meetings, formal written recommendations and reports, and county attorney review under the Utah Constitution and statutes. *See* Parts 3 and 4, Chapter 52a (2020).

In addition, the legislative history of H.B. 224 supports the County's reading of Parts 3 and 4 of Chapter 52a. For example, in the Hearing before the House Political Subdivision Committee on February 1, 2018, Representative Froerer, the Chief Sponsor of H.B. 224, stated as follows:

> The exact reason for [H.B. 224], as Mr. Curtis said, is that there is some grey area about whether it's (sic) allowed to have two study committees, which would be in conflict. This clears up any possibility of two study committees going forward. I've had direct experience with this in a petition that is now being circulated in Weber County.

Id. (2018 Gen. Leg. Sess), https://le.utah.gov/av/committeeArchive.jsp?mtgID=15491. By contrast, Chapter 52a does not prohibit a legislative body from amending its plan of government under Part 5 while a Study Committee studies an alternate form of government. Chapter 52a also

does not prohibit a legislative body from approving ballot questions regarding amendments to its existing plan to run on the same ballot as an optional plan for an alternate form proposed by a Study Committee. Simply, Chapter 52a does not prohibit Propositions 10, 16 and 17 from running alongside each other on the same ballot.

Similarly, Chapter 52a does not limit the method the County may use to come into compliance with Section 103. Specifically, Section 103(1) stipulates the four permissible forms of government; Section 103(2) establishes a default form of government; Section 103(3)(a) mandates that a Study Committee process be initiated in all counties not in compliance with Section 103(1) on or before July 2018; and Section 103(3)(b) mandates a conversion to the forced default for any county operating under a form of government not listed in 103(1) before

December 31, 2020. *See* ***Exhibit E*** (§ 17-52a-103 (2018)).[13]

And importantly, under Chapter 52a, all other counties in Utah which opt to study their form of government get to choose between the existing form of government chosen by the people and a proposed change in form of government chosen by the Study Committee. The Plaintiffs' interpretation means that the State Legislature is treating Grand and Morgan Counties differently than all other counties in Utah by forcing these two counties to a three-person commission if voters did not approve the Study Commission's recommendation. Yet, if the Court accepts the Plaintiffs' interpretation of H.B. 224, then constitutional issues arise, as discussed more fully in Section III(d) below. Certainly, one of the goals of the County's legislative action is to avoid this constitutional battle, which is unnecessary under the County's interpretation of the statute.

In summary and as further shown in Section III(b) below, the FOG Amendment did not substantive changes to the distribution of executive and legislative power as alleged by the

Plaintiffs because the Council was operating under the traditional commission management arrangement form – as the County has since always. And Chapter 52a does not prohibit plan amendments that require voter approval from running alongside a study committee's recommended plan nor constrain the timing of plan amendments and the accompanying ballot questions.

b. THE FOG AMENDMENT IS NOT A CHANGE IN FORM OF GOVERNMENT BECAUSE THE COUNTY HAS OPERATED AS A COMMISSION FORM OF GOVERNMENT WITH EXECUTIVE AND LEGISLATIVE POWER CONSOLIDATED IN ITS GOVERNING BODY, IN FORM AND PRACTICE, SINCE ALWAYS

[13] Section 103 was amended again in 2020 via H.B. 61 (2020) to limit the permissible forms of government for Class 5 and 6 Counties (including Grand County) to the commission forms of government. Thus, the County attaches the 2018 version hereto for the Court's convenience.

Plaintiffs argue that the FOG Amendment "constitutes a major re-distribution of legislative and executive authority." Memorandum, p12. The County concedes that if the Court finds the FOG Amendment is a major re-distribution of such powers, then the FOG Amendment requires voter approval under § 17-52a-504. However, the FOG Amendment does not redistribute power, and Plaintiff's argument is based on a misunderstanding of the County's form and function as well as a misreading of the 1992 Plan and Utah law.

Firstly, pursuant to the plain language of the 1992 Plan cited in Section II above, the Plaintiffs have it entirely wrong. While the County concedes Chapter 52a is hard to read, the Plaintiffs' analysis is unsophisticated, fails to read the 1992 Plan together with the governing statutes at that time, and does not appreciate the precise language and terms utilized in the 1992 Plan. The County urges the Court to end its analysis there. However, if the court deems it necessary to further analyze the language of the 1992 Plan under Chapter 35a (1992), Grand

County's historical exercise of executive power, or the legislative history of H.B. 224, the result is the same.

i. Statutory Construction Analysis:

When applying basic statutory construction principles to the 1992 Plan and Chapters 4, 5, and 35a (1992), we must presume the precise language used is purposeful and read each term according to its ordinary and accepted meaning. *See Boyle v. Christensen,* 251 P.3d 810 (UT 2011). Said another way: wherever possible, we must give effect to every word, avoiding any interpretation which renders parts or words in a provision inoperative or superfluous. *See Turner v. Staker & Parson Cos.,* 284 P.3d 600 (UT 2012). Finally, omissions are as equally important as express language. *See Marion Energy Inc. v. KFJ Ranch Partnership*, 267 P.3d 863, 868 (UT 2011) (we must presume omissions purposeful).

In addition to the express adoption of the commission management arrangement form and integration of the commission powers as set forth in Chapters 4 and 5 (1992), as discussed in Section II above, the language of the 1992 Plan is also entirely consistent with the consolidation of executive and legislative powers in the Council. For example, in addition to §§ 2.04.010, -030 cited in Section II above, § 2.04.090 (Role of the Council) states in relevant part:

> Consistent with this plan's provisions increasing the size and reducing the compensation of the council, it is the intent of this plan to establish the council as a citizen body whose members serve on a part-time basis *primarily* in a legislative, policy-making role, and membership on the council is not intended to be a full-time positions (sic) involving extensive day-to-day administrative oversight of *county operations and functions*. Accordingly, it is expected that the council will implement this plan by utilizing its power under Title 17, Utah Statutes, and other applicable general laws, to maintain and fully utilize an adequate, competent professional county staff to *perform, administer and have day-to-day oversight over the county's operations and functions, pursuant to policies and directives promulgated by the council.* (emphasis added).

The language used in this section is notable. The only "shalls" used in the 1992 Plan refer to the governing body's power. With regard to delegation of "day-to-day oversight," the language is permissive and merely sets "expectations." In addition, "competent staff" are not assigned or delegated power, merely "operations and functions."

Of course, power and duty are distinct. Duty is commonly defined as "assigned tasks or services" or "obligatory tasks, conduct, service, or functions that arise from one's position." Merriam-Webster Dictionary. Executive power is broader and refers to governance of a state. By Plaintiffs' own definition:

> . . . executive branch powers relate[] to managing and directing the activities of the executive branch; supervising the functions of county departments and divisions; carrying out the programs, ordinances and policies enacted by council; and controlling accounting and fund control, as directed by county ordinance.

See Memorandum, p9-10.

It is crucial that these sections of the 1992 Plan vest all such "powers" in the governing

body while delegating only "operations and functions" to "county staff." More specifically, after vesting the public body with legislative power, § 2.04.030 also vests all "power and duties . . . provided by general law for board of county commissioners" in the Council. This includes and specifically means executive power, as the commission form of government, since at least 1953 and today, consolidates executive and legislative powers in the governing body. In addition, the 1992 Plan reserves to the governing body the right to require County staff to adhere to the "policies and directives promulgated" by the governing body regarding County operations and functions.

The Plaintiffs place a lot of weight on the fact that the 1992 Plan names the governing

body a "council" because modern councils are vested with legislative but not executive power. *See e.g.* Utah Statute §§ 17-52a-103, 405 (2020). However, this distinction is not historical. For example, as shown herein, from 1973 to 2000, the general county (modified) form permitted a "council" form that may also have executive authority depending on which management arrangement was chosen in the plan for government.

In fact, a county without a chief executive cannot lawfully function. And the 1992 Plan fails to require or name any chief executive by position or detail the time and manner of appointment or qualifications to serve. *Cf.* §§ 17-35a-15 (1992) (optional plan for county manager form of management arrangement shall provide for the qualifications, time and manner of appointment, term of office, compensation, and removal of the county manager); -15.5 (citing identical requirements for the county administrative officer under a council-county administrative officer form of county government, which position must be established by ordinance). These are critical provisions since executive power is vested in the counties under Utah law, and it cannot be delegated away by implication or ambiguity. *See* Utah Statute §§ 17-

50-301 (exercise of county powers); 17-50-302 (general county powers); 17-53-301 (general powers, duties and functions of county executive); 17-53-302 (county executive duties). It is also important that the 1992 Plan meets, without deviation, the definition of an expanded commission form as defined in current statute. Utah Code § 17-52a-202 succinctly defines an expanded commission form of county government as a governing body with legislative and executive power composed of five to seven members elected to staggering 4-year terms, all of whom shall be elected at large unless the optional plan specifies otherwise. *See Id.* at 202(2)-(4). Note that the definition describes functional characteristics of the governing body. Section 202 does not

require the expanded commission form be identified in the plan for government, nor does Chapter 52a in any other section. Thus, Grand County's form of government conforms to this definition of an expanded commission in all ways, either under the 1992 Plan or the FOG Amendment.

In summary, the 1992 Plan does not create or even imply the creation of a chief executive or executive branch. It does not vest the "competent county staff" with any powers, specific or general. It does not provide for the qualifications, time and manner of appointment, term of office, compensation, or removal of an executive. It does not use mandatory language such as "shall" and "must" to compel the Council to hire an executive. And it does not adopt one of the optional management arrangements available under Chapter 35a (1992). The 1992 Plan instead integrates expressly the powers of the traditional commission management arrangement form and merely encourages the governing body to employ competent staff to help it run the day-to day operations, as is the right of any commission form of government across the state of Utah.

ii. Grand County's Historical Exercise of Executive Power:

We also cannot ignore Grand County's practice for the last nearly 30 years. It is fact that

the Council has made every substantive executive decision for the County since 1992 in open meetings. It is fact that the Council has exercised supervisory control over all executive functions; directed and organized the management of the county; exercised administrative and auditing control over all funds and assets; supervised budgeting, purchasing and other service functions of the county; conducted planning studies and made all decisions related to financial, administrative, procedural, and operational plans, programs and improvements in county government; reviewed, approved, and executed contracts for the county; and signed all deeds

that convey county property since always. *See* Utah Statute § 17-53-302 (county executive duties).

One such example is Ordinance No. 521 (2013), as amended by Ordinance No. 597 (2019), which establishes the County's special events permitting process, a purely executive function and one that is very important to this tourism community. In the Ordinance, the County Council did not delegate any duties or involvement in the process to the Council Administrator. Instead the Council appoints a special events committee and reserves oversight of that committee as well as certain applications for review by the Council. *See* ***Exhibit F*** (Special Events Ordinances).

The title and job description of the Grand County Council Administrator is also dispositive. The Council has never created a *County* Administrator position or office to function as the County's chief executive. Instead, the County *Council* Administrator supports the Council specifically. As stated in the job description for the Council Administrator, the Council Administrator "serves as . . . the chief administrator of the Council" and "performs administrative duties related to management responsibilities of the County Council." *See* ***Exhibit G*** (Council Administrator Job Description). Similarly, Section E.1 of the Council

Policies and Procedures specifies that the Council Administrator serves the Council under the day-to-day supervision of the Chair, as needed. It also specifies, at Section E.7, that the Council Administrator shall sign agreements, permits and contracts on behalf of the County Council when so delegated by resolution approved by the Council. While the Council policy has undergone various updates through the years, these provisions in Section E have not changed. *See* ***Exhibit H*** (Section E, Council Policy). Accordingly, the Council Administrator is not

empowered by the 1992 Plan or the County's governing body to act as the County's executive (except as noted below, as of March 17, 2020, under Executive Order).

In addition, the Council or the Chair of the Council has declared it or themselves the Chief Executive Officer of the County at least eighteen (18) times from 1993 to 2020 by issuing Executive Orders. Just this year, on March 17, 2020, acting in her capacity as the Chief Executive Officer, due to the emergency nature of the COVID-19 pandemic, the Chair of the Council formally delegated duties of Chief Executive Officer to the Grand County Council Administrator in an executive order. *See* ***Exhibit I*** (Executive Orders). This delegation would not have been necessary if the Administrator was previously empowered, in practice or form, with executive power. Not one of these executive orders, and their corresponding executive power declarations, was challenged by the Grand County Council Administrator or the public in the last nearly 30 years.

And similarly, in 2012, the County Council which approved a ballot question asking voters whether a study committee should be formed to study the form of government, the County Council acknowledges that the 1992 Plan "calls for the County Council to hold both legislative and executive responsibility." *See* ***Exhibit J*** (Resolution No. 2982-2012). That declaration of power was not challenged, and the Grand County electorate failed to approve the study of the

form of government at the 2012 general election.

These are just a few examples. The County could pull, literally, thousands of contracts, agreements, permits, ordinances and resolutions that show, in form and practice, Grand County has operated under a commission form of government with its governing body exercising both legislative and executive power, since always.

iii. Legislative History:

If the Court deems H.B. 224 ambiguous, then it is proper and necessary for the Court to consider the legislative history and purpose of H.B. 224. *See In re Worthen*, 926 P.2d 853, 866 (UT 1996) (if statute ambiguous, the court should "seek guidance from the legislative history and relevant policy considerations"); *Beynon v. St. George-Dixie Lodge #1743*, 854 P.2d 513, 518 (UT 1993) (where doubt or uncertainty exists as to a statute's meaning, the court "should analyze the act in its entirety and harmonize its provisions in accordance with the legislative intent and purpose"); *Jensen v. Intermountain Health Care, Inc*., 679 P.2d 903, 906 (UT 1984) (separate parts of an act should not be construed in isolation from the rest).

Given the information above and when reading these sections together with the remaining Parts of Chapter 52a, it is reasonable (if not clear) that the Utah Legislature wanted Grand County to update its plan of government to eliminate non-partisan elections, term limits, and recall elections without regard for which form of government it operated under. This makes sense: the people have a constitutional right to choose their own form of government, but there is no constitutional protection for non-partisan elections or term limits. *See e.g.* UT Const., Art. I and XI. The Utah Legislature never analyzed the 1992 Plan for consistency with Chapter 52a, nor is it the business of our state legislature to interfere with county government as such a micro level. And, as stated above, the 1992 plan was unique in Utah for its non-partisan elections, term

limits, and political recalls, not its treatment of executive and legislative power. Further, in Committee debates in the 2018 General Session, Representative Froerer, Chief Sponsor of H.B. 224, assured the Utah Legislature that: "[H.B. 224] does not attempt to take any legislative (sic) of the counties away. This does not look to take any power away." Rep. Froerer, Hearing before

the House Political Subdivision Committee, February 1, 2018 (2018 Gen. Session). And when considering a 2nd Substitution a week later, Representative Froerer clearly stated "this bill has no recommendation on a form of government. It has nothing to do with that." *Id.* on February 7, 2018, https://le.utah.gov/av/committeeArchive.jsp?mtgID=15541. Similarly, Representative Webb, in response to a Tooele County resident's request that the State Legislature provide more feedback to counties on which forms of government the State Legislature recommends, states: "This is not about what is the best form of government. This is about what process is available to change the form of government." *Id*.

In the committee hearings, choice in form of government was discussed over and over again:

> [The study committee optional plan] goes to the ballot because that is basically what the study requires. But the voters have the option to approve it or not approve it. If they don't approve it, it remains the same. So they are not forced to make a change. They always have the option to vote yes or no.
>
> The voters should have the ultimate choice. They can vote up or down, and there has been some discussion as far as how that goes on the ballot. Whether you check a box for stay the same or you check a box for change. I think that can be resolved. But at the end of the day, the voters should make the decision. And that's what this legislation attempts to do.

Rep. Froerer, Hearing before the House Political Subdivision Committee, February 1, 2018 (2018 Gen. Session), https://le.utah.gov/av/committeeArchive.jsp?mtgID=15491. And, this preservation of choice was a crucial factor for at least some members of the Utah Legislature in supporting H.B. 224 as expressed by Representative Dunnigan: "I like the concept of you

allowing people to say we want to keep what we have." *Id*.

Considering this direct legislative history, the most reasonable interpretation is that the Utah Legislature intended to compel Grand and Morgan County to bring their plans into

conformance with Section 405, not to mandate a change in form of government or treat them differently, as to the form of government chosen, than other counties in Utah.

c. UTAH LAW AUTHORIZES THE COUNTY TO PLACE PROPOSITIONS 16 AND 17 ON THE NOVEMBER 3 GENERAL ELECTION BALLOT

As stated above, Utah Statute § 17-52a-504 permits the County to amend its plan for government subject to majority approval by registered voters "in a *general* or special election at which the amendment is proposed" (emphasis added) if the amendment changes the size or makeup of the legislative body, the distribution of powers between the executive and legislative branches of county government, or the status of the county executive or legislative body from full-time to part-time or vice versa.

Article IV, § 9(1) of the Utah Constitution establishes a general election on the Tuesday following the first Monday in each even-numbered year. Unlike special elections which are permissible under statute, general elections are automatic, established by said Article IV of the Utah Constitution. *Compare* Article IV.9(1) (Special elections may be held as provided by statute); Utah Statute § 20A-1-203(1) (special elections may be called for any lawful purpose); *Id*. at 203(5)(b) (the legislative body shall call the special election); *Id*. at 204 (sets forth procedures for establishing the date of the local special election).

It is also noteworthy that the Lt. Governor's office has accepted and numbered Propositions 16 and 17 and declined to opine on the legality of the same. And, finally, as argued in Section IV above, running Propositions 16 and 17 in a separate special election would cost the taxpayers significantly. Section 504 expressly permits Propositions 16 and 17 to be placed on the

November 3, 2020 general election ballot, and there is no reason to burden taxpayers for an additional election to avoid a perceived and unproven concern about voter confusion. For these

reasons, Propositions 16 and 17 (reducing the number of Commission seats and eliminating Commission districts) fit squarely within the constitutional and statutory framework for general elections, form of government choice, and plan for government amendments.

d. PETITIONERS' POSITION REQUIRES THE COURT ADDRESS H.B. 224'S CONSTITUTIONALITY, A RESULT WHICH SHOULD BE AVOIDED IF POSSIBLE

Courts should avoid the adjudication of constitutional questions wherever possible. This doctrine of constitutional avoidance is a fundamental principle of judicial restraint. And judicial restraint follows from other tenets, equally vital, of constitutional jurisprudence, including the separation of powers, deference to legislative priority in matters of political process, and the gravity and delicacy of judicial review respecting the basic charter for state government. *See e.g., State v. Wood,* 648 P.2d 71, 82 (Utah 1982); *see also, State v. Rowan*, 416 P.3d 566, 572-573 (Utah 2017) (Himonas, J., concurring to "decide this case on settled principles and to avoid unnecessarily roiling constitutional waters"); *see generally,* Thomas Healy, "The Rise in Unnecessary Constitutional Rulings," 83 N. C. L. REV. 848, 848-849 (2005).

H.B. 224 is rife with constitutional question marks, some of which, if addressed, will force this Court to swim in uncharted waters, a prospect which underscores the need to proceed cautiously – with the canon of constitutional avoidance always carefully in view. In addition to the equal protection argument made briefly above, the following sections provide additional examples of H.B. 224's potential for constitutional entanglements under the Utah Constitution:

i. <u>H.B. 224 Violates the Rights of Self-Determination for Grand County Residents Under Articles I and XI of the Utah Constitution</u>

The Utah Constitution, in Article I, § 2 (all political power inherent in the people),

provides that "All political power is inherent in the people; and all free governments are founded

on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." And Article XI, § 4 (optional forms of county government) provides that "The Legislature shall by statute provide for optional forms of county government. The selection of an optional form shall be subject to voter approval as provided by statute."

The general structure of Article XI, § 4 is clear enough: the state legislature provides choices in relation to a form of government, and the people of the county choose from among those options. Any "selection of an optional form," however that selection may be determined, *must meet* with "voter approval." To repeat, voter approval is a *mandatory feature* of this constitutional language. Article I, § 26 (provisions mandatory) requires this result,[14] as does Article XI, § 4's usage of the word "shall."[15] Article I, § 2 moreover, underscores these imperatives through its reminder that all political power is inherent in the citizens of Grand County who have the ultimate prerogative "to alter or reform their government as the public welfare may require." And Article I, § 2 in turn, hearkens back to the "self-evident truth" expressed in our Declaration of Independence, that governments are legitimated through the "consent of the governed," a fundamental principle to which Article I, § 27 (fundamental rights)

[14] Art. I, §26, sets forth a basic rule of constitutional construction: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

[15] Even in contexts where Art. I, §26, may not apply, the Utah Supreme Court interprets the word "shall" to mean "mandatory" rather than "directory." *See State v. Wanosik,* 79 P.3d 937, 943-944 (Utah 2003) (reading Rule 22, Utah Rules of Criminal Procedure, to forbid practice of *in absentia* sentencing; the phrase, "shall afford," in Rule 22 means that the accused and counsel must be given an opportunity to appear and speak in self-defense prior to sentencing); *Ostler v. Buhler,* 989 P.2d 1073, 1076 (Utah 1999) (the word, "shall," as used in Rule 24, Utah Rules of Civil Procedure, is "mandatory[ ]"), *citing Landes v. Capital City Bank,* 795 P.2d 1127, 1131 (Utah 1990) ("shall," as used in joinder rules, is mandatory) and *Board of Educ. of Granite Sch. Dist. v. Salt Lake County,* 659 P.2d 1030, 1035 (Utah 1983) (when "shall" is used, it is presumed to require a person "to comply strictly with the terms of the statutes" at issue).

demands "[f]requent recurrence," because it is "essential to the security of individual rights and the perpetuity of free government."

H.B. 224 runs roughshod over these constitutional requirements. Passed in 2018, it gave Grand County only two general election cycles to change its form of government. If the County fails to comply with the statute by 2020, a commission form is mandated – without voter approval. This is far from the letter of Article XI, §4 and even further removed from the spirit of Article I, §2. In addition, the Plaintiffs interpretation - that H.B. 224 further eliminates the Part 5 amendment process as a way to change its form of government - tramples these protections in the Utah Constitution.

While there is no case law which directly interprets the "voter approval" language of Article XI, § 4, *Larkin* addresses general concerns about changes in forms of government and the political prerogatives of a local electorate. In that opinion, the Utah Supreme Court was faced with the proper construction of a state statute which provided a process for changing a municipal form of government. After determining that the legislative language, as well as the statute's antecedents, were difficult to decipher, the Court reverted to fundamental principles of governmental structure – with special emphasis on Article I, § 2, and the inherent power of local citizens to decide for themselves what kind of government they should have. *Larkin*, 89 P.3d at 169-170.

The default provision of H.B. 224, imposing a three-person commission form of local government, does not pass this test. Thus, to ensure the "consent of the governed" and "voter approval" within the meaning of Articles I and XI of the Utah Constitution, H.B. 224 must be interpretated to provide meaningful choice to Grand County voters, which choice the County has preserved by amending its current plan for government into compliance under Part 5 while

running an optional plan recommending an alternate form of government under Part 3 on the November 3, 2020 ballot.

ii. H.B. 224 Delegates Legislative Power to Private Parties, an Unconstitutional Act under Article V of the Utah Constitution

As stated above, the Utah Constitution requires the legislature to "provide" for optional forms of county government and makes the "selection" of one form over another subject to voter approval, but it does not say how that "selection" in the first instance should be determined. UT Const., Art. XI, § 4. Because the power to make alterations in a form of government is legislative in character, *see e.g., Larkin,* 89 P.3d at 169, prior versions of Article XI, § 4 made clear that the county itself, presumably through its legislative body, was to make this choice.[16] In our case, however, H.B. 224 delegates this task to a Study Commission which is comprised of unelected (and hence non-accountable) private persons.

To recap the study commitment appointment process under H.B. 224 in 2018: once Grand County initiated the process to study an alternate form of government, an "appointment council" was charged with selecting that Committee's membership. For a county-initiated process, as in this case, the appointment council consisted of five members, all of whom were required to be county residents. One was selected by a majority of state senators and representatives whose districts included a part of Grand County. Another was designated by the county legislative body. Three others were to be selected by unanimous consent of the first two, or, in the event unanimous consent could not be obtained respecting any three of the remaining positions, then by majority vote of the legislators described above. §§ 17-52a-102(2); 401

[16] The prior version of Art. XI, § 4 provided that, "The Legislature shall by general law prescribe optional forms of

county government and shall allow each county to select, subject to referendum in the manner provided by law, the prescribed optional form which best serves its needs, and by general laws shall provide for precinct and township organization."

(2018).[17]

The appointment council, in turn, selected all seven members of the Study Committee. There were two requirements for Committee membership: members had to be registered to vote in the county and they could not "hold any public office or employment other than membership on the appointment council." § 17-52a-401(3) (2018). In other words, appointment council members could appoint themselves to membership on the Study Committee – and did so in this case.

Even before we address the fundamental problem of unconstitutional delegation of public power to private persons, we should note that the composition and operations of the Study Committee are fraught with no fewer than five other constitutional defects. First, the Study Committee is created through the appointment council which, in turn, is composed largely by means of state legislators whose districts intersect with Grand County, none of whom live in the Grand County and none of whom, arguably, share the same politics as the majority of the Grand County electorate. Note that Article XI, § 4 contemplates the legislature's – not legislators' – involvement in the inherently legislative process of changing a form of government. *See e.g. Larkin,* 89 P.3d at 169. If the appointment of Study Committee members in fact is a legislative function, then that function should be performed by the legislature as a whole -- which can act, according to established constitutional protocols, only by majority vote. *See* Art. VI, §§1(1)(a) (power vested in the senate, house, and people) and 22 (reading of bills); *see also State ex rel. Judge v. Legislative Finance Com.,* 543 P.2d 1317, 1321 (Mont. 1975) (attempt to delegate power to approve budget amendments to finance committee held unconstitutional; "Clearly the

action of the Finance Committee does not constitute the action of the entire legislature[ ]"); *N. Y.*

[17] The Utah Legislature eliminated the appointment council process in 2020 under H.B. 61; thus, review of the 2018 version of statute is necessary.

Public Interest Research Group v. Carey, 383 N.Y.S.2d 197, 199 (N.Y.Sup.Ct. 1976)(construing appropriations measure in relation to legislative committee action; legislative functions belong exclusively to legislature and "cannot be delegated even to its own committees or committee chairmen . . . the intent of a few committee members should not be considered the act of the entire legislative branch of Government . . . "), *aff'd, N.Y. Pub. Interest Group v. Carey,* 390 N.Y.S.2d 237 (N.Y.Sup.Ct. 1976).

Second, on the other hand, if the power to appoint is seen as an executive function, then these legislators, although crossing the lines of Article V (Distribution of Powers) from another direction, nevertheless are transgressing fixed constitutional bounds. *See e.g., Rampton v. Barlow,* 464 P.2d 378 (Utah 1970) (statute authorizing President of Senate and Speaker of House to appoint members of State Board of Higher Education declared violative of Art. 5).

Third, if H.B. 224 is correct in denominating membership on the appointments board as a "public office and employment," there is a fair chance that any legislator who serves in that capacity has run afoul of Article VI, § 6 (who is ineligible as a legislator) which forbids such dual officeholding – a variation on the separation of powers theme – in the state of Utah. *See e.g. Romney v. Barlow,* 469 P.2d 497 (Utah 1970).

Fourth, when H.B. 224 authorizes the county attorney to block passage of an optional plan by rulings that the plan violates a statutory requirement or constitutional edict, it confers judicial power on an executive official and this well could qualify as a violation of the separation of powers. *See e.g. Vega v. Jordan Valley Medical Center, L.P.,* 449 P.3d 31, 36 (core judicial

function of entering final judgment not delegable, but fact-finding, scheduling proceedings, recommending solutions are tasks which can be delegated to agencies in other departments of state government), *citing State v. Thomas,* 961 P.2d 299, 302 (Utah 1998). Under H.B. 224, the

county attorney does not function merely as a fact-finder who recommends solutions for purposes of an ultimate adjudication by a supervising judge; her decision actually adjudicates the lawfulness of a proposed plan and is final in the sense that the statute does not provide any means for judicial review of her actual adjudication. Indeed, the plan cannot progress further in the reform process unless the legal flaws which she identifies are corrected through amendment by the Study Committee, as happened in this case when the County Attorney identified numerous provisions in the first draft of the Study Committee's optional plan that were violative of the Utah Constitution and statute, including an attempt by the Study Committee to draw new legislative districts, a purely legislative function.

Finally, H.B. 224 requires counties to pay the expenses, including any attorney fees, of Study Committees and requisitions the facilities and personnel of counties to serve any and all Committee needs. These requirements may violate Art. XIII, § 5 (use and amount of taxes) which bars the state legislature from taxing counties for what might be considered state purposes.

Under H.B. 224, once the Study Committee was seated, Grand County's legislative body could not interfere with the Study Committee process, was allowed to propose the adoption only of an optional plan that is "recommended" by the Study Committee, and was required to put any such "recommended" plan to a vote of the county electorate (once the plan passes review by the

county attorney). §§ 17-52a-403-406 (2018). Hence, the power of the Study Committee over plan formulation, recommendation, and adoption is virtually absolute, and, as reinforcement to this control, once the Study Committee process was launched, no other Study Committee process could go forward on an alternate track of any kind. § 17-52a-301(3)(a).

These aspects of H.B. 224 run afoul of Utah's version of the non-delegation doctrine

which holds that legislative power (whether of state legislatures or county legislative bodies) may not be delegated to private parties. Utah's case law is well developed and uncompromising on this point. An illustrative case is *Salt Lake City v. I. A. of Firefighters, Etc.,* 563 P.2d 786 (Utah 1977) which reviewed the constitutionality of legislation which provided for the compulsory arbitration of labor disputes between municipal governments and fire fighter unions. The court held that this aspect of the legislation was unconstitutional because it contemplated the appointment of "arbitrators, who are private citizens with no responsibility to the public, to make binding determinations affecting the quantity, quality, and cost of an essential public service. The legislature may not surrender its legislative authority to a body wherein the public interest is subjected to the interest of a group which may be antagonistic to the public interest." *Id.* at 789. The decisions to be made by the arbitrators, in essence, were political in character, involving the quality of public services and the allocation of public resources. The Court largely was concerned that there could be no political accountability in this decision-making process and that this lack of accountability was "not consonant with the concept of representative democracy." *Id.* at 780.[18]

Other opinions echo this concern with accountability and give voice to the additional problem that private parties may be stakeholders, with an interest, either partisan or pecuniary, in the

issue at hand – as is the case here, where the president of the local republican party and

[18] In *I.A. Firefighters*, compulsory arbitration provisions of that particular legislation likewise had no standards to guide the arbitrators in their decision-making. But the Court said that this lack of standards, as well as the absence of any procedural safeguards, such as hearings, administrative oversight, or judicial review, to palliate or eliminate any tendency to arbitrariness was "not dispositive" of the delegation issue. The constitutional offense, at bottom, consisted of giving public power to politically unaccountable private persons – not the failure to trammel the exercise of that power with substantive standards or procedural constraints. The arbitrators were empowered to decide questions of public policy, questions respecting the "levels and standards of public services," these decisions involved the making of political choices, and the arbitrators as decisionmakers were insulated from and not subject to control by any political process. This, in the Court's view, was not "'consonant with the constitutional exercise of political power in a representative democracy.'" *Salt Lake City v. I. A. of Firefighters, Etc.,* 563 P.2d at 789 (citation omitted).

litigant who filed suit against the County regarding control of the Appointment Council under H.B. 224 was seated on the Study Committee. This lack of disinterestedness or potential for conflicts is another reason why private parties are constitutionally ineligible to become the delegatees of public power. *See e.g. Stewart v. Utah Public Service Comm'n,* 885 P.2d 759, 776 (Utah 1994) (regarding legislature delegates ratemaking power to public service commission, "the Legislature cannot constitutionally delegate to private parties governmental power that can be used to further private interests contrary to the public interest").

The *Stewart* court discusses two other opinions at some length for the purpose of elaborating concerns respecting the delegation of public power to private groups. These opinions are *Union Trust v. Simmons,* 211 P.2d 190, 192 (Utah 1949) and *Revne v. Trade Commission,* 192 P.2d 563, 568 (Utah 1948). In both *Simmons* and *Revne,* the statutes at issue handcuffed public administrators and left them powerless to act outside the control of the private parties involved. Thus, in *Revne,* a board appointed by the governor could not act to initiate the adoption of regulations for local barbers until a stated percentage of such barbers had made recommendations in this regard. Hence, the "public interest was given 'second place to the interest of a 70% majority of the profession directly affected by the law.'" *Stewart v. Utah*

Public Service Com'n, 885 P.2d at 776, *quoting from Revne v. Trade Commission,* 192 P.2d at 567.

Likewise, in *Simmons,* the state bank commissioner was prohibited from approving the establishment of branch banks in a given area unless and until the competing banks in the same area had given written consent to the commissioner in this regard. The operation of the law, in other words, was made contingent, in the first instance, upon the determination of the private parties, rather than upon any assessment of public interest. *Stewart v. Utah Public Service*

Com'n, 885 P.2d at 776, *discussing Union Trust Co. v. Simmons,* 211 P.2d at 192. The fear, naturally, is that "If the interests of the public must give way to those of a [private party], the effect is simply to permit that [party] to impose its will upon the administrative body and the public, be the results beneficial to the public or not." *Id.* at 193.[19]

It is clear that the Study Committee is composed of private persons who, because they are not elected, remain unaccountable in any political sense to the larger electorate of Grand County. The statute, moreover, has endowed this private clique with what clearly is a significant amount of public, and, indeed, legislative power. And this power further is enhanced because the Study Committee performs a "gatekeeper" function, not dissimilar to that performed by the private parties in *Revne* and *Simmons* -- with determinative discretion over what optional plan will be put on the ballot. Whether members of the Committee are stakeholders with an axe to grind or disinterested in fact or practice is beside the point. Outcomes in the cases cited above were not dependent upon any finding of an actual conflict or demonstrated instances of influence peddling. Instead, the justices wrung their hands over the potential for injury in this regard, because of the well-worn reality that these risks loom larger when public power is placed into

private hands. Hence, the delegation of public power to private arbiters is unconstitutional on its face.

[19] *See also Bradshaw v. Wilkinson Water Co.,* 94 P.3d 242, 247-249 (Utah 2004) (public service commission may not approve settlement stipulation which, in effect, requires the commission to defer to private standards in derogation of its statutory duty to consider the public interest in fixing rates; this would have "impermissibly delegated to the parties the task of determining standards[ ]"); *Gumbhir v. Kansas State Bd. of Pharmacy,* 618 P.2d 837, 842 (Kan. 1980) (statute restricting approval of educational qualifications deemed necessary for examination and registration of pharmacists to individuals graduating from schools accredited by private nonprofit association ruled unconstitutional delegation of government power to private parties; ". . . a strict rule is applied when the delegation of authority to some outside, nongovernmental agency is attempted. The legislative power of this state is vested in the legislature and the legislature is prohibited from delegating legislative powers to *nongovernmental associations or groups*[ ]") (emphasis in original) (citations omitted); *Hillman v. Northern Wasco County People's Util. Dist.,* 323 P.2d 664, 670-673 (Ore. 1958) (personal injury verdict predicated upon electrical code of national association which had been approved by legislative enactment; verdict set aside on ground that statute was unconstitutional delegation of legislative power to private group; order setting aside verdict sustained on appeal; "'. . . the question of when such a law was to go into effect was dependent wholly upon the initiative of persons outside the Legislature. This we think is a plain violation of the provision of the Constitution last referred to and, in itself alone, would render the act void, since it authorizes the making of laws the taking effect of which was made to depend upon the authority of persons not provided for in the Constitution[ ]'") (citation omitted).

Here, the Plaintiffs did not file a declaratory action asking the Court to bless the County's action here in the interest of building confidence in the meaningful choice now before the Grand County electorate. No, the Plaintiffs have asked the Court to declare the FOG Amendment and Propositions 16 and 17, adopted by the County's legislative body in the interest of the public, unlawful for the purpose of promoting an optional plan created by private parties and influenced by private interests. For this reason, the Court must reject the Plaintiff's interpretation of H.B. 224 and uphold the County's proper exercise of legislative authority, as intended by the Utah Constitution.

IV. CONCLUSION

The preferred form of government is a critical issue of concern to the community, one that Grand County's engaged citizenry follows closely. The people have the right to choose their form of government under the Utah Constitution and Chapter 52a, and the Utah Legislature did not intend to limit choice in Grand County via H.B. 224.

And, importantly, the County's action does not undermine or defeat the Study Committee process. If the majority of registered voters approve the Study Committee Plan by voting yes on Proposition 10, then the change in form of government takes effect and the FOG Amendment and Propositions 16 and 17 have no practical effect. However, if the Study Committee Plan is not approved by the voters, then the voters may also choose whether they want to modify the size and make-up of the Commission, as is the people's right. Let the people vote!

V. PRAYER FOR RELIEF

WHEREFORE, the County respectfully requests the Court take the following action:

1. Dismiss Plaintiffs' claims;

2. Uphold the Grand County Commission's legislative authority to protect the citizens' constitutional right to choose their own form of government;

3. Find that the adoption of the FOG Amendment and Propositions 16 and 17 on August 21, 2020 by the Grand County legislative body constitutes a lawful exercise of legislative authority by the Grand County Commission; and

4. Rule that the Grand County Plan for Government, as amended by the FOG Amendment on August 21, 2020 is in conformance with the Part 2 forms of government, and Chapter 52a, Title 17 generally.

Respectfully submitted September 23, 2020.

/s/ CHRISTINA R. SLOAN

Christina R. Sloan
Grand County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I efiled the foregoing **GRAND COUNTY RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND MEMORANDUM IN SUPPORT THEREOF** with the Court and served as follows:

Stephen Stocks
stephenjaystocks@gmail.com
Attorney for Plaintiffs
via Greenfiling

/s/ CHRISTINA R. SLOAN

Christina R. Sloan