IN THE SUPREME COURT OF THE STATE OF UTAH

League of Women Voters of Utah, Mormon Women for Ethical Government, Stephanie Condie, Malcolm Reid, Victoria Reid, Wendy Marin, Eleanor Sundwall, and Jack Markman, Appellees and Cross-appellants (Plaintiffs), v. Utah State Legislature, Utah Legislative Redistricting Committee, Scott Sandall, Brad Wilson, Stuart Adams, and Deidre Henderson, Appellants and Cross-appellees (Defendants).	Case No. 20220991-SC

Amicus Curiae Brief of Ballot Initiative Strategy Center in Support of Appellees and Cross-appellants (Plaintiffs)

On Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Dianna M. Gibson, District Court No. 220901712

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

The Ballot Initiative Strategy Center ("BISC") is a District of Columbia nonprofit corporation exempt from federal tax as a social welfare organization under section 501(c)(4) of the Internal Revenue Code. BISC was formed more than twenty years ago to provide information, analysis and guidance to advocacy organizations, labor and civic organizations, and other groups, about effective utilization of and involvement in the initiative and referendum process in the states. BISC helps coordinate and focus the efforts of organizations in identifying initiatives to support and oppose; conducts survey research to test public attitudes and opinions about the subjects and framing of initiatives; analyzes state laws and rules relating to ballot measures; advocates for fairness, integrity, and transparency in the process of qualifying measures for the ballot and in ballot campaigns; and provides financial and technical assistance to ballot committees.

As state legislative chambers are increasingly under the sway of corporate and wealthy donors and lobbyists, advocates of progressive laws and policies have a keen interest in ensuring that ballot measures can be utilized to advance policy changes, particularly in the areas affecting the structure of government itself and the integrity of our democracy. BISC strongly believes that the right of the voters to use the initiative process in each state should be protected to the greatest extent consistent with that state's constitution and laws.

BISC respectfully submits this Amicus Curiae Brief in support of the appeal of Appellees and Cross-Appellants League of Women Voters of Utah, *et al*., of the Third District Court's dismissal of Count Five of the Complaint. Count Five asserted that the Legislature exceeded its constitutional authority in repealing Proposition 4, because Article I, section 2 of the Utah State Constitution reserves to the people the ultimate "right to alter or reform their government as the public welfare may require."

BISC's interest in this case derives from its mission of promoting the right to direct democracy, that is, the right to use the initiative and referendum process where authorized by a state's constitution and laws. Based on BISC's extensive experience with the initiative process in numerous states, BISC is very concerned that, as explained below, upholding the decision of the District Court on Count Five in this case would lead to rendering the right to initiative in the State of Utah meaningless in circumstances in which the Utah Constitution explicitly retains the people's right to have the final say.

STATEMENT OF TIMELY NOTICE TO FILE BRIEF

Pursuant to Utah R. App. P. 25(a)(1), counsel for BISC provided timely notice to all counsel of record for all parties to this appeal of BISC's intent to file this Brief.

STATEMENT OF CONSENT BY ALL PARTIES

Pursuant to Utah R. App. P. 25(e)(5), undersigned counsel for BISC hereby states that all parties to this appeal have consented under Utah R. App. P. 25(b)(2), to the filing of this Brief *Amicus Curiae*.

STATEMENT PURSUANT TO RULE 25(e)(6)

Pursuant to Utah R. App. P. 25(e)(6), counsel for BISC hereby states that no party or party's counsel authored this Brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this Brief; and no person, other than BISC and its sister nonprofit organization, Ballot Initiative Strategy Center Foundation, contributed money that was intended to fund preparing or submitting this Brief.

ARGUMENT

I. PROPERLY INTERPRETED, THE UTAH CONSTITUTION LIMITS THE LEGISLATURE'S POWER TO REPEAL INITIATIVES THAT ALTER OR REFORM THE GOVERNMENT

The Legislative Power Clause of the Utah Constitution provides, in relevant part, that the "voters of the state of Utah . . . may: (A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute[.]" UTAH CONST. art. VI, § 1(2)(a)(i)(A). That provision is preceded and framed by the Inherent Political Powers

Clause, which 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." *Id*. art. I, § 2.

The Constitution is silent as to the authority of the Legislature to repeal a citizen-enacted initiative. Appellees/Cross-Appellants argued in the District Court that the express right of the people to "alter or reform their government" specifically limits the power of the Legislature to repeal an initiative reforming the structure of the government, such as the one at issue in this case—Proposition 4—which passed in November 2018. The District Court disagreed, ruling that, "[g]iven the absence of anything in the Utah Constitution that restricts the Legislature's ability to repeal laws enacted via initiative, there is a clear implication that the Legislature has broad authority to enact and repeal laws, including those enacted by citizen initiatives." District Court Summary Ruling and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("Dist. Ct. Order") at 58. In reaching this conclusion, the District Court relied heavily on the holdings of this Court to the effect that the *scope* of the legislative power held by the citizens through the initiative right, in terms of the permissible subject matter of an initiative, is co-equal with that of the Legislature. "The initiative power of the people is thus parallel and coextensive with the power of the legislature." *Carter v. Lehi City*, 2012 UT 2, ¶ 22, 269 P.3d 141

(addressing the issue of whether certain matters were a permissible subject matter for a local initiative). "[T]he people are a 'legislative body coequal in power' with the legislature." *Id*. ¶ 27 (quoting *Utah Power & Light Co. v. Provo City*, 94 Utah 203, 235 (1937)). "The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive and concurrent, and share 'equal dignity.'" *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069 (quoting *Utah Power & Light*, 94 Utah at 235-36).

That the scope of the initiative power, as to subject matter, is co-extensive with that of the Legislature says nothing about the power of the Legislature to repeal an initiative. In particular, the co-equal power to enact legislation does not imply that the Legislature can specifically exercise that power to repeal a government reform measure. Until now, this Court has not been called upon to address the question of whether the Inherent Political Powers Clause limits the Legislature's power to repeal such a measure.

"'[I]n interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting.'" *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 18, 450 P.3d 1092 (quoting *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12). Applying these principles of construction, it is clear that the Inherent Powers

Clause must have been intended to limit the Legislature's power to repeal a government reform measure enacted through an initiative.

First, the framers of the Constitution clearly saw the will of the people as the source of the Legislature's power, and thus understood and assumed that the exercise of that power through the initiative would not be nullified by the Legislature. "The framers of Utah's constitution saw the will of the people as the source of constitutional limitations upon our state government." *Am. Bush,* 2006 UT at ¶ 13. That is reflected in the opening language of the Inherent Powers Clause: "[a]ll political power is inherent in the people; and all free governments are founded on their authority . . . ." UTAH CONST. art. I, § 2. "Under this basic premise, upon which all our government is built, the people have the inherent authority to allocate governmental power in the bodies they establish by law." *Carter*, 2012 UT at ¶ 21.

As a logical matter, then, the framers could not have intended the initiative power to be subordinated to the Legislature's powers. As this Court has explained, Article VI, Section 1 "is not merely a grant of the right to directly legislate, but reserves and guarantees the initiative *power* to the people." *Gallivan*, 2002 UT at ¶ 23 (emphasis in original). Indeed, Article VI "nowhere indicates that the scope of the people's initiative power is less than that of the legislature's power or that the initiative power is derived from or delegated by the legislature. Instead, '[u]nder our constitutional assumptions, all power derives from the people, who can delegate it

to representative instruments which they create.'" *Carter,* 2012 UT at ¶ 30 (quoting *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 672 (1976). "[I]n exercising the initiative power, the people do not act under the authority of the legislature." *Id*.

Further, the very structure of Constitution implies this understanding and assumption that the power of the people through the initiative would, if anything, be *superior* to that of the Legislature—not in scope, not as to permissible subject matter, but in the ultimate ability to put in effect what the people enact. "Bear in mind that the Constitution vests the Governor with veto power on acts of the Legislature, but he has no veto power on legislation enacted by the people through the initiative." *Utah Power & Light*, 94 Utah at 228 (Larson, J., concurring). And the Constitution explicitly gives the people the right, through exercise of the referendum power, to overturn legislation enacted by the Legislature, but does not expressly confer on the Legislature any power to overturn citizen-enacted initiatives.

Second, it follows from this framework that the silence of the Constitution as to the Legislature's power to overturn initiatives cannot be read, as the District Court would have it, as *implying* such a power. To the contrary, to carry out the intent of the framers, the default position logically must be one of deferring to the will of the people. "Arguably, any rights not specifically granted to state government are already retained by the people." *Sevier Power Co., LLC v. Board of Sevier County Com'rs*, 2008 UT 72, ¶ 5, 196 P.3d 583. One of those rights is the right to enact

through the initiative, laws that actually become the law of the State. To assume that the Legislature has inherent power effectively to nullify that right as to any specific initiative simply by repealing it would defy the fundamental proposition that "[a]ll political power is inherent in the people…" UTAH CONST. art I, § 2.

As Justice Larson explained in his concurring opinion in *Utah Power & Light*:

> For economy and convenience the routine of legislation is exercised by the Legislature but ***the legislative power of the people directly through the ballot is superior to that of the representative body***. By the referendum the people may repeal an act of the Legislature, may prevent it from taking effect and may suspend its operation until they may express themselves thereon by ballot….And if an act enacted by the Legislature and one enacted by the people through the initiative conflict, ***the enactment by the people controls over the act of the Legislature.. . .***

Utah Power & Light, 94 Utah at 228-29 (emphasis added). Justice Larson went on to explain the fundamental basis for those conclusions:

> [T]he people themselves are not creatures or creations of the Legislature. They are the father of the Legislature, its creator, and in the act creating the Legislature the people provided that its voice should never silence or control the voice of the people in whom is inherent all political power; and being co-equal in legislative power, the Legislature, the child of the people, cannot limit or control its parent, its creator, the source of all power.

Id. at 236.

Finally, it follows further that whatever the general interpretation as to the power of the Legislature to repeal initiatives, it must be the case that the Legislature cannot repeal an initiative that alters or reforms the government. Article VI, section 2 confers on legal voters the right to "initiate any desired legislation and cause it to

be submitted to the people for adoption upon a majority vote of those voting . . . ." UTAH CONST. art. VI, § 2(a)(1). That provision does not single out the power of the people to make laws about public employees (Utah Merit System for County Sheriffs, Initiative A, 1960); Medicaid expansion (Medicaid Expansion Initiative, Proposition 3, 2018); medical marijuana (Utah Medical Cannabis Act, Proposition 2, 2018); fluoridation (Freedom from Compulsory Fluoridation and Medication Act, Initiative A, 1976); or confiscation of property by law enforcement in drug cases. (Utah Property Protection Act, Initiative B, 2000). But that provision *does* specifically confer on Utah voters the right of the people to enact measures to "alter or reform their government."

That this power was intended to have real effect—and not be subject to override by the Legislature at will—is underscored by its placement in Article I. "Article I of our constitution is a declaration of those rights felt by the drafters of the document to be of such importance that they be separately described*." Sevier Power Co.*, 2008 UT at ¶ 5.

It makes sense that the framers would single out the people's power to "alter or reform" government in Article I because that power, if not specially protected, would be uniquely vulnerable to being vitiated and undermined by the Legislature. That is because—unlike medical marijuana or Medicaid or fluoridation—government reform can often inherently affect the rights and powers of legislators

themselves and implicate their self-interest. As this Court explained, the Progressive movement that propelled the initiative movement at the dawn of the twentieth century was "based on the premise that 'only free, unorganized individuals could be trusted and that any intermediary body such as politicians, political parties and legislative bodies were inherently corrupt and distorted the public interest.'" *Carter,* 2012 UT at ¶ 23 (quoting Robert Freilich & Derek Gummer*, Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda*, 21 URB. LAW. 511, 516 (1989)).

If the Legislature could simply repeal any initiative measure reforming the government in a way that offended the interests of legislators, the right of the people to "alter or reform their government" would be rendered effectively meaningless. This Court has recognized that same logic in restricting the Legislature's ability to "unduly burden or constrict" the initiative right. *Gallivan*, 2002 UT at ¶ 52. The Court explained that:

> Endorsing this legislative purpose would essentially allow the legislature without limitation to restrict and circumscribe the initiative power reserved to the people, thus rendering itself the only legislative game in town. If such a legislative purpose were legitimate, the legislature would be free to completely emasculate the initiative right and confiscate to itself the bulk of, if not all, legislative power. This would obviously contravene both the letter and spirit of article VI of the constitution.

Id.

With respect to the right of the people to "alter or reform their government," the District Court's holding in this case would indeed allow the Legislature "to completely emasculate the initiative right and confiscate to itself" all of the legislative power. *See id.* at ¶ 52. Such a result cannot be squared with the language and intent of Article 1, section 2. In the absence of express language giving the Legislature the effective power completely to deny the right of the people to "alter or reform their government," the only interpretation faithful to the language, structure and intent of the relevant constitutional provisions is that the Legislature does not have that power.

II. THE NEED TO PREVENT THE LEGISLATURE FROM EFFECTIVELY DENYING THE PEOPLE'S RIGHT TO REFORM THE GOVERNMENT IS ESPECIALLY STRONG IN THE AREA OF REDISTRICTING REFORM

As explained above, the right of the people to "alter or reform their government" would be effectively meaningless if any such reform could simply be thwarted by the Legislature at will. There is no better illustration of that need than the use of the initiative power to effectuate redistricting reform, the subject of Prop.

"Redistricting is a context in which legislators' incentives and the public interest are almost diametrically opposed. Legislators want to win reelection handily and to have their party obtain as many seats as possible. Under almost any theory of democracy, on the other hand, the public is more interested in elections whose outcome is not a foregone conclusion, districts that respect pre-existing political

communities, and legislatures whose partisan composition roughly reflects actual vote totals." Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail,* 23 J. L. & POL. 331, 36 (2007). "A number of scholars have identified legislator conflict of interest as a central concern of redistricting reform efforts. For democratic theorists concerned about electoral fairness and representative accountability, incumbents determining the boundaries of the districts in which they will ultimately compete is obviously problematic." Richard Diggs, *Regulation Via Delegation: A Federalist Perspective on the Arizona State Legislature v. Arizona Independent Redistricting Commission Decision,* 92 N.Y.U. L. REV. 350, 358 (2017). As the United States Supreme Court observed in upholding a challenge, under the Elections Clause of the United States Constitution, to an initiative enacting an independent redistricting commission, "[c]onflict of interest is inherent when 'legislators dra[w] district lines that they ultimately have to run in.'" *Arizona State Legislature v. Arizona Independent Redistricting Com'n,* 576 U.S. 787, 815 (2015) (quoting Bruce Cain, *Redistricting Commissions: A Better Political Buffer*?, 121 YALE L. J. 1808, 1817 (2012)).

It follows that the initiative power is an especially important means by which this inherent conflict of interest can effectively be addressed. The inability of the Legislature to effectuate reform directly implicates a central rationale for the right

of citizen initiative, identified by this Court in examining the history of the initiative movement and the intent of the framers of the Utah Constitution: the belief that "'legislative bodies were inherently corrupt and distorted the public interest,'" and that "[o]nly by wielding the legislative power could the people govern themselves in a democracy unfettered by the distortions of representative legislatures." *Carter*, 2012 UT at ¶ 23 (quoting Freilich & Gummer, *supra*, at 516). "In the political market for redistricting, initiatives allow voters to avoid the suppression of their free choice caused by legislator conflict of interest and partisanship." Diggs, *supra,* at 361. "Legislators' self-interest and adverse court decisions leave critics of contemporary redistricting with only one promising avenue for reform: the popular initiative." Stephanopoulos, *supra,* at 332.

One of the more popular types of redistricting reform has been the kind of independent redistricting commission that was established by Prop. 4. "Independent redistricting commissions—where ordinary citizens instead of politicians draw redistricting plans—have become the premier institutional solution to the problem of partisan gerrymandering." Emily Rong Zhang, *Bolstering Faith with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms*, 109 CALIF. L. REV. 987, 1000 (2021). Among the earliest such reforms to be enacted by citizen initiative were those in California and Arizona. *See* Prop. 11 (Cal. 2008) (codified at CAL. CONST. art. XXI, §§ 1-3) (amended 2010); Prop. 20 (Cal. 2010)

(codified at CAL CONST. art. XXI, §§ 1-3); Prop. 106, Ariz. 2000 Ballot Prop (2000) (codified at ARIZ. CONST. art. IV, pt. 2, § 1). "It was only through the ballot initiative, . . . that voters in California and Arizona were able to limit gerrymandering by taking the power to draw legislative districts out of the hands of self-interested incumbent legislators and creating independent redistricting commissions." D. Theodore Rave, *Fiduciary Voters?*, 66 DUKE L. J. 331, 346-47 (2016).

In 2018, in addition to the passage of Prop 4 in Utah, voters in Colorado, Michigan, and Ohio all established redistricting commissions, through ballot initiatives. *See* Colorado Amendments Y & Z (Colo. 2018) (codified at COLO. CONST. art. V, § 44); Issue 1 (Ohio -May 2018) (codified at OHIO CONST. art. XI, §1; *id.* art. XIX, §§ 1-3).

As the U.S. Supreme Court noted in upholding the Arizona initiative establishing an independent redistricting commission, "[i]ndependent redistricting commissions . . . ' . . . have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting].' . . . They thus impede legislators from choosing their own voters instead of facilitating the voters' choice of their representatives." *Ariz. State Legislature*, 576 U.S. at 821 (brackets in original) (quoting Cain, *supra,* at 1808). Prop. 4 likewise promises to limit the conflict of interest implicit in legislative control over redistricting.

The point, though, is not that such a goal is meritorious, but that there is no realistic possibility of achieving it—no matter how much the people may desire it--if the Legislature itself can thwart and override the will of the people, as the Utah Legislature did in this case. Redistricting reform is a paradigmatic case of the need to protect the exercise of the right to "alter or reform" government from being effectively nullified by the Legislature. Without such protection the right would be meaningless and the ability of the people to accomplish reforms that affect the legislators' interests would be effectively eliminated. Certainly, such a result cannot be countenanced. given the language and intent of Article 1, section 2.

III. ALLOWING A LEGISLATIVE NULLIFICATION OF THE PEOPLE'S INITIATIVE RIGHT IS PARTICULARLY PROBLEMATIC GIVEN THE DIFFICULTY OF QUALIFYING INITIATIVES IN UTAH

The Utah Legislature has already established rules that, by comparison to those in other states, make it extraordinarily difficult to qualify an initiative for the ballot, notwithstanding this Court's admonition that the Legislature is not "to unduly burden or construct that fundamental right by making it harder to place initiatives on the ballot." *Gallivan,* 2002 UT at ¶ 52. As a result of the singularly burdensome nature of the qualification process, compared with other states, very few initiatives have actually appeared on the ballot in Utah. Those initiatives that have qualified therefore represent an especially strong expression of the will of the people.

Upholding the District Court's decision allowing the Legislature to override and nullify the voter's initiative power would be particularly problematic, as it would eliminate the few cases in which initiatives can successfully be pursued.

In Utah, after submission of a proposed initiative, the Lieutenant Governor has broad authority to reject it. A proposed initiative may be rejected if the Lieutenant Governor finds that the proposed law is: (1) patently unconstitutional, (2) nonsensical, (3) unable to become law if passed, (4) containing of more than one subject, (5) identical or substantially similar to a prior initiative filed in the preceding two years for which signatures were submitted, or (6) the subject of which is not clearly expressed in the law's title. UTAH CODE § 20A-7-202(5)(a)-(f). While other states provide for review by a state official for form, constitutionality, and compliance with legal requirements, to BISC's knowledge, no state grants authority to an official to reject for as broad and subjective a set of reasons as under Utah law.

Further, during the Lieutenant Governor's review, proposed ballot initiatives are subject to a uniquely extensive public hearing requirement in Utah. While other states also require public hearings, Utah is the only state where the hearings take place during the review and revision process prior to circulating petitions for signature statewide. UTAH CODE § 20A-7-204.1(1)(a); *compare e.g.,* ALASKA STAT. § 15.45.195 (2022) (public hearings held by lieutenant governor or designee occur outside of the review process); ARIZ. REV. STAT. § 19-123(E) (2022) (at least three

public meetings required but only after certification of an initiative); CAL. ELEC. CODE § 9007 (public hearings held by legislature upon preparation of the circulating title and summary of proposed initiative); MISS. CODE ANN. § 23-17-45 (2019) (public hearings held by the Secretary of State are required in every congressional district that will have the measure on the ballot).

Between the fiscal review and the collection of signatures, initiative sponsors must host seven public hearings around the State, subject to rules regarding the geographic distribution of these hearings. UTAH CODE § 20A-7-204.1(1)(a) (2021). There must be one meeting in each of the following regions: Bear River, Southwest, Mountain, Central, Southeast, Uintah Basin, and Wasatch Front. *Id*. At least two of the public hearings are required to be in a "first or second class county," but not the same county. *Id*. (1)(b).

There are also limitations on when a required public hearing may be held. Sponsors are prohibited from holding a public hearing until after the later of (1) "one day after the day on which a sponsor receives a copy of the initial fiscal impact estimate" or (2) "if three or more sponsors file a petition challenging the accuracy of the initial fiscal impact statement…[then] the day after the day on which the action is final." *Id*. (1)(c)(i)-(ii). Additionally, sponsors are required to provide widespread notice of each hearing. Written notice must be published in a "newspaper of general circulation" within the county of the hearing and include the time, date, and location

of the public hearing at least three days in advance. *Id.*(2)(b)(i)(A). If there is no newspaper of general circulation in the county, then notices must be posted in "places within the county that are most likely to give notice to the residents" at least three days in advance of the hearing. *Id*. (2)(b)(i)(B). BISC has not been able to identify any other state in which the initiative sponsors themselves are required to host public hearings and to meet such an imposing set of requirements.

Once the review process is completed, Utah law then imposes a particularly demanding set of requirements for the collection of the voter signatures. For direct ballot initiatives submitted to a vote of the people for approval, proponents must collect signatures equal to 8 percent of the active registered voters (calculated as of the January 1 immediately following the last regular general election) in at least 26 of the 29 Utah State Senate districts. UTAH CODE § 20A-7-201(2)(a). In 2023, this equals approximately 4000-5000 signatures per State Senate district. By comparison, most states base the signature requirement for a proposed initiative on the number of votes cast in the last general election for a statewide office or offices. In those states that do base their minimum requirement on the number of registered voters, the percentage is significantly lower: for example, in Nebraska, 7 percent (NEB. CONST. art. III-2); in South Dakota, 5 percent (S.D. CONST. art. III, § 1); in Montana, 5 percent (MONT. CONST. art. III, § 4); and in Idaho, 6 percent (IDAHO CODE § 34-1805).

And no other state has a geographic distribution requirement as onerous as that of Utah. There is no geographic distribution requirement at all in Arizona, California, Colorado, North Dakota, Oklahoma, Oregon, South Dakota or Washington State. Montana law requires collection of signatures equal in number to 5 percent of the registered voters in only one-third of the State House districts (MONT. CONST. art. III, § 4). In Nebraska, the requirement is to collect signatures equal in number to 5 percent of the registered voters in as few as 38 of the 93 Counties (NEB. CONST. art. III-2).

As a result of the high barriers imposed by Utah law to qualifying a citizen initiative for the ballot, compared with other states, very few ballot initiatives are ever put to a vote in Utah. Since adopting the initiative and referendum instruments in 1900,[1] only 23 initiatives have appeared on the Utah ballot, with the first in 1952.[2] Of the few initiatives, only seven have passed.[3] Meanwhile, since 1952, North

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[1] W. David Patton, *The Initiatives and Referendum Process in Utah*, Policy Perspectives by Center of Public Policy & Administration at the University of Utah (2006), https://gardner.utah.edu/_documents/publications/governance/pp-initiatives-referendum-process.pdf (last visited, Mar. 29, 2023).

[2] *IRI Historical Database*, IRI Initiative & Referendum Inst., http://www.iandrinstitute.org/data.cfm (last visited, Mar. 30, 2023) (spreadsheet linked "Initiatives (number, approved) by state and year, 1909-2019)," http://www.iandrinstitute.org/docs/Number%20initiatives%20by%20state-year%20(1904-2019).xls); *List of Utah Ballot Measures*, Ballotpedia, https://ballotpedia.org/List_of_Utah_ballot_measures (last visited, Mar. 29, 2023).

[3] *Id.*; Benjamin Wood, *They've Wiped Out Prop 2 and Prop 3, But Lawmakers Say Utah's Anti-Gerrymandering Initiative May Survive – For Now*, Salt Lake Trib.

Dakota has had 99 ballot initiatives appear on the ballot,[4] Montana has had 65,[5] South Dakota has had 64,[6] and Nevada has had 59.[7] By one account, Utah ranks 20th out of 23 states in the all-time number of initiatives qualified for the ballot. *See* David Carillo, Stephen Duvernay, Benjamin Gevercer & Meghan Fenzel, *California Constitutional Law: Direct Democracy*, 92 S. CAL L. REV. 557, 567 (2019).

As previously noted, only seven qualifying initiatives have passed in Utah, corresponding to a passage rate of 30 percent. From 1904 to 2019, the passage rate was 42 percent in North Dakota, 67 percent in Nevada, 56 percent in Montana, and 41 percent in South Dakota.[8]

(Feb. 17, 2019), https://www.sltrib.com/news/politics/2019/08/09/ballot-initiative/; Bryan Schott, *Redistricting Process Results In Bad Blood Between Utah Lawmakers and Anti-Gerrymandering Group*, Salt Lake Trib. (Nov. 13, 2021), https://www.sltrib.com/news/politics/2021/11/13/redistricting-process/.

[4] IRI Initiative & Referendum Inst., *supra* note 2; *List of North Dakota Ballot Measures*, Ballotpedia, https://ballotpedia.org/List_of_North_Dakota_ballot_measures (last visited, Mar. 30, 2023).

[5] IRI Initiative & Referendum Inst., *supra* note 2; *List of Montana Ballot Measures*, Ballotpedia, https://ballotpedia.org/List_of_Montana_ballot_measures (last visited, Mar. 30, 2023).

[6] IRI Initiative & Referendum Inst., *supra* note 2; *List of South Dakota Ballot Measures*, Ballotpedia, https://ballotpedia.org/List_of_South_Dakota_ballot_measures (last visited, Mar. 30, 2023).

[7] IRI Initiative & Referendum Inst., *supra* note 2; *List of Nevada Ballot Measures*, Ballotpedia, https://ballotpedia.org/List_of_Nevada_ballot_measures (last visited, Mar. 30, 2023).

[8] *See Supra*, note 2, 4-7.

Given the difficulty of qualifying a direct citizen initiative for the ballot in Utah, those initiatives that do qualify should be regarded as particularly strong expressions of the will of the people. Articles I and VI of the Utah Constitution are intended to give voice to these strong expressions, particularly as to measures that propose to "alter or reform" the government as in this case where – despite the onerous requirements – Prop. 4 successfully qualified. And it would be highly problematic to give the Legislature the complete power to veto and override the will of the people. The Legislature's effective nullification of the people's initiative right would fly in the face of the language and intent of Article I, section 1 and Article VI, section 1 of the Utah Constitution.

CONCLUSION

For the reasons set forth above, the Court should reverse the district court's order dismissing Count Five of the complaint.

DATED this 7th day of April 2023.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 25(e)(8) and 24(a)(11), I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 25(f) because this brief contains 5,552 words, excluding the parts of the brief exempted by Utah R. App. P. 25(f). Times New Roman 14-point font used.
2. This brief complies with Utah R. App. P. 21(h) regarding public and nonpublic filings.

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CERTIFICATE OF SERVICE

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No. 20220991-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

League of Women Voters of Utah, et al.,
Appellees and Cross-appellants (Plaintiffs),
v.
Utah State Legislature, et al.,
Appellants and Cross-appellees (Defendants).

Brief of Professor Charles Fried as Amicus Curiae in Support of Affirming the District Court Decision

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On Defendants' Petition (20220991-SC)
Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Dianna M. Gibson, District Court No. 220901712

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Appellees and Cross-appellants (Plaintiffs)

League of Women Voters of Utah, Mormon Women for Ethical Government, Stephanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, and Jack Markman

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Cross-appellee (Defendant)

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Plaintiff Dale Cox (voluntarily dismissed)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

Statutes

Other Authorities

INTERESTS OF AMICUS CURIAE[1]

Professor Charles Fried is the Beneficial Professor of Law at Harvard Law School and has been teaching at the school since 1961. He was Solicitor General of the United States, 1985–89, and an Associate Justice of the Supreme Judicial Court of Massachusetts, 1995–99. His scholarly and teaching interests have been moved by the connection between normative theory and the concrete institutions of public and private law. Professor Fried is a member of the Litigation Strategy Council of the Campaign Legal Center, a nonprofit organization that advances democracy through law at the federal, state, and local levels, fighting for every American's rights to responsive government and a fair opportunity to participate in and affect the democratic process. Professor Fried's legal expertise thus bears directly on the question of whether, relying on particular state constitutional provisions, state courts may go beyond the federal limits on the justiciability of partisan gerrymandering.

INTRODUCTION

When determining that partisan gerrymandering claims were nonjusticiable under the federal Constitution, the United States Supreme Court issued a direct invitation for the protections of state constitutions to fill the void. Respondents took up that invitation in filing the instant case in the Utah courts, and our federalist system ensures that this Court

[1] Pursuant to Utah R. App. P. 25(e)(6), no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Utah R. App. P. 25(b)(2) and received timely notice pursuant Utah R. App. P.25(a).

can exercise its distinct responsibility under Utah's Constitution to effectuate the separate protections that its constitution provides. Utah's Constitution—a foundational source of rights and liberties for Utahns—provides "substantive protections against antidemocratic conduct that the federal Constitution does not." Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 913 (2021). The Utah Constitution provides just such protections against an anti-democatic gerrymander.

Utah's Constitution contains provisions distinct from the federal Constitution, including in particular the Free Elections and Uniform Operation of Laws Clauses. The original meaning of these constitutional protections and this Court's own precedent compels the conclusion that partisan gerrymandering claims are justiciable under Utah's Constitution.

ARGUMENT

In shutting the federal courts to partisan gerrymandering claims, the Court "[did] not condone excessive partisan gerrymandering." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Instead of "condemn[ing] complaints about districting to echo into a void," the Court recognized that state constitutions might indeed point in another direction. *Id.* That should come as no surprise for "the very premise of . . . cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977). "[L]iberties," like the rights violated by partisan gerrymandering, "cannot survive if the states betray the trust the [Supreme] Court has put in them." *Id.* Indeed, state courts' "manifest purpose is to expand constitutional protections." *Id.*

This Court can achieve that purpose by recognizing that the Utah Constitution's Free Elections and Uniform Operation of Laws Clauses preclude partisan gerrymandering. Partisan gerrymandering severely undermines Utah's sweeping constitutional guarantees that "[a]ll elections shall be free," Utah Const. art. I, § 17, and that "[a]ll laws of a general nature shall have uniform operation," Utah Const. art. I, § 24. The history of these provisions and this Court's precedents confirm that these provisions bar partisan gerrymandering.

I. State constitutions contain more extensive protections of individual rights than the federal Constitution.

a. State supreme courts have an independent duty and authority to afford the citizens of their state the full protections of their state's constitution.

"State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." Brennan, *supra*, at 491. Accordingly, "state courts, no less than federal [courts] are and ought to be the guardians of our liberties." *Id.* As the final arbiters of the meaning of their constitutions, state courts "may experiment all they want with their own constitutions, and often do in the wake of [the Supreme] Court's decisions." *Kansas v. Carr*, 577 U.S. 108, 118 (2016) (Scalia, J.). "And of course, state courts that rest their decisions wholly . . . on state law need not apply federal principles of . . . justiciability that deny litigants access to the courts." Brennan, *supra*, at 501.

This two-tiered federalist system is a defining feature of American constitutional governance. "Our system of dual sovereigns comes with dual protections." Jeffrey S. Sutton, *51 Imperfect Solutions* 2 (2018). That basic idea traces back to the nation's

founding: "[T]he state and federal founders saw federalism and divided government as the first bulwark in the rights protection and assumed the States and state courts would play a significant role, even if not an exclusive role, in that effort." Jeffrey S. Sutton, *The Enduring Salience of State Constitutional Law*, 70 Rutgers U. L. Rev. 791, 795 (2018). While some limited protections of the federal Constitution began to be applied against the states earlier, before the U.S. Supreme Court incorporated the Bill of Rights' protections against the states in the mid-twentieth century, state constitutions and state courts were the key constitutional guardians of individual rights against actors other than the federal government. *See* Jonathan Thompson, *The Washington Constitution's Prohibition of Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1249 (1996).

Nevertheless, state courts' critical rights-protecting role did not wane following the incorporation of the federal Constitution against the states; such incorporation only further underscored state constitutions' and courts' importance in our federalist system. In the latter part of the twentieth century, state courts continued to recognize that state constitutional guarantees provided "greater protection than was available under the federal Constitution" in hundreds of cases. G. Alan Tarr, *Understanding State Constitutions* 165–66 (1998). Indeed, much of state constitutions would be superfluous if state courts protected only those rights the federal Constitution already preserved. But that is not the purpose of our federal structure.

State courts can and must go further; they should consider the text and history of their own constitutions to determine whether their founding documents provide stronger

bulwarks against government encroachment than the federal Constitution. And when, as here, the U.S. Supreme Court declined to protect the rights violated by partisan gerrymandering, "the state courts [became] the *only* forum . . . for enforcing the right under their own constitutions, making it imperative to see whether, and if so, how the States fill the gaps left by the U.S. Supreme Court." Sutton, *51 Imperfect Solutions* at 2 (emphasis in original).

Utah should heed this call, just as it has in the past. This Court has repeatedly declined "invitation[s] to interpret [Utah's] constitution in lockstep with the federal [Constitution] . . . ." *South Salt Lake City v. Maese*, 2019 UT 58, ¶ 27, 450 P.3d 1092, 1099; *see also West v. Thomson Newspapers*, 872 P.2d 999, 1006 (Utah 1994) (rejecting a "lockstep approach" to interpreting the Utah Constitution that "does not allow independent interpretation of a state constitution"). In fact, this Court has recognized that by developing "independent doctrine and precedent" in state constitutional law, it "act[s] in accordance with the original purpose of the federal system." *Thomson Newspapers*, 872 P.2d at 1006. Consequently, this Court "ha[s] not hesitated to interpret the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate." *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935, 942.

b. Many states, including Utah, have recognized that their state constitutions provide greater protections than the federal Constitution.

Keeping with the foundational principles of American federalism, many state courts interpret their states' constitutions to provide stronger protections than the federal Constitution, recognizing that they have an independent duty and authority under their own

constitutions to protect the people of their state. *See, e.g.*, *State v. Guillaume*, 975 P.2d 312, 230 (Mont. 1999) ("In interpreting the Montana Constitution, this Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart."); *State v. Guzman*, 842 P.2d 660, 666 (Idaho 1992) ("It is by now beyond dispute that this Court is free to interpret our state constitution as more protective of the rights of Idaho citizens than the United States Supreme Court's interpretation of the federal constitution."); *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982) ("[W]e cannot and should not allow [federal constitutional] decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana.").

Often, when state courts find their state constitutions provide greater protections than the federal Constitution, those cases involve broad provisions that the courts have understood to protect rights central to individual liberties. For example, forty-six states "interpret the equal protection clause of their state constitutions to provide greater protections than that afforded by the equal protection clause of the Fourteenth Amendment of the United States Constitution." James A. Kushner, *Government Discrimination: Equal Protection Law and Litigation* § 1.7 (2022).

In interpreting their state constitutions, state courts often find greater protections for criminal defendants than the federal Constitution provides. As an illustration, after the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), nationalizing the exclusionary rule, which prevents the government from unconstitutional evidence gathering, the importance of distinct state constitutional protections became increasingly evident. In *United States v.*

Leon, 468 U.S. 897, 900 (1984), the U.S. Supreme Court established a good-faith exception to the exclusionary rule, allowing evidence gathered in violation of the Fourth Amendment to be admitted. Numerous state supreme courts then rejected that approach, interpreting their own constitutions' protections against illegal search and seizure to preclude any such exception to the exclusionary rule. *See, e.g.*, *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993); *Guzman*, 842 P.2d at 671; *Com. v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991); *State v. Oakes*, 598 A.2d 119, 120 (Vt. 1991); *State v. Crawley*, 808 P.2d 773, 776 (Wash. 1991); *State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990); *State v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987); *People v. Bigelow*, 488 N.E.2d 451, 458 (N.Y. 1985); *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323, 373 (2011) (at least twenty states have rejected the good-faith exception post-*Leon*).

In many cases, state supreme courts have interpreted their own constitutional provisions protecting personal rights as providing more expansive protections than the federal Constitution. For example, state supreme courts, in states both with and without explicit inclusion of the right to privacy in their constitutions, have found greater constitutional protections for privacy rights than the U.S. Supreme Court has found in the federal Constitution. *See, e.g.*, *State v. Brown*, 156 S.W.3d 722, 729 (Ark. 2004); *State v. Perry*, 610 So.2d 746, 758 (La. 1992); *State v. Saunders*, 381 A.2d 333, 341 (N.J. 1977).

As discussed above, this Court has repeatedly acknowledged that Utah's Constitution provides stronger individual protections than does the federal Constitution. This Court disclaimed lock-stepping with the federal Constitution in *Jensen ex rel. Jensen v. Cunningham*:

> "While some of the language of our state and federal constitutions is substantially the same, similarity of language does not indicate that this court moves in lockstep with the United States Supreme Court's [constitutional] analysis or foreclose our ability to decide in the future that our state constitutional provisions afford more rights than the federal Constitution."

2011 UT 17, ¶ 46, 250 P.3d 465 (quotation marks omitted). And this Court has affirmed that "we will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens." *State v. DeBooy*, 2000 UT 32, ¶ 12, 996 P.2d 546.

Following its own directive, this Court has interpreted the Utah Constitution apart from the federal Constitution to protect the greater rights afforded to Utahns by their Constitution. Similar to other states' constitutions detailed above, this Court found that Utah's protection against unreasonable searches and seizures provides "a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court," even though the "provisions contain identical language." *DeBooy*, 2000 UT 32, ¶ 12. This Court also ruled that "the article III constitutional restrictions and federalistic prudential considerations that have guided the evolution of federal court standing law are not necessarily relevant to the development of the standing rules that apply in Utah's state courts." *Provo City Corp. v. Willden*, 768 P.2d 455, 456 (Utah 1989) (collecting cases where this Court developed standing rules distinct from federal standing rules). And this Court has recognized that "our state constitution may well provide greater protection for the free exercise of religion in some respects than the federal constitution." *State v. Holm*, 2006 UT 31, ¶ 34, 137 P.3d 726.

More recently, in 2020, when presented with an analysis of the state constitutional standards under Utah's Due Process Clause, this Court held that "[we] are of course not bound to follow precedent on federal due process in our formulation of state due process standards. And we may thus depart from the federal formulation if and when we are presented with state constitutional analysis rooted in the original meaning of the Utah due process clause." *State v. Antonio Lujan*, 2020 UT 5, ¶ 49 n.7, 459 P.3d 992, 1003. Just like the protections of the Utah Constitution recognized in those cases, here Utah's Free Elections and Uniform Operation of Laws Clauses provide stronger protections than the federal Constitution. Consistent with its precedent affirming that the Utah Constitution need not be interpreted in lockstep with the federal Constitution, this Court must "not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens," from partisan gerrymanders. *DeBooy*, 2000 UT 32, ¶ 12.

II. Utah's Constitution precludes partisan gerrymandering.

a. Utah's Free Elections Clause, like the Free Elections Clauses of sister states, precludes partisan gerrymandering.

Article I, Section 17 of the Utah Constitution provides that "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17. Partisan gerrymandering—the act of drawing electoral districts to disproportionately favor one political party—creates elections that are decidedly not free. Partisan gerrymandering distorts and manipulates Utahns' "free exercise of the right of suffrage." *Id.* From the text alone, Utah's Free Elections Clause

precludes partisan gerrymandering. Historical evidence from the drafting of Utah's Constitution and the state's admission to the United States only underscores the Free Elections Clause's promise to protect Utahns from acts of distortion and manipulation upon their "free exercise of the right of suffrage." *Id.*

In *American Bush v. City of South Salt Lake*, this Court found that "in interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." 2006 UT 40, ¶ 12, 140 P.3d 1235. In doing so, courts must "discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Id.* Therefore, this Court should interpret Utah's Free Elections Clause through the clause's text and historical accounts of the drafters' and citizens' intent and purpose at the time of drafting.[2]

Merriam-Webster includes in its definition of "free" "enjoying political independence or freedom from outside domination" as well as "not determined by anything

[2] *American Bush* is the proper standard for constitutional analysis under this Court's precedent. Petitioners distort this Court's findings in *Machan v. UNUM Life Ins. Co. of Am.* by suggesting that the language "Utah courts are reluctant to recognize an implied right," 2005 UT 37, ¶ 23, 116 P.3d 342, forbids the conclusion that the Free Elections Clause precludes partisan gerrymandering because the clause "says nothing about redistricting, politically neutral or otherwise," Pet'rs' Br. 36. This language from *Machan* is entirely unrelated to constitutional interpretation. In *Machan*, this Court found that "we have generally observed that, in the absence of *statutory* language expressly indicating a legislative intent to grant a private right of action, Utah courts are reluctant to recognize an implied right." *Machan*, 2005 UT 37, ¶ 23 (emphasis added). This Court's "reluctan[ce] to recognize an implied right" of action in that *statutory* context is irrelevant and inapplicable to its interpretation of the Utah *Constitution's* Free Elections Clause. *Id.*

beyond its own nature or being: choosing or capable of choosing for itself." Merriam Webster, *Free*, (last updated March 21, 2023), https://www.merriam-webster.com/dictionary/free. In their Motion to Dismiss, Petitioners claim that because the Utah drafters removed "and equal" from the Free Elections Clause, the drafters did not intend "to guarantee each voter's 'voting power' based on their partisan affiliation." Def's Mot. to Dismiss 21 n.16. This contention is misplaced for at least two reasons. First, the word "equal" is not necessary to conclude that the Free Elections Clause prohibits partisan gerrymandering. The word "free," alone, precludes partisan gerrymandering because drawing district lines to disproportionately favor one political party is the kind of "outside domination" alien to the word "free." Merriam Webster, *Free*, (last updated March 21, 2023), https://www.merriam-webster.com/dictionary/free. The 1891 Black's Law Dictionary similarly defines free as "[u]nconstrained . . . defending individual rights against encroachment by any person or class." *Free*, *Black's Law Dictionary* (1st ed. 1891). The act of partisan gerrymandering constrains, manipulates, and distorts the political will of the people, and, therefore, is inherently and fundamentally not free. This is especially true as to gerrymandering since it allows a majority of the legislature at a particular moment to entrench its power so that future majorities cannot control the lawmaking of a state. Any election in such a regime, where a majority is powerless, is surely not free.

Second, the historical record reflects that the drafters of Utah's Constitution were concerned with eliminating surplusage. *See Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March 1895,*

to Adopt a Constitution for the State of Utah at 229 (Salt Lake City, Star Printing Co. 1898). [hereinafter *Proceedings and Debates*]. This concern included striking the word "equal" to "improve the rhetorical construction, without changing the meaning" in another section of the Constitution. *Id.* That "equal" does not provide greater meaning to "free" in clauses such as the Free Elections Clause made it an ideal target for such elimination.

In addition to this explicit textual answer that the Free Elections Clause precludes partisan gerrymandering, the clause's historical origins demand the same conclusion. Utah's admission as a state was an iterative process. Daniel J.H. Greenwood, Christine M. Durham, & Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 649, 651 (2008) (George E. Connor & Christopher W. Hammons, eds., 2006). In seeking statehood, the first six versions of Utah's Constitution were rejected. *Id.* at 652. Then, in 1896, the federal government approved the draft prepared by the delegates to the 1895 convention (the seventh draft), which became the Utah Constitution. *Id.* at 655.

Like the earlier drafts, the accepted constitution borrowed provisions from other states' constitutions. *Id.* at 651. The drafters "relied on the principle that language imported from other states' constitutions, which Congress had already approved, would serve as a safe harbor, avoiding any potential for federal criticism." *Id.* at 655. Reflecting on this drafting process, historian Jean Bickmore White noted that "[t]he announcement that a particular proposal came from an existing constitution seemed reassuring, not a sign of lack of creativity . . . [i]n a convention dominated by lawyers, there was a clear desire to write provisions that had been accepted by Congress and had worked fairly well since

their adoption." Jean Bickmore White, *Charter for Statehood: The Story of Utah's State Constitution* 52 (1996).

This history of the drafting process led Professor John J. Flynn of the University of Utah to conclude that the Utah Constitution is a "patchwork of bits and pieces borrowed from other state constitutions by a gradual process of attempting to placate a hostile Congress." John J. Flynn, *Federalism and Viable State Government: The History of Utah's Constitution*, 1966 Utah L. Rev. 311, 324–25 (1966). Professor Flynn identified Nevada, Washington, Illinois, New York, and Pennsylvania as among the states the delegates to the 1895 constitutional convention borrowed most heavily from. *Id*. at 323–24. Thomas G. Alexander, then-professor of Western American History at Brigham Young University, Provo, confirmed that the drafters drew from other state constitutions. Thomas G. Alexander, *A Reflection of the Territorial Experience*, 64 Utah Hist. Q. 264, 264 (1996).

The records of the proceedings and debates of the 1895 constitutional convention—particularly concerning the Free Elections Clause—further demonstrate the drafters' borrowing from other states' constitutions. There was no reported debate over the Free Elections Clause in the transcript of the convention, which suggests that the clause was merely a replica of other states' free elections clauses. *Proceedings and Debates*. Indeed, Pennsylvania, Colorado, Illinois, Montana, Washington, and Wyoming—states Professors Flynn and Alexander recognized as heavily influencing the 1895 convention's delegates—all had Free Elections Clauses in their constitutions in 1895. Pa. Const. art. I, § 5; Colo. Const. art. II, § 5; Ill. Const. art. III, § 3; Mont. Const. art. I, § 5 (now reflected at art. II, § 13); Wash. Const. art. I, § 19; Wyo. Const. art. I, § 27. If this clause had been a ground-

breaking, novel concept, it would have generated the same kind of "long[] fight" other constitutional provisions created, such as the equal rights provision. Greenwood et al., *supra*, at 660–61.

The drafters' borrowing from the Pennsylvania Constitution is particularly important for discerning their intent under this Court's constitutional interpretation standard set forth in *American Bush*. Flynn, *supra*, at 324; *Am. Bush*, 2006 UT 40, ¶ 12. Article VI, Section 26 of the Utah Constitution forbids "private or special law[s] . . . where a general law can be applicable." Utah Const. art. VI, § 26. This language "was taken almost verbatim" from the Congressional Act of 1886, which was based on Article III, Section 6 of the Pennsylvania Constitution of 1874. Flynn, *supra*, at 324.

This connection between the Utah and Pennsylvania constitutions alongside the fact that both constitutions include free elections clauses is fruitful in discerning the Utah drafters' intent under the *American Bush* standard. Relying on the constitutional text and related history of the clause, the Pennsylvania Supreme Court has recognized that their Free Elections Clause precludes partisan gerrymandering. *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 814 (2018) .[3] That court ruled that "[a]n election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not free and equal" and that "[i]n such circumstances, a power, civil or military, to wit, the

[3] The Pennsylvania Constitution is among the oldest state constitutions and served as a source for many other state constitutions. While the North Carolina Supreme Court has recently followed the federal courts in holding partisan gerrymandering claims non-justiciable, the Pennsylvania Supreme Court, interpreting a document known to be a source for Utah's Constitution, has found these claims justiciable.

General Assembly, has in fact interfere[d] to prevent the free exercise of the right of suffrage" in violation of Pennsylvania's Free Elections Clause. *Id.* (quoting Pa. Const. art. 1, § 5) (internal quotation marks omitted).

Pennsylvania's Free Elections Clause originated from the English Bill of Rights of 1689, as did analogous clauses in other early states of our nation. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 289 (2021). "As states began enacting constitutions after our Nation declared independence, the Framers of those Constitutions, still wary of executive power, adopted provisions similar to that in the 1689 English Bill of Rights." *Wolf v. Scarnati*, 660 Pa. 19, 53, 233 A.3d 679, 700 (2020). Pennsylvania's Free Elections Clause reflected the personal history of the delegates to the Pennsylvania Constitutional Convention and their desire to "establish[] a critical 'leveling' protection in an effort to establish the uniform right of the people of this Commonwealth to select their representatives in government." *League of Women Voters*, 178 A.3d at 807; *see* John L. Gedid, *History of the Pennsylvania Constitution*, *in* THE PENNSYLVANIA CONSTITUTION A TREATISE ON RIGHTS AND LIBERTIES 48 (Ken Gormley ed., 2004).

The origins of American free elections clauses in the English Bill of Rights of 1689 further confirm that these clauses prohibit partisan gerrymandering. The Free Elections Clause was included in the English Bill of Rights of 1689 following the "Glorious Revolution" to address the King's subversion of democracy through manipulating parliamentary elections. J.R. Jones, *The Revolution of 1688 in England* 148 (1972). The King performed this manipulation through the "rotten boroughs" system—the 1600s

England version of modern-day partisan gerrymandering. For years, the King regularly distorted control of parliament by altering or malapportioning districts (called "boroughs" at the time) to ensure a government loyal to and in favor of the monarch. *See* Ross, *supra*, at 256. This distortion of political districts to deliver the King's desired results became known as the "rotten boroughs" system. *Id*.; *see also Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).

The victims of the "rotten boroughs" system strongly opposed this political manipulation, and their shared opposition to this system was a motivating factor prompting the Glorious Revolution and eventual passage of the English Bill of Rights in 1689. *See Harper*, 868 S.E.2d at 541–42. The Free Elections Clause of the English Bill of Rights states that "[e]lection of Members of Parliament ought to be free." Bill of Rights, 1689, 1 W. & M., Sess. 2 c. 2 (Eng.). This provision was a "central feature of the English Bill of Rights" included to eliminate the distortion and manipulation of the political process the King's rotten boroughs system created and to ensure "an independent Parliament through free elections." Ross, *supra*, at 221–22, 289.

The memory of the rotten boroughs system was still fresh in the American Revolutionary era, during which the Founders were equally committed to ensuring a political system free of manipulation and distortion. *See, e.g.*, McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 Hastings L.J. 1509, 1537 (2018) ("The Framers were responding to the lack of representation afforded them as colonists, in conjunction with fresh memory of rotten boroughs that corrupted England's representative system."). With the Pennsylvania constitution adopted in 1776—

more than a decade before the U.S. Constitution in 1789—the delegates to the Pennsylvania constitutional convention were undoubtedly influenced by their English forebearers and British rule.

The Utah Constitution has further connections to the English Bill of Rights in addition to its ties from adopting provisions from states including Pennsylvania. In fact, Petitioners agree that Utah's Free Elections Clause has its roots in the English Bill of Rights and other states' constitutions. Pet'rs' Br. 40. And this Court has already expressly recognized that at least one provision in the Utah Constitution—Article I, Section 9—originated in the English Bill of Rights of 1689. *See Bott v. Deland*, 922 P.2d 732, 737 (Utah 1996) (finding that Utah's cruel and unusual punishment clause originated from the English Bill of Rights of 1689), *abrogated by Spackman ex rel. Spackman v. Bd of Educ. of Box Elder Cnty. Sch. Dist.,* 2000 UT 87, 16 P.3d 533; *see also State v. Houston,* 2015 UT 40, ¶¶ 166–70, 353 P.3d 55, (Lee, J. concurring) (discussing the English Bill of Rights and English origins of protection against "cruel and unusual punishment").

This Court also recognized in *American Bush* that "the drafters of the Utah Constitution borrowed heavily from other state constitutions[,] . . . the United States Constitution[,]" and English common law. *Am. Bush*, 2006 UT 40, ¶ 31. Professor Alexander confirmed this connection between the Utah Constitution and English common law in his conclusion that "[i]nitially, both New Mexico and Utah rejected English common law because of existing Mexican civil law and Mormon customary law . . . [but] [i]n both territories pressure from national interests, especially from federal judges, forced the

adoption of the national system of English common law which both territories incorporated into their state constitutions." Alexander, *supra*, at 279.

The Free Elections Clause was not the only way in which the Utah drafters demonstrated their commitment to expansively protecting voting rights in their constitution. Greenwood et al., *supra*, at 660–61. For example, "after the 'longest fight in the convention' and despite fears that it might endanger congressional approval," Utahns added "one of the earliest guarantees of equal rights of women" in Article IV, Section 1, which protected women's right to vote. *Id.* Further, in a rare moment of departure from other states' constitutions, the Utah drafters explicitly removed a literacy requirement for enfranchisement. *Id.* Under the *American Bush* standard, this intent of the drafters to expand and protect voting rights must inform constitutional interpretation in Utah.

The textual and historical analysis of Utah's Free Elections Clause demonstrates how and why it precludes partisan gerrymandering. The history of the drafting of Utah's Constitution reveals the drafters' commitment to protecting and expanding Utahns' voting rights as well as preventing tyrannical forces from manipulative acts like partisan gerrymandering. Under its standard in *American Bush*, this Court should conclude that the Free Election Clause precludes partisan gerrymandering. Doing so is the only way to "operationalize the state constitutional commitment to popular sovereignty and political equality" that the Free Elections Clause embodies, for "partisan gerrymandering . . . entails legislative self-dealing that at once undermines the ability of the people to share equally in the power to influence government and confers special treatment on members of one political party." Bulman-Pozen & Seifter, *supra*, at 911.

b. Utah's Uniform Operation of Laws Clause similarly extends farther than the federal Equal Protection Clause and precludes partisan gerrymandering.

Utah's Constitution provides Utah voters a second protection against partisan gerrymandering—the Uniform Operation of Laws Clause. Article I, Section 24 of the Utah Constitution states that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. While this provision "embod[ies] the same general principle" as the federal Equal Protection Clause, *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984), this Court has continuously emphasized that Utah's Uniform Operation of Laws Clause "establishes different requirements than does the federal Equal Protection Clause." *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995). And under those requirements, partisan gerrymandering—as discrimination related to the fundamental right to vote—triggers a heightened scrutiny that such gerrymandering cannot survive.

Under Utah's Uniform Operation of Laws Clause, Utahns enjoy protections distinct from, and stronger than, the federal Equal Protection Clause. Like the federal Equal Protection Clause, Utah's Uniform Operation of Laws Clause stands for the proposition that "persons similarly situated should be treated similarly . . . ." *Malan*, 693 P.2d at 669. Article I, Section 2 of the Utah Constitution confirms this basic idea, affirming that "all free governments are founded on [the people's] authority for [the people's] equal protection and benefit." Utah Const. art. I, § 2. But this "similarity in the stated standards under [the Uniform Operation of Laws Clause and the federal Equal Protection Clause] does not amount to complete correspondence in application." *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988).

Instead, as this Court has stressed time and time again, its "construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause." *Malan*, 693 P.2d at 670; *see also Mohi*, 901 P.2d at 997 (reiterating that the Uniform Operation of Laws Clause "establishes different requirements than does the federal Equal Protection Clause"); *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 426 (Utah 1995) ("[L]anguage from federal equal protection analysis under the Fourteenth Amendment . . . is not readily transposed to the . . . test [this Court] appl[ies] under the uniform operation of laws provision of the Utah Constitution."). In fact, this Court has developed legal standards under the Uniform Operation of Laws Clause that are "at least as exacting and, in some circumstances, *more rigorous* than the standard applied under the federal constitution." *Mountain Fuel*, 752 P.2d at 889 (emphasis added); *see also Blue Cross & Blue Shield of Utah v. State Tax Comm'n*, 779 P.2d 634, 637 (Utah 1989). Those different standards "can produce different legal consequences," *Lee v. Gaufin*, 867 P.2d 572, 577 (Utah 1993), in part because Utah's Uniform Operations of Laws Clause protects against discriminatory effects in ways the federal Equal Protection Clause does not.

Unlike the federal Equal Protection Clause, Utah's Uniform Operation of Laws Clause, based on its plain terms and history, "guards against disparate effects in the application of laws," *Gallivan v. Walker*, 2002 UT 89, ¶ 38, 54 P.3d 1069. *Compare id.* (explaining that "the equal protection principle inherent in [Utah's] uniform operation of laws provision . . . guards against disparate effects in the application of laws) *with Washington v. Davis*, 426 U.S. 229, 239 (1976) (rejecting the "proposition that a law or

other official act . . . is unconstitutional [under the federal Equal Protection Clause] solely because it has a . . . disproportionate impact"). The plain terms of Article I, Section 24 of Utah's Constitution focus on the uniform *operation* of laws. Thus, "it is not enough that [a law] be uniform on its face. What is critical is that the *operation* of the law be uniform." *Lee*, 867 P.2d at 577 (emphasis in original); *see also Blackmarr v. City Ct. of Salt Lake City*, 38 P.2d 725, 727 (Utah 1934) (emphasizing that laws cannot "operate unequally, unjustly, and unfairly upon those who come within the same class"). The Uniform Operation of Laws Clause's historical antecedents confirm this conclusion. "Historically, uniform operation provisions were understood to be aimed at . . . practical *operation*." *State v. Canton*, 2013 UT 44, ¶ 34 & n.7, 308 P.3d 517 (elaborating that "uniform operations clauses originally reflected an '*opposition to favoritism and special treatment for the powerful*,' and explaining that '[a]lthough these provisions may seem to overlap somewhat with federal equal protection doctrine, closer scrutiny reveals significant differences'") (quoting Robert F. Williams, *The Law of American State Constitutions* 209–13 (2009)) (emphasis added).

Accordingly, this Court has developed a three-part test to assess whether statutes or government actions violate the Uniform Operation of Laws Clause. It asks: (1) "what classifications the statute creates," (2) "whether different classes . . . are treated disparately," and (3) "whether the legislature had any reasonable objective that warrants the disparity among any classifications." *DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 49, 364 P.3d 1036. Step three of this inquiry "incorporates varying standards of scrutiny," with heightened scrutiny applying to cases involving "discrimination on the

basis of a fundamental right." *Id.* at ¶ 50. This well-established test allows this Court to assess partisan gerrymandering claims under the Utah Constitution. And applying that test here demonstrates partisan gerrymandering violates Utah's Constitution for it arbitrarily classifies and disparately impacts politically disfavored voters in a way that dilutes their fundamental right to vote.

Partisan gerrymandering that classifies voters by both geographic location and partisan affiliation to diminish the strength of votes for a certain party. Such classifications satisfy the first two prongs of this Court's Uniform Operation of Laws test. In *Gallivan* this Court held that a multi-county signature requirement on the ballot initiative process violated Utah's Uniform Operation of Laws Clause in part because it: (1) created "two subclasses of registered voters: those who reside in rural counties and those who reside in urban counties," *Gallivan*, 2002 UT 89, ¶ 44; and (2) treated "similarly situated registered voters disparately" by requiring prospective ballot initiatives to be signed by a specific percent of voters in twenty of Utah's twenty-nine counties, thereby "diluting the power of urban registered voters and heightening the power of rural registered voters in relation to an initiative petition." *Id.* ¶ 45. The multi-county signature requirement created these disparate effects in part by exploiting "Utah's uniquely concentrated population." *Id.*

Partisan gerrymandering fares even worse under the Uniform Operation of Laws test than the multi-county signature requirement in *Gallivan* did. First, partisan gerrymanders can classify voters on not just one, but two bases: geographic location (as in *Gallivan*) *and* partisan affiliation. *See* Compl. ¶¶ 4, 207–27, 274–76. This sorting clearly creates the "classifications" that the Court in *DirectTV* used as the first prong of its test.

Second, just as in *Gallivan*, the sorting of voters on the basis of party leads to favored factions having "a disproportionate amount of power" in the political process, *Gallivan*, 2002 UT 89, ¶ 45. *See* Compl. ¶¶ 30–33, 36, 187–98, 265, 275–76. Such gerrymanders—that "dilut[e] the power of [one group of voters] and heighten[] the power of [another group of voters]," *Gallivan*, 2002 UT 89, ¶ 45—classify and disparately affect similarly situated Utahns differently, thereby fulfilling the second prong of the Court's test.

As a discriminatory act implicating the fundamental right to vote, partisan gerrymandering triggers a heightened scrutiny in the third prong of Utah's Uniform Operations of Law test. "For decades" this Court has repeatedly reinforced that "the right to vote is a fundamental right." *Gallivan*, 2002 UT 89, ¶ 24; *see also Utah Pub. Emps. Ass'n v. State*, 610 P.2d 1272, 1273 (Utah 1980) ("[T]he catalog of fundamental interests . . . includes such things as the right[] to vote . . . ."). Indeed, in *Gallivan,* this Court reinforced that:

> "[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

Gallivan, 2002 UT 89, ¶ 24 (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964)). The right to vote thus triggers heightened scrutiny not "just because it is important to the aggrieved party," but because it "form[s] an implicit part of the life of a free citizen in a free society." *Utah Pub. Emps. Ass'n*, 610 P.2d at 1273 (Utah 1980). The right to vote is "sacrosanct," and "Utah courts must defend it against encroachment and maintain it inviolate." *Gallivan*, 2002 UT 89, ¶ 27. Partisan gerrymandering dilutes the worth of

certain Utahns' fundamental right to vote, and this Court must use its authorities under the Utah Constitution to defend against that encroachment, just as it did in *Gallivan*.

Partisan gerrymanders plainly implicate the fundamental right to vote. In *Gallivan*, this Court recognized that a statute requiring prospective ballot initiatives to receive the signatures of a certain percent of registered voters in twenty of Utah's twenty-nine counties impacted the fundamental right to vote because "Utah's uniquely concentrated population," *id.* ¶ 45, meant the requirement "ha[d] the effect of heightening the relative weight of the signatures of registered voters in rural, less populous counties and diluting the weight of the signatures of registered voters in urban, more populous counties . . . ," *id.* ¶ 34. Partisan gerrymanders affect the fundamental right to vote for this same reason. And as such, partisan gerrymanders must survive heightened scrutiny.

To survive heightened scrutiny, one would need to demonstrate that a partisan gerrymander is "reasonably necessary to further, and in fact . . . actually and substantially further[s], a legitimate legislative purpose." *Gallivan*, 2002 UT 89, ¶ 42. But partisan gerrymandering does not actually and substantially further any legitimate legislative purposes. Privileging the votes of one set of geographically located voters over those of differently geographically located voters does not actually and substantially further a legitimate legislative purpose. *Cf. id.* ¶¶ 50, 59 n.11, 59–61. Empowering voters of one political party at the expense of voters in other parties also does not actually and substantially further a legitimate legislative purpose. *Cf. Midvale City Corp. v. Haltom*, 2003 UT 26, ¶ 16, 73 P.3d 334, 339 (recognizing claim of viewpoint discrimination where the government "suppress[es] disfavored speech or disliked speakers").

It is this Court's "province to decide the vital and determinative question of whether a classification operates uniformly on all persons similarly situated within constitutional parameters," *Gallivan*, 2002 UT 89, ¶ 38 (internal quotations omitted). Partisan gerrymanders do not operate uniformly on similarly situated Utahns; they impermissibly infringe on some Utahns' sacrosanct right to vote to heighten others' voting powers.

CONCLUSION

For the foregoing reasons, this Court must exercise its independent authority and duty in our federalist system to protect the rights enshrined in the Utah Constitution, by holding that claims of partisan gerrymandering are justiciable under the Utah Constitution's Free Elections and Uniform Operation of Laws Clauses.

DATED this 19th day of May, 2023.

RESPECTFULLY SUBMITTED
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief contains 6,935 words, excluding any tables or attachments, in compliance with Utah R. of App. P. 25(f).
2. This brief complies with Utah R. App. P. 21(h) regarding public and non-public filings.

DATED this 19th day of May, 2023.

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I hereby certify that on the 19th day of May, 2023, I caused the foregoing to be served via email on the following:

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IN THE SUPREME COURT OF UTAH

No. 20220991-SC

UTAH STATE LEGISLATURE, *et al.*,

Petitioners,

v.

LEAGUE OF WOMEN VOTERS OF UTAH, *et al.*,

Respondents.

Review of the Ruling and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, entered on November 22, 2022, at No. 220901712, in the Third Judicial District Court for Salt Lake County

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF UTAH IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

NOTICE AND CONSENT PURSUANT TO RULE 25(E)

Counsel for the parties received timely notice.

All parties consented to the filing of this amicus brief.

ADDENDUM

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with approximately 1.6 million members. The ACLU is dedicated to the principles of liberty and equality embodied in the U.S. and state Constitutions and our nation's civil rights laws, including the rights to free speech, expression, and association, and laws protecting the right to cast a meaningful vote. The ACLU litigates cases aimed at preserving these rights and has regularly appeared before courts throughout this country to vindicate them, including before the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (*amici curiae*).

The ACLU of Utah is a statewide affiliate of the national ACLU and is dedicated to these same principles. The ACLU of Utah has appeared before this Court in cases involving free expression and electoral democracy, including *Utahns for Ethical Gov't v. Greg Bell & Mark Shurtleff*, 2012 UT 90, 291 P.3d 235 (*amici curiae*), and *Bushco v. Utah State Tax Comm'n*, 2009 UT 73, 225 P.3d 153 (*amici curiae*). No one other than *amici curiae* and their counsel paid in any part for or authored any part of this brief.

INTRODUCTION

The Utah Constitution guarantees Utahns the right to meaningful political participation, free from viewpoint-based interference. It is emphatically the province of this Court to safeguard that right, including and especially when it intersects with partisan politics. Thus, it is this Court's duty to ensure that voters and political parties themselves may participate in the marketplace of ideas. It is equally this Court's duty, under the Utah Constitution, to ensure that a political party does not manipulate that marketplace by trampling on the rights of others.

But that is exactly what is happening here. In this case, a political party, acting through the Legislature, has discriminated against Utahns based on how they exercise their rights to political expression—that is, based on how they vote, speak, and associate. Accordingly, Article I, Sections 1 and 15 of the Utah Constitution mandate that this Court strike that action down unless it satisfies heightened scrutiny. Utah Const. art. I, § 1. Utah Const. art. I, § 15.

In 2018, Utah voters adopted Proposition 4, a bipartisan initiative that expressly prohibited partisanship in the redistricting process and empowered the Utah Independent Redistricting Commission ("UIRC") to

draw maps unvarnished by partisan gerrymandering. But the UIRC's maps have never been implemented. In 2020, in direct contravention of the voters who adopted Proposition 4, the Legislature passed SB 200. SB 200 gutted Proposition 4, recast the UIRC as a mere advisory entity, and purported to restore the Legislature's unfettered authority to draw anti-democratic maps that weigh the voices of some voters more heavily than others.

The Legislature quickly exercised that asserted authority and drew that map. In 2021, the Legislature's majority party entrenched its political power by drawing a congressional map (the "Plan") that discriminated against Utahns whose political expression aligns with an opposition political party. For example, the Plan cracked Salt Lake City voters into four districts in a bid to prevent them—because of their political votes, speech, and associations—from electing legislators of their choosing.

The Legislature's actions disregarded the express commands of Proposition 4 and offended the integrity of the election process that is fundamental to a functional democracy. Partisan gerrymandering, moreover, is unconstitutional viewpoint discrimination because it

burdens the political speech and expressive conduct of voters who favor the minority party. The Utah Constitution compels this Court to remedy these corrosive harms.

As explained below, and as laid out in Respondents' brief, partisan gerrymandering claims are both justiciable in Utah courts and subject to heightened scrutiny under Article I, Sections 1 and 15 of the Utah Constitution.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE SUBJECT TO HEIGHTENED SCRUTINY UNDER ARTICLE I, SECTIONS 1 AND 15 OF THE UTAH CONSTITUTION.

Under Utah law, if a law or practice "affects fundamental . . . rights guaranteed by and reserved to the citizens of Utah in the Utah Constitution, [this Court] review[s] the challenged law with heightened scrutiny." *Gallivan v. Walker*, 2002 UT 89, ¶ 42, 54 P.3d 1069; *see also DIRECTV 34 v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 50, 364 P.3d 1036; *State v. Canton*, 2013 UT 44, ¶ 36, 308 P.3d 517 ("[C]lassifications implicating fundamental rights" trigger heightened scrutiny). When heightened scrutiny applies, "the burden of proof shifts to the State to show that a challenged provision" is appropriately tailored to advance a

sufficiently strong state interest. *Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*, 2004 UT 32, ¶ 24, 94 P.3d 217.

Sections 1 and 15 of Article I of the Utah Constitution (together, the Utah Constitution's "expression provisions") protect several such fundamental, constitutional rights that implicate heightened scrutiny—namely, the rights to free speech, association, and expression. Section 1 protects the rights of Utahns "to communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, § 1. Section 15 guards against laws "passed to abridge *or* restrain the freedom of speech." Utah Const. art. I, § 15 (emphasis added). This latter provision cements "[t]he cornerstone of democratic government" and "foundation principle of our state": "the conviction that governments exist at the sufferance of the people . . . ." *Kearns-Trib. Corp., Publisher of Salt Lake Trib. v. Lewis*, 685 P.2d 515, 521 (Utah 1984) (quoting *In re J.P.*, 648 P.2d 1364, 1372 (Utah 1982)).

Since Article 1, Sections 1 and 15 are "both directed toward expression, it is entirely appropriate, in fact necessary," that this Court "construe these two provisions together." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 18, 140 P.3d 1235. It is settled that these expression

provisions' "protections may be broader" than "those offered by the First Amendment" where constitutional "language, history, and interpretation" so instruct. *Am. Bush*, 2006 UT 40, at ¶ 9 (internal citations omitted).[1]

Put simply, the Plan manipulates elections to privilege some viewpoints over others. As such, it directly implicates the rights protected by the expression provisions because it constitutes the purposeful dilution of votes, expression, and association by disfavored voters. As Respondents allege in their Complaint, the Plan divides communities, *see* Pls.' Compl. ¶¶ 242–51, and prevents voters who support the minority party from effectively associating with each other, politically mobilizing and organizing, and otherwise expressing themselves in the political process, *see id.* ¶¶ 289–94.

"In interpreting the state constitution," this Court "look[s] primarily to the language of the constitution itself but may also look to historical and textual evidence, sister state law, and policy arguments . .

[1] This Court, when considering the "historical background against which Article I of the Utah Constitution was drafted," has also concluded that the Utah Constitution "provides an independent source of protection for expressions of opinion." *West v. Thomson Newspapers*, 872 P.2d 999, 1013 (Utah 1994).

. to assist [it] in arriving at a proper interpretation of the provision in question." *State v. Gardner*, 947 P.2d 630, 633 (Utah 1997) (internal citations omitted). As shown below, the expression provisions' plain text compels the conclusion that the Plan is a significant burden on Respondents' constitutionally protected expressive and associational activity. The framers' intent compels that conclusion as well. So do the decisions of other state supreme courts, which counsel that where, as in Utah, the state constitution broadly protects political expression, it safeguards voters against the manipulation of elections to privilege some viewpoints over others. And so do the principles reflected in federal First Amendment jurisprudence, which can help inform how to interpret the Utah Constitution's expression provisions. All these interpretive tools point to the same conclusion: the Plan burdens Respondents' fundamental speech, expressive, and associational rights and is thus subject to heightened scrutiny under the robust expression provisions in the Utah Constitution.

A. Partisan Gerrymandering Burdens the Speech and Associational Rights Enshrined in the Utah Constitution's Plain Text.

To start, the Court ought to look to the Utah Constitution's plain text. *See Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶ 15, 466 P.3d 178 ("In matters of constitutional interpretation, our job is first and foremost to apply the plain meaning of the text." (internal quotation marks omitted)). The constitution must be "read . . . as a whole, giving effect to all [its] provisions." *West v. Thomson Newspapers,* 872 P.2d 999, 1015 (Utah 1994); *cf. Am. Bush*, 2006 UT 40, ¶ 18 ("Other provisions dealing generally with the same topic . . . assist [the Court] in arriving at a proper interpretation of the constitutional provision in question." (quoting *In re Worthen*, 926 P.2d 853 (Utah 1996)). Generally, "in construing a particular section [of Utah's Constitution] the court may refer to any other section or provision to ascertain what was the object, purpose, and intention of the Constitution makes in adopting such section." *State v. Eldredge*, 76 P. 337, 339 (1904). Indeed, regarding the expression provisions specifically, the Court has explained that "article I, section 15," in particular, must "be read in conjunction with other constitutional provisions." *Am. Bush*, 2006 UT 40, ¶ 18. Here, that holistic reading

demonstrates that the Utah Constitution prohibits vote dilution based on political association.

As noted, Article I, Sections 1 and 15 are expansive provisions that protect some of the most critical rights enshrined in the state constitution. Looking at other provisions in the Utah Constitution, the metes and bounds of legislative authority are enshrined in Article I, Section 2's guarantee that "[a]ll political power is inherent in the people." Utah Const. art. I, § 2. That provision reflects a decision to preserve Utahns' rights to self-representation and "circumscribe[] the limits beyond which their elected officials may not tread." *Am. Bush*, 2006 UT 40, ¶ 14. It makes the will of the people paramount, and "tie[s] up alike" Utahns' "own hands and the hands of their agencies," such that "neither [] officers of the State, nor the whole people as an aggregate body" may "take action [and] oppos[e]" it. *Id.* n.5 (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union* 28 (Leonard W. Levy, ed., Da Capo Press 1972) (1868)).

This Court has recognized that the political-power guarantee of Article 1, Section 2, is a "foundation principle of our state constitutional

law." *Kearns-Trib. Corp., Publisher of Salt Lake Trib.*, 685 P.2d at 521. Section 15 commands: "No law shall be passed to abridge or restrain the freedom of speech." Utah Const. art. I, § 15. Particularly when considered in conjunction with Section 2, the "speech" protected by Section 15 necessarily encompasses political expression, including voting for, supporting, and associating with a political party. And by depriving elected officers the opportunity to "abridge or restrain the freedom of speech," *id.*, Section 15 ensures Utahns can freely engage in political expression, retain the political power reserved to them by Section 2, and shape their government "at the[ir] sufferance," *Kearns-Trib. Corp., Publisher of Salt Lake Trib.*, 685 P.2d at 521.

Conversely, Article I, Section 15 denies the Legislature the power to usurp the people's prerogative to choose their representatives—the "cornerstone of democratic government." *Id.* Ultimately, the clause protects this "foundation principle," which is "fundamental to the effective exercise of the ultimate political power of the people." *Id.*

Against this constitutional backdrop, partisan gerrymandering constitutes a frontal assault on the free expression guaranteed by Sections 1 and 15, and, with it, the political power guaranteed by Section

2. The Legislature's adoption of the Plan gave certain Utahns less of a voice in electing members of the Legislature based on their political expression and association, which is straightforward expression and viewpoint discrimination. In an analogous situation, a Utah governmental entity cannot give some Utahns with government-favored viewpoints more weight than others when deciding how to apportion permits for parades or demonstrations. Likewise, the Legislature cannot disfavor certain Utahns' viewpoint and expression when deciding how to apportion seats in the Legislature.

Other provisions in the Utah Constitution establish that the Plan burdens Utahns' speech and associational rights. Interpreting the right and power of initiative under Article VI, Section 1, for example, this Court emphasized that the right to vote enshrined in the Utah Constitution is a "fundamental right" and that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Gallivan*, 2002 UT 89, ¶ 24 (quoting *Reynolds v. Sims,* 377 U.S. 533, 560 (1964)); *cf. Laws v. Grayeyes*, 2021 UT 59, ¶ 61, 498 P.3d 410 ("the right to vote is sacrosanct"). The right to vote under the Utah Constitution's

initiative power protects "the right of qualified voters, regardless of their political persuasion, to cast their votes *effectively*" and "the right of individuals to associate for the advancement of political beliefs." *Gallivan*, 2002 UT 89, ¶ 26 (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)) (emphasis added). Similarly, Article IV, Section 1 guarantees the right to vote for women and stands out among sister state constitutions for its scope and breadth. Utah Const. art. IV, § 1; *see generally* Carrie Hillyard, *The History of Suffrage and Equal Rights Provisions in State Constitutions*, 10 B.Y.U. J. Pub. L. 117, 126–29, 137 (1996).[2]

These many provisions, read together, show not just that the Utah Constitution broadly protects free speech, association, expression, and suffrage, but that these constitutional rights are inextricably bound. The

[2] Other provisions in the Utah Constitution also codify the interconnected rights to effective representation and free speech and association. Utah Const. Art. I, Sec. 17, expresses Utahns' commitment to the free exercise of the franchise, providing: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." That provision "guarantees the qualified elector the free exercise of his right of suffrage." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942). The Utah Constitution preamble further demands that, overall, "the principles of free government" guide the document's construction. Utah Const. Preamble.

Plan places a significant burden on all of these interconnected fundamental rights, triggering heightened scrutiny.

B. Constitutional History Shows the Framers' Intent to Eliminate Excessive Partisanship From the Apportionment Process.

Constitutional history confirms what the text makes plain. The framers of Utah's Constitution did not intend for partisanship to ever override the people's will or drive the apportionment process. To the contrary, the record shows that they drafted the Constitution with the opposite intent in mind. As one framer Arthur Cushing put it, "freedom of election and equality of representation" were "fundamental" principles of the Constitution. *Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah*, 1895 Leg., 1st Sess., Day 2 https://le.utah.gov/documents/conconv/utconstconv.htm [hereinafter *Proceedings*].

In another example, when debating apportionment proposals during the Utah constitutional convention, delegate Charles Crane stated:

> "I believe that I can speak for every member on the subject of apportionment, that I do not believe for one moment that a

> partisan sentiment, or a thought of party aggrandizement of power, entered into this apportionment in any shape or form."

Proceedings, 1895 Leg., 1st Sess., Day 37. Varian answered that he did not offer a specific amendment that would have required each county to have one representative in any legislative apportionment "on the basis of partisanship" either. *Id.* And later in the debate, Edward Snow emphasized the importance of "deal[ing] fairly and justly" in apportionment rather than using "selfish or improper motives," noting that supporting an apportionment proposal most "favorable to the party to which [he] belong[ed]" would be such a motive. *Proceedings*, 1895, Leg. 1st Sess., Day 38.[3]

Cases that predate the Utah Constitution are also consistent with these statements. Before 1895, the Utah Supreme Court had already made clear that the right to vote is "fundamental" and that "no legal voter

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[3] Utah's delegates were not alone in decrying partisan gerrymandering at the time. Before 1895, across several states including Massachusetts, New Jersey, and New York, legislators and members of the public condemned attempts at partisan gerrymandering as unjust, undemocratic, and violative of voters' rights. *See* Br. of Amici Curiae Historians in Support of Appellees, *Gill v. Whitford*, 2017 WL 4311107, at *27 (U.S. 2017). Indeed, in 1891, President Benjamin Harrison denounced partisan gerrymandering as a form of "political robbery." *Id.* at *29.

should be deprived of that privilege by an illegal act of the election authorities." *Ferguson v. Allen*, 26 P.570, 573 (1891). It went on: "All other rights, civil or political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system." *Id*. at 570, 574.

The historical record leaves no doubt: the framers rejected partisan aggrandizement in the strongest possible terms. These statements offer compelling evidence that the constitution they drafted abhors partisan excesses in redistricting as violative of fundamental rights.

C. Sister States' Constitutions Demonstrate that Partisan Gerrymandering Burdens Speech and Associational Rights.

Decisions interpreting other state constitutions offer further compelling authority that, properly interpreted, the expression provisions of Utah's Constitution prohibit discriminating against voters due to partisan affiliation. *See generally People v. City Council of Salt Lake City*, 64 P. 460, 462–63 (1900) (taking note of sister state interpretations of similar constitutional provisions and practical considerations like the Constitution's "future operation"). The Utah Constitution "borrow[s] heavily from" other state constitutions. *Am.*

Bush, 2006 UT 40, ¶ 31. As a result, court decisions interpreting similar state constitutional provisions are strong authority when interpreting the expression provisions. *Id.* ¶ 11; *see also Kearns-Trib. Corp., Publisher of Salt Lake Trib.*, 685 P.2d at 522; *Zimmerman v. Univ. of Utah*, 2018 UT 1, ¶ 19, 317 P.3d 78 (2018) ("If a decision from another court on a state constitutional question includes analysis that persuades us as to the correct interpretation of our constitution, we may certainly look to such decisions.").

As a threshold matter, by the time of Utah's Constitutional Convention, multiple state supreme courts had already held that political gerrymanders violated state constitutional rights. In Wisconsin, for example, the state's Supreme Court held in 1892 that its constitution's limitations on "equal representation in the legislature" were "adopted upon the express ground[s] that they would prevent the legislature from gerrymandering the state." *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 729–30 (Wis. 1892). Courts in Idaho, Indiana, and Michigan, among others,[4] were in accord. *See Ballentine v. Willey*, 31 P. 994, 997 (Idaho 1893) ("Whenever the legislature undertakes to deny the right of

[4] *See also* Appellees and Cross-Appellants' Br. at 4–5, n.1 (citing cases).

the people [to] . . . a just and fair representation . . . it is not acting within the scope of its authority."); *Parker v. State ex rel. Powell*, 32 N.E. 836, 840–41 (Ind. 1892) (recognizing and "securing" "[t]he cardinal principle of free representative government, that the electors shall have equal weight in exercising the right of suffrage"); *Giddings v. Blacker*, 52 N.W. 944, 946 (Mich. 1892) ("Equality in [representation] lies at the basis of our free government.").[5]

More recently, judicial decisions in Maryland and Pennsylvania, two states with free expression provisions comparable to those in the Utah Constitution, have struck down maps for violating their respective state constitutions. Last year, a Maryland court held that a partisan gerrymander violated that state's free speech safeguards, which extend broader than the First Amendment when "necessary to ensure that the rights provided by Maryland law are fully protected." *Szeliga v. Lamone*,

[5] Concurring in the judgment in *Giddings*, Chief Justice Morse called political gerrymandering an "outrageous practice" that "threatens not only the peace of the people, but the permanency of our free institutions." *Giddings*, 52 N.W. at 948 (Morse, C.J., concurring). He noted that "[t]he courts alone, in this respect, can save the rights of the people and give to them a fair count and equality in representation" because "the people themselves cannot right this wrong." *Id.*

No. C-02-CV-21-001816, 2022 WL 2132194, at *18 (Md. Cir. Ct. Mar. 25, 2022) (attached herein as Appendix A). In its analysis of Maryland's Constitutional Convention, the court noted that the intent of the state's constitutional delegates—much like that of Utah's framers, *see infra*—was to "inhibit[] the creation of an engine of oppression to accomplish party ends by whatever party might hold for a time the reins of power to suppress the voice of the people." *Id.* at *14 (quoting *Proceedings and Debates of the 1864 Constitutional Convention*, Volume 1 at 1332).

In Pennsylvania—a state with constitutional provisions this Court has held up as "progenitors" to Utah's speech protections, *Am. Bush*, 2006 UT, ¶ 31—the state supreme court in 2018 invalidated a redistricting map as an unconstitutional partisan gerrymander, albeit under the state's Free and Equal Elections Clause. *League of Women Voters v. Commonwealth*, 645 Pa. 1, 96–97 (Pa. 2018). In particular, the Pennsylvania Supreme Court explained that, at the time of the Pennsylvania constitutional convention, "gerrymandering was regarded as one of the most flagrant evils and scandals of the time, involving notorious wrong to the people and open disgrace to republican institutions." *Id.* at 119 (quoting Thomas Raeburn White, *Commentaries*

on the Constitution of Pennsylvania 61 (1907) (internal quotation marks omitted)).

D. The Government's Duty to Be Neutral—Particularly in Elections and Voting—Is Central to Guaranteeing Speech and Associational Rights.

Utah courts often look to federal First Amendment principles in interpreting the guarantees of expressive rights in the Utah Constitution. Utah's federal district court has observed that "[i]n [] several cases in which the Utah Supreme Court has discussed the interpretation of [expression provisions] of the Utah Constitution, federal case law has been cited and relied upon." *Baird v. Cutler*, 883 F. Supp. 591, 605–06 (D. Utah 1995); *see also, e.g.*, *Utah Safe to Learn-Safe to Worship Coal., Inc.*, 2004 UT 32, ¶ 57, 94 P.3d 217 (relying on federal case law to conclude that "the regulatory provisions at issue in th[e] case" did not "impinge" on Article I, Section 15); *W. Gallery Corp. v. Salt Lake City Bd. Of Comm'rs*, 586 P.2d 429, 431–32 (Utah 1978) ("examin[ing] . . . pronouncements of the federal judiciary," on prior restraint to determine whether obscenity ordinance violated Article I, Section 15). While Utah's Constitution provides greater protection for free speech guarantees, *see supra*, "[t]he First Amendment [still] creates a broad,

uniform 'floor' . . . of protection that state law must respect." *West*, 872 P.2d at 1007.

A review of federal First Amendment law strengthens the conclusion that the Plan burdens fundamental speech and associational rights. In keeping with the "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas," *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 548 n.8 (1980) (internal quotation marks omitted), the "First Amendment stands against attempts to disfavor certain subjects or viewpoints," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). These principles apply with great force in Utah, as this Court has often recognized the importance of protecting the free marketplace of ideas. *See West*, 872 P.2d at 1015 (holding that Article I, Sections 1 and 15 protect "expressions of opinion" because they "fuel the marketplace of ideas"); *see also Spencer v. Glover*, 2017 UT App 69, ¶ 8, 397 P.3d 780 (same); *Provo City v. Thompson*, 2002 UT App 63, ¶¶ 24, 44 P.3d 828, *aff'd in part and vacated in part sub nom. Provo City Corp. v. Thompson*, 2004 UT 14, 86 P.3d 735 (right of free speech guarantees every citizen the "opportunity to win [the] attention" of "willing listeners").

Where elections and voting are at issue, the government's obligation to remain neutral as to viewpoints applies with special force because "[s]peech is an essential mechanism of democracy" and serves as "the means to hold officials accountable to the people." *Citizens United*, 558 U.S. at 339. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it," so "the First Amendment has its fullest and most urgent application to speech" in the context of elections. *Id.* at 339; *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191–92 (2014); *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

These principles instruct that neutrality of government in the electoral forum is desirable for at least four reasons—each critical to democratic governance. First, the responsiveness of legislatures is "at the heart of the democratic process." *McCutcheon*, 572 U.S. 185 at 227. As such, government cannot "favor some participants in th[e] process over others," in order to ensure that "representatives . . . can be expected to be cognizant of and responsive to [constituent] concerns." *Id.* at 227. And yet, by ensconcing the preferred party in office and "freez[ing] the

political status quo," *Jenness v. Forston*, 403 U.S. 431, 438 (1971), partisan gerrymandering undermines the "responsiveness [that] is key to the very concept of self-governance through elected officials," *McCutcheon*, 572 U.S. at 227.

Second, a partisan gerrymander harms voters' associational rights; it "interferes with the vital 'ability of citizens to band together' to further their political beliefs." *Gill*, 138 S. Ct. at 1940; *see also Norman v. Reed*, 502 U.S. 279, 288–89 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (noting First Amendment importance of "independent-minded voters [] associat[ing] in the electoral arena to enhance their political effectiveness as a group").

Third, partisan gerrymanders can harm "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process . . . encourages citizen participation in the democratic process."). Nothing could be more damaging to voter confidence, or more

discouraging to disfavored voters, than having the state itself institutionally entrench its preferred candidates or parties.

Fourth, partisan gerrymanders "ravage[] the party [voters] work[] to support." *Gill*, 138 S. Ct. at 1938; *c.f. Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) ("political parties also have a First Amendment Right of Association") (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000)). Partisan gerrymandering limits the efficacy of citizens with disfavored views who seek to "run for office," "urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign." *McCutcheon*, 572 U.S. at 191. In other words, a disfavored party may have to change its message or associate with different voters to win elections, which burdens the associational freedom of the party. *See Cal. Democratic Party*, 530 U.S. at 581–82 (regulation requiring parties to open candidate-selection process to persons unaffiliated with the party has the "likely outcome . . . of changing the parties' message" and burdens associational freedom).

Put simply, "the First Amendment safeguards an individual's right to participate in the public debate through political expression,"

McCutcheon, 572 U.S. at 203, and protects against any laws or practices that "threaten to reduce diversity and competition in the marketplace of ideas," *Anderson*, 460 U.S. at 794. The same must be true of the Utah Constitution's expression provisions, which are more robust and protective than the First Amendment. *See West*, 872 P.2d at 1007 (noting First Amendment "creates a . . . minimum level of protection"); *Provo City Corp. v. Willden*, 768 P.2d 455, 456 n.2 (Utah 1989) (noting "article I, section 15" of Utah's Constitution "is somewhat broader" than its federal analog).

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In summary, the Utah Constitution's plain text, its framers' intent as expressed through constitutional history, sister states' decisions, and well-settled First Amendment principles all establish that Utah's expression provisions provide robust speech, expression, and associational protections against using elections to privilege some viewpoints over others. Because the Plan implicates—and indeed gravely burdens—these fundamental rights, it is subject to strict scrutiny under Utah law. *See Gallivan*, 2002 UT 89, ¶ 24.

II. RESPONDENTS' CLAIMS ARE JUSTICIABLE UNDER THE UTAH CONSTITUTION.

Relying principally on U.S. Supreme Court decisions interpreting the U.S. Constitution, the Legislature argues that this Court should adopt the federal political question doctrine wholesale, and then apply it to deem this case nonjusticiable. That argument is misplaced for two separate reasons.

First, as a threshold matter, this Court should join the Supreme Court of Wyoming in concluding that "[t]he federal doctrine of nonjusticiable political question, as discussed and applied in [*Baker v. Carr*, 369 U.S. 186 (1962)] and later federal decisions, has no relevancy and application in state constitutional analysis." *State v. Campbell Cnty. Sch. Dist.*, 2001 WY 90, ¶ 37, 32 P.3d 325. The U.S. Supreme Court's partisan gerrymandering cases ask only "whether there is an 'appropriate role for *the Federal Judiciary*' in remedying the problem." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (quoting *Gill*, 138 S. Ct. at 1926) (emphasis added). They say nothing about the proper role of state judiciaries interpreting state constitutions.

That is especially true in Utah, where, as noted *supra*, the constitution expressly reserves "[a]ll political power . . . to the people,"

Utah Const. art. I, § 2, and where the people have exercised that power, through Proposition 4, to enact legislation expressly disapproving of partisan gerrymandering. Not only does the Utah Constitution "provide more protection for free expression and communications rights than the federal Constitution," *Am. Bush*, 2006 UT 40, ¶ 113 (Durham, J., concurring), Utah courts recognize a broader swath of justiciable claims as well, *see Gregory v. Shurtleff*, 2013 UT 18, ¶ 12, 299 P.3d 1098 ("[T]he judicial power of the state of Utah is not constitutionally restricted by the language of Article III of the [U.S.] Constitution requiring 'cases' and 'controversies,' since no similar requirement exists in the Utah Constitution."); *Laws*, 2021 UT 59, ¶ 82 ("[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . .") (quotations omitted)). It is unclear how any political question doctrine that could be said to arise from that state constitutional framework would be as robust, and as deferential to the legislature

(rather than the voters), as the one the U.S. Supreme Court has articulated in the federal constitutional context.[6]

Second, even if this Court were to apply the federal political question doctrine to the problem of partisan gerrymandering in Utah, that doctrine would yield the conclusion that this case does not involve a nonjusticiable political question. The federal doctrine reflects the U.S. Supreme Court's concern that it lacks a "clear, manageable and politically neutral" test for federal courts to assess fairness in partisan gerrymandering. *Rucho*, 139 S. Ct. at 2500; *Baker*, 369 U.S. at 216–17 (listing factors relevant to the federal doctrine). But this Court faces no such difficulty. The people, exercising their power under the state constitution and the ballot initiative process, have supplied a "principled, rational" position on partisan gerrymandering. *Rucho*, 139 S. Ct. at 2507. As explained below, far from arrogating power to itself, this Court's

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[6] Another case pending in this Court also raises questions concerning the proper scope, if any, of the political question doctrine in Utah, and amici are prepared to submit an amicus brief in that case. *See Natalie R. v. State of Utah*, Case No. 20230022-SC.

restoration of that test would respect the political power reserved to, and wielded by, the people.

In *Rucho*, the question the U.S. Supreme Court answered was emphatically *not* whether partisan gerrymandering is constitutionally problematic—the Court was clear that it is, a point it has made several times. *See id.* at 2506 (noting "[e]xcessive partisanship in districting" is "incompatible with democratic principles" (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)); *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (noting a system where politicians entrench one side in power is "incompatible" with "democratic principles"); *see also id.* (noting "a majority of individuals must have a majority say" in a democracy).

Rather, the question *Rucho* answered was limited to whether "the *solution*" to the problem of excessive partisanship in redistricting "lies with the *federal* judiciary." *Rucho,* 139 S. Ct. at 2506 (emphasis added). On that precise score, the U.S. Supreme Court concluded that the federal Constitution lacks "judicially manageable standards for deciding such claims." *Id.* at 2491. Yet notwithstanding federal courts' limitations, *Rucho* made clear that "[p]rovisions in state statutes and state

constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507. *Rucho* thus looked at the federalist system's promise to protect and promote democracy. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (discussing states' "role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

Utah precisely has "provisions in state statutes and state constitutions" from which to draw "manageable standards," *Rucho*, 139 S. Ct. at 2507—indeed, Utah voters expressly authorized those standards. In 2018, Utahns approved Proposition 4, a ballot initiative that created the UIRC, a bipartisan commission designed to guard against gerrymandering and ensure that "Utahns choose their representatives and not the other way around."[7] State law now directs that "[t]he commission shall define and adopt redistricting standards for use by the commission that require that maps adopted by the commission, to the extent practicable . . . prohibit[] the purposeful or

[7] Lisa Riley Roche, *Utah proposition to battle gerrymandering passes as final votes tallied*, Deseret News, (Nov. 20, 2018) https://www.deseret.com/2018/11/20/20659293/utah-proposition-to-battle-gerrymandering-passes-as-final-votes-tallied.

undue favoring or disfavoring of . . . a political party," as well as particular candidates or incumbents. Utah Code Ann. § 20A-20-302(5). The law also empowers the Commission to "adopt a standard that prohibits the commission from using," except in particular circumstances, "partisan political data; political party affiliation information; voting records; [and] partisan election results." *Id.* § 20A-20-302(6). Thus, existing Utah law provides for judicially manageable standards that state courts can use to guide their constitutional inquiry—in sharp contrast to the federal judiciary in *Rucho*, and some other states, *see, e.g.*, *Harper v. Hall*, No. 413PA21-2, 2023 WL 3137057 (N.C. Apr. 28, 2023).

Harper, the recent North Carolina Supreme Court case, is inapplicable for several reasons. For one, the court there determined that it was bound to a prior decision finding that the state constitution "did not provide a judicially manageable standard," and that the trial court erred in failing to follow that prior controlling holding. *Id.* at *27 (citing *Dickson v. Rucho*, 367 N.C. 542, 575, (2014)). No such prior holding exists here. Further, the North Carolina Supreme Court noted that courts must consider where "the people . . . expressly chose to limit the General

Assembly" in its redistricting powers, *id.* at *24—which is precisely what Utah voters did in passing Proposition 4. And North Carolina law already had a preexisting presumption against judicial review in redistricting, which doesn't exist in Utah law. *See Stephenson v. Bartlett*, 358 N.C. 219, 230 (2004) (noting desire to "decrease the risk that the courts will encroach upon the responsibilities of the legislative branch" in apportionment).

Elsewhere, in the years since *Rucho*, state courts have struck down congressional maps as unlawful partisan gerrymanders under their respective state constitutional provisions. As noted *supra*, a Maryland court recently invalidated its state's congressional map as a partisan gerrymander. *See Szeliga*, 2022 WL 2132194, at *43. Likewise, the Alaska Supreme Court considered—and explicitly rejected—the notion that *Rucho* precludes review of partisan gerrymandering claims in state court forums. *Matter of 2021 Redistricting Cases*, No. 18332, 2023 WL 3030096, at *41 (Alaska Apr. 21, 2023) (finding partisan gerrymandering justiciable in state court and holding that "partisan gerrymandering is unconstitutional under the Alaska Constitution."). For their respective parts, the Ohio Supreme Court, *Adams v. DeWine*, 167 Ohio St. 3d 499,

2022-Ohio-89, 195 N.E.3d 74, at ¶ 100, and the New York Court of Appeals, *Harkenrider v. Hochul*, 197 N.E.3d 437, 521 (2022), have also invalidated apportionment plans as unconstitutional partisan gerrymanders. And other challenges to congressional maps as unlawful partisan gerrymanders in Kentucky[8] and New Mexico[9] are ongoing.

In other words, *Rucho* expressly outlined a system wherein state courts—like this one and the District Court below it—are equipped to address the scourge of partisan gerrymandering schemes, acting under state constitutional and statutory law. Since *Rucho* came down, state courts across the country have done just that. As in those other states, partisan gerrymandering claims are justiciable in Utah's courts.

CONCLUSION

For the foregoing reasons, and those laid out in the Petitioners' brief, the Court should hold that Respondents' partisan gerrymandering claims are justiciable in Utah courts and subject to heightened scrutiny under Article I, Sections 1 and 15 of the Utah Constitution.

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[8] *Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Jan. 20, 2022).

[9] *Republican Party of N.M. v. Oliver*, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Valentina De Fex, do hereby certify pursuant to Utah Rules of Appellate Procedure 25 and 27, that the foregoing brief complies with the required word count limits. Per the word processing system, Microsoft Word, the brief contains 6,224 words.

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CERTIFICATE OF SERVICE

I certify that on May 19, 2023, I served the brief of American Civil Liberties Union and American Civil Liberties Union of Utah in Support of Respondents League of Women Voters, Mormon Women for Ethical Government, Stephanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, and Jack Markman via email on the following:

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Addendum A

KATHRYN SZELIGA, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
LINDA LAMONE, et al.,	*	ANNE ARUNDEL COUNTY
Defendants	*	CASE NO.: C-02-CV-21-001816

* * * * * * * * * * * * * * * *

NEIL PARROTT, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
LINDA LAMONE, et al.,	*	ANNE ARUNDEL COUNTY
Defendants	*	CASE NO.: C-02-CV-21-001773

* * * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

Introduction

Partisan gerrymandering refers to the drawing of districting lines to favor the political party in power, and "[p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Rucho v. Common Cause*, ---- U.S. ----,----, 139 S. Ct. 2484, 2499 (2019).[1] *Rucho* is pivotal for the discussion of why this trial court and, potentially, the Court of Appeals[2] are

[1] Gerrymandering based on race is not an issue in this case, so that statutes such as the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified, as amended, at 52 U.S.C. § 10101, *et seq.*), and cases solely addressing this conundrum are not implicated directly.

(continued . . .)

grappling with the issue of the constitutionality of the 2021 Congressional map, because the Supreme Court demurred in the case from addressing, on the basis of the "political question" doctrine, the lawfulness of partisan gerrymandering. *Id.* at ——, 2506–07. Chief Justice Roberts, the author of *Rucho*, suggested, however, that, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at ——, 2507.

Background

Two consolidated cases in issue in the instant case are constitutional challenges to the Maryland Congressional Districting Plan enacted in 2021, hereinafter referred to as "the 2021 Plan." In their Complaint, the 1773 Plaintiffs[3] allege violations of Section 4 of Article III of the Maryland Constitution, which provides:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions[,]

(. . . continued)

[2] A direct appeal to the Court of Appeals is available pursuant to Section 12–203 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.), which provides:

> (a) *In general.* — A proceeding under this subtitle shall be conducted in accordance with the Maryland Rules, except that:
>
> (1) the proceeding shall be heard and decided without a jury and as expeditiously as the circumstances require;
>
> (2) on the request of a party or sua sponte, the chief administrative judge of the circuit court may assign the case to a three-judge panel of circuit court judges; and
>
> (3) an appeal shall be taken directly to the Court of Appeals within 5 days of the date of the decision of the circuit court.
>
> (b) *Expedited appeal.* — The Court of Appeals shall give priority to hear and decide an appeal brought under subsection (a)(3) of this section as expeditiously as the circumstances require.

[3] The named Plaintiffs in the consolidated action, Case No. C-02-CV-21-001773, are Neil Parrott, Ray Serrano, Carol Swigar, Douglas Raaum, Ronald Shapiro, Deanna Mobley, Glen Glass, Allen Furth, Jeff Warner, Jim Nealis, Dr. Antonio Campbell, and Sallie Taylor; hereinafter "the 1773 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

MD. CONST. art. III, § 4, as well as Article 7 of the Maryland Declaration of Rights, which declares:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

MD. CONST. DECL. OF RTS. art. 7. The 1816 Plaintiffs[4] also allege violations of Article 7, but also add Article 24 of the Declaration of Rights, which provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land[,]

MD. CONST. DECL. OF RTS. art. 24, as well as Article 40, which declares:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege[,]

MD. CONST. DECL. OF RTS. art. 40, and Section 7 of Article I of the Maryland Constitution, which provides:

> The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.

MD. CONST. art. I, § 7.

[4] The named Plaintiffs in Case No. C-02-CV-21-001816 are Kathryn Szeliga, Christopher T. Adams, James Warner, Martin Lewis, Janet Moye Cornick, Rickey Agyekum, Maria Isabel Icaza, Luanne Ruddell, and Michelle Kordell; hereinafter "the 1816 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

Defendants in both actions are Linda H. Lamone, the Maryland State Administrator of Elections; William G. Voelp, the Chairman of the Maryland State Board of Elections; and the Maryland State Board of Elections, which is identified as the administrative agency charged with "ensur[ing] compliance with the requirements of Maryland and federal election laws by all persons involved in the election process."[5]

Case No. C-02-CV-21-001816

On December 23, 2021, the 1816 Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. On January 20, 2022, the Democratic Congressional Campaign Committee ("DCCC") filed a Motion to Intervene in the matter, along with its proposed Answer to the Plaintiffs' Complaint. On February 2, 2022, the Defendants filed their Motion to Dismiss or, in the Alternative, for Summary Judgment.[6] The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 3, 2022 and subsequently filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, on February 11, 2022. In the meantime, the Defendants also filed their response to the DCCC's Motion to Intervene. The Court heard argument on the Defendants' Motion to Dismiss on February 16, 2022 and held the matter *sub curia*. Simultaneously, the Court issued its Memorandum Opinion and Order denying the DCCC's Motion to Intervene.

Several days later, on February 22, 2022, the Court issued a Consolidation Order, which consolidated Case No. C-02-CV-21-001816 with another similar case, Case No. C-02-CV-

[5] *About SBE*, THE STATE BD. OF ELECTIONS, https://perma.cc/9GUT-X5KM (last visited March 23, 2022).

[6] It should be noted that the Defendants have asserted that both Case No. C-02-CV-21-001816 and Case No. C-02-CV-21-001773 are non-justiciable "political questions." The Defendants, however, conceded that should the standards in Article III, Section 4 apply to Congressional redistricting, the matter is justiciable.

21001773, and identified Case No. C-02-CV-21-001816 as the "lead" case. On the same day, the Court denied three requests for special admission of out-of-state attorneys on behalf of the DCCC. On February 23, 2022, the Court ultimately issued its Order disposing of the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, and dismissed Count II: Violation of Purity of Elections, with prejudice. The counts that remained included Counts I, III, and IV of the 1816 Complaint, which involved violations of Articles 7 (Free Elections), 24 (Equal Protection), and 40 (Freedom of Speech) of the Maryland Declaration of Rights, respectively. The 1816 Plaintiffs ask for a declaration that the 2021 Plan is unconstitutional under Articles 7, 24, and 40 of Maryland's Declaration of Rights and Section 7 of Article I of the Maryland Constitution. Additionally, Plaintiffs seek to permanently enjoin the use of the 2021 Plan and ask for an order to postpone the filing deadline for candidates to declare their intention to compete in 2022 Congressional primary elections until a new district map is prepared.

Case No. C-02-CV-21-001773

On December 21, 2021, the 1773 Plaintiffs filed their Complaint for Declaratory and Other Relief Regarding the Redistricting of Maryland's Congressional Districts. On January 20, 2022, the DCCC filed a Motion to Intervene in the matter, along with its proposed Motion to Dismiss the Plaintiffs' Complaint. The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 4, 2022. Subsequently, on February 11, 2022, the Plaintiffs filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, in related Case No. C-02-CV-21-001816. On February 15, 2022, the DCCC filed its Reply in Support of its Motion to Intervene. Several days later, on February 19, 2022, the Defendants filed a Motion to Dismiss the Complaint. The Plaintiffs filed their Opposition to the Motion to

Dismiss on February 20, 2022. On February 22, 2022, the Court issued a Consolidation Order (referenced above) and denied the DCCC's Motion to Intervene and the three requests for special admission of out-of-state attorneys on behalf of the DCCC. A hearing on the Defendants' Motion to Dismiss took place on February 23, 2022. Under this Court's February 23rd Order, which dismissed Count II of the 1816 Complaint, both counts in the 1773 Complaint remained.

The 1773 Plaintiffs ask for a declaration that the 2021 Plan is unlawful, as well as a permanent injunction against its use in Congressional elections. Additionally, the 1773 Plaintiffs ask the Court to order a new map be prepared before the 2022 Congressional primaries or, in the alternative, order that an alternative Congressional district map, which was prepared by the Governor's Maryland Citizens Redistricting Commission,[7] be used for the 2022 Congressional elections.

The parties submitted proposed findings of fact prior to trial on March 11, 2022. Simultaneously, the 1816 and 1773 Plaintiffs submitted a Joint Motion in Limine as to exclude portions of testimony from Defendants' experts, Dr. Allan J. Lichtman and Mr. John T. Willis. During the first day of trial on March 15, 2022, the parties submitted Stipulations of Fact and the Court admitted the stipulations as Exhibit 1. The Court then placed, on the record, an agreement between the parties about relevant judicial admissions by the Defendants relative to the Defendants' Answer. On the last day of trial on March 18, 2022, the State submitted a stipulation

[7] The Maryland Citizens Redistricting Commission was established by Governor Lawrence J. Hogan, Jr., in January of 2021. Exec. Order No. 01.01.2021.02 (Jan. 12, 2021). The Commission, pursuant to the Order, was tasked with preparing plans for the state's Congressional districts and its state legislative districts, which would be submitted by the Governor to the General Assembly. *Id.* The Commission submitted its Final Report to the Governor in January 2022. *Final Report of the Maryland Citizens Redistricting Commission*, MD. CITIZENS REDISTRICTING COMM'N (Jan. 2022), https://perma.cc/UUX5-6J72.

that the 2021 Plan did, in fact, pair Congressmen Andy Harris and Congressmen Kweisi Mfume in the same district – the Seventh Congressional District.[8]

With respect to the Plaintiffs' Motion in Limine, which raised the issue of a *Daubert* challenge as well as alleged late disclosure by the Defendants' experts as to various opinions, the trial judge heard argument during trial and ruled that the allegations regarding late disclosure were denied. With respect to the *Daubert* motion regarding the States' expert witnesses, it was eventually withdrawn by the Plaintiffs on March 18, 2022.

In addition, the Defendants moved to strike three questions asked by the trial judge of Dr. Thomas L. Brunell, after cross examination and before re-direct and re-cross examination, and the responses thereto. After a hearing in open court on March 18, 2022, the judge denied the motion to strike the three questions of Dr. Brunell and his responses thereto.

The Motion to Dismiss

In evaluating the Constitutional claims posited in Case Nos. C-02-CV-21-001816 and C02-CV-21-001773, the trial court has been guided in its efforts by the words of Chief Judge Robert M. Bell, when he wrote in 2002, that courts "do not tread unreservedly into this 'political thicket'; rather, we proceed in the knowledge that judicial intervention . . . is wholly unavoidable." *In re Legislative Districting of State*, 370 Md. 312, 353 (2002). Chief Judge Bell recognized that when the political branches of government are exercising their duty to prepare a lawful redistricting plan, politics and political decisions will impact the process. *Id.* at 354; *id.* at 321 ("[I]n preparing the redistricting lines . . . the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they

[8] *See* Stipulation No. 60, *infra* p. 57.

may pursue a wide range of objectives[.]"). Yet, the consideration of political objectives "does not necessarily render the process, or the result of the process, unconstitutional; rather, that will be the result only when the product of the politics or the political considerations runs afoul of constitutional mandates." *Id.* (internal citations omitted).

In considering whether the various counts of the Complaints survived the Motion to Dismiss, the trial court applied the following standard of review[9]:

"Dismissal is proper only if the facts alleged fail to state a cause of action." *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994). Under Maryland Rule 2-303(b), a complaint must state those facts "necessary to show the pleader's entitlement to relief." In considering a motion to dismiss for failure to state a cause of action pursuant to Maryland Rule 2-322(b)(2), a trial court must assume the truth of all well-pleaded relevant and material facts in the complaint, as well as all inferences that reasonably can be drawn therefrom. *Stone v. Chicago Title Ins. Co.*, 330 Md. 329, 333 (1993); *Odyniec v. Schneider*, 322 Md. 520, 525 (1991). Whether to grant a motion to dismiss "depends solely on the adequacy of the plaintiff's complaint." *Green v. H & R Block, Inc.*, 355 Md. 488, 501 (1999).

> "[I]n considering the legal sufficiency of [a] complaint to allege a cause of action . . . we must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." Mere conclusory charges that are not factual allegations may not be considered. Moreover, in determining whether a petitioner has alleged claims upon which relief can be granted, "[t]here is ... a big difference between that which is necessary to prove the [commission] and that which is necessary merely to allege [its commission][.]"

[9] The trial court did not apply the "plausibility" standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), commonly referred to as "the *Twombly-Iqbal* standard," which may be considered a more intense standard of review. The State disavowed that it was positing its application.

Lloyd v. Gen. Motors Corp., 397 Md. 108, 121-22 (2007) (quoting *Sharrow v. State Farm Mutual Ins. Co.*, 306 Md. 754, 768, 770 (1986)) (alterations in original).

There are no provisions in the Maryland Constitution explicitly addressing Congressional districting. The only statutes in Maryland that bear on Congressional redistricting include Section 8–701 through 8–709 of the Election Law Article of the Maryland Code. Section 8–701 states that Maryland's population count is to be used to create Congressional districts, that the State of Maryland shall be divided into eight Congressional districts, and that the description of Congressional districts include certain boundaries and geographic references.[10] Sections 8–702 through 8–709 identify the respective counties included within each of the eight Congressional districts according to the current Congressional map in effect.[11] None of the statutory provisions includes standards or criteria by which Congressional districting maps must be drawn.[12]

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[10] Section 8-701 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.) provides:

> (c) *Boundaries and geographic references.* — (1) The descriptions of congressional districts in this subtitle include the references indicated.
>
> (2) (i) The references to:
>
> 1. election districts and wards are to the geographical boundaries of the election districts and wards as they existed on April 1, 2020; and
>
> 2. precincts are to the geographical boundaries of the precincts as reviewed and certified by the local boards or their designees, before they were reported to the U.S. Bureau of the Census as part of the 2020 census redistricting data program and as those precinct lines are specifically indicated in the P.L. 94-171 data or shown on the P.L. 94171 census block maps provided by the U.S. Bureau of the Census and as reviewed and corrected by the Maryland Department of Planning.
>
> (ii) Where precincts are split between congressional districts, census tract and block numbers, as indicated in P.L. 94-171 data or shown on the P.L. 94-171 census block maps provided by the U.S. Bureau of the Census and referred to in this subtitle, are used to define the boundaries of congressional districts.

[11] MD. CODE ANN., ELEC. LAW §§ 8-701 through 8-709.

[12] During the hearing on the State's Motion to Dismiss, the Court asked the parties to provide supplemental briefings regarding the significance, or not, of two historical laws, which prescribed the application of the (continued . . .)

In ruling on the Defendants' Motion to Dismiss the Complaints, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the 1773 Complaint stated a claim upon which relief can be granted. Article III, Section 4, of the Maryland Constitution does embody standards by which the 2021 Congressional Plan can be evaluated to determine whether unlawful partisan gerrymandering has occurred. The standards of Article III, Section 4 are applicable to the evaluation of the 2021 Plan based upon the interpretation of the Section's language, purpose, and legislative intent.

With respect to the 1773 Complaint and the 1816 Complaint, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that can reasonably be drawn

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(. . . continued)
"constitution and laws of this state for the election of delegates to the house of delegates," to Congressional elections. The first law, enacted in 1788, in relevant part, provided:

> And be it enacted, That the election of representatives for this state, to serve in the congress of the United States, shall be made by the citizens of this state qualified to vote for members of the house of delegates, on the first Wednesday of January next, at the places in the city of Annapolis and Baltimore-town, and in the several counties of this state, prescribed by the constitution and laws of this state for the election of delegates to the house of delegates[.]

1788 Laws of Maryland, Chapter X, Section III (Vol. 204, p. 318). The second law, enacted in 1843, provided:

> Sec. 5. And be it enacted, That the regular election of representatives to Congress from this State, shall be made by the citizens of this State, qualified to vote for members to the House of delegates, and each citizen entitled as aforesaid, shall vote by ballot, on the first Wednesday in October, in the year eighteen hundred and forty-five, and on the same day in every second year thereafter, at the places in the city of Baltimore, and in the city of Annapolis, and in the several counties, and Howard District of this State, as prescribed by the constitution and laws of this State, for the election of members to the house of delegates.
>
> 1843 Laws of Maryland, Chapter XVI, Section 5 (Vol. 595, p. 13).

The parties' responses, collectively, indicated that they ascribed little or no significance to the language, which suggested that the first Congressional elections in Maryland were conducted via the application of election rules prescribed, in part, in the State Constitution.

therefrom and determined that the strictures of Article III, Section 4 are, alternatively, applicable to the 2021 Plan because of the free elections clause, MD. CONST. DECL. OF RTS. art. 7, as well as with respect to the 1816 Complaint, the equal protection clause, MD. CONST. DECL. OF RTS. art. 24; each, individually, provide a nexus to Article III, Section 4 to determine the lawfulness of the 2021 Plan.[13]

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[13] The trial court ultimately dismissed with prejudice Section 7 of Article I of the Maryland Constitution. Article I, Section 7 provides that, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." The 1816 Plaintiffs argued that this provision was violated because the General Assembly failed to pass laws concerning elections that are fair and even-handed, and that are designed to eliminate corruption. *1816 Compl.* ¶ 66. The State took the position that Section 7 of Article 1 was not intended to restrain acts of the General Assembly, but rather, that the provision acted as "an exclusive mandate directed to the General Assembly to establish the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud." *1816 Mot. Dismiss* at 31.

The term "purity" in the Section is undefined and therefore, ambiguous. No case referring to the Section has defined what purity means. *Cnty. Council for Montgomery Cnty. v. Montgomery Ass'n, Inc.*, 274 Md. 52 (1975); *Anderson v. Baker*, 23 Md. 531 (1865) (concurring opinion); *see also Hanrahan v. Alterman*, 41 Md. App. 71 (1979); *Hennegan v. Geartner*, 186 Md. 551 (1946); *Smith v. Higinbothom*, 187 Md. 115 (1946); *Kenneweg v. Allegany Cnty. Comm'rs*, 102 Md. 119 (1905). When asked at oral argument to give the term a meaning applicable to elections, Counsel for the 1773 Plaintiffs could only say "purity means purity."

The phrase "purity" of elections was added to the Maryland Constitution of 1864, where the explicit language directed the General Assembly to preserve the "purity of elections." MD. CONST. of 1864, art. III, § 41 (directing the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters"). The provision focused on voter registration, with the purpose of excluding ineligible voters from the election process.

The language of what is now Article I, Section 7, has changed since its enactment in the Maryland Constitution of 1864. Article III, § 41 of the Constitution of 1864, in whole, directed the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters, and by such other means as may be deemed expedient, and to make effective the provisions of the Constitution disfranchising certain persons, or disqualifying them from holding office." Article III, § 41, was renumbered in the 1867 amendment, to Article III, Section 42, which provided, [t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." MD. CONST. of 1867, art. III, § 42. Article III, § 42, was, again, renumbered and amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978, to Article I, § 7, which now provides, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." MD. CONST. art. 1, § 7.

Cases interpreting Article I, Section 7, have applied the Section to the registration of voters, *Anderson*, 23 Md. at 586 (concurring opinion), improper financial campaigns contributions, *Cnty. Council for Montgomery Cnty.*, 274 Md. at 60–65; *see also Higinbothom*, 187 Md. at 130 ("The Corrupt Practices Act is a remedial measure and should be liberally construed in the public interest to carry out its purpose of preserving the purity of elections.").

From its legislative history, the language of "purity of elections" referred to questions involving the *individual* candidate and the *individual* voter. The only assumption tendered by the 1816 Plaintiffs to support that partisan gerrymandering affected the "purity" of elections was that such gerrymandering was *ipso facto* corrupt.

(continued . . .)

With respect to the 1816 Complaint, alternatively, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the Complaint stated a cause of action under each of the equal protection clause, MD. CONST. DECL. OF RTS. art. 24, and the free speech clause, MD. CONST. DECL. OF RTS. art. 40, which subjects the 2021 Plan to strict scrutiny by this Court.

Alternatively, with respect to the 1773 and 1816 Complaints, this Court assumed the truth of all the well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that both Complaints stated a cause of action under the entirety of the Maryland Constitution and Declaration of Rights to determine the lawfulness of the 2021 Plan.

The Provisions in the Maryland Constitution and Declaration of Rights

In reviewing whether political considerations have run afoul of constitutional mandates in the instant case, we must undertake the task of constitutional interpretation. "Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument's drafters and the public that adopted it." *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 53 (2013) (citing *Fish Mkt. Nominee Corp. V. G.A.A., Inc.*, 337 Md. 1, 8–9 (1994)). We first look to the natural and ordinary meaning of the provision's language. *Id.* If the provision is clear and unambiguous, the Court will not infer the meaning from sources outside the Constitution itself. *Id.* "[O]ccasionally we see fit to examine extrinsic sources of legislative intent merely as a check of our reading of a statute's plain language," including "archival legislative history." *Phillips v. State*, 451 Md. 180, 196–97 (2017). Archival legislative history

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That assumption has not been borne out by review of over 200 cases addressing partisan gerrymandering, none of which characterized the practice as "corrupt."

includes legislative journals, committee reports, fiscal notes, amendments accepted or rejected, the text and fate of similar measures presented in earlier sessions, testimony and comments offered to the committees that considered the bill, and debate on the floor of the two Houses (or the Convention). *State v. Phillips*, 457 Md. 481, 488 (2018).

The rules of statutory construction are well known. Yet, when applying the rules of statutory construction to the interpretation of constitutional provisions, the approach is more nuanced. That approach was described in *Johns Hopkins Univ. v. Williams*, 199 Md. 382 (1952):

> [C]ourts may consider the mischief at which the provision was aimed, the remedy, the temper and spirit of the people at the time it was framed, the common usage well known to the people, and the history of the growth or evolution of the particular provision under consideration. In aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature.

Id. at 386–87.

To construe a constitution, "a constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth." *Snyder ex rel. Snyder*, 435 Md. at 55 (quoting *Bernstein v. State*, 422 Md. 36, 56 (2011)). Similarly, we do not read the constitution as a series of independent parts; rather, constitutional provisions are construed as part of the constitution as a whole. *Id.* Further, if a constitutional provision has been amended, the amendments "bear on the proper construction of the provision as it currently exists," and in such a situation, 'the intent of the amenders … may become paramount." *Norino Properties, LLC v. Balsamo*, 253 Md. App. 226, (2021) (quoting *Phillips*, 457 Md. at 489). We keep in mind that the courts shall construe a constitutional provision in such a manner that accomplishes in our modern society the purpose for which the provisions were adopted by the drafter, and in doing so, the provisions "will be

given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee." *Bernstein v. State*, 422 Md. 36, 57 (2011) (quoting *Johns Hopkins Univ.*, 199 Md. at 386).

We recognize that "a legislative districting plan is entitled to a presumption of validity" but "that the presumption "may be overcome when compelling evidence demonstrates that the plan has subordinated mandatory constitutional requirements to substantial improper alternative considerations."" *In re Legislative Districting of State*, 370 Md. at 373 (quoting *Legislative Redistricting Cases*, 331 Md. 574, 614 (1993)).

Article III, Section 4 of the Maryland Constitution

Article III, Section 4 of the Maryland Constitution provides:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

MD. CONST. art. III, § 4. The 1773 Plaintiffs assert a direct claim under Article III, Section 4, of the Maryland Constitution and urge that the plain meaning of the term "legislative district" corresponds to any legislative district in the State, which must be subject to the standards of adjoining territory, compactness, and equal population with due regard given to natural boundaries of political subdivisions. The 1773 Plaintiffs allege the new Congressional districts under the 2021 Plan violate the requirements of Article III, Section 4. *1773 Compl.* ¶¶ 93– 97.[14]

Defendants claim that the text of Article III, Section 4, is limited to State legislative districting because the term "legislative districts" refers "unambiguously to State legislative districts" whenever it appears in other provisions of the Constitution, and that when Congress is referred to the "c" is capitalized. *1773 Defs.' Mot. Dismiss* at 2. The Defendants argue that although a 1967 constitutional convention proposed a draft that included Constitutional standards for both state districts and Congressional districting, the voters rejected the draft and that the General Assembly drew the current Article III, Section 4 without reference to Congressional redistricting to enable the 1969 amendments to the Constitution to be adopted. *1816 Defs.' Mot. Dismiss* at 19–22.

[14] The 1816 Plaintiffs do not assert a claim under Article III, Section 4, of the Maryland Constitution. *1816 Opp'n Mot. Dismiss* at 10 n.3.

The term "legislative district" is the gravamen of analysis. There is no definition of the term "legislative district" in the Maryland Constitution or Declaration of Rights. Absent a definition, in light of the differing ways the term could be applied, *i.e.*, as State legislative districts and/or Congressional districts, the language is ambiguous.[15]

The "compactness" requirement was added to then extant Article III, Section 4, by the General Assembly in 1969 and ratified by the voters in 1970 (the "1970 Amendment"), as part of a series of amendments to the entirety of Article III. *See* 1969 Md. Laws ch. 785, ratified Nov. 3, 1970 (proposing the repeal of MD. CONST., art. III, §§ 2, 4, 5, and 6, and replacement with new §§ 2 through 6). Its framers recognized that "compactness requirement in state constitutions is intended to prevent political gerrymandering." *Matter of Legislative Districting of State* ("*1984 Legislative Districting*"), 299 Md. 658, 687 (1984). Prior to this amendment, Article III, Section 4 required districts to be "as near as may be, of equal population" and "always consist of contiguous territory," and only applied to the "existing Legislative Districts of the City of Baltimore." MD. CONST. art. III, § 4 (1969).[16]

[15] The State has posited the importance of the exclusion of the word "Congress" in Article III, Section 4 to specifically include reference to Congressional districts. Neither the word Congress nor State, General Assembly, Senate, or House of Delegates appears in Article III, Section 4, unlike other Constitutional provisions or importantly, in Section 4 itself. *See, e.g.*, MD. CONST. art. I, § 6 (using the term "Congress"); art. III, § 10 (using the term "Congress"); art. IV, § 5 (using the term "Congress"); art. XI-A, § 1 (using the term "congressional election"); art. XVII, § 1 (using the term "congressional elections"); art. III, § 3 (using the terms "State," "Senate" and "House of Delegates"); art. III, § 5 (using the terms "State," "General Assembly," "Senate," and "House of Delegates"); art. III, § 6 (using the terms "General Assembly" and "delegate"); art. III, § 13(b) (using the terms "Legislative" and "Delegate district"); and art. XIV, § 2 (using the terms "General Assembly," and "Legislative District of the City of Baltimore").

[16] Prior to 1966, Baltimore City was the only jurisdiction in the State in which Delegates were elected to represent discreet legislative districts; Delegates representing other counties were elected by the voters of those counties at large. *See* MD. CONST. art. III, § 5 (1965) ("The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the Legislative Districts of Baltimore City, respectively . . . ."); 1965 Md. Laws special session, chs. 2, 3 (requiring the first time that counties allocated more than eight delegates be divided (continued . . .)

The present complete version of Article III, Section 4 was enacted in 1972 and ratified by the voters on November 7, 1972. In enacting the present version in 1972, the General Assembly "is presumed to have full knowledge of prior and existing law on the subject of a statute it passes." *Id.*; *see also Bowers v. State*, 283 Md. 115, 127 (1978) ("[T]he Legislature is presumed to have had full knowledge and information as to prior and existing law on the subject of a statute it has enacted."); *Harden v. Mass Transit Admin.*, 277 Md. 399, 406-07 (1976) ("The General Assembly is presumed to have had, and acted with respect to, full knowledge and information as to prior and existing law and legislation on the subject of the statute and the policy of the prior law.").[17] With respect to this knowledge, it is clear that they were aware of

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into districts). The "contiguity" or "equal population" requirements of the early Article III, § 4, did not apply to any "legislative district" outside of Baltimore City.

[17] The State agreed during oral argument on the Motion to Dismiss that cases of the Supreme Court in the 1960s regarding redistricting informed the adoption of the present version of Article III, Section 4:

> THE COURT: In doing research on Article III, Section 4, of the Maryland Constitution, it has come to the Court's attention that one of the reasons for enacting this provision was the Legislature's knowledge—which we presume—of the Supreme Court's cases. That is my understanding, is it yours?
>
> MR. TRENTO, ON BEHALF OF THE STATE: Yes, Your Honor, the Supreme Court's cases were in the front and center of the minds of the 1967 Constitutional Convention. In that Convention, the sweep of amendments to Article III, Sections 3 through 6, were expressly undertaken to address the Supreme Court jurisprudence from the 1960s.

Mot. Dismiss Hearing, 02/23/2022. In the 1967 Constitutional Convention, the Supreme Court cases referencing legislative redistricting were prominent. The delegates in the Proceedings and the Debates of the 1967 Constitutional Convention referenced prior Supreme Court jurisprudence on numerous occasions: *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. I, *Debates* 412, 3255; 104 MD. STATE ARCHIVES 2267, 10853. During the 1967 Constitutional Convention, Delegate John W. White, in response to a question regarding his intent regarding a provision stated:

> DELEGATE WHITE: What I am trying to do is to have all of Maryland line up with the position of the Supreme Court of the United States, which has said that one person should have one vote.

Proceedings and Debates of the 1967 Constitutional Convention, 104 MD. STATE ARCHIVES 7879,

(continued . . .)

Baker v. Carr, 369 U.S. 186 (1962), involving state legislative districts,[18] as well as *Wesberry v. Sanders*, 376 U.S. 1 (1964), a Congressional districting case.[19]

With reference to Supreme Court jurisprudence that is the context of the 1967 to 1972 Amendments to Article III, Section 4, one early case—*Baker v. Carr*—involved the apportionment of the Tennessee legislature. The federal district court dismissed the complaint in apparent reliance on the legal process theory of political justiciability, but the Supreme Court reversed. *Baker v. Carr*, 179 F. Supp. 824, 828 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962). Importantly, the Supreme Court's decision only dealt with procedural issues: jurisdiction, standing, and justiciability. *Baker*, 369 U.S. at 198–237. It held by a 6–2 vote that the court had jurisdiction, plaintiffs had standing, and the challenge to apportionment did not present a nonjusticiable "political question." *Id.* at 204, 206, 209.

The Supreme Court, thereafter, confronted the apportionment of Congressional districts in *Wesberry v. Sanders* in 1964 and held that Congressional apportionment cases were justiciable, noting that there is nothing providing "support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6–7. The Court ultimately applied the "one-person, one-vote" rule to apportionment of

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https://perma.cc/JG3T-KV3J (last visited March 23, 2022). During the Proceedings and Debates of the 1967 Constitutional Convention, the delegates proposed constitutional amendments regarding Congressional districting, however, the amendments failed subsequent enactment and were, ultimately, not included in the adopted 1970 and 1972 versions of Article III, Section 4.

[18] *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 499.

[19] *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES 10863–64.

Congressional districts, explaining that "the [Constitutional] command that representatives be chosen by people of the several states means that as nearly as practicable one man's vote in a Congressional election is to be worth as much as another's." *Id.* at 7–8. The Court believed that "a vote worth more in one district that in another would run . . . counter to our fundamental ideas of democratic government." *Id.* at 8. The opinion rested on the interpretation of the Elections Clause in Article I, Section 4 of the Constitution. *Id.* at 6–7.

On April 7, 1969, another Congressional districting case was decided. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), a decision involving Congressional districting in Missouri, the Supreme Court held that the "as nearly as practicable" standard "requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Kirkpatrick*, 394 U.S. at 530–31.

The context, therefore, of the 1967 through 1972 amending process of Article III, Section 4, was the Supreme Court cases in which state legislative districts, but also Congressional districts, were decided.

The State posits, however, that the Legislature really intended on omitting Congressional districts in the later versions of Article III, Section 4 enacted in 1969 and 1972 because an earlier version from 1967 of Section 4 included a specific reference to Congressional districts, *see* PROPOSED CONST. OF 1967–68, §§ 3.05, 3.07, 3.08, 605 MD. STATE ARCHIVES 9–10, and another section that had a specific reference to the State, *see* PROPOSED CONST. OF 1967–68, § 3.04, 605 MD. STATE ARCHIVES 9. The failed passage of the earlier draft Constitution, which included these phrases, however, does not have any bearing on the analysis of what the Legislature

intended in adopting the 1970 or 1972 versions of Article III, Section 4, because "[f]ailed efforts to amend a proposed bill, however, are not conclusive proof usually of legislative will. . . . This is because there can be a myriad of reasons that could explain the Legislature's decision not to incorporate a proposed amendment." *Antonio v. SSA Sec., Inc.*, 442 Md. 67, 87 (2015). Most importantly, "[i]f the framers desired" to exclude Congressional redistricting from Article III, Section 4, "they knew how to do so." *Schisler v. State*, 394 Md. 519, 594–95 (2006).[20]

The Legislature, keenly aware of its ability to restrict or expand the application of Article III, Section 4, chose not to explicitly exclude Congressional districts from the purview of Article III, Section 4, nor just reference State legislative districts. As a result, "legislative districts" includes Congressional districts. A claim, thus, has been stated under Article III, Section 4.

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[20] Interestingly, the early language in a bill introduced in 1972 included the words Senators and Delegates to alter Article III, Section 4:

> Each legislative district shall consist of adjoining territory and shall be compact in form. The ratio of the number of Senators to population shall be substantially the same in each legislative district; the ratio of the number of Delegates to population shall be substantially the same in each legislative district. Nothing herein shall be construed to require the election of only one Delegate from each legislative district.

Amendments to Maryland Constitutions, 380 MD. STATE ARCHIVES, 489. The final adopted version contained no mention of, nor reference to, "Senator" or "Delegate."

Nexus Between Articles 7 and 24 of the Declaration of Rights and Article III, Section 4 of the Constitution

The standards of Article III, Section 4 are also applicable on an alternate basis, to evaluate the constitutionality of the 2021 Plan because the Free Elections Clause, Article 7 of the Maryland Declaration of Rights, which has been alleged in the 1773 and 1816 Complaints, as well as the Equal Protection Clause, Article 24 of the Maryland Declaration of Rights, as averred in the 1816 Complaint, each implicate the use of the Section 4 criteria. Assuming either clause is applicable,[21] its application to the lawfulness of the 2021 Plan can only be made manifest by use of the standards in Article III, Section 4.

The methodology of drawing a nexus between a "standards" clause and its facilitating constitutional provision is exactly what Judge John C. Eldridge, writing on behalf of the Court, did in *Md. Green Party v. Md. Bd. of Elections,* 377 Md. 127 (2003), between the Free Elections Clause and Section 1 of Article I of the Constitution[22] as well as the Equal Protection Clause and Section 2 of Article I of the Constitution.[23]

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[21] The applicability of the Free Elections Clause and the Equal Protection Clause will be addressed separately, *infra.*

[22] Article I, Section 1 of the Maryland Constitution, provides:

> All elections shall be by ballot. Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State.

[23] Article I, Section 2 of the Maryland Constitution, provides:

> Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter

(continued . . .)

Green Party involved the constitutional validity of various provisions of the Election Code which governed the method by which a party, other than a "principal political party," could nominate a candidate for a Congressional seat. *Id.* at 140. The Green Party, however, had been notified that the name of its candidate could not be placed on the ballot because the Board of Elections was unable to verify a number of signatures on the nominating petition and, as a result, the petition contained less than the number required to vote. *Id.* at 137. The Board posited a number of reasons for denying the adequacy of the number of signatures, but the seminal reason addressed in the opinion was that many of the petition signatures were those who appeared on an inactive voter registry, which did not qualify them to sign a petition as a "registered voter" pursuant to Section 1–101(gg) of the Election Code.

In addressing whether the Free Elections Clause was violated by the provision regarding an inactive voter registry, Judge Eldridge applied the standards in Article I, Section 2 of the Constitution, which, he explained, "contemplates a *single* registry for a particular area, containing the names of *all* qualified voters[.]" *Id.* at 142. (italics in original). Remarking that the statute created a class of "second class" citizens comprised of inactive voters, Judge Eldridge determined that Article 7 had been violated. *Id.* at 150. In so doing, his determination was premised on a line of cases in which adherence with the strictures of the Free Elections Clause was informed by standards set forth in Constitutional Clauses. *Id.* at 144 (citing *Gisriel v. Ocean*

(. . . continued)

> held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

City Bd. of Supervisors of Elections, 345 Md. 477 (1997) (rejecting provision in an Ocean City Charter that failure to vote in two previous elections rendered a person unqualified to vote in municipal elections, based on Sections 1 and 4 of Article of the Constitution and Article 7 of the Declaration of Rights); *State Admin. Bd. of Election Laws v. Bd. of Supervisors of Balt. City*, 342 Md. 586 (1996) (holding that "having voted frequently in the past is not a qualification for voting," under Article I, Section 1 of the Constitution and Article 7 of the Declaration of Rights); *Jackson v. Norris*, 173 Md. 579 (1937) (recognizing nexus between the Free Elections Clause and the mandate in Section 1 of Article 1 of the Constitution, that "elections shall be by ballot")). Judge Eldridge also utilized the standards in Section 1 of Article I to determine that a registry of inactive voters was "flatly inconsistent" with Article 24 of the Declaration of Rights, the Equal Protection Clause.[24] *Id.* at 150.

It is clear, then, that our Free Elections Clause, as well as the Equal Protection Clause implicate the use of standards contained in the Constitution in order to determine a violation of each. So is the case in their application in the instant case, in which implementation of their provisions can be determined in reference to Article III, Section 4.[25]

[24] As discussed, *infra*, Judge Eldridge also utilized the Equal Protection Clause, Article 24, to evaluate whether the requirement that the Green Party, as a non-principle party, was constitutionally required to submit not only 10,000 signatures on a petition to be recognized as a political party and then provide a second petition to nominate its candidate.

[25] The Supreme Court of Pennsylvania, in *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1 (2018), utilized a framework similar to that implemented in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), when it looked to standards delineated in Article 2, Section 16 of its Constitution – defining criteria to be used in drawing state legislative districts – in order to measure Congressional District Plan, which had been enacted by its Legislature, complied with the Free Elections Clause contained in Pennsylvania's Declaration of Rights.

Article 7 of the Maryland Declaration of Rights

Article 7 of the Maryland Declaration of Rights, entitled "Elections to be free and frequent; right of suffrage," provides:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The 1816 Plaintiffs assert that the 2021 Plan violates the Free Elections Clause in several ways, including that the 2021 Plan "unlawfully seeks to predetermine outcomes in Maryland's congressional districts." They also allege that the 2021 Plan violates Article 7, because it is not based upon "well-established traditions in Maryland for forming congressional districts[,]" including compactness, adjoining territory, and respect for natural and political boundaries. They specifically allege that the boundary of the First Congressional District, which they aver is the only district in which a Republican is the incumbent, was redrawn "to make even that district a likely Democratic seat." As a result, they allege that "the citizens of Maryland, including Plaintiffs, with a right to an equally effective power to select the congressional representative of their choice," have been deprived of their right to elections, which are "free." They contend that Article 7 "prohibits the State from rigging elections in favor of one political party[,]" and conclude that, "any election that is poisoned by political gerrymandering and the intentional dilution of votes on a partisan basis is not free."

The 1773 Plaintiffs assert that the 2021 Plan "subordinate[s]" the requirement, under Article 7 of the Declaration of Rights, that elections be "free and frequent" to "improper considerations," namely the manipulation of Congressional district boundaries so that they will

be unable "to cast a meaningful and effective vote for the candidates they prefer." Additionally, these Plaintiffs allege that Congressional district boundaries that are not based on criteria, such as compactness and the minimization of crossing political boundaries, result in elections that are inherently not "free" and, therefore, violate Article 7.

The State, conversely, argued that the 2021 Congressional Plan does not violate the Free Elections Clause of Article 7, because that Section applies only to state elections. The State observes that the capitalization of "L" in "Legislature," is a direct reference to the General Assembly. Additionally, the State asserts that the legislative history of Article 7, particularly surrounding debates regarding the frequency of elections, indicates that the Free Elections Clause could not apply to federal elections, "for which the State is powerless to control the frequency."

With respect to the use of a capital "L" in "Legislature," in the Free Elections Clause, as reflecting only a reference to the state legislature, the State's contention is belied by its own language. Article 7, as it was originally adopted in 1776, was meant to secure a right of participation:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The language of Article 7 enunciated a foundational right to vote for the only entity for which the citizens of Maryland in 1776 had a participatory ability to elect through voting, the Legislature. The reference to "Legislature," then, refers to the only entity for which there was any accountability through suffrage.

The purpose of the Free Elections Clause relative to partisanship, as alleged in the complaints, heretofore has not been the subject of judicial scrutiny. During the Constitutional Convention of 1864, however, proposals to amend Article I of the Constitution, to create a registry of voters whereby voters would be required to pledge a loyalty oath as a prerequisite to voting were hotly debated and the effect of "partisan oppression" on free elections was explored. Proponents of the amendments sought to exclude supporters of the Confederacy, who, by the terms of the oath, would be disqualified from voting. *Proceedings and Debates of the 1864 Constitutional Convention,* Volume 1 at 1332. Those opposed to the loyalty oath argued that it would be counter to the purpose of "free elections." *Id.* at 1332. One delegate noted that the loyalty oath presupposed that,

> there are now in the State of Maryland enjoying the right of suffrage under the present constitution, ten distinct classes of persons who deserve to be disfranchised from hereafter exercising that right. They . . . are to be under a government by others, in which they are to have no voice, in which they are not to be allowed to participate in any shape or form.

Id. In the same debate, another delegate, Mr. Fendall Marbury, decried the imposition of a loyalty oath as a means of oppression, in contravention to the right to participate in free elections:

> The right of free election lies at the very foundation of republican government. It is the very essence of the constitution. To violate that right, and much more to transfer it to any other set of men, is a step leading immediately to the dissolution of all government. The people of Maryland have always in times past, guarded with more than vestal care this fundamental principle of self-government. By constitutional provisions and legislative enactments, they have sought to provide against every conceivable effort that might be made to suppress the voice of the people. They have spurned the idea of excluding any one on account of his religious or political opinions. Is it not unwise and impolitic to depart from this established policy of the State, by introducing words into our

> constitution which are calculated to revive and foster that spirit of crimination and recrimination already existing to an alarming extent between parties in this State? The word loyal has come to be, of late, a word susceptible of such various construction, and has so often been prostituted by the minions of power, to accomplish partizan ends. That to incorporate it into the constitution would be nothing more nor less than creating an engine of oppression, to be used by whatever party might hold for a time the reins of power.

Id. at 1334. Thus, inhibiting the creation of an "engine of oppression" "to accomplish party ends" by "whatever party might hold for a time the reins of power" to "suppress the voice of the people" was a purpose of the Free Elections Clause.

Our jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State. In *Jackson v. Norris*, 173 Md. 579 (1937), the Court of Appeals considered whether automated voting machines, which used ballots that restricted the choice of voters to candidates whose names were printed on the ballot, violated the Free Elections Clause. In resolving the applicability of the Free Elections Clause, the Court explained that legislative acts that were "a material impairment of an elector's right to vote[,]" were to be deemed unconstitutional. *Id.* at 585. The Court held that the ballots were violative of the Free Elections Clause, because they constrained the ability of voters to cast their vote for the candidate of their choice and, by extension infringed upon voters' right to participate in free elections. *Id.* at 603.

The pivotal goal of the Free Elections Clause, to protect the right of political participation in Congressional elections, was emphasized in *Green Party*, 377 Md. at 127, which concerned an attempt by the Green Party to get a candidate on the ballot for election to Congress, in the state's first congressional district, as discussed, *supra*. In that case, Article 7 was held to protect the right of all qualified voters within the state to sign nominating petitions in support of minor party

candidates for office, regardless of whether they had been classified as "inactive voters." In this regard, the decision in *Green Party* recognized that the Free Elections Clause afforded a greater protection of the citizens of Maryland in a Congressional election context, than is provided under the Federal Constitution, in the First, Fifth, Ninth, and Fourteenth Amendments, which also had been alleged in the Complaint. *Green Party*, 377 Md. at 150.[26]

Clearly, the 1773 and 1816 Complaints, with respect to Article 7 of the Declaration of Rights, the Free Elections Clause, have stated a cause of action and survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

[26] In interpreting similar phraseology that "Elections shall be free and equal," the Supreme Court of Pennsylvania, in *League of Women Voters of Pa.*, determined that the state's Free Elections Clause required that "each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives." 645 Pa. at 117. The Court concluded that, in order to comply with the strictures of the Free Elections Clause, Congressional district maps be drawn in order to "provide[] the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *Id.*

Article 24 of the Maryland Declaration of Rights, Equal Protection

Article 24 of the Maryland Declaration of Rights, entitled "Due process," provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Although Article 24 does not contain language of "equal protection," the Court of Appeals has long held that "equal protection" is embodied in it: "we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights. *Att'y Gen. of Md. v. Waldron*, 289 Md. 683 (1981); *Bd. of Supervisors of Elections of Prince George's Cnty. v. Goodsell*, 284 Md. 279, 293 n.7 (1979) ("[W]e have regularly proceeded upon the assumption that the principle of equal protection of the laws is included in Art. [24] of the Declaration of Rights.").

The 1816 Plaintiffs assert that the 2021 Plan violates Article 24 by unconstitutionally discriminating against Republican voters, including Plaintiffs, and infringing on their fundamental right to vote. Specifically, these Plaintiffs assert that the 2021 Plan intentionally discriminates against Plaintiffs by diluting the weight of their votes based on party affiliation and depriving them of the opportunity for full and effective participation in the election of their Congressional representatives. These Plaintiffs add that the 2021 Plan unconstitutionally degrades Plaintiffs' influence on the political process and infringes on their fundamental right to have their votes count fully. The State, in response, asserts that the Plaintiffs have offered no basis for an interpretation broader than that by the Supreme Court of the Fourteenth Amendment

in *Rucho*. The State posits, though, that the scope of equal protection in Maryland is the same as that which is embodied in the federal constitution in the Fourteenth Amendment.

The essence of equal protection is that "all persons who are in like circumstances are treated the same under the laws." *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640 (1983). The treatment of similarly situated people under the law, clearly, cannot be denied in Maryland, in derogation of the Fourteenth Amendment; it also is clear that Maryland can afford greater protection to its citizens under Article 24 of the Declaration of Rights. In this regard, we need only look at various cases of the Court of Appeals in which the Court was clear that Article 24 and the equal protection clause of the Fourteenth Amendment are "independent and capable of divergent application." *Waldron*, 289 Md. at 704; *see also Md. Aggregates Ass'n, Inc. v. State*, 337 Md. 658, 671 n.8 (1995) (explaining the relationship between applications of equal protection guarantees under the Fourteenth Amendment and Article 24 of the Declaration of Rights); *Verzi v. Balt. Cnty.*, 333 Md. 411, 417 (1994) (stating that "'a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.'" (quoting *Waldron*, 289 Md. at 715)); *Hornbeck*, 295 Md. at 640 (stating that "the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other.").

Notably, in *In re 2012 Legislative Districting*, 436 Md. 121 (2013), Chief Judge M. Bell, writing for the Court of Appeals, assumed that Article 24 could embody a greater right than is afforded under the Fourteenth Amendment when he said: "The potential violation of Article 24 of the Maryland Declaration of Rights is not discussed at length in this case because the petitioners do not assert any greater right under Article 24 than is accorded under both the

Federal right and the population equality provision of Article III, § 4 of the Maryland Constitution." *Id.* at 159 n.25.

The State, however, during argument regarding the Motion to Dismiss, attempted to distinguish what the Court of Appeals said in Footnote 25 in the 2012 redistricting case, by urging that the pivotal quote was addressing only a racial gerrymandering issue, rather than partisan gerrymandering. It is notable, however, that in deriving the notion that Article 24 could embody a greater breadth of protection than is afforded by the Fourteenth Amendment, the Court of Appeals cited to *Md. Aggregates Ass'n, supra,* (quoting *Murphy v. Edmonds,* 325 Md. 342, 354–55 (1992)), neither of which involved any racial differentiation.

Obviously, it cannot be lost to anyone that Article 24 was assumed to be applicable in a redistricting context in the 2012 redistricting case. *Id.* Article 24, moreover, has also been applied in various election and voting right contexts prior to 2012. *See Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 686 (2007) (Presidential elections); *DuBois v. City of College Park*, 286 Md. 677 (1980) (election for City Council); *Goodsell*, 284 Md. at 281 (election for County Executive).

Moreover, in *Green Party*, which is of particular significance to the instant case, Judge John C. Eldridge, writing for the Court, addressed whether a statutory scheme comported with equal protection under Article 24 and analyzed the issue using two distinct approaches, both of which are applicable in the instant case.

In 2000, the Maryland Green Party sought to place its candidate on the ballot for the U.S. House of Representatives seat in Maryland's first congressional district. *Green Party*, 377 Md. at 136. The Green Party needed initially to be recognized as a political party within the state,

which, pursuant to Section 4–102 of the Election Code, required it to submit a petition to the State Board of Elections that included "the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the 1st day of the month in which the petition is submitted." *Id.* at 135–36. In August of 2000, the Green Party's petition was accepted, and it became "a statutorily-recognized 'political party[.]'" *Id.* at 135 n.3 (quoting Section 1–101(aa) of the Election Code).

In order to nominate a candidate, however, the Green Party was then required to submit a second petition to the Board of Elections, which, pursuant to Section 5–703(e) of the Election Code, was to be accompanied by signatures of "not less 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought[.]" *Id.* at 137 n.6. "On August 7, 2000, the [Green Party] submitted a timely nominating petition containing 4,214 signatures of voters purporting to be registered in Maryland's first congressional district," *id.* at 137, but the petition was rejected by the Board of Elections. Alleging that "it could verify only 3,081 valid signatures, fewer than the 3,411 required by Maryland's 1% nomination petition requirement," the Board reasoned that "many signatures were 'inactive' voters" and ineligible to sign nominating petitions. *Id.* The basis for the Board's rationale was that, under the provisions of Section 3–504 of Election Code, if a sample ballot, which "the local boards customarily mail out . . . to registered voters prior to an election[,]" were "returned by the postal service" and the voter then "fail[ed] to respond to [a] confirmation notice," the voter's name would be placed on "the 'inactive voter' registration list." *Id.* at 147. Persons on the inactive voter list, pursuant to Sections 3–504(f)(4) of the Election Code, would "not be counted as part of the registry [of voters]," and under Section 3–504(f)(5), their

signatures were not to "be counted . . . for official administrative purposes as petition signature verification[.]" *Id.* at 150.

In addressing the constitutionality of Section 3–504 of the Election Code, which established an inactive voter registry, which essentially disenfranchised voters, Judge Eldridge applied the standards of Section 2 of Article I of the Constitution, which required:

> Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

In applying the standards of Section 2, Judge Eldridge declared Section 3–504 of the Election Code unconstitutional, because that Section "create[d] a group of 'second-class citizens' comprised of persons who are 'inactive' voters and thus not eligible to sign petitions[,]" and was "flatly inconsistent with Article 24 of the Declaration of Rights. *Id.* at 150. In explaining how the inactive voter list failed to comport with the Constitutional standards, Judge Eldridge explained that Section 2 of Article I, which instructs the General Assembly to create a uniform registry of voters,

> contemplates a single registry for a particular area containing the names of all qualified voters, leaving the General Assembly no discretion to decide who may or may not be listed therein, no discretion to create a second registry for inactive voters, and no authority to decree that an "inactive" voter is not a "registered voter" with the rights of a registered voter.

Id. at 143. A nexus between the Equal Protection Clause and a standards clause, therefore, was established.

Judge Eldridge, thereafter, explored another methodology to apply equal protection to evaluate Green Party's claim that the required submission of two petitions in order to nominate its candidate violated Article 24, because it treated principal political parties differently from minor political parties. *Id.* at 159. The Green Party had argued that "once a group has submitted the required 10,000 signatures to receive official recognition as a political party , . . . no further showing of support should be necessary for the name of a minor political party's candidate to be on the ballot." *Id.* at 153. The Board of Elections countered that the second petition was necessary to ensure that a minor party had "a significant modicum of public support," in order to prevent "frivolous" candidates from appearing on ballots. *Id.* at 153–54.

In addressing the question, Judge Eldridge approached the issue through the strict scrutiny lens and required the State to present a compelling interest. In so doing, he determined that the requirement that the Green Party submit one petition to form a political party and then a second petition to nominate a candidate, "discriminates against minor political parties in violation of the equal protection component of Article 24[.]" *Id.* at 156–57. Having identified the two-petition requirement as discriminatory, Judge Eldridge considered "the extent and nature of the impact on voters, examined in a realistic light," in order to determine the appropriate standard of review of the five-year registration requirement. *Id.* at 163 (quoting *Goodsell*, 284 Md. at 288). He then determined that, "the double petitioning requirement set forth by the Maryland Election Code denies ballot access to a significant number of minor political party candidates. On that basis, the challenged statutory provisions' impact on voters is substantial." *Id.*

Clearly, the 1816 Complaint, with respect to the equal protection principles embodied within Article 24 of the Declaration of Rights, has stated a cause of action to survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

Article 40 of the Maryland Declaration of Rights

The 1816 Plaintiffs' cause of action under Article 40 of the Maryland Declaration of Rights survived the Motion to Dismiss. Article 40, which pertains to freedom of speech and freedom of the press, provides:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

MD. CONST. DECL. OF RTS. art. 40.

In their Complaint, the 1816 Plaintiffs allege that the 2021 Plan violates Article 40 by "burdening protected speech based on political viewpoint." Specifically, they allege, the 2021 Plan benefits certain preferred speakers (Democratic voters), while targeting certain disfavored voters (e.g., Republican voters, including Plaintiffs) because of disagreement on the part of the 2021 Plan's drafters with views Republicans express when they vote. *1816 Compl.* at ¶ 79. Plaintiffs aver that the 2021 Plan subjects Republican voters, including them, to disfavored treatment by "cracking"[27] them into specific congressional districts to dilute Republican votes and ensure that they are not able to elect a candidate who shares their views. *1816 Compl.* at ¶ 80. Therefore, Plaintiffs contend that the 2021 Plan has the effect of suppressing their political views and expressions and retaliates against them based on their political speech. *Id.* at ¶ 81.

Defendants argued in their Motion to Dismiss that the Plaintiffs' claims under Article 40 purport to "parrot" free speech claims that are the same as those offered under the First Amendment to the United States Constitution, which the Supreme Court has rejected in the

[27] "A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others." *Rucho v. Common Cause*, ____ U.S. ____, ____, 139 S. Ct. 2484, 2492 (2019).

redistricting context. *See Rucho*, 139 S. Ct. at 2506–07. Defendants further assert that the because the Maryland Court of Appeals has generally treated the rights enshrined under Articles 40 as "coextensive" with its federal counterpart and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, the free speech cause of action should have been dismissed. *1816 Mot. Dismiss* at 3; *see generally 1816 Mot. Dismiss*, Section III.C.

Article 40 of the Maryland Declaration of Rights adopted in 1776, preceded its federal counterpart, adopted in 1788, thereby contributing to the foundations of the latter. Article 40 of Maryland's Declaration of Rights has been generally regarded as coextensive with the First Amendment, but the Court of Appeals has recognized that Article 40 can have independent and divergent application and interpretation. *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621 (2002) ("Many provisions of the Maryland Constitution . . . do have counterparts in the United States Constitution. We have often commented that such state constitutional provisions are *in pari materia* with their federal counterparts or are the equivalent of federal constitutional provisions or generally should be interpreted in the same manner as federal provisions. Nevertheless, we have also emphasized that, simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does not mean that the provision will always be interpreted or applied in the same manner as its federal counterpart."); *see also State v. Brookins*, 380 Md. 345, 350 n. 2 (2004) ("While Article 40 is often treated *in pari materia* with the First Amendment, and while the legal effect of the two provisions is substantially the same, that does not mean that the Maryland provision will always be interpreted or applied in the same manner as its federal counterpart." (citing *Dua*, 370 Md. at 621)). The Court of Appeals has not shied away from "departing from the United States Supreme Court's

analysis of the parallel federal right" when necessary "[to] ensure[] that the rights provided by Maryland law are fully protected." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550 (2013).

A violation of the free speech provision of Article 40 is implicated when there is interference with a citizen's right to vote, which is a fundamental right. *Hornbeck*, 295 Md. at 641 (explaining that the right to vote is a fundamental right). We apply strict scrutiny when a legislative enactment infringes upon or interferes with personal rights or interests deemed to be "fundamental." *Id.* at 641. When a legislative act, such as the 2021 Plan, creates Congressional districts that dilute the influence of certain voters based upon their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here a fundamental right. As a result, this Court, under Article 40, will apply strict scrutiny to the 2021 Plan.

Fundamental Principles Underlying the Maryland Constitution and the Declaration of Rights

The final basis upon which the Plaintiffs have stated a cause of action on which relief can be granted is through the lens of the entirety of our Constitution and Declaration of Rights, which provides a framework to determine the lawfulness of the 2021 Plan based upon their fundamental principles.[28] *Snyder ex rel. Snyder*, 435 Md. at 55 ("In construing a constitution, we have stated 'that a constitution is to be interpreted by the spirit which vivifies[.]'" (quoting *Bernstein*, 422 Md. at 56)).

Plaintiffs argue that partisan gerrymandering is inconsistent with the principles embodied by the Free Elections Clause, the Equal Protection Clause, and the Free Speech Clause of the Declaration of Rights, because it usurps the power of the people to choose those who represent them in government and puts that power solely within the purview of the Legislature. *1816 Compl.* ¶ 2 ("Indeed, the 2021 Plan defies the fundamental democratic principle that voters should choose their representatives, not the other way around."). They posit that usurping the power of voters to elect members of Congress violates the general principles upon which the structure of Maryland's Government and its Constitution were founded.

In response, Defendants posit that judicially manageable standards do not exist under the Maryland Constitution, and further, applicable statutes adjudicating claims regarding Congressional districts do not exist in Maryland. *1816 Mot. Dismiss* at 3. As a result, Defendants

[28] *Whittington v. Polk*, 1 H. & J. 236, 241 (Md. Gen. 1802), in dictum, established in Maryland the idea of judicial review -- that the courts are the primary interpreters and enforcers of the constitution. The General Court of Maryland explained that if an act of the Legislature is repugnant to the constitution, the courts have the power, and it is their duty, so to declare it. *Id.* The General Court realized that the "power of determining finally on the validity of the acts of the legislature cannot reside with the legislature . . . [because] they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other." *Id.* at 243.

argue that Plaintiffs cannot seek relief under the Maryland Constitution or Declaration of Rights. *Id.* at 45. Instead, the State argues, either Congress or the General Assembly must decide to impose statutory restrictions or adopt constitutional amendments to regulate Congressional districting. *Id.* Until congressional or state action is taken, Defendants aver that Plaintiffs will continue to lack a remedy under the Maryland Constitution or Declaration of Rights. *Id.*

The Constitution and Declaration of Rights must be read together to determine the organic law of Maryland. The courts understood this rule of construction early on, explaining that "[t]he Declaration of Rights and the Constitution compose our form of government, and must be interpreted as one instrument." *Anderson v. Baker*, 23 Md. 531, 612–13 (1865). Specifically, the court in *Anderson* explained that, "[t]he Declaration of Rights is an enumeration of abstract principles, (or designed to be so,) and the Constitution the practical application of those principles, modified by the exigencies of the time or circumstances of the country." *Id.* at 627; *see also Bandel v. Isaac*, 13 Md. 202, 202–03 (1859) ("In construing a constitution, the courts must consider the circumstances attending its adoption, and what appears to have been the understanding of those who adopted it[.]"); *and Whittington v. Polk*, 1 H & J 236, 242 (1802) (stating that, "[t]he bill of rights and form of government compose the constitution of Maryland").

More recently, the Court of Appeals has confirmed this rule of construction. In *State v. Smith*, 305 Md. 489 (1986), the court reiterated that it "bear[s] in mind that the Declaration of Rights is not to be construed by itself, according to its literal meaning; it and the Constitution compose our form of government, and they must be interpreted as one instrument." *Id.* at 511

(explaining that the Declaration of Rights announces principles on which the form of government, established by the Constitution, is based).

While it is established that the Declaration of Rights and Constitution, together, form the organic law of our State, *Whittington*, 1 H & J at 242, the analysis then requires a review of the text, nature, and history of both documents. The text of the Maryland Constitution recognizes that "all Government of right originates from the people . . . and [is] instituted solely for the good of the whole; and [that citizens] have, at all times, the inalienable right to alter, reform, or abolish their Form of Government in such manner as they may deem expedient." MD. CONST. DECL. OF RTS. art. 1. Its purpose "is to declare general rules and principles and leave to the Legislature the duty of preserving or enforcing them, by appropriate legislation and penalties." *Bandel*, 13 Md. at 203. Moreover, it is well understood that the rights secured under the Maryland Declaration of Rights are regarded as very precious ones, to be safeguarded by the courts with all the power and authority at their command. *Bass v. State*, 182 Md. 496, 502 (1943). The framers ensured that the Declaration of Rights would be regarded as precious by enacting subsequent constitutional provisions to safeguard those rights. In that vein, the foundational significance of the right of suffrage is memorialized in the first Article of the Constitution, which pertains to the "Elective Franchise," MD. CONST. art. I, and Article I of the Declaration of Rights, which locates the source of all "Government" in the people. MD. CONST. DECL. OF RTS. art. 1.

Popular sovereignty dictates that the "Government" of the people which "derives from them," is properly channeled when our democratic process functions to reflect the will of the people. Although the Maryland Declaration of Rights, like the Constitution, is silent with respect to the right of its citizens to challenge the primacy of political considerations in drawing

legislative districts, the Declaration of Rights does memorialize that the people are guaranteed the right to wield their power through the elective franchise, thereby safeguarding the sacred principle that the government is, at all times, for the people and by the people. MD. CONST. DECL. OF RTS. arts. 1, 7. Specifically, recognizing that the government is for the people and by the people, Article I of the Constitution describes the process of electing persons to represent them in government, which is also embodied in the principles expressed through the Free Elections Clause in Article 7.

Under the principle of popular sovereignty, we bear in mind that the Constitution as a whole "is the fundamental, extraordinary act by which the people establish the procedure and mechanism of their government." *Bd. of Supervisors of Elections for Anne Arundel Cnty. v. Att'y Gen.*, 246 Md. 417, 429 (1967); *Whittington*, 1 H & J at 242 ("This compact [the Constitution] is founded on the principle that the people being the source of power, all government of right originates from them.").

The second principle—avoiding extravagant or undue extension of power by the Legislature—was an important limitation on the Legislature, the only entity for which the Maryland citizens could vote in 1776. It is stated that "[t]he Declaration of Rights is a guide to the several departments of government, in questions of doubt as to the meaning of the Constitution, and "a guard against any extravagant or undue extension of power[.]" *Anderson*, 23 Md. at 628. The limitation on "extravagant or undue extension of power" is coextensive with the principle of popular sovereignty. For this purpose, "courts have [the] power and duty to determine [the] constitutionality of legislation." *Curran v. Price*, 334 Md. 149, 159 (1994).

In Maryland, we have long understood that "[t]he elective franchise is the highest right of the citizen, and the spirit of our institution requires that every opportunity should be afforded to its fair and free exercise." *Kemp v. Owens*, 76 Md. 235, 241 (1892). In *Kemp*, the Court of Appeals characterized the right to vote as "one of the primal rights of citizenship," *id.*, as it did in *Nader for President 2004*: "the right of suffrage" guaranteed by our Constitution "is one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society." 399 Md. at 686. To safeguard the Legislature from exerting extravagant or undue extension of power, each citizen of this State is afforded the opportunity to vote and hold the Legislature accountable. MD. CONST. DECL. OF RTS. arts. 7, 24, 40. Similarly, the judicial branch of government has a responsibility to limit the Legislature from exerting extravagant or undue extension of power by enforcing the standards of legislative districting outlined in Article III, Section 4 of the Maryland Constitution and by the avoidance of extreme partisan gerrymandering.

Therefore, assuming the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom, the Plaintiffs have stated a cause of action under the fundamental principles of the Maryland Constitution and Declaration of Rights of popular sovereignty and avoiding extravagant and undue exercise of power by the Legislature.

Findings of Fact

Stipulations and Judicial Admissions[29]

1. Plaintiffs are qualified, registered voters in Maryland.

[29] Where stipulations and admissions have overlapped, the trial judge has avoided duplication by adopting the more comprehensive of the two.

2. Plaintiffs in *Szeliga v. Lamone* ("No. 1816") are:

a. Kathryn Szeliga is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Ms. Szeliga currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2011. She is a Republican elected official who represents Maryland citizens in Baltimore and Hartford Counties. She resides in District 7 of the 2021 Plan.

b. Christopher T. Adams is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Mr. Adams currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2015. Mr. Adams is a Republican elected official who represents Maryland citizens in Caroline, Dorchester, Talbot, and Wicomico Counties. He resides in District 1 of the 2021 Plan.

c. James Warner is a citizen of the United States and a resident of and registered voter in Maryland. Mr. Warner is a decorated combat veteran and former prisoner of war. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

d. Martin Lewis is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for

Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

e. Janet Moye Cornick is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 3 of the 2021 Plan.

f. Ricky Agyekum is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 4 of the 2021 Plan.

g. Maria Isabel Icaza is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 5 of the 2021 Plan.

h. Luanne Ruddell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She currently serves as Chair of the Garrett County Republican Central Committee and President of the Garrett County Republican Women's Club. Additionally, she serves on the Rules Committee for the Maryland Republican Party and is a member of the Maryland Republican Women and the National Republican Women's organizations. She resides in District 6 of the 2021 Plan.

i. Michelle Kordell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 8 of the 2021 Plan.

3. Plaintiffs in *Parrott v. Lamone* ("No. 1773") are:

a. Plaintiff Neil Parrott is a citizen of Maryland, is registered to vote as a Republican, and resides in the Sixth Congressional District of the new Plan. Mr. Parrott has registered to run for Congress in 2022 in that district. Mr. Parrott is currently a member of the Maryland House of Delegates.

b. Plaintiff Ray Serrano is a citizen of Maryland, is registered to vote as a Republican, and resides in the Third Congressional District of the new Plan.

c. Plaintiff Carol Swigar is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

d. Plaintiff Douglas Raaum is a citizen of Maryland, is registered to vote as aRepublican, and resides in the First Congressional District of the new Plan.

e. Plaintiff Ronald Shapiro is a citizen of Maryland, is registered to vote as a Republican, and resides in the Second Congressional District of the new Plan.

f. Plaintiff Deanna Mobley is a citizen of Maryland, is registered to vote as aRepublican, and resides in the Fourth Congressional District of the new Plan.

g. Plaintiff Glen Glass is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

h. Plaintiff Allen Furth is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan.

i. Plaintiff Jeff Warner is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan. Mr. Warner intends to run for Congress in 2022 in that district.

j. Plaintiff Jim Nealis is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fifth Congressional District of the new Plan.

k. Plaintiff Dr. Antonio Campbell is a citizen of Maryland, is registered to voteas a Republican, and resides in the Seventh Congressional District of the new Plan.

l. Plaintiff Sallie Taylor is a citizen of Maryland, is registered to vote as a Republican, and resides in the Eight Congressional District of the new Plan.

4. Linda H. Lamone is the Maryland State Administrator of Elections.

5. William G. Voelp is the chairman of the Maryland State Board of Elections.

6. The Maryland State Board of Elections is charged with ensuring compliance with the Election Law Article of the Maryland Code and any applicable federal law by all persons involved in the election process. It is the State agency responsible for administering state and federal elections in the State Maryland.

7. Every 10 years, states redraw legislative and congressional district lines following completion of the decennial United States census. Redistricting is necessary to ensure that districts are equally populated and may also be required to comply with other applicable federal and state constitutions and voting laws.

8. The United States Constitution provides that, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. It also states that, "[t]he Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* § 4, cl. 1. The United States Constitution thus assigns to state legislatures primary responsibility for apportionment of their federal congressional districts, but this responsibility may be supplanted or confined by Congress at any time.

9. Maryland has eight congressional districts.

10. The General Assembly enacts maps for these districts by ordinary statute. While the General Assembly's congressional maps are subject to gubernatorial veto, the General Assembly can, as with any ordinary statute, override a veto.

11. In 2011, following the 2010 decennial census, Maryland's General Assembly undertook to redraw the lines of Maryland's eight congressional districts.

12. To carry out the redistricting process, then-Governor Martin O'Malley appointed the Governor's Redistricting Advisory Committee ("GRAC") in July 2011 by Executive Order. The GRAC was charged with holding public hearings around the State and drafting redistricting plans for the Governor's consideration to set the boundaries of the State's 47 legislative districts and 8 congressional districts following the 2010 Census.

13. To carry out the redistricting process, Governor O'Malley appointed the GRAC to hold public hearings and recommended a redistricting plan. As part of a collaborative approach to developing a congressional map in 2011, Governor O'Malley asked Rep. Steny Hoyer to propose a consensus congressional map among Maryland's congressional delegation.

14. Democratic members of Maryland's congressional delegation, including Representative Hoyer, were involved in developing a consensus map to provide Governor O'Malley in order to assist with the process of developing a new congressional map for Maryland.

15. The GRAC held 12 public hearings around the State in the summer of 2011 and received approximately 350 comments from members of the public concerning congressional and legislative redistricting in the State. Approximately 1,000 Marylanders attended the hearings, which were held in Washington, Frederick, Prince George's, Montgomery, Charles, Harford, Baltimore, Anne Arundel, Howard, Wicomico, and Talbot Counties, and Baltimore City.

16. The GRAC solicited submissions of alternative plans for congressional redistricting prepared by third parties for its consideration. The GRAC also solicited public comment on the proposed congressional plan that it adopted.

17. The GRAC prepared a draft plan using a computer software program called Maptitude for Redistricting Version 6.0.

18. GRAC adopted a proposed congressional redistricting plan and made public its proposed plan on October 4, 2011. No Republican member of the GRAC voted for the congressional redistricting plan that was adopted.

19. The GRAC plan altered the boundaries of district 6 by removing territory in, among other counties, Frederick County, and adding territory in Montgomery County.

20. On October 15, 2011, Governor O'Malley announced that he was submitting a plan that was substantially similar to the plan approved by the GRAC to the General Assembly.

21. One perceived consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from District 6.

22. On October 17, 2011, the Senate President introduced the Governor's proposal as Senate Bill 1 at a special session and it was signed into law on October 20, 2011 with only minor

adjustments (the "2011 Plan"). No Republican member of the General Assembly voted in favor of the 2011 Plan.

23. The 2011 Plan was petitioned to referendum by Maryland voters at the general election of November 6, 2012, pursuant to Article XVI of the Maryland Constitution.

24. On September 6, 2012, the Circuit Court for Anne Arundel County rejected contentions that the ballot language for the referendum question was misleading or insufficiently infmmative. *See Parrott, et al. v. McDonough, et al.*, No. 02-C-12-172298 (Cir. Ct. for Anne Arundel Cnty.) (the "Referendum Litigation"). On September 7, 2012, the Court of Appeals denied a petition for certiorari by the plaintiffs in that case.

25. The 2011 Plan was approved by the voters in that referendum. The language of the question on the ballot for the referendum stated:

> *Question 5*
> *Referendum Petition*
> *(Ch. 1 of the 2011 Special Session)*
> *Congressional Districting Plan*
>
> Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.
>
> **For the Referred Law**
> **Against the Referred Law**

26. On July 23, 2014, the Court of Special Appeals affirmed the ruling of the Circuit Court in the Referendum Litigation in an unpublished opinion. *See Parrott, et al. v. McDonough, et al.*, No. 1445, Sept. Tenn 2012 (Md. App. July 23, 2014). A true and

accurate copy of the unpublished opinion in that case is attached hereto as Exhibit XII.[30] On October 22, 2014, the Court of Appeals denied a petition for certiorari by the appellants in that case. *See Parrott, et al. v. McDonough, et al.*, No. 382, Sept. Tenn 2014 (Md. Oct. 22, 2014).

27. Republican Roscoe G. Bartlett won election as United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over his Democratic challenger: 1992 (8.3%); 1994 (31.9%); 1996 (13.7%); 1998 (26.8%); 2000 (21.4%); 2002 (32.3%); 2004 (40.0%); 2006 (20.5%); 2008 (19.0%); 2010 (28.2%).

28. Democrats Goodloe E. Byron (1970-1976) and Beverly Byron (1978-1990) won election United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over their respective Republican challenger: 1970 (3.3%); 1972 (29.4%); 1974 (41.6%); 1976 (41.6%); 1978 (79.4%); 1980 (39.8%); 1982 (48.8%); 1984(30.2%); 1986(44.4%); 1988(50.7%); 1990(30.7%). *See Election Statistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-8VXK.

29. The congressional districts created through the 2011 Plan were used in the 2012-2020 congressional elections. Since 2012, a Democrat has held District 6 and Maryland's congressional delegation has always included 7 Democrats and 1 Republican. The margins of vict01y for the Democrat in District 6 (John Delaney from 2012-2016; David Trone in 2018-2020) have been: 2012 (20.9%); 2014 (1.5%); 2016 (15.9%); 2018 (21.0%);

[30] The identification of exhibits attached to this Court's Opinion has been changed from alphabetical identifications, which were previously labeled by the parties in these stipulations, to roman numeral identifications, so as to avoid any confusion between the exhibits admitted at trial and the exhibits attached to this Opinion.

2020 (19.6%). *See ElectionStatistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-8VXK.

30. Maryland Governor Larry Hogan signed an executive order on August 6, 2015, which created the Maryland Redistricting Refo1m Commission. A true and accurate copy of the August 6, 2015 executive order is attached hereto as Exhibit 1.

31. The Commission was comprised of seven members appointed by the (Republican) Governor, two members appointed by the (Republican) minority leaders in the Maryland Legislature, and two members appointed by the (Democratic) majority leaders in the Maryland Legislature. The Governor's appointees consisted of three Republicans, three Democrats, and one not affiliated with any party. The Legislature's appointments consisted of two Democrats and two Republicans.

32. After several months of soliciting input from citizens and legislators across the State, the Commission observed that Maryland's constitution and laws offer no criteria or guidelines for congressional redistricting, and that the Maryland Constitution is otherwise silent on congressional districting. The Commission recommended, among other things, that districting criteria should include compactness, contiguity, congruence, substantially equal population, and compliance with the Voting Rights Act and other applicable federal laws. The Commission also recommended the creation of an independent redistricting body, whose members would be selected by a panel of officials drawn from independent branches of government such as the judiciary, charged with reapportioning the state's districts every ten years after the decennial census. A true and accurate copy of the Commission's Final Report is attached hereto as Exhibit X.

33. During each regular session of the General Assembly between 2016 and 2020, Governor Hogan caused one or more legislative bills to be introduced that would have established a processes by which State legislative and congressional maps were created in the first instance by a purportedly independent and bipartisan commission, and ultimately by the Court of Appeals in the event that the commission-proposed maps were not approved by the General Assembly or were vetoed by the Governor. These bills were House Bill 458 and Senate Bill 380 introduced in the 2016 regular session of the General Assembly, House Bill 385 and Senate Bill 252 introduced in the 2017 regular session, House Bill 356 and Senate Bill 307 in the 2018 regular session, House Bills 43 and 44 and Senate Bills 90 and 91 in the 2019 regular session, and House Bills 43 and 90 and Senate Bills 266 and 284 in the 2020 regular session. None of these bills was voted out of committee.

34. On January 12, 2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (MCRC) for the purposes of redrawing the state's congressional and legislative districting maps based on newly released census data. The MCRC was comprised of nine Maryland registered voter citizens, three Republicans, three Democrats, and three registered with neither party. Governor Hogan's Executive Order directed the MCRC to prepare maps that, among other things: respect natural boundaries and the geographic integrity and continuity of any municipal corporation, county, or other political subdivision to the extent practicable; and be geographically compact and include nearby areas of population to the extent practicable. A true and accurate copy of the January 12, 2021 Executive Order is attached heretoas Exhibit XI.

35. Over the course of the following months, the MCRC held over 30 public meetings with a total of more than 4,000 attendees from around the State. The Commission

provided a public online application portal for citizens to prepare and submit maps, and it received a total of 86 maps for consideration.

36. After receiving public input and deliberating, on November 5, 2021, the MCRC recommended a congressional redistricting map to Governor Hogan.

37. On November 5, 2021, Governor Hogan accepted the MCRC's proposed final map and issued an order transmitting the maps to the Maryland General Assembly for adoption at a special session on December 6, 2021.

38. In July 2021, following the 2020 decennial census, Bill Ferguson, President of the Maryland Senate, and Adrienne A. Jones, Speaker of the Maryland House of Delegates, formed the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC"). The LRAC was charged with redrawing Maryland's congressional and state legislative maps.

39. The LRAC included Senator Ferguson, Delegate Jones, Senator Melony Griffith, and Delegate Eric G. Luedtke, all of whom are Democratic members of Maryland's General Assembly. Two Republicans, Senator Bryan W. Simonaire and Delegate Jason C. Buckel, also, were appointed to the LRAC by Senator Ferguson and Delegate Jones. Karl S. Aro, who is not a member of Maryland's General Assembly, was appointed as Chair of the LRAC by Senator Ferguson and Delegate Jones. Mr. Aro previously served as Executive Director of the non-partisan Department of Legislative Services for 18 years until his retirement in 2015, and was appointed by the Court of Appeals to assist in preparing a remedial redistricting plan that complied with state and federal law in 2002.

40. The LRAC held 16 public hearings across Maryland. At the hearings, the LRAC received testimony and comments from numerous citizens.

41. One of the themes that emerged from the public testimony and comments was that Maryland's citizens wanted congressional maps that were not gerrymandered. Other citizens indicated in these comments or public testimony that they did not want to be moved from their current districts. Still others advocated for the creation of majority-Democratic districts in every district of the State. And others requested that districts be drawn so as to eliminate the likelihood that a current incumbent might be reelected.

42. At the conclusion of the public hearings, the Department of Legislative Services ("DLS") was directed to produce maps for the LRAC's consideration.

43. On November 9, 2021, the LRAC issued four maps for public review and comment.

44. In a cover message releasing the maps, Chair Aro wrote: "These Congressional map concepts below reflect much of the specific testimony we've heard, and to the extent practicable, keep Marylanders in their existing districts. Portions of these districts have remained intact for at least 30 years and reflect a commitment to following the Voting Rights Act, protecting existing communities of interest, and utilizing existing natural and political boundaries. It is our sincere intention to dramatically improve upon our current map while keeping many of the bonds that have been forged over 30 years or more of shared representation and coordination."

45. On November 23, 2021, the LRAC chose a final map to submit to the General Assembly for approval (the "2021 Plan"). Neither Republican member of the LRAC supported the 2021 Plan.

46. On November 23, 2021, by a strict party-line vote, the LRAC chose a final map to submit to the General Assembly for approval, referred to as the 2021 Plan. Neither Republican

member of the LRAC supported the 2021 Plan. Senator Simonaire uttered the statement during the LRAC hearing on November 23, 2021, "[o]nce again, I've seen politics overshadow the will of the people."

47. A true and accurate copy of the 2021 Plan is attached as Exhibit I.

48. On December 7, 2021, the Maryland House of Delegates voted to reject an amendment that would have substituted the MCRC's map for the 2021 Plan. Two Democrats joined all of the Republicans in voting to substitute the MCRC's map for the Plan. No Republican member voted against the amendment.

49. On December 8, 2021, the General Assembly enacted the 2021 Plan. One Democratic member voted against the 2021 Plan. No Republican member voted to approve the 2021 Plan.

50. On December 8, 2021, the General Assembly enacted the 2021 Plan on a strict party-line vote. Not a single Republican member of the General Assembly voted to approve the 2021 Plan.

51. According to the Princeton Gerrymandering Project, Democrats now have an estimated vote-share advantage in every single Maryland congressional district.

52. On December 9, 2021, Governor Hogan vetoed the 2021 Plan.

53. On December 9, 2021, the General Assembly overrode Governor Hogan's veto, thus adopting the 2021 Plan into law. One Democratic member of the General Assembly voted against overriding Governor Hogan's veto, while no Republican member of the General Assembly voted in favor of override.

54. After passage of the 2021 Plan, Senator Ferguson and Delegate Jones issued a joint statement emphasizing that the 2021 Plan "keep[s] a significant portion of Marylanders in their current districts, ensuring continuity of representation."

55. Under Maryland's 2021 adopted congressional plan, portions of Anne Arundel County are in Districts 1, 2, and 4, and that District 1 includes population residing on the Eastern Shore and in Anne Arundel County.

56. Under Maryland's 2021 adopted congressional plan, portions of Baltimore City are in Districts 2, 3, and 7.

57. Under Maryland's 2021 adopted congressional plan, portions of Baltimore County are in Districts 2, 3, and 7.

58. Under Maryland's 2021 adopted congressional plan, portions of Montgomery County are in Districts 3, 4, 6, and 8.

59. Under Maryland's 2021 adopted congressional plan, nine counties have population assigned to more than one congressional district.

60. Congressmen Andy Harris, who currently represents the First Congressional District under the Enacted Plan and represented the First Congressional District under the 2011 Plan, was in the Seventh Congressional District, which is the District represented by Kweisi Mfume. Since that time, according to the Board of Elections' registration records, in early February 2022, Congressmen Harris registered to vote at a residence in Cambridge, Maryland, in the First Congressional District, which is on the Eastern Shore at a residence or place where Congressmen Harris has owned since 2009.

61. Exhibit II reports the adjusted population of Maryland's eight congressional districts following the 2010 census under Maryland's 2002 redistricting map. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit II are a true and accurate representation of data derived from government sources.

62. Exhibit III reports the adjusted population of Maryland's eight congressional districts following the 2020 census under the 2011 Plan and under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit III are a true and accurate representation of data derived from government sources.

63. Exhibit IV reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2010. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit IV are a true and accurate representation of data derived from government sources.

64. Exhibit V reports the number of eligible active voters and the respective political-party affiliations of those eligible active voters in each of Maryland's eight congressional districts on October 21, 2012. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit V are a true and accurate representation of data derived from government sources.

65. Exhibit VI reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2020. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VI are a true and accurate representation of data derived from government sources.

66. Exhibit VII reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VII are a true and accurate representation of data derived from government sources.

67. Exhibit VIII depicts Maryland's eight congressional districts under the 2011 Plan. The parties stipulate that the matters of fact asserted, stated or depicted in Exhibit VIII are a true and accurate representation of data derived from government sources.

Findings Derived by the Trial Judge from Testimony and Other Evidence Adduced at Trial

Mr. Sean Trende

68. Mr. Sean Trende testified and was qualified as an expert witness in political science, including elections, redistricting, including congressional redistricting, drawing redistricting maps, and analyzing redistricting.

69. Mr. Trende was asked to analyze the Congressional districts adopted by the Maryland Legislature in the recent rounds of redistricting and opine as to whether traditional redistricting criteria was [subordinated] for partisan considerations.[31]

70. Mr. Trende's opinions and conclusions were rendered to a reasonable degree of scientific certainty typical to his field.

71. In deriving his opinions, Mr. Trende conducted a three-part analysis; the first part analyzed traditional redistricting criteria in Maryland, with specific reference to the compactness

[31] The transcript stated, "whether traditional redistricting criteria was coordinated for partisan considerations," however, the trial judge recalls the correct verbiage was "whether traditional redistricting criteria was *subordinated* for partisan considerations." March 15, 2022, A.M. Tr. 45: 2–7.

of the maps with a comparison to other maps that had been drawn both in Maryland and across the country; he then examined the number of county splits, "the number of times the counties were split up by the maps" and finally, he then conducted a "qualitative assessment" to see how precincts were divided.

72. In the first part, Mr. Trende conducted a simulation analysis. In doing so, he "used the same techniques that were used in Ohio and in North Carolina" and "similar to that which has been used in Pennsylvania." The purpose of Mr. Trende's analysis was to analyze "partisan bias of the Maryland 2021 congressional districts."

73. Mr. Trende's methodology relied on "shape files."

74. In analyzing the shape files, he used "widely used statistical programming software called R."

75. Mr. Trende also conducted an analysis of the county splits for Maryland utilizing the "R" software.

76. Based upon his analysis of the county splits, referring to Exhibit 2-A, Mr. Trende found that the 1972 Congressional map included 8 splits.

77. In 1982, there were 10 county splits in the Congressional map.

78. In 1992, there were 13 county splits in the Congressional map.

79. In 2002, there were 21 county splits in the Congressional map.

80. In 2012, there were 21 county splits in the Congressional map.

81. In the 2021 Plan, there are 17 county splits.

82. The 2021 Plan has a historically high number of county splits compared to other Congressional plans, except the 2011 Map.

83. Mr. Trende testified that "you really only need 7 county splits in a map with 8 districts."

84. With respect to "compactness" of the 2021 Plan, Mr. Trende used four of the "most common compactness metrics": the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score; the lower the score the less compact a Congressional plan is.

85. The four scores were presented to strengthen his presentation as well as to present a different "aspect" of compactness.

86. Exhibits 4-A, 4-B, 4-C, and 4-D reflect the bases for Mr. Trende's compactness analyses, which included scores for all of Maryland's congressional districts dating back to 1788.

87. Exhibit 5 reflects the analysis of the four scores using a scale of 0 to 1, where "1 is a perfectly compact district, and 0 is a perfectly non-compact score."

88. There is no "magic number" that reflects whether a district is not compact. Comparisons to historical data supported Mr. Trende's conclusion that the 2021 Plan is "an outlier."

89. Based upon Mr. Trende's testimony, the Court finds that for "much of Maryland's history, including for a large portion of the post-*Baker v. Carr* history, Maryland had reasonably compact districts that showed a similar degree of compactness from cycle to cycle."

90. The Court also finds, based upon Mr. Trende's analysis that by Maryland's historic standards, the 2021 Congressional lines are "quite non-compact" regardless of which of the four metrics is used or analyzed.

91. Mr. Trende also analyzed the 2021 Plan with reference to every district in the United States going back to 1972, which is represented by Exhibits 6-A, 6-B, 6-C, and 6-D.

92. Mr. Trende testified that there are a limited number of maps for other states that have lower Reock scores than the 2021 Plan (*see* Exhibit 6-A).

93. Mr. Trende also testified with reference to Exhibit 6-B that there are only "six maps that have ever been drawn in the last 50 years with worse average Polsby-Popper scores than the current Maryland maps."

94. Mr. Trende further testified with reference to Exhibit 6-C that the 2021 Plan reflects one of the "worst Inverse Schwartzberg score[] in the last 50 years in the United States."

95. With reference to Exhibit 6-D, Mr. Trende testified that it scored, under the Convex Hull analysis, "very poorly relative to anything that's been drawn in the United States in the last 50 years."

96. Mr. Trende testified relative to compactness in the 2002 and 2012 Congressional plans in comparison to the 2021 Plan and concluded that the 2021 Plan is not compact.

97. Mr. Trende testified that relative to Exhibits 7-A, 7-B, 7-C, and 7-D, that the first Congressional district under the 2021 Plan "lower[ed] the Republican vote share in the First" and "[left] the democratic districts or precincts on the bay." He concluded that the "Democrats have an increased chance of winning this district in a normal or good democratic year."

98. As to Exhibits 8-A, 8-B, 8-C, and 8-D, he concluded that "almost all of the Republican precincts were placed into District 3 or District 7," while "[a]lmost all of the democratic precincts were placed into District 1."

99. Mr. Trende then presented a simulation approach to redistricting utilizing "R" software. The simulation package was dependent on the work of Dr. Imai using an approach that samples maps drawn without respect to politics. In each of Mr. Trende's simulations he used 250,000 maps all suppressing politics and utilizing two minority/majority districts mandated by the Voting Rights Act; he discarded duplicative maps and arrived at between 30,000 to 90,000 maps to be sampled for each simulation.

100. He then fed various "political data" into the program to measure partisanship.

101. Mr. Trende's simulations relied upon the correlations between vote shares and Presidential data, because he testified that Presidential data is the most predictive in analyzing election outcomes. Mr. Trende further testified that he used other elections at the Presidential, senatorial, and gubernatorial levels to check his simulation results.

102. In the first set of 250,000 maps, Mr. Trende depended upon population parity or equality and contiguity as well as a "very, very light compactness parameter." Other traditional redistricting criteria was not considered.

103. The second set of 250,000 maps depended on a "modest compactness criteria," "drawing without any political information."

104. The third set of 250,000 maps added respect for county subdivisions.

105. The three analyses are represented in Exhibits 9-A, 9-B, and 9-C.

106. In every one of the maps from which Mr. Trende drew his opinions, there are at least "two majority/minority districts to comport with the Voting Rights Act."

107. With respect to the first set of maps drawn with very little regard to compactness but regard given to contiguity and equal population, 14,000 of the maps have seven districts that

were won by President Joseph Biden and only 4.4% have eight districts won by President Joseph Biden. Mr. Trende concluded that "it is exceedingly unlikely that if you were drawing by chance, you would end up with a map where President Joe Biden carried all eight districts."

108. With respect to the application of compactness and contiguity as well as equal population, he concluded that the 2021 Plan would result in eight districts won by President Biden, which he concluded was "an extremely improbable outcome if you really were drawing – just caring about traditional redistricting criteria and weren't subordinating those considerations for partisanship."

109. With respect to Exhibit 9-C, which reflects maps drawn with consideration of population equality, contiguity, compactness, and respect for county lines, Mr. Trende testified that "you almost never produce eight districts that Joe Biden carries." Specifically, Mr. Trende found that of the 95,000 maps that survived the initial sort, 134 of them, or .14%, produced eight districts that President Biden won.

110. Mr. Trende then presented data dependent on box plots, which are reflected in Exhibits 10-A, 10-B, 10-C, 10-D, and 10-E. On the basis of his box plot analysis, Mr. Trende concluded that, "[p]olitics almost certainly played a role" in the 2021 Plan. He also concluded that, "there is a pattern that appears again and again and again, which is heavily democratic districts are made more Republican but still safely democratic. And that, in turn, allows otherwise Republican competitive districts to be drawn out of that Republican competitive range into an area where Democrats are almost guaranteed to have seven districts, have a great shot at winning that eighth District [that being, the First Congressional District]."

111. With respect to his final analysis, he utilized a "Gerrymandering Index," which is "a number that summarizes, on average, how far the deviations are from what . . . would [be] expect[ed] for a map drawn without respect to politics."

112. Mr. Trende relied Dr. Imai's work in his paper on the Sequential Monte Carlo methods.[32]

113. Exhibits 11-A, 11-B, and 11-C, illustrate Mr. Trende's conclusions with respect to the Gerrymandering Index. Lower scores are indicative of greater gerrymandering.

114. Mr. Trende concludes that the 2021 Plan is an outlier with respect to the Gerrymandering Index. In fact, he concludes with respect to Exhibit 11-A, which included considerations regarding contiguity and equal population, that "it's exceedingly unlikely" that a map would result that would have a larger Gerrymandering Index, because there were only 97 maps of the 31, 316 maps that were consulted that would have a larger gerrymandering index.

115. With respect to Exhibit 11-B in which compact districts are drawn, Mr. Trende concluded that there were only 102 maps with larger gerrymandering indexes than the 2021 Plan: "[i]t's exceedingly unlikely if you were really drawing without respect to partisanship, just trying to draw compact maps that are contiguous and equipopulous, its exceedingly unlikely you would get something like this."

116. The final Gerrymandering Index Exhibit, 11-C, reflects compact plans that are contiguous and of equal population and respect county lines (with due consideration to the Voting Rights Act: two majority/minority districts).

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[32] Kosuke Imai & Cory McCartan, *Sequential Monte Carlo for Sampling Balanced and Compact Redistricting Plans*, HARV. UNIV. 6–17 (Aug. 10, 2021), available at: https://perma.cc/Z2DT-A2RW.

117. On the basis of Exhibit 11-C, Mr. Trende concludes that the 2021 Plan is a "gross outlier," such that of the 95,000 maps under considerations, only one map had a Gerrymandering Index larger than the 2021 Plan.

118. Utilizing the Gerrymandering Index, Mr. Trende concluded that "it's just extraordinarily unlikely you would get a map that looks like the enacted plan."

119. Mr. Trende ultimately concluded that "the far more likely thing that we would accept in social science is given all this data is that partisan considerations predominated in the drawing of this map and that as was the case in Pennsylvania, North Carolina, and Ohio and other states where this type of analysis was conducted, traditional redistricting criteria were subordinated to these partisan considerations."

120. Mr. Trende also concluded that the 2021 Plan has a very high Gerrymandering Index and the same pattern of districts being drawn up in heavily Republican areas made more Democratic, as well as districts drawn down into the Democratic areas made more Republican, even when three majority/minority districts under the Voting Rights Act are conceded in the 2021 Plan.

121. Ultimately, Mr. Trende concludes that the 2021 Plan was drawn with partisanship as a predominant intent, to the exclusion of traditional redistricting criteria.

122. Mr. Trende had no opinion with respect to the Maryland Citizens Redistricting Commission ("MCRC") Plan.

123. Mr. Trende's simulations did not account for communities of interest and "double bunking of incumbents" into a single district.

124. Mr. Trende did not consider in his simulations the effect of Governor Hogan's victories in 2014 and 2018.

125. Mr. Trende did not account for unusually strong Congressional candidates running in an election using the 2021 Plan.

126. Mr. Trende used voting patterns rather than registration patterns in his analyses of the 2021 Plan.

127. Mr. Trende testified that the absolute minimum number of county splits in a map with eight congressional districts is seven splits.

128. Mr. Trende, when asked to defined an "outlier," explained that it "means a map that would have a less than 5% chance of being drawn without respect to politics" and that with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier."

129. Mr. Trende testified within his expertise to a reasonable degree of scientific, professional certainty, that under any definition of extreme gerrymandering, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know, with compactness and respect for county lines, .00001 percent. That's extreme."

130. Mr. Trende further opined that the 2021 Plan reflects "the surgical carving out of Republican and Democratic precincts" and that "there are a lot of individual things that tell an extreme-gerrymandering story," and "when you put them all together, it's just really hard to deny it."

131. Mr. Trende further stated that the 2021 Plan was drawn "with an intent to hurt the Republican party's chances of letting anyone in Congress."

132. Mr. Trende testified that the 2021 Plan "dilutes and diminishes the ability of Republicans to elect candidates of choice."

133. Mr. Trende also testified that among the implications of an extreme partisan gerrymandering, that it "becomes harder for political parties to recruit candidates to run for office, because who wants to raise all that money and then be guaranteed to lose in your district."

134. Mr. Trende did not conduct an efficiency gap analysis in this case.

Dr. Thomas L. Brunell

135. Dr. Brunell testified and was qualified as an expert in political science, including partisan gerrymandering, identifying partisan gerrymandering, and redistricting.

136. Dr. Brunell was asked to examine two Congressional districting maps for the State of Maryland: the 2021 Plan and the MCRC Plan and compare them using metrics for partisan gerrymandering.

137. In his comparison, he looked at city and county splits and compared the outcomes to proportionality regarding the relationship between the statewide vote for each party and the total number of seats in Congress for each party. He also looked at compactness and calculated the efficiency gap regarding statewide elections during the last ten years for both the 2021 Plan and the MCRC Plan.

138. Dr. Brunell testified that the MCRC Map is more compact on average than the eight districts for the 2021 Plan. He testified that the average compactness score using the Polsby-Popper index was lower for the 2021 Plan than the MCRC Plan. Dr. Brunnell also

concluded that in comparison to 29 states, the 2021 Plan had a Reock score that was higher than only two other states, Illinois and Idaho. He also concluded that only Illinois and Oregon had a lower Polsby-Popper score than Maryland with respect to the 2021 Plan.

139. Dr. Brunell utilized the actual number of voters in his analysis rather than voter registration.

140. Dr. Brunell testified that with respect to the 2016 Presidential election, similar to the 2012 Presidential election, the Democratic candidate received 64% of the statewide vote in Maryland and the Democrats carried seven of the eight Congressional districts in Maryland under the 2021 Plan. Using the 2020 Presidential data in evaluating the 2021 Plan, Democrats would carry all eight of the Congressional districts under the 2021 Plan. Using the 2012 Senate candidate data in evaluating the 2021 Plan, the Democrats would carry all eight Congressional districts. Using the 2016 Senate elections in evaluating the 2021 Plan, he testified that the Democrats would carry seven of the eight districts. Using the 2018 Senate elections data, the Democrats under the 2021 Plan would carry all eight districts. Using the 2014 and 2018 gubernatorial elections, he concluded that the Democrats would carry three of the eight seats in the Congressional elections under the 2021 Plan.

141. Dr. Brunell conducted an efficiency test to determine wasted votes, *i.e.*, those cast for the losing party and those cast for the winning party above the number of votes necessary to win.

142. In order to determine the efficiency gap, he added all the wasted votes for both parties in the same district to get a measure of who is wasting more votes at a higher rate.

143. A lower number of votes wasted reflects less likelihood of partisan gerrymandering.

144. Dr. Brunell testified that just considering the efficiency gap would not be enough to find that a map is gerrymandered. Dr. Brunell testified that one would need to look at "the totality of the circumstances, use different measures, different metrics, to see if they're telling you the same thing [or] different things."

145. Dr. Brunell testified that by using an efficiency gap measure, there was a bias in favor of the Republicans in the MCRC Plan, although that bias was not significant.

146. Dr. Brunell testified that there were many more county segments and county splits in the 2021 Plan than in the MCRC Plan.

147. Dr. Brunell testified that redrawing electoral districts "is a complex process with dozens of competing factors that need to be taken into account, . . . like compactness, contiguity, where incumbents live, national boundaries, municipal boundaries, county boundaries, and preserving the core confirmed districts."

148. Dr. Brunell only considered compactness of the districts in his analysis of the 2021 Plan.

149. Dr. Brunell did not take into consideration in his analysis the Voting Rights Act or incumbency bias. He testified he did assume population equality and contiguity having been met in the 2021 Plan.

Mr. John T. Willis

150. Mr. Willis testified and was qualified as an expert in Maryland political and election history and Maryland redistricting, including Congressional redistricting.

151. Mr. Willis was asked to evaluate the 2021 Plan and determine if it was consistent with redistricting in the course of Maryland history and to give his opinion as to its validity and whether it was based on reasonable factors.

152. Mr. Willis opined that Maryland's population over time has changed with an east-to-west migration, "in significant numbers."

153. Mr. Willis referred to a series of Maryland maps reflecting population migration every 50 years from 1800 to 2000, admitted into evidence as Exhibit H.

154. Exhibit H had been prepared by Mr. Willis in anticipation of the 2001 redistricting process.

155. Exhibit H shows population migration to the west in Maryland and towards the suburbs of the District of Columbia.

156. Mr. Willis testified regarding Defendants' Exhibit I, admitted into evidence, which reflects concentrations of population during the Fall of 2010.

157. He testified almost 70% of the Maryland population is "in a central core, which is roughly I-95 and the Beltway."

158. Mr. Willis also testified that geography impacts the redistricting process as well as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, and migration patterns.

159. With respect to Defendants' Exhibit J, Mr. Willis testified regarding the population changes from 2010 to 2020.

160. Mr. Willis further testified that each district in the 2021 Plan had to have a target population of 771,925.

161. Mr. Willis further testified that in Congressional redistricting the General Assembly starts with the map in existence to avoid disturbing existing governmental relationships.

162. Exhibit K includes all of the Congressional redistricting maps from 1789 to the present 2021 Plan, which includes a set of 17 maps. The last map—map 17—Mr. Willis testified that the district lines in the First District appeared to be based on reasonable factors and are consistent with the historical district lines enacted in Maryland. As the basis for his opinion, Mr. Willis explained that there has always been a population deficit in the First District which requires the boundary to cross over the Chesapeake Bay or to cross north over the Susquehanna River in Harford County and that there have been more crossings over the Chesapeake Bay historically than into Harford County.

163. Mr. Willis further testified regarding regional and county-based population changes over the decades in Maryland since 1790, on a decade basis, reflected in Exhibit L. He testified that the district lines in the Second Congressional District appear to be based upon reasonable factors and are consistent with historical district lines enacted in Maryland and reflects migration patterns relative to Baltimore City.

164. Mr. Willis further testified about the district lines for the Third Congressional District, which he opined were based on reasonable factors and consistent with historical district lines enacted in Maryland.

165. With respect to the liens of the Fourth Congressional District, Mr. Willis testified that the district lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. He testified that the Fourth District is also what is known as a "Voting Rights Act District."

166. With respect to the district lines of the Fifth Congressional District, he opined that the lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. The district lines are also based on major employment centers and major public institutions.

167. With respect to the district lines of the Sixth Congressional District, following the Potomac River, Mr. Willis testified that the lines reflect commercial and family connections tying the area together since the State was founded. On that basis, he testified that the lines of the Sixth District appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

168. Mr. Willis testified that the Seventh Congressional District is another "Voting Rights Act district."

169. Mr. Willis then testified about the Eighth Congressional District, the lines of which appear to be based on reasonable factors and consistent with historical district lines enacted in Maryland. Mr. Willis attributes the lines to traffic patterns along what is basically State Route 97.

170. He finally testified that the all the district lines as they are drawn in the 2021 Plan appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

171. Mr. Willis testified that for every election prior to 2002 in Congressional District 2, a Republican candidate won the Congressional seat. A Republican candidate also won every election in Congress in District 8 from 1992 to 2000, that being Congresswoman Constance Morella. Thereafter, from 2002 to 2010, no Republican candidate won a Congressional election in District 8. He then testified that in District 2, a Democratic candidate has won the Congressional election every single year since the 2002 map was drawn, *i.e.*, Congressman C.A. Dutch Ruppersberger.

172. Mr. Willis further testified with respect to the First Congressional District that as a result of a Federal Court decision, District 1 included all of the Eastern Shore and Cecil County as well as St. Mary's County, Calvert County, and part of Anne Arundel County.

173. As a result of the redistricting plan from 2002 to 2010, District 1 was drawn a different way, which included all of the Eastern Shore counties and an area across the Bay Bridge into Anne Arundel County, as well as parts of Harford and Baltimore County.

174. Mr. Willis characterized the Congressional map from 2002 to 2010 as "fraught with politics to favor some candidates over another."

175. He testified that since the Federal Court ordered the drawing of the Congressional districts in Maryland, the First Congressional District has crossed the Chesapeake Bay in southern Maryland, has crossed the Chesapeake Bay in northern Maryland, as well as crossed parts of Cecil, Harford, Baltimore, and Carroll County.

176. Mr. Willis testified that from the 1842 until the 2012 Congressional maps, Frederick County was linked in its entirety with the westernmost counties of Maryland, as well as in the Federal District Court redistricting map.

177. During the Court's questioning, Mr. Willis testified that the biggest "driver" in the redistricting process is populations shifts with gains in population in places like Prince George's County for example, and loss of population, for example, in Baltimore City.

178. He also testified about other factors affecting the redistricting process such as "transportation patterns," preservation of land, federal installations, state institutions, major employment centers, prior history, election history, as well as ballot questions that "show voter attitude." He further testified that incumbency protection might be a factor as well as political considerations.

Dr. Allan J. Lichtman

179. Dr. Allan J. Lichtman testified and was qualified as an expert in statistical historical methodology, American political history, American politics, voting rights, and partisan redistricting.

180. Dr. Lichtman testified that "politics inevitably comes into play" in the redistricting process and that the balance in democratic government is "between political values and other considerations" to include "public policy, preserving the cores of existing districts, avoiding the pairing of incumbents, looking at communities of interest, shapes of the districts, and a balance between political considerations."

181. Dr. Lichtman testified that, "[w]hen you're involved with legislative bodies, it's inevitably a process of negotiation, log rolling, compromise."

182. Dr. Lichtman denied as unrealistic comparing the 2021 Plan with "ensembles of plans with zero – the politics totally taken out."

183. Dr. Lichtman's test of the 2021 Plan, according to his testimony, evaluates whether the 2021 Plan was "a partisan gerrymander based on the balance of party power in the state." His conclusions were that the likely partisan alignment of the 2021 Plan was "status quo, 7 likely Democratic wins, 1 likely Republican win"; that there could be Democratic districts in jeopardy in 2022 because "2022 is a midterm with a Democratic President." In doing his analysis, he looked at other states which were "actually mostly Republican states, where the lead party got 60% or more of the Presidential vote," which he termed are "unbalanced political states." According to Dr. Lichtman, he looked at "gerrymandering" in multiple ways, "all based on real-world considerations, not the formation of abstract models."

184. Using an "S-curve" representation in Exhibit N, he determined that a party with 60% of the vote-share would win all of the Congressional districts. He continued in his testimony to discuss how he determined that the Democratic advantage under the 2021 Plan was likely a 7-to-1 advantage based upon the Cook's Partisan Voter Index ("PVI"), referring to Exhibit R.

185. Dr. Lichtman posited through Exhibit T that traditionally there are many midterm losses by the party of the President.

186. Dr. Lichtman testified that the Democrats could have drawn a stronger First Congressional District for themselves in the 2021 Map than they did to ensure a Republican defeat.

187. Dr. Lichtman testified pursuant to Exhibit U that the Democratic advantage in Maryland in federal elections is in the mid to upper 60% range so that the Democratic seat-share in a "fair" plan would exceed 80% of the seats.

188. With reference to Exhibit V, Dr. Lichtman presented a "trend line" from which he concluded that Maryland's enacted plan was not a partisan gerrymander because a 7-to-1 seat share was not commensurate with the Presidential vote for the Democratic party in 2020. He concluded that based on the trend line, "you would expect Maryland to be close to 100% of the [Congressional] seats."

189. Utilizing Exhibit W, he testified regarding "unbalanced states" in which the lead party secured more than 64.2% of the vote in the 2020 Presidential election. He included that the Democrats were performing below expectation in terms of its share of Congressional seats.

190. Dr. Lichtman testified that, in his opinion, "empirically, Maryland's Congressional seat allocation under the 2021 Plan is exactly what you would expect, assuming a 7-to-1 seat share."

191. He also testified that the Governor's plan, otherwise referred to as the MCRC Plan, is indicative of a gerrymander by "packing Democrats." He also concluded it was a gerrymander because it paired two or more incumbents of the opposition party, which he believed to be indicative of a gerrymander as reflected by Exhibit Z.

192. He testified that when you pair incumbents, "you are forcing them to rescramble and figure out how to rearrange their next election."

193. He also testified that the MCRC Plan also "dismantled the core of the existing districts and disrupted incumbency advantage again and the balance between representatives and the represented," referring to Exhibit AA.

194. Referring to Exhibit AB, he concluded that the MCRC Plan unduly packed Democrats, because in the MCRC Plan, there would be six Democratic districts over 70% and four Democratic districts close to or over 80%.

195. He testified further that the MCRC Plan is a "packed gerrymander." He testified that the Governor's Commission developing the plan was "extraordinarily under representative of Democrats" and that the Commission was appointed by a partisan elected official. He also testified that the Governor's instructions in developing the plan helps explain "why it turns out to be a Republican-packed gerrymander and a paired gerrymander"; "no attention was given to incumbency whatsoever." Instructions included considerations to include compactness and political subdivisions which he concludes "automatically" plays into, what he calls, partisan clustering. He also testified that the Governor's Secretary of Planning, Edward Johnson, sat in on deliberations while "there was no comparable Democratic representative sitting in."

196. Dr. Lichtman was critical of every one of Mr. Trende's simulation analyses because each one presumed "zero politics." Dr. Lichtman opined that "when state legislative body creates a plan, political considerations are one element to be balanced with a whole host of other elements and the process of negotiation, bartering, and trading that goes on in the legislative process and a demonstration that politics is not zero, is by not any stretch equivalent to a demonstration that the plan is a partisan gerrymander." He continued in his criticism of Mr. Trende's analysis that Mr. Trende did not provide "an absolute standard" and no comparative state-to-state standard. He testified in criticism of Mr. Trende's simulations not only based on "zero politics," but also because Mr. Trende's simulations did not consider "where to place historic landmarks, historic buildings, deciding how to deal with parks or airports or large open

spaces of water." He concluded that Mr. Trende's analysis was deficient because "you can't measure gerrymandering relative to zero politics, you can't measure gerrymandering without a standard, and you can't measure gerrymandering when comparing it to unrealistic simulated plans that don't consider much of the factors that routinely go into redistricting."

197. Dr. Lichtman attributed the problems of Republicans across the Congressional districts "not [to] the plan," but rather "the problem is that they are simply not getting enough votes, an absolutely critical distinction in assessing a gerrymander," based upon his review of Governor Hogan's two victories in 2014 and 2018 and the Republican vote-share in the 2014 Attorney General's race.

198. Dr. Lichtman concluded, in criticism of Mr. Trende's simulation analyses, that, "[a] supposed neutral plan based upon zero politics and supposedly neutral principles when applied in the real world into a place like Maryland, in fact, as demonstrated by this chart, produces extreme packing to the detriment of Democratic voters in the State of Maryland. Votes are extremely wasted for Democrats in at least half and maybe even more than half of the districts."

199. Dr. Lichtman, with respect to the 2021 Plan, does not dispute Mr. Trende's use of the four scores beginning with the Reock score, but opines that the scores of compactness reflect an improvement in compactness from the 2012 plan to the 2021 Plan. He then explains that the county splits decreased from the 2012 plan to the 2021 Plan, specifically, from 21 to 17 splits in the latter.

200. Dr. Lichtman further concluded, using the PVI, that the 2021 Plan "may not even be 7–1 in the real world." It may be "6–2, or even 5–3."

201. Dr. Lichtman later concludes that the very structure of the 2021 Plan "pretty much assures that Republicans are going to win two districts and that Democrats have wasted huge numbers of votes in the other districts."

202. In criticizing Dr. Brunell's analysis, he concludes that the 2021 Plan is not a gerrymander "just like [the] 2002 and 2012 plans were not gerrymanders."

203. Ultimately, Dr. Lichtman testified that "through multiple analyses -- affirmative analyses in [his] own report and scrutiny of the analyses of experts for the plaintiffs, it's clear that the Democrats did not operate to create a partisan gerrymander in their favor," and that "[t]he Governor's Commission plan is a partisan gerrymander that favors Republicans."

204. On cross-examination, Dr. Lichtman testified that non-compactness of Congressional districts could be, and it could not be, an indicator of partisan gerrymandering and concluded that "certainly nothing about compactness or municipal splits or county splits proves that a plan is not fair on a partisan basis, but they can be indicators."

205. On cross-examination, Dr. Lichtman acknowledged that for the past ten years, even when a midterm election occurred during the Democratic presidency of Barack Obama, the Maryland Delegation has been 7–1 Democratic/Republican, so that the Democrats did not lose any seats in any midterm elections, and prior to that, for a number of years, the outcome of Maryland's Congressional elections had been 6–2 Democratic/Republican, year after year.

206. Dr. Lichtman, during cross-examination, further stated that he had "checked the addresses of the incumbents to make sure there was not an unfair double bunking, which [Mr. Trende] meant the pairing of incumbents in the same districts" and indicated that he did not see any pairings in the 2021 Plan.

207. Dr. Lichtman, during cross-examination, concluded that if the General Assembly was "intent upon destroying a Republican district, they could have done so and didn't," which he concludes was a deliberate decision by Democratic leaders, including the Senate President, Bill Ferguson." He further concluded that the General Assembly "created a district that Andy Harris is overwhelmingly likely to win in the crucial first election under the redistricting plan."

208. Finally, Dr. Lichtman stated that he had not seen evidence that the General Assembly bumped "Andy Harris into the Seventh District with Kweisi Mfume."

209. On cross-examination, Dr. Lichtman reiterated that Mr. Trende's simulations "do not account for all traditional redistricting ideas. A whole host of them – and we've gone over that numerous times – are left out," and that Mr. Trende's simulation resulted in an "extraordinarily high degree of packing, which wastes large numbers of Democratic votes to the detriment of Democrats in Maryland."

210. In response to questioning from the Court, based on his opinion to a reasonable degree of professional certainty as to whether the 2021 Plan comports with Article III, Section 4, of the Maryland Constitution, Dr. Lichtman testified that the 2021 Plan comported with Article III, Section 4 because the drafters "actually made the districts substantially more compact than they had been in 2012 and equally compact as they had been in 2002." In providing that opinion relative to compactness, Dr. Lichtman testified that "instead of distorting compactness and violating Section 4, they made their district substantially more compact and in line with what compactness had been over long periods of time." Dr. Lichtman acknowledged that historical compactness is not necessarily the measure of Article III, Section 4 compactness and reiterated that there is no objective standard by which to judge any of the measures utilized by Mr. Trende.

He reiterated that he was "not aware of any study which establishes, on an objective scientific basis, a line you can draw in one or more compactness measures, which would distinguish between compact and noncompact."

211. In response to the question of whether in his opinion, to a reasonable degree of professional, scientific certainty that the standards of due regard shall be given to the natural boundaries and the boundaries of political subdivisions was met, he acknowledged that he had not done any of his own individual research. He opined, however, that "there has not been the presentation of proof by plaintiffs' experts that it doesn't comply." He reiterated "Plaintiffs did not prove that the 2021 Plan violates the Constitution."

212. Dr. Lichtman opined that Article 7 of the Declaration of Rights, dealing with free and frequent elections, Article 24 of the Declaration of Rights, entitled Due Process, as well Article 40, the free speech clause, would not apply to districting because "none of them mentioned districting or anything like that." He further opined that the free and frequent elections clause "clearly was designed for legislative elections" and that based upon his delineation of its history, that the free speech clause did not apply at all.

213. Dr. Lichtman further opined that he did not think that Article III, Section 4 or any of the provisions in the Maryland Constitution or Declaration of Rights applied to Congressional gerrymandering, nevertheless, even assuming were the standards to apply, partisan considerations would not predominate.

Application of the Law to the Findings of Fact

Applying the law to the findings of fact adduced during a trial with a "battle of the experts" initially requires a trial judge to transparently reflect what weight was given to a particular opinion or sets of opinions and why. Each expert in the instant case was qualified as an expert in particular areas. The qualification of each witness, however, was only the beginning of the analysis.

Whether the expert's testimony was reliable and helpful to the trier of fact and law, the trial judge herein, informs the weight to be afforded to each of the opinions. Obviously, the newly adopted *Daubert* standard, under *Rochkind v. Stevenson*, 471 Md. 1 (2020), was a point of discussion with respect to the opinions of Mr. Willis and Dr. Lichtman, but that challenge was withdrawn in the end by the Plaintiffs, and the State did not mount a *Daubert* challenge at all. Beyond *Daubert*, then, the weight given to an expert's opinion depends on many factors including, as well as irrespective, of their qualifications, but based upon a consideration of all of the other evidence in the case, under Maryland Rule 5--702.

In the present case, the trial judge gave great weight to the testimony and evidence presented by and discussed by Sean Trende. His conclusions regarding extreme partisan gerrymandering in the 2021 Plan were undergirded with empirical data that could be reliably tested and validly replicated. He used multifaceted analyses in his studies of compactness and splits of counties and acknowledged the data that he did not consider, such as voter registration patterns, might have yielded additional data, although the reliance on such data had not been studied. He readily acknowledged that he was not yet a PhD, although that title was soon to come, and that he was being paid for his work by the Plaintiffs.

Importantly, although he testified that he was on the Republican side of a number of redistricting cases in which Republican plans had been challenged—*Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658 (N.C. Super. July 08, 2013); *Ohio A. Philip Randolph Inst. v. Smith*, 360 F. Supp. 3d 681 (S.D. Ohio 2018), *vacated sub nom. Ohio A. Philip Randolph Inst. v. Obhof*, 802 F. App'x 185 (6th Cir. 2020); *Whitford v. Nichol*, 151 F. Supp. 3d 918 (W.D. Wis. 2015); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); and *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, --- N.E.3d ---, 2022-Ohio-789 (2022)—he apparently learned what would be helpful to a court in evaluating a Congressional redistricting plan, because he clearly relied on methodologies that were persuasive in North Carolina, *Harper v. Hall*, 2022-NCSC-17, 868 S.E.2d 499 (2022), and Pennsylvania, *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576 (2018).

The impeachment of Mr. Trende's presentation undertaken by Dr. Lichtman was unavailing, in large part, because of the bias that Dr. Lichtman portrayed against simulated maps utilizing "zero politics" and county splits that "happened" to be less in number than what had occurred in a map that had been the subject of criticism in 2012 at the Federal District Court level but not addressed in *Rucho* in 2019. Mr. Trende's presentation was an example of a deliberate, multifaceted, and reliable presentation that this fact finder found and determined to be very powerful.

Dr. Brunell's testimony and evidence in support was much less valuable and helpful to the trial judge, because to evaluate compactness, the efficiency gap, as presented, did not have the power that was portrayed in other cases. *See e.g., Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio) (finding that around 75% of historical efficiency

gaps around the country were between -10% and 10%, and only around 4% had an efficiency gap greater than 20% in either direction, and therefore, noting that several of Ohio's prior elections had efficiency gaps indicative of a plan that was a "historical outlier," including an efficiency gap of -22.4% in its 2012 election and an efficiency gap of -20% in its 2018 election, compared to efficiency gaps in 2014 and 2016 that were -9% and -8.7%, respectively). Dr. Brunell's presentation was murky and lacking in sufficient detail. He made no attempt to establish the interaction of an efficiency gap analysis with other types of testing for compactness and certainly, no basis to believe that allocating Republicans two of eight Congressional seats is appropriate, let alone reliable or valid.

The opinions of Mr. Willis, while of interest, to gain a perspective as to what legislators considered in 2002, 2012, and possibly may have considered in 2021 to draw the various Congressional boundaries, such as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, major employment centers, preservation of land, political considerations, and migration patterns, may in fact be "reasonable," but not, in any way, helpful in the determination of whether "constitutional guideposts" have been honored in the 2021 Plan. As Chief Judge Robert M. Bell from the Maryland Court of Appeals, in 2002 in *In re Legislative Districting of State*, eloquently stated in opinion regarding the influence of such criteria on Constitutional redistricting standards:

> Instead, however, the Legislature chose to mandate only that legislative districts consist of adjoining territory, be compact in form, and be of substantially equal population, and that due regard be given to natural boundaries and the boundaries of political subdivisions. That was a fundamental and deliberate political decision that, upon ratification by the People, became part of the organic

> law of the State. Along with the applicable federal requirements, adherence to those standards is the essential prerequisite of any redistricting plan.
>
> That is not to say that, in preparing the redistricting plans, the political branches, the Governor and General Assembly, may consider only the stated constitutional factors. On the contrary, because, in their hands, the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they may pursue a wide range of objectives. Thus, so long as the plan does not contravene the constitutional criteria, that it may have been formulated in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or political parties, or to achieve other social or political objectives, will not affect its validity.
>
> On the other hand, notwithstanding that there is necessary flexibility in how the constitutional criteria are applied – the districts need not be exactly equal in population or perfectly compact and they are not absolutely prohibited from crossing natural or political subdivision boundaries, since they must do so if necessary for population parity – those non-constitutional criteria cannot override the constitutional ones.

370 Md. at 321–22.

Finally, this trial judge gave little weight to the testimony of Dr. Allan J. Lichtman. Dr. Lichtman's presentation was dismissive of empirical studies presented by Mr. Trende because of their "zero politics" and disavowed their use because of their lack of absolute standards or comparative standards to guide what an outlier is. Juxtaposed against Mr. Trende's use of reliable valid measures that have been accepted in other state courts, such as simulations in North Carolina and Pennsylvania, Dr. Lichtman's own data urged the "realities" of Maryland politics, as he used a "predictive" model to address alleged Democratic concerns about losing not only one, but two or three seats in the midterm election in 2022, because of having a Democratic President in power; in fact the realities of Maryland politics, in the last ten years, under Republican as well as Democratic Presidents, as well as a Republican Governor, have been that the Congressional delegation has stayed essentially the same—7 Democrats to 1 Republican.

Dr. Lichtman's denial of the fact that the 2021 Plan, as enacted, actually "pitted" Congressman Andy Harris against Congressman Kweisi Mfume in the Seventh Congressional District when the 2021 Plan did so, reflects a lack of thoughtfulness and deliberativeness that a trial judge would expect of experts. The fact that only a short period of time was afforded for the development of Dr. Lichtman's report does not excuse that it would have taken a review of the 2021 Plan as enacted in December of 2021, rather than in February of 2022, to know that Congressman Harris had to move to Cambridge to reside in the First Congressional District to avoid being "paired" in the 2021 Plan with a Democratic Congressional incumbent in the Seventh Congressional District.

Finally, although a cold record does not always reflect the nuances of a witness's demeanor, it is apparent from the words Dr. Lichtman used that he was dismissive of the use of a normative or legal framework to evaluate the "structure," as he called it, of redistricting. He began his discussion by referring to legal "machinations" in referring to his testimony discussing a challenge by the plaintiffs in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004) against the redistricting plan of Pennsylvania for Congress, and ended with what amounted to a refrain of an "apologist" of the work of politicians.

There is no question that map-making is an extremely difficult task, but like most of the complexities of the modern world, justifications of map-making must be evaluated by the application of principles—here, the organic law of our State, its Constitution and Declaration of Rights.

Analysis and Conclusion

Application of the legal tenets that survived the Motion to Dismiss, as articulated heretofore, to the Joint Stipulations, Judicial Admissions and the stipulation orally presented by the State at the end of the trial, with consideration of the weight afforded to the evidence presented by the experts yields the conclusion that the 2021 Congressional Plan in Maryland is an "outlier," an extreme gerrymander that subordinates constitutional criteria to political considerations. In concluding that the 2021 Congressional Plan is unconstitutional under Article III, Section 4, either on its face or through a nexus to the Free Elections Clause, MD. CONST. DECL. OF RTS. art. 7, the trial judge recognized that the 2021 Plan embodies population equality as well as contiguity, as Dr. Brunell acknowledged. The substantial deviation from "compactness" as well as the failure to give "due regard" to "the boundaries of political subdivisions" as required by Article III, Section 4, are the bases for the constitutional failings of the 2021 Plan, which has been challenged in its entirety.

In evaluating the criteria of compactness required under Article III, Section 4, it is axiomatic that it and contiguity, but particularly compactness, "are intended to prevent political gerrymandering." *1984 Legislative Districting*, 299 Md. at 675 (citing *Schrage v. State Bd. of Elections*, 88 Ill.2d 87 (1981); *Preisler v. Doherty*, 365 Mo. 460 (1955); *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Opinion to the Governor*, 101 R.I. 203 (1966)). With respect to compactness, while it is true that our cases do not "insist that the most geometrically compact district be drawn," *In re Legislative Districting of State*, 370 Md. at 361, we recognized that compactness must be evaluated by a court in light of all of the constitutional requirements to

determine if all of them "have been fairly considered and applied in view of all relevant considerations." *Id.* at 416.

The task of evaluating whether "compactness" and other constitutional requirements have been fairly considered by the Legislature is informed by the various analyses performed by Mr. Trende. Initially, by application of each of the four "most common compactness metrics," *i.e.*, the Reock score; the Polsby-Poppper score; the Inverse Schwartzberg score; and the Convex Hull score, the districts included in the 2021 Plan are "quite non-compact" compared to prior Maryland Congressional maps and to other Congressional maps in other states based upon a comparison of the scores achieved with reference to the four metrics. It is notable that the 2021 Plan reflects compact scores that range from a "limited" number of state maps worse than Maryland, to only six other maps with worse scores, to the worst Inverse Schwartzberg score in the last fifty years in the United States, to "very poorly relative to anything drawn in the last fifty years in the United States."

The simulations conducted by Mr. Trende, of the type already accepted in North Carolina and Pennsylvania, when infused with the same constitutional criteria as embodied in Article III, Section 4 and allowing for two Voter Rights districts, result in only .14% or 134 maps of the 95,000 reflected produce a victory for President Biden in all eight Congressional districts in Maryland, based upon predictive Presidential votes, as acknowledged by the experts. Importantly, Exhibit 11-C, the Gerrymandering Index exhibit, which embodies all of the constitutional mandates and two Voting Rights districts, reflects that the 2021 Congressional Plan is a "gross outlier", as Mr. Trende opined, "such that of the 95,000 maps under consideration, only one map had a Gerrymandering Index larger than the 2021 Plan. It is

extraordinarily unlikely that a map that looks like the 2021 Plan could be produced without extreme partisan gerrymandering." As a result, the notion that the 2021 Plan is compact is empirically extraordinarily unlikely, a conclusion that utilizes comparative metrics and data throughout the various states. The notion that a plan must pass an absolute standard, as Dr. Lichtman suggested, is without merit, for the test is whether the constitutional conditions, especially compactness, are met.

With respect to county splits, it is clear that the number of crossings over county lines are 17 in the 2021 Plan, which is a historically "high number" of splits since 1972, only less than the 21 splits in 2002 and 2012. The importance of the due regard to political subdivisions language is a reflection of the importance of counties in Maryland, as recognized in *Md. Comm. for Fair Representation v. Tawes*, 229 Md. 406 (1962):

> The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire . . . Indeed, Kent County had been established by Claiborne before the landing of the Marylanders . . . We have noted that there were eighteen counties at the time of the adoption of the Constitution of 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. . . . While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

Id. at 411–12. In dissent in *Legislative Redistricting Cases*, 331 Md. 574 (1993), Judge Eldridge reiterated the pivotal governing function of counties:

> Unlike many other states, Maryland has a small number of basic political subdivisions: twenty-three counties and Baltimore City. Thus, "[t]he counties in Maryland occupy a far more important position than do similar political divisions in many other states of the union."
>
> The Maryland Constitution itself recognizes the critical importance of counties in the very structure of our government. See, e.g., Art. I, § 5; Art. III, §§ 45, 54; Art. IV, §§ 14, 19, 20, 21, 25, 26, 40, 41, 41B, 44, 45; Art. V, §§ 7, 11, 12; Art. VII, § 1; Art. XI; Art. XI–A; Art. XI–B; Art. XI–C; Art. XI–D; Art. XI–F; Art. XIV, § 2; Art. XV, § 2; Art. XVI, §§ 3, 4, 5; Art. XVII, §§ 1, 2, 3, 5, 6. After the State as a whole, the counties are the basic governing units in our political system. Maryland government is organized on a county-by-county basis. Numerous services and responsibilities are now, and historically have been, organized at the county level.
>
> The boundaries of political subdivisions are a significant concern in legislative redistricting for another reason: in Maryland, as in other States, many of the laws enacted by the General Assembly each year are public local laws, applicable to particular counties. *See Reynolds v. Sims*, 377 U.S. 533, 580–[]81, 84 S.Ct. 1362, 1391, 12 L.Ed.2d 506, 538 (1964) ("In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions").

Id. at 620–21.

Due regard for political subdivision lines is a mandatory consideration in evaluating compliance with constitutional redistricting, as Chief Judge Bell noted in the 2002 Legislative districting case, *In re Legislative Districting of State*, 370 Md. at 356, such that fracturing counties to the extent accomplished in the 2021 Plan does not even give lip service to the historical and constitutional significance of their role in the way Maryland is governed. To say that the 2021 Plan is four splits better than the 2002 and 2012 Plans (which have never been examined in a State court, let alone sanctioned), and so must be lawful, is a fictitious narrative, because it is inherently invalid; in 2002, Chief Judge Bell, writing on behalf of the Court, rejected similar justifications offered by the experts on behalf of the Defendants in this case. "There is simply an excessive number of political subdivision crossings in this redistricting plan .

. . ." The State has failed to meet its burden to rebut the proof adduced that the constitutional mandate that due regard to political subdivision lines was violated in the 2021 Plan.

To the extent that Dr. Lichtman and Mr. Willis discussed and prioritized a myriad of considerations that Dr. Lichtman called "political" and Mr. Willis called "reasonable factors," would require that this Court accept their implicit bias that constitutional mandates can be subordinated to politics and/or "reasonable factors." Again, Chief Judge Bell, more eloquently and precedentially than this judge could, addressed the same justifications offered by the State, then and now, when in 2002, he said,

> [b]ut neither discretion nor political considerations and judgments may be utilized in violation of constitutional standards. In other words, if in the exercise of discretion, political considerations and judgments result in a plan in which districts: are non-contiguous; are not compact; with substantially unequal populations; or with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained. That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution "trumps" political considerations. Politics or non-constitutional considerations never "trump" constitutional requirements.

Id. at 370.

Mr. Trende's analysis of the 2021 Plan with respect to its extreme nature and its status as an "outlier" reflects the realities of the 2021 Plan: an "outlier means a map that would have a less than five percent chance . . . of being drawn without respect to politics" and with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier," therefore, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know,

with compactness and respect for county lines, .00001 percent. That's extreme." This trial judge agrees; the 2021 Plan is an outlier and a product of extreme partisan gerrymandering.

With regard to the violations of the of the Articles of the Maryland Declaration of Rights, the 2021 Plan fails constitutional muster under each Article.

With regard to Article 7 of the Maryland Declaration of Rights, the 2021 Congressional Plan, the Plaintiffs, based upon the evidence adduced at trial, proved that the 2021 Plan was drawn with "partisanship as a predominant intent, to the exclusion of traditional redistricting criteria," *Findings of Fact, supra,* ¶ 121, accomplished by the party in power, to suppress the voice of Republican voters. The right for all votes of political participation in Congressional elections, as protected by Article 7, was violated by the 2021 Plan in its own right and as a nexus to the standards of Article III, Section 4.

Alternatively, Article 24, the Maryland Equal Protection Clause, applicable in redistricting cases, was violated under the 2021 Plan. The application of the Equal Protection Clause requires this Court to strictly scrutinize the 2021 Plan and balance what the State presented under a "compelling interest" standard. It is clear from Mr. Trende's testimony that Republican voters and candidates are substantially adversely impacted by the 2021 Plan. The State has not provided a "compelling state interest" to rationalize the adverse effect.

Alternatively, the same rationale holds true for the violation of Article 40 of the Maryland Declaration of Rights, the Free Speech Article, which requires a "strict scrutiny" analysis because a fundamental right is implicated, a citizen's right to vote. In many respects, all of the testimony in this case supports the notions that the voice of Republican voters was diluted

and their right to vote and be heard with the efficacy of a Democratic voter was diminished. No compelling reason for the dilution and diminution was ever adduced by the State.

Finally, with respect to the evaluation of the 2021 Plan through the lens of the Constitution and Declaration of Rights, it is axiomatic that popular sovereignty is the paramount consideration in a republican, democratic government. The limitation of the undue extension of power by any branch of government must be exercised to ensure that the will of the people is heard, no matter under which political placard those governing reside. The 2021 Congressional Plan is unconstitutional, and subverts that will of those governed.

As a result, this Court will enter declaratory judgment in favor of the Plaintiffs, declaring the 2021 Plan unconstitutional, and permanently enjoining its operation, and giving the General Assembly an opportunity to develop a new Congressional Plan that is constitutional. A separate declaratory judgment will be entered as of today's date.

3/25/2022
Date

LYNNE A. BATTAGLIA
Senior Judge

In the Supreme Court of the State of Utah

League of Women Voters of Utah,
Mormon Women for Ethical Government,
Stefanie Condie, Malcom Reid, Victoria Reid,
Wendy Martin, Eleanor Sundwall,
Jack Markman, Dale Cox,
Plaintiffs-Respondents,
v.
Utah State Legislature, Utah Legislative Redistricting
Committee, Sen. Scott Sandall,
Rep. Brad Wilson, Sen. J. Stuart Adams,
Defendants-Petitioners.

No. 20220991-SC
On interlocutory appeal from
the Third Judicial District Court
Honorable Dianna M. Gibson
No. 220901712

Brief of Bipartisan Former Governors Michael F. Easley, William Weld, and Christine Todd Whitman as *Amici Curiae* Supporting Plaintiffs-Respondents

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Respondents:

League of Women Voters of Utah, Mormon Women for Ethical Government, Stefanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, and Jack Markman

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Parties to the district court proceedings:

All parties listed above participated in the district court proceedings. In addition, Plaintiff Dale Cox participated in the proceedings below but voluntarily dismissed his claims on March 7, 2023. Defendant Lieutenant Governor Henderson is not a party to this appeal. She is represented by the following counsel:

> Sarah Goldberg, David N. Wolf, and Lance Sorenson of the Utah Attorney General's Office

Table of Contents

Table of Authorities

Cases

Bills

Other Authorities

Rules

Constitutional Provisions

Identity and Interest of *Amici Curiae*[1]

Amici curiae are former governors from both major political parties who, by virtue of these roles, have unique expertise in the structure and operation of state government. *Amici* also have experienced the corrosive effects of extreme partisan gerrymandering in their states and know from experience how such gerrymandering harms democracy, encourages polarization, and makes it harder for governors and the legislature to find common ground on critical issues. As a result of their experience, they have an interest in limiting this harmful practice where, as in Utah, the state constitution prohibits it.

Governor Michael F. Easley was the seventy-second governor of North Carolina, serving from 2001 until 2009. He is a practicing attorney in North Carolina and previously served as both a District Attorney and Attorney General.

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[1] Pursuant to Utah R. App. P. 25(e)(6), *amici* state that no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no other person except *amici* and their counsel contributed money intended to fund the preparation or submission of this brief.

Pursuant to Utah R. App. P. 25(e)(4), counsel for all parties received notice of the intent of *amici* to file this brief at least seven days before filing.

Pursuant to Utah R. App. P. 25(e)(5), all parties consented to the filing of this brief.

Governor William Weld was the sixty-eighth governor of Massachusetts, serving from 1991 until 1997. He is a practicing attorney in Massachusetts, and previously served as a United States Attorney and as Assistant U.S. Attorney General in charge of the Criminal Division, with jurisdiction over election fraud in both offices.

Governor Christine Todd Whitman was the fiftieth governor of New Jersey, serving in that role from 1994 until 2001.

Introduction

"The true principle of a republic is that the people should choose whom they please to govern them." Alexander Hamilton, 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 257 (J. Elliott ed., 1876). Utah recognizes this principle in its Declaration of Rights: "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit[.]" Utah Const. art. I, § 2. It is well-established that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). But all too often, the people's elected representatives use gerrymandering to invert that principle, drawing district lines to pick their constituents, instead of the other way around. In the process, legislators in the majority entrench their party's power and devalue the votes of voters who do not support them. This is not a sign of a healthy democracy.

Modern gerrymandering allows lawmakers to select their constituents with ever-increasing precision, employing high-priced consultants and rich troves of data to help legislative majorities entrench their power. "While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum

advantage[.]" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting).

The modern practice of extreme partisan gerrymandering is not just inconsistent with our founding principles; it harms the workings of our democracy. As former governors of diverse states, *amici* have witnessed the negative effects of partisan gerrymandering on our political landscape. Partisan gerrymandering encourages polarization, hindering the sensible governance that has been the cornerstone of our nation's success. By allowing legislatures to establish permanent and inflated majorities, it distorts our balanced structure of representative government, exaggerating the factional interests of carefully carved districts and diminishing the statewide interests represented by governors. Instead of creating a government that can pass laws through collaboration, gerrymandering enhances polarization and creates insurmountable ideological gaps between elected officials. Gerrymandering not only jeopardizes the effectiveness of the state's governor, whose mandate is to represent the entire state, but it undermines the lynchpins of representative government: building consensus, working in collaboration, and finding common ground for the good of the whole.

Indeed, partisan gerrymandering is repugnant to principles of representative government that are central to the Utah Constitution's vision of democracy. This Court has firmly declared that "the right to vote is a

fundamental right." *Gallivan v. Walker*, 2002 UT 89, ¶ 24, 54 P.3d 1069. And the Utah Constitution guarantees "[a]ll elections shall be free[.]" Utah Const. art. I, § 17. When a political party manipulates the districting process to cement its authority and cut voters off from alternative representation, it corrupts representative democracy and unlawfully dilutes the voting power of those who have different policy views. As other state courts have recently recognized in challenges based on similar constitutional provisions, extreme partisan gerrymandering violates the principles of free elections, equal protection under the law, the freedoms of speech and association, and the right to vote. *See Matter of 2021 Redistricting Cases*, Nos. 18332/18419, 2023 WL 3030096 (Alaska Apr. 21, 2023); *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). Under Utah's Constitution, protecting voters' rights against entrenched legislative majorities is fundamentally an appropriate—and necessary—judicial activity.

This is particularly true here, where the Legislature has cut off any other avenue for voters to protect themselves by repealing Proposition 4—a successful voter initiative that prohibited partisan gerrymandering. To make matters worse, voters cannot, as a practical matter, seek to amend the Utah Constitution to include the provisions of Proposition 4 because all roads to constitutional amendment run through the same entrenched Legislature. *See*

Utah Const. art. XXIII, § 1 (supermajority of legislature needed to propose constitutional amendments); Utah Const. art. XXIII, § 2 (supermajority of legislature needed to call constitutional convention). Fortunately, the U.S. Supreme Court has observed that "state constitutions can provide standards and guidance for state courts to apply" to police extreme partisan gerrymandering. *Rucho*, 139 S. Ct. at 2507. This Court should heed that call. If not, voters will be without a remedy and their calls to end extreme partisan gerrymandering will continue to "echo into a void." *Id*.

Argument

I. The modern practice of extreme partisan gerrymandering harms democracy.

a. *Extreme partisan gerrymandering is incompatible with democratic principles.*

In simplest terms, partisan gerrymandering occurs when "one political party manipulat[es] district lines in order to disproportionately increase its advantage in the upcoming elections, disenfranchising voters of the opposing party." *Harkenrider v. Hochul*, 197 N.E.3d 437, 441 (N.Y. 2022). While partisan gerrymandering takes many forms, it is "always carried out in one of two ways: the *cracking* of a [disfavored] party's supporters across many districts, in which their preferred candidates lose by relatively narrow margins, or the *packing* of a [disfavored] party's backers into a few districts,

in which their preferred candidates win by overwhelming margins."[2] Map-drawers thus engineer districts to give the party in power a share of seats that exceeds (sometimes vastly) the party's share of the statewide vote.

Partisan gerrymandering is widely—and correctly—viewed as inconsistent with democratic values. "The widespread nature of gerrymandering in our politics is matched by the almost universal absence of those who will defend its negative effect on our democracy." *Benisek v. Lamone*, 348 F. Supp. 3d 493, 511 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). While "both Democrats and Republicans have decried partisan gerrymandering when wielded by their opponents," they "nonetheless continue to gerrymander in their own self interest when given the opportunity." *Id.* The practice has been most politely called "incompatible with democratic principles," but more often far worse: "a cancer on our democracy" that "[a]t its most extreme . . . amounts to 'rigging elections.'" *Rucho*, 139 S. Ct. at 2506; *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring); *Benisek*, 348 F. Supp. 3d at 525 (Bredar, C.J., concurring). It is an "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political

[2] Nicholas Stephanopoulos & Eric McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1506 (2018).

parties at the expense of the public good." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 456 (2006) ("*LULAC*") (Stevens, J., concurring in part and dissenting in part) (quotation marks omitted). And it thwarts the fundamental principle of our democracy: that voters choose their representatives.

The harms of partisan gerrymandering are not merely theoretical. As former governors from both major political parties, *amici* have seen the ways that extreme partisan gerrymandering distorts our politics.

To begin, extreme partisan gerrymandering promotes factionalism. In theory, elected representatives ought to serve the interests of all constituents within their district, regardless of their political affiliations. But partisan gerrymandering distorts this relationship by making lawmakers' fates increasingly dependent on their party and its leadership, instead of their constituents—weakening the connections between representatives and the diverse interests of their districts. The problem is not simply that "a representative may believe her job is only to represent the interests of a dominant constituency" within the district. *LULAC*, 548 U.S. at 470 (Stevens, J., concurring in part and dissenting in part). It is that the representative "may feel more beholden to [those] who drew her district than to the constituents who live there." *Id.* Running afoul of voters back home might result in a few lost votes. Running afoul of the map-drawers may cause the

seat to disappear altogether. This dynamic enhances age-old concerns of factionalism that James Madison voiced in Federalist 10—that "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." *The Federalist No. 10*, at 77 (James Madison) (Clinton Rossiter ed., 1961).

Compounding this problem is partisan gerrymandering's tendency to shift the parties away from the center, as the majority creates safer districts to secure partisan advantage. Although over a third of the national electorate identifies as moderate,[3] gerrymandered safe districts encourage politicians to cater to more extreme primary voters, diminishing the influence of moderates in electoral cycles. This results in an ideological mismatch between constituents and their representatives, ideologically extreme legislatures, and state policy outcomes that fail to reflect the will of state majorities.[4] Partisan gerrymandering shifts political parties toward opposite ends of the spectrum instead of meeting in the middle, "skew[ing] legislative

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[3] *See* Lydia Saad, *Democrats' Identification as Liberal Now 54%, a New High*, Gallup (Jan. 12, 2023), https://news.gallup.com/poll/467888/democrats-identification-liberal-new-high.aspx.

[4] *See* Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, Election Law Journal, No. 16(4) 453, 456 (2017).

representation and enacted policy."[5] More divisive party candidates are elected, bipartisan compromise dwindles, and legislatures pass ideologically extreme legislation that does not reflect the more tempered will of the statewide electorate.

Partisan gerrymandering also enables representatives and political parties to root themselves in office, free from competition or challenge. This is itself problematic because it undermines the contest of ideas—a bedrock principle of democratic governance. But the problem is compounded in state legislatures, given that a gerrymandered state legislature can, in turn, secure a gerrymandered congressional delegation. *See* James Madison, *Notes of Debates in the Federal Convention of 1787*, 424 (W. W. Norton & Co. 1987) (warning that "the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter"). One gerrymandered legislature can help protect the other by enacting additional measures to restrict voting rights and further cement its grip on power. This

[5] Nicholas Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, University of Chicago Public Law & Legal Theory Paper Series, No. 695 (2019).

symbiosis between embedded legislatures is an ill the Framers intended to avoid.

These entrenched legislative majorities upset the finely tuned equilibrium of the separation of powers. *Amici* include former governors who have seen how legislatures attempt to craft, through gerrymandering, a supermajority that effectively eliminates the governor's use of a veto. *Amici* have also observed how candidates in politically gerrymandered districts are compelled to take ever-more-extreme partisan positions to protect themselves from primary challenges. When governors aim to implement the policy objectives they campaigned on, in the interest of the entire state, a legislature that is structured to maximize partisan advantage and factional interests is less inclined to consider those objectives. In this way, *amici* have observed that a legislative map drawn to ensure partisan advantage can undermine the collective interest of the whole—the interest governors represent. This enables exaggerated legislative majorities to refuse to engage with and override the executive, the one branch guaranteed to represent the majority of the state's voters. *See* Utah Const. art. VII, § 8 (supermajority can override executive veto); *State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551, 556-557 (Wis. 1964) (observing that the governor is "the one institution guaranteed to represent the majority of the voting inhabitants of the state").

Instead of acting as a balance on the power of the executive, as intended, a legislative supermajority wrought by extreme partisan gerrymandering can arrogate virtually all the state's authority to itself and extinguish the governor's authority. When a gerrymandered supermajority renders the people's elected governor powerless, it does not simply diminish the governor's power: it thwarts the will of the people of the entire state.

b. *Technologically advanced gerrymandering poses an unprecedented threat to our democracy due to its extraordinary precision.*

The modern tools of partisan gerrymandering are making the practice even more damaging to our democracy. The combination of "technological advances and unbridled partisan aggression" has driven gerrymandering "to new heights."[6] "Armed with granular data on a [state's] households and microtargeting of voters," state legislatures "can use mapping technology that surgically carves the most precise partisan districts." *Matter of 2022 Legislative Districting of State*, 282 A.3d 147, 232 (Md. 2022) (Getty, C.J., dissenting). For example, in New York, Democrats recently achieved what one respected election law expert called a "master class in how to draw an

[6] Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 838 (2015).

effective gerrymander," producing a disproportionate advantage to Democratic candidates for Congress.[7]

c. *The pressures of contemporary partisan politics drive even government officials who recognize partisan gerrymandering's harms to engage in the practice.*

Left to their own devices, politicians will not stop districting for partisan advantage. Politicians who gerrymander often feel powerless to stop due to a perceived need to offset the other party's gerrymanders, particularly for congressional maps. According to fellow former Maryland Governor O'Malley, changes in his state's congressional districts flowed from "watch[ing] Republican governors carve Democratic voters into irrelevance in state after state in order to help elect lopsided Republican congressional delegations."[8] This led Democrats to feel "an obligation—even a duty—to push back" by gerrymandering in his state, despite recognizing the harms of gerrymandering discussed above.[9] When one party gerrymanders, the other party feels the need to do the same, making unilateral disarmament unlikely.

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[7] Nicholas Fandos et al., *A 'Master Class' in Gerrymandering, This Time Led by N.Y. Democrats*, N.Y. Times (Feb. 2, 2022), https://nyti.ms/3LOP04I.

[8] Martin O'Malley, *I Added a Democrat to Congress but I Hope Supreme Court Ends Partisan Gerrymandering*, USA Today (Mar. 29, 2018), https://bit.ly/3vDpdXw.

[9] *Id.*

II. The Utah Constitution's normal checks and balances apply to the Legislature's redistricting plans.

Contrary to Petitioners' argument, the Utah Constitution does not "commit[] redistricting solely to the Legislature." Pet. Br. at 19. Yet Petitioners' entire argument hinges on the bold assertion that this Court is powerless to adjudicate constitutional challenges to congressional maps because the Legislature has "sole" authority to conduct redistricting. That argument is flatly contradicted by both the text and structure of the Utah Constitution, which establish essential checks and balances to limit the extent of legislative authority. The Legislature's claim of unilateral authority is repugnant to fundamental constitutional principles.

The relevant provision of the Utah Constitution states only that "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1. Nowhere in the Constitution does it declare that the Legislature's power is exempt from the normal checks and balances or that it can act unilaterally in this area; it cannot claim an entire subject matter for itself. And this makes sense. As former Chief Justice Durham observed, state constitutions "are fundamentally documents of limitation, not empowerment; they operate to restrict and channel

government power, particularly that residing in the legislative branch."[10] Legislative power to conduct redistricting is necessarily circumscribed by constitutional structures. And if redistricting plans are subject to the normal checks and balances that form the basis of democratic governance, as *amici* here assert, then Petitioners' argument fails on its face.

a. *Redistricting plans, like other bills passed by the Legislature, are subject to the Governor's veto.*

The Legislature's assertion that it has "sole" authority to conduct redistricting ignores the gubernatorial veto power—a critical check on legislative power. Like other governors, the Utah Governor maintains the power to veto bills passed by the Legislature. *See* Utah Const. art. VII, § 8. By having a mechanism in place that allows the Governor to review and veto legislation, the Utah Constitution ensures that the Legislature does not have unchecked power and that there is balance between the branches of government.

Veto power is deeply rooted in our history. The Framers understood the "propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments[.]" *The Federalist No. 73*, at 405 (Alexander Hamilton) (Justin McCarthy ed., 1901). So they recognized the

[10] Christine M. Durham, Speech, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. Rev. 1601, 1604 (2001).

importance of the executive veto to "establish[] a salutary check upon the legislative body" and "guard the community against the effects of faction[.]" *Id*. This executive check on power applies to congressional redistricting plans with equal force. For nearly a century it has been axiomatic that redistricting plans are subject "to the veto of the Governor as part of the legislative process." *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (holding redistricting plan subject to normal gubernatorial veto authority); *see also League of Women Voters*, 178 A.3d at 742 ("Pennsylvania's congressional districts are drawn by the state legislature as a regular statute, subject to veto by the Governor.").

The Utah Constitution, like other state constitutions, requires that the Governor review—and, if they wish, veto—redistricting plans. *See* Utah Const. art. VII, § 8. Indeed, that is exactly how the process worked here: the Legislature presented the redistricting plan to Governor Cox as a regular bill, *see* H.B. 2004, 64th Leg., 2d Spec. Sess. (Utah 2022), and he signed the plan into law despite calls for him to exercise his veto power.[11] Unlike some other state constitutions, nothing in the Utah Constitution bars the Governor from vetoing redistricting plans. *Cf.* N.C. Const. art. II, § 22(5) (prohibiting veto of apportionment legislation). And had Governor Cox exercised his veto power,

[11] Bethany Rodgers, *Gov. Spencer Cox Signs Utah's New Congressional Map, Resisting Calls for a Veto*, Salt Lake Tribune (Nov. 12, 2021), https://www.sltrib.com/news/politics/2021/11/12/gov-spencer-cox-signs/.

he would not have been breaking new ground. In 1884 and 1886, Governor Eli H. Murray vetoed the Legislature's apportionment plans.[12] In the latter instance, he did so because the plan cracked the Liberal Party stronghold in Park City by gerrymandering it to include counties that reached 200 miles away and, in his view, violated the "fundamental principles of fair apportionment[.]"[13] Governor George Clyde vetoed legislative districts in 1961.[14] So did Governor Scott Matheson, twenty years later, because of partisan gerrymandering concerns.[15] The Legislature ignores this history. But this Court should not. The Legislature's redistricting authority is not exclusive because it is plainly subject to the Governor's veto power. And if the Legislature's authority is not exclusive, then its redistricting plans must

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[12] *See Murray's Message*, Salt Lake Herald-Republican (Jan. 16, 1884), https://newspapers.lib.utah.edu/ark:/87278/s6sr05r5/10541406; *The Legislature*, Deseret Evening News (Mar. 9, 1886), https://newspapers.lib.utah.edu/ark:/87278/s6ns4v1n/23180897.

[13] *See Legislative Apportionment*, Salt Lake Tribune (Jul. 17, 1892), https://newspapers.lib.utah.edu/ark:/87278/s6sn1kpk/12925700; *The Legislature*, Deseret Evening News (Mar. 9, 1886), https://newspapers.lib.utah.edu/ark:/87278/s6ns4v1n/23180897.

[14] *See* James Golden, *Salary Increases and Legislative Pay*, The Herald Journal (Mar. 15, 1961), https://newspapers.lib.utah.edu/ark:/87278/s6c59fjm/29861904.

[15] *See Matheson Throws Redistrict Plan Back*, Sun Advocate (Nov. 13, 1981), https://newspapers.lib.utah.edu/ark:/87278/s65n1gv0/28345212.

necessarily be subject the normal checks and balances of Utah's government, including judicial review.

b. *Redistricting plans, like other bills passed by the Legislature, are subject to judicial review.*

The Legislature's assertion of exclusive power to conduct redistricting also ignores Utah courts' obligation to interpret the state constitution and enforce its protections. The Petitioners here posit that courts are powerless to adjudicate claims of extreme partisan gerrymandering to ensure compliance with fundamental constitutional rights. That is wrong. Even where the Utah Constitution confers redistricting authority to the Legislature in the first instance, its maps, like all other legislative acts, "must comport with and must not offend against other applicable provisions of the Constitution." *Matheson v. Ferry*, 641 P.2d 674, 677 (Utah 1982).

This Court would not be wading into unprecedented waters by ensuring the Legislature's redistricting plan complies with the Utah Constitution. In fact, this Court has previously analyzed a legislative redistricting plan to ensure compliance with the Constitution. *See Parkinson v. Watson*, 291 P.2d 400, 403 (Utah 1955). In *Parkinson*, the Court reached the merits of a constitutional challenge to the Legislature's redistricting plan. *See id*. There, the Court observed that it was "obliged to review" the Legislature's redistricting plan in order "to adjudicate the limitations upon the authority of

other departments of government." *Id*. Although the Court ultimately upheld the Legislature's redistricting plan, both it and all parties to the litigation agreed that the Legislature's redistricting power was constrained by the Constitution. *See id*. at 402-403. That is because "constitutional provisions are limitations, rather than grants of power" on the Legislature. *Id*. at 405. And this holds true even where the state constitution explicitly confers congressional redistricting authority to the Legislature.

Redistricting plans, like all legislative actions, do not take precedence over the Utah Constitution as interpreted by the courts. The Office of Legislative Research and General Counsel previously concluded that the "redistricting process is subject to the legal parameters established by the United States and Utah Constitutions, state and federal laws, and case law."[16] And this Court has long held that it must review legislative actions for constitutional compliance even where those cases "have significant political overtones." *Matter of Childers-Gray*, 2021 UT 13, ¶ 67, 487 P.3d 96 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). This Court should not, and cannot, "shirk [its] duty to find an act of the Legislature unconstitutional when it clearly appears that it conflicts with

[16] Office of Legislative Research and General Counsel, 2001 Redistricting in Utah (Jan. 2002), https://le.utah.gov/documents/redistricting/redist.htm (last accessed May 19, 2023).

some provision of our Constitution." *Matheson*, 641 P.2d at 680. The Legislature's redistricting authority does not operate to the exclusion of state courts. *See Growe v. Emison*, 507 U.S. 25, 33 (1993) (observing that "state courts have a significant role in redistricting").

Minnesota provides another example. Its state constitution similarly grants the legislature "the power to prescribe the bounds of congressional and legislative districts." Minn. Const. art. IV, § 3; *cf.* Utah Const. art. IX, § 1 ("[T]he Legislature shall divide the state into congressional, legislative, and other districts accordingly."). Yet Minnesota courts routinely get involved in the congressional redistricting process—a process that, like Utah, the state constitution confers in the first instance to the legislature. *See Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. 2012) (observing that "it is the role of the state judicial branch to prepare a valid congressional plan and order its adoption" where the legislature has failed); *see also Wattson v. Simon*, 970 N.W.2d 42, 45 (Minn. 2022) (same). But the reason for this is simple: neither provision confers "sole" redistricting authority to the state legislature, and all legislative acts must abide by state constitutional guarantees.

In *Wattson*, when the legislature failed to enact a new redistricting plan, the Minnesota Supreme Court stepped in and drew districts using "neutral redistricting principles," including drawing districts "without the purpose of protecting, promoting, or defeating any incumbent, candidate, or

political party." *Wattson*, 970 N.W.2d at 46. It applied neutral redistricting principles because "election districts do not exist for the benefit of any particular legislator or political party," but "exist for the people to select their representatives." *Id*. at 51. Courts are thus empowered to apply redistricting principles "that advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process." *Hippert*, 813 N.W.2d at 395. And while those cases were litigated in the context of a legislative impasse, the critical point is undisturbed: state legislatures do not have sole redistricting authority, and state courts are plainly able to analyze maps in accordance with neutral redistricting principles.

Finally, other provisions of the Utah Constitution seemingly confer subject-matter authority to the Legislature, but these provisions have likewise never been interpreted to confer that authority to the exclusion of the other branches. Provisions regarding the compensation of state and local officers, *see* Utah Const. art. VII, § 18, property taxes, *see id*. art. XIII, § 2, and public education, *see id*. art. X, § 2, all imbue the Legislature with authority. But that authority is not unlimited and is still subject to normal constitutional constraints.

The Legislature's constitutional authority to establish public schools provides a telling example. The Utah Constitution provides in relevant part:

"The public education system shall include all public elementary and secondary schools and such other schools and programs as *the Legislature* may designate. . . . Public elementary and secondary schools shall be free, except *the Legislature* may authorize the imposition of fees in the secondary schools." *Id*. (emphases added). This delegation of authority mirrors the provision Petitioners rely on to claim exclusive power to draw congressional maps. *See id*. art. IX, § 1 ("*the Legislature* shall divide the state into congressional, legislative, and other districts accordingly") (emphasis added). There is no mention of the gubernatorial veto or judicial review in either provision. Yet this Court has confirmed that the Legislature's "authority is not unlimited" with respect to the public school system. *Utah Sch. Boards Ass'n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1129 (Utah 2001). The Legislature cannot, for instance, "establish schools and programs that are not open to all the children of Utah or free from sectarian control … for such would be a violation of articles II and X of the Utah Constitution." *Id*.

Likewise, the Utah Constitution grants the Legislature the power to establish various property taxes. For instance, "[t]he *Legislature* may by statute determine the manner and extent of taxing livestock," Utah Const. art. XIII, § 2(4) (emphasis added), and "[t]he *Legislature* may by statute determine the manner and extent of taxing or exempting intangible property," *id*. art. XIII, § 2(5) (emphasis added). But these delegations to the

"Legislature" are still subject to the checks and balances of the Constitution. This Court ruled that, although "levying taxes is a power given to the Legislature by the Utah Constitution," tax legislation is nonetheless "properly referable to the voters," in part because the Constitution grants the people the power to legislate through initiatives and referenda. *Mawhinney v. City of Draper*, 2014 UT 54, ¶ 18, 342 P.3d 262. Moreover, no one would seriously argue that the Legislature could enact a tax structure, free from judicial review, that discriminated on the basis of race or sex in violation of equal protection guarantees. Tax policy, even though delegated to the Legislature in the first instance, must abide by other constitutional provisions.

This same reasoning applies in the redistricting context. The Legislature may, in the first instance, conduct redistricting, but its maps are still subject to other provisions of the Utah Constitution as interpreted by courts, the branch uniquely empowered to enforce state constitutional guarantees that protect the right to vote.

III. Recent decisions limiting partisan gerrymandering in other states show why extreme partisan gerrymandering violates the Utah Constitution.

Heeding the Supreme Court's counsel in *Rucho*, Respondents in this case assert that the Utah Constitution allows state courts to police extreme partisan gerrymandering. They are correct. Utah courts have long recognized

"that the right to vote is a fundamental right." *Gallivan*, 2002 UT 89, ¶ 24. Analyzing parallel provisions in their own state constitutions, courts in Pennsylvania, Maryland, and Alaska limited the role of partisan considerations in redistricting. *League of Women Voters*, 178 A.3d 737; *Szeliga*, 2022 WL 2132194; *Matter of 2021 Redistricting Cases*, 2023 WL 3030096. These courts recognized that when the legislature diminishes voters' ability to elect representatives based on partisan affiliation, it intrudes on free elections, violates equal protection guarantees, tramples on free speech and association, and infringes upon the right to vote. The same is true in Utah, and the same conclusion follows from its Constitution.

The Utah Constitution's guarantee of free elections prohibits extreme partisan gerrymandering. Under article I, section 17 of the Utah Constitution, a provision with no federal counterpart, "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." State constitutions generally provide substantive protections against antidemocratic conduct above and beyond the protections afforded by the federal Constitution.[17] These protections are often construed to include a prohibition on extreme partisan gerrymandering. Interpreting their states' similar constitutional provisions, Pennsylvania and

[17] *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 913 (2021).

Maryland courts have both found extreme partisan gerrymandering to be incompatible with the guarantee of free elections. *See League of Women Voters*, 178 A.3d at 814 (state constitution's Free and Equal Elections Clause prohibits partisan gerrymandering); *Szeliga*, 2022 WL 2132194, at *43 (state constitution's Free Elections Clause prohibits partisan gerrymandering).

As other state courts have noted, Free Elections Clauses trace their roots to the 1689 English Bill of Rights, which declared that "election of members of the parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.); *see also Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) (noting other provisions of Utah Constitution "arose from the English Bill of Rights of 1689"), *abrogated on other grounds by Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533. The English provision was introduced in response to the same type of inequity that arises from extreme partisan gerrymandering. It was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain an "electoral advantage," leading to calls for a "free and lawful parliament" by the participants of the Glorious Revolution.[18] These same concerns resonate today and lead to the conclusion

[18] J.R. Jones, *The Revolution of 1688 in England* 148 (1972); Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 241, 247–48, 250 (2007).

that extreme partisan gerrymandering violates Utah's version of the Free Elections Clause.

Limits on partisan gerrymandering resonate not only in the historical concerns that animated the creation of Free Elections Clauses, but also in their text. Instead of enumerating every form of election tampering that could breach these clauses, they are intended to have a "plain and expansive sweep," necessitating the political system ensure "a voter's right to equal participation in the electoral process[.]" *League of Women Voters*, 178 A.3d at 804. This guarantee to each voter of "an equally effective power to select the representative of his or her choice" cannot be squared with partisan gerrymandering. *Id.* at 814. And it "mandates that all voters have an equal opportunity to translate their votes into representation." *Id*. at 804. Utah's Free Elections Clause likewise should be construed to prohibit "an extreme gerrymander that subordinates constitutional criteria to political considerations." *Szeliga*, 2022 WL 2132194, at *43.

Extreme partisan gerrymandering similarly violates the people's right to the equal protection and uniform operation of laws. *See* Utah Const. art. I, §§ 2, 24. Utah's guarantee of equal protection is "in some circumstances, more rigorous than the standard applied under the federal constitution." *Gallivan*, 2002 UT 89, ¶ 33. This is such a circumstance. Extreme partisan gerrymandering denies equal protection where the disfavored party's "voters

and candidates are substantially adversely impacted" by the redistricting plan without a compelling state interest. *Szeliga*, 2022 WL 2132194, at *46. Utah's Equal Protection Clause does not permit an electoral practice that "effectively discriminates against urban voters in that it affords the registered voters of rural counties a disproportionate amount of voting power." *Gallivan*, 2002 UT 89, ¶ 64. Moreover, there is no compelling interest in subordinating the voting power of a disfavored political group.

The entire goal of partisan gerrymandering is to empower voters of the favored party to elect more representatives than their numbers would justify under a plan not infected with partisan bias. But the equal operation of voting laws requires equal opportunity in the electoral process. That is why the Alaska Supreme Court recently recognized that partisan gerrymandering is unconstitutional under that state's Equal Protection Clause. *Matter of 2021 Redistricting Cases*, 2023 WL 3030096, at *43. That court found that a redistricting board had "intentionally discriminated against certain voters" based on geography and partisan affiliation in violation of equal protection guarantees. *Id*. at *49. Extreme partisan gerrymandering is likewise antithetical to Utah's guarantee of equal protection and the uniform operation of election laws.

Drawing district lines to exaggerate the electoral power of some voters and diminish the electoral power of others based on political affiliation

further violates Utah's guarantee of free speech and association, *see* Utah Const. art. I, §§ 1, 15, because voters "express their views in the voting booth." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). The Legislature cannot "enact[] a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). But that is precisely what it has done: diluted the electoral power of a disfavored group of Utahns based entirely on "their partisan affiliation and their voting history[.]" *Szeliga*, 2022 WL 2132194, at *19. Congressional maps violated the Maryland Constitution's Free Speech Article based on this reasoning, where "the voice of Republican voters was diluted and their right to vote and be heard with the efficacy of a Democratic voter was diminished." *Szeliga*, 2022 WL 2132194, at *46. This extreme form of partisan gerrymandering is a flagrant violation of the freedoms of speech and association because it discriminates against voters based on their political affiliations.

Finally, the dilution of disfavored voters' electoral power violates Utah's guarantee of the right to vote. *See* Utah Const. art. IV, § 2. This is not just the technical right to cast a ballot; rather, the provision encompasses the right to a "meaningful" vote. *See Shields v. Toronto*, 395 P.2d 829, 832 (Utah 1964). To give meaning to the ballot, and consistent with the constitutional right to vote, the Legislature cannot erect an electoral system that operates

to "defeat the public will." *See Earl v. Lewis*, 77 P. 235, 238 (Utah 1904). That would be inconsistent with the Utah Constitution's explicit protection of the right to vote—a provision that has no corollary in the federal Constitution. State constitutions with similar explicit guarantees have been construed to provide "more expansive and concrete protections of the right to vote." *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. 2006) ("[V]oting rights are an area where our state constitution provides greater protection than its federal counterpart."). This Court should similarly conclude that Utah's parallel affirmative right to vote provides robust protection beyond the rights afforded by the federal Constitution. *See State v. Larocco*, 794 P.2d 460, 465 (Utah 1990) (Durham, J.) (noting that Utah Constitution may provide protection beyond the scope mandated by federal Constitution). The Utah Constitution's explicit right to vote should be interpreted to prohibit partisan gerrymandering.

IV. The judiciary provides the only remedy for voters to prevent partisan gerrymandering.

The Court must act to protect these existing constitutional guarantees, particularly where Utah voters are unable to explicitly prohibit partisan gerrymandering without the Legislature's consent. If this Court declines to enforce the Utah Constitution and prohibit extreme partisan gerrymandering, Utah voters will be without recourse. All roads to

redistricting reform run through a Legislature that has entrenched itself through its own partisan gerrymander.[19] The people of Utah cannot take matters into their own hands by explicitly prohibiting partisan gerrymandering through popular initiative or constitutional amendment. The Legislature claims the power to repeal popular initiatives, *see* Opening Brief for Cross-Appellants at 21, and constitutional amendment seemingly requires the Legislature's consent, *see* Utah Const. art. XXIII, §§ 1, 2. To make matters worse, voters cannot so easily resort to the ballot box to replace legislators that have used their power to entrench themselves in office: the very purpose of partisan gerrymandering is to prevent such political competition. This Court is the last and only resort for the people of Utah.

V. Preventing extreme partisan gerrymandering is not a political power grab but rather a means of avoiding partisanship.

There is nothing political about this Court interpreting the Constitution to prohibit extreme partisan gerrymandering. The justiciability of partisan gerrymandering does not inure to the benefit of a particular political party. Nor does it inject partisanship into the redistricting process, as Petitioners suggest. Petitioners have it backward: adjudicating claims of

[19] *See Utah State House Final Plan*, PlanScore (Nov. 30, 2021), https://planscore.org/plan.html?20211130T074239.593773066Z (showing efficiency gap and declination of district map); *Utah State Senate Final Plan*, PlanScore (Nov. 30, 2021), https://planscore.org/plan.html?20211130T074210.576526734Z (same).

extreme partisan gerrymandering will avoid the "exercise [of] raw political power," Pet. Br. at 21, by purging undue political considerations from the redistricting process and applying neutral principles to support fair representation.

State courts have already recognized that there are "neutral benchmarks [] particularly suitable as a measure in assessing whether a congressional districting plan dilutes the potency of an individual's ability to select the congressional representative of his or her choice[.]" *League of Women Voters*, 178 A.3d at 816. They have applied various statical measures of partisan fairness, including the "efficiency gap," "mean-median difference," "partisan bias," and "declination," to determine if a map unduly favors one political party. *Adams v. DeWine*, 195 N.E.3d 74, 91 (Ohio 2022). Other times, they have relied on old-fashioned indicators such as witness testimony, obvious dramatic and unnecessary changes to district boundaries, and comparison to neutral redistricting criteria. *See Benisek*, 348 F. Supp. 3d at 499-507; *League of Women Voters*, 178 A.3d at 816. Courts are well-equipped with the tools necessary to remove undue partisanship from the redistricting process.

Conclusion

As former governors of diverse states, *amici* have experienced how extreme partisan gerrymandering distorts our democracy. It makes our politics more divisive and thwarts the kinds of common-sense compromises that make government work. Like courts in Pennsylvania, Maryland, and Alaska, this Court should hold that extreme partisan gerrymandering violates the Utah Constitution.

Dated: May 19, 2023

Respectfully submitted,

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Certificate of Compliance

Pursuant to Utah R. App. P. 25(e)(8) and 24(a)(11), I hereby certify that this brief: (1) complies with the word limits set forth in Utah R. App. P. 25(f) because this brief does not exceed 7,000 words, excluding the parts of the brief exempted by Utah R. App. P. 25(f), and was prepared in proportionally spaced typeface using 13-point Century Schoolbook font; and (2) contains no non-public information in compliance with the requirements of Utah R. App. P. 21(h).

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Certificate of Service

I hereby certify that on May 19, 2023, a true, correct, and complete copy of the foregoing brief was filed with the Utah Supreme Court and served via electronic mail on the following recipients:

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IN THE UTAH SUPREME COURT

LEAGUE OF WOMEN VOTERS OF UTAH, et al.,	:	
Plaintiffs-Respondents,	:	Case No. 20220991-SC
vs.	:	
UTAH STATE LEGISLATURE, et al.,	:	
Defendants-Petitioners.	:	

BRIEF OF AMICUS CURIAE JENNIFER WILSON IN SUPPORT OF PLAINTIFFS-RESPONDENTS

Interlocutory Appeal from the Third Judicial District Court, Salt Lake County
Honorable Dianna M. Gibson, Judge
Case No. 220901712

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Table of Contents

Table of Authorities

Cases

Constitutions and Statutes

Rules

Other Authorities

INTEREST OF THE AMICUS CURIAE

Jenny Wilson presently serves as Mayor of Salt Lake County. She submits this brief in support of respondents, however, in her individual capacity and not on behalf of Salt Lake County or its County Council. Mayor Wilson[1] has served as Mayor of Salt Lake County since January of 2019. Prior to holding that office, she served two non-consecutive terms on the Salt Lake County Council, the first beginning in 2005. She was a primary candidate for Mayor of Salt Lake City in 2006 and in 2016 served as Utah's national committeewoman for the Democratic Party. Mayor Wilson was also the Democratic nominee for the United States Senate in 2018.

As a result of her long experience in politics in Salt Lake County, Mayor Wilson is uniquely cognizant of the operations of the County, the needs of its citizens, its interaction with the federal government – including Utah's congressional representatives – and the distinct needs of its communities as defined by the municipal boundaries within Salt Lake County. In this respect, she is acutely aware of the impact of the 2021 Congressional Plan at issue in this litigation, the effect of such plan on the citizens of Salt Lake County, and the need for adequate representation. Accordingly, Mayor Wilson's interest is in providing commentary and context to demonstrate the implications of the 2021 Congressional Plan on her constituents and to advocate that her constituents' rights should be afforded the opportunity for protection through the above-captioned litigation.

[1] While reference is made to Mayor Wilson using the honorific appropriate for a person in her elected position, this should not be construed as an indication that she purports to offer support to Respondents on behalf of Salt Lake County.

NOTICE, CONSENT, AUTHORSHIP, AND FUNDING

Pursuant to Utah R. App. P 25(b), amicus curiae Mayor Wilson has given timely notice to the parties of this amicus brief, and they have consented the filing of this amicus brief. None of the parties' counsel authored this brief in whole or in part or contributed money to fund the preparation or submission of this brief. And no other person except amicus curiae or their counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

The right to vote and to have that vote count is the DNA of our democratic government. In the words of the United States Supreme Court, and emphasized by Plaintiffs-Respondents ("Respondents") in their Complaint in this matter,

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms of cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Reynolds v. Sims, 377 U.S. 533, 562 (1964). Mayor Wilson endeavors to protect this fundamental right so that she and her fellow residents of Salt Lake County are given the ability to actively participate in elections and obtain the representation to which they are entitled consistent with their unified communities of interest. Mayor Wilson does so in her personal capacity and as an individual impacted by the gerrymandering Respondents' action seeks to address.

Mayor Wilson does not now advocate on the ultimate conclusion in this action as to the constitutionality of the Legislature's conduct. Rather, she advances Respondents' request that the Court affirm the district court's order allowing Respondents' claims to proceed. These claims implicate fundamental and justiciable constitutional rights jeopardized by the Legislature's fracturing of Salt Lake County. Throughout history, our government and the British before us recognized the importance of drawing representative districts congruous with municipal boundaries to support the interests of county communities, render government accessible, and create faith and trust in the system. Like all others, the residents of Salt Lake County rely upon the cohesiveness between political subdivisions and the communities of interest that they represent. And like all others, the residents of Salt Lake County feel the detrimental impact of the Legislature's disregard of these principles.

The interests of Salt Lake County residents must be afforded the opportunity for protection through litigation on the constitutionality of the Legislature's 2021 Congressional Plan at issue in this litigation. The Plan deviates from the traditional focus on keeping counties together and puts at risk the right to participate in free and fair elections, the right to equal protection, the right to freedom of speech and association, and the right to vote protection, all of which are guaranteed by the Utah Constitution.

Mayor Wilson respectfully supports Respondents' request that this Court affirm the underlying order denying dismissal of Counts I through IV of its Complaint and allow this matter to proceed to final adjudication and provide relief for the 2024 election.

ARGUMENT

I. The Congressional Plan at Issue Disregards County and Municipal Boundaries Depriving Communities of Cohesive Representation.

The 2021 Congressional Plan at issue in this litigation created four congressional districts with roughly equal populations of 817,904 residents based on the population of Utah as determined by the 2020 United States Census of 3,271,616.[2] Of this total population, 1,186,257 people live in Salt Lake County.[3] [R.20]. Based on these figures, fulfilling the goal of creating districts with roughly equal populations, Salt Lake County would necessarily need to cover two congressional districts to maintain equal populations. This was not, however, what the Legislature decided to do. Rather than split the county among two districts, or even three – as Mayor Wilson advocated[4] – the Legislature divided Salt Lake County among all four congressional districts. [R.7]. In doing so, the Legislature threatened Salt Lake County residents' rights to adequate representation consistent with their county and municipal boundaries.

[2] *See* "Utah," U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/UT,saltlakecountyutah,saltlakecitycityutah/PST045222 (last viewed May 17, 2023).

[3] *See id.*

[4] Mayor Wilson attended a meeting of the Utah Independent Redistricting Commission on October 21, 2021, at which time she advocated for Salt Lake County being split between two and no more than three districts. *See., e.g.,* Commission Meeting Minutes, available at https://www.utah.gov/pmn/files/792361.pdf (last viewed May 13, 2023); *see also* Recording of October 21, 2021 Commission Meeting, available at https://www.youtube.com/watch?v=ldE9Q_f11UI&t=1102s (last viewed May 13, 2023).

A. Salt Lake County residents share commonalities beyond political party.

As alleged by Respondents, Salt Lake County contains Utah's largest concentration of non-Republican voters. [R.6-8.]. It is also unified by the nature of its population and the issues facing its predominantly urban community.

With its population and business centers consolidated largely in Salt Lake County and the Wasatch Front, Utah has grown to the seventh most urbanized state in the United States. [R.20.] The Salt Lake County population is predominantly urban and consists of, in significant part, people who identify as racial and/or ethnic minorities. [R.20-21.] As alleged in Respondents' Complaint, Salt Lake County is the center of Utah's racially and ethnically diverse populations. The percentage of Salt Lake County residents who identify as racial and/or ethnic minorities increased from 26% in 2010 to 32.4% in 2020. [R.21.] This amounts to over 350,000 people. And multiple municipalities within Salt Lake County are now considered "majority-minority" such as West Valley City, with minority groups making up over 51.4% of the population. [R.21.]

These factors and features of Salt Lake County that differentiate it from other Utah counties mean that its residents share community, political, and economic resources; they have interests that necessarily differ from the equally important interests of Utah residents living in more rural counties. For example, Salt Lake County residents generally rely on the same infrastructure with the understanding that it will be governed, on a local basis, by politicians elected to serve the needs of the community living in a more urban environment that is located within the political boundaries of Salt Lake County.

In this respect, the citizens of Salt Lake County have the ability to elect officials representative of their interests on a variety of levels according to the natural community needs as defined by local political boundaries. A Salt Lake City resident is represented by their local Mayor and City Council who have an obligation to work for the best interests of its citizens. The same can be said of Draper, West Valley City, and Millcreek, among the various other political subdivisions of Salt Lake County. These same citizens are also represented by Salt Lake County, the larger political subdivision of which they are members. At this level they are represented by Mayor Wilson and the Salt Lake County Council, which is reflective of the political dispersion within the larger County as demonstrated by the Salt Lake County Council district lines.

Salt Lake County utilizes an independent redistricting commission to define its council districts according to certain defined criteria. *See, e.g.*, Salt Lake County Code of Ord., §§2.71.010 & 2.71.050. This includes, among other things, where possible, the alignment of County districts with the jurisdictional boundaries of municipalities and townships and expressly prohibits political gerrymandering for political advantage. *Id.* at §§ 2.71.050(B)(3) & (B)(5). These criteria are consistent with the larger mandate that while the Council districts "shall have substantially equal populations" they should also, "to the extent practical, remain consistent with the original geographical configuration and representation" to all for "continuity and ease of contact between residents and district Council members." *Id.* at 2.04. Each of the nine members of the County Council, as well as the Mayor, are bound to serve their population irrespective of party affiliation in providing infrastructure and resources.

Within Salt Lake County and the cities and unincorporated areas lying therein, the residents *might* share political views, but they assuredly do share common infrastructure and needs. This would include such things as sewers, power grids, schools, parks, street maintenance, and the like. The infrastructure and resources associated with the administration of local government, on the city or county level, inherently necessitate advocacy for federal resources and assistance. This may include the application for and administration of funds for transportation, schools, roads, housing, environmental resources, and others. It would include the potential need to seek federal assistance in the event of a natural or man-caused disaster that may afflict residents of Salt Lake County or the municipalities that comprise the county.

The interests of Salt Lake County residents are in many ways aligned with the local political subdivisions in which they reside. That is, it is presumed that residents of Millcreek will share common interests and needs; residents of Riverton will share common interests and needs. These needs are addressed by local representatives elected by the members of the community. And the residents of Salt Lake County, likewise, share common resources, problems, and solutions, for which the County represents the whole.

Under the congressional districts approved by the Legislature and challenged in this matter, the Legislature threatens the ability of Salt Lake County residents to seek uniform federal representation and assistance aligned with their community needs and the community's political ethos. Both urban and rural voters voiced this concern over the potential for divided interests during the redistricting process. [R.52-53, 774-75.] Yet that

is what the current congressional district structure requires of Utah's congressional representatives; it requires congressional representatives to advocate not for a consistent group, but for a wide array of potentially disparate or inapposite interests. They could be required to opine and advocate for the air quality interests of the urban Wasatch Front and the oil and gas interests of Vernal. Fracturing Salt Lake County diminishes the import of political subdivisions calculated to assure representation and threatens substantial conflict between the dissimilar interests of each representative's rural and urban constituents.

B. The 2021 Congressional Plan fractures Salt Lake County and deprives residents of representation.

The 2021 Congressional plan at issue in this litigation divided Salt Lake County among each of the four (4) congressional districts. The district lines – as alleged in Respondents' Complaint – bisect Salt Lake City's Main Street and Temple Square, and then cut sharply to the east and south, fragmenting residential areas. [R.7, 58.] Perhaps most acutely, all four district boundaries meet near the heart of Millcreek, dividing a population of approximately 63,000[5] into each of the four separate congressional districts. [R.68-69.] Other urban political subdivisions within Salt Lake County are similarly divided including Murray (population approximately 50,000), Midvale (population 36,000), and West Valley City (population 140,000).

[5] *See* U.S. Census Bureau, "Millcreek City, Utah", https://www.census.gov/quickfacts/millcreekcityutah (last viewed May 17, 2023).

The paring of these political subdivisions means that neighbors, who share common roads, sewer systems, schools, parks, and other infrastructure are represented by separate congressional districts. In this respect, a resident of Millcreek is represented by a single City Mayor, a single County Mayor, but four separate congressional representatives. That is, one Millcreek resident may be within walking distance of four neighbors, each of whom resides in a separate congressional district. Residents of Millcreek in need of assistance can, again, appeal to a single City Mayor, a single County Mayor, but in the event of the need for federal assistance in the event of a natural disaster or otherwise, would need to appeal to four separate congressional representatives. [R.68.]

Individuals living in Salt Lake County may send their children to the same school, use the same bus routes, travel on the same highways, make use of the same parks, but be directed to separate representatives for federal representation. The community interest that is represented by city and county boundaries and officials dissipates and is non-existent at the federal level. Moreover, each of these four elected representatives are respectively aligned with both residents of Millcreek as well as with substantial rural districts with equally important but substantially disparate needs than the urban residents of Salt Lake County.

In this respect, a resident of Salt Lake County has different interests in crime prevention and transportation than a resident of Millard County. A resident of Salt Lake County has different interests in school funding and how it is allocated than a resident of Washington County. Nevertheless, the cracking and packing of Salt Lake County assures

that not even an overwhelming consensus of its population can elect an official that would be consistent with its views.

As noted above, each congressional district in the Plan subject to this litigation purports to represent approximately 817,000 residents of the State of Utah. When equally divided by the four districts, the population of Salt Lake County renders each district comprised of approximately 36% residents of Salt Lake County and 64% residents of other counties, including rural counties at the far ends of the state. [R.55-77.] This means that even if every Salt Lake County resident voted consistently with each other, they would still not be a majority of any congressional district. The votes of Salt Lake County residents are diluted by voters who live sometimes hundreds of miles away in rural areas with concerns that are equally important, but fundamentally different. And those elected to congress have an obligation not only to urban Salt Lake County residents and their concerns, but also to substantial numbers of rural voters who may not be as concerned, for example, about funding light rail systems along the Wasatch front.

This is not to say every resident of Salt Lake County has the same political alignment or that they would always vote consistently, but the day-to-day concerns remain the same. Nevertheless, even in the collective, they are deprived of the opportunity to vote for a federal representative to advocate for their interests.

As noted in Respondents' Complaint as well as above, Salt Lake County comprises 35% of the population of the State of Utah. Nevertheless, the 2021 Congressional Plan effectively dilutes the political voice of this population and eliminates the possibility and/or probability that this significant portion of the population can have

its interests adequately represented. A redistricting plan that gives voice to the residents of Salt Lake County is both necessary and required by traditional redistricting criteria that provide for the protection of rights recognized by the Utah Constitution.

II. Unnecessary Fracturing of Counties Implicates Actionable Constitutional Rights.

While the process of drawing districts has varied since this country's inception, one criterion has stood the test of time – keeping counties and municipalities together. That is, even where disagreement is rife among courts and scholars as to what "traditional districting" principles means, preserving county and city boundaries emerges as an outlier for its nearly universal acceptance. And this acceptance is not surprising when examining the history of this country.

A. Counties hold historical prominence as voting centers.

The "modern American county" can be traced back to at least 1066 and the English shire – "an administrative unit that William the Conqueror retained after the Norman Conquest of 1066." Benjamin Plener Cover & David Niven, *Geographic Gerrymandering*, 16 Harv. L. & Pol'y Rev. 159, 180 (2021) (citing Tanis J. Salant, *Overview of County Governments*, *in* How American Governments Work: A Handbook of City, County, Regional, State, and Federal Operations 117 (Roger L. Kemp ed., 2002)). These English "counties" enjoyed a "dual identity as both a top-down administrative arm of the state and a bottom-up mechanism of local control." *Id*. And, eventually, counties became the unit of representation in English Parliament. *Id*. (citing

Robert Luce, *Legislative Principles: The History And Theory Of Lawmaking By Representative Government* 331 (1930)). And with colonization, the county-based representative government found its footing in North America. Cover & David Niven, *supra*, at 180.

Not surprisingly, then, James Madison noted in *Federalist 56* that, "[i]t is [a] sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents." John A. Curiel Steelman & Tyler Steelman, *Redistricting Out Representation: Democratic Harms in Splitting Zip Codes*. Election Law Journal. 2018;17 (4): 332 (quoting Hamilton, Alexander, James Madison, and John Jay. 1788. *The Federalist Papers*. Mineola, NY: Dover Publications: 275). Embodying this principle, "[i]n nearly every state, governments represented the people through apportionment of representatives to counties or townships." Curiel & Steelman, *supra*, at 332 (citing Kromkowski, Charles A. 2002. *Recreating the American Republic: Rules of Apportionment, Constitutional Change, and American Political Development, 1700-1870*. Cambridge, UK: Cambridge University Press).

Indeed, counties existed precisely to function as a political unit with a representative designated to advance the interests of its constituents. Curiel & Steelman, *supra*, at 332. And by delineating localized representation through county borders, the founders ensured "deliberate government by the people." *Id*. at 333. Per Madison, again, "'The natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as public functions demands.'" *Id*. (quoting Hamilton, Alexander, James Madison, and John Jay. 1788. *The Federalist*

Papers. Mineola, NY: Dover Publications: 62). And it is from these roots and this focus on representative government that counties – and the protection of county and municipal boundaries – garnered favored status in the discussion of traditional districting principles. *Id*.

B. County cohesion has been considered a "traditional districting" criterion in case law and statutes.

With respect to congressional districting, counties likewise functioned as the foundation for the first districts. Cover & Niven, *supra*, at 181 (citing Engstrom, Erik J., *Partisan Gerrymandering and the Construction of American Democracy*, University of Michigan Press, 2013, p. 89). "For congressional districting, county preservation was not a requirement of positive law, but a traditional practice." Cover & Niven, *supra*, at 181 (citing Micah Altman, *Districting Principles and Democratic Representation* 1, 163, n. 112 (1998) (Ph.D. dissertation, California Institute of Technology) 21 (1998)). And while the protection of the county boundary subordinated to the population equality requirement during the reapportionment revolution, it nevertheless remained a guiding traditional districting principle justifying at times deviations from the equal population mandate. Cover & Niven, *supra*, at 184-186.[6] To be sure, "after the Court established the

[6] Consistent with the standards applied by Salt Lake County discussed *supra*, prior to the reapportionment revolution, Utah's Constitution originally stated, "When more than one county shall constitute a senatorial district, such counties shall be contiguous, and no county shall be divided in the formation of such districts unless such county contains sufficient population within itself to form two or more districts, nor shall a part of any county be united with any other county in forming any district. . . . In any future apportionment made by the Legislature, each county shall be entitled to at least one representative.'" *Petuskey v. Clyde*, 234 F. Supp. 960, 967 (D. Utah 1964) (quoting Utah

equal population mandate, states did not abandon their historical commitment to county preservation in state and congressional districting. Instead, states tried to preserve the role of counties to the extent possible while achieving substantially equal population." *Id*. at 186. In turn, the United States Supreme Court recognized in *Gaffney v. Cummings*, 412 U.S. 735. 748-49 (1973) (cleaned up) that

> Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. An unrealistic overemphasis on raw population figures, a mere nose count, in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

In other words, while the Court was loathe to veer too far off the equal population path, it "consistently recognized the preservation of local units as one of the few state interests justifying some departure from population equality for state and local districts." Cover & Niven, *supra*, at 181 (citing *Abate v. Mundt*, 403 U.S. 182, 183 (1971) and *Mahan v. Howell*, 410 U.S. 315, 333 (1973)).

Accordingly, in *Shaw v. Reno*, 509 U.S. 630 (1993), the Court found that the

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Const. art. IX, s. 4 (1896)); *see also Petuskey v. Clyde*, 234 F. Supp. 960, 969 (D. Utah 1964) (Ritter, J., concurring) ("Article IX of the Utah Constitution is unconstitutional insofar as each county is given a representative regardless of population"); *Id*. at 965 ("[T]o the extent that the provisions of Article IX of the Utah Constitution compel an apportionment of representation in the Utah Legislature that is violative of the Constitution of the United States, such provisions of the Utah Constitution are themselves unconstitutional and should not be regarded as mandatory upon the legislature of Utah when such provisions are considered either singly or in combination.").

plaintiffs had sufficiently stated a claim upon which relief could be granted under the equal protection clause where districts were so irregularly drawn that they could only be rationally viewed as racially motivated rather than guided by traditional districting principles. In so finding, the Court observed that "of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided." *Id*. at 636. The Supreme Court has long recognized that traditional districting criteria include "respect for political subdivisions," *i.e.,* county boundaries. *Id*. at 647; *see also Davis v. Mann*, 377 U.S. 678, 686 (1964) ("And, because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them.").

The desire to keep counties together also shows up in state statutes. As observed in 2021, 39 states had an explicit requirement to follow county boundaries when drawing state legislative districts and 27 states required following county boundaries in drawing congressional districts. Yunsieg P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 Wisc. Law Rev. 1:184. Despite all of the disagreement, there has been since the founding of this country – and even before – longstanding consensus that counties should not be needlessly divided. And, as discussed below, these concerns are appropriately addressed through litigation – such as this – to assure and protect voters' constitutional rights.

III. When Counties Are Fractured Unnecessarily, Voters – and Their Representatives – Are Harmed.

Justice White observed in *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973),

> The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.

To be sure, the political implications of district lines might be readily evident might from looking at a map, but the degree to which the unnecessary fracturing of counties alienates voters goes deeper than is immediately apparent.

"The election process begins and ends at the county level." Cover & Niven, *supra*, at 188 (citation omitted). This geographic unit "comprised of people with an array of geographic and economic commonalities" and "natural communities of interest." *Id*. And it is the county that administers "local, state, and national" elections. *Id*. As discussed above with respect to Salt Lake County, "voters in the same neighborhood are likely to belong to the same social communities and share political interests; voters in the same area are better able to communicate and coordinate with one another; politicians can better maintain connections with voters in the same area …." Daryl R. DeFord, Nicholas Eubank, and Jonathan Rodden, *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering*, Political Analysis, 1, 5 (2021). Thus, dividing up counties unnecessarily has detrimental effects for not only voters but also the people on the ticket. As scholar Donald E. Stokes noted, "'interview studies … show how much more salient to his voters is the congressman whose district comprises a 'natural'

community … than the congressman who district is a fraction of a great metropolitan complex.'" Cover & Niven, *supra*, at 188 (2021) (quoting Donald E. Stokes, *Parties and the Nationalization of Electoral Forces in the American Party Systems, in* The American Party Systems: Stages of Political Development 197 (William Nisbet Chambers & Walter Dean Burnham, eds., 1967).

A. Fracturing counties hurts voter recall of their representative.

When the county line and district line are incongruous, voters "have a harder time identifying their member of Congress." Cover & Niven, *supra*, at 189 (citing Richard G. Niemi et al., *The Effects of Congruity Between Community and District on Salience of U.S. House Candidates*, 11 Legis. Stud. Q. 187, 193 (1986)). As one study shows, even "while accounting for the influence of various measures of member prominence and voter interest, … respondents in congruent districts were 8% more likely to recall the name of their incumbent member of Congress and 13% more likely to recall the name of the challenger candidate." Cover & Niven, *supra*, at 189 (citing Niemi et al., *supra*, at 193). The consequences of impaired recall are significant when it comes to voting:

> In their study on redistricting's effect on election outcomes, Hood and McKee found that candidate awareness was a primary driver of voter decisions such that respondents who could not recall a candidate were quite unlikely to vote for that candidate. Meanwhile, as Winburn and Wagner warn, incongruency is associated with lower awareness of House candidates but not lower voter participation. Which is to say, residents of incongruent districts are left to cast their ballots with less access to information about whom they are voting for or against.

Cover & Niven, *supra*, at 189-90 (citing M.V. Hood III & Seth C. McKee, *Stranger Danger: Redistricting, Incumbent Recognition, and Vote Choice*, 91 Soc. Sci. Q. 344,

347 (2016) and Jonathan Winburn & Michael W. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout and Voting Behavior*, 63 Pol. Rsch. Q. 373, 376 (2010)); *see also* Curiel & Steelman, *supra*, at 341-42 (finding that where zip codes were divided among congressional districts, such splits reduced representative recognition and that these reductions were even greater when the representative and voter were members of different political parties or races).[7]

B. Fracturing counties hurts voter-representative relations.

When voters can't recall their representative's name, it becomes difficult to hold that representative responsible when those voters do not feel adequately represented. There is no relationship between the voter and the representative, and again this works to the detriment of both. "'Members thrive where some sense of community already exists.'" Cover & Niven, *supra*, at 193 (quoting Richard F. Fenno, Jr., *Home Style: House Members In Their Districts* 250 (1978)). "But – importantly – where districts lack coherence, members are hard pressed to cobble together commonalities and connections that are not already there." Cover & Niven, *supra*, at 193.

[7] And the confusion doesn't end with the voters. Consider the case of Ohio's 12th district, which includes "the entirety of three counties and bits of four others" – including Franklin County. "The Franklin County Board of Elections revealed that from 2012 through the 2018 primary election, 2,000 county voters had been assigned to the wrong congressional districts in county election files. For six years, the county gave those voters the wrong ballot and counted those votes for the wrong candidates." Benjamin Plener Cover & David Niven, *Geographic Gerrymandering*, 16 Harv. L. & Pol'y Rev. 159, 189 (2021) (citation omitted) (citing Jeremy Pelzer, *More Than 2,000 Franklin County Voters Were Assigned to Wrong Congressional District, Election Officials Say*, Cleveland.com (June 29, 2018), https://www.cleveland.com/open/index.ssf/2018/06/2000-_frankling_county_voters_we.hmtl).

And, thus, in districts where the district line is not congruous with the county line, voters are less likely to have "positive evaluations of their member of Congress's constituent service." *Id*. (citing Daniel C. Bowen, *Boundaries, Redistricting Criteria, and Representation in the U.S. House of Representatives*, 42 Am. Pol. Rsch. 856, 858 (2014)). Voters are also less likely to contact their representatives in incongruous districts. Cover & Niven, *supra*, at 193 (citing Curiel & Steelman, *supra*, at 340-42).

Consistent with this finding, incongruent districts "are likely to foster more ideological distance between constituents and their members of congress." Cover & Niven, *supra*, at 193 (citing Curiel & Steelman, *supra*, at 340-42). This makes practical sense because where districts split counties, they also split communities of interest leaving a representative to try and "make sense of disparate interests." Cover & Niven, *supra*, at 194.[8]

C. When districts are drawn to unnecessarily fracture counties, voters have constitutional remedies.

As former Representative Ralph Regula observed, "'[o]ne of the key elements of a congressional district is that people have to know where to go when they need help.'" Cover & Niven, *supra*, at 193 (quoting Jim Siegel, *His Car Can Handle Miles of Redrawn District, Say Stivers*, Columbus Dispatch (Sept. 21, 2011, 12:01 AM), http://www.dispatch.com/article/20110921/news/309219702). When voters cannot recall

[8] One study even suggests that "'packed' and 'cracked' voters might receive fewer fiscal transfers". Daryl R. DeFord, Nicholas Eubank, and Jonathan Rodden, *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering*, Political Analysis, 1, 5 (2021) (citing Stashko, A. 2020. *Crossing the District Line: Border Mismatch and Targeted Redistribution*. Working Paper, University of Utah).

their representative and otherwise feel no relationship with their representative, their voting power suffers. When "clusters of voters [are] carved out of their natural communities and pooled with other voters in an effort to dilute their political influence[,]" it not only "may undermine the political effectiveness of these voters, but it may also deprive them of the benefits associated with belonging to a coherent constituency." Daryl R. DeFord, Nicholas Eubank, and Jonathan Rodden, *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering*, Political Analysis, 1, 5 (2021). This is a harm that keeping counties from unnecessary and unnatural fractures seeks to prevent.

In the words of Alexander Hamilton, "'[t]here can be no truer principle than this – that every individual of the community at large has an equal right to the protection of the government.'" *Evenwel v. Abbott*, 578 U.S. 54 65, (2016) (quoting 1 Records of the Federal Convention of 1787, p. 473 (M. Farrand ed. 1911)). By drawing district lines that fracture counties more than mathematically necessary, the legislature denies voters equal protection of the government and dilutes the right to vote. Accordingly, amicus respectfully submits that Utah Supreme Court should affirm the district court's denial of Defendants-Appellants' motion to dismiss on Plaintiffs-Respondents' Counts I through IV of the Complaint to preserve the mechanisms that protects the public when the Legislature dilutes their vote by fracturing counties.

D. Focusing on county cohesion avoids the justiciability concerns raised in *Rucho*.

Of course, in addition to the reapportionment revolution and district population equality, growing populations and large city centers will necessarily require more county division today than contemplated by Madison's philosophical concern for the importance of accessible government. But counties should not be split more than necessary, and these splits should be minimal, particularly at the congressional level because of the relatively large size of the districts. As posited by Benjamin Plener Cover & David Niven in *Geographic Gerrymandering*, 16 Harv. L. & Pol'y Rev. 159, 181 (2021), whether a county has been needlessly split is calculable.

> A state's ideal district population is the state's total population divided by the number of districts in the state's congressional map. We then define a county's population ratio as the county's [] population divided by the state's ideal district population. A county's population ratio tells us how many county splits a mapmaker must impose to satisfy the equal population mandate. If a county's ratio is less than one, no split is required; if the ratio is between one and two; one split is required. More generally, the number of splits a county requires is the county's population ratio rounded down to the nearest integer ….

Cover & Niven, *supra*, at 196. Using Salt Lake County, Utah, as an example, as noted above, the 2020 population of Utah was 3,271,616. *See* United States Census Bureau, Utah: 2020 Census, https://www.census.gov/library/stories/state-by-state/utah-population-change-between-census-decade.html (last visited 13 May 2023). With 4 congressional districts, the ideal district population for Utah is 817,904 (3,271,616/4). The 2020 population of Salt Lake County was 1,185,238. *Id*. Thus Salt Lake County's population ratio – or the number of splits required – is 1 (1,185,238/817,094 = 1.45).

Under this theory, Salt Lake County should be split only once and anything in excess of that makes it a needlessly fractured county. Cover & Niven, *supra*, at 196.

In this same vein, Yunsieg P. Kim and Jowei Chen in *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 Wisc. Law Rev. 1, also push for an objective approach, by defining traditional districting criteria based on normative principles. In particular, they define "traditional" districting criteria to include only those criteria which are "permitted by twenty-six or more states and prohibited by twelve or fewer" namely, "equal population, compactness, contiguity, and preserving city and county boundaries." *Id*. at 104.

The value of mathematical or empirical principles is that they do not require the Court to consider partisan gerrymandering, a claim eschewed Justice Roberts in *Rucho v. Common Cause*, 139 S.Ct. 2484, 2500 (2019) as federally non-justiciable. As Justice Roberts laments,

> The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in [redistricting] …. Fairness may mean a greater number of competitive districts. … But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. … On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by … cracking and packing, to ensure each party its "appropriate" share of "safe" seats. … Such an approach, however, comes at the expense of competitive districts. … Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as … keeping communities of interest together, and protecting incumbents. … But protecting incumbents, for example, enshrines a particular partisan distribution. … Deciding among just these different visions of fairness … poses basic questions that are political, not

> legal. There are no legal standards discernible in the Constitution for making such judgments ….

But these mathematical and empirical approaches which protect the county boundaries do not require Justice Roberts "or any other judge to impose as law their personal opinions regarding traditional criteria." Kim & Chen, *supra*, at 119. That is, by framing the alleged harm in geographic terms "(*e.g.,* disproportionate county splits)" … "many of the justiciability problems" are avoided. Cover & Niven, *supra*, at 212.

> Geographic representation cannot be rejected as a subjective norm inconsistent with the theoretical underpinnings and traditional practices of the American electoral system. Geographic representation reflects the traditional practices and the representational theory underlying the American electoral system. The predominance of geographic districting, both historically and today, indicates its significance. The States themselves demonstrate the value they accord to geographic representation by adopting districting criteria designed to promote it.

Id. at 213. In other words, consideration of county boundaries and geographic gerrymandering (irrespective of whether it is also partisan gerrymandering) presents a justiciable controversy as to whether unnecessary splits violate voters' equal protection rights, free speech and association rights, and the affirmative right to vote.[9]

[9] This is not to say that partisan gerrymandering does not also present a justiciable controversy in its contravention of one-person, one-vote. "Assume, for example, that a state has 50 voters, 30 of whom vote for Party A and 20 for Party B. Further assume that each district elects one representative and consists of ten voters. Under proportional representation, this state would elect three representatives from Party A and two from Party B. However, assume that each district is drawn to include six voters who support Party A and four who support Party B. Then, because Party A's candidates would win in every district by two votes, this state would elective five, not three, candidates from Party A. … [This] violates one-person, one-vote, because the redistricting eliminates 20 voters' influence on government by guaranteeing that their votes will be wasted …." Yunsieg P. Kim and Jowei Chen in *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and a Proposal for Their Empirical Redefinition,* 2021 Wisc. Law

And ultimately, it is the protection of these rights that requires a court to consider the cohesiveness of counties in congressional maps. As discussed above, the rights that suggest a traditional deference to boundaries are the rights of which residents of Salt Lake County have been deprived due to the cracking and packing worked by the 2021 Congressional Plan at issue in this matter. That is, the same reasons underlying the focus on counties underlying this this country's founding necessitate the cohesive treatment of county boundaries today - because, as set forth below, without it, voters – and votes – are lost in deprivation of constitutional rights.

CONCLUSION

For the reasons set forth herein, Mayor Wilson respectfully supports Plaintiffs-Respondents' request that this Court affirm the underlying order denying dismissal of Counts I through IV of its Complaint and allow this matter to proceed to final adjudication and provide relief for the 2024 election.

DATED this 19th day of May, 2023.

PARSONS BEHLE & LATIMER.

By: /s/ Nathan D. Thomas
Nathan D. Thomas
Elizabeth M. Butler
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Rev. 1, 132-33. This abrogation of constitutional rights is a harm courts – both federal and state - exist to address.

CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. 25(e)(8) and 24(a)(11), I hereby certify that:

This brief complies with the type-volume limitations of Utah R. App. P. 25(f) because this brief contains 6,558 words, excluding the parts of the brief exempted by Utah R. App. P. 25(f).

This brief complies with the typeface requirements of Utah R. App. P. 27(a) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 13 points, according to the word processing program with which it was prepared.

This brief complies with Rule 21(h) governing public and private records.

DATED this 19th day of May, 2023.

PARSONS BEHLE & LATIMER

By: /s/ Nathan D. Thomas
Nathan D. Thomas
Elizabeth M. Butler
Attorneys for Amicus Curiae Jennifer Wilson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of May, I caused a true and correct copy of the foregoing to be served via electronic mail on the following:

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In the Supreme Court of the State of Utah

League of Women Voters of Utah, Mormon Women for Ethical Government, Stefanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, Jack Markman, Dale Cox, *Plaintiffs-Respondents*, v. Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Brad Wilson, Sen. J. Stuart Adams, *Defendants-Petitioners*.	No. 20220991-SC On Interlocutory Appeal From the Third Judicial District Court Honorable Dianna M. Gibson No. 220901712

Brief of Amicus Curiae Common Cause In Support of Reversal

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

MISCELLANEOUS

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Common Cause was founded by John Gardner in 1970 as a nonpartisan "citizens lobby" whose primary mission is to protect and defend the democratic process and make government accountable and responsive to the interests of ordinary people, and not merely to those of special interests. Common Cause is one of the nation's leading democracy organizations and currently has over 1.5 million members and supporters nationwide and local chapters in 30 states. Common Cause promotes, on a non-partisan basis, its members' interest in open, honest, and accountable government and political representation. Common Cause has participated as a party or amicus curiae in numerous Supreme Court, lower court, and state court actions concerning the constitutionality and implementation of federal and state election laws.

INTRODUCTION

Partisan gerrymandering—the drawing of electoral maps in ways that dilute the voting strength of some voters based on party affiliation or other community characteristics—is a bipartisan practice that allows a political party to lock in election

[1] Pursuant to Utah R. App. P. 26(e)(6), no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Utah R. App. P. 26(b)(2) and received timely notice pursuant Utah R. App. P.26(a).

victories in perpetuity and "can also short-circuit majority rule."[2] Partisan gerrymanders "are incompatible with democratic principles."[3] Independent redistricting commissions represent a neutral and effective attempt at reforming and professionalizing how voting district lines are drawn. By drawing congressional maps based on neutral, nonpartisan criteria, such commissions empower voters by honoring their constitutional right to choose their representatives in free and fairly contested elections, and under rules unencumbered by the machinations of party insiders. Utah voters chose just such an option in 2018, by passing Proposition Number 4, ("*Prop 4*"), with 512,218 votes in favor. Prop 4 created a Utah Independent Redistricting Commission (the "*UIRC*") and tasked it with providing 12 Maps—three Congressional, three State House, three State Senate, and three State School Board. Legislators would then be required to give these maps an up or down vote to determine which would govern Utah's voting district lines for this decade's elections.[4]

Disregarding the voice of the citizens of Utah, a single party supermajority in the state legislature subsequently passed S.B. 200, which "remove[d] the requirement that the Legislature vote on the commission's proposals and follow specific redistricting criteria, eliminate[d] the role of the Chief Justice of the state Supreme Court in redistricting, and [got] rid of the right of private citizen lawsuits if the Legislature approve[d] maps different

[2] Claire Snyder-Hall, *How Partisan Gerrymandering Kills Democracy*, 34 Del. Law. 18, 18 (2016).

[3] *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015).

[4] UIRC, *Redistricting Report* (Nov. 2021) ("Redistricting Rep.") at 3.

than the commission."[5] After repealing Prop 4, "right before the decennial census that triggers the redistricting process", the Utah Legislature assured voters that, despite rescinding the voter sponsored reforms of Prop 4 almost completely, it would both allow the UIRC to perform its vital work and earnestly consider the UIRC's proposed district maps.[6] "The Legislature, however, had other ideas" and chose to draw up and enact new district maps before the UIRC had even completed its work.[7] The final congressional district lines produced by the Legislature completely disregarded the UIRC's work and recommendations, and the enacted maps reflect extreme partisan gerrymandering. The process by which the maps were enacted "minimized any meaningful opportunity for public scrutiny and input,"[8] and the maps themselves are designed to marginalize all voters not in the majority party.

SUMMARY OF ARGUMENT

Amicus joins in the legal arguments made by Appellee in the district court below and in their briefing before this Court.[9] We write separately to make the Court aware of the

[5] Princeton University, *Gerrymandering Project (Utah)*, https://gerrymander.princeton.edu/reforms/UT (last visited on May 5, 2023).

[6] Complaint ¶ 3.

[7] Appellee Brief at 13.

[8] *Id.* at 16.

[9] *See id.* at 17 ("The Legislature's repeal of Prop 4 was unconstitutional. The Legislature has no power to repeal any citizen-enacted legislation. The text, structure, and history of the Constitution make clear that Legislature had no authority to repeal Prop 4.") Thus, the Court should reverse the decision below so that the maps drawn by the UIRC, maps representative of the people's will, may fairly guide the coming decade's elections.

work done by the UIRC—work reflecting the engaged and active participation of Utah's citizenry, whose recommendations and insight the Legislature disregarded. Partisan gerrymandering is a broad multifaceted problem involving innumerable factors and considerations. "There are a multitude of ways to examine the accuracy of political representation and fairness of districts, which is one of the many reasons why redistricting can become contentious and controversial."[10] But it can be done through transparency, neutrality and fairness. In the wake of the Supreme Court's decision in *Rucho v. Common Cause*, 588 U. S. __, 139 S. Ct. 2484 (2019), states have gradually and earnestly been confronting the problem head on;[11] independent redistricting commissions have proliferated across America as a solution to partisan dysfunction.[12] Although "not all redistricting commission are created equally,"[13] citizen groups, academics, and political

[10] Redistricting Rep. at 5.

[11] *See generally* Alaska Const. art. VI; Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI; Cal. Gov't Code §§ 8251-8253.6; Colo. Const. art. V, §§ 44-44.6, 46-48.4; Idaho Const. art. III, §§ 2, 4, 5; Idaho Code Ann. §§ 72-1501-1508; Mich. Const. art. IV, §§ 1-6; *id.* at art. V, §§ 1, 2, 4; *id.* at art. VI, §§ 1, 4; Mont. Const. art. V, § 14; Mont. Code Ann. §§ 5-1-101-115; Wash. Const. art. II, § 43; Rev. Code Wash. ch. 44.05; Ark. Const. art. 8, § 1; Haw. Const. art. IV; Haw. Rev. Stat. ch. 25; N.J. Const. art. II, § II; *id.* at art. IV, § II; *id.* at art. IV, § III; Ohio Const. art. XI; *id.* at art. XIX; Pa. Const. art. II, § 17.

[12] Alex Keena, Article, *2021 Redistricting in Virginia: Evaluating the Effectiveness of Reforms*, 26 Rich. Pub. Int. L. Rev. 85, 91 (2022) ("In these 'independent' redistricting commissions, elected officials appoint citizens to serve and impose eligibility criteria to prevent undue political influence in the process.")

[13] Tierney Sneed, *A fair maps success story or 'multi-layered stages of Dante's Hell'? Where redistricting commissions worked – and didn't work – this cycle*, CNN Politics (June 18, 2022), https://www.cnn.com/2022/06/18/politics/redistricting-commission-takeaways-success/index.html (last visited May 5, 2023).

experts have worked tirelessly to improve the means by which such commissions can best serve their democratic aims. So far, these commissions have proven to "have succeeded to a great degree in limiting the conflict of interest implicit in legislative control over redistricting" and "thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives."[14] Utah's Prop 4, and the processes and recommendations produced subsequently by the UIRC represent the highest application of this work and provide a model which should rightfully govern all future state map drawing procedures. The UIRC's work represents a success story that Utahns can honor, despite the Legislature's disregard.

ARGUMENT

I. Independent Redistricting Commissions Represent a State-Based Solution to a Complex Problem.

A. Gerrymandering and State Responses

In the majority of states, the state legislature, as an entity, has monolithic control over the redistricting process. This means that after the decennial U.S. Census results are released, and after the federal government determines how many seats a state is given in the United States House of Representatives, state elected officials are empowered to draw the district maps by which candidates will be selected by voters in future elections.[15] "In

[14] *Ariz. State Legis.*, 576 U.S. at 821.

[15] League of Women Voters, Report, Designing a Transparent and Ethical Redistricting Process (2021), https://www.lwv.org/sites/default/files/2021-03/Transparency_Report_FINAL.pdf.

most states, district lines are passed just like regular legislation, with a majority vote in each legislative chamber."[16] This drawing of electoral maps for the coming decade by politicians leaves the democratic process vulnerable to abuse; politicians may easily opt to benefit their own reelection chances or further the entrenched power of their party through the process of partisan gerrymandering.[17]

No political party is immune from this problem; rather, it can threaten democracy itself. Lawsuits have proliferated with mixed success. In federal court, the U.S. Supreme Court declined to upend a partisan scheme, finding a case non-justiciable wherein "[v]oters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders" based on maps drawn to disfavor the minority party in each state.[18] In Alaska, Pennsylvania, and Maryland, state

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[16] Professor Doug Spencer, *Guide to Drawing the Electoral Lines, Who draws the lines?* (Loyola Law School), https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/ (last visited on May 5, 2023).

[17] Lillian V. Smith, Note, *Recreating the 'Ritual Carving': Why Congress Should Fund Independent Redistricting Commissions and End Partisan Gerrymandering*, 80 Brook. L. Rev. 1641, 1648 (2015) ("One danger of redistricting, when conducted by elected officials, is that it allows the map-drawing party to create safe, uncompetitive districts and to allocate political power in a way that is beneficial to the party in power but that does not necessarily reflect voters' actual preferences. Because, in most states, redistricting is the purview of the legislature, the majority party has significant influence over the process."); D. Theodore Rave, Article, *Politicians As Fiduciaries*, 126 Harv. L. Rev. 671, 683-84 (2013) ("[G]errymanders tend to reduce competition in districted elections, helping to insulate incumbents from challenge. Indeed, incumbents routinely win by landslides in the overwhelming majority of districted elections.")

[18] *Rucho*, 139 S. Ct. at 2491; *see also Gill v. Whitford*, 138 S. Ct. 1916 (2018) (in which the Supreme Court ruled that the plaintiffs challenging a gerrymandered map plan had failed to demonstrate standing to bring the suit under Article III of the United States Constitution).

courts have interpreted state constitutional provisions to prohibit partisan gerrymandering.[19] Similar litigation has moved throughout a number of states.[20] Justice Kagan aptly summarized the problem:

> Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party… He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. … In short, the mapmaker has made some votes count for less, because they are likely to go for the other party. (citations omitted).[21]

[19] *In re 2021 Redistricting Cases Matanuska-Susitna Borough*, Nos. 18332/18419, 2023 Alas. LEXIS 33, 107-108 (Alaska Apr. 21, 2023); *Szeliga v. Lamone*, 2022 Md. Cir. Ct. LEXIS 9, 54 (Md. Cir. Ct. Mar. 25, 2022); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 123 (2018),

[20] *See e.g.*, *Caster v. Merrill*, No. 2:21-CV-1536 (N.D. Ala. Nov. 16, 2021), *Suttlar v. Thurston*, No. 60CV-22–1849 (Ark. Cir. Ct. Mar. 21, 2022), *Common Cause v. Byrd*, No. 4:22-CV-109 (N.D. Fla. Mar. 11, 2022), *Graham v. Adams*, No. 22-CI-47 (Ky. Cir. Ct. Jan. 20, 2022), *Parrott v. Lamone*, No. C-02-CV-21–001773 (Md. Cir. Ct. Dec. 21, 2021), *League of Women Voters of Michigan v. Independent Citizens Redistricting Commission*, No. 164022 (Mich. Sup. Ct. Feb. 1, 2022).

[21] *Rucho*, 139 S. Ct. at 2513-14 (Kagan, J., dissenting).

Some state legislative bodies have themselves attempted to mitigate this damage to the democratic process through various incremental strategies.[22] On one end of the spectrum, certain states treat the passage of redistricting legislation differently than other law-making. For example, Connecticut and Maine both require supermajorities of two-thirds in each state house to approve a redistricting plan; and Connecticut, Florida, Maryland, Mississippi, and North Carolina set district lines by joint resolution without the potential for a gubernatorial veto.[23] Iowa, Maine, and Vermont have appointed advisory commissions which "do not take the legal power of redistricting away from the legislature, but can have a great influence on the process depending on the culture of the state."[24] For example, the "purely advisory version of the UIRC" adopted by S.B. 200 here in Utah remained empowered to make recommendations, engage the public, and deploy resources from state budgets in fulfilling its mandate.[25] Additionally, many states have used backup commissions, which function to draw state and congressional district lines if the legislature fails to pass a satisfactory map. The specific functions of such commissions vary by state,

[22] Nick Corasanti & Reid J. Epstein, *How a Cure for Gerrymandering Left U.S. Politics Ailing in New Ways*, N.Y. Times (Nov. 17, 2021), https://www.nytimes.com/2021/11/17/us/politics/gerrymandering-redistricting.html ("Taking the map-drawing process out of the hands of lawmakers under pressure to win elections, the thinking went, would make American democracy more fair. But as this year's once-in-a-decade redistricting process descends into trench warfare, both Republicans and Democrats have been throwing grenades at the independent experts caught in the middle.")

[23] Spencer, *supra* note 16.

[24] League of Women Voters, *supra* note 15.

[25] *See* Appellee Brief at 15.

with some granting the authority over final maps to statewide actors, the governor's office, or specially selected committees in the event of legislative failure.[26]

Moving across the spectrum from these well-meaning but toothless reforms, and addressing the risk of legislative actors injecting partisanship into this vital democratic process, Arkansas, Hawaii, Missouri, New Jersey, Ohio, Pennsylvania, and Virginia have empowered political commissions to take the power of redistricting away from the legislature in favor of specially elected officials to draw the legislative maps.[27] Some states such as Alaska, Idaho, Montana, and Washington empower commissions with significant or complete authority to make final decisions on maps while allowing elected officials to appoint commissioners with few restrictions. Finally, and most robustly, Arizona, California, Colorado, and Michigan empower citizen commissions to make final decisions on maps with very limited participation of elected officials even in the appointment of commissioners.[28] The limited participation of elected officials in the drafting of maps was of course the ambition of Prop 4 in Utah.

Even within this gold standard form of district line drawing, however, the level of permissible partisanship or the actual independence of the various commission members differs by state, thus impacting the system's effectiveness. States may police potential commission members' former ties to politics, legislatures, and lobbying to varying degrees

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[26] Barry Edwards *et al*., Article, *Can Independent Redistricting Commissions Lead us Out of the Political Thicket?*, 9 Alb. Gov't L. Rev. 288 (2016).

[27] *Id.*

[28] Spencer, *supra* note 16.

of sufficiency.[29] For example, Utah Statute 20A-20-201(5) strictly bars lobbyists, candidates or holders of office, employees of political parties or political entities, and political appointees of various degrees from UIRC membership. But, in the most recent redistricting cycle, states in which advisory commissions drew congressional maps saw "most of [their] state legislatures essentially disregard[] the good work of the advisory commissions."[30] "Only some of the commissions set up for the 2020 cycle were truly independent, and how they were designed affected how functional – or dysfunctional – they were."[31] A lack of true independence and multiple process failures in transparency, ethics, citizen engagement, and commitment to their mandate have all proven fatal to the well-intentioned designs of many state commissions.

Criteria for map-making, and democratic operations have been studied, critiqued, and guided by academics, policy experts, and citizens groups. There is a robust literature now available which identifies the necessary considerations that must guide, not only the formation of a redistricting commission, but also its operations and policy recommendations if it is to become a universally trustworthy and effective tool for democratic preservation.

1. Independent Commission Best Practices

In addition to abiding by redistricting requirements and principles imposed by state

[29] *Id.*

[30] Sneed, *supra* note 13.

[31] *Id.*

and federal law independent voting commissions, when drawing maps, should also follow a host of best practices guidelines from the researcher community. A consensus has emerged that "putting commissions in charge of redistricting can significantly reduce many of the worst abuses associated with redistricting and improve outcomes and satisfaction across the stakeholder spectrum — but only if commissions are carefully designed and structured to promote independence and incentivize discussion and compromise."[32] "An important feature of commissions is "their capacity to negotiate … and agree on reasonably imperfect plans (*i.e.*, good redistricting deliberation)."[33]

Policy experts recommend commission rules guided by the ethical principles of transparency, accountability, and rigorous personal standards of conduct applied to commission members.[34] States have additionally adopted criteria around map drawing prohibiting the favoring or disfavoring of incumbent candidates or parties, prohibitions against using partisan data in line drawing, making competitiveness between partisans a priority in drawing lines, and imposing proportionality considerations in drawing districts which reflect the historical preferences of state voters.[35] Drawing upon the lessons from

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[32] Brennan Center for Justice, *Redistricting Commissions: What Works* (July 24, 2018), https://www.brennancenter.org/our-work/analysis-opinion/redistricting-commissions-what-works (last visited May 5, 2023).

[33] Bruce E. Cain, Essay & Feature, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808 (2012).

[34] League of Women Voters, *supra* note 15.

[35]National Conference of State Legislatures, Redistricting Criteria (July 16, 2021), https://www.ncsl.org/redistricting-and-census/redistricting-criteria (last visited May 5, 2023).

previous state efforts, geared toward empowering redistricting commissions, academic, state, and policy stakeholders make the following recommendations for structuring independent commissions:

- An independent selection process to screen applicants for disqualifications or conflicts of interest and to make qualitative assessments about the fitness of applicants to do the job.[36]
- Clear, prioritized criteria for map drawing.
- A commission sized to ensure geographic, political, and ethnic diversity.[37]
- Strong transparency requirements that make commission proceedings as accessible as possible and encourage public input.[38]
- Adequate funding to enable the commission to hire sufficient staff and experts.[39]
- An appointment timeframe that allows new commissioners adequate time to hold public hearings, obtain feedback on initial proposed maps, make any necessary adjustments, and draw final maps.[40]
- A ban on local partisan actions, elected officials, family members, and campaign staff from the commission.[41]
- Public notice and comment procedures and facilitations of the public's ability to submit draft maps.

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[36] Snyder-Hall, *supra* note 2, at 18.

[37] Brennan Center for Justice, *supra* note 32.

[38] Micah Altman, *et al*., Op-Ed, *Principles for Transparency and Public Participation in Redistricting* (June 17, 2010), https://www.brookings.edu/opinions/principles-for-transparency-and-public-participation-in-redistricting/ (last visited on May 5, 2023) ("Increasing transparency can empower the public to shape the representation for their communities, promote public commentary and discussion about redistricting, inform legislators and redistricting authorities which district configurations their constituents and the public support, and educate the public about the electoral process.")

[39] Common Cause, California Local Redistricting Project, *Commission Considerations* (Apr. 2017), https://www.localredistricting.org/commissions (last visited May 5, 2023).

[40] Brennan Center for Justice, *supra* note 32.

[41] Common Cause, California Local Redistricting Project, *Redistricting Commission Best Practices* (Dec. 2017), https://assets.ctfassets.net/mla2k9txthv8/5Z4PT6IXaoAcMes6EMOAuS/6991e3959f55e26d56f6dd46b4511563/Brief_-_Best_Practices_-_Final.pdf

- Electronic publication of proposed final maps prior to passage so that the public may comment.[42]

These measures, when adhered to, can be successful. Empirical studies have found that "[i]nfusing a nonpartisan, technocratic redistricting commission with strong citizen participation and limited oversight from an elected legislature is a compelling vehicle for reform" which has generated the most successful and fair maps and map drawing processes.[43]

Finally, new technology can also play a fundamental role in making all maps available for public notice and comment and in making all data used in commission considerations, along with the sources of such data, open to public review.[44] Although "[r]ecent advances in technology have allowed elected officials to manipulate districts with

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[42] *Id.*

[43] Noah Litton, Note, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 Ohio St. L.J. 839, 850 (2012) ("analysis shows that nonpartisan redistricting is best suited to control partisan gerrymandering by simultaneously increasing electoral responsiveness and reducing partisan bias"); Edwards, *supra* note 26, at 320 ("When additional data from the 1972, 1982, and 2012 elections were added in a follow-up analysis, commission drawn plans were still more likely to be competitive.")

[44] "Prior to the advent of computer databases, election officials kept track of which voters resided in which districts using a combination of paper maps, lists of addresses, and paper records of voter registration information. Today, many election officials use computerized election management systems (EMS), geographic information systems (GIS), electronic voter registration systems, and other technology tools to help maintain voter and associated district boundary information." *See* U.S. Election Assistance Commission, *Election Officials' Guide to Redistricting* (Aug. 25, 2021), https://www.eac.gov/sites/default/files/2021-08/LEO_Guide_to_Redistricting.pdf.

unprecedented effectiveness[,]"[45] technology in the proper hands provides a vehicle for true citizen empowerment. The academic community has provided a blueprint whereby independent commissions may utilize citizen feedback in map making through use of the internet.[46] "[S]tate redistricting websites should include data repositories … and available state data on political boundaries; open-redistricting tools incorporating relevant data and including easy-to-use mapping software and accompanying instructions/tutorials; hearing portals that include notice of hearings, live-streamed hearings, and hearing archives; posted plans—both those created by legislative/commission line drawers and maps submitted by members of the public; and portals for public input and comment."[47] The digital age has the capacity to restore public trust in democracy through restoring public oversight and participation in every facet of our democratic process, beginning with how district lines are drawn.

In the remaining portion of this brief, amicus will demonstrate that the design and operation of the UIRC, and the work done and delivered by the UIRC in drawing its own maps —"perform[ing] its [albeit] watered-down role under S.B. 200"[48]— fully embraced, adhered to, and in many ways surpassed the most rigorous standards embodied by the

[45] *Daunt v. Benson*, No. 19-2377, 2020 WL 820741, at *14 (6th Cir. Feb. 20, 2020).

[46] Rebecca Green, Article, *Redistricting Transparency*, 59 Wm. & Mary L. Rev. 1787, 1812 (2018) ("Particularly in rural states where traveling to a central location is more difficult, technology can provide a valuable bridge.")

[47] *Id.*

[48] *See* Appellee Brief at 15.

consensus recommendations and legal requirements described above.

B. Utah's Response: Prop 4 and the UIRC.

During the 2018 election, Prop 4 appeared as an "initiative to create an independent commission on redistricting for the state, known today as the Utah Independent Redistricting Commission."[49] Due to the efforts of citizen volunteers and community advocacy organizations the initiative passed with 512,218 votes in favor.[50] The original statute enacted due to Prop 4, Utah Code Annotated ("U.C.A.") 1953 Section 20A-19-101 *et seq*., was a model of transparency and accountability in the redistricting process. As outlined in the complaint below, this legislation imposed strict non-partisan requirements on commission members along with far reaching measures encouraging responsiveness, transparency, and compromise.[51] However, and most importantly, "Proposition 4 required the Legislature to consider the Commission's proposed maps in an open public hearing and to vote to enact without material change or reject the Commission-adopted plans."[52] And, if the Legislature rejected the Commission's selected map, "Proposition 4 required the Legislature to issue a detailed written report explaining its decision and why the Legislature's substituted map(s) better satisfied the mandatory, neutral redistricting criteria."[53] Prop 4 also forbade the Legislature from enacting a redistricting plan "or

[49] Redistricting Rep. at 7.

[50] *Id.*

[51] *See* Complaint ¶¶ 80-90.

[52] U.C.A. § 20A-19-204(2)(a), repealed by Laws 2020, c. 288, § 12, eff. Mar. 28, 2020.

[53] *Id.* § 20A-19-204(5)(a), repealed by Laws 2020, c. 288, § 12, eff. Mar. 28, 2020.

modification of any redistricting plan unless the plan or modification has been made available to the public by the Legislature, including by making it available on the Legislature's website, or other equivalent electronic platform, for a period of no less than 10 calendar days."[54] Finally, it contained a citizen suit provision as a failsafe measure to block any redistricting plan that failed to conform to Prop 4's mandates.[55]

Although, the original UIRC was technically an advisory commission, the statute placed the onus on the Legislature to explain why it would choose to disregard the nonpartisan map proffered by the people's voice, through the UIRC, in favor of maps drawn through its own less transparent and more easily manipulatable proceedings.

This changed with the passage of S.B.200. "SB200 required the Commission to craft its own standard 'prohibiting the purposeful or undue favoring or disfavoring' of parties, incumbents, or candidates, but [allowed] the Legislature [to] follow its own preferences, permitting the gerrymandering of Utah's maps for partisan advantage."[56] Amicus joins with Appellee's briefing as to why the Legislature's disregard of the people, and of the initial mandates of Prop 4 in passing S.B.200, was a violation of democratic principles and of citizens' rights.[57] "SB200 eliminated all mandatory anti-gerrymandering restrictions imposed by the people on the Legislature as well as Proposition 4's

[54] *Id.* at (4).

[55] U.C.A. § 20A-19-301(2), repealed by Laws 2020, c. 288, §12, eff. Mar. 28, 2020.

[56] Complaint ¶ 95.

[57] *See* Appellee Brief at 17-18, 20-27.

enforcement mechanisms … as if the people had never spoken."[58] However, this did not prevent the "new" UIRC from carrying out its mandate to the fullest extent contemplated by Prop 4 under the compromise structure still in place after passage of S.B. 200.

C. The Commission's Work

The UIRC's structural independence began with its appointment procedures. "The appointed commissioners are barred from being active lobbyists, elected officials, political party leaders, or executive appointees as a step to ensure there are no conflicts of interest. Additionally, the seven-member commission was appointed by both Democratic and Republican party leaders—with the chair appointed by the governor."[59] Careful statutory prescriptions govern the appointment of each member of the commission, guaranteeing that is membership represents all branches of the Utah government and representatives of all major political constituencies.[60]

As Prop 4 expressly prohibited "the purposeful or undue favoring or disfavoring of an incumbent elected official, a candidate or prospective candidate for elected office, or a political party" in drawing district lines,[61] the UIRC unanimously adopted seven affirmative neutral redistricting criteria and one prohibition on favoring candidates,

[58] Complaint ¶¶ 96-97.

[59] Redistricting Rep. at 11.

[60] *See* U.C.A. § 20A-20-201(2).

[61] *See* U.C.A. § 20A-20-302.

incumbents, and/or political parties in line drawing.[62] Additionally, S.B. 200 requires that the UIRC hold "no fewer than seven public hearings throughout the state to discuss maps;" affords the public "a reasonable opportunity to submit written and oral comments to the commission and to propose redistricting maps for the commission's consideration;" prescribes rigorous standards for equitable map drawing; provides staffing and budget resources outside the reach of partisan control; and empowers the UIRC to define and adopt redistricting policies in line with the best recommendations of experts and citizens.[63] The UIRC not only complied with these mandates but in many ways exceeded these goals.

1. Community Outreach

The need for an independent redistricting commission to serve the citizens of Utah was never higher than after this most recent census cycle. The population of the state of Utah grew by about half a million people in the previous decade.[64] The 2020 Census showed that some cities concentrated along the Wasatch Front grew by literally hundreds of percentage points (with one city's, Vineyard Front's, population growing by as much as 10,000%).[65] This transformation of multiple cities and municipalities necessitated radical changes to the district maps drawn for the state of Utah. Additionally, the U.S. Census Bureau released its redistricting data to states a full six months later than the usual deadline

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[62] UIRC, UIRC Meeting–August 27, 2021, https://uirc.utah.gov/uirc-meeting/uirc-august-27-2021/.

[63] *See* U.C.A. § 20A-20-301, *et seq.*

[64] Redistricting Rep. at 15.

[65] *Id.*

due to pandemic complications which increased the difficulties of tabulating proper populations. "There was less time to conduct public hearings, gather comments and input from communities of interest, and most importantly less time to draw district maps."[66] Still, the UIRC exceeded its mandate.

"Prior to any mapping, the Commission worked to ensure that the mapping itself would be transparent and open to public input. While the criteria used by the commissioners is largely explained in the statute, some specific clarifications and details of the statute were ambiguous, prompting the commission to formally adopt criteria to be used while drafting maps."[67]

The Commission adopted criteria to preserve communities of interest, contiguous boundaries, geographic boundaries, municipal and country lines, and prohibited any undue favoring of incumbents or candidates; all criteria were listed on the Commission's website with a window for public input, and with explanations provided at public hearings throughout the state.[68]

Exceeding the statutory mandate for 7 public hearings, the UIRC conducted 15 public hearings across the state.[69] Embracing transparency, the UIRC made all public

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[66] *Id.* at 16.

[67] *Id.* at 19. *See* Appendix 1.

[68] UIRC, Synopsis of Threshold Criteria and Redistricting Standards, https://uirc.utah.gov/uirc-meeting/synopsis-criteria-and-standards/.

[69] Redistricting Rep. at 21.

hearings and all team mapping sessions available online—initiatives which greatly expanded on the requirements mandated under the law.[70] Live streaming technology enabled the public to witness every modification made to district maps in real time and allowed commissioners to engage with public comments throughout the mapping process.[71] The UIRC provided virtual access to all its business and "actively considered differing urban and rural needs in its communities-of-interest analyses."[72] This unprecedented level of public access was coupled with an equally unprecedented degree of public participation in the map making. Open houses and active dialogue sessions between the UIRC and the public were included in every hearing—citizens could and often did submit their own maps for consideration online and during public meetings.[73]

Additionally, the Commission solicited feedback as to what the public believed constituted relevant communities of interest implicated in any redistricting design. After receiving thousands of comments defining and protecting communities of interest, from both the website and outside organizations, commission staffers worked to categorize submissions into the following categories: economic communities, educational communities, environmental communities, ethnic communities, industrial communities, language communities, local government communities, neighborhood communities, and

[70] *Id.* at 15.

[71] *See* Complaint ¶ 125.

[72] *Id.* ¶ 128.

[73] *Id.* ¶ 124.

religious communities.[74] Utilizing cutting edge technology, communities of interest were categorized with data turned into "viewable layers within the redistricting software, allowing the Commissioners to evaluate whether their drafted maps were considerate of collected communities."[75] Finally, the commission used social media both to educate the public about its work via outreach programs, and to solicit feedback from the public by "sharing polls that asked followers what they thought about specific maps or where they would like to see their district boundaries."[76]

In addition to its sophisticated cyberspace initiatives the UIRC compiled a list of over 500 organizations throughout the state of Utah to solicit their engagement in the redistricting efforts. These organizations hosted UIRC emissaries at their meeting places and shared information provided by the UIRC with their members, thus ensuring that all interested parties throughout the state had the opportunity to participate in the UIRC's work.[77] "Because each Commissioner is not familiar with every community across the state, public input was necessary to better understand each community's needs, and through this mutually beneficial educational process citizens were able to impact the commission's work in substantial ways."[78] Finally, countless additional meetings were held with groups

[74] Redistricting Rep. at 23.

[75] *Id.*

[76] *Id.* at 24-25.

[77] *Id.* at 25-26.

[78] *Id.*

as diverse as local school boards, The Navajo Nation, and Mormon Women for Ethical Government. During these meetings the UIRC members and representatives could both discuss their work with the public and hear first-hand the public's concerns in preparation for and throughout map-making.

2. The Mapping Process

The map drawing process itself was yet another instance of the UIRC embracing and exceeding all mandates for transparency and citizen engagement. The commissioners were split into three mapping teams, each with a commissioner appointed by a Democrat and a Republican. Transparency guided all UIRC work as explained in the UIRC redistricting report:

> During mapping sessions, all discussions and mapping were streamed live, and those people doing the actual mapping included not only staff members, but also expert volunteers associated with parts of the Geographic Information System (GIS) community. Commissioner Hillyard would often explain to members of the public that this mapping process was more difficult than it seemed, explaining that not only was the commission restricted by adopted criteria, but also noting that every change had a ripple effect. Changing the boundary of one district necessitated changing the boundary of another. The teams created detailed maps that not only fulfilled legal requirements, but also took into consideration the many public comments received by the commissioners.[79]

By using three different teams, each of which often chose and utilized different methodologies and worked independently, the UIRC maximized the potential for a fair and balanced compromise map emerging. Congressional maps, of course, always involve a tradeoff of considerations pertaining to rural and urban interests, neighborhood concerns,

[79] *Id.* at 29; *see also* Appendix 2.

and differing community interests. But six of the seven commissioners, of differing political affiliations, successfully agreed to the final map submitted to the Legislature.[80] This unprecedented achievement should inspire public confidence in the UIRC process, not least because the public had easy real time access to and input over every facet of the UIRC's duties. Given the partisan climate, the extreme population changes in Utah, and the inherent difficulties in fairly fulfilling any mandate involving something as charged as voting districts, the UIRC's process and the maps it produced stand as a clear success story of how citizen initiatives can transcend partisan ambition to improve and sustain the quality of our democracy and achieve the goal of free and fair elections.

Unfortunately, the Utah Legislature chose to ignore the voice of the people and the labors of the UIRC, first when it repealed Prop 4, and then again when it devised and enacted a gerrymandered congressional map even "before the UIRC presented its impartial proposal."[81] The UIRC maps nonetheless remain as a reflection of citizen will and of a fair and open process essential to democratic principles.

CONCLUSION

State action to address partisan gerrymandering ensures that citizen complaints about this threat to democracy do not "echo into a void." [82] Rather than succumbing to

[80] *Id.* at 30 ("On February 25, 2021 commissioner Rob Bishop, appointed by Speaker Wilson, resigned his position as commissioner citing a frustration with the makeup of the commission and disagreements with other commissioners' congressional mapping philosophies.")

[81] *See* Appellee Brief at 15.

[82] *Rucho*, 139 S. Ct. at 2490.

despair or partisanship, the citizens of Utah embraced the tradition of active engagement in American politics by states and their citizens and passed Prop 4, thereby bringing an end to partisan gerrymandering in the State of Utah. The Legislature has circumvented the people's will, and in disregarding the work of the UIRC, failed to protect our democracy from manipulation. But the work and results of the UIRC demonstrate that another way is possible. "Better redistricting politics is not a judgment imposed by the politically pure upon the less pure; it is a 'reasonably imperfect' outcome that a broad cross-section of citizens and groups can live with for a decade."[83] The Legislature's maps reflect partisan manipulation of voting districts, which will distort voting results for a decade. The UIRC's maps demonstrate what is required for neutrally drawn and fair district lines, and, even more important, what can be achieved by a process that ensures fairness, openness, and freedom from partisan abuse.[84]

[83] Cain, *supra* note 33, at 1843.

[84] *Developments in the Law: Voting and Democracy*, 119 Harv. L. Rev. 1165, 1176 (2006) ("State [courts have] . . . the potential to provide a significant layer of defense against misuse of redistricting power and thus deserve[] greater consideration as a complement . . . to independent commissions.")

Dated: May 18, 2023 WILSON SONSINI GOODRICH & ROSATI
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CERTIFICATE OF COMPLIANCE

This brief (1) does not exceed 7,000 words in compliance with the requirements of Utah R. App. P. 24(a)(11) and 25(f); (2) was prepared in proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font in compliance with the requirements of Utah R. App. P. 27(a); and (3) contains no non-public information in compliance with Utah R. App. P. 21(h).

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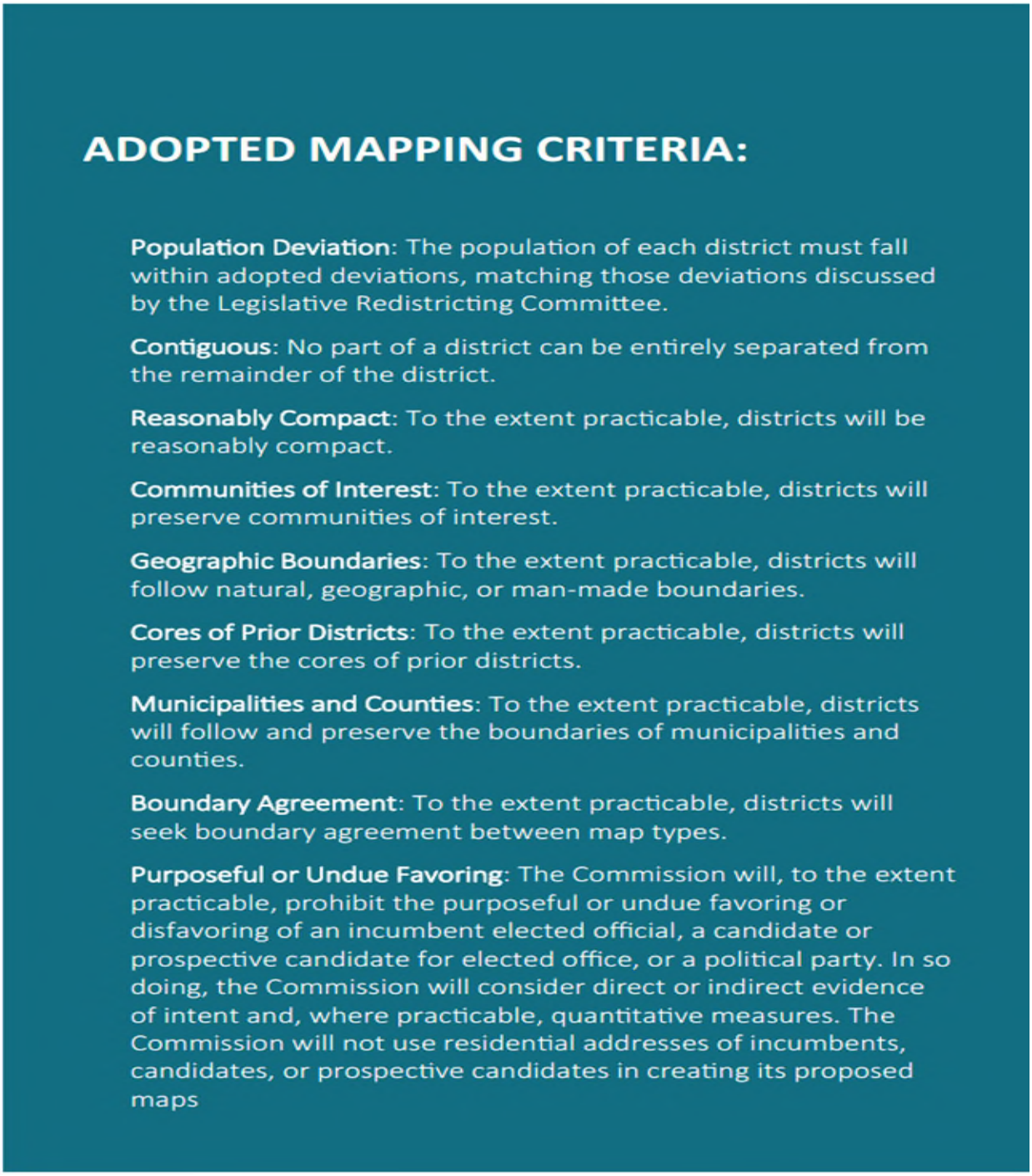
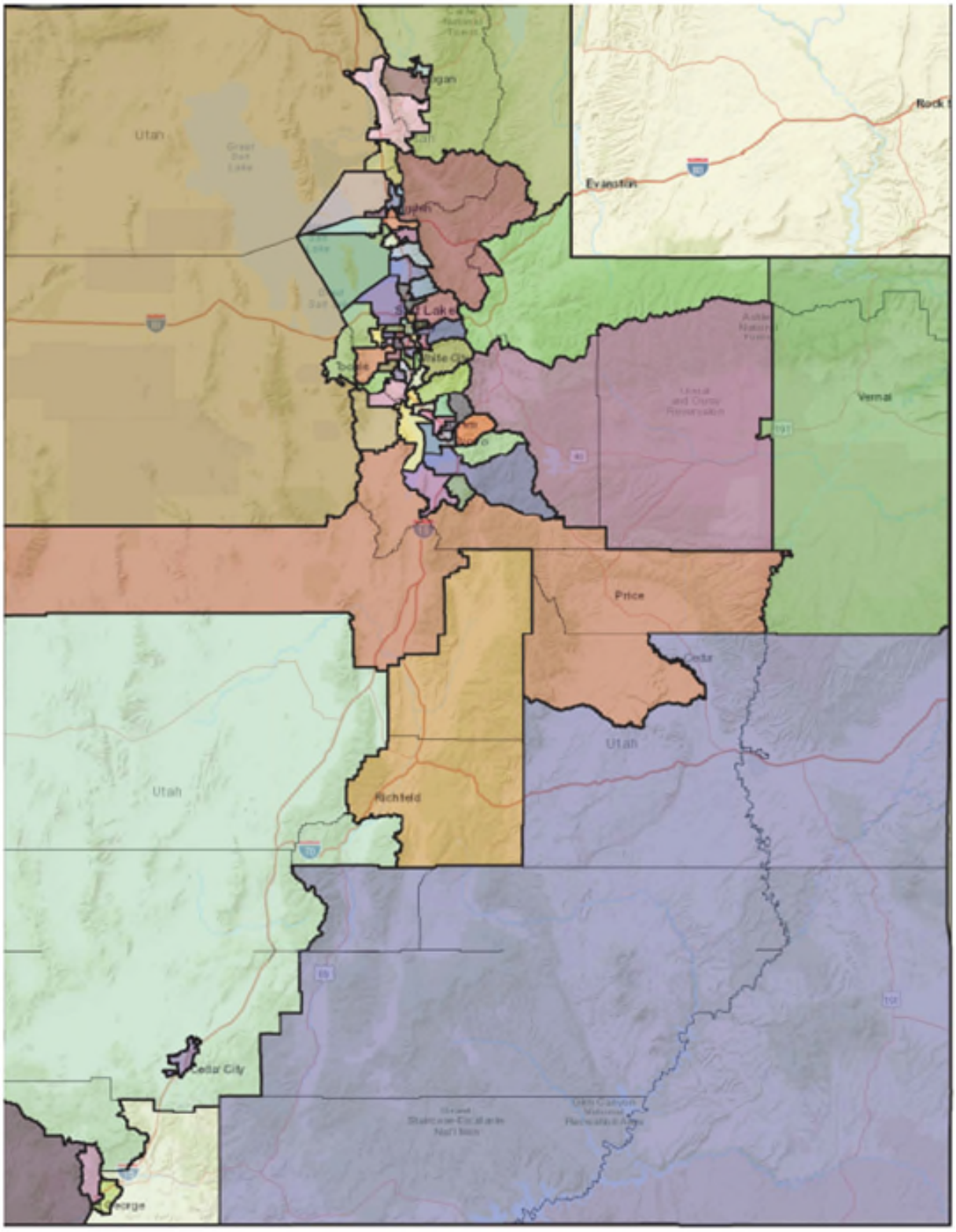
APPENDIX 1

UIRC MAPPING CRITERIA

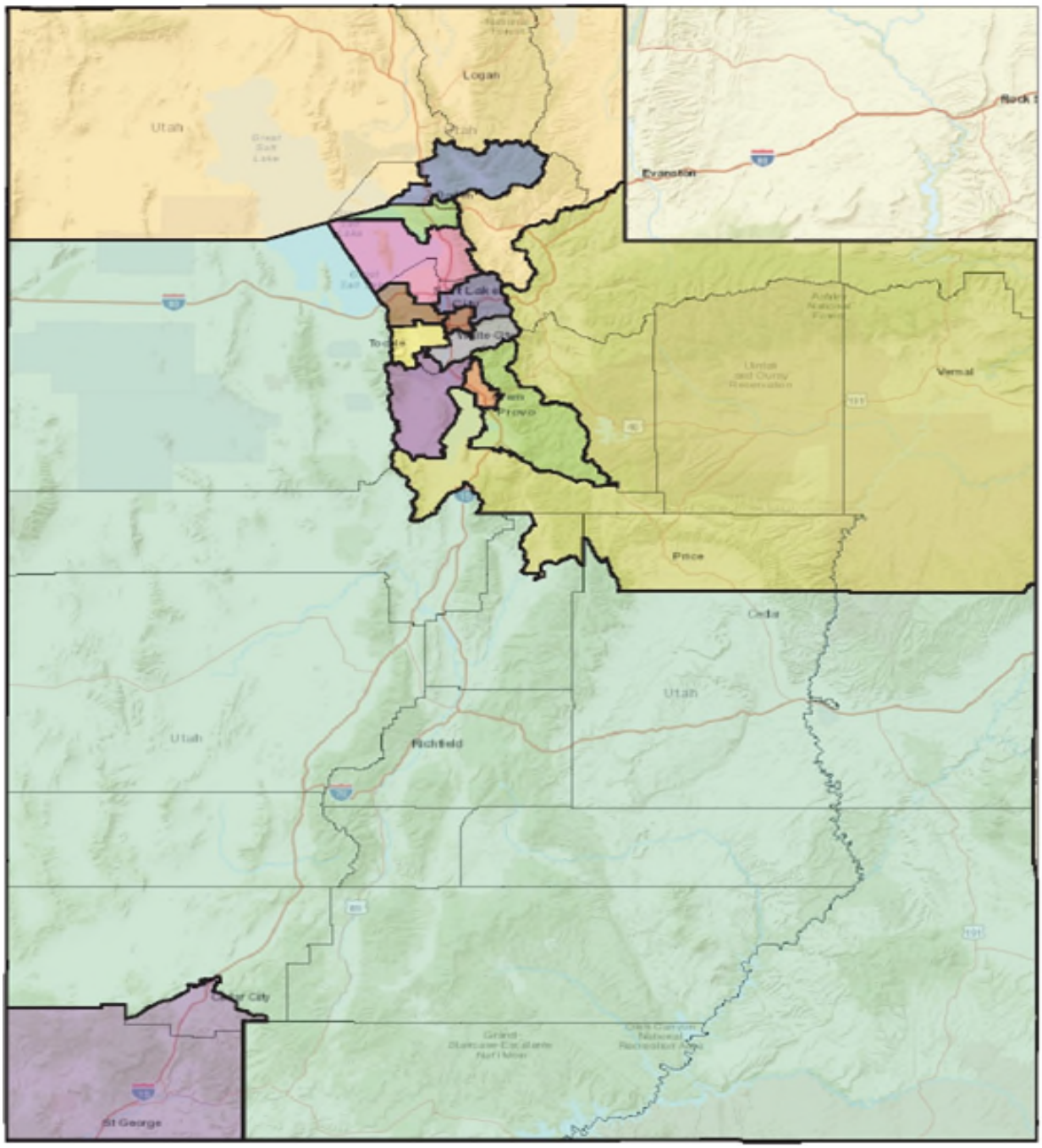


APPENDIX 2

HOUSE MAP



SCHOOL BOARD MAP



CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2023, a true, correct, and complete copy of the foregoing **Brief of Amicus Curiae in Support of Respondents** was filed with the Utah Supreme Court and served via electronic mail as follows:

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No. 20220991-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

League of Women Voters of Utah, et al.,
Appellees and Cross-appellants (Plaintiffs),
v.
Utah State Legislature, et al.,
Appellants and Cross-appellees (Defendants).

Brief of Professor Charles Fried as Amicus Curiae in Support of Reversal of the District Court Decision

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On Defendants' Petition (20220991-SC)
Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Dianna M. Gibson, District Court No. 220901712

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Represented by Victoria Ashby, Robert H. Rees, and Eric N. Weeks of the Office of Legislative Research and General Counsel; and Tyler R. Green, Taylor A.R. Meehan, Frank H. Chang, and James P. McGlone of Consovoy McCarthy PLLC

Appellees and Cross-appellants (Plaintiffs)

League of Women Voters of Utah, Mormon Women for Ethical Government, Stephanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, and Jack Markman

Represented by Troy L. Booher, J. Frederic Voros, Jr., and Caroline A. Olsen of Zimmerman Booher; David C. Reymann and Kade N. Olsen of Parr Brown Gee & Loveless; and Mark Gaber, Hayden Johnson, Aseem Mulji, and Anabelle Harless of Campaign Legal Center

Cross-appellee (Defendant)

Lt. Governor Deidre Henderson

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Parties below not parties to the appeal

Plaintiff Dale Cox (voluntarily dismissed)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

Statutes

Other Authorities

INTERESTS OF AMICUS CURIAE[1]

Professor Charles Fried is the Beneficial Professor of Law at Harvard Law School and has been teaching at the school since 1961. He was Solicitor General of the United States, 1985–89, and an Associate Justice of the Supreme Judicial Court of Massachusetts, 1995–99. His scholarly and teaching interests have been moved by the connection between normative theory and the concrete institutions of public and private law. Professor Fried is a member of the Litigation Strategy Council of the Campaign Legal Center, a nonprofit organization that advances democracy through law at the federal, state, and local levels, fighting for every American's rights to responsive government and a fair opportunity to participate in and affect the democratic process. Professor Fried's legal expertise thus bears directly on the question of whether, relying on particular state constitutional provisions, state courts may go beyond the federal limits on the justiciability of partisan gerrymandering.

INTRODUCTION

When determining that partisan gerrymandering claims were nonjusticiable under the federal Constitution, the United States Supreme Court issued a direct invitation for the protections of state constitutions to fill the void. Respondents took up that invitation in filing the instant case in the Utah courts, and our federalist system ensures that this Court

[1] Pursuant to Utah R. App. P. 25(e)(6), no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Utah R. App. P. 25(b)(2) and received timely notice pursuant Utah R. App. P.25(a).

can exercise its distinct responsibility under Utah's Constitution to effectuate the separate protections that its constitution provides. Utah's Constitution—a foundational source of rights and liberties for Utahns—provides "substantive protections against antidemocratic conduct that the federal Constitution does not." Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 913 (2021). The Utah Constitution provides just such protections against an anti-democatic gerrymander.

Utah's Constitution contains provisions distinct from the federal Constitution, including in particular the Free Elections and Uniform Operation of Laws Clauses. The original meaning of these constitutional protections and this Court's own precedent compels the conclusion that partisan gerrymandering claims are justiciable under Utah's Constitution.

ARGUMENT

In shutting the federal courts to partisan gerrymandering claims, the Court "[did] not condone excessive partisan gerrymandering." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Instead of "condemn[ing] complaints about districting to echo into a void," the Court recognized that state constitutions might indeed point in another direction. *Id.* That should come as no surprise for "the very premise of . . . cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977). "[L]iberties," like the rights violated by partisan gerrymandering, "cannot survive if the states betray the trust the [Supreme] Court has put in them." *Id.* Indeed, state courts' "manifest purpose is to expand constitutional protections." *Id.*

This Court can achieve that purpose by recognizing that the Utah Constitution's Free Elections and Uniform Operation of Laws Clauses preclude partisan gerrymandering. Partisan gerrymandering severely undermines Utah's sweeping constitutional guarantees that "[a]ll elections shall be free," Utah Const. art. I, § 17, and that "[a]ll laws of a general nature shall have uniform operation," Utah Const. art. I, § 24. The history of these provisions and this Court's precedents confirm that these provisions bar partisan gerrymandering.

I. State constitutions contain more extensive protections of individual rights than the federal Constitution.

a. State supreme courts have an independent duty and authority to afford the citizens of their state the full protections of their state's constitution.

"State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." Brennan, *supra*, at 491. Accordingly, "state courts, no less than federal [courts] are and ought to be the guardians of our liberties." *Id.* As the final arbiters of the meaning of their constitutions, state courts "may experiment all they want with their own constitutions, and often do in the wake of [the Supreme] Court's decisions." *Kansas v. Carr*, 577 U.S. 108, 118 (2016) (Scalia, J.). "And of course, state courts that rest their decisions wholly . . . on state law need not apply federal principles of . . . justiciability that deny litigants access to the courts." Brennan, *supra*, at 501.

This two-tiered federalist system is a defining feature of American constitutional governance. "Our system of dual sovereigns comes with dual protections." Jeffrey S. Sutton, *51 Imperfect Solutions* 2 (2018). That basic idea traces back to the nation's

founding: "[T]he state and federal founders saw federalism and divided government as the first bulwark in the rights protection and assumed the States and state courts would play a significant role, even if not an exclusive role, in that effort." Jeffrey S. Sutton, *The Enduring Salience of State Constitutional Law*, 70 Rutgers U. L. Rev. 791, 795 (2018). While some limited protections of the federal Constitution began to be applied against the states earlier, before the U.S. Supreme Court incorporated the Bill of Rights' protections against the states in the mid-twentieth century, state constitutions and state courts were the key constitutional guardians of individual rights against actors other than the federal government. *See* Jonathan Thompson, *The Washington Constitution's Prohibition of Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1249 (1996).

Nevertheless, state courts' critical rights-protecting role did not wane following the incorporation of the federal Constitution against the states; such incorporation only further underscored state constitutions' and courts' importance in our federalist system. In the latter part of the twentieth century, state courts continued to recognize that state constitutional guarantees provided "greater protection than was available under the federal Constitution" in hundreds of cases. G. Alan Tarr, *Understanding State Constitutions* 165–66 (1998). Indeed, much of state constitutions would be superfluous if state courts protected only those rights the federal Constitution already preserved. But that is not the purpose of our federal structure.

State courts can and must go further; they should consider the text and history of their own constitutions to determine whether their founding documents provide stronger

bulwarks against government encroachment than the federal Constitution. And when, as here, the U.S. Supreme Court declined to protect the rights violated by partisan gerrymandering, "the state courts [became] the *only* forum . . . for enforcing the right under their own constitutions, making it imperative to see whether, and if so, how the States fill the gaps left by the U.S. Supreme Court." Sutton, *51 Imperfect Solutions* at 2 (emphasis in original).

Utah should heed this call, just as it has in the past. This Court has repeatedly declined "invitation[s] to interpret [Utah's] constitution in lockstep with the federal [Constitution] . . . ." *South Salt Lake City v. Maese*, 2019 UT 58, ¶ 27, 450 P.3d 1092, 1099; *see also West v. Thomson Newspapers*, 872 P.2d 999, 1006 (Utah 1994) (rejecting a "lockstep approach" to interpreting the Utah Constitution that "does not allow independent interpretation of a state constitution"). In fact, this Court has recognized that by developing "independent doctrine and precedent" in state constitutional law, it "act[s] in accordance with the original purpose of the federal system." *Thomson Newspapers*, 872 P.2d at 1006. Consequently, this Court "ha[s] not hesitated to interpret the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate." *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935, 942.

b. Many states, including Utah, have recognized that their state constitutions provide greater protections than the federal Constitution.

Keeping with the foundational principles of American federalism, many state courts interpret their states' constitutions to provide stronger protections than the federal Constitution, recognizing that they have an independent duty and authority under their own

constitutions to protect the people of their state. *See, e.g.*, *State v. Guillaume*, 975 P.2d 312, 230 (Mont. 1999) ("In interpreting the Montana Constitution, this Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart."); *State v. Guzman*, 842 P.2d 660, 666 (Idaho 1992) ("It is by now beyond dispute that this Court is free to interpret our state constitution as more protective of the rights of Idaho citizens than the United States Supreme Court's interpretation of the federal constitution."); *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982) ("[W]e cannot and should not allow [federal constitutional] decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana.").

Often, when state courts find their state constitutions provide greater protections than the federal Constitution, those cases involve broad provisions that the courts have understood to protect rights central to individual liberties. For example, forty-six states "interpret the equal protection clause of their state constitutions to provide greater protections than that afforded by the equal protection clause of the Fourteenth Amendment of the United States Constitution." James A. Kushner, *Government Discrimination: Equal Protection Law and Litigation* § 1.7 (2022).

In interpreting their state constitutions, state courts often find greater protections for criminal defendants than the federal Constitution provides. As an illustration, after the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), nationalizing the exclusionary rule, which prevents the government from unconstitutional evidence gathering, the importance of distinct state constitutional protections became increasingly evident. In *United States v.*

Leon, 468 U.S. 897, 900 (1984), the U.S. Supreme Court established a good-faith exception to the exclusionary rule, allowing evidence gathered in violation of the Fourth Amendment to be admitted. Numerous state supreme courts then rejected that approach, interpreting their own constitutions' protections against illegal search and seizure to preclude any such exception to the exclusionary rule. *See, e.g.*, *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993); *Guzman*, 842 P.2d at 671; *Com. v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991); *State v. Oakes*, 598 A.2d 119, 120 (Vt. 1991); *State v. Crawley*, 808 P.2d 773, 776 (Wash. 1991); *State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990); *State v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987); *People v. Bigelow*, 488 N.E.2d 451, 458 (N.Y. 1985); *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323, 373 (2011) (at least twenty states have rejected the good-faith exception post-*Leon*).

In many cases, state supreme courts have interpreted their own constitutional provisions protecting personal rights as providing more expansive protections than the federal Constitution. For example, state supreme courts, in states both with and without explicit inclusion of the right to privacy in their constitutions, have found greater constitutional protections for privacy rights than the U.S. Supreme Court has found in the federal Constitution. *See, e.g.*, *State v. Brown*, 156 S.W.3d 722, 729 (Ark. 2004); *State v. Perry*, 610 So.2d 746, 758 (La. 1992); *State v. Saunders*, 381 A.2d 333, 341 (N.J. 1977).

As discussed above, this Court has repeatedly acknowledged that Utah's Constitution provides stronger individual protections than does the federal Constitution. This Court disclaimed lock-stepping with the federal Constitution in *Jensen ex rel. Jensen v. Cunningham*:

> "While some of the language of our state and federal constitutions is substantially the same, similarity of language does not indicate that this court moves in lockstep with the United States Supreme Court's [constitutional] analysis or foreclose our ability to decide in the future that our state constitutional provisions afford more rights than the federal Constitution."

2011 UT 17, ¶ 46, 250 P.3d 465 (quotation marks omitted). And this Court has affirmed that "we will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens." *State v. DeBooy*, 2000 UT 32, ¶ 12, 996 P.2d 546.

Following its own directive, this Court has interpreted the Utah Constitution apart from the federal Constitution to protect the greater rights afforded to Utahns by their Constitution. Similar to other states' constitutions detailed above, this Court found that Utah's protection against unreasonable searches and seizures provides "a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court," even though the "provisions contain identical language." *DeBooy*, 2000 UT 32, ¶ 12. This Court also ruled that "the article III constitutional restrictions and federalistic prudential considerations that have guided the evolution of federal court standing law are not necessarily relevant to the development of the standing rules that apply in Utah's state courts." *Provo City Corp. v. Willden*, 768 P.2d 455, 456 (Utah 1989) (collecting cases where this Court developed standing rules distinct from federal standing rules). And this Court has recognized that "our state constitution may well provide greater protection for the free exercise of religion in some respects than the federal constitution." *State v. Holm*, 2006 UT 31, ¶ 34, 137 P.3d 726.

More recently, in 2020, when presented with an analysis of the state constitutional standards under Utah's Due Process Clause, this Court held that "[we] are of course not bound to follow precedent on federal due process in our formulation of state due process standards. And we may thus depart from the federal formulation if and when we are presented with state constitutional analysis rooted in the original meaning of the Utah due process clause." *State v. Antonio Lujan*, 2020 UT 5, ¶ 49 n.7, 459 P.3d 992, 1003. Just like the protections of the Utah Constitution recognized in those cases, here Utah's Free Elections and Uniform Operation of Laws Clauses provide stronger protections than the federal Constitution. Consistent with its precedent affirming that the Utah Constitution need not be interpreted in lockstep with the federal Constitution, this Court must "not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens," from partisan gerrymanders. *DeBooy*, 2000 UT 32, ¶ 12.

II. Utah's Constitution precludes partisan gerrymandering.

a. Utah's Free Elections Clause, like the Free Elections Clauses of sister states, precludes partisan gerrymandering.

Article I, Section 17 of the Utah Constitution provides that "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17. Partisan gerrymandering—the act of drawing electoral districts to disproportionately favor one political party—creates elections that are decidedly not free. Partisan gerrymandering distorts and manipulates Utahns' "free exercise of the right of suffrage." *Id.* From the text alone, Utah's Free Elections Clause

precludes partisan gerrymandering. Historical evidence from the drafting of Utah's Constitution and the state's admission to the United States only underscores the Free Elections Clause's promise to protect Utahns from acts of distortion and manipulation upon their "free exercise of the right of suffrage." *Id.*

In *American Bush v. City of South Salt Lake*, this Court found that "in interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." 2006 UT 40, ¶ 12, 140 P.3d 1235. In doing so, courts must "discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Id.* Therefore, this Court should interpret Utah's Free Elections Clause through the clause's text and historical accounts of the drafters' and citizens' intent and purpose at the time of drafting.[2]

Merriam-Webster includes in its definition of "free" "enjoying political independence or freedom from outside domination" as well as "not determined by anything

[2] *American Bush* is the proper standard for constitutional analysis under this Court's precedent. Petitioners distort this Court's findings in *Machan v. UNUM Life Ins. Co. of Am.* by suggesting that the language "Utah courts are reluctant to recognize an implied right," 2005 UT 37, ¶ 23, 116 P.3d 342, forbids the conclusion that the Free Elections Clause precludes partisan gerrymandering because the clause "says nothing about redistricting, politically neutral or otherwise," Pet'rs' Br. 36. This language from *Machan* is entirely unrelated to constitutional interpretation. In *Machan*, this Court found that "we have generally observed that, in the absence of *statutory* language expressly indicating a legislative intent to grant a private right of action, Utah courts are reluctant to recognize an implied right." *Machan*, 2005 UT 37, ¶ 23 (emphasis added). This Court's "reluctan[ce] to recognize an implied right" of action in that *statutory* context is irrelevant and inapplicable to its interpretation of the Utah *Constitution's* Free Elections Clause. *Id.*

beyond its own nature or being: choosing or capable of choosing for itself." Merriam Webster, *Free*, (last updated March 21, 2023), https://www.merriam-webster.com/dictionary/free. In their Motion to Dismiss, Petitioners claim that because the Utah drafters removed "and equal" from the Free Elections Clause, the drafters did not intend "to guarantee each voter's 'voting power' based on their partisan affiliation." Def's Mot. to Dismiss 21 n.16. This contention is misplaced for at least two reasons. First, the word "equal" is not necessary to conclude that the Free Elections Clause prohibits partisan gerrymandering. The word "free," alone, precludes partisan gerrymandering because drawing district lines to disproportionately favor one political party is the kind of "outside domination" alien to the word "free." Merriam Webster, *Free*, (last updated March 21, 2023), https://www.merriam-webster.com/dictionary/free. The 1891 Black's Law Dictionary similarly defines free as "[u]nconstrained . . . defending individual rights against encroachment by any person or class." *Free*, *Black's Law Dictionary* (1st ed. 1891). The act of partisan gerrymandering constrains, manipulates, and distorts the political will of the people, and, therefore, is inherently and fundamentally not free. This is especially true as to gerrymandering since it allows a majority of the legislature at a particular moment to entrench its power so that future majorities cannot control the lawmaking of a state. Any election in such a regime, where a majority is powerless, is surely not free.

Second, the historical record reflects that the drafters of Utah's Constitution were concerned with eliminating surplusage. *See Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March 1895,*

to Adopt a Constitution for the State of Utah at 229 (Salt Lake City, Star Printing Co. 1898). [hereinafter *Proceedings and Debates*]. This concern included striking the word "equal" to "improve the rhetorical construction, without changing the meaning" in another section of the Constitution. *Id.* That "equal" does not provide greater meaning to "free" in clauses such as the Free Elections Clause made it an ideal target for such elimination.

In addition to this explicit textual answer that the Free Elections Clause precludes partisan gerrymandering, the clause's historical origins demand the same conclusion. Utah's admission as a state was an iterative process. Daniel J.H. Greenwood, Christine M. Durham, & Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 649, 651 (2008) (George E. Connor & Christopher W. Hammons, eds., 2006). In seeking statehood, the first six versions of Utah's Constitution were rejected. *Id.* at 652. Then, in 1896, the federal government approved the draft prepared by the delegates to the 1895 convention (the seventh draft), which became the Utah Constitution. *Id.* at 655.

Like the earlier drafts, the accepted constitution borrowed provisions from other states' constitutions. *Id.* at 651. The drafters "relied on the principle that language imported from other states' constitutions, which Congress had already approved, would serve as a safe harbor, avoiding any potential for federal criticism." *Id.* at 655. Reflecting on this drafting process, historian Jean Bickmore White noted that "[t]he announcement that a particular proposal came from an existing constitution seemed reassuring, not a sign of lack of creativity . . . [i]n a convention dominated by lawyers, there was a clear desire to write provisions that had been accepted by Congress and had worked fairly well since

their adoption." Jean Bickmore White, *Charter for Statehood: The Story of Utah's State Constitution* 52 (1996).

This history of the drafting process led Professor John J. Flynn of the University of Utah to conclude that the Utah Constitution is a "patchwork of bits and pieces borrowed from other state constitutions by a gradual process of attempting to placate a hostile Congress." John J. Flynn, *Federalism and Viable State Government: The History of Utah's Constitution*, 1966 Utah L. Rev. 311, 324–25 (1966). Professor Flynn identified Nevada, Washington, Illinois, New York, and Pennsylvania as among the states the delegates to the 1895 constitutional convention borrowed most heavily from. *Id*. at 323–24. Thomas G. Alexander, then-professor of Western American History at Brigham Young University, Provo, confirmed that the drafters drew from other state constitutions. Thomas G. Alexander, *A Reflection of the Territorial Experience*, 64 Utah Hist. Q. 264, 264 (1996).

The records of the proceedings and debates of the 1895 constitutional convention—particularly concerning the Free Elections Clause—further demonstrate the drafters' borrowing from other states' constitutions. There was no reported debate over the Free Elections Clause in the transcript of the convention, which suggests that the clause was merely a replica of other states' free elections clauses. *Proceedings and Debates*. Indeed, Pennsylvania, Colorado, Illinois, Montana, Washington, and Wyoming—states Professors Flynn and Alexander recognized as heavily influencing the 1895 convention's delegates—all had Free Elections Clauses in their constitutions in 1895. Pa. Const. art. I, § 5; Colo. Const. art. II, § 5; Ill. Const. art. III, § 3; Mont. Const. art. I, § 5 (now reflected at art. II, § 13); Wash. Const. art. I, § 19; Wyo. Const. art. I, § 27. If this clause had been a ground-

breaking, novel concept, it would have generated the same kind of "long[] fight" other constitutional provisions created, such as the equal rights provision. Greenwood et al., *supra*, at 660–61.

The drafters' borrowing from the Pennsylvania Constitution is particularly important for discerning their intent under this Court's constitutional interpretation standard set forth in *American Bush*. Flynn, *supra*, at 324; *Am. Bush*, 2006 UT 40, ¶ 12. Article VI, Section 26 of the Utah Constitution forbids "private or special law[s] . . . where a general law can be applicable." Utah Const. art. VI, § 26. This language "was taken almost verbatim" from the Congressional Act of 1886, which was based on Article III, Section 6 of the Pennsylvania Constitution of 1874. Flynn, *supra*, at 324.

This connection between the Utah and Pennsylvania constitutions alongside the fact that both constitutions include free elections clauses is fruitful in discerning the Utah drafters' intent under the *American Bush* standard. Relying on the constitutional text and related history of the clause, the Pennsylvania Supreme Court has recognized that their Free Elections Clause precludes partisan gerrymandering. *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 814 (2018) .[3] That court ruled that "[a]n election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not free and equal" and that "[i]n such circumstances, a power, civil or military, to wit, the

[3] The Pennsylvania Constitution is among the oldest state constitutions and served as a source for many other state constitutions. While the North Carolina Supreme Court has recently followed the federal courts in holding partisan gerrymandering claims non-justiciable, the Pennsylvania Supreme Court, interpreting a document known to be a source for Utah's Constitution, has found these claims justiciable.

General Assembly, has in fact interfere[d] to prevent the free exercise of the right of suffrage" in violation of Pennsylvania's Free Elections Clause. *Id.* (quoting Pa. Const. art. 1, § 5) (internal quotation marks omitted).

Pennsylvania's Free Elections Clause originated from the English Bill of Rights of 1689, as did analogous clauses in other early states of our nation. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 289 (2021). "As states began enacting constitutions after our Nation declared independence, the Framers of those Constitutions, still wary of executive power, adopted provisions similar to that in the 1689 English Bill of Rights." *Wolf v. Scarnati*, 660 Pa. 19, 53, 233 A.3d 679, 700 (2020). Pennsylvania's Free Elections Clause reflected the personal history of the delegates to the Pennsylvania Constitutional Convention and their desire to "establish[] a critical 'leveling' protection in an effort to establish the uniform right of the people of this Commonwealth to select their representatives in government." *League of Women Voters*, 178 A.3d at 807; *see* John L. Gedid, *History of the Pennsylvania Constitution*, *in* THE PENNSYLVANIA CONSTITUTION A TREATISE ON RIGHTS AND LIBERTIES 48 (Ken Gormley ed., 2004).

The origins of American free elections clauses in the English Bill of Rights of 1689 further confirm that these clauses prohibit partisan gerrymandering. The Free Elections Clause was included in the English Bill of Rights of 1689 following the "Glorious Revolution" to address the King's subversion of democracy through manipulating parliamentary elections. J.R. Jones, *The Revolution of 1688 in England* 148 (1972). The King performed this manipulation through the "rotten boroughs" system—the 1600s

England version of modern-day partisan gerrymandering. For years, the King regularly distorted control of parliament by altering or malapportioning districts (called "boroughs" at the time) to ensure a government loyal to and in favor of the monarch. *See* Ross, *supra*, at 256. This distortion of political districts to deliver the King's desired results became known as the "rotten boroughs" system. *Id*.; *see also Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).

The victims of the "rotten boroughs" system strongly opposed this political manipulation, and their shared opposition to this system was a motivating factor prompting the Glorious Revolution and eventual passage of the English Bill of Rights in 1689. *See Harper*, 868 S.E.2d at 541–42. The Free Elections Clause of the English Bill of Rights states that "[e]lection of Members of Parliament ought to be free." Bill of Rights, 1689, 1 W. & M., Sess. 2 c. 2 (Eng.). This provision was a "central feature of the English Bill of Rights" included to eliminate the distortion and manipulation of the political process the King's rotten boroughs system created and to ensure "an independent Parliament through free elections." Ross, *supra*, at 221–22, 289.

The memory of the rotten boroughs system was still fresh in the American Revolutionary era, during which the Founders were equally committed to ensuring a political system free of manipulation and distortion. *See, e.g.*, McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 Hastings L.J. 1509, 1537 (2018) ("The Framers were responding to the lack of representation afforded them as colonists, in conjunction with fresh memory of rotten boroughs that corrupted England's representative system."). With the Pennsylvania constitution adopted in 1776—

more than a decade before the U.S. Constitution in 1789—the delegates to the Pennsylvania constitutional convention were undoubtedly influenced by their English forebearers and British rule.

The Utah Constitution has further connections to the English Bill of Rights in addition to its ties from adopting provisions from states including Pennsylvania. In fact, Petitioners agree that Utah's Free Elections Clause has its roots in the English Bill of Rights and other states' constitutions. Pet'rs' Br. 40. And this Court has already expressly recognized that at least one provision in the Utah Constitution—Article I, Section 9—originated in the English Bill of Rights of 1689. *See Bott v. Deland*, 922 P.2d 732, 737 (Utah 1996) (finding that Utah's cruel and unusual punishment clause originated from the English Bill of Rights of 1689), *abrogated by Spackman ex rel. Spackman v. Bd of Educ. of Box Elder Cnty. Sch. Dist.,* 2000 UT 87, 16 P.3d 533; *see also State v. Houston,* 2015 UT 40, ¶¶ 166–70, 353 P.3d 55, (Lee, J. concurring) (discussing the English Bill of Rights and English origins of protection against "cruel and unusual punishment").

This Court also recognized in *American Bush* that "the drafters of the Utah Constitution borrowed heavily from other state constitutions[,] . . . the United States Constitution[,]" and English common law. *Am. Bush*, 2006 UT 40, ¶ 31. Professor Alexander confirmed this connection between the Utah Constitution and English common law in his conclusion that "[i]nitially, both New Mexico and Utah rejected English common law because of existing Mexican civil law and Mormon customary law . . . [but] [i]n both territories pressure from national interests, especially from federal judges, forced the

adoption of the national system of English common law which both territories incorporated into their state constitutions." Alexander, *supra*, at 279.

The Free Elections Clause was not the only way in which the Utah drafters demonstrated their commitment to expansively protecting voting rights in their constitution. Greenwood et al., *supra*, at 660–61. For example, "after the 'longest fight in the convention' and despite fears that it might endanger congressional approval," Utahns added "one of the earliest guarantees of equal rights of women" in Article IV, Section 1, which protected women's right to vote. *Id.* Further, in a rare moment of departure from other states' constitutions, the Utah drafters explicitly removed a literacy requirement for enfranchisement. *Id.* Under the *American Bush* standard, this intent of the drafters to expand and protect voting rights must inform constitutional interpretation in Utah.

The textual and historical analysis of Utah's Free Elections Clause demonstrates how and why it precludes partisan gerrymandering. The history of the drafting of Utah's Constitution reveals the drafters' commitment to protecting and expanding Utahns' voting rights as well as preventing tyrannical forces from manipulative acts like partisan gerrymandering. Under its standard in *American Bush*, this Court should conclude that the Free Election Clause precludes partisan gerrymandering. Doing so is the only way to "operationalize the state constitutional commitment to popular sovereignty and political equality" that the Free Elections Clause embodies, for "partisan gerrymandering . . . entails legislative self-dealing that at once undermines the ability of the people to share equally in the power to influence government and confers special treatment on members of one political party." Bulman-Pozen & Seifter, *supra*, at 911.

b. Utah's Uniform Operation of Laws Clause similarly extends farther than the federal Equal Protection Clause and precludes partisan gerrymandering.

Utah's Constitution provides Utah voters a second protection against partisan gerrymandering—the Uniform Operation of Laws Clause. Article I, Section 24 of the Utah Constitution states that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. While this provision "embod[ies] the same general principle" as the federal Equal Protection Clause, *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984), this Court has continuously emphasized that Utah's Uniform Operation of Laws Clause "establishes different requirements than does the federal Equal Protection Clause." *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995). And under those requirements, partisan gerrymandering—as discrimination related to the fundamental right to vote—triggers a heightened scrutiny that such gerrymandering cannot survive.

Under Utah's Uniform Operation of Laws Clause, Utahns enjoy protections distinct from, and stronger than, the federal Equal Protection Clause. Like the federal Equal Protection Clause, Utah's Uniform Operation of Laws Clause stands for the proposition that "persons similarly situated should be treated similarly . . . ." *Malan*, 693 P.2d at 669. Article I, Section 2 of the Utah Constitution confirms this basic idea, affirming that "all free governments are founded on [the people's] authority for [the people's] equal protection and benefit." Utah Const. art. I, § 2. But this "similarity in the stated standards under [the Uniform Operation of Laws Clause and the federal Equal Protection Clause] does not amount to complete correspondence in application." *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988).

Instead, as this Court has stressed time and time again, its "construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause." *Malan*, 693 P.2d at 670; *see also Mohi*, 901 P.2d at 997 (reiterating that the Uniform Operation of Laws Clause "establishes different requirements than does the federal Equal Protection Clause"); *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 426 (Utah 1995) ("[L]anguage from federal equal protection analysis under the Fourteenth Amendment . . . is not readily transposed to the . . . test [this Court] appl[ies] under the uniform operation of laws provision of the Utah Constitution."). In fact, this Court has developed legal standards under the Uniform Operation of Laws Clause that are "at least as exacting and, in some circumstances, *more rigorous* than the standard applied under the federal constitution." *Mountain Fuel*, 752 P.2d at 889 (emphasis added); *see also Blue Cross & Blue Shield of Utah v. State Tax Comm'n*, 779 P.2d 634, 637 (Utah 1989). Those different standards "can produce different legal consequences," *Lee v. Gaufin*, 867 P.2d 572, 577 (Utah 1993), in part because Utah's Uniform Operations of Laws Clause protects against discriminatory effects in ways the federal Equal Protection Clause does not.

Unlike the federal Equal Protection Clause, Utah's Uniform Operation of Laws Clause, based on its plain terms and history, "guards against disparate effects in the application of laws," *Gallivan v. Walker*, 2002 UT 89, ¶ 38, 54 P.3d 1069. *Compare id.* (explaining that "the equal protection principle inherent in [Utah's] uniform operation of laws provision . . . guards against disparate effects in the application of laws) *with Washington v. Davis*, 426 U.S. 229, 239 (1976) (rejecting the "proposition that a law or

other official act . . . is unconstitutional [under the federal Equal Protection Clause] solely because it has a . . . disproportionate impact"). The plain terms of Article I, Section 24 of Utah's Constitution focus on the uniform *operation* of laws. Thus, "it is not enough that [a law] be uniform on its face. What is critical is that the *operation* of the law be uniform." *Lee*, 867 P.2d at 577 (emphasis in original); *see also Blackmarr v. City Ct. of Salt Lake City*, 38 P.2d 725, 727 (Utah 1934) (emphasizing that laws cannot "operate unequally, unjustly, and unfairly upon those who come within the same class"). The Uniform Operation of Laws Clause's historical antecedents confirm this conclusion. "Historically, uniform operation provisions were understood to be aimed at . . . practical *operation*." *State v. Canton*, 2013 UT 44, ¶ 34 & n.7, 308 P.3d 517 (elaborating that "uniform operations clauses originally reflected an '*opposition to favoritism and special treatment for the powerful*,' and explaining that '[a]lthough these provisions may seem to overlap somewhat with federal equal protection doctrine, closer scrutiny reveals significant differences'") (quoting Robert F. Williams, *The Law of American State Constitutions* 209–13 (2009)) (emphasis added).

Accordingly, this Court has developed a three-part test to assess whether statutes or government actions violate the Uniform Operation of Laws Clause. It asks: (1) "what classifications the statute creates," (2) "whether different classes . . . are treated disparately," and (3) "whether the legislature had any reasonable objective that warrants the disparity among any classifications." *DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 49, 364 P.3d 1036. Step three of this inquiry "incorporates varying standards of scrutiny," with heightened scrutiny applying to cases involving "discrimination on the

basis of a fundamental right." *Id.* at ¶ 50. This well-established test allows this Court to assess partisan gerrymandering claims under the Utah Constitution. And applying that test here demonstrates partisan gerrymandering violates Utah's Constitution for it arbitrarily classifies and disparately impacts politically disfavored voters in a way that dilutes their fundamental right to vote.

Partisan gerrymandering that classifies voters by both geographic location and partisan affiliation to diminish the strength of votes for a certain party. Such classifications satisfy the first two prongs of this Court's Uniform Operation of Laws test. In *Gallivan* this Court held that a multi-county signature requirement on the ballot initiative process violated Utah's Uniform Operation of Laws Clause in part because it: (1) created "two subclasses of registered voters: those who reside in rural counties and those who reside in urban counties," *Gallivan*, 2002 UT 89, ¶ 44; and (2) treated "similarly situated registered voters disparately" by requiring prospective ballot initiatives to be signed by a specific percent of voters in twenty of Utah's twenty-nine counties, thereby "diluting the power of urban registered voters and heightening the power of rural registered voters in relation to an initiative petition." *Id.* ¶ 45. The multi-county signature requirement created these disparate effects in part by exploiting "Utah's uniquely concentrated population." *Id.*

Partisan gerrymandering fares even worse under the Uniform Operation of Laws test than the multi-county signature requirement in *Gallivan* did. First, partisan gerrymanders can classify voters on not just one, but two bases: geographic location (as in *Gallivan*) *and* partisan affiliation. *See* Compl. ¶¶ 4, 207–27, 274–76. This sorting clearly creates the "classifications" that the Court in *DirectTV* used as the first prong of its test.

Second, just as in *Gallivan*, the sorting of voters on the basis of party leads to favored factions having "a disproportionate amount of power" in the political process, *Gallivan*, 2002 UT 89, ¶ 45. *See* Compl. ¶¶ 30–33, 36, 187–98, 265, 275–76. Such gerrymanders—that "dilut[e] the power of [one group of voters] and heighten[] the power of [another group of voters]," *Gallivan*, 2002 UT 89, ¶ 45—classify and disparately affect similarly situated Utahns differently, thereby fulfilling the second prong of the Court's test.

As a discriminatory act implicating the fundamental right to vote, partisan gerrymandering triggers a heightened scrutiny in the third prong of Utah's Uniform Operations of Law test. "For decades" this Court has repeatedly reinforced that "the right to vote is a fundamental right." *Gallivan*, 2002 UT 89, ¶ 24; *see also Utah Pub. Emps. Ass'n v. State*, 610 P.2d 1272, 1273 (Utah 1980) ("[T]he catalog of fundamental interests . . . includes such things as the right[] to vote . . . ."). Indeed, in *Gallivan,* this Court reinforced that:

> "[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

Gallivan, 2002 UT 89, ¶ 24 (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964)). The right to vote thus triggers heightened scrutiny not "just because it is important to the aggrieved party," but because it "form[s] an implicit part of the life of a free citizen in a free society." *Utah Pub. Emps. Ass'n*, 610 P.2d at 1273 (Utah 1980). The right to vote is "sacrosanct," and "Utah courts must defend it against encroachment and maintain it inviolate." *Gallivan*, 2002 UT 89, ¶ 27. Partisan gerrymandering dilutes the worth of

certain Utahns' fundamental right to vote, and this Court must use its authorities under the Utah Constitution to defend against that encroachment, just as it did in *Gallivan*.

Partisan gerrymanders plainly implicate the fundamental right to vote. In *Gallivan*, this Court recognized that a statute requiring prospective ballot initiatives to receive the signatures of a certain percent of registered voters in twenty of Utah's twenty-nine counties impacted the fundamental right to vote because "Utah's uniquely concentrated population," *id.* ¶ 45, meant the requirement "ha[d] the effect of heightening the relative weight of the signatures of registered voters in rural, less populous counties and diluting the weight of the signatures of registered voters in urban, more populous counties . . . ," *id.* ¶ 34. Partisan gerrymanders affect the fundamental right to vote for this same reason. And as such, partisan gerrymanders must survive heightened scrutiny.

To survive heightened scrutiny, one would need to demonstrate that a partisan gerrymander is "reasonably necessary to further, and in fact . . . actually and substantially further[s], a legitimate legislative purpose." *Gallivan*, 2002 UT 89, ¶ 42. But partisan gerrymandering does not actually and substantially further any legitimate legislative purposes. Privileging the votes of one set of geographically located voters over those of differently geographically located voters does not actually and substantially further a legitimate legislative purpose. *Cf. id.* ¶¶ 50, 59 n.11, 59–61. Empowering voters of one political party at the expense of voters in other parties also does not actually and substantially further a legitimate legislative purpose. *Cf. Midvale City Corp. v. Haltom*, 2003 UT 26, ¶ 16, 73 P.3d 334, 339 (recognizing claim of viewpoint discrimination where the government "suppress[es] disfavored speech or disliked speakers").

It is this Court's "province to decide the vital and determinative question of whether a classification operates uniformly on all persons similarly situated within constitutional parameters," *Gallivan*, 2002 UT 89, ¶ 38 (internal quotations omitted). Partisan gerrymanders do not operate uniformly on similarly situated Utahns; they impermissibly infringe on some Utahns' sacrosanct right to vote to heighten others' voting powers.

CONCLUSION

For the foregoing reasons, this Court must exercise its independent authority and duty in our federalist system to protect the rights enshrined in the Utah Constitution, by holding that claims of partisan gerrymandering are justiciable under the Utah Constitution's Free Elections and Uniform Operation of Laws Clauses.

DATED this 19th day of May, 2023.

RESPECTFULLY SUBMITTED
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief contains 6,935 words, excluding any tables or attachments, in compliance with Utah R. of App. P. 25(f).
2. This brief complies with Utah R. App. P. 21(h) regarding public and non-public filings.

DATED this 19th day of May, 2023.

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IN THE UTAH SUPREME COURT

League of Women Voters of Utah, Mormon Women for Ethical Government, Stefanie Condie, Malcom Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, Jack Markman, Dale Cox, Plaintiffs-Respondents, vs. Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Brad Wilson, Sen. J. Stuart Adams, Defendants-Petitioners.	Appellate Case No. 20220991-SC On interlocutory appeal from the Third Judicial District Court, the Honorable Dianna M. Gibson, No. 220901712

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Procedural Rules

Secondary Sources

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Founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society, the Brennan Center is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice.

The Brennan Center seeks to bring the idea of representative self-government closer to reality, including by working to ensure fair and non-discriminatory redistricting practices and to protect the right of all Americans to vote. The Brennan Center conducts regular empirical, qualitative, historical, and legal research on redistricting and has participated in a number of voting rights and redistricting cases around the country in state and federal court, both as counsel and as amicus curiae.

The Brennan Center also works to realize a fair and independent judicial system that protects fundamental rights, democratic values, and the rule of law under state constitutions as well as the United States constitution. Recognizing that state courts and state constitutions are critical and distinct sources of protection of rights and democratic institutions, the Brennan Center regularly produces research and resources about state constitutional developments, including in a recently launched publication, State Court

[1] No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Utah R. App. P. 25(b)(2) and received timely notice pursuant Utah R. App. P.25(a). This brief does not purport to convey the position, if any, of N.Y.U. School of Law.

Report. The Brennan Center also regularly participates as an amicus before the U.S. Supreme Court, federal circuit courts, and state appellate courts on these issues.

SUMMARY OF ARGUMENT

The Brennan Center for Justice urges this Court to reject the position of the Utah Legislature that the political party in control of redistricting has the unfettered and unreviewable discretion to design electoral maps to intentionally entrench its political power and to target, subordinate, and disadvantage opposing political groups. In so ruling, the Court should hold that intentional partisan gerrymandering violates the Utah Constitution and remand the case to the district court so that it can proceed with a trial to allow the plaintiffs the opportunity to prove the allegations they make in this case.

State courts play an essential role in protecting American democracy. More than 40 years ago, Justice William J. Brennan, Jr. wrote that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 491 (1977). The U.S. Supreme Court reaffirmed that central wisdom in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019), writing that while partisan gerrymandering claims might be non-justiciable under the federal constitution, "our conclusion [does not] condemn complaints about districting to echo into a void." Rather, "state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* State constitutions, in fact, are the original and often strongest sources of protections for

democratic rights. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, 10–12 (2018) [hereinafter Sutton, *51 Imperfect Solutions*].

These constitutional protections are especially important when disfavored, out-of-power political groups are targeted and subordinated by politicians seeking to artificially entrench their hold on power through intentional partisan gerrymandering. Based on the provisions of their constitutions, a growing number of state courts in recent years have found workable frameworks for assessing partisan gerrymandering claims. Using discernible and manageable standards rooted in the basic democratic values protected by state constitutions, state courts have been vital democracy backstops, striking down intentionally discriminatory maps drawn by both Democrats and Republicans.

The Utah Constitution similarly provides strong protections for democratic rights. Indeed, a review of the Utah Constitution and case law makes clear that (I) the Utah Constitution was enacted with the purpose of preventing exactly the type of governmental overreach alleged in this case; and (II) the Utah Constitution created a system of checks and balances to restrain the political power of each branch—a system in which judicial review of legislative action, including redistricting, is an essential part. Under this constitutional order, judicial review of partisan gerrymandering claims is not only possible, but critical to the continued maintenance of the free government guaranteed by the Utah Constitution. Whether or not the plaintiffs ultimately prevail on the merits at trial, they have made serious allegations about abuse of the legislative process and deserve to have their day in court.

ARGUMENT

I. State Constitutions and State Courts Play a Role in Protecting the Democratic Process that is Distinct from and Broader than that of Federal Courts.

A foundational assumption in the U.S. Constitution's design is that states will be the first-line guarantors of the democratic and individual rights of Americans. Indeed, the Framers' design of the federal constitution was built on the bedrock assumption that state constitutions, and not the federal government, would protect democratic rights. The prominence of rights in founding-era state constitutions, after all, is one of the principal reasons why the Framers initially did not include a bill of rights in the federal constitution. By the time delegates to the Constitutional Convention gathered in Philadelphia, most states had adopted state constitutions enshrining a broad range of democratic and individual rights, typically through a Declaration of Rights included as the very first section of the constitution. Jeffrey S. Sutton, *Who Decides?*: *States as Laboratories of Constitutional Experimentation* 124 (2021) [hereinafter Sutton, *Who Decides?*]; Gordon S. Wood, *The creation of the American Republic*, *1776-1787*, 132-33, 271 (1998 ed.); Robert F. Williams, *"Experience Must Be Our Only Guide"*: *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 Hastings Const. L.Q. 403, 404 (1988). In fact, when the topic of a federal bill of rights came up during the Constitutional Convention, it was quickly rejected in a 10-0 vote of states after Roger Sherman reminded the gathered delegates that "State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient[.]" *The Documentary History of the Ratification of the Constitution*

125 (John P. Kaminski, et al. eds., 2009); Leonard W. Levy, *Origins of the Bill of Rights* 13 (1999).

Even when Congress later faced pressure from state ratifying conventions to add a bill of rights, the pressure was not to create new positive rights, but merely to ensure that the federal government did not trample on rights already protected by state law. Akhil Reed Amar, *America's Constitution: A Biography* 316-17 (2005). Not surprisingly, given the founding generation's state-centric approach to protecting rights, "most of the constitutional-rights litigation of the first 150 years after 1776 took place in the States." Sutton, *51 Imperfect solutions* at 13.

If anything, the rights guaranteed by state constitutions are stronger in later state constitutions than in those of the founding era, particularly in the western United States where, as one scholar has noted, the drafters of state constitutions "wrote ever longer bills of rights" in response to concerns about political and corporate monopolies and the possibility that one group or another would have too much unfettered power. *See* Amy Bridges, *Democratic Beginnings: Founding the Western States* 60, 80-100 (2015). Indeed, a defining feature of later state constitutions is that they almost uniformly become increasingly skeptical of state power in general and legislative power in particular. Robert F. Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 201-2 (1983).

In Utah's case, citizens ratified a constitution with particularly strong protections of rights, a direct outgrowth of discrimination that early Utah settlers experienced as a disfavored political and religious minority. These constitutional protections include both

an exceptionally robust system of checks and balances protecting against abuses of the democratic process and a strong system of constitutionally guaranteed democratic rights, including protections for the rights of political minorities against abuses from those with power. *See, e.g.*, *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 46, 250 P.3d 465 (explaining that Utah's "state constitutional provisions [may] afford more rights than the federal Constitution," even where "substantially the same" language is used). [2]

II. Utah Has a Strong System of Checks and Balances in its Constitution Protecting Against Abuses of the Democratic Process.

In drafting a constitution, Utah "adopted many of the provisions of its original 1896 constitution from those of its sister states." Daniel J. H. Greenwood, Christine M. Durham, and Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, 649-665 (2008); available at https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1358. Thus, what makes Utah's constitution unique is not "the text of its provisions," but "Utah's 'unusual history and experience' in struggling to become a state and to draft an acceptable statehood charter." *Id*. (citation omitted); *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 18, 450 P.3d 1092 (holding that the text of the Utah Constitution must be interpreted within the historical context in which it was adopted).

In interpreting the Utah Constitution within its historical context, this Court often considers "Utah's particular traditions at the time of drafting" with the "goal" of "discern[ing] the intent and purpose of both the drafters of our constitution and, more

[2] While the Reconstruction Amendments made the Bill of Rights applicable to states and gave federal courts an expanded role in protecting rights, it did not divest state courts of their rights-protecting function.

importantly, the citizens who voted it into effect." *See Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235. In this case, that relevant historical context includes the fact that: (A) before adopting Utah's 1896 statehood constitution, Utah citizens had endured years of abuse from state and federal governments, including election-related abuse; and (B) Utah citizens understood that their new constitution's strong system of checks and balances, including a role for judicial review, would protect Utah's citizens from the types of abuses of power they had previously endured.

A. Before Statehood, Utah Citizens Had Endured Years of Abuse From Governments, Including Election-Related Abuses.

Utah's strong commitment to protecting political and other minorities has its roots in the extensive discrimination experienced by members of the Church of Jesus Christ of Latter-Day Saints prior to statehood. James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah Constitutional Law*, 60 Alb. L. Rev. 1515, 1515 (1997). This persecution began with early church communities in eastern states and continued even after the migration of members of the church to what became the Utah Territory, culminating in the Edmonds Act—a law designed to "deny polygamists the right to vote." *Id*. at 782. As part of the Act, "Utah's registration and election offices were declared vacant, and a five-man commission was appointed to oversee Utah elections." *Id*. "During its first year, the Utah Commission barred over 12,000 Mormons from voting in Utah. This was nearly one-fourth of eligible Mormon voters, and far exceeded the number of polygamists in Utah." *Id*.

After the U.S. Supreme Court upheld the Act, Utahns decried what one speaker described as "the extraordinary effort that [was] being made to curse the Territory of Utah with political serfdom."[3] At a "great mass meeting" in Salt Lake City, one speaker—B.H. Roberts (a future, vocal delegate at the Utah State Constitutional Convention who was also later elected to the U.S. House of Representatives)—described the exclusion of so many Utah voters as "the despotic effort that was made to do violence to the expressed wishes of the people of this Territory." This experience left what one scholar has described as "a deep distrust" of government held by many Utah citizens after "enduring such a tortured process of legislative and judicial persecution" for decades. Edwin B. Firmage, *Religion & The Law: The Mormon Experience in the Nineteenth Century*, 12 Cardozo L. Rev. 765, 798.

B. With These Concerns in Mind, the People of Utah Adopted a System of Checks and Balances to Guard Against Abuses of the Democratic Process

Consistent with early Utahns' experience of discrimination, the Utah Constitution's preamble declares that the purpose of Utah's constitution is "to secure and perpetuate the principles of *free* government." UTAH CONST. PREAMBLE (emphasis added). Under a nineteenth-century definition of the term "free," this meant that the purpose of Utah's Constitution was to create a government that is restrained by fixed laws and principles and

[3] B.H. Roberts, "Mormon" Protest Against Injustices, in AN APPEAL FOR CONSTITUTIONAL AND RELIGIOUS LIBERTY: FULL REPORT OF THE GREAT MASS MEETING HELD IN SALT LAKE CITY, MAY 2, 1885, WITH THE FULL TEXT OF THE SPEECHES AND THE PROTEST AND DECLARATION OF GRIEVANCES 41 (reported by John Irvine 1885).

that would be free from arbitrary or despotic control. *See Free*, Webstersdictionary1828.com; https://webstersdictionary1828.com/Dictionary/Free (defining "Free" alternatively as "subject only to fixed laws, made by consent, and to a regular administration of such laws," "not subject to the arbitrary will of a sovereign or lord," or "securing private rights and privileges by fixed laws and principles; not arbitrary or despotic"); *see also State v. Canton*, 2013 UT 44, ¶ 13, 308 P.3d 517 ("In determining the ordinary meaning of nontechnical terms," this Court's "'starting point' is the dictionary.").

To give teeth to this guarantee of a free government, Utahns also adopted a robust tripartite system of government in which each branch of government checks and balances the power of the other branch and where no one branch has unfettered power. UTAH CONST. ART. V, § 1. As a part of this system, the judiciary is granted authority to review the constitutionality of legislative enactments. The drafters of the Utah Constitution did not exempt legislative redistricting from this constitutional system.

i. Utah's Constitution Grants the Judiciary Express Authority to "Declare Any Law Unconstitutional Under Th[e] [Utah] Constitution or the Constitution of the United States."

In contrast to the federal constitution and earlier state constitutions, where judicial review is implicit and developed over time, under Utah's tripartite system, Utah's constitution explicitly acknowledges the judiciary's authority to declare laws "unconstitutional under th[e] [Utah] constitution or the Constitution of the United States." UTAH CONST. ART. VIII, § 2. Under this system, when the constitutionality of a governmental act is challenged, Utah courts have a duty to identify "what principle the

constitution encapsulates" and to determine "how that principle should be applied" in a particular case. *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092. While Utah courts strike down legislative acts "with reluctance," this Court has been clear that the judiciary "cannot shirk [its] duty to find an act of the Legislature unconstitutional when it clearly appears that it conflicts with some provision [or principle] of our Constitution." *Matheson v. Ferry*, 641 P.2d 674, 679-80 (Utah 1982); *see also Jenkins v. Swan*, 675 P.2d at 1149 (Utah "courts have the dual obligation to apply statutory and common law principles to a particular dispute and to evaluate those principles against governing constitutional standards.").

Consistent with this duty, Utah courts have regularly reviewed the constitutionality of legislative acts since Utah's founding. For example, in *State v. Standford*—a 1901 case—this Court considered whether the Legislature had violated the Constitution "by taking the administrative affairs of the county out of [the county's] control." 66 P. 1061, 1061 (Utah 1901). Although Article XI, section 4 of the Utah Constitution authorized the "Legislature [to] by statute provide for option forms of county government," this Court held that this did not provide the Legislature authority "to run and operate the machinery of the local government to the disfranchisement of the people." *Id*. at 1062. Similarly, in *State v. Eldredge*—a 1904 case—this Court determined that "the Legislature ha[d] no power, under the Constitution, to authorize the State Board of Equalization to assess or value property, for the purposes of taxation, . . . which w[as] wholly within one county." 76 P. 337, 341 (Utah 1904).

That same year, this Court declared that even though the Legislature could "rightfully enact a [voter] registration law which merely regulates the exercise of the elective franchise," the right to vote "cannot be abridged, impaired, or taken away, even by an act of the Legislature." *Earl v. Lewis*, 77 P. 235, 238 (Utah 1904). So from this State's earliest days, judicial review of legislative enactments has been an established and accepted part of Utah's tripartite system of government. *See*, *e.g.*, *Matheson v. Ferry*, 641 P.2d 674, 680 (Utah 1982) (striking down a legislative act as a violation of the separation of powers doctrine); *Gallivan v. Walker*, 2002 UT 89, ¶ 49, 54 P.3d 1069 (declaring a voter-initiative requirement that was not "reasonably necessary" to "further [an asserted] intended legislative purpose").

Accordingly, the importance of judicial review within Utah's tripartite system of government is well established. When a constitutional challenge to a governmental action is raised, Utah courts have a duty to review that action against the requirements and principles enshrined in Utah's constitution.

ii. Nothing in Utah's Constitution Exempts Legislative Redistricting from Generally Applicable Constitutional Restrictions on Governmental Authority.

More importantly for the purposes of this case, nothing in Utah's Constitution exempts redistricting from generally applicable constitutional restrictions on governmental authority or from judicial review. Although Article IX, section 1 authorizes the "Legislature" to "divide the state into congressional, legislative, and other districts," that section contains no language suggesting that this authority exempts the Legislature from other constitutional restraints. Thus legislative redistricting remains subject to the "judicial

power" granted to the judiciary in Article VIII, section 1—a power that includes the obligation of judicial review for constitutionality recognized in Article VIII, section 2. So even though the judiciary may lack the authority to draw a congressional district map in the first instance under the separation-of-powers doctrine, it nevertheless has the obligation to review the Legislature's redistricting activity when Utahns challenge the constitutionality of that legislative action as treading on rights held by the people.

Consistent with this obligation, Utah courts have long discussed legislative authority over elections in qualified (or limiting) terms that make clear that the Legislature's power over election procedures is not absolute or immune from judicial review. For example, in *Earl v. Lewis*—a 1904 case—this Court recognized that the Legislature's authority to enact voter registration laws was limited to enacting a law "*which merely regulates* the exercise of the elective franchise, and does not amount to a denial of the right itself, and does not abridge or impair the same." 77 P. 235, 238 (Utah 1904) (emphasis added).

Similarly, in *Anderson v. Cook*—a 1942 case—this Court again discussed the Legislature's unquestioned authority "to provide regulations, machinery, and organization for exercising the elective franchise" and to "prescribe *reasonable* methods and proceedings for determining and selecting the persons who may be voted for at an election." 130 P.2d 278, 285 (Utah 1942). By inserting the qualifier "reasonable" while discussing the "methods and proceedings" the Legislature could establish, this Court recognized a limit to the Legislature's authority in the election arena and, in so doing, the Court also impliedly recognized its authority to review those methods and proceedings.

This principle was reaffirmed more recently in *Gallivan v. Walker*, this Court's 2002 case in which the Court declared a voter-initiative requirement unconstitutional because the requirement was "not reasonably necessary" to "further [an] intended legislative purpose." 2002 UT 89, ¶ 55.

Because the Legislature does not have absolute authority over election-related matters, including redistricting, Utah courts have a duty to ensure that the principles enshrined in the constitution are not violated where an alleged constitutional violation is raised. *See S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092 ("The Utah Constitution enshrines principles," so a "proper inquiry focuses on what principle the constitution encapsulates and how that principle should be applied."). This is something Utah courts do regularly in equally novel contexts that are not susceptible to bright-line rules. *See Matter of Childers-Gray*, 2021 UT 13, ¶ 18, 487 P.3d 96 (establishing, as a matter of first impression, the standard for reviewing sex-change petitions); *State v. Tiedemann*, 2007 UT 49, ¶ 45, 162 P.3d 1106 (applying a "balancing process" to assess "fundamental fairness"); *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 9, 140 P.3d 1235 (analyzing, as a matter of first impression, whether the free-speech clause protects nude dancing). Utah courts have a duty to do similarly in the partisan-gerrymandering context.

III. The Utah Constitution Contains a Strong Textual Commitment to Democracy Including Guarantees for the Rights of Disfavored Political Groups

A commitment to democracy lies at the heart of the Utah Constitution, which begins with a lengthy Declaration of Rights. Article 1, section 27 makes clear these constitutional guarantees are not mere laudatory verbiage but rather "fundamental principles" to which

"[f]requent reoccurrence . . . is essential to the security of individual rights and the perpetuity of free government."[4] It is the judiciary's duty, therefore, to identify "what principle [each provision in the] constitution encapsulates" and to determine "how that principle should be applied" in a particular case. *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092.

In this case, the plaintiffs rely on the fundamental principles found in the following constitutional provisions: (A) Article I, Section 2, which entrusts governmental actors to act as agents of the people in perpetuating principles of a free government; (B) Article I, Section 17, which prohibits actions intended to make elections less "free"; (C) Article I, Sections 1 and 15, which prohibit actions intended to diminish the rights of free speech and association; and (D) Article IV, Section 2, which prohibits intentional acts to make the votes of some voters less meaningful. These provisions operate in concert to safeguard free government. *See Am. Bush.*, 2006 UT 40, ¶ 17, 140 P.3d 1235.

When these provisions are read together, as Utah courts instruct that they should be, they evince a strong textual commitment to democracy and to a level playing field for political minorities. Laws that target out-of-power political groups to artificially

[4] Article 1, section 27 of the Utah Constitution was borrowed from the Washington constitution. *See* Daniel J. H. Greenwood, Christine M. Durham, and Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, 655-56 (2008). The Washington equivalent of Article 1, section 27 has been understood to be rooted in a trust of the people but not the legislature, which could be corrupted. *See* Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 684-86 (1992).

disadvantage or subordinate them, or to advantage or entrench those in power, do violence to this core commitment.

A. The Utah Constitution Bars Governmental Actions Not Taken For the Public Benefit.

Article I, Section 2 states, in part, that "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit." UTAH CONST. ART. I, § 2.

Two fundamental principles are encapsulated by this provision. First, the "political power" is ultimately owned by the people collectively, and is wielded by governmental actors (such as the legislature), as *agents* for the people. *See United States v. Church of Jesus Christ of Latter-Day Saints*, 15 P. 473, 477 (Utah 1887) ("A government based upon the will of the people must ever keep such authority within reach of the people's will. Legislatures are but the agents of the people . . . ."); *People v. Daniels*, 22 P. 159, 160 (Utah 1889) ("[Sovereignty] resides in the people, and they use it through the general government as an agency."); *State v. Eldredge*, 76 P. 337, 339 (Utah 1904) (describing governmental entities as "the agencies by which power was to be exercised"); *Bleon v. Emery*, 209 P. 627, 630 (Utah 1922) ("The Legislature . . . is the direct agency of the people."). Second, this political power is delegated with the express limitation that it be used for the purposes of a "free government[] . . . for [the people's] *equal protection* and *benefit*." *Id.* (emphases added). As a result, the Legislature "cannot . . . perform acts or assert rights or have duties which are not a part or exercise of its governmental obligations or prerogatives." *Duchesne Cnty. v. State Tax Comm'n*, 140 P.2d 335, 340 (Utah 1943). This means that the Legislature

does not have "any power or capacity to be, do or act in an activity . . . which is not within the measure of its creation, 'to secure and perpetuate the principles of free government.'" *Id*. (quoting UTAH CONST. PREAMBLE). Accordingly, if the Legislature acts intentionally in a way that is not aimed at securing and perpetuating the principles of free government it has exceeded the scope of its authority.

In the representative democracy guaranteed by the Utah Constitution, the Legislature performs its functions as an agent and owes the people fiduciary duties. As one scholar has noted, "[t]he idea that rulers stand in a fiduciary relationship to the ruled is not new; its origins date back at least as far as the Middle Ages and can be seen even earlier in the writings of Cicero." D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 708 (2013) [hereinafter Rave, *Politicians as Fiduciaries*]; *see also id*. at 711 ((explaining that "a primary objective of the Constitution was to impose on public officials fiduciary obligations comparable to those duties borne by private law fiduciaries") (citing Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077, 1116, 1124-25, 1128-30 (2004))).

Under this fiduciary-duty view, "[w]hen incumbent politicians manipulate the election laws to entrench themselves," they "breach their fiduciary duty of loyalty" to the people. *Id*. at 715. The harm from such a breach is not necessarily that "one political party suffers discrimination at the hands of another, nor that a group of voters has its votes diluted to less than their proper strength." *Id*. at 717. Instead, "the harm is the disloyalty—the manipulation by self-interested political actors, for their own benefit, of the very mechanisms by which they derive their power and legitimacy." *Id*. at 718. In short, the

harm is the Legislature's "failure to act for the exclusive benefit of the principals"—a failure that is wholly inconsistent with the text of Article I, section 2 of the Utah Constitution. *Id*.

In sum, Article I, section 2 enshrines two important principles: (1) the Legislature is an agent of the people and cannot use its authority in a way that exceeds the scope of that authority; and (2) the preamble and Article I, section 2 of Utah's constitution limits the scope of the government's agency to actions that are consistent with the practices of a "free" government (*i.e*., a non-arbitrary government) and that are aimed at the "equal protection and benefit" of the people. These principles would be violated by the Legislature intentionally targeting political groups to disadvantage or subordinate them in the exercise of their fundamental political rights.

B. The Utah Constitution Prohibits Actions Aimed at Making Elections Less Free

Similarly, Article 1, section 17 enshrines the constitutional principle that "all elections shall be *free*, and no power, civil or military, shall at any time interfere to prevent the *free* exercise of the right to suffrage." UTAH CONST. ART. I, § 17 (emphases added). So, on its face, this provision prohibits government interference "to" (*i.e*., with intent)[5] prevent the free exercise of voting rights or make elections less free. As noted above, a nineteenth-century-era dictionary defines the adjective "free" as "not arbitrary or despotic." With this in mind, and in light of the federal government's infamous interference in Utah's

[5] *To*, MERRIAM-WEBSTER'S DICTIONARY (online) ("used as a function word to indicate purpose, intention, tendency, result, or end"), available at https://www.merriam-webster.com/dictionary/to.

congressional election shortly before the time the constitution was adopted, *see, e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 35-36 (1885) (describing the allegedly willful and malicious acts of federal officials in interfering with a Utah citizen's voting rights), Utah citizens in 1896 would have understood the phrases "elections shall be free" and "no power . . . shall at any time interfere to prevent the *free* exercise of the right to suffrage" to prohibit the Legislature from interfering with the outcome of elections by *intentionally* drawing electoral maps in a way that entrenches power of one identifiable sub-set of Utah's population while diminishing or subordinating the political power of another. In other words, the constitutional prohibition against preventing the *free* exercise of the fundamental right to vote secures not only the ability to cast ballots, but also prohibits actions intended to interfere with the results of an election. Accordingly, Article I, section 17 would be violated by intentional acts aimed at securing electoral results favorable to one political party.

C. The Utah Constitution Prohibits Actions Intended to Diminish the Rights of Free Speech and Association

Intentional partisan gerrymandering also implicates principles enshrined in Article I, sections 1 and 15, which prohibit actions intended to diminish the rights of free speech and association. Article I, section 1 states, in part, that "All persons have the inherent and inalienable right . . . to assemble peaceably" and "to communicate freely their thoughts and opinions." UTAH CONST. ART. I, § 1. And Article I, section 15 states that "[n]o law shall be passed to abridge or restrain the freedom of speech." UTAH CONST. ART. I, § 15. This Court has previously explained these provisions "are both directed toward expression" and

"prohibit laws which either directly limit protected rights or indirectly inhibit the exercise of those rights." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 18, 140 P.3d 1235*Id.* ¶¶ 18, 21.

By intentionally drawing a congressional map to elevate the party in power's favored views to the detriment of those expressing opposing views, the Legislature necessarily "either directly limit[s]" or "indirectly inhibit[s]" the exercise of minority voters expression-related rights. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (observing that "voters express their views in the voting booth"); *Gallivan*, 2002 UT 89, ¶ 26 (holding that the Utah Constitution protects "the rights of individuals to associate for the advancement of political beliefs"); *see also Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 17 n.27, 225 P.3d 153 (explaining that under the First Amendment to the U.S. Constitution, laws that have the "predominant purpose" of "suppress[ing], disadvantag[ing], or impos[ing] differential burdens upon speech because of its content" are subject to "the most exacting scrutiny"). Accordingly, Article I, sections 1 and 15 would be violated if the predominant purpose for configuring electoral districts was to inhibit the expressive activity of minority voters in pursuit of entrenching majority view points.

D. The Utah Constitution Prohibits Actions Intended to Make the Votes of Some Utah Voters Less Meaningful.

Finally, intentional partisan gerrymandering runs afoul of principles enshrined in Article IV, section 2. This section states that "Every citizen of the United States, eighteen years of age or over, who [qualifies as a Utah resident], shall be entitled to vote in the election." UTAH CONST. ART. IV, § 2. "The right to vote is sacrosanct." *Laws v. Grayeyes*,

2021 UT 59, ¶ 61, 489 P.3d 410. Because of the importance of this right to the "over-all functioning of our democratic system of government," this Court has stressed that the judiciary must "make the [right to vote] meaningful." *Shields v. Toronto,* 395 P.2d 829, 832 (Utah 1964). Intentional partisan gerrymandering violates this guarantee by decreasing the likelihood of success for some Utah voters, thereby making the votes of those voters less meaningful.

IV. Intentional Partisan Gerrymandering Claims Are Judicially Manageable

As discussed above, the Utah Constitution (I) creates a robust system of checks and balances—including authority for judicial review—to protect against abuses of the democratic process and (II) includes critical protections to guard against the use of political power by governmental actors to target and deliberately disadvantage out-of-power political groups, whether through partisan gerrymandering or other means. Despite this, the Legislature argues that courts cannot review its redistricting activities because there is not a judicially manageable method for doing so. This is incorrect.

Utah courts have long been tasked with making the type of intent determination that is needed in reviewing allegations of partisan gerrymandering. *See, e.g.*, *Matter of Childers-Gray*, 2021 UT 13, ¶ 48 ("[I]t is the duty of this court, according to its best knowledge and understanding, to declare the law as it finds it, and determine the intent and purpose.") (quoting *Eames v. Bd. of Comm'rs*, 199 P. 970, 972 (Utah 1921)); *Buscho*, 2009 UT 73, ¶ 19 (reviewing "evidence in the record" to determine the Legislature's "predominant purpose" in enacting a statute). Rather than needing to determine what an appropriate baseline of party strength should be or other such assessments, a court faced

with an allegation of partisan gerrymandering is asked merely to examine the record to see if there is sufficient evidence of improper legislative motive or arbitrariness to overcome a presumption of the map's validity—the type of inquiry that Utah courts have long successfully, and without controversy, performed in other areas. *See Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 18, 452 P.3d 1109 (assessing whether there was a "non-arbitrary basis" for a provision in a voting statute); *Lyon v. Burton*, 2000 UT 19, ¶ 27, 5 P.3d 616 (holding that a constitutional right prohibited the legislature from enacting "arbitrary and unreasonably discriminatory laws"); *State v. Sopher*, 71 P. 482, 485 (Utah 1903) (assessing whether a "statute [wa]s arbitrary").[6]

In recent years, other states around the country—many with identical or substantively similar constitutional provisions—have been asked to rule on the same question and have similarly found partisan gerrymandering claims readily manageable. In fact, since 2018 alone, state courts in Alaska, Florida, Maryland, New York, Ohio, Oregon, and Pennsylvania have found that partisan gerrymandering claims under state constitutional provisions are justiciable. Order at 4-7, In re the 2021 Redistricting Cases, No. S-18419 (Alaska May 24, 2022); Order at 5-6, In re the 2021 Redistricting Cases, No. S-18332 (Alaska Mar. 25, 2022); In re Sen. J. Res. of Legis. Apportionment 100, 334 So.3d 1282, 1290 (Fla. 2022); Memorandum Opinion and Order at 12-43, 88-94, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. 2022); *Harkenrider v. Hochul*, 197 N.E.3d

[6] Under this framework, the Utah Legislature could establish a safe harbor of proper intent by following procedures aimed at preventing intentional partisan gerrymandering, such as the procedures included in the 2018 Utah Independent Redistricting Commission and Standards Act passed by citizen ballot initiative.

437, 440, 452—53 (N.Y. 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 407-13 (Ohio 2022), petition for cert. filed, No. 22-362 (U.S. 2002); *Opinion of the Special Judicial Panel*, *Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632371, at *3-6 (Or. Cir. Ct. Nov. 24, 2021); *Sheehan v. Or. Legis. Assemb.*, 499 P.3d 1267, 1271-72, 1277-78 (Or. 2021); *League of Women Voters of Penn. v. Pennsylvania*, 178 A.3d 737, 801-21 (Pa. 2018). In contrast, only two state courts have declared the judiciary unavailable to protect voters from intentional incumbent subjugation of a popular majority. *Harper v. Hall*, 2023 WL 3137057 (N.C. Apr. 28, 2023); *Rivera v. Schwab*, 512 P.3d 168, 180-87 (Kan. 2022).

Although the state constitutional provisions in these cases vary, courts approach them in the same way that they approach any other case where the intent of a party is at issue, holistically examining the totality of the direct and circumstantial evidence, including expert testimony. In redistricting cases, evidence of illicit intent can include things such as deviation from traditional districting criteria, procedural irregularities, such as use of a rushed or closed-door process that excludes the public or minority party lawmakers, or ad hoc explanations for a map at odds with the evidence. In this case, for example, the plaintiffs point to fact that the Legislature rejected an alternative map that did better at meeting the Legislature's stated goal of "urban-rural balancing" but was less politically skewed than the enacted plan as strong circumstantial evidence of illicit motive. Response Brief, at 40-41. Additional evidence of intent also can be derived from things like comparison of a challenged map to a broad range of alternatives consistent with state law. Or challenging parties can rely on political science metrics used to ascertain whether

a map is such an extreme outlier compared with expected results that its adoption cannot be explained by anything other than illicit intent. *See* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2043 (2018).

Importantly, in this case as in every partisan gerrymandering case, state decisionmakers will have a chance at trial to rebut evidence of invidious intent with evidence of their own. Indeed, the existence of a cause of action does not mean that every claim should prevail—and the plaintiffs may not prevail on the merits here. Sometimes the sum of the evidence will reveal a pattern clear to any objective fact finder. For example, in 2011, Pennsylvania map-drawers transformed the state's competitive congressional map into one with bizarrely shaped districts that ruthlessly split communities with no rhyme or reason. The map was hard to explain as anything other than the product of rank partisan politics. *League of Women Voters of Penn. v. Pennsylvania*, 818-21.

But other times, state actors will be able to rebut a prima-facie showing—and in that event, the claims are (and should be) rejected. For example, a trier of fact might conclude that a state's explanation for the partisan effects of a map can be credibly explained by a state's political geography or the need to comply with legal requirements or is the unavoidable product of efforts to address legitimate state goals. In the partisan gerrymandering cases that have been heard by courts around the country, some courts have found constitutional infirmity in the challenged plans. In others, the maps were upheld. But all of these courts found the review process manageable. They determined that courts could identify—and, when necessary, reject—the use of state power to insulate particular partisan

officials against popular sentiment and in that way intentionally injure one set of voters based on what those voters believe.

Judicial review, including review of legislative redistricting efforts, is an essential aspect of Utah's tripartite system of government, As has been shown, a review of Utah's Constitution and case law establishes that (I) the Utah Constitution was enacted with the purpose of preventing the type of governmental overreach at issue here; and (II) the Utah Constitution created a system of checks and balances to restrain the political power of each branch—a system in which judicial review of legislative action, including legislative redistricting, is an essential part. Under this system, Utah courts have an ability and obligation to review partisan gerrymandering claims. The Court should allow this case to proceed in the district court so that the plaintiffs can present whatever evidence of the Legislature's intent the plaintiffs can produce.

CONCLUSION

For the forgoing reasons, the Brennan Center for Justice requests the Court to affirm the decision of the district court and allow this case to proceed to trial.

DATED: May 19, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Rules 21 and 25 of the Utah Rules of Appellate Procedure. This brief contains 6,610 words.

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

Dated this 19th day of May, 2023

/s/ Joshua Cutler
Joshua Cutler

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2023, I caused a true, correct, and complete copy of the foregoing **AMICUS CURIAE BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW IN SUPPORT OF RESPONDENTS AND AFFIRMANCE** to be filed with the Utah Supreme Court via email, and to be served via email upon the following:

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No. 20220991-SC

THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE LEGISLATURE, ET AL.,
Appellants/Cross-appellees,
v.
LEAGUE OF WOMEN VOTERS OF UTAH, ET AL.,
Appellees/Cross-appellants.

Brief of Rural Utah Project, Ann Leppanen, Steve Cox, Shaun Dustin, and Kenneth Maryboy as Amicus Curiae in Support of Appellees/Cross-appellants

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On Plaintiff's Petition (Consolidated No. 20220998-SC)
On appeal from the Third Judicial District Court,
Honorable Dianna M. Gibson, District Court No. 220901712

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List of Current and Former Parties

Parties to the proceeding in the appellate court

Appellants and Cross-appellees (Defendants): Petitioner Utah State Legislature, Utah Legislative Re- districting Committee, Sen. Scott Sandall, Rep. Brad Wilson, and Sen. J. Stuart Adams

> Represented by Tyler R. Green, Taylor A.R. Meehan, Frank H. Chang, and James P. McGlone of Consovoy McCarthy PLLC; and Victoria Ashby, Robert H. Rees, and Eric N. Weeks of the Office of Legislative Research and General Counsel

Appellees and Cross-appellants (Plaintiffs): Respondent League of Women Voters of Utah, Mormon Women for Ethical Government, Stefanie Condie, Malcom Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, Jack Markman, and Dale Cox

> Represented by Troy Booher, J. Frederic Voros, Jr., and Caroline Olsen of Zimmerman Booher; David C. Reymann and Kade N. Olsen of Parr Brown Gee & Loveless; and Mark Gaber, Harden Johnson, Aseem Mulji, and Anabelle Harless of Campaign Legal Center

Cross-appellee (Defendant): Lt. Governor Deidre Henderson

> Represented by Sarah Goldberg, David N. Wolf, and Lance Sorenson of the Utah Attorney General's Office

Parties below not parties to the appeal

Plaintiff Dale Cox (voluntarily dismissed)

Table of Contents

Addenda

A. Alliance for a Better Utah Education Fund, *Fair Redistricting: A Better Deal for Rural Utah* 1 (2018)

Table of Authorities

Cases

Legislative Authorities

Other Authorities

Interest of Amicus Curiae

The Legislature asserts that this litigation concerns "[s]even Utah voters and two advocacy groups want[ing] Utah courts to rebalance the politics of Utah's congressional districts so that their preferred candidates are more likely to win elections." [Pet.Op.Br. at 1.] That is flatly incorrect.

The Rural Utah Project ("RUP") is a non-profit voter advocacy group operating in Carbon, Emery, Grand, San Juan, Garfield, Wayne, and Kane counties. Its members and volunteers include both urban and rural Utahns. Most of RUP's work involves registering voters, updating voter registrations, mobilizing local voters around issues and elections, and supporting local candidates to local offices.

Redistricting has always been a preeminent issue for RUP. *See generally Navajo Nation v. San Juan County*, 929 F.3d 1270 (10th Cir. 2019). RUP has been involved with the present circumstances from the beginning. In 2018, RUP distributed literature supporting Proposition 4 and collected signatures from San Juan and Grand County voters. In 2020, RUP urged these voters to contact their state representatives in opposition to S.B. 200. In 2021, RUP expended significant time and effort encouraging these voters to attend the Independent Redistricting Commission's ("Commission") hearings in southwestern Utah. RUP opposes the 2021 Congressional Plan. RUP respectfully files this amicus curiae brief to emphasize that rural Utahns generally oppose partisan gerrymandering despite the Legislature's pretextual purpose of balancing urban and rural interests.

Multiple public officials join RUP in filing this brief. Ann Leppanen is the current mayor of Bluff, Utah, a small town of 246 people within rural San Juan County. Steve Cox is the former mayor of Boulder, Utah, a small town of 236 people within rural Garfield County. Shaun Dustin is the former mayor of Nibley, Utah, a city of 7,529 people within largely rural Cache County. Kenneth Maryboy is a former San Juan County commissioner. These individuals join this brief to represent their current and former rural constituents' popular opposition to the 2021 Congressional Plan.

Notice, Consent, and Authorship

Counsel for the parties received timely notice.

All parties consented.

No party or party's counsel authored any portion of this brief or contributed money to fund preparing or submitting the brief. No other person other than the amicus, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

Introduction

The Legislature incorrectly states that this litigation concerns "[s]even Utah voters and two advocacy groups want[ing] Utah courts to rebalance the politics of Utah's congressional districts so that their preferred candidates are more likely to win elections." [Pet.Op.Br. at 1.] Said differently, the Legislature would have this court believe that Plaintiff's claims represent merely a few voters' cynical ploy to elect a Democrat to Congress. For one, this argument is transparent whataboutism given the Legislature's flagrant Republican gerrymander, as if the Legislature's consciously[1] partisan gerrymander is excusable because a politically neutral map might have different political results Plaintiffs prefer. For another, it is simply false.

As ably detailed in the Complaint, nearly 200,000 Utahns signed the petition to put Proposition 4 and its express proscription against partisan gerrymandering on the general ballot in 2018. [R.24,28.] Then, "[a] majority of Utah citizens from a range of geographic areas and across the political spectrum voted to approve Proposition 4 and enact it into law." [R.28.] Even after S.B. 200[2]

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[1] [R.43–45]; *see also* Kyle Dunphey & Cindy St. Clair, *Lawmakers Received Hundreds of E-mails in Support of the Independent Redistricting Commission. Why Didn't They Listen?*, KSL (June 19, 2022, 9:57 PM), https://ksltv.com/481760/lawmakers-received-hundreds-of-emails-in-support-of-the-independent-redistricting-commission-why-didnt-they-listen/ ("[Sen. Scott] Sandall[, the co-chair of the Legislative Redistricting Committee,] says that [the 2021 Congressional Plan] was drawn using political data, which the redistricting process was intended to be devoid of.").

[2] Redistricting Amendments, S.B. 200, 2020 Gen. Sess. (Utah 2020), https://le.utah.gov/~2020/bills/static/SB0200.html.

gutted Proposition 4's most critical provisions, thousands of Utahns reached out to the Commission to express their opinions on the Commission's maps and process, which likewise proscribed partisan considerations. [R.33–37.] After the Legislature published their gerrymandered map with a tiny fraction of the public input received by the Commission, hundreds of Utahns expressed their opposition to the gerrymander both in-person and online.[3] [R.29–30,43,46–48,52–53.] The overwhelming majority of opinions expressed, including by rural citizens and elected officials, opposed the Legislature's map, its obvious Republican gerrymander, and the fact that the Legislature did not select one of the Commission's politically neutral maps. [R.47–48,54.] In short, the complaint's allegations—which must be taken as true on the Legislature's motion to dismiss—demonstrate that the majority of both urban and rural Utahns prefer congressional districts to be drawn without partisan gerrymandering regardless of the political consequences. Taken as true, Plaintiff's claims align with the majority political voice of Utah.

[3] *See also* Dunphey & Cindy St. Clair, *supra* note 1; Carter Williams, *Utah Business, Community Leaders Call for Legislature, Cox to Adopt Nonpartisan Voting Maps*, KSL (Nov. 8, 2021, 5:30 PM), https://www.ksl.com/article/50279002/utah-business-community-leaders-call-for-legislature-cox-to-adopt-nonpartisan-voting-maps.

Summary of the Argument

The Legislature claims the 2021 Congressional Plan cracks Salt Lake County because "[w]e are one Utah, and believe both urban and rural interests should be represented in Washington, D.C. by the entire federal delegation." [R.45.] But it is unclear what the Legislature meant by this. They rejected the Commission's SH2 Plan, which "[b]y any plausible measure, . . . achieves a superior mix of urban and rural components in all four districts" without cracking Salt Lake County into four. [R.38,49–50,64,68.] They made no effort to define "rural-urban" and paid no attention to how Utah law generally defines these terms. [R.42,49.]; [Resp.Op.Br. Add. W.] The overwhelming majority of both urban and rural Utahns opposed the 2021 Congressional Plan. [R.29–30,43,46–48,52–53.]

This is because, as Plaintiffs sufficiently plead, the Legislature's purpose is pretextual. [R.51–53.] But even taken at face value, the Legislature's purpose is not meaningfully different than "balancing urban and rural power," which the United States Supreme Court has found to be an illegitimate purpose when drawing congressional districts. *Davis v. Mann*, 377 U.S. 678, 685–90 (1964); *Reynolds v. Sims*, 377 U.S. 533, 622–23 (1964) (Harlan, J., dissenting).

The right to vote is the preservative of all other civil and political rights. *Reynolds*, 377 U.S. at 562. "The right to vote is a fundamental right." *Gallivan v. Walker*, 2002 UT 89, ¶ 24, 54 P.3d 1069. Neither the U.S. nor Utah Constitutions leave any "room for classification of people in a way that unnecessarily abridges

this right." *Id.* (quoting *Reynolds*, 377 U.S. at 560). As such, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds*, 377 U.S. at 562. It is almost beyond dispute that extreme partisan gerrymanders are "incompatible with democratic principles" and necessarily infringe on the right to vote. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019); *id.* at 2514–15 (Kagan, J., dissenting). This court should apply a heightened level of scrutiny to all of Plaintiffs' constitutional claims.

Under heightened scrutiny, the 2021 Congressional Plan is not necessary to achieve the Legislature's stated purpose. Under any level of scrutiny, "balancing urban and rural power" in the abstract is not a legitimate legislative purpose. Instead, the legislature may evaluate the "particular circumstances and needs" of specific communities on a case-by-case basis. *Abate v. Mundt*, 403 U.S. 182, 185–86 (1971).

Argument

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* Yet the Legislature argues that this court has no power to protect Utahns' fundamental voting rights from the "antidemocratic and un-American practice" of partisan gerrymandering.[4] As demonstrated by the Plaintiff's principal brief on appeal, this is flatly false. Not only does the court have the power to do so, it has the obligation to do so. Further, a vote can be diluted in meaningful effect as much by partisan gerrymandering as by malapportionment.

This court should therefore scrutinize the Legislature's alleged purpose carefully. For not only do the facts not support that the Legislature's purpose is to ensure every congressional district contains both urban and rural areas, but that is not a legitimate purpose when redistricting.

1. The Legislature's Purpose is Pretextual

Plaintiffs have sufficiently plead that the Legislature's purpose is pretextual, and Utah's redistricting history and the broad opposition of rural

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[4] Ronald Reagan, *Remarks at the Republican Governors Club Annual Dinner*, REAGAN LIBRARY (Oct. 15, 1987), https://www.reaganlibrary.gov/archives/speech/remarks-republican-governors-club-annual-dinner.

Utahns to "rural-urban districts" further demonstrate this is the case. [R.51–53.] "[F]or decades, rural and urban areas have been artificially combined in political districts," but rather than elevate rural interests, "the result is that rural Utahns' interests have often been overlooked by lawmakers from urban areas of the state, both in the Utah Legislature as well as in Congress." All. for a Better Utah Educ. Fund, *Fair Redistricting: A Better Deal for Rural Utah* 1 (2018) [hereinafter "*Fair Redistricting*"] (attached as Addendum A). And since at least 2001, the majority of rural Utahns opposed plans which combined their districts with portions of Salt Lake County. *Id.* at 3.

In 2011, the Legislature publicly announced the criteria it would officially consider in redistricting but omitted the "rural-urban" mix they would actually prioritize. *Compare id.* at 2–3 *with* [R.42,49.] At that time, Senator Michael Waddoups justified the "rural-urban" mix as maximizing "the number of congressional representatives that would fight against federal regulations on public lands." *Fair Redistricting* at 2–3. At that time, the majority of Utahns—urban and rural, Republican and Democrat—opposed the "rural-urban" mix plans.[5] *Id.* at 3. For example, Cedar City resident Ron Solomon lamented, "'I, and others I have spoken with, really despise the dividing up of the Salt Lake City area and then spreading out [boundaries] to the rest of the state[.] . . . That just

[5] *See also* Lee Davidson, *Rural Utahns Want Stronger Voice in Congress*, Salt Lake Tribune (June 11, 2011, 11:35 PM), https://archive.sltrib.com/article.php?id=51988992&itype=CMSID.

completely disenfranchises us' in rural areas that have fewer votes." Davidson, *supra* note 5. St. George resident Dorothy Engelman opined that urban and rural Utah's needs are not the same. *Id.* Over ten years later, former Nibley mayor and amicus curiae Shaun Dustin echoed these sentiments:

> "'I feel like what the legislature did was dilute our voice, as a rural community' . . . . [R]ural Utah has an entirely separate list of issues, and should have entirely separate representation. 'I do have a problem with people from the Wasatch Front attempting to represent the interests of areas where they don't reside and where they don't really have contact.'"

Dunphey & St. Clair, *supra* note 1. For example, Mr. Dustin points to the Bear River compact, which allocates water between Utah, Wyoming, and Idaho and thus requires federal action. *Id.* "Now the congressional district that is going to be involved in resolving a lot of this includes interest from both the Great Salt Lake and from northern Utah where that water is[] . . . It puts our congressman, whoever that is, in a very difficult position." *Id.* Mr. Dustin further argues at this time that the 2021 Congressional Plan does not just sell out rural Utah today, but if upheld, ensures that Salt Lake County will forever be able to subsume rural Utah's congressional representation in the same way as it continues to grow and increasingly dominate the political priorities and partisan make-up of the Legislature.

Rural Utah is struggling with relative economic stagnation, decreasing unemployment, and overall population decline, whereas urban Utah is

struggling with a housing shortage, homelessness, and poor air quality. *Fair Redistricting* 8. Rural Utah would benefit disproportionately from expanding Medicaid or other forms of financial assistance to address intergenerational poverty, but urban representatives in the Legislature consistently block that relief. *Id.* at 9–12. Similarly, rural and urban Utah may have different views when it comes to tourism, mining, and the use of public lands. Rather than justify the Legislature's alleged purpose, these conflicts undermine it as each congressional representative has only one vote to cast, and thus must choose whether to represent the urban or rural perspective with that vote when they conflict.

The foregoing concerns are justified; since 2001 Utah's congressional districts have consistently elected representatives who reside in either Salt Lake or Utah County, with only a few exceptions. *Fair Redistricting* 6. This includes Utah's current House representatives, all of whom live along the Wasatch Front. [R.53.] And the mostly urban delegation often prioritizes urban priorities. For example, in 2018, all four of Utah's congressional representatives voted for a bill that increased work requirements to 20 hours a week for SNAP beneficiaries, most of whom are rural and thus also live where job scarcity is most acute. *Fair Redistricting* 13–14.

And as Plaintiffs alleged, the viewpoints of rural Utahns generally remained the same in 2021, with the vast majority opposing the 2021 Congressional Plan as a partisan gerrymander. [R.29–30,43,46–48,52–53.] For

example, at the October 6, 2021 hearing of the Legislative Redistricting Committee ("LRC"),[6] former Uintah County commissioner Bart Haslem spoke to the importance of rural representation at Congress now because the rapid economic shifts in rural Utah are occurring far faster than every ten years.

The Legislature's statements justifying the "rural-urban" purpose are generally framed as being for rural Utah's benefit, but rural Utahn's broad and consistent opposition to "rural-urban" districts suggests that the Legislature's purpose is pretextual. And of course, the Legislature's transparent partisan purpose also suggests the "rural-urban" purpose is pretextual. Sen. Sandall admitted that the LRC included partisan considerations in their redistricting process and that the LRC adopted the urban/rural criterion on an unofficial, *ad hoc* basis. [R.42–43,49.]; Dunphey & St. Clair, *supra* note 1. And by all accounts, the LRC did not formulate a consistent definition of "urban" and "rural" to guide it in, ostensibly, balancing urban and rural representation. [R.49.] This is striking as the Legislature has prioritized this unspoken criterion since at least 2011. *Fair Redistricting* 3. There is no indication that the Legislature paid any attention to how Utah law already defined "rural" and "urban." *Cf.* [Resp.Op.Br. Add. W.] And during a closed-door session between the LRC and the Republican

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[6] *Legislative Redistricting Committee Hearing*, 64th Leg., 2d Spec. Sess. (Utah Oct. 6, 2021) (statement of Comm'r Bart Haslem). https://le.utah.gov/MtgMinutes/publicMeetingMinutes.jsp?Com=SPELRD&meetingId=17675.

caucus, the caucus "discussed partisan voting trends, and used that information to inform its redistricting decisions." [R.44–45.] In fact, the Legislature's process was overall designed to limit public involvement and feedback. [R.9–10,40–51.]

Finally, the Legislature has never articulated why cracking Salt Lake County is the method they continually choose to include urban and rural areas in each district. While the Legislature never detailed what criteria would guide its redistricting decision, they did state that they would consider "reasonable compactness." [R.42.] Compactness generally refers to maintaining cohesive communities in close geographic proximity. *See* Justin Levitt, A Citizen's Guide to Redistricting 51 (2010). But the 2021 Congressional Plan was less compact than any of the Commission's politically neutral plans, including SH2, which contained urban and rural areas in each district without cracking Salt Lake County. [R.49,64–71.] Further, the 2021 Congressional Plan divides "far more counties, municipalities, and communities of interest than a map based on neutral criteria." [R.65.] While the 2021 Congressional Plan splits five counties into twelve pieces and fifteen municipalities into thirty-two pieces, the SH2 map splits four counties into eight pieces and seven municipalities into fourteen pieces. [R.65–70.] In short, SH2 demonstrates that each district could have contained urban and rural areas without cracking Salt Lake County, further suggesting that the Legislature's purpose is pretextual.

2. This Court Should Apply Heightened Scrutiny to Plaintiffs' Claims

The parties generally disagree as to what degree of scrutiny, if any, is appropriate for Plaintiffs' claims. [R.72–73,768,775–76,783–84,787]; [Pet.Op.Br. at 37,53–55,59.] Plaintiffs argue that heightened scrutiny applies to their equal protection claim "because the 2021 Congressional Plan implicates their fundamental rights and creates impermissible and suspect classifications." [R.72]; [Resp.Op.Br. at 45, 61–64.]; *see also Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶¶ 28–31, 452 P.3d 1109 (outlining the standard for equal protection claims). The Legislative Defendants argue that only rational basis review applies both because "partisan affiliation is not a suspect classification" and because the 2021 Plan does not "unduly burden or constrict" Utahns' ability to "cast a ballot" for their congressional representative. [Pet.Op.Br. at 53–55.]

But Utahns' right to vote also includes their right to "fair and effective representation." *Gallivan v. Walker*, 2002 UT 89, ¶ 72, 54 P.3d 1069; *Count My Vote, Inc.*, 2019 UT 60, ¶ 74 (affirming that "representation" is fundamental to the democratic process of Utah). And the right to vote for representation is undeniably fundamental, being the "preservative of other basic civil and political rights [so that] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

As Justice Kagan wrote in her *Rucho* dissent, "[t]hough different Justices have described the constitutional harm in diverse ways, nearly all have agreed

on this much: [e]xtreme partisan gerrymandering . . . violates the [United States] Constitution." *Id.* at 2514–15 (Kagan, J., dissenting). Even the *Rucho* majority agreed: "Excessive partisanship in districting leads to results that reasonably seem unjust. But the *fact* that such gerrymandering is incompatible with democratic principles does not mean that solution lies with the federal judiciary." *Id.* at 2506 (emphasis added) (quotation simplified) (citing *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)).

Said differently, it is almost beyond dispute that partisan gerrymandering *does* unduly burden and constrict voters' right to "fair and equal representation." When representatives choose their voters instead of voters choosing their representatives, it renders the government a republic in name only and in a very real sense undermines its constitution. *Cf. Arizona State Legislature*, 576 U.S. at 824 (stating that it is "the core principle of republican government . . . that the voters should choose their representatives, not the other way around"). That being the case, this court should apply heightened scrutiny to all of Plaintiffs' constitutional claims.

When this court applies heightened scrutiny to equal protection claims, it requires legislative actions implicating fundamental rights to "be reasonably necessary to further, and in fact [to] actually and substantially further, a legitimate legislative purpose." *Gallivan*, 2002 UT 89, ¶ 42. Further, despite the shared use of the word "legitimate" between rational basis review and this

heightened standard, *see Count My Vote, Inc.*, 2019 UT 60, ¶ 35, here "legitimate legislative purpose" should be construed as equivalent to the federal requirement of "a state interest of compelling importance" because Utah's "heightened-scrutiny analysis under the uniform operation of laws provision of the Utah Constitution . . . 'is at least as exacting' if not more so than" its federal equivalent. *Gallivan*, 2002 UT 89, ¶ 83.

3. The Legislative Map Fails a Heightened Scrutiny Analysis

The Legislature does not attempt to justify the 2021 Congressional Plan under heightened scrutiny and instead summarily asserts that "'combin[ing] and elevat[ing]' urban and rural voices together in Utah's congressional delegation" by ensuring "each district has a 'foothold' in both rural and urban areas" is a legitimate governmental purpose because "[t]his policy choice has been repeated for decades." [Pet.Op.Br. at 13,35,55.]; *see also* [R.38–39,43,51–52 (quoting the Legislature Redistricting Committee's co-chairs as saying "[w]e are one Utah, and believe that both urban and rural interests should be represented in Washington, D.C. by the entire federal delegation" (alteration in original)).

But this argument conflates the Legislature's purpose with its means—that is, cracking Salt Lake County so that each congressional district contains both rural and urban areas—making the Legislature's actual purpose uncertain and vague. Taking Plaintiffs' allegations as true, this is because this proffered

purpose is pretextual. [R.43–45,49,51–53,64–67.] But even taking the Legislature's justification at face value, it cannot withstand heightened scrutiny.

3.1. The Legislative Map Is Not Reasonably Necessary

As detailed in part 1, cracking Salt Lake County is not reasonably necessary to include both urban and rural areas in each congressional district. *Supra* at 12–13. Indeed, as the Complaint alleged, the Commission's SH2 map "achieves a superior mix of urban and rural components in all four districts" "[b]y any plausible measure." [R.38,49,52.]

Further, drawing each congressional district so that it contains both urban and rural areas is not itself reasonably *necessary* to balance urban and rural representation, or even particularly effective. As noted above, urban and rural Utah face different challenges and may have conflicting interests. When all four of Utah's congressional representatives represent both urban and rural areas, they must pick whose interests wins out over the other's. It perhaps goes without saying that if the redistricting is not effective, it cannot possibly be necessary.

3.2. Illegitimate Legislative Purpose

Even if the 2021 Congressional Plan was reasonably necessary to balance urban and rural representation in Utah's federal delegation, this is not a legitimate or compelling legislative purpose when subjected to Utah's heightened scrutiny standard. *Gallivan*, 2002 UT 89, ¶¶ 42, 83.

The United States Supreme Court considered the legitimacy of "balancing urban and rural power" in the malapportionment cases. In *Davis v. Mann*, the Virginia legislature drew its chambers' districts with substantially unequal populations, giving the citizens in some districts more individual voting power than others. 377 U.S. 678, 685–90 (1964). Based on the court's contemporaneous ruling in *Reynolds v. Sims*, which "held that the Equal Protection Clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis," the court found the Virginian apportionment unconstitutional. *Id.* at 690 (citing 377 U.S. 533 (1964)). Virginia argued that its plan was "sustainable as involving an attempt to balance urban and rural power in the legislature." *Id.* at 692. The court rejected this justification as not only contrary to the facts, but also summarily as "lack[ing] legal merit." *Id.*

Justice Marshall Harlan II interpreted the court in *Davis* to rule that it is "unconstitutional for a State to give effective consideration to" balancing urban and rural power "in establishing legislative districts." *Reynolds*, 377 U.S. at 622–23 (Harlan, J., dissenting). Previous dissents by Justice Harlan and Justice Felix Frankfurter in this line of cases demonstrate that Justice Harlan interpreted *Davis* correctly. In *Baker v. Carr*, both justices expressed the opinion that balancing urban and rural power was a legitimate legislative purpose which might justify malapportionment in future cases. Justice Frankfurter, dissenting, wrote, "I would hardly think it unconstitutional if a state legislature's expressed reason for

establishing or maintaining an electoral imbalance between its rural and urban population were to protect the State's agricultural interests from the sheer weight of numbers of those residing in its cities." 369 U.S. 186, 336 (1962).

Justice Harlan, dissenting, wrote, "It is said that one cannot find any rational standard in what the Tennessee Legislature has failed to do over the past 60 years. But surely one need not search far to find rationality in the Legislature's continued refusal to recognize the growth of the [ur]ban population that has accompanied the development of industry over the past half decade. The existence of slight disparities between rural areas does not overcome the fact that the foremost apparent legislative motivation has been to preserve the electoral strength of the rural interests notwithstanding shifts in population. And I understand it to be conceded by at least some of the majority that this policy is not rendered unconstitutional merely because it favors rural voters." *Id.* at 345–49. Justice Harlan maintained this position in his dissent to *Gray v. Sanders*, where he said, "a State might rationally conclude that its general welfare was best served by apportioning more seats in the legislature to agricultural communities than to urban centers, lest the legitimate interests of the former be submerged in the stronger electoral voice of the latter." 372 U.S. 368, 386 (1963).

The 1964 *Davis* court was, of course, ignorant of neither *Baker* and *Gray* nor Justice Harlan's position when it ruled otherwise—that balancing urban and rural power wholly "lack[ed] legal merit" as a legislative purpose. 377 U.S. at

692. Nor did the *Reynolds* majority contradict his interpretation of *Davis*. *See generally* 377 U.S. 533. One might argue that because these cases all concerned malapportionment, the *Davis* court was only holding that "balancing urban and rural power" was only not a legitimate legislative reason to unequally apportion districts. But that argument would also conflate "purpose" with "means."

In 1962, the Virginia legislature drew their districts with unequal populations to, ostensibly, "balance urban and rural power in the legislature." *Davis*, 377 U.S. at 680–81, 692. In 2021, the Utah legislature drew the state's congressional districts with both urban and rural areas to, ostensibly, ensure "urban and rural interests [are] represented in Washington, D.C. by the entire federal delegation;" in other words, to balance urban and rural power in the federal delegation. [R.45.] The means in 1962 and 2021 differ, but the legislative purpose remains the same and remains illegitimate. For while "particular circumstances and needs of a local [less populous, i.e. rural] community as a whole may sometimes justify departures from strict equality," *Abate v. Mundt*, 403 U.S. 182, 185–86 (1971), "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State." *Reynolds*, 377 U.S. at 558. Said differently, while the Legislature might have legitimately considered the particular circumstances and needs of Utah's rural communities of interest, it cannot legitimately prioritize balancing urban and rural representation as its own

abstract end. At minimum, this purpose is not sufficiently compelling to be deemed "legitimate" under heighted scrutiny. *Gallivan*, 2002 UT 89, ¶¶ 42, 83.

Conclusion

The Legislature drew the 2021 Congressional Plan with the alleged purpose of ensuring rural Utah was represented by the entirety of Utah's federal delegation, but they wholly disregarded the voice of rural Utahns who told them time and again that they wanted fair, politically neutral maps instead of being arbitrarily lumped in with part of Salt Lake County. They likewise would have this court believe that the instant litigation is a cynical ploy by a few unhappy Democrats. But it is not. Rural Utahns—like those who work with RUP and were represented by fellow amicus curiae—still oppose partisan gerrymandering no matter which party benefits, and would prefer congressional representatives who primarily represent rural interests instead of having to compete with urban Utah for that same representative's vote.

Dated this 19th day of May, 2023.

JULIE J. NELSON LAW

/s/ Skylar Walker
Julie J. Nelson
Skylar Walker
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Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 25(f) because this brief contains fewer than 7,000 words, excluding the parts of the brief exempted by Utah R. App. P. 25(f).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(a).

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

DATED this 19th day of May, 2023.

/s/ Julie J. Nelson

Certificate of Service

I certify that on May 19, 2023, a true and correct copy of the foregoing motion was served on the following by electronic mail:

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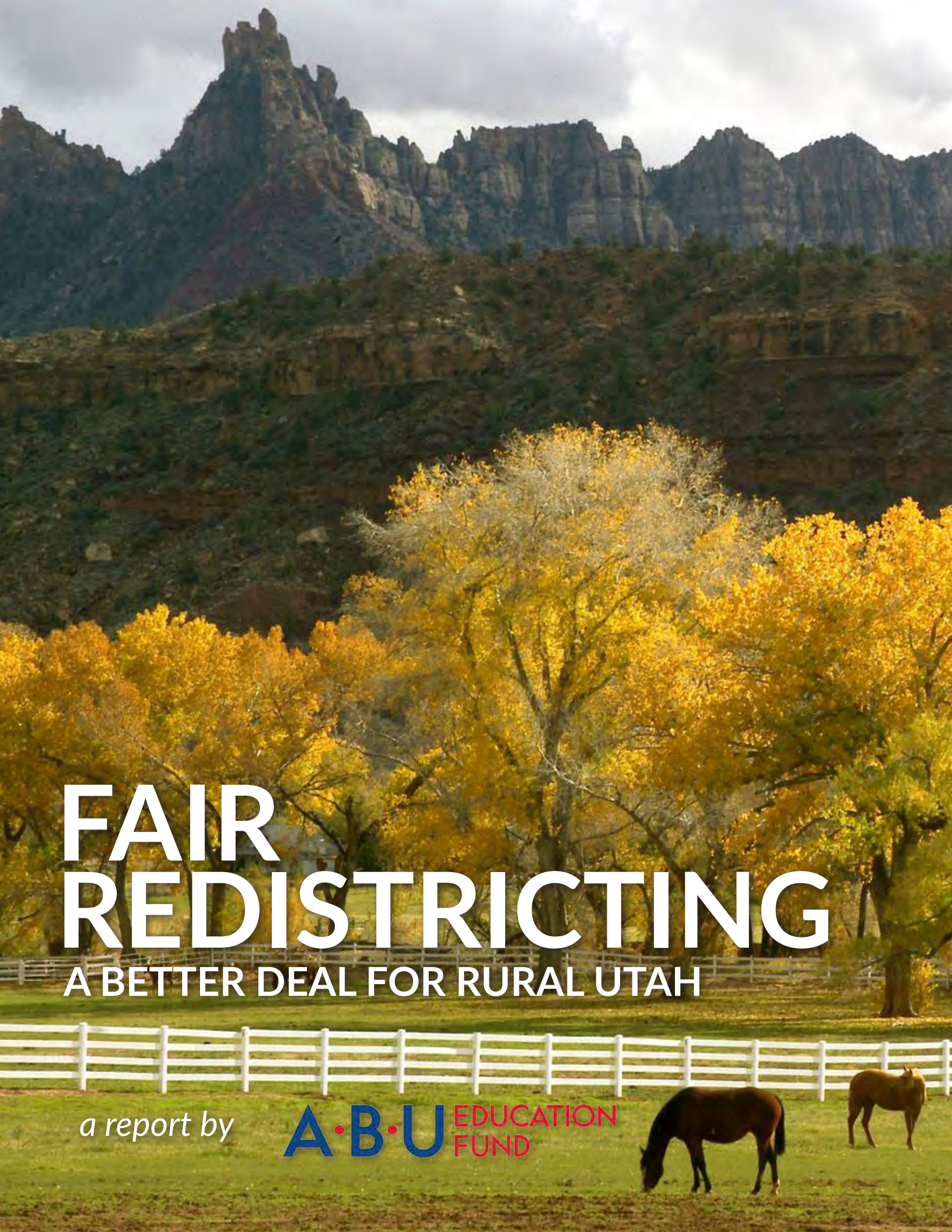
Addendum A



FAIR REDISTRICTING

A BETTER DEAL FOR RURAL UTAH

a report by A·B·U EDUCATION FUND

The most common mistake made by out-of-state political observers about Utah is a willingness to paint both rural and urban parts of the state with the same broad, red brush.

The relationship between rural and urban Utah is more nuanced than their political makeups suggest.

On the surface level, Utah's defining characteristics seem to apply fairly consistently across the state: a politically monochromatic population with a high birth rate, a strong religious tradition, a thriving economy, and a population on the cusp of exponential growth. However, the relationship between rural and urban Utah is more nuanced than their political makeups suggest.

Closer inspection reveals a large gap between the Wasatch Front, which contains four urban counties housing the majority of the population,[1] and the rest of the state. Statistics show that rapid growth in urban parts of the state[2] will widen the already-existing divide between rural and urban Utah.[3] In the coming years, rural Utah's challenges, interests, and opportunities will continue to grow more distinct from their urban counterparts. Attempting to represent both areas together in shared political districts would be a folly, and rural Utahns would pay the price.

In 2021, following the upcoming 2020 Census, Utah will redraw its congressional and state legislative district boundaries. The only question is who those districts will be drawn to represent. This November, voters will have the option to vote for a ballot proposition establishing an independent redistricting committee, which would create district maps for the state legislature to approve. The committee would be bound by the following criteria in creating district maps:

1. Creating districts equal in population, in accordance with the Constitution of the United States and the Voting Rights Act
2. Keeping cities and counties together as much as possible
3. Creating geographically compact districts
4. Creating geographically contiguous districts
5. Preserving traditional neighborhoods and local communities of interest
6. Following natural and geographic boundaries
7. Maximizing boundary agreement across overlapping districts

\- *Utah Independent Redistricting Commission and Standards Act*

Rural Utahns would benefit from a more impartial and fair redistricting process—for decades, rural and urban areas have been artificially combined in political districts. The result is that rural Utahns' interests have often been overlooked by lawmakers from urban areas of the state, both in the Utah Legislature as well as in Congress.

By respecting rural needs and experiences as important and distinct, an independent redistricting commission could keep rural Utah united as a community of interest, finally allowing rural Utahns to have their own zealous representation.

Utah's Redistricting History

Over 75 percent of Utah's population lives within four urban counties along the Wasatch Front: Salt Lake, Utah, Davis, and Weber.[4] The remainder of the state's population is spread throughout Utah's remaining 25 counties: Washington, Cache, Tooele, Box Elder, Iron, Summit, Uintah, Wasatch, Sanpete, Sevier, Carbon, Duchesne, San Juan, Millard, Morgan, Juab, Emery, Grand, Kane, Beaver, Garfield, Wayne, Rich, Piute, and Daggett.[5]

Following the 2010 Census, population increases in Utah resulted in the creation of a new, fourth Congressional district. Prior to the 2010 reapportionment, Utah had three congressional districts. In 2011, the Utah State Legislature had the task of deciding where the new congressional district should be located, in addition to updating the district maps for Utah's 29 Senate seats and 75 House seats. This redistricting process sparked intense debate as to where the new congressional seat would be located, and who the new district would benefit.

The Joint Redistricting Committee of the Utah Legislature was responsible for drafting the district boundaries. Committee members were selected by House Speaker Rebecca Lockhart and Senate President Michael Waddoups. The committee consisted of 19 legislators in total: 13 representatives and 6 senators, 14 Republicans and 5 Democrats, 13 legislators from urban counties and 6 legislators from rural counties.[6]

At the outset, the committee adopted six redistricting principles which would govern the 2011 redistricting process.[7] These principles ensured equality of population, so as to not violate the Voting Rights Act, relying on the 2010 Census data. Two traditional redistricting principles were also included: that districts would be contiguous and reasonably compact. To reduce the risk of litigation, the Office of Legislative Research and General Council recommended that the legislature not adopt additional traditional redistricting principles, such as preserving political subdivisions and keeping communities of interest intact. Thus, the Legislature was licensed to split up pre-existing political subdivisions, such as cities or counties, as well as communities of interest in both state and federal districts.

Although not officially adopted as a 2011 redistricting principle, it soon became clear that many Republican lawmakers in Utah had an additional redistricting principle in mind: creating a mix of rural and urban areas in each of Utah's congressional districts. The push for a rural-urban mix was championed by then-Senate President Michael Waddoups, who wanted to maximize the number of congressional representatives that

would fight against federal regulations on public lands.[8] This was commonly referred to as a "pizza slice" model, with wedge-shaped districts extending outward from Salt Lake City. An alternative favored by Democrats was the "doughnut hole" model, with concentrated urban districts surrounded by a larger, more sparsely populated rural district.

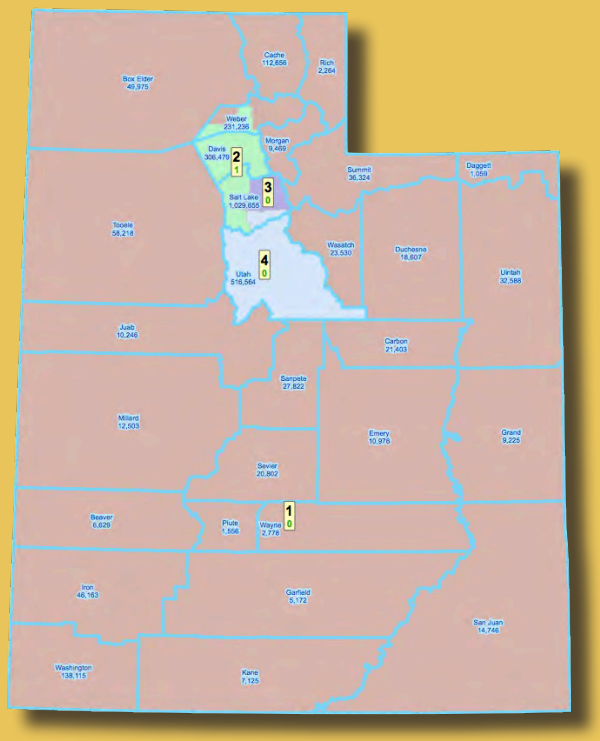
The committee held 17 public hearings across the state to gather public input on how the new district lines should be drawn. Most rural Utahns who testified at hearings in Ephraim, Richfield, Cedar City, and Saint George opposed the pizza slice model, favoring the "doughnut hole" model that would keep rural Utah together.[9] As one resident explained, "I feel we have more in common here in Cedar City with the folks in Brigham City and Logan than with the folks in the avenues in Salt Lake."[10] A state poll conducted at the same time as the public hearings found that statewide, a majority of both republicans and democrats favored the "doughnut hole" approach.[11]

The clamor for a predominantly rural district was not new, nor was the Legislature's insistence on a rural-urban mix. In 2001, the last time Utah redistricting occurred, Republican legislators drew new maps carving up Salt Lake County and spreading rural Utah out among three congressional districts. Rural Utahns vocally opposed the plan, saying the rural-urban mix effectively prevented them from having a congressional representative who was part of their cultural base.[12] One proposal, introduced by Rep. Curt Webb, R-Logan, as a "rural bias map," went at odds with GOP leadership by featuring two mostly rural districts surrounding two urban districts.[13]

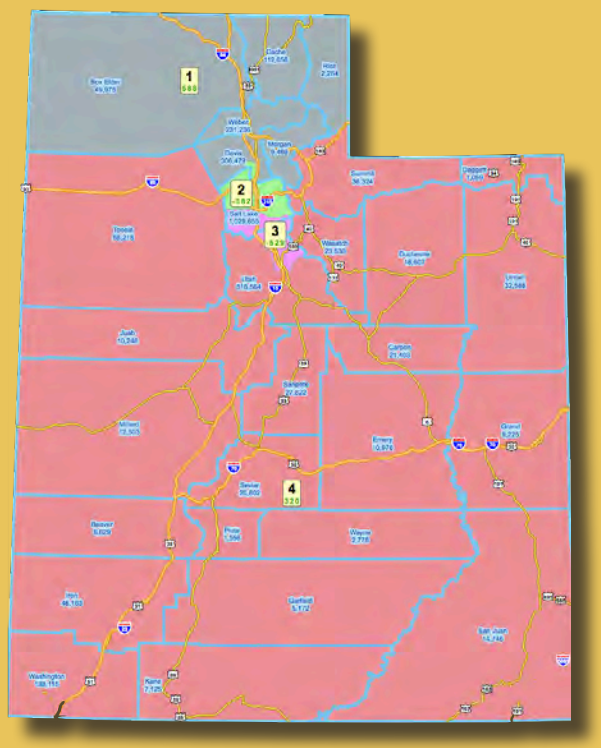
The 2011 redistricting process was hailed by legislators as unimpeachably fair—in addition to the 17 public hearings across the state, the public had the opportunity to submit their own maps using a free version of redistricting software on the state website. The Legislature received over 160 submissions through the website. However, the Redistricting Committee declined to seriously consider any maps featuring an all-rural district. Of the six map finalists selected, all adopted the rural-urban mix, breaking rural Utah into wide areas and combining them with portions of Salt Lake County.[14]

Ultimately, the Legislature did not keep rural Utah united. The final map adopted by the Legislature was a modification of a pseudo-doughnut hole map created by Rep. Ken Sumison, dividing rural Utah into three large sections. The first district combined Weber County and half of Davis County with Utah's more rural northern counties. The second district combined all of southwestern Utah with Salt Lake City and the lower half of Davis County. The third district combined all of rural southeastern Utah with portions of Salt Lake and Utah Counties. The new fourth district combined parts of Salt Lake and Utah Counties with portions of Juab and Sanpete Counties, thereby creating a rural-urban mix in all four congressional districts.

Pre-2011 Congressional District Map



Example of a Proposed "Doughnut Hole" Map



"Rural Bias" Map from Rep. Curt Webb

Final 2011 Map Passed by Legislature

The Rationale for Rural-Urban Districts: Public Lands

Why was the Legislature so insistent upon breaking up both rural and urban Utah?

One answer typically proffered by Democrats was political gerrymandering—asserting that the primary objective of the GOP-dominant legislature was to break up the traditionally Democratic voting bloc in Salt Lake County. Indeed, one self-described Republican political elections blog endorsed an early version of the final map, advising Utah readers to "call your legislator in support of this solid 4-0 SLC crackin' beauty."[15]

An alternate explanation, typically proffered by Republicans, is that a mix of rural and urban areas in each district would unify and balance Utah's congressional delegation, ensuring that each would be able to advocate on behalf of both rural and urban constituents. Congressman Rob Bishop said, "[I]t's disingenuous to say rural people think one way and urban people think another way," claiming that Utah's House delegates, like senators and governors, should represent both rural and urban interests.[16]

Specifically, the GOP leadership push for simultaneous rural and urban representation was largely focused on ensuring that all four representatives would deal with public lands issues like federal regulation and energy development.[17] As reported by the Deseret News, Sen. Waddoups said "he would like to see each congressional district include some public lands in order have more representation on that issue in Washington D.C."[18]

However, critics of the rural-urban mix warned that districts which diluted communities of interest would not be capable of representing any of those communities particularly well. The Daily Herald editorial board, advocating for an all-Utah County district, wrote, "It's absurd to expect the House of Representatives to be made up solely of bland, wishy-washy 'moderates.' Rather, it should, on the whole, represent a wide spectrum of beliefs."[19]

During the 2001 redistricting process, Rep. Patrice Arent said artificially combining rural and urban areas was contrary to the intent of the Founding Fathers. "I think it's mixing the roles of the U.S. Senate and the U.S. House.... The Senate balances the interests of the state, while the House represents people in a specific area."[20]

In practice, congressional districts with a rural-urban mix usually do not elect rural representatives.

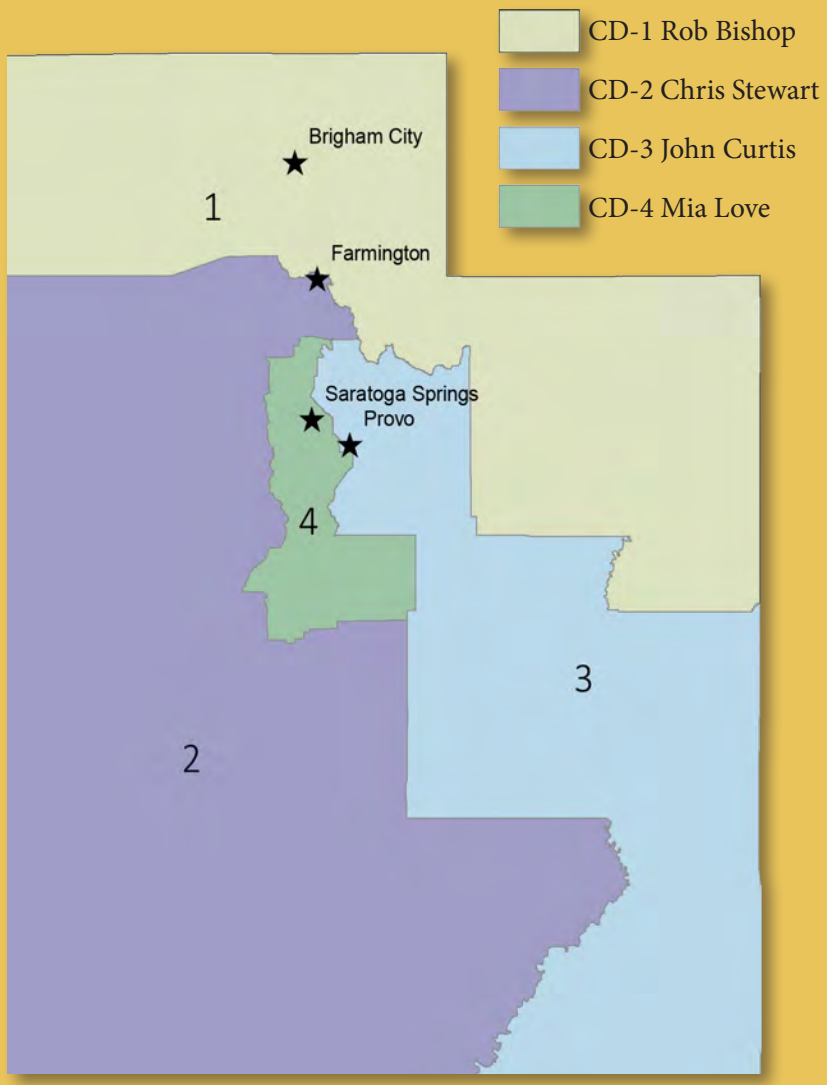
In practice, congressional districts with a rural-urban mix usually do not elect rural representatives. In 2003, Utah's second congressional district shifted from an urban district concentrated in Salt Lake County to a rural-urban mixed district combining parts of Salt Lake County with the southern and eastern borders of the state. Since incorporating vast rural territory into the formerly urban district, the district has never had a representative hailing from rural Utah.

Utah's third and fourth congressional districts illustrate the same pattern—since their creations in 1983 and 2013, respectively, both have always featured a rural-urban mix. Neither district has ever elected a representative outside of Salt Lake or Utah County, the two most populous counties in the state.

Currently, Utah has one congressional representative from rural Utah: Rep. Rob Bishop, from Brigham City in Box Elder County. Utah's first congressional district, which he represents, encompasses 8 rural counties, along with urban Weber County and part of Davis County. Unfortunately, Utah's 17 other rural counties do not enjoy rural representation. Based on county population data from the 2010 Census, this means 61.3 percent of rural Utahns—or 417,009 individuals—are not represented at the federal level by a person from rural Utah.[21]

Thanks to the rural-urban mix, most rural areas in the state have an urban representative. Utah's second, third, and fourth Congressional districts encompass all of central and southern Utah, yet the current representatives for these districts all live within an hour's drive from each other along the Wasatch front.

Where do Utah's Congressional Representatives Live?



Rural Utah Has Distinct Needs

One could argue that it should not matter to rural Utahns where their representative lives, as long as he or she advocates for policies that benefit rural Utah. As Rep. Sumison quipped after the 2011 public hearings, "I'm not sure what we've learned, really…Most people want a representative who lives in the neighborhood."[22] Obviously, placing too high a value on locational representation can present a tremendous obstacle to realistic congressional representation. Yet in Utah, combining rural areas together as a community of interest could both rectify a perceived lack of authentic representation as well as result in stronger advocacy for legislation and policy benefiting rural Utahns.

Demographically, rural Utah has distinct needs that can differ substantially from the needs of urban counties within the state. Often, representation centered around the priorities of urban Utah—even representation from a member of the same political party—will leave rural Utah without a true advocate.

Although rural and urban counties in Utah often share the same political preferences, the two areas should not be confused. The demographic gap between rural and urban Utah has grown substantially in the past decade.

While Utah overall has enjoyed the strongest job growth in the nation,[23] that success has largely been limited to the Wasatch Front and surrounding bedroom communities, along with the St. George metropolitan area in Washington County and Moab in Grand County. Rural Utah, by contrast, has undergone a "silent recession," with employment decreasing since 2007 in 11 rural counties.[24] The job divide between rural and urban Utah is only projected to widen. According to the Utah Economic Council's 2018 Economic Report to the Governor, nearly 90 percent of the new jobs created in 2018 will be located in Utah's four urban counties (Salt Lake, Utah, Davis, and Weber), along with the rapidly developing Washington County.[25]

Additionally, Utah's unemployment rate hit a low 3.0 percent in 2018, nearly a full percentage point from the national unemployment rate, which dipped below 4.0 percent for the first time in 18 years. However, Utah's unusually low unemployment rate fluctuates widely by county: along the Wasatch Front, Utah, Morgan, and Cache counties had the lowest annual unemployment rates in 2017, all under 3 percent.[26] Meanwhile, in rural Utah, Garfield, Wayne, and San Juan counties all had unemployment rates over 7 percent.[27]

Poverty is also highest in rural Utah. While the median poverty rate in urban and "transitional" urban-adjacent counties has increased more dramatically since the 2000 Census, the rate in rural counties remains higher.[28] Additionally, rural counties exhibit a high rate of intergenerational poverty,[29] defined by the state-run Utah Intergenerational Poverty Initiative as "poverty in which two or more successive generations of a family continue in the cycle of poverty, as measured through utilization of public assistance for at least 12 months as an adult and at least 12 months as a child."[30] Rural San Juan County has the highest level of children experiencing intergenerational poverty, at 34 percent—more than triple the rate of Weber County, the urban county with the highest level of child intergenerational poverty, at 10 percent.[31]

Another key issue unique to rural Utah is population decline. Overall, Utah's population is expected to nearly double in the next 50 years, reaching an estimated 5.8 million by 2065.[32] But that growth is only expected to occur along the I-15 corridor and surrounding bedroom communities. Thanks to a high birth rate as well as increased number of people moving in from out of state,[33] urban and suburban areas of Utah will continue to swell.

By contrast, rural Utah is struggling to retain its population, as young people move away for school or work to urban areas of the state. The consequences for rural Utah can be severe—a shrinking population often means fewer available jobs and less access to health services. Public schools, dependent on a critical mass of students in order to function, can find themselves particularly at risk.[34]

Rural Utah also suffers from a lack of basic infrastructure, compared to its urban neighbors. According to Linda Gillmor, director of the Office of Rural Development in the Governor's Office of Economic Development, "the high cost of infrastructure development is one of the biggest factors to inhibit growth and business recruitment in rural Utah."[35] Common infrastructure needs in Utah include roads and maintenance, power lines and substations, natural gas lines, and water self-supply systems. For rural economies to survive and flourish, they need the initial investment of necessary infrastructure.

In sum, rural Utah is facing significant challenges, such as relative economic stagnation, as well as decreasing employment and an overall population decline. These issues are markedly different from the challenges associated with rapid growth that urban Utah struggles with, such as a housing shortage, homelessness, and poor air quality. As urban Utah continues to experience rapid growth, the gap between rural and urban areas of the state is projected to widen. Lawmakers should be aware of this gap and be careful not to attend to the challenges facing urban Utah at the expense of rural Utah. Just as rural Utah's needs and priorities are different, the solutions to address those needs will likely be different as well.

Ignoring Rural Issues by State Lawmakers

The risk that rural Utah's needs will go unnoticed is increased by the political makeup of the state. Rural Utahns consistently vote for Republican candidates, as do urban voters living in Utah, Davis and Weber counties, as well as parts of Salt Lake County. On a federal level, Utah's rural-urban mix across its congressional districts results in both rural and urban voters usually electing GOP candidates.

In an era of increased political tribalism, voters are mostly concerned about poor representation through a candidate of another party, rather than a candidate from their same party. Yet solutions to the complex issues facing rural Utah cannot be pigeonholed as right vs. left—and often, opposition to solutions that would benefit rural Utah comes from representatives of the same party, living in urban areas of the state.

Rural Utah, like much of urban Utah (with the exception of Salt Lake County) tends to consistently vote for Republican candidates. In theory, an alignment in party affiliation would result in a consistent set of legislative priorities across the state. With regard to rural Utah, the impetus to help create a strong economy seems clear. In Governor Gary Herbert's State of the State address in January 2017, he challenged Utah businesses to create 25,000 new jobs in rural parts of Utah over the next four years.[36] Two months later, the Utah Legislature unanimously passed a joint resolution encouraging business development and expansion in rural Utah in endorsement of that goal.[37]

However, based on legislative voting records, an alignment in party affiliation between rural and urban lawmakers does not necessarily translate into a shared set of legislative priorities or perspective. Generally, the legislators who voted against bills specifically designed to benefit rural Utahns were Republicans from urban parts of the state.

One day after the 2017 Utah Legislature passed S.J.R. 14, Joint Resolution Regarding Jobs in Rural Utah, the House and Senate voted on the S.B. 267, Utah Rural Jobs Act.[38] This bill, sponsored by rural resident Sen. Ralph Okerlund, supported rural Utah businesses by creating a nonrefundable state tax credit for investments in eligible small businesses primarily located in rural counties. The bill passed, but was opposed by six Republican representatives, all living in Utah or Salt Lake Counties—and all of whom had voted in favor of the joint resolution supporting rural jobs the day before. Because these urban representatives are not in touch with the issues affecting rural Utah, they fail to support important policies benefiting rural Utah. These lawmakers want rural Utah's economy to get back on its feet, but aren't willing to offer a hand up to rural businesses.

Recent bills explicitly aimed at helping rural Utah get back on its feet

S.J.R. 14, Joint Resolution Regarding Jobs in Rural Utah (2017)
- Sponsor: Sen. Kevin Van Tassell
- Resolution encouraging business development and expansion in rural Utah
- Voted against: no one

S.B. 267, Utah Rural Jobs Act (2017)
- Sponsor: Sen. Ralph Okerlund
- Created a state nonrefundable tax credit for investments in small businesses in rural counties
- Voted against: 6 republicans from urban counties (Reps: Kay Christofferson, Brian Greene, Corey Maloy, Dan McCay, Marc Roberts, Mike Winder)

H.B. 390, Rural Economic Development Incentives (2018)
- Sponsor: Rep. Carl Albrecht
- Created the Rural Employment Expansion Program, which provides grants to companies that create high-paying jobs in rural areas.
- Voted against: 2 republicans from an urban county (Reps: Marc Roberts, Norm Thurston)

S.B. 232, School Transportation Amendments (2018)
- Sponsor: Sen. David Hinkins
- Provides reimbursement for student transportation costs to rural school districts where at least 65 percent of students qualify for free or reduced lunch.
- Voted against: 12 republicans from urban counties, 4 democrats from urban counties, 3 republicans from rural counties (Reps: Stewart Barlow, Joel Briscoe, Craig Hall, Timothy Hawkes, John Knotwell, Bradley Last, Karianne Lisonbee, Dan McCay, Jefferson Moss, Val Peterson, Marie Poulson, Susan Pulsipher, Tim Quinn, Adam Robertson, Angela Romero, Mike Schultz, Travis Seegmiller, Norm Thurston, Elizabeth Weight)

H.B. 414, Utah Broadband Outreach Center (2015)
- An extension of the Utah Broadband Project where the Governor's Office of Economic Development coordinates with stakeholders to "promote the voluntary expansion of broadband infrastructure in both rural and urban communities," and map where commercial services were being provided.
- Voted against: 10 republicans from urban counties, 1 republican from rural Utah (Reps: Jacob Anderegg, Brian Greene, Michael Kennedy, John Knotwell, Dan McCay, Marc Roberts, Norm Thurston; Sens: Deidre Henderson, David Hinkins, Mark Madsen, Howard Stephenson)

H.B. 327, Rural Online Initiative (2018)
- Sponsor: Rep. Michael Noel
- Created a pilot program to help rural Utahns take advantage of freelance, job, and business opportunities available online
- Voted against: 2 republicans from urban county (Rep. Marc Roberts, Sen. Deidre Henderson)

H.B. 422, Natural Gas Infrastructure Amendments (2018)
- Sponsor: Rep. Michael Noel
- Allows gas companies to spread the cost of new rural gas infrastructure out to their larger customer base. This enables the expansion of natural gas infrastructure into unserved rural areas that would not otherwise be able to support the high installation costs.
- Voted against: 3 republicans from urban counties, 2 republicans from rural counties (Reps: Francis Gibson, Kelly Miles, Scott Sandall, Norm Thurston, Logan Wilde)

The Utah Legislature has also voted on bills that, while not explicitly targeted toward rural Utah, would disproportionately benefit people living there.

A key example is the Legislature's reluctance to fully expand Medicaid. Expanding Medicaid up to 138 percent of the federal poverty line would allow an estimated 130,000 Utahns health coverage under the program.[39] Currently, Utahns from rural counties enroll in Medicaid at higher rates than those from urban counties.[40] If the Legislature were to fully expand Medicaid, rural Utahns- whose remote locations afford them limited access to other social service programs-could stand to benefit most.

However, the state has yet to fully extend the program. In 2018, the Legislature passed H.B.472, authorizing Medicaid expansion capped at up to 100 percent of the federal poverty line-a relatively modest measure that took five years to pass.[41] It is still unclear whether the federal government will approve Utah's waiver application for partial Medicaid expansion.

In 2015, momentum had gathered around S.B.164, Access to Healthcare Amendments, a compromise Medicaid expansion bill championed by Governor Gary Herbert.[42] Polls showed a majority of Utahn voters supported the "Healthy Utah" plan, and 88 percent of voters favored the plan over doing nothing at all.[43] A study conducted by an independent non-profit showed the state would receive a return on its investment of 24.4 dollars for every dollar spent.[44] Yet former House Speaker Greg Hughes, a Republican from Salt Lake County, initially blocked the bill from receiving a committee hearing, claiming a lack of support.[45] The bill eventually made it to committee, where it was voted down by nine representatives.[46] All nine were Republican, and all but one lived in urban parts of the state.

Another example is H.B. 326, Intergenerational Poverty Initiative, which passed in 2018, creating a pilot program to address intergenerational poverty.[47] Through the program, the state provides funding to counties to implement local solutions. Because rural counties have the highest rates of intergenerational poverty, they stand to benefit the most from this program. Three representatives and one senator voted against the bill, all Republicans from Utah and Weber Counties.

H.B. 57, Intergenerational Poverty Work and Self-Sufficiency Tax Credit, was also put before the Legislature in 2018.[48] This bill would have created a refundable state earned income tax credit for individuals experiencing intergenerational poverty; on average, families would have received $242. Bill sponsor Rep. John Westwood, R-Cedar City, said it would help "those who need it the most," particularly in "rural parts of Utah, like Iron County, [which] have a high poverty and intergenerational poverty rate."[49] The bill received votes in the House and Senate, but died before it could be signed into law. Thirty-two representatives and four senators voted against the bill—all were Republican, and all but five legislators were from Utah's urban counties.[50]

Of course, there are other issues pertinent to rural Utah where Republican representatives from rural and urban Utah are aligned with each other, and at odds with Democratic representatives from urban Utah:

H.J.R. 1, Joint Resolution Urging Exemption from the Antiquities Act (2018)

- Sponsor: Rep. Carl Albrecht
- Called on Congress to pass legislation exempting Utah from the Antiquities Act, which would restrict the president's ability to designate new national monuments.
- Voted against: 17 Democrats and 2 Republicans, all from Salt Lake County

S.C.R. 8, Concurrent Resolution in Support of the Creation of a New National Park, (2018)

- Expressed support for Congress creating a new national park and three new national monuments after President Trump dramatically reduced the boundaries of the Grand Staircase-Escalante National Monument.
- Voted against: 21 Democrats and 4 Republicans, all from urban counties except for one representing St. George

S.B. 246, Funding for Infrastructure Revisions (2016)

- Indirectly committed $53 million in state funds to help build a deep-water port in California.
- Then-Rep. Brad King, D-Price defended the controversial bill, saying that the port would save jobs by opening new markets for Utah coal, particularly in China.[51]
- Voted against: 14 Democrats and 10 Republicans, all but one from urban counties

Ignoring Rural Issues by Federal Lawmakers

The interests of rural Utahns are also often overlooked on a federal level, in addition to the state level. Due to the rural-urban mix implemented in Utah's redistricting process, all four congressional districts contain rural and urban parts of the state. As a result, most rural Utahns are represented by a Congressperson who lives on the Wasatch Front.

On issues concerning public lands—the stated rationale for rural-urban blended districts—Utah's current all-Republican congressional delegation has been united, consistently opposing federal ownership or management of rural lands. Representatives Rob Bishop,[52] Chris Stewart,[53] John Curtis,[54] Mia Love,[55] as well as former Rep. Jason Chaffetz[56] have all sponsored (or in the case of Rep. Love, co-sponsored) bills seeking to limit the scope of Utah's public lands.

However, outside of public lands issues, Utah's congressional representatives often do not recognize nor effectively advocate for issues affecting rural areas. It is here that the rural-urban district mix becomes a double-edged sword for rural representation—although federal land issues receive ample attention from Utah's congressional delegates, no representative is championing the many other causes important to rural Utahns. While many rural Utahns may align with legislators on issues of environmental deregulation, their needs go far beyond land use designations—and do not fit neatly within the platform of one political party.

Tom Vilsack, the former USDA secretary under President Obama, says what's often lost in the conversation is that without the federal government, many isolated, rural communities couldn't exist today.[57] And without advocates who understand and fight for important government programs, rural Utahns can lose out on benefits by urban members of their own party.

For example, according to data provided by the Utah's Office of Legislative Research and General Counsel, Utahns in rural State House districts disproportionately rely on Supplemental Nutrition Assistance Program

(SNAP) benefits, formerly known as food stamps, compared to the rest of the state.[58] The Farm Bill passed in June 2018 by the U.S. House of Representatives cracked down on SNAP benefits, adding stricter work requirements than the current law.[59] The new House Farm Bill will require SNAP recipients to spend 20 hours a week working or participating in a state-run job training program in order to receive benefits. These requirements would be the most difficult to fulfil in rural areas, where jobs are already hard to come by, and where access to a job training program will be the most difficult to access. As a result, the new program would place the greatest burden on the people already experiencing the most food insecurity in the state.[60] Still, all four of Utah's congressional representatives voted in favor of the Farm Bill.[61] The margin was thin; if just two of Utah's representatives had voted against it, the bill would not have passed the House.[62]

Of course, no community of interest is ideologically homogeneous. Some individuals from rural Utah oppose investment in coal and favor strong public land protections, just as some rural Utahns oppose social welfare programs. The point is not that rural Utahns all think the same way—it is that neither Republican nor Democrat representatives from urban Utah can presume they speak for the interests of rural Utah. Only rural Utahns can speak for themselves, and they should have the power to elect their own representatives.

Fair Redistricting Would Benefit Rural Utah

Rural Utahns deserve to have advocates fighting for their community who are from their community. Even though their party preferences are often similar to their urban neighbors, their needs and priorities are distinct. Treating rural Utahns as a community of interest, rather than artificially separating them into different districts, will allow their voices to have maximum impact.

The way to achieve fair redistricting for rural Utah is to respect it as a distinct population, drawing boundaries that reflect a rural demographic rather than insisting on a rural-urban mix. On a federal level, this would mean grouping cities and suburbs together along the Wasatch Front, creating more concentrated urban districts and allowing rural voters to stay together. Rural Utah should not be treated as a solvent for urban areas—either to dilute Salt Lake County's urban liberal influence by splitting it three ways or to bolster Utah county's urban Republican influence by splitting it in two. (As former House Speaker Rebecca Lockhart said of Utah's 2011 redistricting process, "I feel the people of Utah county would be best served by having two members in Congress.")[63]

The rural-urban mix should also be eradicated from Utah's state legislative districts. Currently, Utah's House Districts 3 and 4 split the city of Logan in half, combining each half with more rural surrounding areas. The two current representatives live in Logan and North Logan. State Senate Districts 7 and 16 do the same to the city of Provo—one half is combined with rural parts of Wasatch County, while the other stretches down to the bottom of the county and picks up half of Santaquin. Senate District 18 takes half of Ogden, where the current senator resides, and combines it with a large portion of Morgan County. Senate District 19 captures the rest of the Ogden, combining it with the remainder of Morgan County and part of Summit County; the current senator lives in North Ogden.

The only people equipped to represent and zealously advocate for the needs of rural Utah are rural Utahns themselves.

As the gap between rural and urban Utah continues to widen, rural Utah's unique opportunities and challenges will continue to grow more distinct from the rest of the state. As a result, it cannot be well represented by urban lawmakers, regardless of their political affiliation. The only people equipped to represent and zealously advocate for the needs of rural Utah are rural Utahns themselves. By eliminating the false redistricting principle of the rural-urban mix—and instead prioritizing keeping communities of interest together—rural Utah can have better, stronger representation in both state and federal government.

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Utah Counties, 2010

	Utah Population	2,763,885	
Rural Counties	**2010 Population**	**Urban Counties**	**2010 Population**
Beaver County	6,629	Davis County	306,479
Box Elder County	49,975	Salt Lake County	1,029,655
Cache County	112,656	Utah County	516,564
Carbon County	21,403	Weber County	231,236
Daggett County	1,059	**Total**	2,083,934
Duchesne County	18,607		
Emery County	10,976		
Garfield County	5,172		
Grand County	9,225		
Iron County	46,163		
Juab County	10,246		
Kane County	7,125		

Utah Congressional District Makeup

UT-1	UT-2	UT-3	UT-4
Box Elder	Beaver	Carbon	Juab
Cache	Davis	Emery	Salt Lake
Daggett	Garfield	Grand	Sanpete
Davis	Iron	Utah	Utah
Duchesne	Juab	Salt Lake	
Morgan	Kane	San Juan	
Rich	Millard	Wasatch	
Summit	Piute		
Uintah	Salt Lake		
Weber	Sanpete		
	Sevier		
	Tooele		
	Washington		

Millard County	12,503					Wayne	
Morgan County	9,469						
Piute County	1,556						
Rich County	2,264				**UT-1**	**Rural County Population**	
San Juan County	14,746				Box Elder	49,975	
Sanpete County	27,822				Cache	112,656	
Sevier County	20,802				Daggett	1,059	
Summit County	36,324				Davis		
Tooele County	58,218				Duchesne	18,607	
Uintah County	32,588				Morgan	9,469	
Wasatch County	23,530				Rich	2,264	
Washington County	138,115				Summit	36,324	
Wayne County	2,778				Uintah	32,588	
Total	679,951				Weber		
				Rural County Population Total		262,942	
Rural Utahns with a congressional representative from a rural county:							
	262,942	38.67%					
Rural Utahns with a congressional representative from an urban county:							
	417,009	61.32%					
Source: United States 2010 Census							
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IN THE SUPREME COURT OF THE STATE OF UTAH

League of Women Voters of Utah, Mormon Women for Ethical Government, Stefanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, Jack Markman, and Dale Cox, *Plaintiffs-Respondents*, v. Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Brad Wilson, Sen. J. Stuart Adams, and Lt. Gov. Deidre Henderson, *Defendants-Petitioners.*	Case No. 20220991-SC

Amicus Curiae Brief of Professor Bertrall Ross in Support of Plaintiffs-Respondents League of Women Voters of Utah, *et al.*

On Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Dianna M. Gibson, District Court No. 220901712

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

Bertrall L. Ross II is the Justice Thurgood Marshall Distinguished Professor of Law and Director of the Karsh Center for Law and Democracy at the University of Virginia School of Law. Professor Ross teaches and writes in the areas of constitutional law, constitutional theory, election law, administrative law, and statutory interpretation. He has also researched and written specifically about the influence of the English Bill of Rights Act of 1689 on the principle of legislative independence and the development of Free Elections Clauses in American state constitutions. *See, e.g.*, Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause,* 73 Ala L. Rev. 221 (2021). Professor Ross's scholarship has been cited by both sides in this case, and he has a professional interest in ensuring that his work is properly understood. More broadly, he seeks to ensure that state constitutional jurisprudence properly accounts for the origins of Free Elections Clauses and for the significance of those clauses in securing core structural protections against legislative manipulation of electoral processes.

STATEMENT OF TIMELY NOTICE TO FILE BRIEF

Pursuant to this Court's March 1, 2023 Order in this matter, counsel for Professor Ross provided timely notice to all counsel of record for all parties to this appeal of Professor Ross's intent to file this Brief.

STATEMENT OF CONSENT BY ALL PARTIES

Pursuant to Utah R. App. P. 25(e)(5), undersigned counsel for Professor Ross hereby state that all parties to this appeal have consented under Utah R. App. P. 25(b)(2) to the filing of this Brief.

STATEMENT PURSUANT TO RULE 25(e)(6)

Pursuant to Utah R. App. P. 25(e)(6), counsel for Professor Ross hereby state that no party or party's counsel authored this Brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this Brief; and no person—other than the amicus curiae or his counsel—contributed money that was intended to fund preparing or submitting this Brief.

INTRODUCTION & SUMMARY OF ARGUMENT

Utah's Constitution guarantees that "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17. This provision, including its initial Free Elections Clause, is a linchpin of Utah's system of government. It is as foundational—and as judicially cognizable—as the Constitution's guarantees of due process and uniform operation of laws. The Clause demands that electoral processes fairly and neutrally translate the popular will into representation and political power. When partisans stack the deck by manipulating district lines, they deny Utahns the free elections that their Constitution promises. This understanding of Utah's Free Elections Clause accords with historical context, underlying structural principles, and persuasive authority.

I. The lineage of Utah's Free Elections Clause confirms that it functions in part as an anti-gerrymandering provision. The Clause can be traced back through a series of earlier state constitutions and, ultimately, to the English Bill of Rights of 1689, which declared that elections "ought to be free." The English provision responded to the Crown's efforts to pack Parliament with loyalists and dilute the opposition's power by strategically manipulating the borough system—the seventeenth century equivalent of a partisan gerrymander. As originally understood, an election was not "free" when those in power rigged boundaries to skew representation in favor of themselves or their allies.

Early state constitutions imported and adapted the free elections principle. Pennsylvania's Free Elections Clause is the first American ancestor of Utah's provision, and its history is similarly instructive. Pennsylvanians embraced the Clause to disapprove of efforts to dilute voting power and representation based on geography, religion, and politics. Prior to the adoption of Utah's Constitution, the Pennsylvania Supreme Court had expressly construed that state's Clause to apply to electoral districting.

II. Construing Utah's Free Elections Clause to constrain partisan gerrymandering is not only faithful to the provision's historical origins; it also best aligns with the Constitution's core structural principles. Utah's Constitution is, at bottom, a document premised on the idea of rule by the people, with safeguards against abuses of power. Lawmakers who manipulate district lines to achieve their preferred political outcomes exceed their authority as the people's agents and interfere with the people's ability to self-govern through representatives who accurately reflect the popular will. Like Utahns today,

the drafters and ratifiers of Utah's Constitution cherished self-rule and rejected unchecked legislative power. It is difficult to imagine that their blueprint for the state's government gave lawmakers free rein to stack the deck when adopting electoral maps.

III. Persuasive authority from other states bolsters the conclusion that partisan gerrymandering contravenes Utah's Free Elections Clause. Multiple courts in other states have applied Free Elections Clauses to reject partisan gerrymanders. The Utah Constitution should not be construed to provide less protection against partisan gerrymandering than the constitutions of these sibling states.

ARGUMENT

I. UNDERSTOOD IN ITS HISTORICAL CONTEXT, UTAH'S FREE ELECTIONS CLAUSE IS AN ANTI-GERRYMANDERING PROVISION.

From the seventeenth century forward, Free Elections Clauses have stood as safeguards against anti-democratic mischief. Defendants here appear to accept that Utah's Free Elections Clause prohibits *some* forms of partisan manipulation of the electoral process, such as interferences with casting a ballot, but they insist that the Clause has nothing to say about partisan gerrymandering. Given that Article I, § 17 separately bars interference with "the free exercise of the right of suffrage," Defendants' reading would reduce the Free Elections Clause to mere surplusage. Their effort to limit the Clause's scope runs counter to historical evidence, which shows that the Free Elections Clause arrived in Utah as a safeguard against partisan redistricting abuses.

A. The Principle of "Free Elections" Embodied in the English Bill of Rights of 1689 Prohibited Government Manipulation of Electoral Districts.

Utah's Free Elections Clause traces its lineage back through several state constitutions and ultimately to the English Bill of Rights Act of 1689. More than two centuries before Utahns approved a Constitution in 1895 declaring that all elections "shall be free," Parliament declared that all elections "ought to be free." The genesis of this original free elections provision indicates that Utah's Clause is properly regarded as a restraint on gerrymandering. *Cf. Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235 (explaining that "constitutional 'language … is to be read not as barren words in a dictionary but as symbols of historic experience'" and that it is proper to consider "the background out of which [a provision] arose") (quoting *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring); *State v. Betensen*, 14 Utah 2d 121, 378 P.2d 669, 669 (1963)).

In the early 1680s, King Charles II was eager to gain the upper hand over his Whig opposition in Parliament and pack the body with Tory loyalists. He opted to revive a seldom-used power to issue a writ of quo warranto and unilaterally revise or revoke municipal corporate charters for boroughs (towns and cities). Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause,* 73 Ala L. Rev. 221, 258-59, 267-77 (2021). Through the use—and abuse—of this prerogative, the Crown could control who in the boroughs could vote for members of Parliament and, more broadly, whether particular boroughs would even receive parliamentary representation. *See id.* The Crown could also approve entirely new boroughs

and give them parliamentary franchises. *Id.* Prior to Charles, the Crown had used this power sparingly and only to resolve local conflicts, but under Charles and his successor, James II, the Crown increasingly sought to manipulate the laws and boundaries of boroughs to pack Parliament with allies. *Id.*

Ultimately, the abuse of this prerogative contributed to James's downfall and to the Glorious Revolution and the English Bill of Rights—including its decree that elections "ought to be free." *See id.* at 281-89. Defendants accept much of this historical account, *see* Def.'s Br. at 41-43, but they seek to cabin its implications in two ways. First, they characterize the borough remodeling campaign as being solely about denying qualified electors the right to vote. *Id*. at 43. Second, they suggest that the free elections principle encompassed only executive rather than legislative electoral machinations. *Id.* at 42-43. Defendants are wrong on both counts.

First, the Crown's 1680s-era borough remodeling campaign entailed much more than stripping borough residents of their voting rights. It is true that in many boroughs the Crown altered municipal charters to limit or deny the franchise for large swaths of residents in order to suppress votes for opposition candidates. *See* Ross, *supra*, at 268. In other boroughs, however, the Crown unscrupulously *extended* the franchise to non-residents so as to dilute the opposition's voting power. *See id.* at 269.

Beyond manipulating the franchise, the Crown also sought to deplete the opposition's ranks by removing or withholding boroughs' rights to return members to Parliament. *See id*. The Whig stronghold of London, for instance, had its charter revoked

and could not send representatives to Parliament for five years in the 1680s. *See id.* at 273-74, 283. At the same time, the Crown sought to pack Parliament with allies by creating new boroughs, often small ones, that had the same representation as larger boroughs. *See id.* at 269-77. This further diluted the opposition's power. *See id*. James used this maneuver to approve forty-four new boroughs in the lead-up to the first Parliamentary elections under his rule. *Id.* at 275. Thus, the royal prerogative that inspired the free elections principle encompassed much more than denying the right to vote. It was about manipulating boundaries and representation to weaken the opposition's power and give the upper hand to loyalists—concepts that mirror the ills of modern partisan gerrymandering.

Second, though the Crown's misdeeds served as an impetus for the free elections provision of the English Bill of Rights, the idea was not to shift mischief-making power from the King to Parliament. Instead, consistent with its expansive terms, the provision condemned electoral manipulations, whatever their source. At a minimum, this is plainly how the provision was understood by the time Founding-era Americans imported free elections clauses into the earliest state constitutions. The governments that these early constitutions established had extremely weak executives and lacked truly independent executive branches. *See, e.g.*, Gordon S. Wood, The Creation of the American Republic, 1776-1787, 135-41, 149 (1969); Miriam Seifter, *Gubernatorial Administration*, 131 Harv. L. Rev. 483, 493 (2017). Governors were largely figureheads who did not possess anything akin to a royal prerogative power. Instead, authority over elections rested principally with legislatures. As detailed below, the Free Elections Clauses of state constitutions sought to

guard against abuses of *that* authority; they were not limited to constraining a virtually non-existent executive authority. The fact that Free Elections Clauses in Utah and elsewhere appear in the Constitution's Declaration of Rights reinforces this conclusion, since such declarations serve to constrain the legislative branch and not merely the executive.

B. As Imported to the United States, the "Free Elections" Principle Encompassed Freedom from Partisan Districting Abuses.

When the American founders set out to create state governments, they looked to the English Bill of Rights for inspiration. The first eleven states to adopt constitutions (in 1776-1777), including the highly influential Pennsylvania and Virginia constitutions, all had free elections provisions. *See* Ross, *supra*, at 289 n.475. As new states were admitted into the Union, they continued to include these provisions through an ongoing process of constitutional borrowing. *See, e.g.,* Gordon Morris Bakken, Rocky Mountain Constitution Making, 1850-1912, 11-12 (1987). This is ultimately how the Free Elections Clause arrived in Utah, bringing with it a shared tradition of prohibiting governmental manipulation of legislative districts.

Specifically, constitutional convention records indicate that Utah's Free Elections Clause traces its lineage through Washington, Oregon, Indiana, and Pennsylvania. Utah's 1895 convention indicates that the state modeled its Free Elections Clause on Washington's, which had been approved in 1889. *Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March 1895*

to Adopt a Constitution for the State of Utah, Vol. I, 310 (1898) ("*Utah Official Report*").[1] Washington, in turn, drew its provision from Oregon; Oregon adopted its from Indiana; and Indiana took its from Pennsylvania, which was the first state to adopt a clause that guarantees that elections shall be "free and equal." *See Foster v. Sunnyside Valley Irr. Dist.*, 102 Wash. 2d 395, 405, 687 P.2d 841 (1984); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 101-08, 178 A.3d 737 (2018); *see also* John D. Barnhart, *Sources of Indiana's First Constitution*, Indiana Magazine of History 39, 59 (March 1943).

The influence of Pennsylvania's Free Elections Clause on Utah's is especially important here because Pennsylvania's provision has a rich history that likely would have been familiar to the Utah Constitution's framers and ratifiers. It is well-documented that Pennsylvania's first two Free Elections Clauses (in the state's 1776 and 1790 constitutions) were enacted in response to laws that diluted the voting power of citizens based on geography, religion, and political beliefs. *See League of Women Voters of Pa.*, 178 A.3d at 804-09. The 1776 Clause reacted to the colonial assembly's deliberate efforts to

[1] Utah's delegates removed "and equal" from Washington's Clause, which provided that "[a]ll elections shall be free *and equal.*" *Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March 1895 to Adopt a Constitution for the State of Utah, Vol. I*, 323 (1898). This change might have been merely to avoid surplusage, as records from Washington suggested that "free" and "equal" were to be given the same meaning. *The Journal of the Washington State Constitutional Convention, 1889,* 508. Moreover, the Utah delegates elsewhere provided for the "uniform operation" of laws and guaranteed equal "political rights" for all Utahns, maintaining, if not enhancing, the "equal" election rights contained in Washington's constitution. Utah Const. art. I, § 24; *id.*, art. IV, § 1.

underrepresent the City of Philadelphia and western Pennsylvania in the colonial government, which caused much strife pre-statehood. *Id.*

In 1790, Pennsylvania adopted a new constitution in an effort to curb the partisan rancor and severe governmental dysfunction that beset the state in its early years. That constitution reflected a compromise: One faction got the bicameral legislature and chief executive it preferred, while the other faction was guaranteed—in part through the Free Elections Clause—"popular elections in which the people's right to elect their representatives in government would be equally available to all, and would, hereinafter, not be intentionally diminished by laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs." *Id.* at 808. Thus, Pennsylvania's Free Elections Clause stood firmly in opposition to legislative schemes to manipulate how representation is allocated.

By the time of Utah's constitutional convention, the Pennsylvania Supreme Court had affirmatively construed that state's Free Elections Clause to bar legislative schemes to dilute the power of disfavored voters. In *Patterson v. Barlow*, 60 Pa. 54, 75 (1869), the Court made clear that the Clause required the legislature to "arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." *Id. Patterson* involved a challenge to a voter

registration requirement, not a districting plan, which makes it especially notable that the court nevertheless identified the Clause as a safeguard against districting abuses.[2]

This history bolsters the District Court's conclusion that Plaintiffs stated a cognizable claim under Utah's Free Elections Clause. Free Elections Clauses have long served as bulwarks against partisan manipulation of elections: Just as Pennsylvanians understood their clause to embrace principles of fair representation, so, too, did the framers and ratifiers of Utah's Constitution. And just as the original Free Elections Clause repudiated a seventeenth century scheme to stymie Whigs and pack Parliament with Tory-loyalists, Utah's Clause bars the twenty-first century analog that Plaintiffs have alleged.

II. PARTISAN GERRYMANDERING CONTRAVENES THE UTAH CONSTITUTION'S CORE STRUCTURAL PRINCIPLES.

Defendants' efforts to narrow Utah's Free Elections Clause also run counter to the Constitution's core commitments to popular self-rule and limited government. From start to finish, the Utah Constitution guarantees the right of Utahns to govern themselves and requires lawmakers, as elected agents, to act for the people, not against them. These foundational democratic principles are the Constitution's north star. And here, they confirm that the Free Elections Clause is properly understood to check legislative schemes to manipulate district lines for partisan gain. *Cf. Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 17,

[2] Gerrymandering was a looming issue when *Patterson* was decided. According to an eminent authority on Pennsylvania's Constitution, by the state's 1873-74 constitutional convention, Pennsylvanians regarded gerrymandering as "one of the most flagrant evils and scandals of the time, involving notorious wrong to the people and open disgrace to republican institutions." *League of Women Voters of Pa.*, 178 A.3d at 815 (quoting Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 61 (1907)).

144 P.3d 1109 (explaining that constitutional provisions should be interpreted in light of "the meaning and function of the constitution as a whole").

A. A Constitution Premised on Popular Sovereignty Cannot Be Understood to Condone Partisan Gerrymandering.

A cramped construction of the Free Elections Clause that leaves gerrymandering unredressed is at odds with the Utah Constitution's bedrock commitment to popular sovereignty and democratic self-government. The Free Elections Clause is no mere window dressing. Instead, it operates in conjunction with other provisions to ensure that the people remain firmly in control of a government that must respect their rights and pursue their interests.

After confirming that individuals have "inherent and inalienable" rights to life, liberty, and property, Utah Const. art. I, § 1, the Utah Constitution declares unequivocally—as it has since the beginning—that "[a]ll political power is inherent in the people," and that "free governments are founded on their authority for their equal protection and benefit," art. I, § 2; *see also Carter v. Lehi City*, 2012 UT 2, ¶ 30, 269 P.3d 141 ("Under our constitutional assumptions, all power derives from the people, who can delegate to representative instruments which they create.") (quoting *City of Eastlake v. Forest City Enters*., 426 U.S. 668, 672 (1976)). The Constitution then proceeds to identify and enshrine a series of rights that are preconditions to democratic self-governance, including religious liberty, *id.*, art. I, § 4; due process, *id.*, art. I, § 7; freedom of speech and press, *id*., art. I, § 15; uniform operation of laws, *id*. art. I, § 24; and, crucially, free elections and "the free exercise of the right of suffrage," *id.*, art. I, § 17; *see also id*., art. IV (further

fleshing out the right of suffrage); *Ferguson v. Allen*, 7 Utah 263, 274, 26 P. 570 (Utah 1891) ("This right [to vote] is a fundamental right. All other rights, civil or political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system."). The Constitution makes clear that its enumeration of these rights is not exclusive, *see id.*, art. I, § 25, and that, to ensure "the security of individual rights and the perpetuity of free government," "[f]requent recurrence to fundamental principles is essential," *id*., art. I, § 27.

Collectively, these provisions make plain that a "fundamental principle" of the Utah Constitution—indeed, the ultimate touchstone of Utah's constitutional system—is rule by the people. *See, e.g.*, *Gallivan v. Walker*, 2002 UT 89, ¶ 22, 54 P.3d 1069 ("The government of the State of Utah was founded pursuant to the people's organic authority to govern themselves."). As this Court has recognized, the Constitution's "system of checks and balances" is "hindered" when a numerical minority receives "an inordinate and disproportionate amount of power" at the expense of the majority. *Id*. ¶ 61. That principle offers the proper lens for construing and applying the Free Elections Clause. Reading the Clause to promote popular self-rule by checking partisan gerrymandering and the representational inequalities and distortions that come with it is far more faithful to the Utah Constitution's democratic structure and values than the alternative construction Defendants advocate. *Cf.* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Colum. L. Rev. 859 (2021). Moreover, properly accounting for the relationship between the people and the legislature helps to explain why

the Free Elections Clause is indeed self-executing. The Clause exists to bar lawmakers from subverting the people's right to choose who will govern in their name. It would be incongruous to say that a constitutional provision adopted to protect the people from legislative usurpations cannot be enforced unless the legislature first enacts anti-usurpation legislation. *See also* Utah Const. art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.").

B. The Constitution's Drafters and Ratifiers, Who Were Gravely Concerned About Legislative Abuses of Power, Did Not Give Lawmakers Carte Blanche to Manipulate District Lines.

The Utah Constitution's commitment to popular self-rule goes hand in hand with its rejection of unchecked legislative power. The Constitution was drafted and ratified during a period marked by high-profile episodes of legislative corruption and capture. *See* Martin B. Hickman, *The Utah Constitution Retrospect and Prospect*, in Neal A. Maxwell and Edward W. Clyde, *Interim Report of the Constitutional Revision Commission Submitted to the Governor and the Legislature of the State of Utah,* 30 (1971) ("All of the accumulated mistrust of state legislatures which is the hallmark of state constitution development in the nineteenth century is reflected in the Utah constitution."); *see also* Thomas G. Alexander, *Utah's Constitution: A Reflection of the Territorial Experience*, 64 Utah Hist. Q. 264, 266 (1996). Convention delegates in Utah and elsewhere were "horrified" by the "open venality of legislators" and committed to ensuring that the "biennial mob of adventurers" who occupied legislative office would not aggrandize themselves and their allies at the people's expense. Alexander, *supra*, 266; Bakken, *supra*, 102-103.

Accordingly, the drafters of Utah's Constitution took great care to cabin legislative authority. *See, e.g.*, *Gallivan*, *supra*, ¶ 21 ("[G]overnment … is an organization created *by* the people for their own purposes, to wit, for governmental purposes. As such the government has powers [that] are strictly limited by the constitution.") (quoting *Duchesne Cty. v. State Tax Comm'n*, 140 P.2d 335, 339 (Utah 1943)). The Constitution is premised on the notion that those who are elected to do the people's business must remain their faithful agents. This is why, in addition to adopting a detailed Declaration of Rights and multiple protections for suffrage, the Constitution's drafters placed a litany of substantive and procedural limitations on the legislature, from capping the length of legislative sessions, to precluding an array of "private or special laws," and much more. *See* Hickman, *supra*, at 30 (summarizing the numerous restrictions).

All of these provisions aim to keep the people in the driver's seat. As this Court has recognized, "the people themselves are not creatures or creations of the Legislature. They are the father of the Legislature, its creator, and in the act [of] creating the Legislature the people provided that its voice should never silence or control the voice of the people in whom is inherent all political power; and … the Legislature, the child of the people, cannot limit or control its parent, its creator, the source of all power." *Carter*, *supra*, ¶ 30, n.20 (quoting *Utah Power & Light v. Provo City*, 74 P.2d 1191, 1205 (Utah 1937) (Larson, J., concurring)).

A constitution so centrally preoccupied with the dangers of legislative overreach and so committed to keeping government dependent on the people cannot reasonably be

construed to have handed lawmakers unfettered power to manipulate electoral districts for partisan advantage. Instead, through the Free Elections Clause, the Utah Constitution provides a vital safeguard against this particularly pernicious form of legislative mischief.

C. Utah Courts Have the Authority and Responsibility to Check Partisan Gerrymandering.

Consistent with the Utah Constitution's history and structure, it is entirely proper for Utah courts to entertain claims that electoral maps have been manipulated in violation of the Free Elections Clause. Although late nineteenth century constitution makers harbored deep mistrust of legislatures, they "expressed faith in the judiciary" and "manifested a growing willingness … to trust the judicial system" to protect rights, including political rights. Bakken, *supra*, at 35, 102-03; *see also Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 35, 974 P.2d 1194 (explaining that, at the time of the Utah Constitution's adoption, "the people, disillusioned by what they perceived as legislative corruption … [,] vest[ed] increased power in the judiciary") (Stewart, J., concurring) (quoting David Schulman, The Right to a Remedy, 65 Temple L. Rev. 1197, 1200 (1992)). Nothing in the Constitution's text or surrounding context suggests that claims involving redistricting improprieties were somehow beyond the judiciary's reach. To the contrary, Utahns at this time were familiar with redistricting litigation in other states and expressed no reservations about the judiciary's involvement.

In the run-up to statehood, high courts resolved redistricting challenges in a number of states, including Wisconsin and Indiana—cases that received contemporaneous coverage in Utah. *See, e.g.*, Salt Lake Tribune at 4 (Mar. 29, 1892) ("Gerrymandering has

received a black eye in Wisconsin."); *Gerrymandering*, Salt Lake Herald-Republican (Dec. 24, 1892) ("When the courts can be appealed to, as in the Indiana case, with an assurance of the right being vindicated, the evil [of gerrymandering] receives an efficient check."). In Wisconsin, the state supreme court rejected assertions that its intervention would "invade the province of legislation" and held that it had "the judicial power to declare [an] apportionment act unconstitutional, and to set it aside as absolutely void." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 477, 51 N.W. 724, 728, 730 (1892). The court stressed that "courts of justice have the right, and are in duty bound, to test every law by the constitution." *Id*. at 728. According to the court, the legislature was not free to disregard constitutional restrictions on its redistricting authority—restrictions "adopted … [to] prevent the legislature from gerrymandering the state" in contravention of the people's "sacred" and "fundamental" rights to equal representation and self-government. *Id*. at 730. In the court's words, "If the remedy for these great public wrongs cannot be found in this court, it exists nowhere." *Id*.; *see also id*. at 735 (Pinney, J., concurring) (explaining that the court, "as a conservative and restraining power," had a duty to enforce "the constitutional rules of apportionment designed to secure a fair and just representation" in order to "to protect and preserve the government against … the struggles of partisan strife and factional fury with might otherwise overthrow it").

The Indiana Supreme Court likewise held that "actions calling in question the validity of apportionment acts" are justiciable. *Parker v. Powell*, 133 Ind. 178, 32 N.E. 836, 838 (1892). The court rejected an argument that only a subset of constitutional

provisions or legal theories could be litigated. *See id*. at 839 ("If the courts have jurisdiction to declare an apportionment act void because it violates one provision of the constitution, we are unable to perceive why they have not such jurisdiction where it violates some other provision."). A concurring opinion stressed that the court's duty to "stand[] immovably against legislative encroachment … is as clear where apportionment acts are involved as in cases concerning other acts." *Id.* at 846 (Elliott, J., concurring). According to the concurrence, "the duty is, if possible, higher and sterner in such cases than in any others, for, if unconstitutional apportionment acts are conceded to be beyond the domain of the judiciary, then the legislative power is absolutely unlimited and unfettered, and a legislative body would be at full and unrestrained liberty to enact measures perpetuating its own existence and augmenting its own power. Constitutional limitations are imposed to prevent unrestrained legislative action, and are intended to guard against legislative usurpation." *Id*.

These rulings, moreover, accord with a leading contemporary treatise, Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (6th ed. 1890). Delegates at Utah's 1895 convention repeatedly referenced Cooley's treatise, praising it as a "great work," and describing Cooley as "a man who stands as high as any living man on the question of constitutional law." *Utah Official Report* at 438, 913; *see also Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 13, 140 P.3d 1235 (describing Cooley as "the preeminent authority of the late nineteenth century on state constitutional matters"). Cooley's treatise states that

"[a]ll regulations of the elective franchise … must be reasonable, uniform, and *impartial*; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, *they must be declared void*." Cooley, *supra*, at 758 (emphasis added). Consistent with the position of Cooley and the weight of other historical authority, it is entirely appropriate for this Court to exercise jurisdiction over Plaintiffs' claims and to hold that the Utah Constitution's Free Elections Clause restricts partisan gerrymandering.

III. PERSUASIVE AUTHORITY FROM OTHER STATES CORRECTLY RECOGNIZES THAT FREE ELECTIONS CLAUSES CONSTRAIN PARTISAN GERRYMANDERING.

The District Court's recognition that Utah's Free Elections Clause protects against governmental manipulation of electoral districts also accords with modern practice and precedent in other states with similar clauses. Consistent with the District Court's decision, courts in several states have recently invoked their Free Elections Clauses to reject both Democratic and Republican gerrymanders.

Take Pennsylvania. As previously described, the Pennsylvania Supreme Court long recognized that its Free Elections Clause prohibits legislative manipulation of electoral districts. *See Patterson*, 60 Pa. at 75. In 2018, the Court applied this precedent and directly held that its Clause prohibits partisan gerrymandering of legislative districts. In *League of Women Voters of Pa.,* the Court explained that the "plain and expansive sweep" of the Clause's words were "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our

Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters of Pa.*, 178 A.3d at 804. The Court's bottom line is equally applicable here: the Free Elections Clause "provides the people of this Commonwealth an equally effective power to select the representative of his or her choice[] and bars the dilution of the people's power to do so." *Id.* at 814.

Pennsylvania is not alone. In 2022, a Maryland Circuit Court invalidated a congressional redistricting plan as an unlawful partisan gerrymander (favoring Democrats) under the state's Free Elections Clause (which provides that elections shall be "free and frequent"), among other provisions. *See Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022). Examining the Clause's history, as well as case law "broadly interpret[ing]" the Clause in other contexts, the court concluded that it "afford[s] a greater protection" to Maryland voters "than is provided under the Federal Constitution." *Id*. at *14. According to the court, "protect[ing] the right of political participation in Congressional elections" was a "pivotal goal" of the Clause, and the challenged redistricting plan violated this right by "suppress[ing] the voice of Republican voters." *Id.* at *14, *46.

There is also North Carolina. In February 2022, the North Carolina Supreme Court rejected congressional and state legislative district plans as unlawful partisan gerrymanders (favoring Republicans) under the state constitution's Free Elections, Equal Protection, Free

Speech, and Freedom of Assembly Clauses. *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022). As to the Free Elections Clause, which provides that "[a]ll elections shall be free," the court provided a thorough historical analysis. The Court correctly traced the Clause's lineage to the English Bill of Rights and noted the "key principle" that it prohibits manipulating districts to dilute votes for electoral gain. *Id.* at 373. The Court examined other states' experiences with free elections clauses, including Pennsylvania's. *Id.* 373-74. And, consistent with the state constitution's core commitment to popular sovereignty, the Court emphasized that "elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government." *Id.* at 376.

Earlier this year, shortly after the North Carolina Supreme Court's composition changed, the court "reheard" and reversed *Harper. Harper v. Hall,* __ S.E. __, 2023 WL 3137057 (N.C. Apr. 28, 2023). The Court held that partisan gerrymandering claims present nonjusticiable political questions. Addressing the Free Elections Clause, the new majority agreed that the English Bill of Rights influenced the Clause but nevertheless construed the Clause narrowly to apply only when a law "prevents a voter from voting according to one's judgment" or "votes are not accurately counted." *Id.* at *44. This conclusion is historically dubious, and its persuasive value is undermined by the case's highly unusual posture. Significantly, the Court's analysis is also distinguishable because Utah's Free Elections Clause, unlike North Carolina's, derives from Pennsylvania's Free Elections Clause, which was plainly enacted to bar legislative machinations to dilute the power of disfavored voters.

Beyond the partisan gerrymandering context, several more state courts have long interpreted their state's Free Elections Clauses to embrace anti-vote dilution principles that closely resemble the principle underlying Plaintiffs' claims here. These rulings are contrary to Defendants' position that Utah's Free Elections Clause should be limited to overt forms of vote denial. The Illinois Supreme Court's decision in *People v. Hoffman*, 116 Ill. 587, 5 N.E. 596 (1886), is especially notable since that court articulated its anti-dilution position shortly before Utah's constitutional convention. According to *Hoffman*, the guarantee that "elections shall be free and equal" means, in part, that "the vote of every elector is equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot." *Id*. at 599. The high courts of Indiana, Kentucky, and Oregon have conveyed similar understandings. *See Oviatt v. Behme,* 238 Ind. 69, 75, 147 N.E.2d 897 (1958) ("The constitutional provision that 'all elections shall be free and equal' means that 'the vote of every elector is equal in its influence upon the result to the vote of every other elector'."); *Perkins v. Lucas*, 197 Ky. 1, 7, 246 S.W. 150 (1922) ("This is a constitutional guaranty to the citizen that, if he is a legal voter, he can freely vote for whom or for what he may choose, and that his vote shall be equal in effect to the vote of any other citizen."); *Ladd v. Holmes*, 40 Or. 167, 178, 66 P. 714 (1901) ("Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege."). Thus, while these courts have not yet specifically applied their Free Elections Clauses to partisan gerrymandering, they have embraced the underlying logic of such claims and rejected the cramped reading of the Clause that Defendants advocate here. Consistent with these rulings, this Court should hold

that Utah's Free Elections Clause guarantees to Utahns of all partisan stripes the right to exert electoral influence on equal terms, free from the distortions of doctored electoral districts.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges this Court to affirm the District Court's decision finding that the Plaintiffs properly stated claims under the Utah Constitution.

Respectfully submitted,

Dated this 19th day of May 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 25(e)(8) and 24(a)(11), I hereby certify that:

1. This Brief complies with the word limits set forth in Utah R. App. P. 25(f) because this Brief contains 5,980 words, excluding the parts of the Brief exempted by Utah R. App. P. 25(f). Times New Roman 13-point font used.
2. This Brief complies with Utah R. App. P. 21(h) regarding public and nonpublic filings.

/s/ Alan L. Smith_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2023, I caused the foregoing to be served via email on the following:

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Appendix

A. Curriculum Vitae of Bertrall L. Ross II

B. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause,* 73 Ala L. Rev. 221 (2021)

A. Curriculum Vitae of Bertrall L. Ross II

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ACADEMIC APPOINTMENTS

University of Virginia School of Law 2021-pres.
Justice Thurgood Marshall Distinguished Professor of Law
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Founder, Designing Democracy Project
Member, Grand Challenges Steering Committee on Digital Technology and Democracy

Free University, Berlin Spring 2022
Visiting Professor

American Academy, Berlin Fall 2021
Berlin Prize Fellow

University of California, Berkeley School of Law 2010-2021
Chancellor's Professor of Law 2017-2021
Chair, Othering and Belonging Institute:
Diversity and Democracy Cluster 2020-2021
Professor of Law 2016-2017
Assistant Professor of Law 2010-2016

Courses Taught: Constitutional Law, Election Law, Constitutional Theory, Legislation, Election Law Practicum, Notes Publishing Workshop

Service: Appointments Committee Chair (2018-2020); Curriculum Committee Chair (2017-2018), Dean Search Committee (2016-17); Equity and Inclusion Committee (2014-2017); Haas Institute for a Fair and Inclusive Society, Diversity and Democracy Cluster search committee (2018-19, 2014-15, 2012-13); Academic Placement Committee Co-chair (2015-2016) and committee member (2012-13, 2010-11); Thelton E. Henderson Center for Social Justice co-faculty chair (2014-15) and committee member (2010-2016); First Generation Professional faculty advisor (2011-present).

University of Virginia School of Law Fall 2020
Visiting Professor

Princeton University 2013-2014
Fellow, Program on Law and Public Affairs

Columbia Law School 2008-2010
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Administrative Conference of the United States 2020-pres
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President Biden's Commission on Supreme Court Reform 2021
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EDUCATION

J.D. **Yale Law School** 2006

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M.Sc. **London School of Economics and Political Science** 2001
Politics of the World Economy

B.A. **University of Colorado, Boulder** 1998
International Affairs and History
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HONORS AND AWARDS

Rutter Award for Teaching Excellence 2021
UC Berkeley School of Law
- Award description: Honors Berkeley Law professors who have demonstrated an outstanding commitment to teaching.

Berlin Prize 2020
American Academy in Berlin
- Prize description: Awarded annually to US-based scholars, writers, composers, and artists who represent the highest standards of excellence in their fields.

Law and Public Affairs Fellowship 2013-2014
Princeton University
- Fellowship description: in residence fellowship program for outstanding faculty members, independent scholars, lawyers and judges.

PUBLICATIONS

Articles and Chapters

We (Who are Not) the People: Interpreting the Undemocratic Constitution, 102 TEX. L. REV. ___ (forthcoming 2023) (with Joy Milligan)

Fundamental: How the Vote Became a Right, 109 IOWA L. REV. ___ (forthcoming 2023)

The Supreme Court and the Racial Gerrymandering Thicket, in OXFORD HANDBOOK ON ELECTION LAW (forthcoming 2023)

Inequality, Anti-Republicanism, and Our Unique Second Amendment, 135 HARV. L. REV. FORUM 491 (2022)

Race and Election Law: Interest-Convergence, Minority Voting Rights, and America's Progress Toward a Multiracial Democracy", in OXFORD HANDBOOK OF RACE AND THE LAW (2022)

Voter Data, Democratic Inequality, and the Risk of Political Violence, 107 CORNELL L. REV. 1011 (2022) (with Douglas Spencer)

Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause, 73 ALA. L. REV. 223 (2021)

Guns and the Tyranny of American Republicanism, BRENNAN CTR FOR JUSTICE (2021)

Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor, 114 NW. U. L. REV. 633 (2019) (with Douglas Spencer)

Administrative Constitutionalism as Popular Constitutionalism, 168 U. PA. L. REV. 1783 (2019)

Addressing Inequality in the Age of Citizens United, 93 N.Y.U. L. REV. 1120 (2018)

Partisan Gerrymandering, the First Amendment, and the Political Outsider, 118 COLUM. L. REV. 2187 (2018)

A Constitutional Path to Fair Representation for the Poor, 66 KANSAS L. REV. 92 (2018)

Administering Suspect Classes, 66 DUKE L.J. 1807 (2017)

Measuring Political Power: Suspect Class Determinations and the Poor, 104 CAL. L. REV. 323 (2016) (with Su Li)

Embracing Administrative Constitutionalism, 95 B.U. L. REV. 519 (2015)

Paths of Resistance to Our Imperial First Amendment, 113 MICH. L. REV. 917 (2015) (book review of Robert Post, Citizens Divided: Campaign Finance Reform and the Constitution)

The State as Witness: Credibility and the Democratic Process, 89 N.Y.U. L. REV. 2027 (2017) (selected for the Yale-Harvard-Stanford Junior Faculty Forum – 2014)

Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism, 2014 U. CHI. LEGAL F. 223

Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics, 101 CAL. L. REV. 1565 (2013)

Reconsidering Statutory Interpretive Divergence Between Elected and Appointed Judges, 80 U. CHI. L. REV. DIALOGUES 53 (2013)

The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard, 81 FORDHAM L. REV. 101 (2012) (selected for the Yale-Harvard-Stanford Junior Faculty Forum – 2012)

The Costs and Elusive Gains of Creating Complementarities Between Party and Popular Democracy, 3 CAL. L. REV. CIRCUIT 146 (2012)

Against Constitutional Mainstreaming, 78 U. CHI. L. REV. 1203 (2011)

Minimum Responsiveness and the Political Exclusion of the Poor, 72 L. & CONTEMP. PROBS. 197 (2009) (with Terry Smith)

Reconciling the Booker *Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 725 (2006)

Works in Progress

Fixing Partisan Gerrymandering

Subordinating Cities (with Rich Schragger)

"This is [Not] a White Man's Government: The Fifteenth Amendment and the Constitutionalization of Democratic Self-Governance

Reports

Presidential Commission of the Supreme Court: Final Report (with other members of the commission) (2021)

Fair Elections During a Crisis (joint report by an ad hoc committee for 2020 Election Fairness and Integrity) (with various other scholars and policy advocates) (2020)

Encyclopedia Entries

"Minor v. Happersett," "United Jewish Organization v. Carey," and "Republican Party of Minnesota v. White," *in* ENCYCLOPEDIA OF THE UNITED STATES CONSTITUTION (David Schultz ed., 2009)

"The Fifteenth Amendment," "Literacy Tests," "Voter Disenfranchisement," "Voting Rights Act of 1965," *in* ENCYCLOPEDIA OF CAMPAIGNS, ELECTIONS, AND ELECTORAL BEHAVIOR (Kenneth F. Warren ed., 2008)

PRESENTATIONS AND INVITED LECTURES

Panelist, New York City Bar Association Rule of Law Federalism Program (May 2023)

Panelist, UCLA Law School Safeguarding Democracy Conference (March 2023)

"Fundamental: How the Vote Became a Right," presented at the University of Texas Law School Faculty Workshop (October 2022) and the Louisiana State University Law Center Faculty Workshop (March 2023)

"We (Who are Not) the People: Interpreting the Undemocratic Constitution," presented at the Georgetown Law Center Faculty Workshop (February 2023) and the UC Berkeley Law School Public Law Workshop (March 2023)

Panelist, Conference on Constitutional Political Economy, Georgetown Law Center (November 2022)

Panelist, Election Gamesmanship, University of Toledo Law Review Symposium (October 2022)

Panelist, *Merrill v. Milligan* (Section 2 Voting Rights Act Case), American Constitution Society and Southern Poverty Law Center (September 2022)

Panelist, Constitution Day Conversation, American Constitution Society (September 2022)

Panelist/Judge, Supreme Court Preview at William & Mary School of Law (September 2022)

"This is [Not] a White Man's Government: The Fifteenth Amendment and the Constitutionalization of Democratic Self-Governance, Law and Society Association Annual Meeting, ISCTE University Institute of Lisbon (July 2022)

Panelist, AALS Faculty Focus: Creating an Inclusive Classroom (April 2022)

"Inequality, Anti-Republicanism, and Our Unique Second Amendment," presented at the Duke-Harvard Conference on Guns, Violence, and Democracy (March 2022)

Commentator, Election Emergencies, Federalist Society National Symposium (March 2022)

Panelist, Voting Rights Under Attack, Washington Institute for the Study of Inequality and Race, University of Washington (January 2022)

Election Subversion: Assessing the Dangers to American Democracy, AALS Annual Conference (January 2022)

What Research Can Tell Us About How Law Schools, Lawyers, and Leaders Can Nourish Democracy, AALS Annual Conference (January 2022)

Redistricting, Gerrymandering, the Voting Rights Act, AALS Annual Conference (January 2022)

"Voter Data, Economic Inequality, and the Risk of Political Violence, NYU Constitutional Theory Colloquium (November 2021)

Inaugural American Academy Lecture, Overcoming the Constitutional Barriers to Economic Inequality in the United States, Free University of Berlin (November 2021)

Berthold Leibinger Lecture, The Fifteenth Amendment and the Constitutionalization of Democratic Self-Governance, American Academy in Berlin (October 2021)

Keynote Lecture, The Constitution, Democracy, and Economic Inequality, Federal Bar Association Annual Conference, San Diego Chapter (July 2021)

The Hugo Black Lecture, Inequality, Democracy, and the First Amendment, Wesleyan University (March 2021)

"Partisan Gerrymandering as a Threat to Multiracial Democracy," presentation at Southwestern Law School (February 2021), AALS Conference on Rebuilding Democracy (May 2021)

"Challenging the Crown: Checks, Balances, and the Principle of Legislative Independence," presentation at Duke Law School (February 2021), Berkeley Law School Public Law Workshop (January 2021), AALS Election Law Works in Progress Panel (January 2021), University of Michigan Law School (April 2021), Research Workshop on American Politics, UC Berkeley (April 2021)

Guns and the Tyranny of American Republicanism, Brennan Center Workshop on Gun Rights and Regulation (February 2021)

Voting During a Pandemic, presentation at the Association of American Law Schools Annual Meeting (January 2021)

Where We Are After the 2020 Election, panel presentation at Duke Law School (November 2020)

The Future of Freedom: Reparations after 400 years, moderator, UC Berkeley Othering and Belonging Institute (2020)

Lessons from the 2020 Election, panel presentation at UC Berkeley (November 2020)

Litigating the Election, panel presentation at the University of Virginia Law School's Karsh Center for Democracy (November 2020)

Pandemic Voting: From Crowds to Clouds, panel presentation at the UC Berkeley Matrix On Point (October 2020)

"Voter Data and Democratic Inequality," presentation at the University of Virginia Law School (October 2020), Denver University School of Law (October 2020), Columbia University Knight First Amendment Institute Data & Democracy Conference (October 2020)

Campaign Finance and Female Officeholding: An Empirical Assessment of the Second "Year of the Woman," presentation at the University of Colorado Symposium on the Nineteenth Amendment (April 2020)

Fair Elections in a Crisis, The Role of Election Law, panel presentation at UC Irvine Law School (January 2020)

Explaining the Decline of Legislative Constitutionalism, presentation at the Association of American Law Schools Annual Meeting (January 2020)

"The Supreme Court and the Partial Rationing of Democracy," presentation at the University of Wisconsin School of Law (October 2019)

"Fixing Distortions in our Democracy," Keynote Speech, Constitution Day Rights and Wrongs Conference, San Francisco State University (September 2019)

Discussant, Restoration and Suppression: The Contemporary Frontiers of Voting Rights, American Political Science Association Annual meeting (September 2019)

"Flipping the Narrative on American Democracy," presentation at the American Constitution Society National Convention (June 2019)

Distinguished Commentator, National Conference of Constitutional Law Scholars, University of Arizona School of Law (March 2019)

"Passive Voter Suppression," presentation at UC Berkeley Center for the Study of Law and Society (January 2019), George Washington Law School (February 2019), University of Wisconsin Law School (March 2019), UC Berkeley Public Law Workshop (August 2019)

"Administrative Constitutionalism as Popular Constitutionalism", presentation at University of Pennsylvania Law School (October 2018)

"Partisan Gerrymandering, the First Amendment, and the Political Outsider," presentation at Columbia University Law School (March 2018)

"The Gerrymandering Harm," presentation at the University of California, Berkeley School of Law Public Law Workshop (January 2018)

"The Legacy of Shaw," presentation at the American Association of Law Schools Annual Conference (January 2018)

"Re-Imagining Representative Fairness," presentation at the University of Kansas Law School (October 2017)

"Addressing Inequality in the Age of Citizens United," presentations at University of Colorado Law School (October 2016), Arizona State University Law School (November 2016), UC Davis Law School (November 2016), University of Texas Law School (December 2016), Cornell University Law School (December 2016), University of Arizona Law School (March 2017), UCLA Law School (March 2017), University of Minnesota Law School (April 2017), and Seoul National University Law School (July 2017)

"Administering Suspect Classes," presentation at Duke University Law School (March 2017)

"The New First Amendment Categoricalism," presentations at Stanford Law School (February 2016), Free Speech for the People Conference at Seton Hall Law School (April 2016), and UC Davis School of Law Faculty Workshop (September 2016)

"What the Constitution Owes the Poor," presentations at Columbia Law School (April 2016) and University of Chicago Law School (May 2016)

"Measuring Political Power: Suspect Class Determinations and the Poor," presentations at

University of Chicago Law School (May 2016), University of Southern California School of Law (March 2016), UC Irvine School of Law (December 2015) University of Colorado School of Law (November 2015), Culp Colloquium, Duke Law School (May 2015), UC Berkeley School of Law Faculty Workshop (March 2015), UC Berkeley School of Law Junior Working Ideas Group (February 2015), Class Crits VII, UC Davis School of Law (November 2014), UC Davis Center for Poverty Research, Poverty and Place Conference (November 2014)

"Toward a Class Conscious Voting Rights Act," presentation at Florida State University School of Law (March 2015)

"Embracing Administrative Constitutionalism," presentation at Duke Law School Culp Colloquium (May 2014), Princeton University Law and Public Affairs Seminar (March 2014), Emory Law School Faculty Workshop (October 2014)

"Transparent Adjudication: Promoting Dialogue on Judicial Conceptions of Politics," presentation at the University of Maryland School of Law Constitutional Law Schmooze (February 2014)

American Constitution Society, Convening on Voting Rights, George Washington University Law School (December 2013)

"Resisting Administrative Constitutionalism," presentation at the University of Chicago Legal Forum on the 50th Anniversary of the Civil Rights Act (November 2013)

"The State as Witness: Credibility and the Democratic Process," presentation at the Fordham Law School Legal Theory Workshop (October 2013), Loyola Constitutional Law Colloquium (November 2013), and the Harvard-Yale-Stanford Junior Faculty Forum at Stanford Law School (June 2014)

"Discrete and Insular: Re-Assessing the Political Power of the Poor," presentation at the American University School of Law Poverty Law Conference (October 2013)

"Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics," and "Transparent Adjudication: Promoting Democratic Dialogue on Judicial Conceptions of Politics," presentation at the U.C. Berkeley School of Law Faculty Workshop (April 2013), Race, Ethnicity, and Immigration Colloquium, Institute of Governmental Studies, UC Berkeley (February 2013), Junior Faculty Federal Courts Workshop at William & Mary School of Law (October 2012), Law and Society Association Annual Meeting (June 2012)

American Constitution Society, Convening on Federalism and Marijuana Legalization, Washington D.C. (April 2013)

"Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics," and "The State as Witness: Credibility and the Democratic Process," invited

presentation at the Workshop on Law, Philosophy, and Political Theory, U.C. Berkeley School of Law (April 2013)

"U.S. Supreme Court Preview," Panel Presentation at the Bar Association of San Francisco (October 2012)
"NFIB v. Sebelius," panel Presentation at the U.C. Berkeley Summer Faculty Colloquium Supreme Court Review (July 2012)

"The Representative Government Principle," presentation at the Yale-Harvard-Stanford Junior Faculty Forum, Harvard Law School (June 2012), Duke Law School Culp Colloquium (May 2012), UCLA School of Law faculty workshop (April 2012), UC Berkeley School of Law Junior Working Ideas Group (December 2011)

"Against Constitutional Mainstreaming," presentation at the UC Berkeley School of Law Junior Working Ideas Group Workshop (December 2010), and the Columbia Law School Legislation Works Roundtable (April 2011)

"Against Constitutional Mainstreaming: Toward a Proper Role for Courts in Dynamic Statutory Interpretation," job talk presentation at the law school faculty workshops at Fordham, Boston University, Cardozo, Minnesota, University of Colorado, UC Davis, Vanderbilt, Duke, Temple, Loyola-Los Angeles, San Diego, University of North Carolina, American, UC Irvine, UC Berkeley, UCLA (October 2009-January 2010), Columbia Law School Summer Junior Faculty Workshop (July 2009); Columbia Law School Associates' and Fellows' Workshop (May 2009)

"Minimum Responsiveness and the Political Exclusion of the Poor," invited paper presentation at Race & Socio-economic Class: Unraveling a Complex Tapestry, Duke Law School, Durham, NC (January 2009), Columbia Law School Associates' and Fellows' Workshop (December 2009)

"North American Monetary Union," workshop presentation to members of Congress – Princeton University, Princeton, NJ (April 2003)

"Regulations Confronting Trade in Services," presentation to officials from the European Commission – London, UK (May 2001)

PROFESSIONAL SERVICE

Multistate Bar Exam, Constitutional Law Committee 2022-present
Member

Journal of American Constitutional History 2022-present
Editorial Board

The Order of the Coif Book Award Committee 2019-present

Committee Member; Chair

Emerging Scholars Program/Culp Colloquium 2015-present
Organizer/Mentor for aspiring academics and junior scholars of color

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Executive Committee Member

AALS Section on Legislation & Law of the Political Process 2015-16
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Peer-Reviewed articles and book manuscripts for:

- American Political Science Review
- Cambridge University Press
- Yale Law Journal, Harvard Law Review, Law and Social Inquiry, and the California Law Review

MEDIA APPEARANCES

- National Public Radio, Salute to MLK – January 2023
- Common Law, UVA Law School Podcast (Independent state legislature doctrine) – November 2022
- Scholars Circle, Voter Suppression – November 2022
- KCBS – San Francisco, Methods of Voting – November 2022
- National Public Radio (All Sides with Ann Fisher – Election Denialism) – September 2022
- National Public Radio (On Point – Independent State Legislature Doctrine) – July 2022
- National Public Radio (Your Call – The Right to Vote) – January 2022
- PBS, The Open Mind (America's Extraconstitutional Supreme Court) – May 2021
- National Public Radio (The Electoral College Vote, and What Happens Next) – Dec. 2020
- National Public Radio (A Look at the Court Battles of the 2020 Presidential Election – November 2020
- National Public Radio – Forum (Electoral College in the Spotlight) – November 2020
- National Public Radio (Safeguarding the Electoral Vote) – October 2020
- National Public Radio (How Do Elections Work in a Pandemic) – May 2020
- BBC
- CNBC
- New Zealand Public Radio (Voting rights, enfranchisement & disenfranchisement in US elections) – October 2020
- Various local media appearances in California and Virginia

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CHALLENGING THE CROWN: LEGISLATIVE INDEPENDENCE AND THE ORIGINS OF THE FREE ELECTIONS CLAUSE

Bertrall L. Ross II

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The American system of checks and balances is under considerable stress. The President's exercise of unilateral and unchecked powers, once limited to foreign affairs and war, has increasingly been extended to domestic matters. At the same time, Congress's authority to check the President's unilateral exercise of power, long emasculated in foreign affairs and war, now is threatened in domestic affairs by its own declining will to check. Unrestrained executive power has grown as Congress recedes into the background.

Congress's declining will to check presidential unilateralism bottomed out during the Trump presidency, when Congress could not muster the will to check clear abuses of executive authority. The President's co-partisans in Congress refused to discharge their constitutional role because they needed the President's support for their own reelections. Since the Constitution requires congressional super-majorities to override inevitable presidential vetoes of legislation blocking unilateral presidential authority, the unwillingness of the President's co-partisans to reign him in rendered Congress a dependent subordinate to the President.

To fully understand the checks and balance framework and how the Constitution protects legislative independence, it is necessary to move beyond legal scholarship's usual starting points. Focusing on Montesquieu and Madison, the Constitutional Convention and ratification debates in 1787, and the Federalist Papers contributes to the misleading impression that the American checks and balances framework began with Montesquieu and ended with the U.S. Constitution. The U.S. Constitution's checks and balance framework, I argue, originated in the overlooked struggle between the Crown and Parliament in seventeenth-century England. To comprehend a key pillar of the checks and balance framework, we need to account for those struggles.

The roots of the checks and balances framework arose from a coordination theory of governance, in which Parliament's will to check arose from its coequality with, and independence from, the Crown. During those struggles, successive crowns sought to undermine the equality and independence of Parliament, but Parliament reclaimed both through civil war and revolution. English revolutionaries ultimately secured protection for parliamentary independence by constitutionalizing free elections, which they understood to be parliamentary elections free from undue crown influence. The free election clause, which was a central feature of the English Bill of Rights, would later be included in every new state constitution adopted during the American Revolution in order to protect legislative independence.

This Article, which recovers the roots of checks and balances, serves as the first in a three-article series that will ultimately link this history to the present. In doing so, this article expands our historical understanding of the checks and balance framework so that we can better effectuate its goal of preventing the concentration of power in any one branch. The second article will connect the English principle of legislative independence to the American constitutional project a century later. The third article will

* Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia Law School.. For their valuable comments and feedback, I am grateful to Tabatha Abu El-Haj, Aziza Ahmed, Maggie Blackhawk, Richard Briffault, Guy Charles, William Eskridge, Ned Foley, Daryl Levinson, Timothy Lovelace, Joy Milligan, Derek Muller, Teddy Rave, Luis Fuentes-Rowher, Reva Siegel, Douglas Spencer, Franita Tolson, and the participants in the AALS Panel on Legislative Constitutionalism, the AALS Election Law Works-in-Progress Session, the UC Berkeley Public Law Workshop, and the Duke Law School Faculty Workshop. I would also like to thank the editors of the University of Alabama Law Review for their helpful editing and feedback.

explore the modern electoral threats to legislative independence and propose methods to counteract them so that Congress can fulfill its constitutionally assigned role of checking the President.

INTRODUCTION

> *[The Framers] put [the power of impeachment] in the constitution for a reason . . . . For a man who would be disdainful of constitutional limit, ignoring or defeating the other branches of government and their co-equal powers . . . . For a man who believed himself above the law and beholden to no one. For a man, in short, who would be a king.*[1]

On February 15, 2019, President Trump proclaimed a national emergency along the southern border only weeks after Congress rejected his request to fund the border wall he promised during his 2016 presidential campaign.[2] That rejection indicated that most Congressmembers agreed there was no emergency requiring funding for a wall along the southern border.[3] Yet, for the first time ever, a president invoked the National Emergencies Act to override Congress so that Trump could divert money appropriated elsewhere for the wall.[4]

Less than two weeks after the emergency proclamation, Republican Senator Thom Tillis authored an op-ed that appeared in the *Washington Post*. Tillis declared that as "a member of the Senate" he had "grave concerns when our

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1. Congressman Adam Schiff (D-CA), Lead House Manager in President Donald Trump's First Impeachment Trial (Jan. 22, 2020). The full excerpt of Adam Schiff's opening statement in President Trump's impeachment trial:

> They did not intend for the power of impeachment to be used frequently, or over mere matters of policy, but they also put it in the constitution for a reason. For a man who would subvert the interests of our nation to pursue his own interests. For a man who would seek to perpetuate himself in office by inviting foreign interference and cheating in an election. For a man who would be disdainful of constitutional limit, ignoring or defeating the other branches of government and their co-equal powers. For a man who would believe[] that the constitution gave him the right to do anything he wanted and practiced in the art of deception. For a man who believed himself above the law and beholden to no one. For a man, in short, who would be a king.

Read Adam Schiff's Opening Argument at Senate Impeachment Trial, POLITICO (Jan. 22, 2020), https://www.politico.com/news/2020/01/22/adam-schiff-opening-argument-trump-impeachment-trial-102202.

2. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); *see also President Donald J. Trump's Border Security Victory*, TRUMP WHITE HOUSE ARCHIVE (Feb. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-border-security-victory/ ("President Trump was elected partly on his promise to secure the Southern Border with a barrier and, since his first day in office, he has been following through on that promise. . . . President Trump is taking Executive action to ensure we stop the national security and humanitarian crisis at our Southern Border.").

3. Consolidated Appropriations Act, 2019, Pub. L. No. 116–6, 133 Stat. 13, 28 (appropriating only $1.375 billion of the $5.7 billion that President Trump requested for the construction of a border wall). Scholarly observers agreed that the conditions on the border did not constitute an emergency. *See, e.g.*, Daniel A. Farber, *Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies*, 71 HASTINGS L.J. 1143, 1150 (2020) ("If an emergency is supposed to be sudden and unexpected, the Proclamation's description of border conditions fails to meet the bill.").

4. *See President Donald J. Trump's Border Security Victory*, *supra* note 2 (specifying the amount of congressionally appropriated money that the President intended to divert to build the wall).

institution looks the other way at the expense of weakening Congress's power."[5] He deemed it his "responsibility to be a steward of the Article I branch, to preserve the separation of powers and to curb the kind of executive overreach that Congress has allowed to fester for the better part of the past century."[6]

Soon after Senator Tillis's op-ed, President Trump issued a warning to Republicans who were thinking of challenging his emergency declaration. "I really think that Republicans that vote against border security and the wall," Trump asserted in a *Fox News* interview, "put themselves at great jeopardy."[7] Trump's warning was accompanied by threats from Trump-supporting conservative activists and GOP party leaders calling for a primary challenge of the Republican Senator.[8]

Tillis, who was up for reelection in November 2020, began to waver. A little over a week after President Trump's *Fox News* interview, Senator Tillis voted against a resolution of disapproval under the National Emergencies Act that could have terminated the emergency and halted the President's diversion of congressionally appropriated funds.[9] Tillis was not the only Republican congressmember to reverse course.[10] Senators and members of the House of

5. Thom Tillis, Opinion, *I Support Trump's Vision on Border Security. But I Would Vote Against the Emergency*, WASH. POST (Feb. 25, 2019), https://www.washingtonpost.com/opinions/2019/02/25/i-support-trumps-vision-border-security-i-would-vote-against-emergency/.

6. *Id.*

7. *Trump Says Republicans Who Oppose His Border Emergency Declaration Are in 'Great Jeopardy'*, ASSOCIATED PRESS (Mar. 2, 2019), https://www.marketwatch.com/story/trump-says-republicans-who-oppose-emergency-declaration-are-in-great-jeopardy-2019-03-01.

8. *See* Scott Wong & Alexander Bolton, *GOP's Tillis Comes Under Pressure for Taking on Trump*, THE HILL (Mar. 13, 2019), https://thehill.com/homenews/senate/433929-gops-tillis-comes-under-pressure-for-taking-on-trump (describing the political pressure that President Trump and his supporters placed on Senator Tillis and the threats of a primary challenge).

9. 50 U.S.C. § 1622 (describing the method by which Congress can terminate a presidentially declared emergency under the National Emergencies Act).

10. Around the same time as Tillis's op-ed, Republican Senator Ben Sasse of Nebraska predicted, "If we get used to presidents just declaring an emergency any time they can't get what they want from Congress, it will be almost impossible to go back to a Constitutional system of checks and balances." Bret Stephens, Opinion, *Twelve Righteous Republicans (and 41 Cowards)*, N.Y. TIMES (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/opinion/republicans-trump-veto-emergency.html. Senate Majority Leader Mitch McConnell privately opposed the emergency declaration and warned the President "he would face a significant bloc of GOP defections." Paul Kane, *Tillis's Reversal Sums Up the State of Republicans—Few Willing to Cross Trump*, WASH. POST (Mar. 14, 2019) [hereinafter Kane, *Tillis's Reversal Sums Up the State of Republicans*], https://www.washingtonpost.com/powerpost/tilliss-reversal-sums-up-state-of-senate-republicans—few-willing-to-cross-trump/2019/03/14/aceb6c4a-45d5-11e9-8aab-95b8d80a1e4f_story.html; *see also* Emily Cochrane & Glenn Thrush, *Bill to Curtail Future Emergency Declarations Could Save Trump's Current One*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/us/politics/bill-emergency-declarations.html (describing the political pressure that President Trump and his supporters placed on Senators who initially opposed the emergency declaration). Senators Sasse and McConnell, whose Senate seats were also up for election in November 2020, ultimately joined Tillis in voting against the resolution of disapproval. Stephens, *supra*. A similar pattern arose in the House of Representatives where every member was up for reelection in 2020. In the days immediately following the emergency declaration, some Republican congressmembers openly opposed it. But after President Trump's *Fox News* interview, opposition from Republican congressmembers died down as most fell in line with the President's assertion of authority. *See* Paul Kane, *Republicans' Pack*

Representatives, who initially opposed the President's emergency proclamation, fell in line after President Trump's threat. In the end, every Republican Senator up for reelection, except Senator Susan Collins of Maine, voted against the resolution's approval, as did all but thirteen House Republicans.[11] Although the resolution passed with the support of Democrats and a small number of retiring, libertarian, and swing state or swing district Republicans, Congress lacked the votes to override the President's veto.[12] President Trump moved forward with his co-optation of Congress's power of the purse, a power that James Madison considered "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[13]

Congress's unwillingness to check Trump's assertion of unilateral presidential authority to fund the border wall is easy to forget given the constant tumult of the Trump presidency. But it is crucially important: President Trump provided a blueprint for future presidents to exercise even more expansive unchecked emergency authority. As Justice Frankfurter warned in *Youngstown Sheet & Tube Co. v. Sawyer*, the case establishing the constitutional separation of powers framework used today, "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[14]

The Constitution's checks and balances framework requires all three governmental branches to defend their powers from other branches' encroachment to prevent the accumulation of power in any one branch. If branches fail to defend their power, rule by one branch's arbitrary will may result.[15]

Mentality in Trump Era Leaves Little Room for Course Correction, WASH. POST (Feb. 27, 2019) [hereinafter Kane, *Republicans' Pack Mentality in Trump Era*], https://www.washingtonpost.com/powerpost/republicans-pack-mentality-in-trump-era-leaves-little-room-for-course-correction/2019/02/26/7b2e42bc-3a0f-11e9-a06c-3ec8ed509d15_story.html.

11. *See* James Arkin & John Bresnahan, *'Beware the Fury of Trump': 2020 GOP Senators Back President on Border*, POLITICO (Mar. 14, 2019), https://www.politico.com/story/2019/03/14/senate-republicans-trump-national-emergency-vote-1222367 (noting how "[n]early every other Republican on the ballot in 2020 voted to uphold the emergency" and quoting a Republican donor's warning, "[b]eware the fury of Trump" as "Republican senators could have faced primary challenges for opposing Trump on the issue.").

12. *See* Erica Werner et al., *House Passes Resolution to Nullify Trump's National Emergency Declaration*, WASH. POST (Feb. 27, 2019), https://www.washingtonpost.com/powerpost/house-sponsor-of-resolution-to-nix-emergency-declaration-acknowledges-uphill-battle-on-overriding-expected-trump-veto/2019/02/26/22104532-39d2-11e9-aaae-69364b2ed137_story.html (providing an account of the ideological leanings of the thirteen Republican House members and Senators up for reelection that voted for the disapproval resolution).

13. THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

14. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

15. *See, e.g.*, THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 126 (1785) (describing the concentration of legislative, executive, and judicial powers into the same hands as "precisely the definition of despotic government"); *see also* THE FEDERALIST NO. 48, *supra* note 13, at 310–11 (James Madison) (quoting JEFFERSON, *supra*).

Individual officials must embrace their branch's prerogative for the framework to operate. In James Madison's words, "[t]he interest of the man must be connected with the constitutional rights of the place."[16] The "man" in this quote is an elected or appointed official; the place is the branch to which he belongs. This connection between an official and his branch of government is supposed to be "the great security against a gradual concentration of the several powers in the same department,"[17] giving each official the "personal motive" and "ambition" that is necessary to counteract other officials' drives to aggrandize power.[18]

Yet in the border wall episode described above, a pivotal segment of Congress subordinated the legislature's authority to their desire to please a president they determined posed an existential threat to their reelection prospects. With the President making clear to congressmembers that he would view support for the disapproval as "an act of betrayal," Republican congressmembers concluded, "[t]here's no way to win reelection if you don't first win the GOP primary."[19] Thus, "even Republicans who could face difficult general elections lined up behind Trump rather than risk his wrath."[20]

A Congress dependent on the President represents a structural breakdown in the American system of checks and balances. For the Framers of the Constitution's checks and balances framework, the independence of the branches from each other was critical for maintaining each branch's institutional will to check.[21] The Constitution established specific tenure and selection processes to secure judicial and executive independence from legislative encroachment.[22] But the Framers were silent about the means of protecting legislative independence from executive encroachment. That silence,

16. THE FEDERALIST NO. 51, supra note 13, at 322 (James Madison).

17. *Id.* at 321.

18. *Id.*

19. Kane, *supra* note 10.

20. *Id.*; *see also* Jonathan Martin & Maggie Haberman, *Fear and Loyalty: How Donald Trump Took Over the Republican Party*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/us/politics/trump-impeachment-republicans.html (interviewing a Republican congressmember who explained, "[t]here is no market . . . for independence" as "Mr. Trump will target you among Republicans . . . and the vanishing voters from the political middle will never have a chance to reward you because you would not make it through a primary").

21. THE FEDERALIST NO. 68, *supra* note 13, at 413 (Alexander Hamilton) (defending the Electoral College system for reelecting the president as a means by which the president would be "independent for his continuance in office on all but the people themselves" removing the president's temptation to "sacrifice his duty . . . for those whose favor was necessary to the duration of his official consequence"); THE FEDERALIST NO. 78, *supra* note 13, at 465 (Alexander Hamilton) (describing judicial independence from the "encroachments and oppressions of the representative body" as "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws").

22. *See* U.S. CONST. art. II, § 1, cl. 2–3 (establishing the Electoral College system for the selection of the President); U.S. CONST. art. III, § 1, cl. 1 (establishing life tenure for federal judges); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 419 n.118 (1995) (explaining the branch independence from the different modes of selection for the different branches of government).

however, did not mean that the Framers neglected or deemed legislative independence unnecessary. Rather, they recognized that the means for protecting legislative independence had already been established prior to the adoption of the Constitution. These means were ultimately incorporated into the Constitution in a way that scholars have thus far overlooked.

In this Article, I argue that President Trump's domination of Congress is not a new problem, nor was the challenge overlooked in America's construction of its constitutional system. America's revolutionaries of 1776 would have readily understood the great threat represented by an executive dominating the legislature.[23] Their predecessors, the English who fought the Glorious Revolution against an overreaching king, would also have recognized the danger as the primary evil that they opposed.[24]

Seventeenth-century England saw sustained clashes over the relative power of Parliament and the Crown. Out of these clashes emerged the "coordination" theory of governance, in which the king stood in an equal and coordinate position with the two houses of Parliament, rather than exercising absolute monarchical power. English kings were loath to relinquish power, however, and sought to undermine Parliament's independence by corrupting parliamentary selection processes in order to fill the Parliament with loyalists.[25] The Glorious Revolution of 1688 arose in response to that pattern of excessive Crown influence over parliamentary selection, as well as deep disputes over religious tolerance.[26]

After Parliament prevailed, the English revolutionaries presented to their newly installed monarch a declaration of rights listing their grievances against the prior kings and the obligations of the new monarch.[27] A principal obligation of the new monarch was "[t]hat election of members of Parlyament ought to be free."[28] For the parliamentarians, free elections meant elections free from undue influence, which they understood to be the principal means by which parliamentary independence would be permanently secured.

Safeguarding legislative independence was thus a cornerstone of the constitutional framework elaborated in England. That principle would be transported to America eighty years after the Glorious Revolution through

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23. *See, e.g.*, Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1057 (1994) ("A prime goal of constitution makers in the newly independent American states was the creation of limited executive authorities that would be unable to exercise the vast control that the British Kings and Royal Governors had asserted over legal and social arrangements."); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 718 (2012) ("The colonial experience with overly powerful executives and judges answerable only to a distant crown led to the creation of almost unfettered legislatures in the early Republic.").

24. *See infra* Part V.

25. *See infra* Part IV.

26. *See infra* Part V.

27. *See* Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.), https://www.legislation.gov.uk/aep/WillandMarSess2/1/2.

28. *See id.*

provisions for free elections, which were included in every new state constitution written between the Revolution and the U.S. Constitution's ratification.[29]

It is impossible to understand the checks and balances regime that we inherited from England unless one grasps how the experience of executive dominance and legislative independence underpinned the constitutional system they designed. Yet modern separation of powers scholarship, with its focus on the eighteenth century and the contributions of Montesquieu and Madison to the theory, bypasses those key historical origins.[30] In this Article, I excavate and recover that much older understanding of the origins of checks and balances. I use this history to shed light on the modern problem of a weakened Congress, unwilling to check an overreaching president.

That history's significance is two-fold: First, it illuminates the meaning and modern utility of the "free election" clauses found within state constitutions, which govern federal elections just as they do state ones. Those clauses provide a constitutional mandate for addressing and curing legislative dependence. Second, the history provides a broader foundation for understanding the goals of, and foremost threats to, our constitutional scheme of checks and balances. As this Article foregrounds, legislative independence and the role of electoral structures in securing it are core and neglected features of the U.S. checks and balances framework.

The Article proceeds in five parts. In Part I, I describe the problem of presidential unilateralism from the perspective of the system of checks and balances. I focus on the unique challenges that President Trump's exercise of

29. *See infra* text accompanying note 475.

30. *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1750 (1996) ("[V]irtually none of the even self-consciously historicist work on separation of powers begins the story much before the summer of 1787."). A few scholars have consciously pushed the separation of powers analysis beyond Madison and Montesquieu in an attempt to uncover the deeper eighteenth-century roots of the principle. *See, e.g.*, William Seal Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 32, 32–38 (1928) (examining the eighteenth-century American colonial roots of separation of powers); Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 452–56 (2013) (questioning Montesquieu's contribution to the American separation of powers framework and identifying other eighteenth-century sources). The seventeenth-century English roots, however, remain mostly overlooked in scholarly accounts of the American checks and balances system. For the rare examples of legal scholarship that mentions without interrogating the seventeenth-century roots of the American checks and balances system, see Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 375–76 (1976) (providing a brief account of the influence of the Glorious Revolution on American thought, but lacking details about the nature of that influence); Benjamin F. Wright, Jr., *The Origins of the Separation of Powers in America*, 40 ECONOMICA 169, 169 (1933) (recognizing the role of seventeenth-century English Republican theorists on the theoretical development of checks and balances). Two scholars have provided more extensive accounts of the seventeenth-century origins of separation of powers, but their foci differ from mine. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 41–75 (1967) (identifying the theoretical origins of separation of powers from the mid-seventeenth-century English Civil War onward, but overlooking the struggles between the king and Parliament that were central to the development of the principle of legislative independence); W.B. Gwyn, *The Meaning of the Separation of Powers*, 9 TUL. STUD. POL. SCI. 1 (1965) (deriving the roots of the American conception of liberty and tyranny from the struggle for judicial independence from the executive in seventeenth-century England).

unilateral authority raised from his successful efforts to undermine congressional independence by depressing its will to check.

In the remainder of the Article, I use original source materials to reconstruct one of the foundations of the American system of checks and balances: legislative independence. In Part II, I begin the historical excavation of the principle of legislative independence by tracing the origins of the coordination theory of government, which continues to be at the foundation of the checks and balances framework today. In Part III, I examine the period of the de facto operation of the coordination theory and the rise of the English Parliament as a coequal institution that checked the crown's exercise of unilateral authority. In Part IV, I trace the Crown's attack on parliamentary independence through his use of royal prerogative to remodel boroughs. Finally, in Part V, I document the English response to the Crown's threat on parliamentary independence, which led to a revolution and adoption of a Constitution protecting legislative independence through the provision for free elections. I conclude by previewing how my future work will connect this history and constitutional principle to the current crisis in America's checks and balances framework.

I. THE PROBLEM OF PRESIDENTIAL UNILATERALISM

President Trump's emergency proclamation to build a wall along the southern border of the United States is only the most recent example of presidential unilateralism. In this Part, I provide an account of the constitutional and historical bases for presidential unilateralism. I focus here on emergency powers that have served as the foundation for broader presidential unilateralism in both foreign and domestic affairs. I then describe the challenges to checks and balances arising from presidential unilateralism in the Trump era. Throughout the Part, I show how conventional and modern approaches for operationalizing the system of checks and balances have proven inadequate to address the problem of presidential unilateralism.

A. Checks and Balances and Presidential Unilateralism

The principal mischief that the system of checks and balances seeks to avoid is despotic tyranny that leads to rule by arbitrary will.[31] The rule of law, developed most prominently in the political philosophy of John Locke, stood

31. As James Madison explained,

> An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.

THE FEDERALIST NO. 48, *supra* note 13, at 311 (James Madison).

as the antithesis to rule by arbitrary will.[32] Rule of law demands the public promulgation of laws that are equally enforced and independently adjudicated so that the governors are as constrained as the governed in their actions by the laws they establish.[33]

Under the American checks and balances system, most exercises of power require the consent of at least two independent branches of government who represent distinct but overlapping parts of the polity.[34] Proponents of the Constitution, however, argued that in narrow circumstances, the existential needs of the state ultimately outweighed concerns about despotic power. Five years after the Constitution's ratification, Alexander Hamilton proffered a full-throated defense of unilateral executive power during the debate over President Washington's authority to declare American neutrality during a war between European powers.[35] Hamilton, writing under the pseudonym Pacificus, pointed to a difference between the Vesting Clauses of Articles I and II as the foundation for his claim that executive authority extends beyond that specified in the Constitution.[36] Whereas the Article I Vesting Clause specifies, "All legislative Powers herein granted shall be vested in a Congress of the United States," the Article II Vesting Clause only says, "[t]he executive Power shall be vested in a President of the United States."[37] Hamilton interpreted the decision to not include the language "herein granted" in the Article II Vesting Clause to mean that the executive power included powers not specified in Article II.[38]

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32. As John Locke theorized,

> Wherever law ends, tyranny begins, if the law be transgressed to another's harm. And whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate. . . .

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 217–18 (Mark Goldie ed., 1993) (1690).

33. *See, e.g.*, Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–07 (1989) (describing the relationship between separation of powers and rule of law).

34. *See, e.g.*, John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1979–84 (2011) (describing the distinct and overlapping constituencies that the President and two houses of Congress represent and their shared powers under the constitutional framework).

35. President Washington ultimately declared American neutrality between the warring European powers without congressional consent. *See* George Washington, Neutrality Proclamation (April 22, 1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 1 (Morton J. Frisch ed., 2007); *see also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 18 (First Mariner Books ed. 1973) (defining President Washington's neutrality declaration as "a unilateral presidential act" that "involved . . . in the eyes of some, a repudiation of obligations assumed by the United States in its treaty with France of 1778").

36. *See* Alexander Hamilton, *Pacificus Number 1* (June 29, 1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 8–17 (Morton J. Frisch ed., 2007).

37. U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1, cl. 1.

38. *See* Hamilton, Pacificus Number 1, *supra* note 36 at xviii (rejecting the claim that the Executive has only those powers contained in Article II, arguing, "It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause"). Presidents have since relied on this constitutional textual argument to justify unilateral exercises of executive power. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1404 (1989) (describing how Presidents Theodore Roosevelt, Harry Truman, and Richard Nixon

Even Hamilton's greatest opponent during the debate on the neutrality proclamation, Thomas Jefferson, came to agree with him that the President had the authority to unilaterally exercise powers not contained in the Constitution. During a presidency in which he exercised emergency authority to protect military assets, Jefferson wrote in a letter that "on great occasions every good officer must be ready to risk himself in going beyond the strict line of law."[39] In a later letter, Jefferson further acknowledged that "[a] strict observance of the written laws is doubtless *one* of the high duties of a good citizen: but it is not *the highest*."[40] Instead, "[t]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."[41]

The Madisonian theory of checks and balances suggested that the opportunities for the President to exercise unilateral power would nonetheless be limited. The contesting ambitions of the political branches would presumably lead members of one branch to protect their prerogative by checking another branch's unilateral exercise of power that went too far and lasted for too long.

The first century and a half of American history supported the Framers' assumptions that congressional ambition would check exercises of presidential unilateralism beyond the temporal and substantive limits of an emergency.[42] Since World War I, however, the dynamics of emergency power have changed dramatically, particularly in the context of foreign affairs. Two World Wars, an undeclared and lengthy Cold War, and an undefined and indefinite War on Terror has left the United States in a state of emergency for most of the past century.[43] In these states of emergency, which have spawned international military conflicts, entanglements, and agreements, presidents have broadly exercised unilateral authority.[44]

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relied on Hamilton's argument to assert that "the President has inherent power to do either anything necessary to preserve the United States, or, even more broadly, anything not explicitly forbidden by the Constitution").

39. Letter from Thomas Jefferson to Governor William C.C. Claiborne Washington (Feb. 3, 1807), https://founders.archives.gov/documents/Jefferson/99-01-02-5008.

40. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* 11 THE WORKS OF THOMAS JEFFERSON 146 (Paul Leicester Ford ed., 1905).

41. *Id.* at 148.

42. SCHLESINGER, *supra* note 35, at 26–34 (describing the dynamics between Congress and the courts between the Jefferson years and the Civil War in which Congress actively checked presidential exercises of power and presidents were restrained in their exercises of power).

43. *See, e.g.*, Lobel, *supra* note 38, at 1404 (describing how during the Cold War "the ideology and reality of permanent crisis . . . dramatically transformed the constitutional boundaries between emergency and non-emergency powers. . . . Emergency rule has become permanent."); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1015 (2004) ("[T]he Cold War ushered in an era of 'permanent emergency' in which the constitutional sacrifices that were to be made were not clearly temporary or reversible."); ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 237–56 (2006) (describing President George W. Bush's exercise of unilateral powers after the 9/11 terror attacks).

44. Presidents Woodrow Wilson and Franklin Roosevelt exercised unilateral emergency authority both at home and in support of allies abroad prior to congressional declarations of war during World Wars I and

In war and foreign affairs, neither the Supreme Court nor Congress has had the ambition to check the President's exercise of unilateral powers that the Madisonian theory of checks and balances predicted. Both Congress and the Supreme Court have, through their delegation of and deference to unilateral exercises of authority, implicitly acknowledged their own capacity limits and the President's unique advantages to address matters of war and foreign affairs.[45] As a result, the President's exercise of unilateral power in those realms has gone mostly unchecked.[46]

In domestic affairs, however, the Supreme Court has been more willing to check unilateral exercises of presidential power during emergencies. For example, the Supreme Court in *Ex Parte Milligan* rejected the President's assertion of unilateral emergency power during the Civil War to employ military commissions to try and sentence American citizens for crimes committed during the war.[47] Repudiating the President's claimed need to exercise unilateral authority to protect the nation's security even at the expense of an individual's constitutional liberty, the Court asserted, "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of

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II. *See* SPECIAL COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, WAR AND EMERGENCY POWER STATUTES, S. REP. NO. 93-549, at 2–4 (1973) (describing the use of unilateral emergency authority by Presidents Wilson and Roosevelt). The Cold War global conflicts between the United States and the Soviet Union involved Presidents Harry Truman, Lyndon Johnson, and Richard Nixon in the unilateral commission of the American military to conflicts in Korea and Vietnam and subsequent presidents' unilateral commission of troops abroad into other conflicts without congressional declarations of war or statutory permission in many cases. *See, e.g.*, J. William Fulbright, The Decline—and Possible Fall—of Constitutional Democracy in America, *reprinted in* 117 CONG. REC. 10355 (1971) (describing exercises of presidential unilateralism by Presidents Roosevelt, Truman, Johnson, and Nixon); SCHLESINGER, *supra* note 35, at 132–206 (providing a historical account of presidential exercises of power between Presidents Truman and Nixon). During the War on Terror following the tragedy of 9/11, President George Bush unilaterally ordered the indefinite detention of enemy combatants and Presidents Barack Obama and Trump participated in active drone strike campaigns sometimes only loosely connected to the statutory authorization for the use of military force. *See, e.g.*, Scheppele, *supra* note 43, at 1053 ("The avoidance of separation of powers constraints in the domestic war on terrorism has reached its height with the claimed presidential power to label suspect individuals as enemy combatants who are immune from legal process altogether.").

45. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–22 (1936) (interpreting the constitutional framework giving the President broad unfettered authority over foreign affairs); Lobel, *supra* note 38, at 1406 (positing that "the executive branch has often relied on the President's generic and ill-defined power as 'the sole organ of foreign affairs,' articulated by dicta in *United States v. Curtiss-Wright Export Corp.*, to justify power to act in emergency situations"); *see also* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 29 (2009) ("For their part, courts become involved in disputes over executive authority only episodically and are anxious about decision making in areas where they might lack expertise or could be perceived as intruding in policy making, as opposed to legal interpretation.").

46. *See* Scheppele, *supra* note 43, at 1022 (arguing in the post-Cold War period, "[t]he practical deference of courts to the political branches is nearly universal on all matters of foreign and military policy, including outsized claims of national security"); Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1203 (2018) ("With undefined [statutory] terms and broad delegated powers, a president is free to make the requisite [national security] finding with limited accountability.").

47. *Ex parte* Milligan, 71 U.S. 2, 121 (1866).

government."[48] "Such a doctrine," the Court concluded, "leads directly to anarchy or despotism."[49] During the domestic economic emergency of the Great Depression, the Supreme Court in *Home Building & Loan Ass'n v. Blaisdell* was equally adamant about the limits of emergency powers when such exercises of powers infringed constitutional rights.[50] In rejecting a state's provision of emergency mortgage relief that would violate the federal Constitution, the Court explained, "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."[51] Finally, in the seminal case of *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson's concurring opinion proffered a doctrinal framework to check presidential abuses of unilateral power over domestic affairs.[52]

Although the Court has imposed greater checks on presidential exercises of unilateral power over domestic affairs, its bark has proven to be greater than its actual bite.[53] The Court, in reviewing exercises of presidential unilateralism, has made clear that Congress is the primary line of defense against executive abuses of power that could undermine the rule of law and lead to rule by arbitrary will. As Justice Jackson explained in his influential concurring opinion in *Youngstown*, "A crisis that challenges the President equally, or perhaps primarily, challenges Congress. . . . We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[54]

Congress has responded to Justice Jackson's invitation by being more assertive in checking presidential exercises of unilateral power over matters of domestic affairs.[55] The effectiveness of congressional checks has been bolstered

48. *Id.*

49. *Id.*

50. Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 425 (1934).

51. *Id.*

52. 343 U.S. at 635–38 (Jackson, J., concurring) (establishing the tripartite framework that permitted presidential action only when either Congress has approved or "the imperatives of events and contemporary imponderables" support the president's actions when Congress has been silent); *but see* Lobel, *supra* note 38, at 1410 ("Although advocates of congressional authority look to *Youngstown*'s invalidation of the President's seizure of the steel mills as the basis for imposing limits on executive authority, the decision contains the seeds for an expansion of the President's emergency power.").

53. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 111 (2008) (arguing the "*Youngstown* framework is . . . of very dubious relevance to actual political outcomes . . . [because] it is excessively plastic" and there are "serious question[s] whether any actors will have the motivation to enforce it.").

54. *Youngstown Sheet*, 342 U.S. at 654 (Jackson, J., concurring); *see also* POSNER & VERMEULE, *supra* note 53, at 54 (identifying as "the basic problem underlying judicial review of emergency measures . . . the divergence between the courts' legal powers and their political legitimacy in times of perceived crisis"); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 171 (1999) ("[T]he Court, in staying out of many separation of powers issues, has essentially left it up to Congress to protect its own institutional interests against presidential aggrandizement.").

55. In domestic affairs, Congress does not suffer the same capacity constraints as it does in foreign affairs or war situations as it often can obtain the information and develop the corresponding expertise to

by presidential self-restraint in the exercise of unilateral power over domestic affairs that may have arisen out of fear of the electoral consequences from going alone on matters that directly impact Americans.[56] President Nixon, however, fundamentally changed this dynamic. He exercised unilateral powers in domestic affairs in ways not previously seen in American history. Most prominently, Nixon exercised unilateral authority to not spend money Congress appropriated for certain programs and to support domestic policies.[57] Nixon's impoundment of congressionally appropriated money allowed the President to unilaterally employ an unauthorized line-item veto over spending statutes without check from Congress.[58]

Before President Nixon could further undermine the rule of law and distort the system of checks and balances, the Watergate scandal forced his resignation.[59] A resurgent Congress reasserted some of the authority that had been long ceded to the President. In the four-year period following President Nixon's resignation, Congress passed: (1) the War Powers Resolution (WPR) to limit presidential unilateralism in the involvement of the United States in war,[60] (2) the Congressional Budget and Impoundment Control Act to prevent the President from unilaterally impounding congressionally appropriated funds,[61] (3) the National Emergencies Act (NEA) to terminate all prior emergencies and formalize a role for Congress in checking presidential exercises of emergency powers,[62] and (4) the International Emergency Economic Powers Act (IEEPA) to constrain presidential exercises of economic powers during peacetime emergencies.[63]

For the moment, the theory of checks and balances accorded with reality; the ambition of Congress counteracted the ambition of the President. But the

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determine whether the President needs to exercise unilateral power to protect the nation from an existential threat. *See, e.g.*, SCHLESINGER, *supra* note 35, at ix ("Confronted by presidential initiatives in domestic policy, the countervailing branches of the national government — the legislature and the judiciary — have ample confidence in their own information and judgment.").

56. For example, when presidents exercised unilateral emergency powers in the context of domestic affairs during the Civil War and the two World Wars, they soon thereafter turned to Congress to sanction the actions as a means to mobilize public support through statutory authorization and to raise funds through congressional appropriations. *See id.* at xiii–xiv. On issues of civil rights between the 1930s and 1960s, presidents did exercise unilateral power to overcome southern congressional resistance to legislative initiatives. *See* Moe & Howell, *supra* note 54, at 160 (describing past presidential exercises of unilateral power to advance civil rights).

57. *See* SCHLESINGER, *supra* note 35, at 238–40 (describing Nixon's policy of impounding congressionally appropriated funds).

58. *Id.* at 240; RUDALEVIGE, *supra* note 43, at 88–90 (describing both the President's unilateral impoundment of funds and unilateral exercises of war powers in parts of Southeast Asia despite congressional denial of funds to support his military actions).

59. RUDALEVIGE, *supra* note 43, at 99.

60. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

61. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

62. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

63. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977).

match between separation of powers theory and reality proved to be ephemeral in the realm of war and foreign affairs. First, the Supreme Court in *Dames & Moore v. Regan* held that the President had unilateral authority to issue an executive order implementing economic agreements with Iran to end the Iran hostage crisis.[64] In the process, the Court treated the IEEPA as a statute "indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[65]

Soon thereafter, the Supreme Court declared the legislative veto unconstitutional.[66] The legislative veto embedded into the WPR, NEA, and IEEPA was considered a critical tool by which Congress could check presidential unilateralism during wars and emergency.[67] Through the legislative veto, the two houses of Congress could terminate the war or the emergency without presidential approval.[68] Without the legislative veto, any check on the President's exercise of unilateral emergency power required passage of a statute with the support of congressional supermajorities to counter the President's likely veto.[69]

Finally, congressional capacity constraints in the realm of foreign affairs did not change with the passage of the checking legislation. Congress continued to lack the expertise needed to assess the nature and extent of national security threats from abroad.[70] Thus, while the moment of presidential corruption associated with Watergate increased the electoral incentives for Congress to respond to other Nixonian abuses of executive power, a lack of congressional capacity limited the branch's willingness to apply those checks to subsequent exercises of presidential unilateralism in foreign affairs.[71]

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64. Dames & Moore v. Regan, 453 U.S. 654, 655 (1981).

65. *Id.* at 677.

66. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) (invalidating the legislative veto because the lawmaking process contained in Article I, Section Seven of the Constitution "represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure").

67. *See, e.g.*, Lobel, *supra* note 38, at 1416 (describing the legislative veto as "a critical congressional check in the War Powers Resolution, NEA, and IEEPA").

68. *Id.*

69. *Id.* at 1417.

70. *See, e.g.*, SCHLESINGER, *supra* note 35, at 296–97 (finding that in foreign affairs, Congress "lacked continuity . . . and interest . . . information and expertise . . . power to command national attention . . . the capacity to make clear and quick decisions . . . [and] guts").

71. For example, since the adoption of the WPA, the President has reported the introduction of U.S. forces into hostilities and imminent hostilities abroad 168 times. MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICES 68 (2019). Only once, two years after the Act's passage and while the legislative veto was still in effect, did the President cite its obligations under the WPR as a reason for doing so thus triggering the sixty-day troops withdrawal requirement under the statutes. *Id.* at 10. On several occasions of committing forces abroad, "none of the President, Congress, or the courts has been willing to initiate the procedures of or enforce the directives in the War Powers Resolution." *Id.* at Summary. Similarly, presidents have invoked the NEA fifty-nine times to pursue unilateral actions. ELAINE HALCHIN, CONG. RSCH. SERV., R98-505, NATIONAL EMERGENCY POWERS 12–17 (2020). Only once, in response to President Trump's emergency proclamation regarding the southern border, did

In domestic affairs, however, a more balanced equilibrium emerged between the President and Congress after Nixon's resignation. In this more balanced equilibrium, presidents generally resisted invoking emergency powers over matters of domestic affairs. Of the fifty-nine invocations of the NEA, only five primarily involved domestic affairs.[72] Two emergency orders responded to pandemics, one responded to a drought, another targeted weapons proliferation by Americans, and the last involved the southern border.[73]

Only one of those five presidential assertions of emergency powers over domestic affairs, the emergency involving the southern border, saw the invocation of the only mechanism by which the President can access funds to respond to, or mitigate, an emergency without congressional approval.[74] That invocation of emergency powers to access funds for the border wall represents the same threat to the system of checks and balances as President Nixon's impoundment of funds. This time, however, an impeachment of the President would not halt this distortion to the system of checks and balances. Rather, the episode would reveal a fundamental weakness in the system, which future presidents could exploit in ways that would irreparably damage the rule of law.

B. Presidential Unilateralism in the Trump Era

Trump's presidency brought together the perfect storm of four factors that threaten the proliferation of future presidential abuses of unilateral emergency powers: (1) a President with authoritarian tendencies willing to push the boundaries of presidential authority beyond its limits and electorally punish those congressmembers who seek to constrain him;[75] (2) an intensely loyal and

Congress pass a bill to terminate the emergency under the NEA. *Id.* at 17–18. That effort to check presidential unilateralism ultimately failed as a result of President Trump's veto. *Id.* at 20.

72. The Congressional Research Service provides a list of all fifty-nine emergency declarations since the adoption of the NEA. I coded the declarations as foreign if the exercise of power was principally directed at a foreign person, entity, or government and domestic if it did not. ELAINE HALCHIN, CONG. RSCH. SERV., R98-505, NATIONAL EMERGENCY POWERS 12–17 (2020).

73. Exec. Order No. 12,930, 59 Fed. Reg. 50,475 (Sept. 29, 1994) (Ordering measures to restrict the participation by United States persons in weapons proliferation activities); Proclamation No. 6907, 61 Fed. Reg. 35,083 (July 1, 1996) (declaring a state of emergency and release of feed grain from the disaster reserve); Proclamation No. 8443, 74 Fed. Reg. 55,439 (Oct. 23, 2009) (declaring a national emergency with respect to the 2009 H1N1 influenza pandemic); Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (declaring a national emergency concerning the southern border of the United States); Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (declaring a national emergency concerning the novel coronavirus disease (COVID-19) outbreak).

74. 10 U.S.C. § 2808 (authorizing "the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces" when the President declares a national emergency). President Trump invoked the statute to support his diversion of money for the construction of the wall. *See* ELAINE HALCHIN, CONG. RSCH. SERV., R98-505, NATIONAL EMERGENCY POWERS 17–19 (2020).

75. *See, e.g.*, Douglas Kellner, *Donald Trump as Authoritarian Populist: A Frommian Analysis*, *in* CRITICAL THEORY AND AUTHORITARIAN POPULISM 71–79 (Jeremiah Morelock ed., 2018) (describing the authoritarian traits exhibited by Donald Trump).

politically active minority of the American people willing to support the President no matter what he does in office;[76] (3) electoral structures that empower this minority to exercise undue influence on congressional elections;[77] and (4) co-partisan congressmembers who care intensely about reelection, are willing to ignore executive abuses of power, and will sacrifice their governing ambitions to curry favor with, or avoid punishment from, the President.[78]

The consequence of this perfect storm was President Trump's exercise of unchecked unilateral authority. As described in the introduction, under the pretext of an emergency, President Trump unilaterally diverted congressionally appropriated funds to build a wall along the southern border.[79] Similarly, President Trump invoked national security to unilaterally impose a travel ban almost entirely focused on countries with predominantly Muslim populations.[80] The President also selectively enforced trade agreements and effectively halted asylum using national security as the pretext for his unilateral actions.[81]

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76. *See, e.g.*, Edward Lempinen, *Despite Drift Toward Authoritarianism, Trump Voters Stay Loyal. Why?*, BERKELEY NEWS (Dec. 7, 2020), https://news.berkeley.edu/2020/12/07/despite-drift-toward-authoritarianism-trump-voters-stay-loyal-why/ (providing an account of the loyalty of Trump supporters and explanations for that loyalty).

77. *See, e.g.*, Susan Davis, *GOP Primaries Focus on Candidates' Loyalty to President Trump*, NPR (May 4, 2018), https://www.npr.org/2018/05/04/608193538/gop-primaries-focus-on-candidates-loyalty-to-president-trump (describing the efforts of Republican primary candidates to attract the support of Trump loyalists to win congressional elections).

78. *See, e.g.*, Reid J. Epstein & Nick Corasaniti, *How Gerrymandering Will Protect Republicans Who Challenged the Election*, N.Y. TIMES (Jan. 19, 2021), https://www.nytimes.com/2021/01/19/us/politics/republicans-gerrymander-trump-election.html (describing Republican congressmembers' support of President Trump's efforts to overturn the election and showing how gerrymandering will insulate the congressmembers from electoral accountability).

79. *See* Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (declaring a national emergency concerning the southern border of the United States); *see also* Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J. F. 610, 610–11 (2019) (describing how "President Trump's declaration of a 'national emergency' . . . belatedly focused meaningful public attention on . . . Congress's systematic over-delegation of authority to the President to respond to a surprisingly broad array of real or invented (or, at least, overblown) crises").

80. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (implementing the third of three travel bans and the one the Supreme Court upheld); *see also* Cecillia D. Wang, *Ending Bogus Immigration Emergencies*, 129 YALE L.J. F. 620, 623–26 (2019) (reviewing President Trump's exercises of immigration authority and concluding that the lesson "is that the checks and balances against presidential power . . . may be dangerously ineffective").

81. *See, e.g.*, Proclamation No. 9894, 84 Fed. Reg. 23,987 (May 19, 2019) (adjusting imports of steel into the United States); Proclamation No. 10,060, 85 Fed. Reg. 49,921 (Aug. 6, 2020) (adjusting imports of aluminum into the United States); *see also* CONG. RSCH. SERV., R45529, TRUMP TARIFF ACTIONS: FREQUENTLY ASKED QUESTIONS 1–3 (2019); Presidential Determination on Refugee Admissions for Fiscal Year 2019, 83 Fed. Reg. 55,091 (Nov. 1, 2018) (limiting the number of refugees to be admitted to the United States during the 2019 fiscal year to 30,000); *see also* Farber, *supra* note 3, at 1155 (describing President Trump's aggressive use of unilateral trade authority pursuant to Section 232 of the Trade Expansion Act of 1962, which granted the President the authority to impose trade restrictions for national security purposes, and criticizing the flimsy national security rationales supporting the exercises of unilateral power); Leigh Ann Caldwell & Heidi Pryzbyla, *GOP's Division on Tariffs Erupts on Senate Floor*, NBC NEWS (June 12, 2018), https://www.nbcnews.com/politics/congress/gop-s-division-tariffs-erupts-senate-floor-n882581
(reporting on political opposition to the President's unilateral trade actions but an unwillingness to check the

Finally, and most perniciously, President Trump exercised unilateral power to support his reelection efforts. In this effort, the President illegally impounded money Congress appropriated for Ukrainian security to coerce Ukrainian authorities to investigate his future opponent in the presidential election, Joe Biden.[82] That presidential abuse of power led to President Trump's impeachment in the House of Representatives.[83] But the Senate, controlled by the President's co-partisans, refused to convict and remove the President for this action.[84] Furthermore, in the immediate aftermath of the impeachment, there would not be a resurgence of Congress as a check on presidential unilateralism as occurred after the Watergate scandal forced the resignation of President Nixon.[85] Rather, President Trump followed his impeachment with more exercises of unchecked presidential unilateralism, retaliating against witnesses for testifying during the impeachment hearings and the Inspector General for fulfilling his statutory duty of reporting the President's interaction with Ukrainian authorities to Congress.[86]

Public opinion surveys suggest President Trump's exercises of presidential unilateralism lacked the support of the majority of the people.[87] Yet, Congress

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President because of "the damage a presidential Twitter tirade against Republicans could cause the party in a difficult election season").

82. U.S. GOV'T ACCOUNTABILITY OFF., B-331564, MATTER OF OFFICE OF MANAGEMENT AND BUDGET—WITHHOLDING OF UKRAINE SECURITY ASSISTANCE (2020) (describing the President's Office of Management and Budget's illegal impoundment of funds that Congress appropriated for Ukrainian security).

83. *See, e.g.*, Martin & Haberman, *supra* note 20.

84. *See id.* (describing the President's iron grip over the Republicans during the impeachment proceeding with the result that "[n]o House Republican supported either article, or even authorized the investigation" into the President's dealings with Ukraine as "they defended him as a victim of partisan fervor").

85. *See supra* notes 60–63.

86. *See* Peter Baker et al., *Trump Hits Back, Firing Witnesses After Acquittal*, N.Y. TIMES, Feb. 8, 2020, at A1 (reporting that Trump removed two central witnesses in the impeachment trial from their government posts two days after his acquittal in the Senate); Maggie Haberman et al., *Trump to Fire Intelligence Watchdog Who Had Key Role in Ukraine Complaint*, N.Y. TIMES (Apr. 3, 2020), https://www.nytimes.com/2020/04/03/us/trump-inspector-general-intelligence-fired.html (reporting President Trump's firing of "the intelligence community inspector general whose insistence on telling lawmakers about a whistle-blower complaint about his dealings with Ukraine triggered impeachment proceedings").

87. *See, e.g.*, Domenico Montanaro, *Poll: 6-In-10 Disapprove of Trump's Declaration of a National Emergency*, NPR (Feb. 19, 2019), https://www.npr.org/2019/02/19/695720851/poll-6-in-10-disapprove-of-trumps-declaration-of-a-national-emergency (reporting a survey finding that 61% of surveyed adults disapproved and 36% approved of President Trump's emergency declaration); Ben Casselman & Ana Swanson, *Survey Shows Broad Opposition to Trump Trade Policies*, N.Y. TIMES (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/business/economy/trade-war-economic-concerns.html (reporting that 58% of surveyed adults thought increased tariffs between the United States and China were bad and only 38% thought they were good for the United States); Michael Burke, *Poll: Just 30 Percent Favor Stricter Asylum Rules as Trump Calls for Tightening Restrictions*, THE HILL (Apr. 30, 2019), https://thehill.com/homenews/news/441300-poll-just-30-percent-favor-stricter-asylum-rules-as-trump-calls-for-tightening (reporting a poll finding that 30% supported making asylum more difficult as Trump's executive order did, while 27% supported making asylum easier and 34% supported keeping the law the same); *but see* Steven Shepard, *Poll: Majority of Voters Back Trump Travel Ban*, POLITICO (July 5, 2017),

failed to check any of these exercises of power. According to the leading separation of powers accounts, the failure of Congress to check the President should not be surprising. Daryl Levinson and Richard Pildes argue that congressmembers' loyalties lie more with their parties than with the branches they serve.[88] As a result, the operation of the system of checks and balances is predicated on divided government in which a member of one party controls the presidency and members of the other party control both branches of Congress.[89] Only in divided government, Levinson and Pildes contend, might we expect Congress to pass statutes or pursue other checks on presidential actions.[90] Since there was never completely divided government during the Trump administration, Congress's failure to check presidential unilateralism was entirely predictable.[91]

While correct in its predictions about the operation of the system of checks and balances, Levinson and Pildes's Separation of Parties theory has at least two blind spots that the Trump years exposed. First, the theory fails to fully account for how presidential unilateralism shifts the burden to Congress to override the President's actions through the passage of a statute requiring supermajority support to overcome a presidential veto. As a result, divided government alone does little to secure the operation of the system of checks and balances when the president takes the initiative. Only when the opposing party controls a supermajority of the seats in the House and Senate, which has never happened in the history of this Republic, would Congress be able to check presidential unilateralism under the Separation of Parties framework.

Furthermore, the theory fails to account for the willingness of co-partisans to check presidential abuses of authority. Dozens of Republican congressmembers expressed opposition to President Trump's exercises of unilateral authority on policy grounds due to the unpopularity of the President's actions, but also in defense of congressional authority and the system of checks and balances.[92] These expressions of opposition suggest a willingness by

https://www.politico.com/story/2017/07/05/trump-travel-ban-poll-voters-240215 (reporting a poll finding that 60% of respondents supported the travel ban and only 28% opposed it).

88. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2323–24 (2006) (arguing that "the political interests of elected officials generally correlate more strongly with party than with branch").

89. *Id.* at 2323 ("[P]arties can create the conditions necessary for interbranch competition to emerge.").

90. *Id.* at 2329.

91. During the first half of Trump's presidency, Republicans controlled the two houses of Congress. Aaron Blake, *Trump Set to Be First President Since 1932 to Lose Reelection, the House and the Senate*, WASH. POST, (Jan. 6, 2021), https://www.washingtonpost.com/politics/2021/01/06/trump-set-be-first-president-since-1932-lose-reelection-house-senate/. During the second half, Republicans controlled the Senate and Democrats controlled the House. *Id.*

92. *See supra* notes 5–6, 10, and accompanying text; *see also* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 30–31 (2017) (arguing "members of Congress do, on some occasions, care about their chamber's power, per se").

members of Congress to put aside partisan loyalties to protect branch prerogative, the constitutional framework, and ultimately the rule of law.

However, far too few of these Republicans formalized their opposition through votes in favor of bills or other actions that would check presidential unilateralism. They failed to do so because of the perfect storm of factors that required they either be loyal to the President or risk losing their seats in Congress. President Trump made clear his willingness to electorally punish disloyal Republicans. And Republican congressmembers recognized the President's capacity to mobilize his devoted followers who, though they represented a minority in the nation at-large, benefited from electoral structures that enabled them to disproportionately influence congressmembers' reelection prospects.[93] Rather than facing a primary challenger supported by the President, most Republican congressmembers acquiesced to presidential exercises of unilateral authority even when they involved clear abuses of power.[94] Most Republicans who opposed the President either faced defeat in their next primary or general election or chose to retire from Congress.[95] Republican congressmembers during the Trump era were therefore dependent on the President for their reelection in ways not accounted for in the Separation of Parties framework.

That dynamic of congressional dependence also distorted the system of checks and balances in ways that the constitutional framers did not anticipate. That oversight probably reflects the Founders' focus on constructing a checks and balances framework that could adequately combat the principal mischief they feared, legislative tyranny.[96]

In contrast to the Framers and modern separation of powers theorists, the American revolutionaries, who participated in the construction of state constitutions over a decade before the federal Constitutional Convention, were fully cognizant of the executive's capacity to secure legislative loyalty and dependence. The revolutionaries were familiar with the efforts of English kings over the prior two centuries to influence parliamentary elections to secure a

93. *See* Janet Hook, *Donald Trump's Iron Grip on the GOP: Why Republicans Stick With Him*, L.A. TIMES (June 12, 2020), https://www.latimes.com/politics/story/2020-06-12/republican-officials-fear-trump (showing how the interaction of a primary system and the devoted support of a Republican minority in states and districts renders most elected officials dependent on the President).

94. *See supra* notes 9–11 and accompanying text.

95. *See* Martin & Haberman, *supra* note 20 ("Interviews with current and former Republican lawmakers as well as party strategists, many of whom requested anonymity so as not to publicly cross the president, suggest that many elected officials are effectively faced with two choices. They can vote with their feet by retiring . . . [o]r they can mute their criticism of him.").

96. As James Madison complained, "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." He then acknowledged that "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." THE FEDERALIST NO. 48, *supra* note 13, at 309 (James Madison); *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 603 (1984) ("The Constitutional Convention arose out of dissatisfaction with a government dominated by the legislature.").

loyal and dependent Parliament willing to acquiesce to the monarch's exercise of unchecked unilateral power. They were also familiar with episodes of parliamentary resistances to such monarchical efforts to protect Parliament's co-equality with, and independence from, the Crown. In the remainder of this Article, I excavate the origins of the checks and balances framework to recover the source of the legislative will to check.

II. EVOLVING THEORIES OF GOVERNANCE AND THE PARLIAMENTARY ROLE

The Trump presidency exposed the value of a central predicate to our constitutional system of checks and balances, legislative independence. Although much has been written about the value of judicial and executive independence to our frame of government, American legal scholars have entirely overlooked the principle of legislative independence. One reason is that there is nothing in the Constitution itself that speaks directly to the principle of legislative independence. Whereas the Constitution provides for selection mechanisms in the form of life tenure to protect judicial independence and the electoral college system to protect executive independence, there is nothing apparent in the document that provides for the analogous legislative independence.[97] Furthermore, the Framers of the Constitution, who are an obvious focal point in judicial review and scholarly discussions of our system of checks and balances, defended the constitutional mechanisms for protecting judicial and executive independence, but did not say anything at all about legislative independence.[98]

In the following, I argue that despite this silence, the principle of legislative independence, like the principles of judicial and executive independence, is a core component of the American checks and balances framework. To begin advancing this argument, I explore the seventeenth-century Crown–Parliament struggle that has been neglected in legal scholarly accounts of the origins of the American checks and balances framework. On one side of this struggle stood successive English kings asserting unilateral authority in the form of royal prerogative, pursuant to a theory that kings had the divine right to rule absolutely and perpetually. On the other side stood Parliament seeking to shed its historical status as an institution dependent on, and subordinate to, the Crown through a theory of coordinated power in which the two Houses of Parliament are independent from, and coequal to, the Crown. In this Part, I outline the theoretical and historical origins of Crown–Parliament disputes about parliamentary power and status in the evolving English frame of government.

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97. *See* sources cited *supra* note 22.

98. *See* sources cited *supra* note 21.

A. The Divine Right of Kings and Royal Absolutism

Royal absolutism derived from a divine right theory of kingship was the leading theory of governmental authority in England at the beginning of the tumultuous seventeenth century.[99] The theory of divine right draws from biblical conceptions of the origins and evolution of human society. God as the origin of authoritative power created Adam and conferred on him absolute dominion over all of his children.[100] Adam's absolute authority over his children served as the foundation for his regal authority over the world.[101] That regal authority was passed down from Adam to his male descendant and after the Great Flood was extended to all parts of the globe through Noah and his children.[102]

Kings, according to this theory, were God's vicegerents holding absolute and perpetual power over their subjects.[103] In the words of one of the leading philosophers of royal absolutism, the King had the power "to dispose of [the people's] property and persons [and] govern the state as he thinks fit."[104] The King could exercise such power according to his own will or according to laws that he made, enforced, and interpreted.[105] In exercising this power, the King was accountable only to God.[106]

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99. Matthew White, *The Turbulent 17th Century: Civil War, Regicide, The Restoration and The Glorious Revolution*, BRITISH LIBRARY (June 21, 2018), https://www.bl.uk/restoration-18th-century-literature/articles/the-turbulent-17th-century-civil-war-regicide-the-restoration-and-the-glorious-revolution.

100. *See, e.g.*, NATHANIEL JOHNSTON, THE EXCELLENCY OF MONARCHICAL GOVERNMENT 13 (London, Printed by T.B. for R. Clavel 1686) ("We have reason to judge, (according to Scripture) that God gave *Adam* (as an universal Monarch) Dominion over all his Fellow Creatures, and of all Men that should be born into the World as long as he liv'd . . . .").

101. According to leading divine right theorist Robert Filmer, *"[c]reation made man Prince of his posterity*. And indeed not only *Adam*, but the succeeding *Patriarchs* had, by Right of Fatherhood, Royal Authority over their Children. . . . And this subjection of Children [is] the Fountain of all *Regal Authority*, by the Ordination of God himself . . . ." ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS 11–12 (London, 1680).

102. *See, e.g.*, JOHN WILSON, A DISCOURSE OF MONARCHY 19 (London, Printed by M.C. for Jos. Hindmarsh 1684) (describing the passing of sovereign power to Noah and his children after the Flood).

103. *See, e.g.*, ROBERT SHERINGHAM, THE KINGS SUPREMACY ASSERTED 34 (London, 1660) (deriving the King's supremacy from him "being the only head of the Kingdome, having no equal or Superiour but God alone, whose Vicegerent he is upon earth"). English historians C.C. Weston and J.R. Greenberg explain that political theories of divine right and patriarchalism were frequently voiced in early modern England where the belief in a divinely ordered "world was ubiquitous, their advocates arguing that since God, the author of the universe, had ordained kings to rule as his vicars on earth, the English king was the human source of law and political authority generally." CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 1–2 (1981).

104. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 27 (M.J. Dooley trans., Alden Press, 1955) (1576).

105. *Id.* at 25–26 (theorizing that the king as sovereign possesses the "absolute and perpetual power vested in a commonwealth").

106. JOHNSTON, *supra* note 100, at 131 ("[Kings] are accountable to none but the Great Sovereign of the Universe."). The divine right theorists frequently referenced the revered thirteenth-century English cleric and jurist, Henry de Bracton, who asserted in his famous writings on law, "[t]he king must not be under man

The only constraints on royal power, according to the divine right theory, were those the King chose to impose on himself through concessions that he granted to his subjects.[107] In pre-seventeenth-century English history, monarchs made two major concessions to the people. First, under the Magna Carta, monarchs would have to obtain the general consent of the "archbishops, bishops, abbots, earls, and greater barons," summoned to convene in what later became known as a Parliament, in order to tax the people.[108] Second, in a practice that began with Henry III in the thirteenth century and evolved over time, monarchs granted to the nobility and commoners summoned to a Parliament the power to deliberate and advise on laws the King had made.[109]

Despite these concessions to subjects convened in parliaments, monarchs under the divine right theory of kingship continued to claim absolute sovereign power. This was made manifestly clear in the assertion that the King stood exempt from the laws he made. "Kingly power," according to Robert Filmer, the leading seventeenth-century divine right theorist, "is by the Law of God, so it hath no inferiour Law to limit it."[110] Divine right adherent and Anglican prelate, James Ussher, further elaborated that kings "are not liable to the civil punishments set down for the breach of any law, as having no superior upon earth that may exercise any such power over them."[111] "[I]f the Sovereign were obliged . . . to give an account of his Administration to his Subjects," Nathaniel Johnston concludes, "he should cease from being a Sovereign."[112]

In addition to being above the law, the King claimed unilateral royal prerogatives that positioned the Crown as the unrivaled sovereign power. This included powers to call and dissolve Parliament, command the militia, coin money, pardon felonies and treasons, make offices, and appoint officers.[113] And then there were the two royal prerogatives that would emerge as central focal points in the late seventeenth-century Crown–Parliament struggle: (1) the

but under God." 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 33 (Samuel E. Thorne trans., 1968) (1235). *See e.g.*, PETER HEYLYN, THE STUMBLING-BLOCK OF DISOBEDIENCE AND REBELLION 249–50 (London, Printed by E. Cates for Henry Seile 1658) ("*Bracton* . . . affirms expressly, that the King hath supreme power and jurisdiction over all causes and persons in this his Majesties Realm of *England*, that all jurisdictions are vested in him and are issued from him, and that he hath . . . the right of the sword, for the better governance of his people.").

107. JOHNSTON, *supra* note 100, at 71 ("[T]he Kings of *England* . . . are not limited by any other Power than their own Royal Pleasure . . . .").

108. MAGNA CARTA, cl. 14 (G.R.C Davis trans., British Museum 1963) (1215), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation#.

109. ROBERT HOLBORNE, *The Freeholder's Grand Inquest Touching Our Sovereign Lord the King, and His Parliament*, *in* PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER 143 (Peter Laslett ed., 1949) (1653) (describing Henry III's first calling of a Parliament comprised of commoners and nobles).

110. FILMER, *supra* note 101, at 81.

111. JAMES USSHER, *The Power Communicated by God to the Prince and the Obedience Required of the Subject*, *in* 11 THE WHOLE WORKS OF THE MOST REVEREND JAMES USSHER 317 (Charles R. Elrington ed., Dublin, Hodges and Smith 1847) (1654).

112. JOHNSTON, *supra* note 100, at 133.

113. *Id.* at 126 (describing the extent of the royal prerogatives).

prerogative to grant, revise, and revoke charters to borough corporations, including those responsible for selecting members of Parliament;[114] and (2) the prerogative to dispense with laws "upon Causes only known to him."[115]

King James I, the first of four successive seventeenth-century kings from the House of Stuart, assertively espoused the divine right theory both before his accession to the English crown and during his reign. In the *Trew Law of Free Monarchies*, King James ascribed to kings the status of Gods who had the unfettered authority "to minister Justice and Judgement to the people," "[t]o advance the good, and punish the evill," "[t]o establish good Lawes to his people," and "procure obedience . . . ."[116] King James derived absolute royal authority to make laws from the divine rights theory's account of history. According to this version of history, kings preceded in time any convening of parliaments.[117] Therefore, "it followes of necessitie, that the kings were the authors and makers of the Lawes, and not the Lawes of the kings."[118] Furthermore, James asserted, "it lies in the power of no Parliament, to make any kinde of Lawe or Statute, without his Scepter be to it, for giving it the force of a Law . . . ."[119]

The governing hierarchy established in the mind of King James I at the turn of the seventeenth century was one in which the monarch held absolute power as ruler over its subjects. The Parliament, as a convening of nobility and commoners, stood as a subordinate subject to the Crown.

After James acceded to the Crown, his divine right theory of kings and its associated royal absolutism began to encounter resistance from a more assertive Parliament. The opportunity for Parliament to take the initiative and claim for itself a more significant role than subordinate subject to the King arose from its power to withhold consent to the Crown's requests for money.[120] Due to the combination of the Crown's constant involvement in war, the growing expense of war due to technological developments, and economic inflation, King James faced a shortage of monetary supplies to fund war efforts and to support his royal household.[121]

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114. *See, e.g.*, JOHN KIDGELL, THE POWER OF THE KINGS OF ENGLAND TO EXAMINE THE CHARTERS OF PARTICULAR CORPORATIONS AND COMPANIES 4–8 (London, 1684) (providing a defense of the King's power over corporate borough charters).

115. FILMER, *supra* note 101, at 98.

116. KING JAMES I, *The Trew Law of Free Monarchies*, *in* KING JAMES VI AND I: POLITICAL WRITINGS 63–64 (Johann P. Sommerville ed., 1994) (1598).

117. *Id.* at 73–74.

118. *Id.* at 73.

119. *Id.* at 74.

120. *See* WALLACE NOTESTEIN, THE WINNING OF THE INITIATIVE BY THE HOUSE OF COMMONS 31 (London, Oxford Univ. Press 1924).

121. *See* CONRAD RUSSELL, KING JAMES VI AND I AND HIS ENGLISH PARLIAMENTS: THE TREVELYAN LECTURES DELIVERED AT THE UNIVERSITY OF CAMBRIDGE 1995, at 2–4 (Richard Cust & Andrew Thrush eds., 2011).

James's rather desperate financial situation provided Parliament the opening to make demands for redress of grievances arising from royal exercises of prerogative power.[122] Along with these grievances came parliamentary assertions of privileges that prior monarchs had denied. These included parliamentary members' privilege to be free from royal arrest for statements or actions in their official capacity, to speak on issues arising in the kingdom without the Crown's permission, and to resolve election disputes involving members of the House of Commons.[123]

By the end of James I's reign, there was a subtle and slight shift in the balance of power between the Crown and Parliament. Most still considered royal authority to be absolute and unequaled as the King made only limited concessions in response to parliamentary grievances directed at his exercise of royal prerogatives.[124] But even King James himself acknowledged during his most desperate financial state in 1610 that he as King was "bound to observe that paction made to his people by his Lawes . . . ."[125] In addition to acknowledging being bound by his laws, the King recognized parliamentary privileges to be free from arrest, to decide election disputes, and to speak freely in order to advise the king on matters of government.[126]

B. Toward a Coordinate Theory of Governance

Even as Parliament asserted important privileges, the institution continued to function as a subordinate to a monarch that exercised almost entirely unfettered authority. But the problem of inadequate monetary supply continued to plague James's son and successor, King Charles I, when he assumed the throne.[127] Unlike James, who philosophized about absolute monarchical power but nonetheless respected a parliamentary role in governing, Charles viewed and treated Parliament as a subject from which he demanded obedience and

122. *See* NOTESTEIN, *supra* note 120 (describing Parliament's increasingly assertive demands that the King respond to grievances prior to Parliament consenting to subsidies).

123. *See* DAVID L. SMITH, THE STUART PARLIAMENTS, 1603–1689, at 45–46, 65–67 (John Morrill & Pauline Croft eds., 1999) (describing the assertions of these privileges during the reign of King James I). One of Parliament's most famous assertions of privileges came early in the reign of King James at a time of great tension between the Crown and Parliament. *See* House of Commons, Form of Apology and Satisfaction (June 20, 1604), *in* J.R. TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I 217–24 (Cambridge Univ. Press, 1961).

124. *See* SMITH, *supra* note 123, at 45–46, 65–67.

125. KING JAMES I, A Speech to the Lords and the Commons of the Parliament at White-Hall (Mar. 21, 1610), *in* KING JAMES VI AND I, POLITICAL WRITINGS, *supra* note 116, at 183.

126. *See, e.g.*, TANNER, *supra* note 123, at 201, 302 (describing a controversy between the Crown and Parliament over which institution had the authority to resolve disputed parliamentary election returns and a case addressing the privilege of parliamentarians to be free from arrest for speeches and actions as members of Parliament).

127. RUSSELL, *supra* note 121, at 184 (describing the debt situation of the Crown at the time Charles assumed the throne).

loyalty.[128] A deeply adversarial relationship arose between the Crown and Parliament in which Charles was viewed by members of Parliament as an existential threat to the institution and to the people's liberties.[129]

Parliament sought to restrain Charles in the same way that they did James—by withholding consent to taxation to force him to limit his exercise of royal prerogatives.[130] In a Petition of Right, Parliament requested that in exchange for monetary supplies, the King recognize the people's liberties and restrain from nonparliamentary forms of revenue-raising without their consent.[131] Charles responded to Parliament with an ultimatum: "if you . . . should not do your duties in contributing what this State at this time needs I must in discharge of my conscience use those other means which God hath put into my hands to save that . . . the follies of particular men may otherwise hazard to lose."[132] In other words, Charles warned Parliament to either fulfill its historical function and provide him with the money demanded or he would use other unilateral ways to obtain the funds and render Parliament irrelevant.

The Parliament refused to supply the King the money he demanded and Charles dissolved the Parliament in March of 1629.[133] Charles then proceeded to rule without a Parliament for over a decade.[134] This period of personal rule marked the last period of royal absolutism in English history, as it would be followed by the emergence of an alternative theory of governance that put the Crown and Parliament on a more equal standing.

After Charles dissolved the Parliament, he exercised royal prerogatives to raise revenue without parliamentary consent. The King granted monopolies and patents, sold honors and titles, applied customs and impositions to imports, and forced the people to lend money to the Crown.[135] Each of these forms of

128. SMITH, *supra* note 123, at 113 ("Although he was not averse to Parliaments in principle he tended, far more than James, to regard them as tests of his subjects' loyalty, and he was acutely sensitive to the slightest sign of disobedience.").

129. *Id.* (Due to Charles's authoritarian tendency and demands for parliamentary obedience, many members of the House of Commons during the late 1620s "became more and more fearful about the future of Parliaments").

130. After Charles assumed the throne, Parliament sought to impose further limits on the King's taxing powers by limiting to one year the King's capacity to impose customs as opposed to his lifetime as parliaments had granted to prior kings. *Id.* at 54.

131. Petition of Right 1628, 3 Car. 1 c. 1 (Eng.), https://oll.libertyfund.org/page/1628-petition-of-right.

132. King Charles I, King's Speech to Parliament (Mar. 17, 1628), *in* J.P. KENYON, THE STUART CONSTITUTION OF 1603-1688: DOCUMENTS AND COMMENTARY 80–81 (1966).

133. *See* PEREZ ZAGORIN, THE COURT AND THE COUNTRY: THE BEGINNING OF THE ENGLISH REVOLUTION 66 (1970) (describing the political context in which Charles dissolved Parliament as one of "bitterest animosity" between the Crown and Parliament).

134. *See* JOHN K. GRUENFELDER, INFLUENCE IN EARLY STUART ELECTIONS, 1604–1640, at 183 (1981) (describing the period of King Charles's "personal rule" as one in which "royal policies seemed to emphasize the growing division of interest between the king and his subjects").

135. *See, e.g.*, LINDA LEVY PECK, COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND 137–43 (1990) (describing the King's sale of honors and titles and grant of patents of monopolies

nonparliamentary revenue generation had encountered some resistance from prior Parliaments and the people.[136] But it was Charles's new form of nonparliamentary revenue generation, the required payment of ship money, that led to a constitutional controversy about royal prerogatives and parliamentary authority.

English kings long claimed the authority to demand that coastal towns and counties provide ships for defense of the realm in an emergency.[137] When Charles first conscripted ships from coastal towns in 1634, England faced multiple perils from contending Spanish and French warships in the English Channel, fierce competition from Dutch fishermen along the western coast, and "marauding barbary corsairs" or pirates on all sides.[138] The conscription of ships therefore fit within the long-standing royal prerogative to defend the realm. The next year, however, Charles extended the demand to inland counties and asked that they provide money instead of ships to support the building of a stronger navy during these emergencies.[139] Soon after Charles made these demands, however, it became clear that emergency defense was a mere pretext for raising money that Charles used for things other than building a strong navy, including supporting the popularly reviled Catholic Spain in its thirty-year war on the continent.[140]

When the imposition of ship money was challenged in court as a tax without parliamentary consent in violation of the Magna Carta, a seven-judge majority of the King's Court of Exchequer ruled in favor of Charles.[141] The court's majority deferred to the King's emergency justification for the imposition, concluding that it lacked the competency to question whether an

as a tool to generate revenue); SMITH, *supra* note 123, at 53–54 (providing an account of the King's use of forced loans and custom and impositions to raise revenue).

136. *See* Statute of Monopolies 1623, 21 Jac. 1 c. 3 (Eng.) (establishing limits on the Crown's grant of monopolies); The Five Knights' case (1627), 3 How. St. Tr. 1 (challenging forced loans imposed by King Charles); *The Commons Remonstrance of Tonnage and Poundage*, *in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 73 (Samuel Gardiner ed., 1906) (1628) (declaring "[t]hat the receiving of Tonnage and Poundage, and other impositions not granted by Parliament, is a breach of the fundamental liberties of this kingdom"). In the Remonstrance of Tonnage and Poundage, the House of Commons not only disputed the Crown's power to raise impositions but also the Court of the Exchequer's decision that validated the Crown's power to raise impositions without parliamentary consent. Bate's Case (1606), 2 St. Tr. 371, *in* ERNEST C. THOMAS, LEADING CASES IN CONSTITUTIONAL LAW BRIEFLY STATED 26–27 (London, Steven & Haynes 1908).

137. KENYON, *supra* note 132, at 88 ("The right of the king to demand ships from the maritime towns and counties for the defence of the realm and the suppression of piracy was undoubted . . . .").

138. *Id.*

139. *Id.*

140. *Id.*; *see also* CONRAD RUSSELL, THE CRISIS OF PARLIAMENTS: ENGLISH HISTORY 1509–1660, at 321 (1971) (recounting how ship money "was by far the most profitable of Charles's financial expedients").

141. Rex v. Hampden (1637) 3 How. St. Tr. 826, *in* ERNEST CHESTER THOMAS, LEADING CASES IN CONSTITUTIONAL LAW BRIEFLY STATED 30–34 (London, Steven & Haynes 1908).

emergency in fact existed.[142] Five judges, however, dissented, and their dissents inspired a campaign of popular evasion of the tax that dramatically reduced the King's ship-money revenue.[143] The reduced ship-money revenue came at an unfortunate time for Charles as a religious dispute with Scotland involving his exercise of royal prerogative triggered a war that increased his demand for revenue beyond what he could raise without Parliament.[144] In April 1640, Charles summoned a Parliament, concluding his decade of personal rule.[145]

When Charles summoned Parliament, it was in no mood to aid the King's war efforts with the Scots. Many members, in fact, supported the Scots and sought to use the King's predicament as an opportunity to limit the royal prerogative to tax without parliamentary consent.[146] Within a month, Charles dissolved the Parliament having received nothing from it in support of his war efforts.[147] The Scots' military advances and ultimate occupation of parts of England forced Charles to summon another Parliament four months later in hopes of staving off the collapse of his government.[148]

That Parliament, which later became known as the Long Parliament because it would sit for nearly twenty years,[149] made a series of demands on the King. First, Parliament demanded that the King renounce the collection of ship-money as unlawful.[150] Charles quickly acceded to the request. "[W]hat parts of my revenue that shall be found illegal or grievous to the public," Charles announced in a speech to Parliament in January 1641, "I shall willingly lay down, relying entirely upon the affections of my people."[151]

Just over a year later, in March 1642, Parliament, distrusting the King exercising royal prerogative to command and direct the militia during his war with Scotland, passed the Militia Ordinance without the King's assent.[152] This

142. *See id.* at 32 ("The law which has given the interest and sovereignty of defending and governing the kingdom to the king, also gives him power to charge his subjects for its defence, and they are bound to obey.").

143. *See* RUSSELL, *supra* note 140, at 322 (explaining that the dissents "gravely damaged the king's case in the eyes of the public, and people who previously had only complained of their assessments began a massive campaign of tax refusal").

144. *See id.* at 323–27 (describing the lead up to the war with Scotland over matters of religion).

145. *Id.* at 327.

146. *See* ZAGORIN, *supra* note 133, at 103 (recounting the shared interests between the Scots and the English opponents to the King in Parliament and explaining that "the English oppositionists saw the revolt as the occasion that might reinstate liberty and religion in England").

147. *Id.* at 104.

148. *Id.* at 104–05.

149. *Id.* at 116–18.

150. Ship Money Act 1640, 16 Car. 1 c. 14, *reprinted in* 5 Statutes of the Realm, 1628–80, at 116–17 (John Raithsby ed., Great Britain Record Commission 1819), http://www.british-history.ac.uk/statutes-realm/vol5/pp116-117.

151. King's Speech (Jan. 25, 1641), *in* KENYON, *supra* note 132, at 19. Parliament also codified a prohibition on ship-money. *See* Act Declaring the Illegality of Ship-Money 1641, 17 Car. 1 c. 14, *reprinted in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, *supra* note 136, at 189–191.

152. *See* CHRISTOPHER HIBBERT, CAVALIERS & ROUNDHEADS: THE ENGLISH CIVIL WAR, 1642–1649, at 37–38 (1993).

ordinance granted to Parliament the power to command and direct the militia.[153] Two months later, the Parliament declared, on the basis of the King's coronation oath requiring that he uphold "the Laws and Rightful Customs which the Commonalty of this your Kingdom have," that the King could not withhold his royal assent to laws passed by Parliament.[154] That limitation on the royal prerogative to withhold his assent to laws sought to dramatically shift lawmaking authority to the Parliament.

Finally, in June 1642, the Parliament sent a set of demands in the form of nineteen propositions to Charles, who had since departed from London in preparation for a possible civil war against the Parliament.[155] Those included demands that Parliament approve appointments to royal offices, as well as be able to debate, resolve, and transact "the great Affairs of the Kingdom," and that the King acquiesce to the Militia Ordinance delegating to the Parliament command over the militia.[156]

Charles's ministers answered the Nineteen Propositions in the King's name.[157] They rejected the parliamentary demands arguing that they would subvert the government.[158] But importantly, in the Answer, the ministers made a critical and apparently inadvertent concession to Parliament in response to its efforts to deprive the King of his prerogative to withhold his royal assent to laws passed in Parliament. In the Answer, the King's ministers acknowledged a lawmaking authority that deviated from the one espoused in the divine right theory of kings, in which the monarch exclusively made the laws and Parliament's only role was deliberation and advising.[159] In that theory, there existed a governing hierarchy in which the King operated above and apart from the three estates in Parliament comprising the Lords Spiritual and Temporal in the House of Lords and the Commons in the House of Commons.[160]

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153. An Ordinance of the Lords and Commons in Parliament, for the Safety and Defence of the Kingdom of England, and Dominion of Wales (1642), I ACTS & ORDS. INTERREGNUM 1–5.

154. *See* A Declaration of the Lords and Commons in Parliament concerning His Majesty's Proclamation of the 27th May 1642 (June 6, 1642), *reprinted in* KENYON, *supra* note 132, at 248–49 (1969); HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 5 (London, 1642) (citing the coronation oath's confirmation of "all Lawes and rightfull customs" as support for the theory that "the King is bound to consent to new Lawes if they be necessary, as well as defend old").

155. XIX. Propositions Made by Both Houses of Parliament, to the Kings Most Excellent Majestie: With His Majestie's Answer Thereunto (York, Robert Barker 1642), *reprinted in* 1 THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH CENTURY ENGLISH POLITICAL TRACTS 148–54 (Joyce Lee Malcolm ed., 1999) [hereinafter 1 THE STRUGGLE FOR SOVEREIGNTY].

156. *Id.* at 148–53.

157. *Id.* at 154–78; *see also* WESTON & GREENBERG, *supra* note 103, at 36 (identifying the King's three ministers as the authors of the Answer to the Nineteen Propositions).

158. WESTON & GREENBERG, *supra* note 103, at 36.

159. *See supra* text accompanying note 109.

160. *See, e.g.*, HOLBORNE, *supra* note 109, at 147 (citing Sir Edward Coke for a definition of the three estates comprising "1. The Lords Spiritual 2. The Lords Temporal 3. And the Commons" with the King separate and apart).

In the Answer, the ministers advanced a different understanding of lawmaking and the relationship between the King and Parliament. "In this Kingdom," the ministers wrote, "the Laws are jointly made by a King, by a House of Peers, and by a House of Commons chosen by the People, all having free Votes and particular Priviledges."[161] The Answer further described the distinctive roles of the three estates in the shared process of law-making and the responsibilities of each of the three estates to check abuses of power by the others.[162]

The pronouncement in the Answer to the Nineteen Propositions marked a critical point of departure for a previously marginalized coordination theory of governance.[163] That theory later served as the foundation for the system of checks and balances that would be developed more fully in the eighteenth century.[164]

Contemporaneous theorists, who scholars label parliamentarians,[165] built from the assertions in the Answer to develop a more complete account of coordination theory to compete with the divine right theory for acceptance as the English model of governance. According to the influential parliamentarian Charles Herle, "*Englands* is not a simply *subordinative*, and *absolute*, but a *Coordinative*, and *mixt Monarchy*."[166] Repeating the assertions in the Answer, Herle elaborated that "here the *Monarchy*, or *highest* power is it selfe *compounded* of [three] *Coordinate* Estates, a *King*, and two *Houses* of Parliament . . . ."[167] "The *Parliament* cannot be said properly to be a *Subject*," Herle concluded, "because the *King* is a part, and so hee should be *subject* to himself . . . ."[168] Philip Hunton, another influential parliamentarian, concurred with Herle's arguments for a coordinated theory of government and advanced the principle of institutional independence as a critical precondition to ensure that coordinated government did not devolve into absolutism. Hunton explained, "[t]he end of constituting these two Estates being the limiting and preventing the excesses of the third,

161. XIX. Propositions Made by Both Houses of Parliament, to the Kings Most Excellent Majestie: With His Majesties Answer Thereunto (York, Robert Barker 1642), *reprinted in* 1 THE STRUGGLE FOR SOVEREIGNTY, *supra* note 155, at 168.

162. *Id.* at 168–69.

163. Prior to the 1640s, there were very few published defenses of the coordination theory of government. Sir Thomas Smith authored one of those few published defenses in the late sixteenth century, but it did not appear to gain much popular support. *See* SIR THOMAS SMITH, DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND 48 (L. Alston ed., Cambridge Univ. Press 1906) (1583) (arguing that "[t]he most high and absolute power of the realme of Englande, consisteth in the Parliament . . . . where the king himselfe in person, the nobilitie, the rest of the gentilitie, and the yeomanrie are . . . .").

164. *See, e.g.*, Gwyn, *supra* note 30, at 25–26 (identifying a link between the coordinate theory advanced in the Answer to the Nineteen Propositions and modern separation of powers).

165. *See generally* WESTON & GREENBERG, *supra* note 103, at 2–3.

166. CHARLES HERLE, A FULLER ANSWER TO A TREATISE WRITTEN BY DR. FERNE 2 (London, John Bartlet 1642).

167. *Id.*

168. *Id.* at 3.

their power must not be totally dependent and derived from the third, for then it were unsuitable for the end for which it was ordained . . . ."[169]

To support the coordination theory of governance, the parliamentarians first advanced an alternative origins story of governance that deviated from the divine right account. While the parliamentarians agreed with the divine right theorists that God ordained government, they claimed that God gave to the people the power to choose the form of government.[170] Thus, absolute monarchy was not ordained by God as asserted in the divine right theory.[171] Rather, the form of governmental authority was derived from the people's consent.[172]

The parliamentarians then drew from history to ascertain that the government the people chose in England was a limited monarchy with a king subject to law, accountable to the people, and a coequal partner to the Parliament. In the historical account of leading parliamentarians, the ancient Saxon institution that would later be named Parliament predated kings in England and those ancient parliaments originally elected kings.[173] As an elected monarch, the King was merely equal and coordinate to the two Houses of Parliament in governing.[174] The lawmaking power was therefore said to be anciently shared between the King and the Parliament.[175]

It would be going too far to suggest that the coordination theory secured the acquiescence and support of all, or even most, of the English people.[176]

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169. PHILIP HUNTON, A TREATISE OF MONARCHIE 43 (London, John Bellamy & Ralph Smith 1643).

170. *See, e.g.*, JOHN MILTON, THE TENURE OF KINGS AND MAGISTRATES 8 (London, Matthew Simmons 1650) ("No man who knows ought, can be so stupid to deny that all men naturally were borne free, being the image and resemblance of God himself, and were by privilege above all the creatures, born to command and not to obey: and that they liv'd so.").

171. *See supra* text accompanying notes 100–106.

172. MILTON, *supra* note 170, at 11 ("It being thus manifest that the power of Kings and Magistrates is nothing else, but what is only derivative, transferr'd and committed to them in trust from the People, to the Common good of them all . . . .").

173. *See, e.g.*, JOHN SADLER, RIGHTS OF THE KINGDOM 35 (London, Richard Bishop 1649) ("[O]f our Saxon Ancestors, the *Mirror* is very plain, that They did *Elect*, or Chuse, Their King from among themselves . . . . And being *Elected*, they did So, and So Limit Him: by *Oath*, and *Lawes* . . . .").

174. *See, e.g.*, HUNTON, *supra* note 169, at 35 (describing how the Saxons brought their form of government from Germany to England in which "[t]heir Kings had no absolute but limited power: and all weighty matters were dispatched by generall meetings of all the Estates.").

175. *See, e.g.*, JAMES HOWELL, THE PRE-EMINENCE AND PEDIGREE OF PARLEMENT 8–13 (London, Humphrey Moseley 1642) (describing the shared governing arrangement between the Parliament and the King in the ancient period); *see also* WILLIAM PETYT, THE ANTIENT RIGHT OF THE COMMONS OF ENGLAND ASSERTED 12 (London, F. Smith et al. 1680) ("[I]t is apparent and past all contradiction, that the Commons in [the ancient period] were an essential part of the Legislative power, in making and ordaining Laws, by which themselves and their posterity were to be governed . . . .").

176. From the Civil War to the Glorious Revolution, adherents of the divine right theory rejected the coordination theory on various grounds. *See* WESTON & GREENBERG, *supra* note 103, at 42 ("From 1642 until the end of the century . . . [r]oyalists contended that despite Charles I's words in the Answer to the Nineteen Propositions, the three estates who made law in parliament were, properly speaking, the lords spiritual, the lords temporal, and the commons, with the king at their head."); *see also* JOHN SPELMAN, THE CASE OF OUR AFFAIRES, IN LAW, RELIGION, AND OTHER CIRCUMSTANCES BRIEFLY EXAMINED, AND PRESENTED TO THE CONSCIENCE 2–7 (Oxford, W.W. 1643) (rejecting the principle of coequality between

Many in England were royalists and devout believers in the divine right theory of monarchy, and thus continued to view the relationship between the monarch and Parliament in hierarchical terms.[177] But the coordination theory had been established as a serious competitor to the divine right theory and provided theoretical support to parliamentarian efforts to weaken the Crown and strengthen itself.

Despite King Charles's concessions and inadvertent acknowledgment of the coordination theory of governance, civil war erupted in England in August of 1642 between forces aligned with the King and forces aligned with Parliament.[178] The Parliament, and the House of Commons in particular, emerged as the military and political victor. After a trial in January 1649, the Parliament's High Court of Justice found Charles guilty of treason and sentenced him to death.[179] He was executed three days later.[180] And a week after Charles's execution, the House of Commons abolished the monarchy and established a commonwealth.[181] The next month, the House of Commons abolished the House of Lords leaving itself as the sole governing authority in England.[182] During what ended up being just over a decade long interregnum, England briefly flirted with a republican form of government before settling on a protectorate led by Oliver Cromwell, who exercised many of the powers of the kings that preceded him.[183] When Cromwell died in September 1658, the protectorate slowly collapsed without a competent successor.[184] King Charles's son, who had been exiled to France along with his brother James, returned to

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the Parliament and the Crown and arguing that the King is the sovereign superior to the subject Parliament); HEYLYN, *supra* note 106, at 249 (arguing that "the King established in an absolute *Monarchy,* from whom the meeting of the *three* Estates in Parliament detracteth nothing of his power and authority Royal"); JOHN B. BRYDALL, THE ABSURDITY OF THAT NEW DEVISED STATE-PRINCIPLE (London, T.D. 1681) ("If [Parliament] be Co-partners in the Soveraignty, in what a fine Condition are we, that must be obliged to Impossibilities. For we must obey three Masters, Commanding contrary things.").

177. *See* WESTON & GREENBERG, *supra* note 103, at 6 (explaining that the divine right theory "had stout advocates as late as the Glorious Revolution").

178. *See, e.g.*, RUSSELL, *supra* note 140, at 342–60 (providing the political context of the Civil War and an account of the battles between parliamentary and royal forces during the war).

179. The Death Warrant of Charles I (January 29, 1649), *in* CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, *supra* note 136, at 380.

180. A LOOKING-GLASS FOR THE TIMES IN THE TRYAL AND MARTYRDOM OF KING CHARLES THE I, at 19–24 (London, n. pub. 1689).

181. Act Abolishing Kingship (1649), *reprinted in* PAUL L. HUGHES & ROBERT F. FRIES, CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND: A DOCUMENTARY CONSTITUTIONAL HISTORY, 1485– 1714, at 236 (G.P Putnam's Sons 1959).

182. Act Abolishing the House of Lords (1649), *reprinted in* HUGHES & FRIES, *supra* note 181, at 235–36.

183. Act Establishing the Commonwealth (1649), *reprinted in* HUGHES & FRIES, *supra* note 181, at 237; The Instrument of Government (1653), *reprinted in* HUGHES & FRIES, *supra* note 181, at 240–42 (establishing the protectorate).

184. *See, e.g.*, CHRISTOPHER HILL, THE CENTURY OF REVOLUTION: 1603–1714, at 117 (Christopher Brooke & Denis Mack Smith eds., 1980) (describing the failure of Oliver Cromwell's successors to continue the Protectorate and avoid anarchy).

England and was officially restored to the throne as King Charles II in May 1660.[185]

III. THE ROYAL PREROGATIVE AND THE RISE OF THE PARLIAMENTARY CHECK

With the restoration of the King came renewed debate about the form of government. Although the restoration marked the end of parliamentarian efforts to rule without a monarch, Parliament would not be returned to the subordinate status of its past. Instead, the theory of coordination lived on and assumed an increasingly dominant position. Prior to the King's restoration, Parliament passed a resolution that affirmed the coordination theory, declaring that "Government is, and ought to be, by King, Lords, and Commons."[186]

After the King's restoration, the Parliament took the initiative as an active participant in lawmaking while continuing to control the power of the purse. Far from being the subordinate subject of the King, the Parliament operated as something akin to a coequal institution. King Charles II nonetheless held the same ambition as his predecessors of advancing his preferred policy program, along with a willingness to do so unilaterally, if necessary. Parliament's role in lawmaking and control over money, however, continued to be an obstacle. This Part explores the immediate post-restoration period of English history, which served as a precursor to an intense power struggle between the Crown and Parliament, culminating in the Glorious Revolution.

A. Post-Restoration England and Religion

At the time of the restoration, England was deeply divided over religion. The two principal religious factions comprised of Anglicans, who were adherents to the established Church of England, and Protestant dissenters, who did not conform to the practices and beliefs of the Church of England.[187] For the most part, the two religious factions were on opposite sides during the Civil War and Interregnum. Most Anglicans supported Charles and advocated for restoring the monarchy after his death.[188] Most Protestant dissenters supported

185. RUSSELL, *supra* note 140, at 397.

186. Resolution Re-establishing the Government (1660), *in* 8 JOURNAL OF THE HOUSE OF COMMONS, 1660–1667, at 8 (London, His Majesty's Stationery Office 1802), http://www.british-history.ac.uk/commons-jrnl/vol8/pp4-8.

187. *See, e.g.*, PAUL SEAWARD, THE RESTORATION, 1660–1688, at 41–43 (1991) (describing the religious divisions between Anglicans and Protestant dissenters in England during the seventeenth century).

188. *See*, *e.g.*, PAUL SEAWARD, THE CAVALIER PARLIAMENT AND THE RECONSTRUCTION OF THE OLD REGIME, 1661–1667, at 327 (1988) (recounting Anglican gentry support for restoration of the monarchy during the Interregnum).

the Parliament during and after the Civil War.[189] Until the late years of the Interregnum, the Protestant dissenters opposed restoring the monarchy.[190] The two groups were also divided over theories of governance, with Anglicans more sympathetic to a strong monarchy consistent with the divine right theory and Protestant dissenters seeking a weaker monarchy in accordance with the coordination theory.[191] The one major point of agreement between Anglicans and Protestant dissenters, and most English people for that matter, was their fear and loathing of Catholics.

Catholics comprised a very small portion of the English population, estimated at 1.2%.[192] Yet a combination of historical memory and European continental developments provoked continuous alarm, bordering on paranoia, about the Catholic threat to the English nation and the Protestant religion. The English could not forget the Catholic Queen Mary I, who, in seeking to undo the English Reformation that separated the nation from the Catholic Church, persecuted and burned at the stake hundreds of Protestants during her five-year reign in the mid-sixteenth century.[193] Also fixed in the English memory were several attempted Catholic assassinations of English monarchs sanctioned by the pope.[194] This included the failed Gunpowder Plot to blow up the House of Lords while King James I presided over the opening of Parliament in 1605.[195] Nor did the English forget the more recent massacre of Protestant settlers by Catholics in Ireland during the Irish Rebellion of 1641.[196]

Developments on the European continent further fueled English Protestant fears of Catholics. Catholic France, as the leading power in Europe, was seen as a constant threat to England and its Protestant religion and form of government.[197]

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189. *See, e.g.*, TIM HARRIS, POLITICS UNDER THE LATER STUARTS: PARTY CONFLICT IN A DIVIDED SOCIETY, 1660–1715, at 32 (John Morrill & David Cannadine eds., 1993).

190. *See, e.g.*, RUSSELL, *supra* note 140, at 361–70 (describing the linkages between Protestant dissenters and parliamentarians during the Interregnum).

191. *See, e.g.*, HARRIS, *supra* note 189, at 7 (identifying disagreements about the appropriate power of the king during the post-Restoration period).

192. *Id.* at 12.

193. *See* 5 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 337 (1778) (describing Queen Mary's reign of terror over Protestants that resulted in the royally sanctioned killing of hundreds of Protestants).

194. *See* MICHAEL A.R. GRAVES, THE TUDOR PARLIAMENTS: CROWN, LORDS AND COMMONS, 1485–1603, at 130–31 (John Morrill & David Cannadine eds., 1985) (describing Catholic attempts to assassinate Queen Elizabeth during the sixteenth century).

195. *See* 5 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 25–32 (1778) (recounting the Gunpowder Plot).

196. *See id.* at 335–47 (providing an account of the Irish rebellion and associating it "with circumstances of the utmost horror, bloodshed, and devastation"). What was, however, forgotten or conveniently excused were the many instances of Protestant persecution and killing of Catholics in England, Ireland, and elsewhere.

197. *See* J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 76–78 (1972) (detailing the English Protestant fear and hatred of Catholic France and its absolute form of government that they saw as a threat to the Protestant religion).

The Anglicans and Protestant dissenters used the threat of Catholicism, which they pejoratively labeled "popery" and associated with absolutism, against each other during the Restoration. The Anglicans claimed that Protestant dissenters' demands for a more comprehensive English church enabled popery, while Protestant dissenters responded by associating the Anglican hierarchy in their religious rituals and practices with popery.[198] These religious divisions turned into constitutional controversies between the Crown and Parliament because of the Catholic sympathies held by Charles II and the Catholic beliefs of his brother and future successor, James II.

B. An Early Threat to Parliamentary Independence

In the Restoration settlement, some of the changes that the Parliament extorted from Charles I prior to the Civil War remained in place. Those included a prohibition on the Crown's unilateral exercise of taxing power without parliamentary consent.[199] In exchange, the Parliament provided Charles II with a continuous stream of money for royal expenses.[200] During the first two decades of Charles II's reign, however, the taxes provided less revenue than anticipated, and the revenue shortage re-ignited the old struggle between the Crown and the Parliament over money.[201]

Matters of religion were also tense between the Crown and the Parliament. Prior to assuming the crown in 1660, Charles II promised in his *Declaration of Breda* that there would be religious toleration upon his restoration.[202] However, the Anglicans, who controlled Parliament, pushed in another direction. Through several laws passed in the early 1660s, Parliament not only rejected religious toleration but imposed strict conformity requirements on non-

198. *See*, *e.g.*, HARRIS, *supra* note 189, at 70 (describing the Anglicans' belief that "[t]olerating Dissent . . . would only lead to the growth of popery").

199. Tenures Abolition Act 1660, 12 Car. 2 c. 24, *reprinted* in 5 STATUTES OF THE REALM, 1628–80, *supra* note 162, at 259–66, http://www.british-history.ac.uk/statutes-realm/vol5/pp259-266 (abolishing several forms of royal prerogative taxation); *see also* SMITH, *supra* note 123, at 59.

200. Tenures Abolition Act 1660, *supra* note 199, at 259. The Restoration Parliament determined that preserving its full power over the purse was key to avoiding another instance of personal sovereign rule that England experienced under King Charles I with its potential to lead to absolute monarchy. *See* SMITH, *supra* note 123, at 59 (recounting the parliamentary desire to avoid a repeat of royal personal rule and cataloguing the parliamentary abolition of unilateral crown taxation after the Restoration).

201. SMITH, *supra* note 123, at 60.

202. In the *Declaration of Breda*, Charles proclaimed,

> We do declare a Liberty to Tender Consciences, and that no man shall be disquieted or called in question for differences of opinion in matters of Religion, which do not disturb the Peace of the Kingdom; And that we shall be ready to consent to such an Act of Parliament, as upon mature Deliberation shall be offered to us for the full granting that indulgence.

King Charles II, His Declaration to all his Loving Subjects of the Kingdom of England Dated from his Court at Breda in Holland, the 4/14 of April 1660 (Harts Close, Christopher Higgins 1660), https://quod.lib.umich.edu/e/eebo/B02052.0001.001/1:1.1?rgn=div2;view=fulltext.

Anglicans.[203] By initiating these laws, Parliament continued in the role as a primary lawmaking institution that it assumed prior to the Civil War.

A final element of the Restoration settlement provided a roadmap for changing the dynamic of parliamentary supremacy. Soon after the Restoration, the Parliament introduced the Corporation Act designed to purge nonconformists and persons suspected of disloyalty to the King from municipal governments.[204] These municipal governments administered boroughs, which were responsible for selecting most of the members to the House of Commons.[205] Much of the pressure for the purge of disloyal borough officials came from within the boroughs themselves. Anglican supporters of the monarchy after the Restoration sought to respond in kind to their removal from municipal offices by Protestant dissenters and other supporters of the Parliament during the Interregnum.[206] As introduced, the Corporation Bill gave the Parliament the power to appoint a body of special commissioners "to purge corporations of 'disaffected' members."[207] Those commissioners would have the authority to remove municipal government officeholders who refused to take the Oath of Allegiance and Supremacy to the King as the supreme governor of the Church of England and to declare nonresistance to the King.[208] Upon removal, the commissioners would have the authority to fill any vacancy in municipal government with any inhabitant from the borough.[209]

Charles and his brother saw the bill as an opportunity not only to rein in municipal independence but also to exercise greater influence over the House of Commons's membership.[210] Under one amendment proposed by the Crown,

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203. *See, e.g.*, Act of Uniformity, May 19, 1662, *in* THE EDINBURGH SOURCE BOOK FOR BRITISH HISTORY, 1603–1707, at 77–79 (Basil Williams ed., 1933) (requiring religious uniformity in prayer, service, and the administration of sacraments and rights); An Act to Prevent and Suppresse Seditious Conventicles 1670, 22 Car. 2 c. 1, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 516–20, http://www.british-history.ac.uk/statutes-realm/vol5/pp516-520 (prohibiting religious gatherings of more than five persons outside of the Church of England).

204. An Act for the Well Governing and Regulating of Corporations 1661, 13 Car. 2 c. 1, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 321, http://www.british-history.ac.uk/statutes-realm/vol5/pp321-323.

205. *See infra* Part IV.A.

206. *See, e.g.*, PAUL D. HALLIDAY, DISMEMBERING THE BODY POLITIC: PARTISAN POLITICS IN ENGLAND'S TOWNS, 1650–1730, at 15–19 (Anthony Fletcher et al. eds., 1998) (describing the series of purges and counter-purges arising from local partisan strife).

207. John Miller, *The Crown and the Borough Charters in the Reign of Charles II*, 100 ENG. HIST. REV. 53, 60 (1985).

208. ANDREW SWATLAND, THE HOUSE OF LORDS IN THE REIGN OF CHARLES II 239 (1996).

209. JENNIFER LEVIN, THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660–1688, AND ITS CONSEQUENCES 9 (1969).

210. *See* Robert Pickavance, The English Boroughs and the King's Government: A Study of the Tory Reaction, 1681–85, at 38 (1976) (Ph.D. dissertation, Oxford University), https://ora.ox.ac.uk/objects/uuid:0ff12ca6-f7e8-4302-b407-acffd978bdef (stating that with the Corporation Act, "[t]he crown intended to solve the double problem of municipal independence—magisterial autonomy and parliamentary representation—at a single blow").

all royal charters for incorporation would have to be renewed or forfeited.[211] In the renewed charters, the King could control the appointment of new borough members and influence the parliamentary selection processes.[212] A second amendment proposed by the Crown shifted authority from Parliament to the King to appoint the special commissioners and delegated to the commissioner permanent authority to remove municipal government officials.[213]

Members of Parliament opposed the amendments as they considered them a threat to borough autonomy and independence.[214] One dissenting member suggested the Crown's amendments would produce "[s]o total an Alteration of the Government" that it "may have an ill Influence upon the free Elections."[215] The dissenting parliamentarian clearly understood free elections to mean elections free from Crown influence. Another dissenter noted the permanent nature of the changes to the relationship between the central government and municipalities that would be wrought by the amendments to the detriment of municipal autonomy.[216]

The parliamentary opponents blocked the amendments providing for the required renewal of corporate charters and granting the King the power to choose future recorders, town clerks, and mayors.[217] Parliament did agree, however, to the amendment providing for the Crown appointment of the special commissioners, but the commissioners' powers expired fifteen months after the act's adoption.[218] Although the King did not get all he wanted in the Corporation Act, he was able to use the power under the Act to systematically purge municipal governments and appoint officeholders loyal to the Crown and the monarchical system of government.[219]

In the decade that followed, there continued to be disputes about royal prerogative and parliamentary authority, but none that raised the same threats of absolute monarchy or devolution into civil war associated with the reign of Charles I.[220] That relative harmony between the Crown and the Parliament

211. *Id.*

212. *See* J.H. Sacret, *The Restoration Government and Municipal Corporations*, 45 ENG. HIST. REV. 232, 250 (1930) (the proposed amendments would have given the Crown the authority to nominate "all future recorders and town clerks, and virtually also of mayors"); 1 EDWARD PORRITT ASSISTED BY ANNIE G. PORRITT, THE UNREFORMED HOUSE OF COMMONS: PARLIAMENTARY REPRESENTATION BEFORE 1832, at 393 (1903) (describing the proposal to give the Crown the authority to limit the parliamentary franchise in the borough to the common council he was primarily responsible for selecting).

213. Sacret, *supra* note 212, at 247.

214. Historian J.H. Sacret recounts that "[e]ven the royalist members for boroughs seem to have been aghast at this attempt to reduce their constituents to servitude." *Id.* at 250.

215. *Id.*

216. *Id.*

217. *Id.* at 251.

218. Miller, *supra* note 207, at 63.

219. *See* BETTY KEMP, KING AND COMMONS: 1660–1832, at 14 (1st ed. 1957) ("The Corporation Act of 1661, which gave the King absolute control over the officers of the corporations for fifteen months, and a limited control thereafter, provided a basis for royal influence over elections.").

220. *See id.* at 18–19.

began to break down in the 1670s, when threats (real and imagined) of "popery" and absolute monarchy fueled parliamentary distrust of the King and attempts to limit the Crown's powers. The King, unable to subordinate parliaments in the ways of his predecessors, responded by reviving royal prerogatives used by his predecessors.

C. The Revival of the Royal Prerogative

After the Restoration settlement, the status and extent of the royal prerogative remained underdetermined. The settlement deprived the Crown of the royal prerogative to engage in any form of nonparliamentary taxation and restored the royal prerogative to direct and command the militia.[221] The limits of royal prerogative over the courts were also resolved during the settlement.[222] But two important royal prerogatives went entirely unaddressed. The first was the royal prerogative to dispense with, or suspend, laws. Divine right theorists argued that monarchs could exercise this unilateral power when equity demanded that they do so or for reasons only known to the Crown.[223] That power to dispense with laws had awesome potential as it could lead to a range of unilateral royal lawmaking that the Parliament would lack any authority to check. For that reason, there was considerable tension between the power to dispense with laws and the coordination theory of governance since the coordination theory required the participation of the King and the two houses of Parliament in the lawmaking process.[224]

The restoration settlement did not resolve the question of the continued availability of the royal prerogative to dispense with laws because it had not been the subject of major dispute or controversy prior to the Civil War and interregnum.[225] It would, however, emerge as a source of major controversy after the restoration as both Charles II and James II attempted to employ the royal prerogative to advance a policy of religious tolerance and liberty of conscience.[226]

A second royal prerogative left unresolved in the settlement that would also emerge as a source of considerable controversy was the King's power to issue

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221. *See supra* text accompanying note 150; *see also* An Act Declaring the Sole Right of the Militia to be in King and for the Present Ordering & Disposing the Same 1661, 13 Car. 2 c. 6, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 308–09, http://www.british-history.ac.uk/statutes-realm/vol5/pp308-309.

222. *See* SMITH, *supra* note 123, at 147 (noting that after the Restoration, "the Courts of Star Chamber and High Commission remained permanently abolished").

223. *See* WESTON & GREENBERG, *supra* note 103, at 32 (arguing that the royal dispensing power was central to the divine right theory of governing).

224. *See supra* Part II.B.

225. *See* WESTON & GREENBERG, *supra* note 103, at 32 (describing the lack of controversy surrounding the royal dispensing power).

226. *See infra* Parts III.C.1 & IV.C.

a writ of quo warranto and unilaterally revise or revoke municipal borough corporate charters.[227] The restoration settlement did not resolve the question regarding the continued legitimacy of this prerogative because under the prior Stuart kings it had been mostly used as a tool to resolve local disputes rather than to convey royal power.[228] The prerogative, nonetheless, held tremendous potential to enhance crown authority as the King could use it to force changes in the parliamentary selection process,[229] undermining the independence and co-equal status of Parliament.

In what follows I describe the re-emergence of these royal prerogatives and the constitutional controversies that followed. Out of these disputes over the two royal prerogatives came critical steps in the evolution of the constitutional framework. These steps included (1) further limiting royal prerogatives by embedding them within a checks and balances framework; and (2) establishing parliamentary independence as a core principle of constitutional balance preserved through parliamentary selection processes free from undue crown influence.

1. Religion and the Royal Power to Dispense with Laws

Two years after Charles declared from Breda that he would promote religious tolerance once restored to the crown, the King followed through with his Declaration of Indulgence in 1662.[230] The Declaration, issued pursuant to the King's exercise of royal prerogative, granted religious toleration to Protestant dissenters, Catholics, and other Nonconformists through the suspension of penal laws applied to these groups.[231] Prior monarchs' exercise of royal prerogative to dispense with laws had, at most, been met with ineffective protest and subsequent acquiescence to the King's exercise of such power.[232] Since the King was head of the Church of England with exclusive authority over ecclesiastical matters, the expectation was that Parliament would

227. *See* HALLIDAY, *supra* note 206, at 26 ("By quo warranto, the King inspected and corrected those who misused corporate powers that derived from the King.").

228. *See, e.g.*, Catherine Patterson, *Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts*, 120 ENG. HIST. REV. 879, 880 (2005) (finding that the early-seventeenth-century Crown's use of quo warranto was focused more on addressing local concerns than applying arbitrary power).

229. *See* 1 HENRY ALWORTH MEREWETHER & ARCHIBALD JOHN STEPHENS, THE HISTORY OF THE BOROUGHS AND MUNICIPAL CORPORATIONS OF THE UNITED KINGDOM, at xxxix–xl, lii–liv (London, Stevens and Sons, S. Sweet, & A. Maxwell 1835).

230. HARRIS, *supra* note 189, at 55.

231. *Id.*

232. For a widely held view of the King's dispensing power prior to the Restoration, see, for example, SHERINGHAM, *supra* note 103, at 98 ("[T]here is scarcely any man in the Kingdom, so much a stranger to the Laws, but knows that the King alone hath power to dispense with the Statutes . . . .").

once again acquiesce to the King's exercise of royal prerogative.[233] But this first Declaration of Indulgence provoked a more intense and immediate reaction from Parliament.[234] Rather than acquiescing, Parliament forced the King to withdraw the declaration and compelled the King to assent to additional laws rejecting toleration in favor of enforced conformity to the Church of England.[235]

The first Declaration of Indulgence triggered parliamentarian distrust about the religious leanings of the King. Many parliamentarians suspected the King had Catholic sympathies, which they saw as a threat to Parliament because of the religion's popular association with "popery" and royal absolutism.[236] Two series of events in the early 1670s exacerbated parliamentarian fears and reignited Crown–parliamentarian conflict.

The first involved the King in another exercise of unilateral royal prerogative. In 1670, Charles concluded the Treaty of Dover with King Louis XIV of France, which allied England with Catholic France against the Protestant Dutch Republic.[237] For parliamentarians, the treaty represented a betrayal of the Protestant faith and contributed to anxiety about the influence of French "popery" and absolutism on the king.[238] This anxiety had some foundation as the treaty included a secret provision in which the French agreed to provide Charles with subsidies in return for his promise to declare his allegiance to the Catholic faith when the opportunity arose.[239] In accord with the treaty, Charles declared war against the Dutch in 1672.[240] Two days after the war declaration, Charles employed his royal prerogative to issue his second Declaration of Indulgence suspending penal laws applied to Protestant dissenters, Catholics, and other Nonconformists and granting religious tolerance to these groups.[241]

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233. *See, e.g.*, J.L. DE LOLME, THE CONSTITUTION OF ENGLAND 71 (London, G.G.J. & J. Robinson Paternost-Row & J. Murray 1793) (ascribing to the king the status of "Supreme Head of the Church").

234. For an example of popular resistance to the declaration of indulgence from an Anglican leader, see generally RICHARD BAXTER, FAIR WARNING: OR, XXV REASONS AGAINST TOLERATION AND INDULGENCE OF POPERY; WITH THE ARCH-BISHOP OF CANTERBURY'S LETTER TO THE KING, AND ALL THE BISHOPS OF IRELANDS PROTESTATION TO THE PARLIAMENT TO THE SAME PURPOSE (London, S.U.N.T.F.S. 1663) (providing twenty-five reasons to oppose toleration of popery).

235. *See* HARRIS, *supra* note 189, at 55 ("The King's Declaration of Indulgence of 1662 . . . provoked an outcry against popery, and not only did Parliament force the King to withdraw the Indulgence, but proceeded to introduce bills to prevent the growth of popery.").

236. *See* SEAWARD, *supra* note 187, at 47 (describing the "king's sympathy for catholics" in the 1660s that "gave him an attitude towards religious persecution and protestant uniformity that to churchmen was disquietingly ambivalent").

237. Treaty of Dover, *reprinted in* ENGLAND UNDER CHARLES II: FROM THE RESTORATION TO THE TREATY OF NIMEGUEN, 1660–1678, at 101–03 (W.F. Taylor ed., 1889).

238. *See* SMITH, *supra* note 123, at 151–52 (describing the broader religious-based distrust between Parliament and the King during the late 1660s and early 1670s).

239. Treaty of Dover, *supra* note 237, at 101.

240. HARRIS, *supra* note 189, at 56.

241. *See* Charles II, Declaration of Indulgence, March 15, 1672, *reprinted in* FRANK BATE, THE DECLARATION OF INDULGENCE, 1672: A STUDY IN THE RISE OF ORGANISED DISSENT 76–78 (1908).

Once again, the declaration provoked an intense and immediate parliamentary reaction.[242] To check the King, Parliament returned to a familiar tool, the power of the purse. Facing a serious parliamentary threat to deny him needed funds to pay his military, the King was forced to withdraw the declaration and make peace with the Dutch.[243] Parliament, however, did not stop there. In 1672, Parliament compelled the King to assent to the Test Act.[244] That Act excluded from civil and military office anyone who refused to take the oath of allegiance and supremacy to the crown and renounce belief in the Roman Catholic doctrine of transubstantiation.[245] Through the Test Act of 1672, the Parliament not only codified another form of religious intolerance against the King's wishes, but also limited his royal prerogative to appoint civil and military officials of his choosing.

The second series of events involved the King's brother, James II, who was the successor to the throne because Charles lacked a legitimate male heir.[246] James had converted to Catholicism in 1669 and publicly affirmed his allegiance to Catholicism three years later by refusing to take the Anglican sacrament.[247] The next year, James married the devout Catholic Mary of Modena.[248] James's conversion to Catholicism and marriage to a Catholic meant that unless Charles's wife, Queen Catherine of Branganza, bore a male child—an increasingly unlikely proposition given her age—England would soon be ruled by a Catholic monarch for the first time since Queen Mary Tudor in the sixteenth century.[249] This prospect of royal succession to a Catholic monarch further amplified parliamentarian anxiety and would contribute to an intense struggle between the crown and Parliament as the Parliament tried to coerce the King into excluding James from the Crown.

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242. BATE, *supra* note 241, at 117–18 (quoting a letter from Parliament to the King opposing the Declaration of Indulgence as an unconstitutional royal dispensation of law); *see also* The Second Parliament of Charles II: Eleventh Session- Begins 4/2/1673, *in* 1 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS: 1660–1680, at 163–78 (London, Chandler 1742), http://www.british-history.ac.uk/commons-hist-proceedings/vol1/pp163-178 ("[W]e find ourselves bound in Duty to inform your Majesty, That Penal Statutes in Matters ecclesiastical cannot be suspended but by Act of Parliament.") (quoting Edward Seymour, Speaker, House of Commons, Address to His Majesty Against the Declaration of Indulgence (Feb. 19, 1673)).

243. SMITH, *supra* note 123, at 152.

244. *Id.*

245. An Act for Preventing Dangers Which May Happen from Popish Recusants 1672, 25 Car. 2 c. 2, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 782, http://www.british-history.ac.uk/statutes-realm/vol5/pp782-785.

246. HARRIS, *supra* note 189, at 56.

247. *Id.* at 56–57.

248. *Id.* at 57.

249. *Id.* at 56–57.

2. The Exclusion Crisis

Six months after the marriage between James and Mary, a member of the House of Lords, the Earl of Carlisle, proposed a measure excluding from succession "any prince [of blood] who married a Catholic without parliament's approval."[250] The proposal to exclude the Catholic successor to the Crown marked the first salvo in the Exclusion Crisis. Charles tried to head off the proposal and avoid a crisis of succession by abandoning his pursuit of religious tolerance. The King instructed his Lord Treasurer Thomas Osborne, the Earl of Danby (Lord Danby), to secure majority support for the King and opposition to exclusion in the Anglican-controlled Parliament through the pursuit of a pro-Anglican policy of religious intolerance.[251] That included aggressive royal enforcement of penal laws targeting Catholics and Protestant dissenters and support for the passage of a second Test Act of 1678 that excluded anyone who failed to take communion in the Church of England from serving in Parliament.[252] Danby also sought to curry royal favor in the Parliament through the provision of pensions and bribes to its members.[253] Danby's actions were part of a scheme to construct a Court party in the Parliament that would be loyal to, and dependent on, the King and hence support and defend the monarchy and royal succession.[254]

Danby's scheme met with mixed success as he was able to temporarily foreclose the introduction of an Exclusion Bill in Parliament. He, however, proved unable to organize a cohesive faction in the Parliament as distrust remained about the Crown's religious sympathies and ambitions.[255] Yet, despite his mixed success, Danby might have been able to avoid a constitutional crisis regarding succession if not for the emergence of the "popish plot."

In 1678, the English priest Titus Oates started to spread an ostentatious and fictitious tale about a Catholic plot to murder the king.[256] Despite the lack of evidence, pervasive English anxieties about "popery" and absolutism made them vulnerable to believing the baseless tale. Public hysteria about the threats

250. In proposing this measure, Carlisle received the support of the influential Ashley Cooper, the first earl of Shaftesbury (Lord Shaftesbury), the former Lord Chancellor of England, and future leader of the first political party in England, the Whigs, the principal organized proponents of Exclusion. SWATLAND, *supra* note 208, at 217.

251. *See id.* at 242–43 (describing Danby's policy program of religious conformism in the Parliament).

252. An Act for the more effectuall preserving the Kings Person and Government by disableing Papists from sitting in either House of Parlyament 1678, *reprinted in* 5 STATUTE OF THE REALM, 1628–80, *supra* note 150, http://www.british-history.ac.uk/statutes-realm/vol5/pp894-896.

253. *See* HARRIS, *supra* note 189, at 62–63 (describing Danby's use of bribes and pensions).

254. *See* J.H. PLUMB, THE GROWTH OF POLITICAL STABILITY IN ENGLAND, 1675–1725, at 47–48 (1967) (detailing Danby's efforts to build a Court Party in Parliament).

255. *See* HARRIS, *supra* note 189, at 63 (describing the limits on Danby's efforts to organize a cohesive Court party in Parliament).

256. *See* W.A. SPECK, RELUCTANT REVOLUTIONARIES: ENGLISHMEN AND THE REVOLUTION OF 1688, at 32 (1988) (recounting the fictional popish plot).

to the English religion and form of government ensued.[257] The calls from the Parliament and English society to exclude James from succession grew louder. Lord Shaftesbury, the former lead minister under Charles, organized parliamentary proponents of exclusion into a rudimentary party.[258] The proponents of exclusion were pejoratively labeled Whigs.[259]

The Whigs comprised mainly members of a "Country" faction in the Parliament who opposed the Court's corruption of Parliament, including Danby's schemes to bribe members of Parliament to support the Crown.[260] The Whigs under Shaftesbury coalesced around a shared theory of governance that built on the foundation of Country opposition to the Court. Most prominently, the Whigs supported the coordination theory of government and its mixed monarchy consisting of the Kings, Lords, and Commons sharing sovereign authority.[261] The Whigs also coalesced around their shared religion as the party was dominated by Protestant dissenters who sought a more comprehensive church in opposition to the stringent conformity promoted by the Anglicans.[262] But like the Anglicans, the Whigs rejected religious toleration for Catholics due to their association of the religion with popery and absolutism.[263]

Despite the rumored popish plot and growing popular support for Exclusion, the Whigs, as they coalesced into a party, were in the minority in the predominantly Anglican Parliament that had sat since the restoration in 1660.[264] That Parliament was comprised of members required under the Corporation Act to take the oath of allegiance and supremacy to the King as the head of the Church of England.[265] And although Protestant dissenters still held seats in Parliament after the Corporation Act through their "casual" conformity to the Church of England, they were a distinct parliamentary minority unable to advance their platform of Exclusion.[266]

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257. *See* SWATLAND, *supra* note 208, at 253 (associating public hysteria with the popish plot).

258. *See* JONES, *supra* note 197, at 39 (defining the Whigs as a party with "a clearly defined and accepted group of leaders").

259. The Whigs were named after Scottish Presbyterian rebels who opposed the King's efforts to secure religious conformity in Scotland. HARRIS, *supra* note 189, at 8.

260. J.R. JONES, THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISIS, 1678–1683, at 11 (1961).

261. *See* CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN 6 (1959) ("[The Whigs] believed in a separation of powers and hoped that each of the three parts of the government would balance or check the others.").

262. *See* JONES, *supra* note 197, at 39 (identifying the association between the Whigs and Protestant dissenters).

263. *See* HARRIS, *supra* note 189, at 89–91 (describing the Whig antipathy toward Catholics and popery).

264. *See* BASIL DUKE HENNING, THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1660–1690, at 77 (Secker & Warburg eds., 1983) (detailing the political orientation of members of Parliament and showing the Anglican and Court domination of the Cavalier Parliament that sat from 1661–1678).

265. *See supra* notes 204–208 and accompanying text.

266. *See* HALLIDAY, *supra* note 206, at 112 (describing the phenomenon of casual, or occasional, conformity).

However, in the midst of the public hysteria surrounding the popish plot, Danby's secret negotiations with the French on behalf of the King were discovered.[267] Danby's negotiations served as the basis for parliamentary allegations that Danby was "popishly affected."[268] The House of Commons subsequently initiated an impeachment proceeding against Danby.[269] In response, and as a way of defending Danby, the King exercised his royal prerogative to dissolve the Parliament in January 1679.[270] That decision to dissolve Parliament proved to be a pivotal political misstep for the King. In the election that followed the King's summoning of the next Parliament in March 1679, proponents of Exclusion won a majority of the seats after Shaftesbury and the Whigs pursued a sophisticated and organized electoral campaign.[271] In this campaign, the Whigs promoted exclusion "as the only means of preserving the liberties, property and religion of Englishmen" and denounced those who opposed exclusion as "favourers of Popery and arbitrary government."[272]

The newly constituted House of Commons held its first session in March 1679 and introduced a bill to exclude James from the succession in May 1679.[273] Charles offered concessions to the exclusionists in the form of limitations that would be placed on a Catholic successor, which included depriving the Crown of "rights of ecclesiastical patronage and of appointment to civil, legal and military offices whenever a Catholic occupied the throne."[274] The exclusionists rejected the concessions, and Charles dissolved the Parliament in July 1679 after only four months in session.[275] The King summoned another Parliament in October 1679, but the King prorogued the Parliament until October 1680 in hopes that the popish hysteria would die down.[276] It did not, and the Whig-controlled House of Commons introduced a second exclusion bill rejecting the Crown's additional concessions.[277] Three months later, the King dissolved the Parliament.[278] The King then summoned a third Parliament and required that it be moved from London, a Whig stronghold, to Oxford, a more pro-royalist

267. SMITH, *supra* note 123, at 156; *see also* ANDREW MARVELL, AN ACCOUNT OF THE GROWTH OF POPERY AND ARBITRARY GOVERNMENT IN ENGLAND 3, 12 (1678) (reviving the memories of Queen Mary Tudor and other instances of Catholic persecution and threats to Protestants and their magistrates).

268. SMITH, *supra* note 123, at 156.

269. *Id.*

270. *See* JONES, *supra* note 260, at 34 (describing the decision to dissolve the Parliament "a calculated gamble").

271. LEVIN, *supra* note 209, at 5–6 ("Shaftesbury . . . created a very efficient 'party' organisation geared to win elections.").

272. HENNING, *supra* note 264, at 37.

273. LEVIN, *supra* note 209, at 6.

274. SMITH, *supra* note 123, at 157.

275. HARRIS, *supra* note 189, at 98.

276. SMITH, *supra* note 123, at 157–58.

277. *Id.* at 158 (describing the King's "offer to accept 'any new remedies which shall be proposed that may consist with the preserving the succession of the Crown in its due and legal course of descent'").

278. *Id.*

constituency.[279] The move did little to change the dynamics as the Whig-controlled Parliament introduced a third exclusion bill. After being in session for only a week in March 1681, the King dissolved this third exclusion Parliament.[280] The Exclusion Crisis continued without a clear resolution in sight.

After several centuries in which the Parliament served as a supplicant subordinate to the Crown, the institution had emerged as a coordinate rival to the Crown by the early 1680s. Continuing the dynamic from the period immediately before the Civil War, the Parliament during the post-Restoration period assertively checked royal exercises of unilateral authority to advance policies of religious tolerance and took the initiative in the lawmaking process to promote religious conformity. But facing an intransigent Parliament seeking to prevent the succession of his brother to the Crown, Charles shifted tactics with major potential consequences for the coordination theory of government.

Following the dissolution of the Oxford Parliament, the King revived his rarely used royal prerogative to revoke or revise municipal corporate charters through the issuance, or threats to issue, writs of quo warranto against borough corporations.[281] Since municipal corporate charters set the terms of municipal membership and governance as well as elections to the House of Commons, the King's exercise of this royal prerogative posed a major threat to parliamentary independence. By deciding who held borough offices and who had the power to choose members of Parliament through the remodeling of corporate charters, the King could create a class of parliamentarians dependent on him for office and ultimately loyal to his policy program.

For Charles in the immediate term, this meant ensuring the selection of parliamentarians opposed to Exclusion. For James in the longer term, this meant ensuring the selection of parliamentarians that would support or defer to the Crown's unilateral exercise of power to promote religious tolerance for Catholics. In broader constitutional terms, if the King proved able to secure parliamentary dependence on the Crown, the door would be open to a return to the divine right theory and royal absolutism with Parliament reassuming the role of the subordinate supplicant to the King. In the next part, I turn to the Crown's assault on parliamentary independence in the 1680s that led to a revolutionary response recounted in Part V.

279. *Id.*

280. *See* HENNING, *supra* note 264, at 39 (attributing Charles's decision to so quickly dissolve the Parliament to his newfound financial independence from his secret arrangement with King Louis of France).

281. *Id.* at 40.

IV. THE CROWN ASSAULT ON PARLIAMENTARY INDEPENDENCE

By the early 1680s, the Crown and the Parliament were at a crossroads. After the King summoned and dissolved three Parliaments in just over two years,[282] the two bodies were unable to come to an agreement on succession. The Whig-controlled Parliament, however, appeared to be in the driver's seat with a crown concession to rigid exclusion appearing to be only a matter of time. The vehemently anti-Catholic English public increasingly supported exclusion and the parliamentarians assumed the King could not avoid summoning a new Parliament, which would likely be no different than the previous ones in its partisan orientation.[283] Under the Triennial Act of 1664, adopted to prevent the Crown from ruling without Parliament, the King was required to call Parliament at least once in three years.[284] Moreover, Parliament controlled the power of the purse and the King was legally prohibited from raising revenue without parliamentary consent beyond the funding streams provided in the restoration settlement.[285]

Two factors, however, worked against these assumed Whig advantages. First, for most of the English, loyalty to the King far exceeded loyalty to a particular cause, especially if that cause threatened to divide the country and expose it to the violence, chaos, and anarchy of the Civil War years.[286] Second, the King proved to be more capable of ruling without Parliament than the Whigs might have assumed. The Triennial Act lacked any mechanism of enforcement.[287] Moreover, the combination of peace, secret subsidies from France, and a trade boom that increased the Crown's customs receipts made the King financially independent and without need for additional parliamentary appropriations.[288] Over the remaining four years of his life, Charles proceeded to rule without Parliament. Since Parliament provided a key platform for the Whig cause, its absence diminished the ability of the Whigs to influence public opinion.[289] On the flip side, the King, without the competition of Parliament, had a greater capacity to influence the views of his people.

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282. *See supra* text accompanying notes 270–278.

283. *See* JONES, *supra* note 197, at 39 (describing the successful efforts of the Whigs to mobilize public support for exclusion in the early 1680s).

284. An Act for the assembling and holding of Parliaments once in Three yeares at the least 1664, 16 Car. 2 c. 1, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 513, http://www.british-history.ac.uk/statutes-realm/vol5/p513.

285. *See supra* note 200 and accompanying text.

286. *See* SMITH, *supra* note 123, at 162 (noting that in the 1680s, "Popular loyalty to the Crown remained high").

287. *Supra* note 284.

288. *See* HARRIS, *supra* note 189, at 35 (describing the improved financial situation of the King that allowed him "to become both economically and politically independent of Parliament during the last years of his reign").

289. *See* JONES, *supra* note 260, at 182 (describing the deterioration of the Whigs' position due to the crippling effect of the King's rule without a Parliament).

The King's capacity to rule without Parliament bought the Crown time to pursue a strategy of purging opponents from governing institutions that functioned as rivals to his authority and put his partisan allies in control. Through the strategy that contemporaneous critics called packing, the Crown gained control over the membership of municipal boroughs and local courts and thereby influenced the composition of Parliament.[290] Through this strategy, both municipal boroughs and Parliament became more amenable to the Crown's policy preferences, particularly on the issue of succession, and more deferential to the Crown because of officials' dependence on the Crown for their offices. To purge opponents from borough and parliamentary offices and replace them with loyalists, Charles revived a royal prerogative that had gone mostly dormant over the prior century: the power to revoke and revise corporate charters to remodel municipal boroughs.[291] The charters dictated the terms by which boroughs operated local courts and the means and mechanisms of parliamentary selection from boroughs.

I begin this part with a brief history of boroughs, the Crown's use of royal powers to create and revise borough charters, and this power's relationship to the selection of members of Parliament. I then return to the context of the 1680s and examine Charles's extensive efforts to remodel boroughs that produced, after his death, a Parliament dominated by his newly organized partisan allies, the Tories. In the final section of this part, I describe James's efforts to pack a new Parliament with members willing to assent to his exercise of unilateral royal prerogative to secure religious tolerance for Catholics.

A. The History of Royal Prerogative over Municipal Borough Charters

Since at least the ancient Saxon period, which spanned from the eighth century to the Norman Conquest in 1066, England had been comprised of two principal types of political subdivisions.[292] The first, known as shires, arose from the division of earlier subkingdoms that existed on the island. Those shires later took on the appellation "counties."[293] In the counties, two of the King's appointees had primary authority: the aldermen who governed and the sheriffs who adjudicated and enforced laws.[294] The second political subdivisions were boroughs.[295] All towns and cities were constituted as boroughs and their constituents, who went by the name burgesses, were the free inhabitants of the

290. Miller, *supra* note 207, at 53.

291. *Id.* at 57–58.

292. *See* MEREWETHER & STEPHENS, *supra* note 229, at viii–ix (detailing the origins of boroughs and counties).

293. *Id.* at ix–x.

294. *Id.* at x.

295. *Id.*

boroughs.[296] The burgesses had duties and privileges, which included paying taxes (scots and lots) and serving on the municipal court (the court leet).[297]

In the late thirteenth century, King Edward I called upon boroughs to return members to Parliament for the first time.[298] The burgesses and the knights of the shire formed into a political body of commoners, later known as the House of Commons.[299] By the early fourteenth century, the Commons had secured its right to be represented and was included in every Parliament that followed.[300]

Over time, the boroughs became objects of Crown manipulation to secure royal influence over Parliament. Whereas counties were subject to a law that fixed voting qualifications for parliamentary elections, in the boroughs, the Crown could exercise control over borough membership and thereby the voting qualifications for parliamentary elections.[301] The Crown exercised that control through the process of municipal incorporation. The Crown granted its first charter of municipal incorporation to a borough in the fifteenth century.[302] According to historians H.A. Merewether and A.J. Stephens, the purpose of incorporation was "to give to the grantees a general name by which they might sue and be sued, and take and grant lands; and that they should enjoy all their rights, privileges, and possessions by perpetual succession."[303]

Through incorporation, the charters granted to the boroughs franchises, defined as "Royal Priviledge in the Hands of a Subject, of some Benefit, Power, or Freedom that Persons or Places have above others . . . ."[304] One franchise granted to corporate boroughs was the privilege to return two of its members

296. *Id.* at v.

297. *Id.*

298. *See* J.S. Roskell, *The Composition of the House of Commons*, *in* THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1386–1421 (J.S. Roskell et al. eds., 1993), https://www.historyofparliamentonline.org/volume/1386-1421/survey/v-composition-house-commons (describing the Crown's experimentation with different compositions for the House of Commons before settling on a body with two representatives from counties and boroughs with the exception of London, which sent four representatives).

299. *Id.*

300. *Id.*

301. *See* Electors of Knights of the Shire Act 1432, 10 Hen. 6 c. 2 (Eng.) (establishing a voting qualification requiring that individuals possess a freehold of at least 40 shillings). *See also* CHARLES SEYMOUR, ELECTORAL REFORM IN ENGLAND AND WALES: THE DEVELOPMENT AND OPERATION OF THE PARLIAMENTARY FRANCHISE, 1832–1885, at 11 (1915) (providing an account of what motivated the forty-shilling freehold requirement).

302. *See* 1 THOMAS HINTON BURLEY OLDFIELD, THE REPRESENTATIVE HISTORY OF GREAT BRITAIN AND IRELAND 170 (London, Baldwin, Cradock, & Joy 1816) (finding that King Edward IV granted the first parliamentary charter to Wenlock in the late fifteenth century).

303. MEREWETHER & STEPHENS, *supra* note 229, at xxxvii.

304. THE POWER OF THE KINGS OF ENGLAND TO EXAMINE THE CHARTERS OF PARTICULAR CORPORATIONS AND COMPANIES 2 (London, John Kidgell 1684).

to Parliament.[305] Initially, the corporate charters did not significantly interfere with borough autonomy regarding decisions about governance, membership, and parliamentary selection.[306] But as the Crown extended corporate status to more boroughs, the threat to borough autonomy grew.[307]

Along with the extension of corporate status to boroughs came the Crown's assertion of prerogative to determine which municipal corporate boroughs had the authority to return members to Parliament.[308] And as the Crown embedded the parliamentary franchise into certain corporate charters, kings and queens through their charters dictated who within the borough had the right to select members of Parliament.

Thus, whereas in the era prior to borough incorporation, all free inhabitants who paid taxes could participate in the selection of the borough's members of Parliament, charters limited the right in some boroughs to property holders, or so-called burgage tenants, and in other boroughs the charters extended the right to nonresidents.[309] These charter innovations had as one of their objectives increasing Crown influence over parliamentary selection so that the Crown could secure Parliaments more amenable to royal requests for taxes and revenue.[310]

From the sixteenth century forward, the Crown also sought to influence the composition of Parliament by expanding the body through the grant of charters with parliamentary franchises to new, and often smaller and poorer, boroughs.[311] In these boroughs (later nicknamed rotten boroughs), nonresident lords, barons, and other nobles allied with the King could control parliamentary selection and assume seats in Parliament that borough residents had no interest in contesting.[312]

Finally, the Crown influenced the composition of Parliament using the royal prerogative to revoke borough charters and remodel municipal

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305. Although the Crown originally granted to all boroughs the authority to send burgesses to Parliament, the sheriffs had considerable discretion over which boroughs returned members to Parliament. *See* OLDFIELD, *supra* note 302, at 171–74.

306. *See* MEREWETHER & STEPHENS, *supra* note 229, at xxxix–xl (describing early Crown efforts to influence borough membership and parliamentary selection).

307. In this extension of corporate status, the Crown often used the more expedient vehicle of incorporation "by *inference* or *implication*." *Id.* at xxxviii; *see also* Pickavance, *supra* note 210, at 10 (explaining that for the monarch, "[m]unicipal independence was . . . seen as an ever-present threat to the establishment to authoritarian government").

308. MEREWETHER & STEPHENS, *supra* note 229, at xl.

309. *Id.* at xliv–l (describing the different voting qualifications established in boroughs during the sixteenth-century reign of Queen Elizabeth).

310. *Id.* at lii ("[B]y those means [of charter innovation] all [borough] rights were brought under the influence and control of the crown.").

311. *See* PORRITT, *supra* note 212, at 367–76 ("It was . . . the . . . desire of the Crown [for control of the House of Commons] that, between the reigns of Henry VI and James I, so many boroughs were enfranchised and the number of members of the House of Commons so largely increased.").

312. *See id.* at 390–92 (describing the proliferation of rotten boroughs at the behest of English monarchs).

corporations through a legal process initiated by the writ of quo warranto.[313] The writ of quo warranto requires a corporation to show "by what warrant . . . [it] claim[s] to be a corporation or to exercise a certain privilege granted by the King."[314] Whenever a corporation fails to use, refuses to use, or abuses and misuses the corporate franchise granted to the borough, a judge can declare "that the body politic has broken the condition upon which it is incorporated, and thereupon the incorporation is void."[315] Since corporate charters tended to be longstanding and included several privileges that were trivial, technical, and sometimes outdated, most, if not all, corporate boroughs were vulnerable to charter invalidation through the quo warranto writ by the late seventeenth century.[316] With this power to revoke municipal corporate charters, the Crown could remodel boroughs and change the terms of their membership and influence the parliamentary selection process.

Prior to the latter part of the seventeenth century, the Crown rarely used the royal prerogative to revoke and revise charters for purposes of influencing the composition of Parliament. As historian Catherine Patterson has catalogued, before the seventeenth century, the writ of quo warranto was primarily used by the Crown to recover "jurisdictional and fiscal rights allegedly usurped by [their] subjects" and to "curb[] private authority among their subjects."[317] It was only during the reigns of Charles II and James II that the power came to be primarily "associated with absolutism and arbitrary authority," as these two monarchs' use of the quo warranto writ was widely seen as a tool to control boroughs and Parliament.[318]

Crown influence over borough parliamentary selection had particularly strong implications for parliamentary independence in the 1680s. At this time, boroughs were responsible for returning nearly eighty percent of the members of the House of Commons.[319] Thus, if the Crown could influence or control parliamentary selection in the boroughs through quo warranto writs and charter remodeling, a loyal and dependent Parliament could be secured.

313. According to historian Catherine Patterson, the "writ seems to have originated in the thirteenth century [and] its use can be found as early as Henry III's reign" from 1207 to 1272. Patterson, *supra* note 228, at 881.

314. HALLIDAY, *supra* note 206, at 26.

315. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *262).

316. *See* JONES, *supra* note 197, at 45 ("The legal officers were invariably certain of success in [quo warranto] actions against the charters, since they could always find technical breaches to justify forfeiture.").

317. Patterson, *supra* note 228, at 881.

318. *Id.* at 879.

319. *See* Pickavance, *supra* note 210, at 16 ("[Since] [a]bout four fifths of the members of the House of Commons were returned by the boroughs[,] the independence of Parliament itself was . . . underwritten by the municipal franchise.").

B. Borough Remodeling

At the conclusion of the third exclusion Parliament in Oxford, Charles made a rare address to his people.[320] At the time, the King faced not only a Parliament pressing him on the issue of exclusion but also a public still anxious about the popish plot. The Whigs had successfully amplified the fictional plot to mobilize fear about the threat of James's succession to both the Protestant religion and the English form of government.[321]

In his speech, the King sought to counter the Whig exclusion campaign by providing his side of the negotiations with Parliament. Charles highlighted the compromises he proposed to the House of Commons that he said were designed to protect "the Security of the Protestant Religion" while "preserving the Succession of the Crown, in its due and legal Course of Descent . . . ."[322] The King explained that he was willing to consider other means "to remove all reasonable Fears that might arise from the Possibility of a Popish Successor's coming to the Crown," including limiting the successor's powers to administer government and religion.[323] "We were ready to hearken to any Expedient," Charles announced, "by which the Religion Establish'd might be Preserv'd, and the Monarchy not Destroy'd."[324]

Through his speech, the King sought to shift the public perception of the threats to the English government and religion from his brother's succession to Parliament's demand for exclusion. Just as the Whigs in their propaganda revived the historical memories of Catholic persecution of Protestants to motivate fear of a Catholic king, Charles in his speech tried to revive the memory of civil strife, bloodshed, and anarchy from forty years earlier when the House of Commons resisted the King and disrupted the monarchy. The King implored, "We cannot, after the sad Experience We have had of the late Civil War[], that Murder'd Our Father of Blessed Memory, and ruin'd the Monarchy, consent to a Law, that shall establish another most Unnatural War."[325] The King then assured his people that he would preserve the English form of government in which summoning Parliament continued to be "look[ed] upon as the best Method for healing the Distempers of the Kingdom . . . ."[326] And he vowed to protect the English religion by "us[ing] Our utmost Endeavours to extirpate Popery . . . ."[327]

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320. *See* KING CHARLES II, HIS MAJESTIES DECLARATION TO ALL HIS LOVING SUBJECTS TOUCHING THE CAUSES AND REASONS THAT MOVED HIM TO DISSOLVE THE LAST TWO PARLIAMENTS (1681).

321. *See* SWATLAND, *supra* note 208, at 256 (identifying the Whigs' exploitation of the plot to arouse public anxiety).

322. CHARLES II, *supra* note 320, at 4.

323. *Id.* at 6.

324. *Id.*

325. *Id.* at 7.

326. *Id.* at 9.

327. *Id.*

Finally, the King appeared to preview his assault on parliamentary independence when he confidently declared, "Our next meeting in Parliament, shall perfect all that Settlement and Peace which shall be found wanting either in Church or State."[328] In this Parliament, the King continued, "We shall be Assisted therein by the Loyalty and good Affections of all those who consider the Rise and Progress of the late Troubles and Confusions, and desire to preserve their Countrey from a Relapse."[329]

The King's declaration, read from every pulpit in the kingdom, galvanized public support for succession and fueled the rise of a nascent political party, the Tory party, to oppose the Whigs and exclusion.[330] The Tories, disparagingly nicknamed by their opponents after Catholic–Irish bandits, included deeply conservative Englishmen who supported a strong monarchy and the established Church.[331] Most Tories were Anglicans who staunchly supported religious conformity and advocated for the exclusion of Protestant dissenters and Catholics from public life as well as the prosecution of casual conformists or nonconformists who attained civil and military offices.[332] The Tories were also adherents to the divine right theory, in which the King's civil authority was "derived directly from God" and not from the people.[333] The Tories considered the King to be the absolute sovereign power, only limited by the laws he created, who must be obeyed and could not be resisted.[334]

The Tories supported the Crown's succession to a Catholic monarch despite their ardent religious intolerance because they considered him bound by established laws to preserve the Protestant religion.[335] The Tories therefore viewed James as less of a threat to the established religion than the Whigs and Protestant dissenters.[336] For the Tories, the Whigs' support for religious comprehension and for republican principles invited "popery" and arbitrary government by undermining both religious unity and the King as protector of the Protestant religion.[337]

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328. *Id.* at 9–10.

329. *Id.* at 10.

330. Pickavance, *supra* note 210, at 92.

331. SWATLAND, *supra* note 208, at 234.

332. SMITH, *supra* note 123, at 159.

333. *Id.*

334. *See* EDWARD VALLANCE, THE GLORIOUS REVOLUTION 6 (2008) (describing as core beliefs of the Tory party, "non-resistance and passive obedience" to the Crown); *see also* HENRY ST. JOHN & LORD VISCOUNT BOLINGBROKE, A DISSERTATION UPON PARTIES 5 (11th ed. 1786) ("Divine, hereditary, indefeasible right, lineal succession, passive-obedience, prerogative, non-resistance . . . were associated in many minds to the idea of a Tory . . . .").

335. *See* HARRIS, *supra* note 191, at 97, 121–22 (accounting for the source of Tory support for Charles and his policy of succession).

336. *See id.* at 99 (recounting the Tory "depiction of the Whigs as Nonconformists and republicans whose real aim was to destroy the Church and State as by law established").

337. *Id.* at 99–100.

The King's speech triggered the "Tory reaction" that initially targeted London, the heart of Whig opposition. The Tory reaction had three principal components.[338] First, Tory officials supported by the Crown actively prosecuted Whig opponents, sometimes for acts against the Crown and at other times for failure to abide by laws requiring religious conformity.[339] Second, when the Tory-led legal prosecutions ran up against the obstacle of Whig-sympathetic courts and juries appointed by borough officials, the Crown, through local Tory officials, tried to manage and corrupt elections to advance officials favorable to the King.[340] Finally, when the efforts to manage and corrupt elections proved too difficult, the King used his royal prerogative over corporate charters to support local Tories in their campaigns to purge Whigs from borough governments.[341]

In London, the Crown's efforts began with the discovery of a fictitious Protestant plot to kill the King involving the former Lord, and now Earl, of Shaftesbury.[342] At the time of the prosecution, Shaftesbury was still the leader of the Whigs and therefore a prime target of the Crown's efforts to suppress opposition.[343] Shaftesbury, however, was a resident of the London borough, and in London the Whig sheriffs had the authority to appoint grand jurors.[344] For Shaftesbury's grand jury, the Whig sheriff appointed fellow Whig jurors, including former Whig members of the Exclusion Parliament.[345] After hearing witnesses and evidence, the grand jury returned an ignoramus verdict protecting Shaftesbury from any further prosecution.[346]

Shaftesbury's acquittal convinced the King that the only way to secure political control over the recalcitrant city was through the revocation of the borough's charter. Just over a month after the acquittal, Charles issued a writ of quo warranto against the London borough.[347] The writ charged the council

338. *See* Pickavance, *supra* note 210, at 93 (describing the King's speech as a call to arms for a newly emerging Tory party comprised of Englishpersons "inclined to support [the King]").

339. *Id.* at 8–9 (describing as one of the "most conspicuous effects" of the Tory reaction, "the vigorous prosecution of protestant nonconformity [and] the harassment of men and women who regarded themselves as living beyond the pale of the political nation").

340. *See id.* at 110–11.

341. *See id.*

342. *See* 1 GILBERT BURNET, BISHOP BURNET'S HISTORY OF HIS OWN TIME 504–06 (Thomas Burnet ed., 1818) (providing details of the supposed Protestant Plot against the King).

343. *See* Pickavance, *supra* note 210, at 9.

344. *See* BURNET, *supra* note 342, at 495 (alluding to the past practices of London sheriffs returning juries favorable to Whigs).

345. *Id.* at 508–09.

346. *Id.* at 508.

347. LEVIN, *supra* note 209, at 23. After the issuance of the writ and prior to the trial on the writ, the Crown attempted to manage and corrupt borough elections for the London sheriffs and the city council through measures that included the disenfranchisement of Protestant dissenters, violence targeting Whig opponents, and blatant refusals to count votes cast. The efforts were only partially successful and demonstrated to the Crown and local Tories the political unsustainability of managing and corrupting elections every year. *See* BURNET, *supra* note 342, at 529–31 (describing the Crown's extensive efforts to manage and corrupt London borough elections).

with two violations of its charter. The first charged sedition for the council's petition to the King opposing his earlier prorogation of the Parliament.[348] The second charged violation of the corporation's franchise privileges for imposing taxes not provided for in the charter.[349] Despite facing long odds and high costs, the city council defended itself against the charges before the King's Bench, but to no avail. The court ruled in favor of the Crown and forced the city to forfeit its charter.[350]

The King's successful revocation of the London charter set in motion an extensive corporate borough remodeling campaign that continued through the remaining years of Charles's reign. London's failure to defend its charter demonstrated to other corporations the costly futility of resisting the King's request to surrender their charter.[351] In the four years between the dissolution of the Oxford Parliament and the summoning of James's first Parliament in 1685, the Crown remodeled charters for more than 120 boroughs, 98 of which selected members of Parliament.[352] In most of these corporate remodels, the King purged Whigs from borough offices and appointed Tories as the first corporate officials under the new charters.[353] He then gave himself the power to veto the selection of future corporate borough officials and to remove borough officials at his pleasure.[354]

The powers that Charles granted to himself through the borough remodeling campaign were the same powers that Charles had earlier attempted to give himself through his proposed amendments to the Corporation Act of 1661.[355] At that time, Parliament rejected Charles's proposals as a threat to borough independence that would also undermine parliamentary independence.[356] In the new partisan context of the 1680s, only the Whigs continued to foreground these threats.[357] However, with the Parliament dissolved, the Whigs lacked that platform to air their concerns and mobilize the English people to oppose this exercise of royal prerogative that had the potential to give rise to royal absolutism. On the other side of the partisan divide, the Tories rallied in favor of the King's efforts to remodel borough

348. BURNET, *supra* note 342, at 533.

349. *Id.*

350. LEVIN, *supra* note 209, at 48–49.

351. JONES, *supra* note 197, at 45.

352. *See* Pickavance, *supra* note 210, at i, 60.

353. *See* HALLIDAY, *supra* note 206, at 22–34 (detailing the partisan purges that resulted from the Crown's extensive remodeling of boroughs).

354. JONES *supra* note 197, at 45.

355. *See supra* text accompanying notes 210–212.

356. *See supra* text accompanying notes 214–215.

357. *See, e.g.*, REFLECTIONS ON THE CITY-CHARTER, AND WRIT OF QUO WARRANTO 28–31 (London, E. Smith 1682) (urging resistance to the Crown's efforts to control the selection of London borough officials, including sheriffs, through his revocation of its charter).

charters to purge their partisan opponents from office.[358] The Tories proved willing to sacrifice borough and parliamentary independence to not only protect the Monarchy and the Church but also to satisfy their ambition for power, even if such power was constrained by the need to be loyal to the Crown. In the end, "of all [the] attempts in the seventeenth century to bring the municipalities to a greater dependence on the crown, none was as successful as in the period of Tory reaction."[359]

On February 6, 1685, Charles died.[360] His borough remodeling campaign was not complete, but the Crown passed to his brother James without controversy.[361] James, however, needed to summon a Parliament to secure its consent for taxes and revenue that automatically terminated upon his brother's death. In the three months leading up to the assembling of Parliament in May, James continued Charles's remodeling campaign, adding forty-four of the ninety-eight new charters for parliamentary boroughs established in the four years between the two parliaments.[362]

In the first parliamentary election since the borough remodeling campaign began, only 142 members of the Oxford Parliament were returned to the 513-member House of Commons.[363] In this new Parliament, which has been labeled the Loyal Parliament, Tories and their allies were elected to a super-majority of seats in the Commons while Whigs were elected to only fifty-seven.[364] Modern scholars dispute how much borough remodeling contributed to this dramatic shift in the partisan dynamics of Parliament.[365] It is probably the case that the Tories owed at least some of their success to increasing public support for the King and the Crown's right of succession, along with declining support for the Whigs. But it is also likely the case that the Tories would not have been nearly as successful in the parliamentary election without the extensive borough remodeling. Regardless of how modern historians interpret and revise their understandings of the past, what matters for the account of the

358. *See* HALLIDAY, *supra* note 206, at 22–34 (describing the local Tory support for the King's remodeling of boroughs).

359. Pickavance, *supra* note 210, at iii.

360. *Id.* at 60.

361. *Id.* at 123.

362. *Id.* at 60.

363. *Id.* at 50.

364. HARRIS, *supra* note 189, at 120.

365. For example, Pickavance argues that borough remodeling had a limited impact on the composition of Parliament because the remodeled boroughs only returned 194 members to the new Parliament and not all of these remodeled boroughs shifted power from Whigs to Tories. Furthermore, Pickavance points out that Tories were just as successful in counties, which were not subject to borough remodeling, as they were in the boroughs. *See* Pickavance, *supra* note 210, at 60–64. J.R. Jones, however, provides further context that suggests borough remodeling had a greater influence on the composition of the 1685 Parliament. Jones finds that Whigs were elected to only 9 of the 195 seats in the remodeled boroughs, and most of the remodeled boroughs took the unusual step of pledging loyalty to the crown upon James's accession. *See* JONES, *supra* note 197, at 46–47.

constitutional principle that arose in response to the borough remodeling campaign is how contemporaries understood the Crown's actions.

Those who lived during Charles's reign associated the borough remodeling campaign with the Crown's effective packing of Parliament with loyalists. For example, influential Scottish philosopher and historian Gilbert Burnet, whose writings date to King Charles II's reign, associated borough remodeling with the court's desire to "free [itself] from the fears of troublesome parliaments for the future."[366] English diarist John Evelyn included in his memoirs a description of the Loyal Parliaments that seemed to accord with a widely held view of the remodeling campaign's effect: "A Parliament was now summoned, and great industry used to obtain elections which might promote the Court-interest, most of the Corporations being now, by their new charters, empowered to make what returns . . . members [of the court] pleased."[367] English politician and government official Lord Bolingbroke explained that the borough remodeling campaign gave "the crown such an influence over the elections of members to serve in parliament, as could not fail to destroy that independency, by which alone the freedom of our government hath been, and can be supported."[368]

If there were any doubts about whether Charles's borough remodeling campaign was part of an assault on parliamentary independence, his brother James's actions toward the boroughs in the years that followed removed them. Given the loyalty of the Parliament elected after the extensive borough remodeling campaign, the new King's need to engage in a further assault on parliamentary independence might appear surprising. But a broken promise that went to the core of the Tory religious identity forced James to search for new parliamentary loyalists who would assent to his exercise of royal prerogative to promote religious tolerance toward Catholics.[369]

That search led him to Whig Protestant dissenters who had just been nearly vanquished from Parliament and whom James thought might be amenable to a program of religious tolerance after their years of suffering political and legal persecution at the hands of Anglican religious conformists.[370] To return supportive Whigs to power, James planned to use the very tools provided in the new charters that previously had been used to purge the Whigs. However, the deep and widespread antipathy that Tories and Whigs held toward Catholics prevented James from carrying out this strategy as the former partisan enemies came together during the Glorious Revolution to force James to abdicate the

366. BURNET, *supra* note 342, at 528.

367. 2 JOHN EVELYN, DIARY OF JOHN EVELYN 216 (William Bray ed., 1907).

368. BOLINGBROKE, *supra* note 334, at 81.

369. *See generally* JONES, *supra* note 197, at 5, 138–40; G. H. WAKELING, KING AND PARLIAMENT 90–91 (New York, Scribner 1896).

370. *See generally* JONES, *supra* note 197, at 107, 138–40.

Crown.[371] That constitutional near miss, which could have led to the revival of unchecked royal prerogative beyond the limits of law, ultimately prompted the Whig and Tory push to constitutionalize a principle providing for parliamentary elections free from undue crown influence.

C. The Crown's Attempted Packing of Parliament

In a speech to the privy council on the day he assumed the throne, James announced, "I shall make it my Endeavour to Preserve this Government, both in Church and State as it is now by Law Established."[372] Then, in a nod to his Tory allies and dependents that he hoped would control the Parliament to come, James continued with a promise: "I know the Principles of the Church of *England* are for Monarchy, and the Members of it have shewed themselves Good and Loyal Subjects, therefore I shall alwayes take care to Defend and Support it."[373] With the King's promise to defend and support the Church of England, the Tory-dominated Parliament emerged as a body that a contemporaneous historian described as "the most loyal Parliament a Stewart ever had."[374] During its first session, at least, the Parliament proved to be more loyal and deferential to the King than any prior Parliament during the seventeenth-century reign of the House of Stuart.

Unlike prior Stuart-era parliaments, the Loyal Parliament approved generous custom revenue streams for the Crown that put James in a strong position of financial independence from Parliament.[375] When Charles's illegitimate son led a rebellion to restore a Protestant king to the Crown, Parliament supported James in his raising of a substantial army in which James commissioned many Catholics to command the forces.[376] After the suppression of the rebellion, James made his boldest request yet: he requested money from Parliament to maintain a standing army to ostensibly defend the Crown against future rebellions.[377] Prior Parliaments had consistently opposed funding standing armies out of fear that the King would use the army against Parliament and its people.[378] Under ordinary parliaments, that fear would have been particularly pronounced if the King making the request had been Catholic, with rejection of the Crown's request certain to follow. But this was not an ordinary

371. *See generally* 8 DAVID HUME, HISTORY OF ENGLAND 190–91 (Dublin, United Co. of Booksellers 1775); SMITH, *supra* note 123, at 163–64.

372. King James II, Speech to the Privy Council (Feb. 7, 1684), *in* LONDON GAZETTE (1685).

373. *Id.*

374. WAKELING, *supra* note 369, at 91.

375. *See* HUME, *supra* note 371, at 190–91 (providing an account of the parliamentary approved impositions that gave James a generous supply of funds).

376. HARRIS, *supra* note 189, at 124.

377. SMITH, *supra* note 123, at 162.

378. *See* 6 DAVID HUME, HISTORY OF ENGLAND 366–68 (Oxford, Talboys & Wheeler 1826) (1757) (describing past parliamentary opposition to standing armies).

Parliament. This most loyal of all the Stuart parliaments seemed open to James's request until he went too far in taking Parliament's loyalty for granted.

Prior to Parliament's vote on supplies for the standing army, James made a speech to Parliament in which he announced his plans to dispense with the Test Act of 1672's prohibition on Catholics holding military office.[379] The speech set off a firestorm in Parliament that led the body to issue an address to the King asserting that "the penalties of the test act could in no way 'be taken off but by an act of Parliament.'"[380]

Despite the fact that James's proposal broke his promise to the people to preserve the government in Church and State according to the law established, the resolution opposing the proposal only carried by one vote because of extensive parliamentary loyalty to the King.[381] But rather than using his influence to change a single vote in a Parliament comprised of many beneficiaries of the Crown's borough remodeling campaign, James instead impetuously prorogued Parliament a week later before dissolving it altogether in July 1687.[382]

After proroguing Parliament, James proceeded to rule without Parliament and to advance his policy of religious tolerance through the unilateral exercise of royal prerogative. James initially sought legal validation from the Court of King's Bench for his dispensation of the Test Act. Although the court in *Godden v. Hales* ruled in the King's favor, the judgment was tainted by James's purge of potential judicial opponents to his exercise of prerogative powers prior to the decision.[383] Following the decision in *Godden*, James directed preachers to avoid religious controversies during their sermons.[384] When the preachers refused to comply, James set up a Commission for Ecclesiastical Causes to police and punish members of the clergy.[385]

James also attempted to address the anti-Catholic teaching and indoctrination in schools and universities with the Anglican Oxford University as his primary target. He first tried to install a Catholic named Anthony Farmer to preside over the famed Magdalen College.[386] When the governing fellows

379. James II, King of England, His Majesties Most Gracious Speech to Both Houses of Parliament (Nov. 9, 1685).

380. WESTON & GREENBERG, *supra* note 103, at 232; *see also* House of Commons, Address Against Catholic Officers, *in* 9 JOURNAL OF THE HOUSE OF COMMONS, 1667–1687, at 758 (1685).

381. WESTON & GREENBERG, *supra* note 103, at 231–32 (explaining that the vote was significant because "many of its members elected by corporations that Charles II had remodeled, might have been expected to take the king's lead.").

382. PORRITT, *supra* note 212, at 398.

383. Godden v. Hales, 11 St. Tr. 1165 (1686), *in* ERNEST C. THOMAS, LEADING CASES IN CONSTITUTIONAL LAW 13 (1908) ("The laws of England are the king's laws; it is his inseparable prerogative to dispense with penal laws, in particular cases and upon particular reasons; and of these reasons the king himself is sole judge.").

384. *See* HUME *supra* note 371, at 479 (detailing the directions to preachers).

385. HARRIS, *supra* note 189, at 125.

386. *Id.*

rejected that move, James expelled them from the college.[387] The King then forcibly installed Farmer as president and replaced the fellows with his own appointees.[388]

Not seeing any checks arising to his authority, James then issued an audacious and, to the Catholics, courageous Declaration of Indulgence.[389] In the declaration, he unilaterally suspended all religious penal laws, the Test Acts' religious requirements for holding office, and the Corporation Act's mandatory oath of allegiance and supremacy to the King and Church of England.[390] That declaration was more far-reaching than those issued by his brother in the 1660s and 1670s that only sought incremental changes for marginally greater religious tolerance. Through his exercise of royal prerogative, James tried to produce a wholesale transformation of the religious conditions in England in favor of liberty of conscience.

As a King financially independent from Parliament and therefore without need to call another one any time soon, James could have continued along this path of royal unilateralism to secure de jure religious tolerance. But the King faced a critical dilemma. Like his brother, he lacked a male offspring to inherit the Crown and maintain his policy of religious tolerance. If James passed without a male heir, the Crown would be passed down to his Protestant daughter from a prior marriage, Mary, and her Protestant husband William, King of Holland.[391]

James therefore set out to pack the next Parliament with loyalists dependent on him for their seats and willing to support laws codifying his policy of religious tolerance. He initiated this Parliament-packing in late 1687 with a poll of borough officials to assess whether they were willing to support him in securing the election of members of Parliament who would commit to repealing the religious penal laws and Test Acts.[392] As he received the results of the surveys in late 1687 and early 1688, James systematically annulled corporate charters, using the writ of quo warranto, to expel and replace borough officials who refused to commit to repealing the religious conformity laws.[393] In many

387. *See* BURNET, *supra* note 342, at 384–85.

388. *See id.* at 699–700 (describing the Crown's efforts to install a Catholic president and fellows at Magdalene College).

389. King James II, Declaration of Indulgence (Apr. 4, 1687), *in* 8 ENGLISH HISTORICAL DOCUMENTS, 1660–1714, 399–400 (Andrew Browning ed., 1953); *see also* JONES *supra* note 197, at 52 (arguing that James's "Declaration of Indulgence . . . represented a conscious bid for the cooperation of dissenters who had formerly been identified with the Whigs" as well as being designed to "advanc[e] Catholic interests").

390. King James II, *supra* note 389.

391. *See* JONES, *supra* note 197, at 52 (describing how "James expected to be succeeded by his irrevocably Protestant daughter Mary . . . [and] since she deferred in everything to her husband, William would rule after James").

392. *See* GEORGE FLOYD DUCKETT, PENAL LAWS AND TEST ACT: QUESTIONS TOUCHING THEIR REPEAL PROPOUNDED IN 1687–88 BY JAMES II, at V–VI (London, 1882) (describing the Crown's process of canvassing boroughs for supporters of the Test Act).

393. *Id.* at VI.

instances, James replaced Anglican Tories, who benefited from the initial borough remodel under Charles but opposed his program of religious tolerance, with officials he thought would be more sympathetic including Catholics, Protestant dissenters, and former Whigs.[394]

In April 1688, as James prepared for parliamentary elections that he planned for the latter part of 1688,[395] he reissued his Declaration of Indulgence requiring the clergy to read it from the pulpit in every church in England on two successive Sundays.[396] Unlike the original issuance of the declaration that many opposed but few actively resisted, the clergy openly resisted the re-issued declaration. Their resistance precipitated a crisis from which the King would not survive.

After the issuance of the declaration, seven Anglican bishops asked to be excused from reading the declaration in their churches.[397] James rejected the bishops' request and then jailed and prosecuted them for seditious libel to head off further resistance.[398] The bishops were tried in the same purged Court of King's Bench that approved James's dispensation of the Test Act.[399] But to the King's surprise and dismay, the bishops were acquitted.[400]

The acquittal gave rise to celebrations throughout the country including among some of the regiments in the King's standing army.[401] Worse yet for the King, the prosecution and trial of the bishops cost him the support of religious nonconformists who he needed to approve his religious toleration program in Parliament. During the case of the seven bishops, Tory Anglicans made a promise to their erstwhile rivals, the Whig Protestant dissenters. The Tory Anglicans offered to accept religious tolerance for Protestant dissenters in exchange for the Whig commitment to protect the Church of England from the Catholic offensive that they said threatened to destroy the Church.[402] After the trial and the Anglican promise, many Protestant dissenters shifted their

394. *See also* JONES, *supra* note 197, at 154–57 (detailing James's efforts at partisan realignment).

395. According to historian J.R. Jones, by April the Crown's process of enlisting agents and sending them to boroughs "to prepare for favourable parliamentary elections" was complete. JONES, *supra* note 197, at 133. Over the summer, James continued to purge mostly Tory borough officials, added regulations to existing borough charters, and issued thirty-two new charters. *Id.* The Crown then distributed propaganda in the boroughs favorable to the Monarch and a nomination list of "106 royally approved candidates." *Id.*

396. King James II, Declaration of Indulgence (Apr. 27, 1688) *in* ENGLISH HISTORICAL DOCUMENTS, *supra* note 389, at 399–400.

397. William Sancroft et al., Petition of the Seven Bishops (May 18, 1688) *in* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, 583–84 (Carl Stephenson & Frederick George Marcham eds., New York, Haper & Row 1953).

398. WESTON & GREENBERG, *supra* note 103, at 242.

399. Seven Bishops' Case, 12 St. Tr. 183 (1688), *in* ERNEST C. THOMAS, LEADING CASES IN CONSTITUTIONAL LAW 14 (1876).

400. *Id.*

401. JONES, *supra* note 197, at 127.

402. HARRIS, *supra* note 189, at 128.

allegiance away from the King and to the bipartisan efforts to resist James and his unilateral exercises of power.[403]

Added urgency to this movement to resist the King arose from the birth of James's son in June of 1688. That birth ensured a Catholic successor to the Crown if James remained on the throne.[404] Weeks after the birth of James's son, seven prominent English nobles, who were later described as "the Immortal Seven," sent a letter to King William of the Protestant Dutch Republic.[405] In the letter to William, who was married to James's daughter Mary, the nobles pledged the support of the English people if he sent a small force to invade England, remove James, and restore the protections to the Protestant religion in the Kingdom.[406] After months of military preparations over the summer, William invaded with a force, and the Glorious Revolution began.

V. THE GLORIOUS REVOLUTION AND THE ENGLISH DEFENSE OF PARLIAMENTARY INDEPENDENCE

Religion was at the core of the dispute between James and his opponents during the Glorious Revolution, but of equal or greater importance to the opponents was James's attempt to pack the Parliament.[407] James's opponents understood what his successful packing of Parliament would mean for the limited monarchy. The attempt to pack Parliament therefore provoked resistance to royal control over Parliament and a responsive call for elections free from undue Crown influence.

In a letter to King William titled *A Memorial from the Church of England to the Prince of Orange*, the English and Scottish clergy expressed the many grievances that they said the English people suffered at the hands of James. The clergy proclaimed, "the Protestants of England, who continue true to their religion and government established by law, have been many ways troubled and vexed by restless contrivances and designs of Papists, under pretence of the royal authority, and things required of them unaccountable before God and Man."[408]

403. *See id.* at 129 (explaining that, after the trial, "[m]ost dissenters decided to rally behind the bishops in their opposition to the second Declaration of Indulgence, proclaiming that they wanted 'liberty by law'").

404. JONES, *supra* note 197, at 52 (providing an account of the meaning of the birth of James's son to the succession).

405. Charles Talbot et al., Invitation to the Prince of Orange, *in* ENGLISH HISTORICAL DOCUMENTS, *supra* note 389, at 120–22; *see also* SPECK, *supra* note 256, at 76 (referring to the nobles as "the Immortal Seven").

406. Talbot et al., *supra* note 405.

407. *See, e.g.*, JONES, *supra* note 197, at 129–30 ("Of all [the] domestic policies, the campaign to pack Parliament was easily the most important in provoking the Revolution, more resented and feared than even the attack on the Church and its leaders."); *see also* BOLINGBROKE, *supra* note 334, at 281 ("The cry of the nation was for a free parliament, and no man seem'd to doubt in that ferment, but that a parliament must be free, when the influence, which the crown had usurp'd, in the precedent reigns, over the elections, was removed as it was by the revolution.").

408. A Memorial from the Church of England to the Prince of Orange (1688), *in* SOURCE-BOOK OF ENGLISH HISTORY: LEADING DOCUMENTS 417 (Gary Carlton Lee ed., 1900).

The clergy recounted direct threats to the Protestant religion arising from the use of ecclesiastical commissions to deprive Protestants of their "[e]cclesiastical benefits and preferment."[409] They also criticized James's exercise of "a pretended dispensing power," his maintenance of a standing army during peacetime, and his commissioning of Catholics contrary to law thereby transforming the English army into what they declared to be "a popish mercenary army."[410]

Much of the letter, however, focused on the threat to the Protestant religion arising from changes James had made to the English form of government. These changes included, most prominently, the dissolution of corporations as a means to control Parliament. The clergy explained to William that the "[l]iberty of chusing members of Parliament" had been "wholly taken away, by Quo Warrantos served against corporations."[411] The King's polling of borough members along with his removal of opponents and appointment of allies to borough offices were, according to the clergy, "carried on in open view for the propagation and growth of Popery, for which the courts of England and France have so long jointly laboured, with so much application and earnestness."[412]

The clergy concluded their letter with a plea to William for his protection from James's "suspending and encroachments made upon law, for maintenance of the Protestant religion, our civil and fundamental rights and privileges."[413] And they asked that William "be pleased to insist, that the free Parliament of England, according to law, may be restored," the religious conformity laws be again applied to Catholics, the royal power to suspend or dispense with the law be nullified, and "the rights and privileges of the City of London, the free choice of their magistrates, and the liberties as well of that as of other corporations restored."[414]

William accepted the invitations and entreaties and prepared to invade England during the summer of 1688.[415] In late September, James published a declaration summoning a Parliament to meet in November.[416] The King announced as the purpose of the Parliament "a legal Establishment of an Universal Liberty of Conscience for all our Subjects . . . ."[417] Out of either prudence or a desire to hedge against the risk of a potential Dutch invasion, the King resolved in his declaration "to preserve the Church of England" and to

409. *Id.*

410. *Id.*

411. *Id.* at 418.

412. *Id.*

413. *Id.*

414. *Id.*

415. *See* TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720 at 274–76 (2006) (describing William's preparations for invasion).

416. King James II, Declaration of Indulgence (Sept. 20, 1688), *in* 1 A COLLECTION OF STATE TRACTS 43, 43–44 (1705).

417. *Id.* at 43.

abide by the Test Act's prohibition on Catholics serving as members of the House of Commons.[418]

When James declared his intent to summon a Parliament, the English people harbored deep distrust of James because of his suspension of established laws and his perceived failure to protect the Protestant religion.[419] The King's borough policy and construction of an increasingly Catholic standing army quartered in the homes of a predominantly Protestant English public contributed to domestic discontent and disorder.[420] James seemed to recognize that he lacked popular support. Thus, when James received intelligence that the Dutch military preparations were for the purpose of invading England, he withdrew his declaration to summon Parliament even though his plan to pack Parliament did not depend on popular support.[421] James appeared to make the calculation that a potential invasion by a Protestant king posed the risk that he might lose control of the inevitably majority Protestant Parliament. That would put him in the same jeopardy as his father of being overthrown through the combined efforts of Parliament and a foreign invading force.

As the Prince of Orange's invasion loomed, James made a concession in hopes of recovering the support of the English people in the face of the existential threat to his crown. The first concession evidenced what James understood to be a primary source of English opposition to the Crown: the borough remodeling policy.[422] James addressed his brother's very first action in the borough remodeling campaign, the writ of quo warranto against London that led to the legal forfeiture of London's charter.[423] Since the forfeiture five years earlier, England's largest city had existed without a charter and was thereby denied the privilege of electing members to Parliament.[424] The King, in early October, sought to undo this wrong, declaring to the London Common Council, the Lord Aldermen, and the Sheriffs of London that he would "restore to them their ancient Charter and Privileges, and . . . put them into the same Condition they were in at the time of the Judgment pronounced against them upon the *QUO WARRANTO*."[425]

A day after the King's declaration in London, the Archbishop of Canterbury and nine other bishops appealed to the King to do more.[426] They asked James to terminate the ecclesiastical commission, abide by the Test Acts

418. *Id.*

419. *Id.*

420. *Id.* at 42.

421. King James II, Declaration of Indulgence (Sept. 28, 1688), *in* 1 A COLLECTION OF STATE TRACTS, *supra* note 416, at 44–45.

422. *Id.* at 45.

423. *Id.*

424. *See* LEVIN, *supra* note 209, at 55–58 (recounting the five-year period in which London operated without a charter).

425. King James II, *supra* note 416, at 45.

426. The Last Appeal, *in* SOURCE-BOOK OF ENGLISH HISTORY, *supra* note 408, at 412–13.

and remove Catholics from offices held in violation of the Act, restore the President and fellows of Magdalen College, and cease from exercising his dispensing power until Parliament could determine the legality of the royal prerogative.[427]

Finally, they requested that James do for other corporations what he had done for London, which is to restore "their ancient charters, privileges, and franchises" and "supersede all further prosecution of Quo Warranto's against corporations."[428] Upon restoring the corporations and thereby ending his campaign to pack Parliament, the bishops requested that James summon "a free and regular Parliament, in which the church of England may be secured according to the Acts of Uniformity; provision[s] may be made for a due liberty of conscience, and for securing the liberties and properties of all your subjects; and a mutual confidence and good understanding may be established between Your Majesty and all your people."[429] The appeal indicated that the bishops did not seek to remove James from the Crown. Rather, they wanted to return the kingdom to a form of government in which the King's power could be properly checked by Parliament. At the core of a limited or mixed Monarchy stood an independent Parliament that could protect the church and English liberties against royal exercises of unilateral power that might threaten them.

The bishops' acknowledgment of the liberty of conscience was evidence of the Anglicans' compromise with Protestant dissenters that confirmed their united front against the King. Facing this united opposition and continued dissension from the English people, the King responded by acceding to many of the requests including the dissolution of the ecclesiastical commission and the return of the President and fellows of Magdalen College.[430] Most importantly, James, in a declaration, restored the corporate charters and all of the franchises and privileges they had prior to Charles's borough remodeling campaign.[431]

As part the process of restoring borough charters, James removed officials who had taken office pursuant to the borough remodeling campaign and replaced them with those who had held office prior to the campaign.[432] The object was to put the boroughs "into the same State and Condition they were in . . . before any Deed of Surrender was made of their Charters or Franchises."[433] The boroughs would, therefore, completely recover their prior

427. *Id.*

428. *Id.* at 413.

429. *Id.*

430. King James II, *supra* note 416, at 51.

431. King James II, Proclamation (October 17, 1688), *in* 1 A COLLECTION OF STATE TRACTS, *supra* note 416, at 49–50.

432. *Id.*

433. *Id.* at 49.

autonomy and independence regarding governance and elections to borough offices and Parliament.

Despite these concessions, the threat from the Prince of Orange remained. English distrust and discontent festered as James stubbornly refused to summon a Parliament during "the General Disturbance of our Kingdom by the intended Invasion . . . ."[434] When the Crown intercepted a declaration from the Prince of Orange to the English people, he tried to suppress it.[435] And when William landed in England with his forces in early November, James sought to preempt the Prince's declaration with one of his own.[436] Although most of the English people had not read the Prince's declaration due to the King's suppression of it,[437] James made many references to it in what came to resemble a counter-declaration.

James began, "It is but too evident, by a late Declaration published by [William], That notwithstanding the many specious and plausible Pretences it carries, *His Designs at the bottom do tend to nothing less than an absolute usurping our Crown and Royal Authority* . . . ."[438] James continued to recognize in his declaration that the freedom and independence of Parliament stood at the core of the revolutionary fervor. He, therefore, attempted to shift the threat to a free Parliament from his recently terminated borough remodeling campaign to England's potential occupation by an invading force. James explained, referring to William, "in order to the effecting of his ambitious Designs, he seems desirous in the close of his Declaration to submit all to the determination of a Free Parliament, hoping thereby to ingratiate himself with our People . . . ."[439] "[T]ho nothing is more evident," James continued, "than that a Parliament cannot be *Free*, so long as there is an Army of Foreigners in the Heart of our Kingdoms; so that in truth he himself is the sole Obstructer of such a Free Parliament."[440] The King then expressed his continued resolve, "so soon as by the Blessing of God our Kingdoms shall be delivered from this Invasion, to call a Parliament . . . ."[441] A Parliament "no longer be liable to the least Objection of not being freely chosen, since We have actually restored all the Boroughs and Corporations of this our Kingdom to their ancient Rights and Privileges . . . ."[442]

James's counter-declaration did little to bolster support for him among the English people. Instead, it highlighted James's refusal to call a Parliament, which

434. *Id.* at 50.

435. King James II, *supra* note 416, at 53.

436. King James II, Declaration of Indulgence (Nov. 6, 1688) *in* 1 A COLLECTION OF STATE TRACTS, *supra* note 416, at 58–59.

437. *Id.* at 58.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

served only to deepen popular distrust of the King.[443] By the time that William landed in England in early November, his declaration had been broadly distributed despite the King's suppression efforts.[444]

William protested in his declaration against James's alteration of religion contrary to law and raised a constitutional objection to his exercise of unilateral royal prerogative to dispense with the laws through the Declaration of Indulgence.[445] In objecting to James's unilateral royal prerogative, William embraced the coordination theory of government. He explained, "[T]here is nothing more certain, than that, as no Laws can be made but by the joint Concurrence of King and Parliament . . . ."[446] Therefore, "Laws so enacted, which secure the publick Peace and Safety of the Nation, and the Lives and Liberties of every Subject in it, cannot be repealed or suspended but by the same Authority."[447] William proceeded to describe the many English grievances against the King, including James's dispensation of the Corporation Act and Test Act, establishment of the Ecclesiastical Commission with Catholic commissioners, the Crown's legal actions against the seven bishops, the expulsion of the President and fellows of Magdalen College, and the purging of the courts.[448]

At the heart of his declaration appealing to the English people, the Prince of Orange extensively criticized James's effort to pack the Parliament. William detailed the several objectionable features of the borough-remodeling and Parliament-packing campaign and clearly articulated its goal. "[C]ontrary to the Charters and Privileges of those Boroughs that have a Right to send Burgesses to Parliament," William expounded, the King and his ministers "have ordered such Regulations to be made, as they thought fit and necessary for assuring themselves all the Members that are to be chosen by those Corporations."[449]

The Prince also advanced a constitutional claim against borough remodeling and Parliament packing that centered upon free parliaments through free elections. "[A]ccording to the Constitution of the *English* Government and immemorial Custom," William asserted, "all Elections of Parliament-men ought to be made with an intire Liberty, without any sort of Force, or the requiring the Electors to choose such Persons as shall be named to them . . . ."[450] And he continued by proclaiming that "[p]ersons thus freely

443. King James II, *supra* note 416, at 59.

444. *See* 6 DAVID HUME, DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 509 (recounting that just prior to William's invasion his "declaration was dispersed over the kingdom, and met with universal approbation").

445. *See* Prince of Orange's Declaration (Dec. 19, 1688), *in* 10 JOURNAL OF THE HOUSE OF COMMONS 1688–93, at 1 (London, 1802).

446. *Id.* at 1.

447. *Id.*

448. *See id.* at 1–6.

449. *Id.* at 3.

450. *Id.*

elected ought to give their Opinions freely upon all Matters that are brought before them, having the Good of the Nation ever before their Eyes, and following in all things the Dictates of their Conscience."[451] Under James, William contended, "the People of *England* cannot expect a Remedy from a free Parliament legally called and chosen; but they may perhaps see one called" a Parliament "which will be composed of such Persons of whom those evil Counsellors hold themselves well assured, in which all things will be carried on according to their Direction and Interest, without any Regard to the Good or Happiness of the Nation."[452]

William concluded by justifying his invasion as necessary for the reconvening of a free Parliament to protect the Protestant religion and the liberties of the people. This Parliament, the Prince claimed, would be comprised of members "lawfully chosen" who "shall meet and sit in full Freedom."[453] Members in the two houses "may concur in the Preparing of such Laws as they, upon full and free Debate, shall judge necessary and convenient, both for the confirming and executing the Law concerning the Test, and such other Laws as are necessary for the Security and Maintenance of the Protestant Religion."[454] The parliamentary body would be called to do all of the things, "which the Two Houses of Parliament shall find necessary for the Peace, Honour and Safety of the Nation, so that the[re] may be no . . . Danger of the Nation's falling at any time hereafter under arbitrary Government."[455] The Prince then invited the English people to come and assist him "in order to the Executing of this our Design, against all such as shall endeavour to oppose us."[456]

The English people faced a choice. Would they side with a king who they distrusted because of his exercise of unilateral authority to undercut the Protestant religion established by law and attempt to pack Parliament? Or would they shift their loyalties to an invading prince who promised to protect the Protestant religion and summon and preserve a free Parliament? For many of the non-Catholic English people, the choice proved easy. In the months after the Declaration, prominent English lords, nobles, and their English followers joined in support of William.[457] And with only a few minor skirmishes between forces devoted to William and forces devoted to James, the mostly bloodless revolution ultimately forced James to flee his kingdom for France and abdicate his throne.[458]

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451. *Id.*

452. *Id.* at 3–4.

453. *Id.* at 4.

454. *Id.*

455. *Id.*

456. *Id.*

457. *See* King James II, *supra* note 416, at 62 (describing the lords, nobles, and army regiments' desertions of the King and joining in support of Prince William).

458. *See id.* at 78–87.

After James's abdication, a Convention Parliament assembled to decide the constitutional future of the country, including questions about the authority and limitation of the King and who should assume the throne.[459] The Convention Parliament agreed to a Declaration of Rights that contained thirteen grievances and thirteen clauses limiting the Crown.[460] The grievances were familiar and mirrored those earlier made in the bishops' appeal to James and in William's declaration of reasons for invading England. The limitations on Crown power, which were responsive to the grievances listed, prohibited the Crown from dispensing or suspending laws, establishing ecclesiastical commissions or courts, imposing taxes without parliamentary authorization, and maintaining a standing army without parliamentary consent.[461] The Declaration also included clauses limiting the Crown through protections for Parliament, including the freedom of members to speak and debate on issues without fear of punishment, and the requirement that parliaments be held frequently.[462] Finally, the Declaration included a mandate that "Election of Members of Parlyament ought to be free."[463]

The Declaration of Rights represented a clear embrace of principles central to the coordination theory of government, in which the King and Parliament were equal and coordinated powers in governing. The Declaration constrained the Crown's unilateral authority and made his most important exercises of power dependent on the concurrence of a Parliament—Parliament that needed to be independent in order to be a true equal to the King.[464] In February 1689, Parliament presented the Declaration of Rights to their chosen monarchs, William and Mary.[465] Two months later, when the new monarchs were crowned, they signaled their acceptance of the Declaration's central precepts in their coronation oath. In the oath, William and Mary swore "to Governe the People of this Kingdome of England . . . according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same . . . ."[466] This oath, acquiescing to a form of government in which the King exercised power from within, rather than above, Parliament, diverged from that of prior monarchs who swore to "confirm to the people of England *the laws and customs to them granted by the King[] of England*."[467] The coordination theory and an independent

459. *See* Jennifer Carter, *The Revolution and the Constitution*, *in* BRITAIN AFTER THE GLORIOUS REVOLUTION, 1689–1714, at 40–41 (Geoffrey Holmes ed., 1969) (describing the debates in the convention on the English form of government after the abdication of King James).

460. *See* Bill of Rights, *supra* note 27.

461. *Id.*

462. *Id.*

463. *Id.*

464. BOLINGBROKE, *supra* note 334, at 163.

465. *See* HARRIS, *supra* note 189, at 117.

466. Coronation Oath Act of 1688, 1 W. & M., c. 6, *reprinted in* 6 STATUTES OF THE REALM 56 (London, John Raithsby ed. 1819).

467. SMITH, *supra* note 123, at 165.

Parliament had emerged as core principles shaping the English form of government.

CONCLUSION

In December 1689, the Glorious Revolution culminated with the King-in-Parliament's codification of the Declaration of Rights as the English Bill of Rights.[468] In a country famous for never having a written constitution, the Bill of Rights represented "[t]he closest approximation."[469] The Bill of Rights "was the statutory institution of conditional kingship[s] for the future" through its mandate for an independent Parliament through free elections.[470] As a contemporary from the period, Lord Bolingbroke wrote, "[T]he design of the revolution was not accomplish'd, the benefit of it was not secured to us, the just expectations of the nation could not be answer'd, unless the freedom of elections, and the frequency, integrity, and independency of parliaments were sufficiently provided for."[471] These, Bolingbroke continued, "are the essentials of British liberty."[472]

Free elections would also emerge as one of the essentials of American liberty. In the first American state constitution adopted 87 years after the English Bill of Rights enactment, the New Hampshire Constitution began "WE, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony," as a clear signal of their independence from Crown influence in their selection.[473] And even after independence from England was secured, the first part of the New Hampshire Constitution of 1784, which defined the legislative powers, adopted language from the English Bill of Rights declaring "[a]ll elections ought to be free."[474]

New Hampshire was not the only state to embrace free elections. In fact, the constitutions of all twelve states that adopted constitutions prior to the federal constitutional convention contained clauses protecting or recognizing free elections as a fundamental right or principle.[475] The inclusion of those

468. Bill of Rights, *supra* note 27.

469. PETER D.G. THOMAS, GEORGE III: KING AND POLITICIANS, 1760–1770, at 1 (2002).

470. KEMP, *supra* note 219, at 30.

471. BOLINGBROKE, *supra* note 334, at 163.

472. *Id.*

473. N.H. CONST. of 1776.

474. *Id.* art. XI.

475. *See* MASS. CONST. art. IX ("All elections ought to be free . . . ."); MD. CONST. of 1776, art. V ("[T]he right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free and frequent . . . ."); N.C. CONST. of 1776, art. VI ("That elections of members, to serve as Representatives in General Assembly, ought to be free."); N.J. CONST. of 1776, pmbl. ("We, the representatives of the colony of New Jersey, having been elected by all the counties, in the freest manner, and in congress assembled, have, after mature deliberations, agreed upon a set of charter rights and the form of a Constitution . . . ."); *id.* art. VI ("That the Council shall . . . in all respects be a free and independent branch of the Legislature of this Colony."); N.Y. CONST. of 1777,

clauses demonstrated the continued importance of the principle of legislative independence even to the republican forms of government that the new states established in their constitutions.

In the next chapter to this project of recovering the constitutional principle of legislative independence, I will argue that the mandate of free elections was also incorporated into the federal Constitution through (1) Article I, Section 2 and the Seventeenth Amendment's delegation to the states to set the qualifications for congressmembers and senators consistent with those established for the most numerous branch of the state legislature and (2) Article I, Section 4's delegation to the states of the authority to set the time, place, and manner for federal elections.[476] The requirement that elections be free is both a qualification and manner of election established for state legislatures that I argue also applies to Congress. Thus, as in seventeenth-century England, congressional independence through free elections should be understood as a key constitutional tool for preventing the distortions of the American form of government that can arise from disabling congressional check on executive power. In the twenty-first century, the revival of congressional independence is key to reducing the considerable stress on the American checks and balances framework and defending against the creep toward despotism.

pmbl. ("[T]his convention hath by their suffrages and free choice[s] been appointed . . . ."); PA. CONST. of 1776, art. VII ("That all elections ought to be free . . . ."); S.C. CONST. of 1776 art. I ("That this congress being a full and free representation of the people of this colony, shall henceforth be deemed and called the general assembly of South Carolina . . . ."); VA. CONST. of 1776, § 6 ("That elections of members to serve as representatives of the people, in assembly, ought to be free . . . ."); GA. CONST. of 1777, art. X ("No officer whatever shall serve any process, or give any other hinderances to any person entitled to vote, either in going to the place of election or during the time of the said election, or on their returning home from such election; nor shall any military officer, or soldier, appear at any election in a military character, to the intent that all elections may be free and open."); VT. CONST. of 1777, ch. I, art. VIII ("That all elections ought to be free . . . ."). Rhode Island continued to operate under its royal charter until 1843. R.I. CONST. pmbl.

476. U.S. CONST. art. I, §§ 2, 4; *id.* amend. XVII.