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

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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:

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INTRODUCTION

Seven Utah voters and two advocacy groups want Utah courts to rebalance the politics of Utah's congressional districts so that their preferred candidates are more likely to win elections. Do Utah courts have the power to do that? No—never before, and not now.

Indeed, courts throughout the Nation have refused identical requests to referee partisan politics. The U.S. Supreme Court has declared so-called "partisan gerrymandering" claims to be non-justiciable in federal courts. *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019). After *Rucho*, plaintiffs moved their efforts to state courts. But other state supreme courts have agreed: courts cannot adjudicate such claims of partisan unfairness absent a specific state law requiring political neutrality in redistricting. *Compare Rivera v. Schwab*, 512 P.3d 168, 187 (Kan. 2022) (claims not justiciable), *and Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶53-63, 967 N.W.2d 469 (same), *with League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (Fla. 2015) (applying Florida constitutional provision requiring neutrality), *and League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 198 N.E.2d 812 (Ohio 2022) (similar); *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022) (similar); *see also Rucho*, 139 S.Ct. at 2507-08 (citing examples of specific state constitutional provisions). A few courts, however, have seen things differently, permitting such claims to proceed without a specific state law requiring neutrality. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *cert. granted* 142 S.Ct. 2901 (2022). But North Carolina is now reconsidering that decision. *See Harper*, 882 S.E.2d 548 (N.C. 2023) (granting rehearing).

Nothing in the Utah Constitution permits Utah courts to traverse "the hazards of the political thicket" of redistricting. *Gaffney v. Cummings*, 412 U.S. 735, 749-50 (1973). When the

Utah Constitution requires partisan neutrality, it says so. Utah Const. art. VIII, §8, cl. 4; art. X, §8; art. XI, §5; art. XIII, §6, cl.1. It does *not* say so for redistricting. Article IX vests only *the Legislature* with power to redistrict after every census. For good reason: there is no Platonic notion of political "fairness" for this Court to apply. Redistricting's inherent policy choices, and the inherent *political* consequences of those policy choices, belong to the political branches. *See Rucho*, 139 S.Ct. at 2500; *Vieth v. Jubelirer*, 541 U.S. 267, 289-90 (2004) (plurality op.). And Article V prohibits Utah's courts from usurping that power.

In short, Plaintiffs' claims are neither justiciable nor cognizable under the Utah Constitution. No provision of the Constitution enables judges to recalibrate districts to pick political winners and losers—to favor Democratic candidates based on predictions about Utahns' future votes, including Utah's more than 400,000 independents —or to otherwise decide what is most "fair" in redistricting. Plaintiffs' claims must be dismissed.

STATEMENT OF THE ISSUES

1. Are policy choices in redistricting delegable to the Utah courts?
2. Are allegations of partisan gerrymandering justiciable under the Utah Constitution?
3. Does the Utah Constitution's Free Elections Clause, Qualifications Clause, Uniform Operation Clause, or Free Speech and Association Clauses, limit the Legislature's consideration of partisanship in redistricting, to be refereed by Utah courts?

Preservation: The Legislature raised these issues in its memorandum in support of the motion to dismiss Plaintiffs' complaint. Bates#000217-226, Bates#000229-244.

Standard of review: The denial of the Legislature's motion to dismiss presents questions of law reviewed "for correctness, giving no deference to the district court's determination." *Christiansen v. Harrison W. Constr. Corp.*, 2021 UT 65, ¶10, 500 P.3d 825. To that end, questions involving the meaning of the "term[s] ... used in the Utah Constitution" and the "threshold

question of justiciability" are "question[s] of law," reviewed "*de novo*." *Utah Stream Access v. Coal. v. VR Acquisitions, LLC*, 2019 UT 7, ¶¶25-27, 439 P.3d 593.

STATEMENT OF THE CASE

I. Redistricting requirements and principles.

Every ten years, the U.S. Census Bureau counts everyone in the United States. Bates#000019 ¶50. Congress then reapportions the number of congressional representatives for each State based on its relative population. *Id.* ¶51; *see* U.S. Const. art. I, §2 cl. 3. Beginning with only one representative in 1896, Utah's congressional delegation has grown to four representatives today.

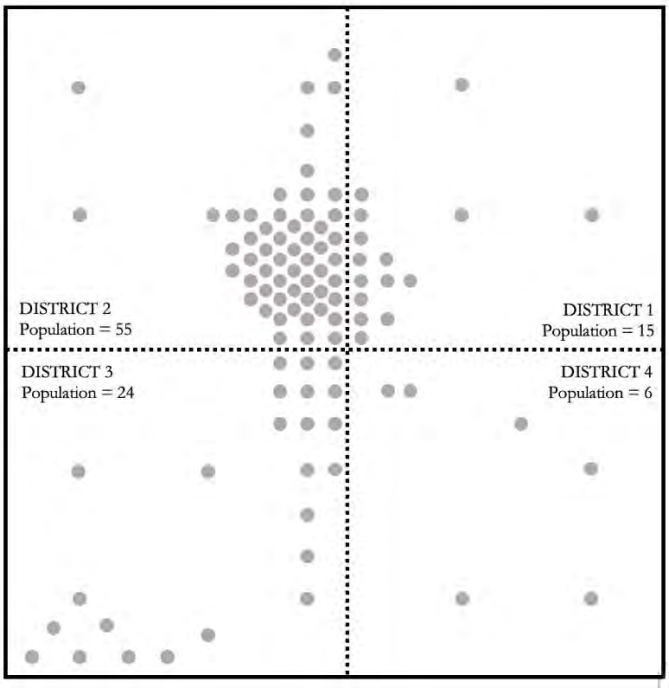
Both the U.S. and Utah Constitutions task Utah's Legislature with deciding how to divide the State into those four congressional districts. The U.S. Constitution states that "[t]he Times, Places and Manner of holding Elections for … Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, §4, cl. 1. The "Manner of holding Elections" includes redistricting. *See Ariz. State Legis. v. Ariz. Ind. Redistricting Comm'n*, 576 U.S. 787 (2015). The Utah Constitution states that "the Legislature shall divide the state into congressional, legislative, and other districts" after each census. Utah Const. art. IX, §1 (2008).

Redistricting entails weighing various legal principles and a host of policy considerations. ***First***, federal law generally requires States to draw single-member districts. 2 U.S.C. §2c. Voters in each district elect one representative (rather than electing four representatives from the State at large).

Second, each district must have equal population. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). For congressional districts, any population differences between districts must be "unavoidable" or otherwise justified. *Kirkpatrick v. Preiser*, 394 U.S. 526, 530-31 (1969); *see, e.g.*,

Karcher v. Daggett, 462 U.S. 725, 731-34 (1983) (no acceptable *de minimis* population difference). Applied here, each Utah congressional district must have an "ideal population" of 817,904 people.[1] That means Salt Lake County cannot all fit within one congressional district because its total population—exceeding 1.85 million people[2]—is more than double the size of an 817,904-person congressional district. Relatedly, when a State's population is concentrated in one urban area—like the Wasatch Front—simply dividing the State into geographical quadrants, as illustrated below (the State's population represented by grey dots), would result in severely malapportioned districts:

Figure 1



Instead, densely populated areas must be split into multiple districts. A State can divide population centers in myriad different ways, each involving tradeoffs. Figures 2a and 2b below are

[1] *See* "Utah," U.S. Census Bureau, http://census.gov/quickfacts/UT (showing total population of 3,271,616).

[2] "Salt Lake County, Utah," U.S. Census Bureau, http://census.gov/quickfacts/saltlakecountyutah.

but two examples that show those tradeoffs. Figure 2b keeps more of the city together in the hypothetical District 3, but that causes the hypothetical Districts 1 and 4 to be less compact because their boundaries must grow to find population elsewhere.

Figure 2a

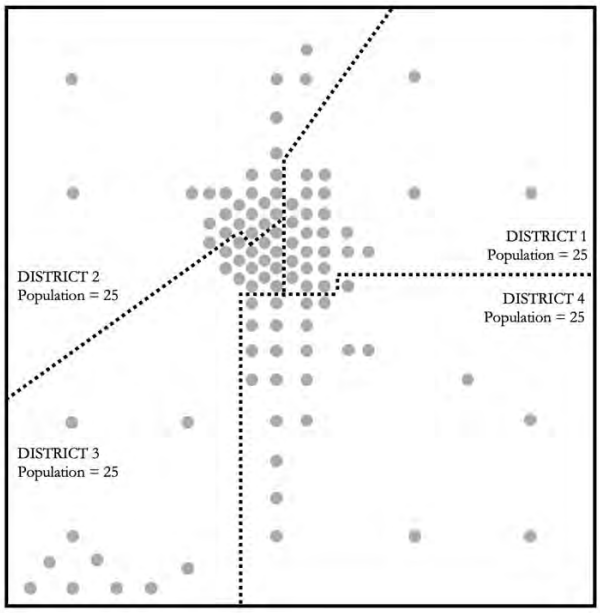
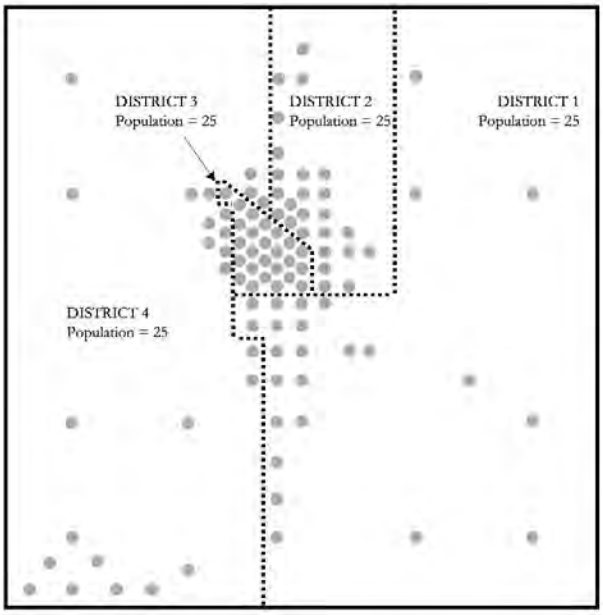


Figure 2b



***Third*,** legislatures must comply with the U.S. Supreme Court's Voting Rights Act precedents, which have been applied to redistricting, and not allow race to predominate in redistricting. *See* 52 U.S.C. §10301; U.S. Const. amend. XIV, §1; *Abbott v. Perez*, 138 S.Ct. 2305, 2314-15 (2018) (discussing "competing hazards of liability" between VRA and Equal Protection Clause). Plaintiffs raise no VRA or racial-gerrymandering claims here.

***Fourth*,** beyond those legal requirements, legislatures may choose to follow traditional redistricting principles. Those principles entail policy choices including drawing districts of contiguous territory, keeping districts reasonably compact, keeping together communities of interest or political subdivisions, following natural boundaries, and retaining existing district

lines ("core retention") or not pairing incumbents.[3] These policy choices must win majority support in both houses of the Legislature.

The resulting districts will have some inherent "'unfairness.'" *Rucho*, 139 S.Ct. at 2500. "[T]he voting strength of less evenly distributed groups will invariably be diminished" in single-member, winner-take-all districts "as compared to at-large proportional systems for electing representatives." *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in judgment). Illustrated below, one could imagine the hypothetical State shown above in Figures 2a and 2b to consist of 100 persons, all of whom are voters; of those voters, 52 tend to vote for Party A (red), 14 tend to vote for Party B (blue), 4 tend to vote for different third parties (purple, orange, and yellow), and the remaining 30 voters are independents (grey).[4]

Figure 3a

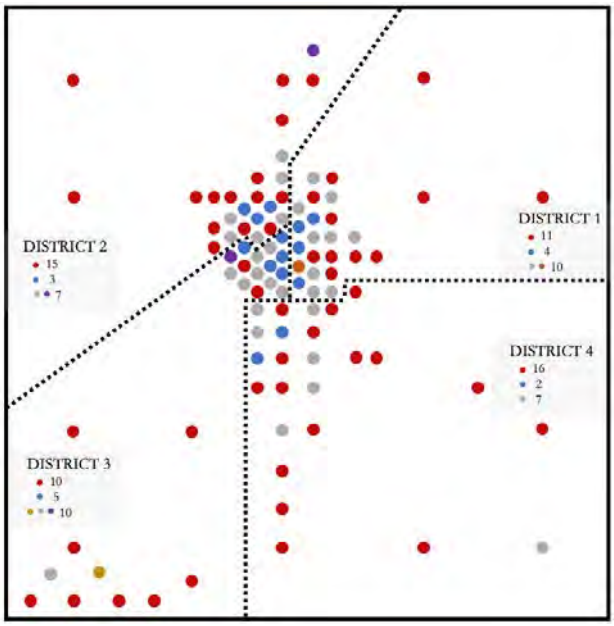
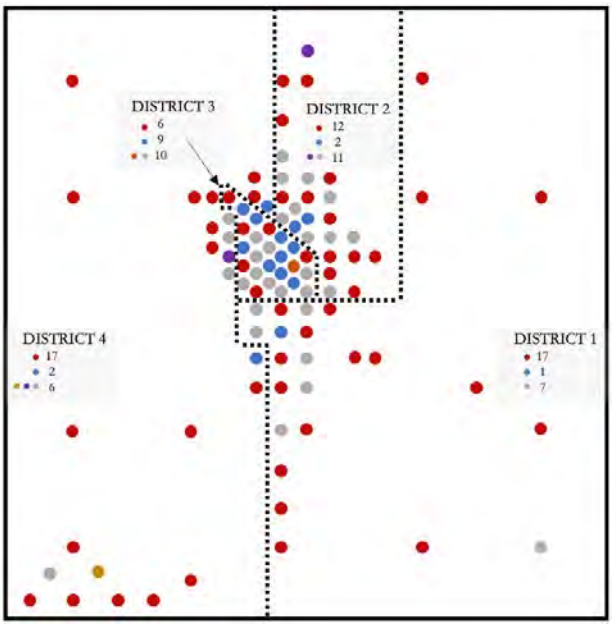


Figure 3b



[3] *See, e.g.*, "2021 Redistricting Principles," Legislative Redistricting Committee (May 18, 2021), bit.ly/3JRbxNU.

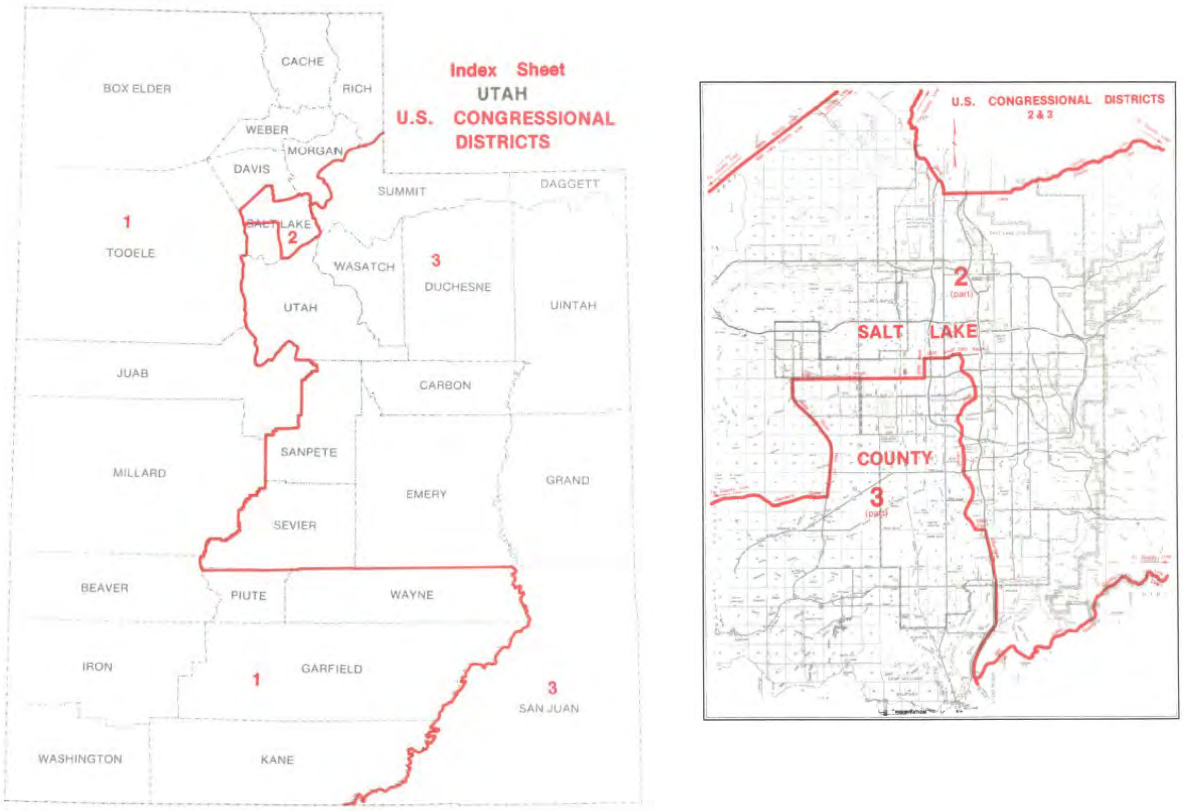
[4] These proportions roughly reflect current Utah voter registrations. *See* "Current Voter Registration Statistics," Utah Office of Lt. Gov. (Mar. 20, 2023), http://vote.utah.gov/current-voter-registration-statistics.

The likely winners in the districts will not necessarily be proportional to the statewide political support of the different parties. A party with densely concentrated voters will be "systematically affected" by district lines drawn for "compactness" because such voters are naturally "pack[ed]" in urban areas as compared to a party with more evenly disbursed voters. *Vieth*, 541 U.S. at 289-90 (plurality op.). The Legislature—or a court, in Plaintiffs' view—could counteract that inherent "unfairness," *Rucho*, 139 S.Ct. at 2500, but such acts are still policy choices. Redistricting is a zero-sum exercise; making a district more favorable for one party's candidate comes at the expense of making it less favorable for others'. *E.g.*, *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008).

II. Historical redistricting in Utah.

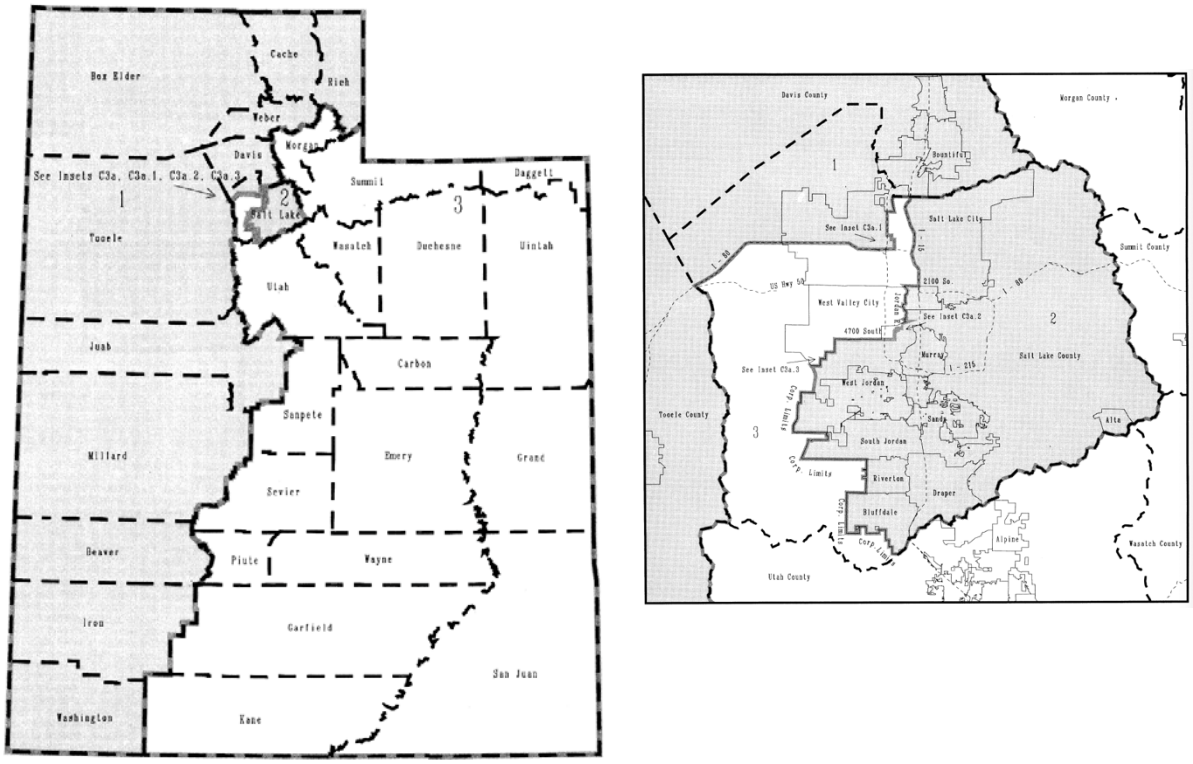
Utah's congressional redistricting plans have always had to account for Utah's concentrated population along the Wasatch Front and sparse population elsewhere. After the 1980 and 1990 censuses, for example, Utah had three congressional districts (Figs. 4 & 5). The Legislature divided Salt Lake County between Districts 2 and 3 in the 1980s (Fig. 4 right) and between Districts 1, 2, and 3 in the 1990s (Fig. 5 right).

Figure 4
1980s Congressional Districts[5]



[5] "1981 Reapportionment in Utah," Research Report No. 37, Utah Office of Legis. Research (Jan. 1982).

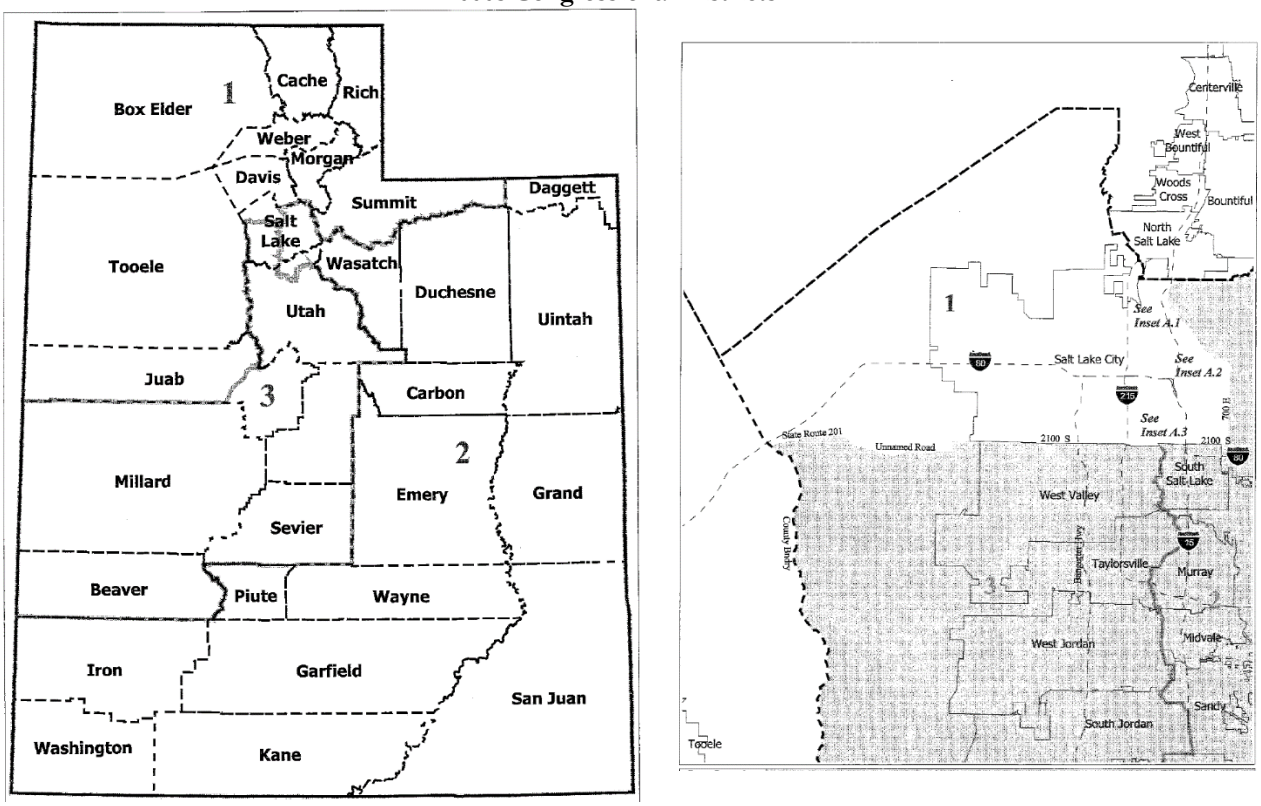
Figure 5
1990s Congressional Districts[6]



[6] "1991 Redistricting in Utah," Research Report No. 57, Utah Office of Legis. Research & Gen. Counsel (Mar. 1991).

After the 2000 census, the Legislature reconfigured District 1 to no longer span the length of the State. Each district continued to contain portions of Salt Lake County. Shown in Figure 6, District 1 included northwest Salt Lake County, including Salt Lake City; District 2 included eastern Salt Lake County; and District 3 included western Salt Lake County:

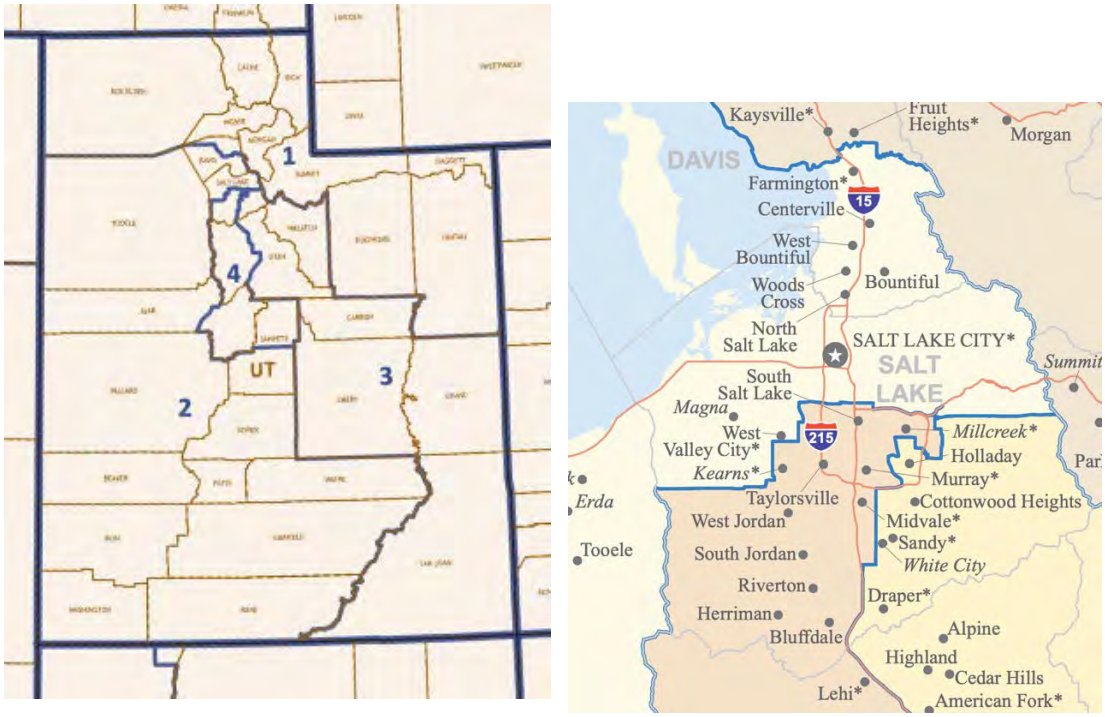
Figure 6
2000s Congressional Districts[7]



[7] *See* "2001 Redistricting in Utah," Utah Office of Legis. Research & Gen. Counsel (Jan. 2002).

After the 2010 census, Utah gained a fourth congressional district. The congressional map again divided Salt Lake County into Districts 2, 3, and newly added District 4:

Figure 7
2010s Congressional Districts[8]



III. The Legislature fulfills its constitutional responsibility to redistrict in 2021.

Redistricting began anew in 2021. The census showed Utah grew by more than 500,000 people—more than half the size of a congressional district—making it the fastest-growing State of the decade.[9] Population growth was not uniformly distributed. Salt Lake and Utah Counties grew by more than 150,000 and 140,000 people, respectively; mid-size counties including Cache, Davis, Weber, and Washington each grew by tens of thousands of people; but

[8] *See* "114th Congressional District Wall Map," U.S. Census Bureau (2015), https://www.census.gov/geographies/reference-maps/2015/geo/cong-dist-114-wall.html. The 2001, 2011, and 2021 plans are available at gis.utah.gov/data/political/political-districts.

[9] "Utah Was Fastest-Growing State from 2010 to 2020," U.S. Census Bureau (Aug. 25, 2021), http://census.gov/library/stories/state-by-state/utah-population-change-between-census-decade.html.

more rural counties remained roughly the same or declined in population.[10] With these changes, nearly 80 percent of Utah's population is concentrated in Cache, Davis, Weber, Salt Lake, and Utah Counties, with more than 35 percent of all Utahns in Salt Lake County alone.[11]

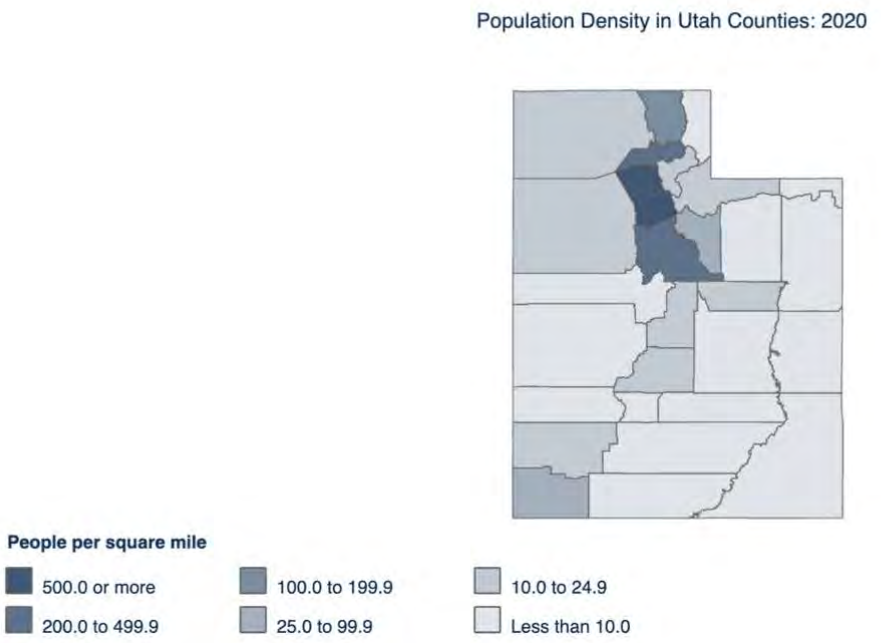


Figure 8
2021 Congressional Districts[12]

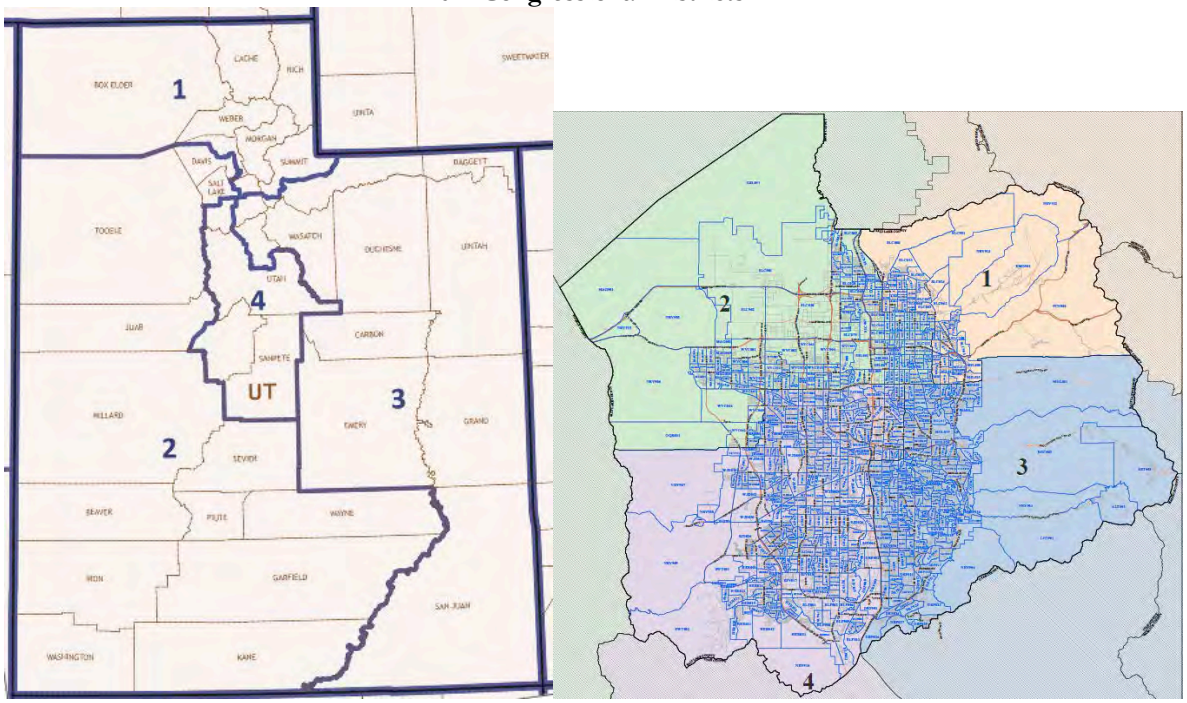
These population changes required the Legislature to adjust existing congressional district lines to bring each congressional district back to equal population. *See Wesberry*, 376 U.S. at 7-8. The resulting districts resemble past redistricting plans:

[10] *See* "Population Density in Utah Counties," Utah: 2020 Census, U.S. Census Bureau, bit.ly/3FSO4L7.

[11] *Id.*

[12] *Id.*

Figure 9
2021 Congressional Districts[13]



Those district lines reveal a policy choice. The 2021 legislative redistricting committee chairs announced that each new district would continue to include urban areas in the Wasatch Front along with rural areas, just like previous districts did:

> The congressional map we propose has all four delegates representing both urban and rural parts of the state. Rural Utah is the reason there is food, water and energy in urban areas of the state. We are one Utah, and believe both urban and rural interests should be represented in Washington, D.C. by the entire federal delegation.

See Bates#000045 ¶158. A majority of both houses passed the legislation, and the Governor signed it into law in November 2021. *See* Bates#000009-10 ¶11; Utah Code §§20A-13-101.1–104.

[13] *See* "118th Congressional District Wall Map," U.S. Census Bureau (2023), https://www.census.gov/geographies/reference-maps/2023/geo/cong-dist-118-wall.html; "Salt Lake County District Maps," Salt Lake County Clerk (Jan. 2022), https://slco.org/clerk/elections/maps/district-maps/.

IV. Plaintiffs sue the Legislature.

Nearly four months later, two organizational plaintiffs and seven individual voters, mainly "supporting Democratic candidates," filed this lawsuit against the Utah Legislature, the Legislative Redistricting Committee, individual legislators, and the Lieutenant Governor. Bates#000010-19 ¶¶13-45. Plaintiffs asked the district court to declare the congressional plan "unconstitutional and invalid" and to enjoin Defendants from administering congressional elections under the plan. Bates#000080-81. Plaintiffs asked for an order compelling the Legislature to redistrict by a court-imposed deadline and court-imposed standards of fairness, and, if the Legislature failed to do so, for the court to draw its own maps. *Id.*

Plaintiffs allege specifically that the congressional districts effectuated a "partisan gerrymander" in violation of four constitutional provisions: (1) the Free Elections Clause, art. I, §17, *see* Bates#000072-73 ¶¶257-69; (2) the Uniform Operation Clause, art. I, §§2 & 24, *see* Bates#000073-75 ¶¶270-82; (3) the Free Speech and Association Clauses, art. I, §§1 & 15, *see* Bates#000075-77 ¶¶283-97; and (4) the Voter Qualifications Clause, art. IV, §2, *see* Bates#000077-78 ¶¶298-309. At bottom, Plaintiffs' theory is that the Legislature should have drawn different lines around the Wasatch Front to decrease Republican (and increase Democratic) voting power.

The Legislature moved to dismiss Plaintiffs' complaint, and the district court mostly denied that motion.[14] It rejected the Legislature's arguments that Plaintiffs' claims were

[14] Plaintiffs' Count Five alleges that the Legislature unlawfully modified statutory provisions about an independent redistricting commission created by a citizens' initiative. The district court dismissed Count Five, and Plaintiffs filed a cross-petition for interlocutory review of the dismissal of that count, which this Court granted. The parties' Count Five arguments are in cross-appeal briefs.

nonjusticiable and transgressed the separation of powers, and that they were not cognizable under any constitutional provision. The court did not adopt any test for Plaintiffs' claims, stating instead that "[a]s this case proceeds through litigation and with specific input from both parties, this Court can determine what criteria or factors should be considered in this case, under Utah law." Bates#000751. The court also stated that "[t]here is no legitimate legislative objective in … seeking partisan advantage through redistricting." Bates#000774. And the court concluded that Plaintiffs had sufficiently alleged that the 2021 congressional plan "has the effect of substantially diminishing or diluting the power of democratic voters, based on .their political views," "makes it systematically harder for non-Republican voters to elect a congressional candidate," and renders Plaintiffs' Democratic votes "meaningless." Bates#000768, 786. The court dismissed the stated policy choice of combining urban and rural areas as "pretext." Bates#000769.

This Court granted Legislative Defendants' petition for leave to file an interlocutory appeal. The district court then stayed its proceedings, including a dispute over Plaintiffs' attempt to take substantial discovery from state legislators.

SUMMARY OF ARGUMENT

I. The Constitution vests exclusively in the Legislature the power to perform the inherently political task of redistricting. Utah's courts would violate Article V's strict separation-of-powers guarantee were they to usurp the Legislature's exclusive redistricting power and grant Plaintiffs' request to redraw maps that favor candidates of their preferred political party.

II. Plaintiffs' partisan-fairness claims are nonjusticiable political questions. Every key political-question factor leads to that conclusion. First, Article IX expressly vests the redistricting power in the Legislature, a coordinate branch of government. That's critical, plain

textual evidence that courts have no right to perform this function. Second, no judicially manageable standards exist by which courts can adjudicate partisan-fairness claims. For one thing, unlike other constitutional provisions, Article IX plainly does not *forbid* partisan considerations *entirely* in redistricting, so *some* amount of partisan considerations in redistricting raise no constitutional problem. But that means that partisan-fairness claims cannot be resolved without first deciding *how much* partisanship is *too much*—and the Constitution does not define what is "fair." This Court would have to make up an answer. But there is no objective way for it to do so. Third, those considerations all confirm that redistricting is inherently a policymaking function whose political consequences should be borne by legislators—not by Utah's apolitical judges.

III. Plaintiffs' partisan-fairness claims are not cognizable in any event. Unlike certain constitutional provisions in other States, not one of the constitutional provisions that Plaintiffs invoke *expressly* provides a right to partisan fairness in redistricting. And an original-public-meaning analysis of each provision confirms that not one of them was generally understood by those who ratified the Constitution to provide an (implied) right to redistricting free from (an unspecified amount of) partisan considerations. Plaintiffs' claims must be dismissed for failing to state a claim upon which relief can be granted.

ARGUMENT

I. Utah courts would violate the separation of powers by adjudicating partisan-fairness claims.

A. The Constitution separates power between "three distinct departments, the Legislative, the Executive, and the Judicial." Utah Const. art. V, §1. Article V commands that "no person charged with the exercise of powers properly belonging to one of these departments,

shall exercise any functions appertaining to either of the others." *Id.*; *see also Patterson v. State*, 2021 UT 52, ¶167, 504 P.3d 92. The Legislature's powers are thus "nondelegable." *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶15, 449 P.3d 31. This Court has honored that command since ratification, resisting "arguments … [which] might with propriety be addressed to a legislative assembly," and has "decline[d] to resolve this court into a law-making body, even though it may be considered … more enlightened to do so." *Larson v. Salt Lake City*, 34 Utah 318, 97 P. 483, 489 (1908). For "[w]here the legitimate power of the court ends and it nevertheless acts, the act is usurpation pure and simple, and any attempt to justify the act upon the ground that in the opinion of the court justice demands the act cannot rescue the act from constituting usurpation." *State ex rel. Skeen v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 P. 120, 126 (1910).

This Court's decisions demarcate the boundaries between legislative and judicial power. The Legislature's power is one of "adopting rules of general applicability"—legislation for the entire State. *Carter v. Lehi City*, 2012 UT 2, ¶38, 269 P.3d 141. Legislative decisionmaking entails "weigh[ing] broad policy considerations, not the specific facts of individual cases." *Id.* Conversely, the judicial power is the power to "resolv[e] specific disputes between parties as to the applicability of the law to their actions." *Id.* ¶37; *accord, e.g.*, *Gill v. Whitford*, 138 S.Ct. 1916, 1933-34 (2018) (warning that a federal court is "not responsible for vindicating generalized partisan preferences").

B. Applied here, redistricting is an act of legislative power. Section 1 of Article IX vests only in "the Legislature" the power to "divide the state into congressional, legislative, and

other districts."[15] That is consistent with the U.S. Constitution's assignment of redistricting to "the Legislature." *See* U.S. Const. art. I, §4, cl. 1; *Rucho v. Common Cause*, 139 S.Ct. 2484, 2495 (2019) (discussing Elections Clause).

This assignment of redistricting to the Legislature should come as no surprise. Redistricting is "root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.). Redistricting "inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). For that reason, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in judgment). "[E]xtirpating politics" from those "essentially political processes" is an "impossible task." *Gaffney*, 412 U.S. at 754; *Rivera v. Schwab*, 512 P.3d 168,182 (Kan. 2022) (describing politics as "inseparable" from redistricting). And telling legislators to ignore politics "would essentially countermand the Framers' decision to entrust districting to political entities." *Rucho*, 139 S.Ct. at 2497.

When Utah adopted its Constitution, our Framers understood that redistricting was committed to the Legislature by both state and federal constitutions *because of* its political considerations. Partisanship in redistricting was a known practice when Utah's citizens entrusted

[15] Article IX originally provided for the election of one "at large" Member of Congress and anticipated that "the *Legislature* shall divide the State into congressional districts accordingly" based on further apportionment "made by congress." Utah Const. art. IX, §1 (1895) (emphasis added). Article IX was amended in 1988 to say that "the *Legislature* shall divide the state into congressional, legislative, and other districts." Utah Const. art. IX, §1 (1988) (emphasis added). The provision was further amended in 2008 to give the Legislature more time to redistrict, clarifying that "the *Legislature*" must redistrict after the general session following "the *Legislature*'s receipt" of census results. Utah Const. art. IX, §1 (2008). The point: Article IX does not now grant, and has never granted, redistricting power to courts.

the task solely to the Legislature. From the first congressional elections, the Federalists accused Patrick Henry of gerrymandering Virginia's districts to disfavor their candidates, including James Madison. *See Rucho*, 139 S.Ct. at 2494; *see also* 5 Writings of Thomas Jefferson 451 (P. Ford ed. 1904) (Letter to W. Short (Feb. 9, 1789)) ("Henry has so modelled the districts for representatives as to tack Orange to counties where he himself has great influence that Madison may not be elected in the lower federal house."). The term "gerrymander" itself derives from Massachusetts's congressional elections of 1812—eight decades before Utah's statehood—when Governor Elbridge Gerry approved a map that favored his own Democratic-Republican Party over rival Federalists. *See Rucho*, 139 S.Ct. at 2494. Nevertheless, the people continued to commit redistricting power to legislatures throughout the country, including Utah's. *See id.* at 2496; *Parkinson v. Watson*, 4 Utah 2d 191, 196, 291 P.2d 400 (1955).

From its inception, the Utah Constitution committed redistricting solely to the Legislature. *See supra*, p.17-18 & n.15. As this Court has already recognized, a "cardinal principle[ ]" of "paramount importance" is that redistricting is constitutionally "addressed, *not to the courts*, but to the legislature, whose responsibility it is to carry it out." *Parkinson*, 4 Utah 2d at 196 (emphasis added). The Constitutional Convention intensely debated the redistricting power, foreseeing "potential conflicts of interests between the rural and urban areas." *Id.* at 200. At the convention, the principal question was whether each county would have at least one state representative in the Legislature, regardless of population. Proceedings and Debates of the Convention, Days 37-38, at 820-64 (Apr. 9-10, 1895). While urban and rural factions disagreed on that question, all sides agreed that it was the Legislature's to answer. The debates adverted to what "the Legislature … ought to do" when redistricting and discussed "the Legislature … tak[ing] some action." *Id.*, Day 37, at 832 (Apr. 9, 1895) (Mr. Varian); *id.*, Day 38, at 853 (Apr.

10, 1895) (Mr. Bowdle). Through all these debates about representing urban and rural interests, it was "clearly contemplated that such matters would properly commend themselves to the attention of legislators in subsequent reapportionments." *Parkinson*, 4 Utah 2d at 200.

Nothing in the convention records suggests that the Framers ever contemplated that a *court* could decide how urban and rural interests should be represented in the state or national legislatures. But Plaintiffs want precisely that—courts to override the Legislature's decision to combine rural and urban areas in congressional districts. Utah courts have no constitutional authority to act as a super-Legislature and revise that policy decision; that legislative power is "nondelegable." *Vega*, 2019 UT 35, ¶15.

C. Nevertheless, Plaintiffs liken their claims to redistricting issues that courts may adjudicate—claims alleging malapportionment or impermissible race discrimination in redistricting. But the U.S. Supreme Court rejected such analogies in *Rucho*, and this Court should, too. 139 S.Ct. at 2501-02. The potential for political gerrymandering was well established at America's founding and Utah's founding. At no point in the federal or Utah constitutional conventions "was there a suggestion that the federal courts," or Utah state courts, "had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing." *Id.* at 2496; *accord Parkinson*, 4 Utah 2d at 200.

Confirming the point, courts adjudicating malapportionment and racial-discrimination claims do not re-weigh the Legislature's prior policy choices. Instead, they police categorical prohibitions governed by knowable tests. *Rucho*, 139 S.Ct. at 2497. The permissible amount of racial discrimination in redistricting is zero, just as the permissible amount of population inequality in congressional districts is zero absent some compelling reason. *Id.* at 2502; *Karcher v.*

Daggett, 462 U.S. 725, 734 (1983).[16] Even before the U.S. Supreme Court in *Wesberry* required exacting population equality, this Court refused to "nullify" statehouse districts enacted by the Legislature unless "wholly unreasonable and arbitrary." *Parkinson*, 4 Utah 2d at 203. Wholly unreasonable and arbitrary based on what? The Utah Constitution's command that the apportionment be "adjust[ed] … on the basis of … enumeration" of the population "according to ratios to be fixed by law." Utah Const. art. IX, §2 (1895).

Contrast those categorical prohibitions to Plaintiffs' request that this Court *rebalance the partisan makeup* of any given district. Redrawing district lines to achieve Plaintiffs' preferred partisan outcomes is not adjudicating "specific disputes between parties," *Carter*, 2012 UT 2, ¶37, in the same way that claims of racial discrimination or malapportioned districts vindicate the particular interest of an individual voter who has been the target of *verboten* race discrimination or placed in an overpopulated district. Rather, a court redrawing districts to achieve different partisan outcomes would exercise raw political power.

Other constitutional provisions confirm that the Legislature's policy decisions for redistricting—and the attending political consequences—remain with the Legislature, not to be second-guessed by courts. Since the beginning, Article IX's assignment of redistricting power to the Legislature has said nothing about partisan neutrality. In contrast, other constitutional provisions expressly ban partisan considerations in other governmental functions. In 1895, for example, the Constitution prohibited "partisan test[s]" as "a condition of admission, as teacher or student, into any public educational institution of the State." Utah Const. art. X, §12 (1895).

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[16] Evidence of a malapportionment claim, moreover, is objective. The U.S. Census Bureau conducts an actual count of the people—a census—every ten years. That count then becomes the basis for any malapportionment challenge. *Evenwel v. Abbott*, 578 U.S. 54, 61, 66-69 (2016). There is no such evidence for partisanship claims.

This ban on "partisan test[s]" as "a condition of employment, admission, or attendance in the state's education systems" remains today. Utah Const. art. X, §8.

After the Founding, when voters have wanted other governmental functions to be governed by specific rules about partisanship, their constitutional amendments have said so. Provisions adopted in 1930 establishing the State Tax Commission specify that the Commission shall consist "of four members, not more than two of whom may belong to the same political party." *Id.*, art. XIII, §6, cl. 1. Provisions adopted in 1932 require the election of city charter commissioners "without party designation." *Id.*, art. XI, §5. And the 1984 amendments governing judicial selection specify that judicial nominees shall be selected "based solely upon consideration of fitness for office without regard to any partisan political consideration." *Id.* art. VIII, §8, cl. 4.

In short, Utah voters know how to ban partisan considerations in governmental functions when they want to. Their inclusion of such bans in Articles VIII, X, and XI—but not in Article IX's legal requirements governing redistricting—is by design. *Cf. Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶14, 267 P.3d 863 ("We therefore seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.").

D. With respect to congressional redistricting, the U.S. Constitution also commits redistricting to the legislative branch. The "Manner" of holding elections for congressional Representatives—including the drawing of single-member districts in which each election will be held—"shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, §4, cl. 1. If this Court were to redraw those congressional districts to satisfy its preferred partisan political balance, thus exceeding this Court's power, that would violate the federal Constitution. It would be contrary to the "method which the state has prescribed for legislative enactments."

Smiley v. Holm, 285 U.S. 355, 367 (1932). Utah courts have no veto on the Legislature's policy decisions and cannot lawfully rebalance the politics of districts under the federal Elections Clause.

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Utah's separation-of-powers guarantee "render[s] it imperative that courts resist efforts to use them for the purpose of interfering with or attempting to control matters of judgment and determination of policy within other departments of government." *Ricker v. Bd. of Educ. of Millard Cnty. Sch. Dist.*, 16 Utah 2d 106, 112, 396 P.2d 416 (1964). Here, redistricting is an act of "policymaking" that the Utah Constitution commits solely to the Legislature and puts beyond the "judicial role." *Schroeder Investments, L.C. v. Edwards*, 2013 UT 25, ¶23, 301 P.3d 994. Any judicial review of the final legislative product for partisan political fairness would only draw the Court into the "inappropriate realm of 'legislative policymaking.'" *State v. Davis*, 2011 UT 57, ¶33 n.57, 266 P.3d 765. For the reasons that follow, "[c]ourts are ill-suited for such ventures." *Id.* ¶36. Plaintiffs' partisan-gerrymandering claims should be dismissed as an improper attempt to reassign legislative power to the judicial branch.

II. Plaintiffs' partisan-fairness claims are non-justiciable political questions.

Not all disputes raise controversies justiciable in Utah courts. The political-question doctrine ensures that this Court does not adjudicate "matters wholly within the control and discretion of other branches of government." *Matter of Childers-Gray*, 2021 UT 13, ¶62, 487 P.3d 96 (quotation marks omitted). The doctrine "preserves the integrity of functions lawfully delegated to political branches of the government and avoids undue judicial involvement in specialized operations in which the courts may have little knowledge and competence." *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995). It allows courts to "hold strictly to an

exercise and expression of their delegated or innate power to interpret and adjudicate," thereby "curtail[ing] interference of one branch [the courts] in matters controlled by the others." *Id.* at 541-42 (cleaned up); *Childers-Gray*, 2021 UT 13, ¶64.

Utah's standard for determining whether a controversy presents a non-justiciable political question mirrors the federal standard. *See Childers-Gray*, 2021 UT 13, ¶64 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Claims are not justiciable if committed to a different branch of government, *e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849), or have no judicially manageable standard for resolving the dispute, *e.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1003-04 (1979) (plurality op.), or require policymaking, *e.g.*, *Ogden City v. Stephens*, 21 Utah 2d 336, 339, 445 P.2d 703 (1968) ("the necessity, expediency, or propriety of opening a public street or way is a political question"); *Green v. Frazier*, 253 U.S. 233, 240 (1920). *See Vieth*, 541 U.S. at 278 (plurality op.) (describing "six independent tests" for justiciability from *Baker*). *Rucho* applied the same standard and held that partisan-gerrymandering claims under the U.S. Constitution are not justiciable. 139 S.Ct. at 2506-07. The same conclusion necessarily follows here.

A. The Utah Constitution textually commits redistricting to the Legislature.

"A controversy is nonjusticiable … where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993). This test requires, "in the first instance, interpret[ing] the text in question and determin[ing] whether and to what extent the issue is textually committed" to another branch. *Id.* That's straightforward here: for all the reasons discussed in Section I, the Utah Constitution commits the issue of redistricting to the Legislature. Article IX requires "the Legislature"—not Utah courts—to "divide the state into congressional, legislative, and other districts." Utah. Const. art. IX, §1. Given that express textual commitment, Plaintiffs'

suit can be understood only as an invitation for this Court to sit as a super-Legislature. They want this Court to veto the Legislature's congressional redistricting plan and put in place its own, with its own policy objectives. Bates#000081. By themselves, these undisputed features of Plaintiffs' complaint make Plaintiffs' suit non-justiciable.

B. There are no judicially manageable standards by which Utah courts could adjudicate Plaintiffs' claims.

Second, Plaintiffs' claims are non-justiciable because there are no judicially manageable standards for Utah courts to apply. Such standards "must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'" *Rucho*, 139 S.Ct. at 2498. Courts cannot adequately define or apply partisan "fairness" for three reasons.

1. The permissible amount of partisan considerations in redistricting is not zero.

Because the Framers committed redistricting to the legislative branch, *some* consideration of partisanship is valid. "It would be idle … to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U.S. at 752-53; *see Rucho*, 139 S.Ct. at 2497 (collecting six prior cases for the proposition that "a jurisdiction may engage in constitutional political gerrymandering"); *id.* at 2517 (Kagan, J., dissenting) ("even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice"); *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) (agreeing that some use of partisanship can "find justification in … desirable democratic ends" even though "harmful to the members of one party"). Two other state supreme courts agree. *Rivera*, 512 P.3d at 182; *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶51, 967 N.W.2d 469. And history confirms that it has been a "lawful and common practice" for legislatures to use partisan considerations in redistricting from the beginning. *Vieth*, 541 U.S. at 286 (plurality op.); *Rucho*, 139 S.Ct. at 2494-

95 (citing historical examples). Given this default rule, the few States that require partisan neutrality in redistricting say so expressly in their state constitutions, *Rucho*, 139 S.Ct. at 2507-08 (collecting examples), thereby rebutting the presumption that a task "clearly contemplate[d] … by political entities … turns out to be root-and-branch a matter of politics," *Vieth*, 541 U.S. at 285. Especially since our Constitution expressly requires partisan neutrality for other governmental functions, *see* p. 21-22, *supra*, but has no express partisanship ban in Article IX, some amount of partisan politics in redistricting is not only permitted but expected.

2. There is no judicial test for "fairness."

If some amount of partisanship is valid, this Court would have to decide *how much* is *too much*. But Courts cannot "even begin to answer th[at] determinative question." *Rucho*, 139 S.Ct. at 2501; *see also Rivera*, 512 P.3d at 183. Judges "[s]elect[ed]" for office "without regard to any partisan political consideration," Utah Const. art. VIII, §8, cl. 4, cannot become the sole referees—applying only judge-created rules in a zero-sum political game—deciding whether districts ought to favor Republicans or Democrats.

The lack of "legal standards to limit and direct" judicial decisionmaking in this "most intensely partisan aspect[ ] of American political life" is not for lack of trying. *Rucho*, 139 S.Ct. at 2507. For more than 50 years, beginning with *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965), the U.S. Supreme Court searched for a standard of "partisan fairness" in redistricting. It never found one. Decades of effort failed to disclose a "limited and precise rationale" that could separate judicial adjudication from legislation. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in judgment); *see, e.g.*, *Gill*, 138 S.Ct. at 1933 (rejecting "efficiency gap" metric as merely an "average measure" of redistricting's effects "on the fortunes of political parties"); *id.* at 1926-29 (recounting other rejected standards); *Rucho*, 139 S.Ct. at 2502-05 (same). The failed

experiment finally ended in *Rucho* when the Supreme Court, without ever having struck down a map as an unconstitutional partisan gerrymander, at last concluded that no judicially manageable standard existed for adjudicating partisan-fairness claims under the federal Constitution. *Id.* at 2506-07.

The same is true under the Utah Constitution. While the Utah Constitution elsewhere expressly requires partisan neutrality in *other governmental functions*, *see* pp. 21-22, *supra*, no provision of the Utah Constitution sets a standard of partisan fairness *in redistricting* that Utah's courts could apply. Without constitutional text to answer that question, this Court would be left with a choose-your-own-adventure process for answering the same questions that led *Rucho* to decide that claims of political unfairness are nonjusticiable. *See Rucho*, 139 S.Ct. at 2500.

Consider just a few political questions this Court would have to decide for all Utahns about what is "fair" if it chose to enter the political thicket of redistricting. Does partisan fairness counsel a map with many politically competitive districts, where each district consists of roughly 50 percent of voters from one party and 50 percent of voters from another party? Such closely contested districts could result in "a seismic shift in the makeup of the legislative delegation," which would have consequences that themselves "seem highly undemocratic." *Vieth*, 541 U.S. at 359 (Breyer, J., dissenting); *see* James Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized?*, 90 Marq. L. Rev. 555, 572 (2007) (explaining districts "split evenly among Republicans and Democrats" can all be won by one party with only "a slight general shift in voter preferences"). These 50-50 districts make it unpredictable who will win from one election to the next, sacrificing continuity of representation by a familiar incumbent. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial*

Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649, 668 (2002) (in maps of 50-50 districts, "the slightest shift in voter preferences would lead to a landslide victory for one of the parties"). Nor would such perfect calibration be possible in Utah, where more than 33 percent of voters—nearly double the number of registered Democrats—identify as independents or minority-party members.[17] A court could decide it would be most "fair" to distribute Republican, Democratic, and independent voters evenly across all four Utah districts, as illustrated in Figure 10a below, but that is a political decision, not a judicial one. *Holder v. Hall*, 512 U.S. 874, 894 (1994) (Thomas, J., concurring in judgment) (observing "[v]ote dilution cases" require "decisions based on highly political judgments—judgments that courts are inherently ill-equipped to make").

Or would it be "fairer" to create "safe" seats for major parties, as illustrated in Figure 10b below? Electoral outcomes might be more predictable. *Cf. Bandemer*, 478 U.S. at 130-31 ("To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit."). But that only leads to more questions: How many safe seats for each party would be "fair"–one district for a Democrat candidate, even though only 14 percent of the State's voters are registered Democrats?[18] How should the Court decide which voters should be placed in safe "districts allocated to the opposing party"? *Rucho*, 139

[17] "Current Voter Registration Statistics," Utah Office of the Lt. Gov. (Mar. 20, 2023), http://vote.utah.gov/current-voter-registration-statistics/ (tabulating more than 550,000 active voters registered for third parties or as unaffiliated).

[18] *Supra* n.17.

S.Ct. at 2500. Here again, how should the Court accommodate the more than 550,000 voters who are not registered members of the two major political parties?[19]

Figure 10a

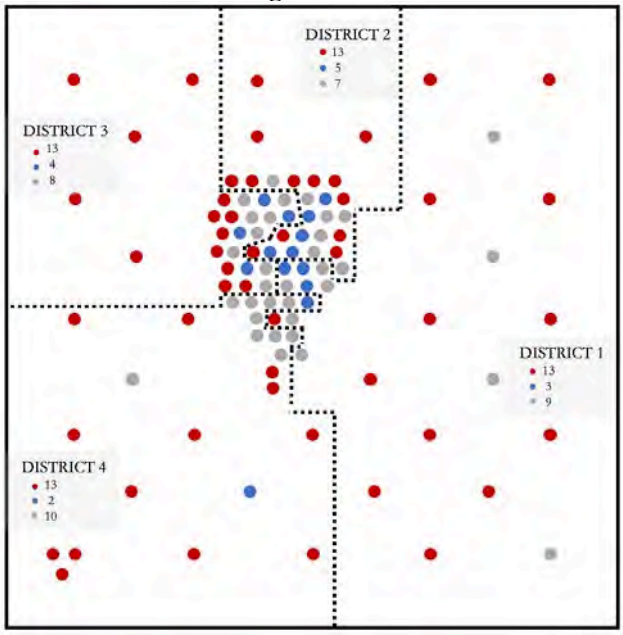
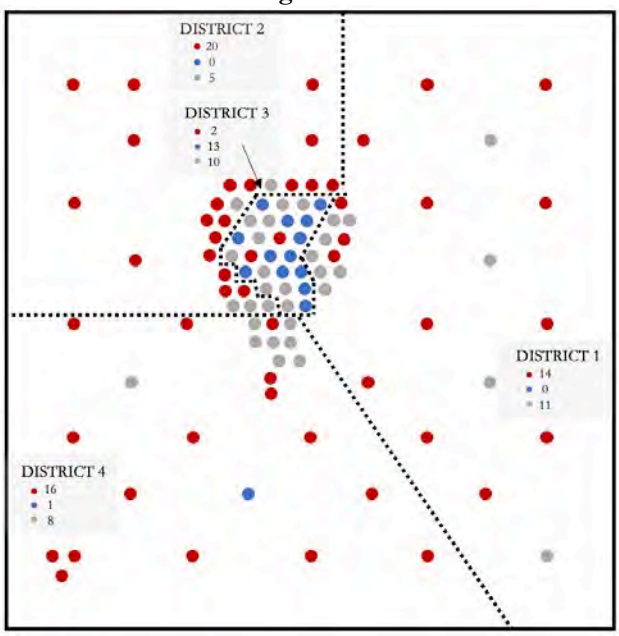


Figure 10b



Deciding what is "fair" is also complicated by the fact that redistricting already begins with a political choice to elect members of Congress in single-member, winner-take-all districts. U.S. Const. art. I, §2, cl. 1; 2 U.S.C. §2c; Utah Const. art. IX, §1; Utah Code Ann. §20A-13-101.5. Single-member districts ensure geographical representation of the whole state—something that Utah's Framers valued highly. *See Parkinson*, 4 Utah 2d at 200.

But as discussed, pp. 6-7, *supra*, single-member districts come with tradeoffs. They are incompatible with requiring proportionality as a measure of "fairness," as the Supreme Court has explained time and again.[20] By design, they do not aim at proportional *partisan*

[19] *Supra* n.17.

[20] *See, e.g.*, *Rucho*, 139 S.Ct. at 2499; *League of United Latin Am. Citizens v. Perry* [*LULAC*], 548 U.S. 399, 419 (2006) (op. of Kennedy, J.); *Vieth*, 541 U.S. at 288 (plurality op.); *id.* at 308 (Kennedy, J., concurring in judgment); *id.* at 338 (Stevens, J., dissenting) ("The Constitution

representation—only at proportional *population* representation. *See* Gardner, *supra*, at 572-73 ("partisan competition" and "territorial districting … are conflicting and indeed incommensurable principles"). A natural result of single-member districting is that representatives will not necessarily reflect the statewide *partisan* proportion of the vote, because individual voters do not live in perfect political homogeneity. *See Bandemer*, 478 U.S. at 159 (op. of O'Connor, J.) ("voting strength of less evenly distributed groups will invariably be diminished by districting as compared to at-large proportional systems for electing representatives"); *Vieth*, 541 U.S. at 343 (Souter, J., dissenting) ("The choice to draw a district line one way, not another, always carries some consequence for politics, save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity."); *see also* Figs. 3a & 3b, *supra* p. 6; Figs. 10a & 10b, *supra* p. 29.

One final problem arises in any attempt to define "fairness" in redistricting: why should partisanship be the only consideration relevant to achieving fairness? If proportional representation really were the hallmark of a fair map, there is no good reason why only the two major political parties deserve to be proportionally represented. There are innumerable "other variables"—minor political parties, urban versus rural residence, levels of education, industry sector, religion—which could plausibly claim the same solicitude in redistricting. *Johnson*, 2021 WI 87, ¶57; *see* Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 Wm. & Mary L. Rev. 1, 21-22 (2008). This Court would be entering into the "political thicket" of balancing any number of interests that define different factions of voters.

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does not, of course, require proportional representation of racial, ethnic, or political groups."); *Bandemer*, 478 U.S. at 130 (plurality op.); *Whitcomb v. Chavis*, 403 U.S. 124, 153-55 (1971).

In place of proportionality, plaintiffs have proposed other tests. None answers the question of how much is "too much"—that is, what *amount* of politics in redistricting is "fair." Start with the "efficiency gap." This purports to measure "wasted" votes—defined as the number of votes cast for a losing candidate in a district. Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 886-890 (2015). But the efficiency gap is merely an "average measure" of the statewide effect of redistricting "on the fortunes of political parties" in elections *after* they occur. *Gill*, 138 S.Ct. at 1933. It is an *ex post* measure of election *outcomes*, not an *ex ante* measure of *competitiveness*. It assumes that voters vote for political parties (versus candidates) in particular races. Other tests, including the "symmetry standard," compare how the two major parties would fare in a hypothetical election, but they depend on mere "conjecture" and "a hypothetical state of affairs." *LULAC*, 548 U.S. at 419-20 (2006) (op. of Kennedy, J.). Likewise, *Rucho* rejected still another test, a "median" test, that compares possible plans against other possible plans; it does nothing to answer the question of what is "too much" partisanship among those plans. 139 S.Ct. at 2505; *see also id.* at 2501-02 (rejecting the categorical tests for invidious racial discrimination and mal-apportionment as an appropriate test for partisan fairness).

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More to the point, none of those tests finds a *textual* basis in the Utah Constitution. "Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal." *Rucho*, 139 S.Ct. at 2500. Questions about how to measure unfair vote dilution are "questions of political philosophy, not questions of law." *Holder*, 512 U.S. at 901 (Thomas, J., concurring in judgment). Like the U.S. Constitution, the Utah Constitution precludes courts from "mak[ing] their own political judgment about how

much representation particular parties *deserve*—based on the votes of their supporters [statewide]—and to rearrange the challenged districts to achieve that end." *Rucho*, 139 S.Ct. at 2499. "[S]eizing such power would encroach on the constitutional prerogatives of the political branches." *Johnson*, 2021 WI 87, ¶45 (citing *Vieth*, 541 U.S. at 291).

3. Even if courts knew abstractly "how much partisanship is too much," courts cannot reliably measure "how much is too much" in practice.

Even if courts could define partisan "fairness," they cannot reliably measure future votes before they are cast. Thus they cannot reliably measure "fairness," even once defined.

Under any conceivable test, a court would first have to establish a baseline—that is, which party should have won a district if the lines were "fair." This baseline is *not* a toss-up election. Every given area has a preexisting political lean. Areas of any State will naturally vary in their preexisting likelihood to elect a Republican or a Democrat. Voters "of every political identity" are not "distributed in an absolutely gray uniformity." *Vieth*, 541 U.S. at 343 (Souter, J., dissenting). What is a "fair" baseline in Salt Lake City necessarily differs from what is "fair" in Provo. Courts would have to account for the preexisting partisan lean of any given area based on where voters live.

But the problem with establishing a judicially reliable baseline is that voters don't vote for parties. They vote for candidates. A pollster can guess at which political party is likely to win a future election, but no one can know for sure, especially in a State with hundreds of thousands of independents. Courts cannot simply assume voters will choose the same preferred party, in every election, no matter the candidate. *See Rucho*, 139 S.Ct. at 2503 ("Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever

that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.").

In reality, a voter's political affiliation "is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287 (plurality op.); *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment) ("voters can—and often do—move from one party to the other"); Persily, *In Defense of Foxes Guarding Henhouses*, *supra*, at 659-60 (prior margins of victory are only poor indicators of an incumbent's future prospects). Some, but nowhere near all, Utah voters have publicly registered as members of political parties. Even among those registered with major parties, those affiliations change over time, and they do not dictate votes in any one election. In 1960, 45 percent of Utahns voted for John F. Kennedy for President; in 2016, only 27.5 percent of Utahns voted for Hillary Clinton for President.[21] By 2020, roughly 38 percent of voters voted for President Biden. But in the same election, Utahns split their tickets—voting for one party's candidate for president and another party's candidate for congressional representative. More than 50,000 more votes were cast for President Biden than were cast for Democratic candidates running in all four House races; conversely thousands fewer votes were cast for President Trump than were cast for Republican candidates running in all four House races.[22] As these statistics show, voters cast their ballots not for parties but for "separate elections between separate candidates in separate districts, and that is all there is." *Vieth*, 541 U.S.

[21] "Historical Election Results - 1960 General," Utah Office of Lt. Gov., bit.ly/3LNYq2T; "Historical Election Results - 2016 General," Utah Office of Lieutenant Governor, bit.ly/3IKITWR.

[22] "Historical Election Results - 2020 General," Utah Office of Lt. Gov., bit.ly/3KhP6TT.

at 288 (plurality op.). "These facts make it impossible to assess the effects of partisan gerrymandering," *id.* at 287, let alone to articulate a standard for crafting a "fair" remedy.

Yet any conceivable fairness standard will count these voters as though their future political affiliations are certain and immutable. For example, the "efficiency gap," rejected in *Gill*, asks how many "Republican" votes versus "Democratic" votes were "wasted" in past elections based on the assumption that these past "wasted" votes reliably predict future "wasted" votes. Stephanopoulos & McGhee, *supra*, at 834. The efficiency gap and any other test would leave it to the courts to decide how to "count" a split-ticket voter who voted for President Biden in the last election but an incumbent Republican congressional representative. Is that person a Democrat or a Republican for Plaintiffs' claims? What about someone who voted for a Republican congressional candidate in one cycle, but against her in the next? And what about the third-party and independent voters in Utah—a full one-third of registered Utah voters? No provision of law supplies an answer *precisely because* these are questions of politics, polling, and prediction—not questions of law.

C. This Court cannot redistrict without policymaking reserved for the Legislature, with massive political consequences.

Third, Plaintiffs' claims are nonjusticiable because they ask Utah courts to make "'policy determination[s] of a kind clearly for nonjudicial discretion.'" *Childers-Gray*, 2021 UT 13, ¶64. Even if, contrary to reality, a court could reliably define "fair" and reliably predict the future to measure "fairness," a Court cannot redraw district lines to determine winners and losers. *Cf. Johnson*, 2021 WI 87, ¶45 ("The people have never consented to the Wisconsin judiciary deciding what constitutes a 'fair' partisan divide."). Even the seemingly politically neutral factors that guide redistricting—including compactness, use of local-government lines and

natural boundaries, or continuity of existing district lines—have political consequences. *See Vieth*, 541 U.S. at 298. And in redistricting, a change to favor Democrats' candidates is necessarily a change to disfavor some other faction of voters.

More fundamentally, deciding which redistricting factors to use requires tradeoffs with others—precisely the kind of "determination or resolution" that "requires placing a premium on one societal interest at the expense of another." *Jones v. Barlow*, 2007 UT 20, ¶34, 154 P.3d 808. For example, illustrated in Figures 2a and 2b above, a plan that maximizes the number of voters from a large city in one district will often have to sacrifice compactness in other districts. Or consider the real-world reasons behind Utah's actual maps: Legislators wished to "combine and elevate" urban and rural voices together in Utah's congressional delegation.[23] In their policy view, rural and urban Utah are "so connected" economically that they are "the same Utah"—and best represented if each district has a "foothold" in both rural and urban areas.[24] Another legislator explained that because two-thirds of Utah is federal land, all four Representatives should represent those rural, federally owned areas to advocate for Utah's interests *vis-à-vis* the federal government's.[25] Judges need not agree with either policy call. But if judges want to disagree *and change the maps themselves*, they should hang up their robes and print yard signs, for these policy determinations are a "job for the Legislature, not the courts." *Jones*, 2007

[23] Senate Floor Debate at 11:00-11:14, 2021 Second Special Session (Nov. 10, 2021), bit.ly/42GmiLM (Sen. Sandall); House Floor Debate at 12:20-12:35, 2021 Second Special Session (Nov. 9, 2021), bit.ly/3KdR4Vi (Rep. Ray) (noting that while the law doesn't require congressional districts to include urban-rural mix, it was a "policy" that the Legislature adopted).

[24] Senate Floor Debate at 12:00-12:50, bit.ly/42GmiLM (Sen. Sandall).

[25] *Id.* at 30:57-34:23 (Sen. Fillmore) ("I'm counting on our four representatives that each represent a portion of a district that is getting hosed by the delinquent taxpayer," *i.e.*, the federal government).

UT 20, ¶34; *see also* Nathaniel Persily, *When Judges Carve Democracies*, 73 Geo. Wash. L. Rev. 1131, 1158 (2005) ("there are no such things as 'neutral' districting principles").

Adopting plaintiffs' arguments will make this Court the State's final redistricting policymakers. Incessant redistricting litigation *between* each census will follow, asking whether the Legislature's maps (or a court's redrawn maps) meet elusive notions of fairness. The upshot? Politics for Utah's courts and perpetual uncertainty for candidates and voters.

III. The district court erroneously interpreted multiple constitutional provisions to impliedly guarantee partisan fairness in redistricting.

The Constitution nowhere expressly guarantees a right to partisan fairness in districting. But the district court refused to dismiss Plaintiffs' complaint for failure to state a claim by construing "the objective original public meaning" of at least four constitutional provisions to contain an *implied* right to partisan fairness in redistricting. *South Salt Lake City v. Maese*, 2019 UT 58, ¶19 n.6, 450 P.3d 1092. Each holding should be reversed.

A. The Free Elections Clause does not impliedly guarantee partisan outcomes.

Utah's Free Elections Clause states, "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." Utah Const. art. I, §17. The Clause says nothing about redistricting, politically neutral or otherwise. Because "Utah courts are reluctant to recognize an implied right," *Machan v. UNUM Life Ins. Co. of Am.*, 2005 UT 37, ¶23, 116 P.3d 342, that should have been the end of the analysis. Even so, Plaintiffs' claims are not cognizable under the Free Elections Clause for the following three independent reasons.

1. The Free Elections Clause is not self-executing.

Certain provisions of the Utah Constitution "contemplate[ ] that something more [is] to be done to carry out [their] mandate, and [are], therefore, not self-executing." *Mercur Gold Min. & Milling Co. v. Spry*, 16 Utah 222, 52 P. 382, 384 (1898). "'[W]here a constitutional provision furnishes no rule for its own enforcement, or where it expressly or impliedly requires legislative action to give effect to the purposes contemplated, it is not self-executing.'" *Id.* Conversely, a provision is "'self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers.'" *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, ¶7, 16 P.3d 533.

This Court has already held that the Free Elections Clause is "not … self-executing" and "requires the legislature to provide by law for the conduct of elections, and the means of voting, and the methods of selecting nominees [for offices]." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942); *see also Spackman*, 2000 UT 87, ¶9 n.3. The district court's holding that Plaintiffs' claims are cognizable cannot be reconciled with this Court's precedent. *See* Bates#000757-70. In fact, the district court's order never mentioned this Court's doctrine regarding self-executing provisions, even though the Legislature raised it in the motion to dismiss. *See id.* Compounding the problem, the Court concluded that Plaintiffs had stated a claim under a heretofore unknown "'effects-based' test for violation of Utah's Free Elections Clause," Bates#000769—a holding incompatible with *Mercur*'s holding that the Free Elections Clause itself "furnishes no rule for its own enforcement." 52 P. at 384; *see Anderson*, 130 P.2d at 285. This break from *Mercur* justifies reversing the judgment below.

2. This Court's precedent bars Plaintiffs' claim on the merits.

Anderson also rejected Plaintiffs' view that the Clause guarantees an individual's *own* political successes. 130 P.2d at 285; *see also State v. Robertson*, 2017 UT 27, ¶28, 438 P.3d 491 ("an alternative holding" is "binding precedent"). The plaintiff in *Anderson* failed to meet the requirements to appear on a primary-election ballot yet wanted to run as a write-in candidate, but Utah law limited "the 'write in' privilege … to the names already appearing on the printed ballot." 130 P.2d at 285. The plaintiff argued that limiting his and other voters' ability to write in names in the ballots violated the Free Elections Clause. *Id.* This Court disagreed, holding that "[w]hile this provision guarantees the qualified elector the free exercise of his right of suffrage, it does not guarantee any person the unqualified right to appear as a candidate upon the ticket of any political party." *Id.* So too here: The Clause also does not guarantee a voter's preferred party's successes. *See id.* Instead, it specifically guarantees to "qualified elector[s]"—persons who "hav[e] the constitutional qualifications of a voter"—the right to cast their vote. *Id.*

3. The Free Elections Clause's original public meaning does not require partisan balancing in redistricting.

The text, history, and structure of the Free Elections Clause confirm that it does not require partisan balancing or prohibit political considerations in redistricting. *See Maese*, 2019 UT 58, ¶¶20-67 (discerning objective original public meaning by analyzing constitutional text, convention debates, and common law, including contemporaneous laws in other States).

Text. The Free Elections Clause contains two subclauses: (1) "All elections shall be free," (2) "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. Reading these two sub-clauses together, in

view of their "structure" and "physical and logical relation," *Salt Lake City Corp. v. Haik*, 2020 UT 29, ¶15, 466 P.3d 178, discloses that the first announces the Clause's purpose and the second creates a command.

The Founders commonly structured "individual-rights provisions of state constitutions" to "include[ ] a prefatory statement of purpose." *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008). Contrary to the district court's suggestion that these are free-floating and "independent clauses," Bates#000758, "[l]ogic demands that there be a link between the stated purpose and the command," *Heller*, 554 U.S. at 577. The clause that "[a]ll elections shall be free" must instead be read in context with the second clause: An election is free if no power, civil or military, interferes to prevent the free exercise of the right of suffrage.

These words' commonly understood meanings confirm this contextual reading. The Clause twice uses the word "free"—referring to "free" elections and "free exercise." At ratification, "Free" meant "[u]nconstrained; having power to follow the dictates of his own will." *Free*, Black's Law Dictionary (1891). It also meant to be "able to act without external controlling interference" and not "subjected to physical or moral restriction or control, either absolutely or in one or more particulars." *Free*, The Cent. Dictionary (1895). Thus, elections are "free" when voters may cast their vote without the State's interference.

That is confirmed by the second clause's use of the phrases "interfere to prevent" and "exercise of the right of suffrage." The phrase "interfere to prevent" generally meant to hinder, obstruct, or thwart. *See Interfere*, Am. Encyclopedic Dictionary (1895) ("intermeddle, to interpose, to intervene"); *Interfere*, The Cent. Dictionary (1895) ("[t]o take part in the affairs of others; especially, to intermeddle; act in such a way as to check or hamper the action of other persons or things"); *Prevent*, Am. Encyclopedic Dictionary (1895) ("to hinder by something

done before; to stop or intercept; to impede, to thwart, to obstruct"); *Prevent*, The Cent. Dictionary (1895) ("hinder from action by the opposition of obstacles; impede; restrain; check; preclude").

And the phrase "exercise of the right of suffrage," as relevant here, generally meant the act of putting into action the right to vote—voting. *See Exercise*, Webster's Complete Dictionary of the English Language (1886) ("1. The act of exercising; a setting in action or practicing; employment in the proper mode of activity; exertion; employment; application; use."); *Suffrage*, Black's Law Dictionary (1891) ("A vote; the act of voting."). That commonly understood meaning contradicts the district court's suggestion that *winning*, as compared to *voting*, matters. *See* Bates#000773 (describing non-winning votes as "meaningless").

The Free Elections Clause, therefore, guarantees free elections by prohibiting external or controlling civil or military interference that would hinder voters from voting according to the dictates of their will. These interferences would most naturally include preventing someone from voting altogether, intimidation, or undue influence (such as bribery) that act as an external controlling factor.

Historical Evidence. The Framers' decision to vest redistricting power in the Legislature alone, and without a partisan-fairness requirement, is a constitutional "decision" with "roots in the English common law." *Am. Bush v. City of South Salt Lake*, 2006 UT 40, ¶31, 140 P.3d 1235. From the English Bill of Rights of 1689 to other States' constitutions adopted between 1776 and 1895, the free elections guarantee was uniformly understood to prevent interference at the polls and the ability to cast a vote. No English or American source shows that the free elections guarantee was enforceable against legislatures in the context of redistricting—let alone required partisan balancing in redistricting. Nor does any source suggest—

as the district court did here—that alleged dilution or diminution of voting power based on political views ran afoul of the free elections guarantee. *See* Bates#000768.

The uniformity of historical evidence is critical because the record of the Utah constitutional convention is largely silent on the meaning of the Free Elections Clause. Such silence is evidence, "all other things being equal, that our framers were endorsing the prevailing approach." *State v. Houston*, 2015 UT 40, ¶206, 353 P.3d 55.

English Bill of Rights and Common Law: The English Bill of Rights of 1689, which stated that the "election of members of Parlyament ought to be free," prohibited arbitrary disenfranchisement of qualified electors by the Crown. Members of Parliament were selected from towns and cities that were "constituted as boroughs" by their "free inhabitants" called the "burgesses." Bertrall L. Ross, *Challenging The Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 267 (2021). These boroughs were municipal corporations subject to royal charters—and thus subject to the Crown's prerogative powers and manipulation. *Id.* at 268. The Crown routinely interfered with Parliamentary elections by *disenfranchising* the burgesses who did not support the Crown's various policies. *See id.* at 269. The Crown did so by remodeling the charters to designate who could vote in certain boroughs, *see id.*, or by outright revoking the boroughs' municipal charters, *see* J.R. Jones, *The Revolution of 1688 in England* 148 (1972). For instance, the Crown sent "agents" who "reported" which "town was being obstinately resistant." *Id.* at 147; *see also id.* at 149 (noting that "over 1200 persons judged to be unreliable had been ejected from municipal offices, and replacements had been provided for them"). Only when these towns signed the "pledges of support" for the Crown "would [they] be reinstated as voters." *Id.* at 148. Against this backdrop, the English Bill of Rights states that James II, "by the assistance of divers evil counsellors, judges and

ministers," violated "the laws and liberties of the kingdom … [b]y violating the freedom of election of members to serve in parliament." The English Bill of Rights thus "constrained the Crown's unilateral authority" to disenfranchise the electors for members of Parliament. Ross, *supra*, at 288.

Later, English common law prohibited voter intimidation and undue influence. Blackstone affirmed that "elections should be absolutely free"—a guarantee designed to "strongly prohibit[ ]" "all undue influences upon the electors." 1 Blackstone, *Commentaries on the Laws of England* 172. English common law was especially concerned with actions of "executive magistrate[s]" who could "employ[ ] the force, treasure, and offices of the society, to corrupt the representatives, or openly pre-engage the electors, and prescribe what manner of persons shall be chosen." *Id.* To avoid any intimidation by force, English law required that "[a]s soon … as the time and place of election … are fixed, all soldiers quartered in the place … remove, at least one day before the election, to the distance of two miles or more; and not to return till one day after the poll is ended." *Id.* "Riots"—which could intimidate voters—"likewise [were] frequently determined to make an election void." *Id.* And to avoid any undue influence from bribery, "[i]f any officer of the excise, customs, stamps, or certain branches of the revenue, presumes to intermeddle in elections, by persuading any voter or dissuading him, he forfeit[ed] and [was] disabled to hold any office." *Id.* And officials—such as "the sheriff or other returning officer"—who were tasked with administering the elections were often required to "tak[e] an oath against bribery." *Id.* at 173.

Against this backdrop of guarding against *executive* abuses, there is no evidence that those guarantees applied *to Parliament* or that Parliament was required to ensure partisan fairness. For instance, Parliament kept the notoriously malapportioned boroughs called "rotten

boroughs" until the mid-19th Century, with no one suggesting that Parliamentary elections somehow violated the free elections guarantee. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 302-03 (1962) (Frankfurter, J., dissenting).

The North Carolina Supreme Court had a different telling of this English history. But its opinion in *Harper v. Hall*—which is currently being reconsidered—gets the history wrong. The district court was wrong to rely on it. Bates#000763-64; *see Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *cert. granted* 142 S.Ct. 2901 (2022); *but see Harper v. Hall*, 882 S.E.2d 548 (N.C. 2023) (granting rehearing). As the *Harper* dissent observed, the free-elections guarantee "had a *specific* meaning" unrelated to modern partisan-gerrymandering claims. 868 S.E.2d at 441 (Newby, C.J., dissenting). The English Bill of Rights addressed specific problems that Parliament faced before the Glorious Revolution—unilateral disenfranchisement by *the Crown*, not imbalances caused by malapportioned (or gerrymandered) boroughs retained by Parliament. *See id.* at 441-43 & n.13; *supra* pp. 41-42. Nor did the *Harper* majority or the district court here consider later developments in English common law confirming that the English free-elections guarantee specifically concerned the ability to vote free from intimidation and undue influence. *Cf.* Bates#000763; *supra* pp. 42-43. The North Carolina Supreme Court reheard this case just weeks ago, suggesting that the *Harper* majority's error is likely short lived.

State Constitutions: "[E]xamin[ing] sister state law" can be a "useful" aid to "interpreting our constitution." *Maese*, 2019 UT 58, ¶59. Here, this interpretive tool confirms the district court's error. In 1895, 21 of the then-44 States had an analogous state constitutional provision guaranteeing "free" elections. Between 1776 and 1896, *not one* of those States interpreted its clause to require partisan balancing or neutrality in redistricting.

Nine States had nearly identical free election clauses that expressly equated free elections with elections in which "civil or military" "power" does not "interfere to prevent" the right to vote. *See* Ark. Const. art. 3, §2 (1874); Colo. Const. art. II, §5 (1876); Idaho Const. art. I, §19 (1890); Mo. Const. art. I, §25 (1875); Mont. Const. art. II, §13 (1884); Pa. Const. art. I, §5 (1874); S. Dak. Const. art. VII, §1 (1889); Wash. Const. art. I, §19 (1889); Wyo. Const. art. I, §27 (1889).[26] Until a 2018 Pennsylvania decision, not one State interpreted its clause to require partisan neutrality. Missouri specifically rejected partisan-gerrymandering claims under its free elections clause, holding that it "has not recognized a 'vote dilution' claim" outside of malapportionment cases, *Pearson v. Koster*, 359 S.W.3d 35, 43 (Mo. 2012), and only recently added a *separate* constitutional provision defining "partisan fairness" and delegating redistricting to a to a bipartisan redistricting commission, Mo. Const. art. III, §3(b) & (b)(5). Other States have likewise understood their clauses to prohibit the total deprivation of the ability to vote and coercion at the polls, not to require political neutrality. *See Neelley v. Farr*, 158 P. 458, 567 (Colo. 1916) ("free and open elections" mean that voters' right to the act of suffrage is free from coercion); *Adams v. Lansdon*, 110 P. 280, 282 (Idaho 1910) (the free elections clause prohibited only "officers, civil or military," from "meddl[ing] with or intimidat[ing] electors"); *Chamberlin v. Wood*, 88 N.W. 109, 110-11 (S. Dak. 1901) ("the elector cannot legally be physically restrained in the exercise of his right [to vote] by either civil or military authority …," but that "[t]he framers of the constitution seem to have designedly left the right of suffrage … to be regulated … by such laws as the legislature might deem proper to enact").

[26] All cited provisions are included in Attachment005-008.

The Pennsylvania Supreme Court's 2018 outlier decision is not persuasive. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). That court noted that its decision was largely driven by the "Commonwealth's centuries-old and unique history." *Id.* at 804. And its interpretative method is irreconcilable with this Court's original-public-meaning method. The Pennsylvania court went outside "the plain language," *id.* at 803, and was driven by "the consequences [of its] particular interpretation"—"guard[ing] against" what *it* viewed as "the antithesis of a healthy representative democracy," *id.* at 814. The court's outcome-driven interpretation required it to overrule its previous decision barring a partisan-fairness claim under the free and equal elections clause. *Id.* at 813 ("expressly disavow[ing]" *Erfer v. Commonwealth*, 794 A.2d 325 (2002), which held that Pennsylvania's free and equal elections clause was no broader than the federal Equal Protection Clause). The court said nothing of what an ordinary English speaker would have understood its clause to mean when ratified.

Seven other States' similarly worded provisions further confirm that in 1895 Utah's voters did not understand the Free Elections Clause to implicate redistricting. Like Utah's, these States' clauses begin by declaring that elections shall be free. They differ from Utah's in wording—they discuss the right of suffrage protected instead of prohibitions on conduct that would preclude exercising that right—but their aims are the same and they are still instructive.

Start with Virginia. The Virginia Constitution stated that "all elections ought to be free; and … all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage." Va. Const. art. 1, §6 (1870). Virginia's free elections clause has existed since 1776. Yet, in those nearly 250 years, Virginia's courts have never held that "free" "elections" require partisan balancing. Recall Patrick Henry's gerrymander targeting James Madison. *See supra*, p.19. There is no evidence that Madison—who helped

draft Virginia's free elections clause—or anyone else thought that Henry's actions violated the free elections clause.

If they did, Virginia's more recent actions would make no sense. In 2020, the Virginia General Assembly submitted for referendum a constitutional amendment to create an independent redistricting commission that also expressly vested new redistricting powers in the Virginia Supreme Court. *See* Va. Const. art. 2, §6-A. Also in 2020, the General Assembly enacted a statute prohibiting maps that "unduly favor or disfavor any political party." Va. Code §24.2-304.04(8). Under Plaintiffs' logic, modern Virginians are "chumps!" because instead of passing that new referendum and statute, "all they had to do was interpret the constitutional term[s]" in the free elections clause they've had since 1776. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting).

Vermont's Constitution similarly states that "all elections ought to be free and without corruption, and … all freemen, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers." Vt. Const. ch. I, art. 8 (1793). Interpreting Vermont's clause to equate "free" "elections" with elections in which all who meet the qualifications can vote comports with early interpretations of the Vermont Council of Censors, "an elected body that came together every seven years to determine whether 'the legislative and executive branch of government … have … exercised … greater powers than they are entitled to by the constitution." *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 329 (Vt. 1999). The Council of Censors said that a law that "empowered" the supreme court to "disfranchise a freeman for any evil practice which shall render him notoriously scandalous" was "against the letter and spirit" of the free elections clause, which "preserve[d] inviolate the

right of suffrage of every freeman, unless he should in fact forfeit that right." *Records of the Council of Censors of the State of Vermont* 156 (1991).

Besides Virginia and Vermont, five other States in 1895 expressly equated free elections to those in which qualified individuals can exercise their right to vote. *See* Md. Decl. of Rts. art. VII (1867); Mass. Const. pt. I, art. IX (1780); Neb. Const. art. I, §22 (1875); N.H. Const. pt. I, art. 11 (1784); S.C. Const. art. I, §5 (1868). Since 1776, not one of those seven States' highest courts has held that their free elections clauses do more than guarantee qualified individuals the right to vote. Notably, no partisan-fairness claims were made under the Massachusetts Constitution against Governor Elbridge Gerry's "salamander"-shaped district. *See Rucho*, 139 S.Ct. at 2494. Again, considerations of partisanship in redistricting have been "lawful and common practice" since the Founding. *Vieth*, 541 U.S. at 286 (plurality op.); *see also Rucho*, 139 S.Ct. at 2494-96. To be sure, last year a Maryland trial court held that plaintiffs stated a claim under Maryland's free elections clause. *See Szaeliga v. Lamone*, 2022 WL 2132194, at *14 (Md. Cir. Ct. Mar. 25, 2022). But the court acknowledged that this was a matter of first impression and "the Free Elections Clause relative to partisanship … ha[d] not been the subject of judicial scrutiny" in Maryland. *Id.* at *13. The court did not analyze the original public meaning of its free elections clause, and it found the faulty Pennsylvania decision persuasive. *Id.* at *14 n.26. This Court should reject the Pennsylvania and Maryland decision for the same reasons.

Finally, in 1895, a third group of five other States had a shorter free elections clause. *See, e.g.*, Del. Const. art. I, §3 (1831) ("All elections shall be free and equal."); Ill. Const. art. III, §3 (1870); Ind. Const. art. 2, §1 (1851); Ky. Const. §6 (1891); N.C. Const. art. I, §10 (1868) ("All elections shall be free."). Only one of those States—North Carolina in *Harper* in 2022—

has held that its clause requires partisan balancing. Tellingly, that decision is under reconsideration.

Context and Structure: Context and structure confirm that Plaintiffs have no claim under the Free Elections Clause. The clause also guarantees that "Soldiers" may "vote at their post of duty, in or out of the State." Utah Const. art. I, §17. That implicates an individual right to freely cast a ballot; it does not "deny the legislature the power to provide regulations" for elections, including redistricting plans. *Anderson*, 130 P.2d at 285; *see also Earl v. Lewis*, 28 Utah 116, 77 P. 235, 238 (Utah 1904) (when Legislature "merely regulates the exercise of the elective franchise," that "does not amount to a denial of the right itself").

As for structure, consider two points. First, the Utah Constitution separately addresses reapportionment in Article IX. If the Free Elections Clause were as significant to redistricting as Plaintiffs contend, the Founders would have included its prescriptions for redistricting in Article IX. Its absence there further confirms that Platonic notions of partisan fairness in redistricting are beyond the Free Elections Clause's original public meaning. Second, Utah voters know how to prohibit partisan considerations in governmental actions when they want to. As discussed, the Constitution requires judges to be selected "based solely upon consideration of fitness for office without regard to any partisan political consideration," Utah Const. art. VIII, §8, cl. 4, among three other constitutional partisan-neutrality requirements, *supra* pp. 21-22. The omission of an identical ban on partisan considerations in Article IX was no accident and bars Plaintiffs' claims.

B. The Qualifications Clause does not impliedly guarantee partisan outcomes.

Plaintiffs also claim that partisan gerrymandering violates the Qualifications Clause in Article IV, §2. The text, structure, and history of that Clause confirm that it governs what qualifies a voter to vote—nothing more.

The Qualifications Clause provides, "Every citizen of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days … shall be entitled to vote in the election." Utah Const. art. IV, §2. That text "fixe[s] the qualification of voters" who are then, by virtue of the Free Elections Clause, guaranteed the right to cast a ballot without the State telling them how to vote or precluding them from voting. *Earl*, 77 P. at 238. Together, the clauses "entitle[ ]" qualified voters "to vote in the election." Utah Const. art. IV, §2. The text goes no further.

The clause's structure buttresses the point. It resides in Article IV, whereas the redistricting power is in Article IX. Article IV says nothing about redistricting or partisan fairness; it gives women an equal right to vote, sets voting qualifications, establishes privileges from arrest and militia duty on election day, prohibits qualifying non-U.S. citizens and others with certain disabilities from voting, forbids property qualifications on the right to vote, and contains provisions about administering elections and casting ballots. *See* Utah Const art. IV, §§1-9. Article IV's structure thus confirms that the Qualifications Clause designates who is qualified to vote.

What's more, the relevant debates on the Qualifications Clause at the Constitution Convention centered on qualifications. The Framers intensely debated women's suffrage—an issue ultimately resolved outside the Qualifications Clause. *See* Utah Const. art. IV, §1;

Proceedings and Debates of the Convention, Day 25, 420-56 (Mar. 28, 1895). Having guaranteed women's suffrage, the Framers turned to other voter qualifications, and debated the Qualifications Clause on the convention's thirtieth day. *See* Proceedings and Debates of the Convention, Day 30, at 601-20 (Apr. 2, 1895).

The debate records show that the Framers understood the Qualifications Clause and other provisions of Article IV to set minimum qualifications for voting. *See id.* at 618 (Mr. Thurman) (understanding the Qualifications Clause to allow "every citizen of the United States of certain age and qualification … [to] be entitled to vote" and suggesting that the Legislature should lack power to "permit others than citizens of the United States to vote"). The Framers carefully balanced the legitimate need for minimum qualifications to ward off "dishonest use of the elective franchise," *id.* at 601 (Mr. Ryan), with the desire to avoid unnecessary "disfranchisement of citizens," *id.* (Mr. Hart). Some Framers wanted a longer 90-day residency requirement to discourage "floating vote[s]," *id.* (Mr. Ryan), but the Framers rejected this proposal in favor of the 60-day residency requirement adopted in the original Utah Constitution, *id.* at 602. A hotly contested proposal—to be a separate section in Article IV—was whether voters should "be able to read the Constitution of the United States," at least "in his own language," to be "entitled to vote." *Id.* at 603 (Mr. Thurman).

Since the Convention, the Qualifications Clause has been amended to lower the residency requirement to 30 days and to allow citizens who are 18 years or older to vote, but evidence suggests that the voters understood those amendments to do more than set qualifications. *See* H.J.R. 3 (1975), https://images.archives.utah.gov/digital/collection/432n/id/61563.

That the Qualifications Clause does this and nothing more dooms Plaintiffs' partisan-fairness claims. The clause's text is silent about guaranteeing certain partisan outcomes for redistricting. Despite acknowledging that Plaintiffs failed to provide "any arguments regarding the plain meaning of this clause, historical evidence … or … any particular test to be applied," Bates#000784, the district court still held that Plaintiffs stated a claim by relying not on the Qualifications Clause's *text* but on the penumbral emanations of the Utah Constitution's right to vote. It "consider[ed] the entire Utah Constitution and its purpose, including the Free Elections Clause, the Equal Protection Clause, the Free Speech and Associations Clauses and the long line of cases generally discussing the 'right to vote.'" Bates#000785-86.

This was error. The district court's refusal to consider the Clause's original public meaning contravenes this Court's method of interpretation. *See Maese*, 2019 UT 58, ¶¶18-19. Nor do Plaintiffs allege that the congressional plan prevents them from voting *even though* they meet the minimum residency and citizenship qualifications. That required the district court to acknowledge that Plaintiffs "can engage in the act of voting" under the plan. Bates#000786. Because the congressional plan does not prevent Plaintiffs from casting their votes if they meet the qualifications, it does not "abridge[ ], impair[ ], or take[ ] away" Plaintiffs' right to vote. *Earl*, 77 P. at 238.

Instead, Plaintiffs claim that their votes were rendered meaningless because their preferred candidates are not likely to win. Bates#000078 ¶301. On that basis, the district court reasoned that "'Plaintiffs' votes no longer have any effect" and are "meaningless" if their preferred political candidates don't win. Bates#000786. But the Qualifications Clause neither expressly nor implicitly deems a vote "meaningless" or without "any effect" because the voter's preferred candidate loses. As originally understood, a vote serves its purpose, is effective, and

means something—regardless of outcome—because it allows the voter to "express[ ] … his will, preference, or choice" among the candidates. *Vote*, Black's Law Dictionary (1891). Under both state and federal law, voters are not deprived of representation if their candidate loses an election; if that were so, our majoritarian system itself would be unconstitutional. *See Bandemer*, 478 U.S. at 132 (plurality op.); *Holder*, 512 U.S. at 901 (Thomas, J., concurring in judgment).

Finally, the district court erroneously suggested in a footnote that this Court has approved vote-dilution claims based on the Qualifications Clause. Bates#000786 (citing *Dodge v. Evans*, 716 P.2d 270 (Utah 1985)). This is incorrect. *Dodge* held only that an inmate incarcerated in Salt Lake County but domiciled in Weber County was "not denied" the right to vote under the Qualifications Clause—even though his Salt Lake County voter registration was voided based on his Weber County domicile—because he could have "received an absentee ballot and cast his vote" in Weber County. 716 P.2d at 73. *Dodge* confirms that no Qualifications Clause violation exists if the qualified voter can vote. *Dodge* does not, as the district court reasoned, further suggest the existence of a claim when the "right to vote [is] improperly … diluted." Bates#000786 n.30 (quoting *Dodge*, 716 P.2d at 273). This Court simply observed that "Dodge made no contention that his right to vote was … diluted"—which could also refer to malapportionment dilution—and that he only "claim[ed] … that he was deprived of the right to vote in any county election." *Id.* Reciting what a party did and didn't argue sheds no light on the Qualifications Clause's original public meaning. *Dodge* does not create a partisan vote-dilution claim.

C. The Uniform Operation Clause does not impliedly guarantee partisan outcomes.

The Uniform Operation of Laws clause reads now just as it did in 1896: "All laws of a general nature shall have uniform operation." Utah Const. art. I, §24. This clause supplies the legal test for equal protection guarantees.[27]

Under this provision's modern understanding, courts "employ a three-step test" that assesses "(1) what classifications, if any, the statute creates, (2) whether different classes are treated disparately, and (3) if there is disparate treatment, whether the legislature had any reasonable objective that warrants the disparity." *In re Adoption of J.S.*, 2014 UT 51, ¶67, 358 P.3d 1009 (cleaned up). The first two factors form a "threshold inquiry" into "whether a 'discriminatory classification exists.'" *State v. Drej*, 2010 UT 35, ¶34, 233 P.3d 476. "Without such a classification, the statutory scheme and the uniform operation of laws never intersect and there is no need to further inquire into the permissibility of the statute." *Id.* Even then, "[m]ost classifications"—such as sorting citizens into congressional districts—"are presumptively permissible and thus subject to rational basis review," with only "'suspect'" classifications—those based on race or sex or infringing on fundamental rights—triggering "heightened scrutiny." *Adoption of J.S.*, 2014 UT 51, ¶68.

Plaintiffs' claim fails at the outset: the Legislature's map has no "discriminatory classification." The perfectly apportioned map gives every voter the same chance to cast a vote of equal weight. Voters are not "treated disparately" by being organized into districts

[27] Though Article I, §2, also "uses the phrase 'equal protection'" and "'is relevant to the construction of Article I, §24, it is more a statement of purpose of government than a legal standard that can be used to measure the legality of governmental action.'" *Gallivan v. Walker*, 2002 UT 89, ¶32 n.8, 54 P.3d 1069.

overpopulated or underpopulated with voters registered as members of a political party. After the election, voters whose candidate loses are still represented in Congress; by any other rule, losing voters would have a constitutional claim every election. *Bandemer*, 478 U.S. at 132 (plurality op.); *Whitcomb*, 403 U.S. at 153. Still less do voters in one district face discrimination when their preferred political party loses elections in *another* district; residents of District 1 have no right to a particular electoral outcome in District 4. *See Gill*, 138 S.Ct. at 1931.

Even reaching the test's third prong, Plaintiffs' claim fails because partisan affiliation is not a suspect classification triggering heightened scrutiny. That label belongs only to a few classifications that "are so generally problematic (and so unlikely to be reasonable) that they trigger heightened scrutiny," such as race and sex. *Adoption of J.S.*, 2014 UT 51, ¶68 (quotation marks omitted); *see also, e.g.*, *Merrill v. Utah Lab. Comm'n*, 2009 UT 26, ¶8, 223 P.3d 1089 (age not a suspect classification). This Court has never recognized any trait remotely similar to political affiliation as one triggering heightened scrutiny.

By their transient nature, political preferences cannot trigger heightened scrutiny. Political affiliation "is not an immutable characteristic, but may shift from one election to the next." *Vieth*, 541 U.S. at 287 (plurality op.). Even "self-identified partisans can—and do—vote for a different party's candidates." *Johnson*, 2021 WI 87, ¶56; *see also Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment).

If classifications based on political preferences are suspect, that raises all the same questions discussed above. *See* Part II.B, *supra*. How is a court to decide whether a map discriminates "too much" along political lines? Or to categorize the split-ticket voter, who favors the Democratic presidential candidate but her Republican incumbent for Congress? Or to treat hundreds of thousands of independents? Each question lacks judicially manageable answers.

Because political preferences are not a suspect classification, the Legislature's act is entitled to "[b]road deference … when assessing 'the reasonableness of its classifications and their relationship to legitimate legislative purposes.'" *ABCO Enters. v. Utah State Tax Comm'n*, 2009 UT 36, ¶17, 211 P.3d 382. Under rational-basis review, the Legislature's policy choice easily passes muster. The Legislature reapportioned the existing congressional districts, as Article IX obligated it to do, and it did so by joining urban and rural areas in each district. This policy choice has been repeated for decades. *See* pp. 7-11, *supra*. The Uniform Operation Clause provides no basis for further scrutiny of the Legislature's districts because it fails to achieve Plaintiffs' preferred partisan political ends.

Nor do Plaintiffs' claims require heightened scrutiny because they involve the right to vote. It's not enough that a government classification be related in some way to a fundamental right; rather, that classification must "unduly burden or constrict that fundamental right" on a discriminatory basis. *Gallivan*, 2002 UT 89, ¶ 52. In *Gallivan*, for example, regulations on the citizens' initiative power made it *harder to exercise* that constitutional right on a disparate basis. *Id.* ¶45. But congressional maps leave everyone with the same right to vote. *See Cook v. Bell*, 2014 UT 46, ¶31, 344 P.3d 634 (statute that regulated initiative process "but applied equally to all Utah citizens" did not violate Uniform Operation (cleaned up)). A redistricting plan does not preclude any plaintiff from casting a ballot; it has only drawn lines to organize who votes where in future elections. Accordingly, no fundamental right triggers heightened equal protection scrutiny.

Additional founding evidence confirms the clause has no application here. The provision passed on the Convention floor with no substantive discussion. No one appeared to hint at the idea that this clause could apply to electoral maps' partisan balance, or at the notion of

an individual or group right to any particular election outcomes. *See Proceedings and Debates of the Convention*, Day 31, at 622-652 (Apr. 3, 1895). If anything, the evidence undermines that conclusion because Utah did not recognize a constitutional problem with districts of disparate populations until *Reynolds v. Sims*, 377 U.S. 533 (1964), required equally apportioned districts as a matter of federal law. *See Parkinson*, 4 Utah 2d at 202; Jean Bickmore White, *The Utah State Constitution: A Reference Guide* 121-22 (1998). Utah's Framers valued geographical representation highly, debated it extensively, and specifically provided for legislative representation for all counties in the State. *See id.* The fact that they made no provision for partisan affiliation suggests it was not a classification suspect enough to trigger heightened Uniform Operation scrutiny.

Federal equal protection law, which decisively rejects protection of partisan fairness, further corroborates that the Uniform Operation clause has no unspoken partisan fairness requirement.[28] "[N]o group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment." *Bandemer*, 478 U.S. at 150 (O'Connor, J., concurring in judgment). Every voter has the right to have his or her "vote weighted equally with those of all other citizens," *id.* at 151—that is, to live in equally populated districts—but the "idea that each vote must carry equal weight…does not extend to political parties," *Rucho*, 139 S.Ct. at 2501. As explained, "securing partisan advantage" has long been a "permissible intent" in redistricting, in contrast to impermissible purposes such as racial discrimination. *Id.* at 2503.

[28] The Uniform Operation guarantee is "'substantially parallel'" to federal equal protection, "incorporat[ing] the same general fundamental principles." *Merrill*, 2009 UT 26, ¶7; *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984).

D. The Free Speech and Free Association Clauses do not impliedly guarantee partisan outcomes.

Plaintiffs fare no better under the Utah Constitution's guarantees of free speech and association. Article I, §1 states that "[a]ll persons have the inherent and inalienable right … to assemble peaceably, protest against wrongs, and petition for redress of grievances; [and] to communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, §1. Article I, §15 states that "[n]o law shall be passed to abridge or restrain the freedom of speech." *Id.* art. I, §15.

Nothing from these Clauses concerns redistricting. "[T]he text of the Utah Constitution … defin[es] the scope of activities protected by the freedom of speech." *Am. Bush*, 2006 UT 40, ¶29. The same is true of the free-association guarantee. The framers "must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824). Speaking, assembling, protesting, petitioning, and communicating are not synonymous with voting.

- "Speech" meant, as relevant here, "5. A formal discourse in public" and "6. Any declaration of thoughts." *Speech*, Webster's Complete Dictionary of the English Language (1886). Back in the 19th Century—as now—"speech" had a natural connotation of written or spoken words. *See id.* ("1. The faculty of uttering articulate sounds or words …; the faculty of expressing thoughts by words or articulate sounds").

- "Assembly" meant "[t]he concourse or meeting together of a considerable number of persons at the same place." *Assembly*, Black's Law Dictionary (1891); *Right of assembly*, Black's Law Dictionary (11th ed. 2019) (the right to "gather peacefully for public expression").

- "Protest" meant "[a] formal declaration made by a person interested or concerned in some act about to be done, or already performed, … whereby he expresses his dissent or disapproval." *Protest*, Black's Law Dictionary (1891).

- "Petition for redress of grievances" meant a request to seek satisfaction of a wrong. *See Petition*, Black's Law Dictionary (1891) ("A written address, embodying an

> application or prayer …, for exercise of [the] authority in the redress of some wrong."); *Redress*, Black's Law Dictionary (1891) ("The receiving satisfaction for an injury sustained."); *Grievance*, Webster's Complete Dictionary of the English Language (1886) ("A cause of uneasiness and complaint; wrong done and suffered.").

None of these rights implicates redistricting or voting. Nor could a redistricting plan affect these rights. *Rucho* rejected similar free-speech and free-association claims, holding that "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue." 139 S.Ct. at 2504. The Wisconsin and Kansas Supreme Courts have similarly rejected free-speech and free-association arguments. *Johnson*, 2021 WI 87, ¶60 ("[n]othing about the shape of a district infringes anyone's ability to speak, publish, assemble, or petition"); *Rivera*, 512 P.3d at 192 ("[a]ny line drawing … does not infringe on a stand-alone right to vote, the right to free speech, or the right to peaceful assembly"). Whatever the lines are, "citizens remain free to 'run for office, express their political views, endorse and campaign for their favorite candidates, vote, and otherwise influence the political process through their expression.'" *Johnson*, 2021 WI 87, ¶60.

These observations comport with this Court's free-speech cases. The Court has repeatedly "distinguishe[d] political expression from political activity." *Cook*, 2014 UT 46, ¶34. In a case about ballot initiatives, the Court held, "Free speech protections guarantee neither success in placing an item on the ballot nor eventual ratification by voters. Rather, free speech is found in the interplay of ideas during the attempt to capture the voters' curiosity and support." *Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*, 2004 UT 32, ¶57, 94 P.3d 217 (cleaned up); *see also id.* ¶59 ("Free and robust public debate … can neither be equated with successfully communicating one's ideas, nor with successfully placing an initiative on the ballot, or with the proposal being adopted as law."). So too here: The Constitution guarantees a "'right to engage

in discourse,'" *id.*, not "a right to political success," *Cook*, 2014 UT 46, ¶34. Even a conceded partisan gerrymander would not "directly discourage or prohibit political expression." *Id.* A redistricting plan neither stifles speech nor the ability to organize politically. A redistricting plan's alleged "unfairness" does not violate these rights.

Because the constitutional text is clear, this Court need not look further. Nevertheless, history confirms Legislative Defendants' reading. This Court has already extensively inquired about the original meaning of these Clauses by examining the Clauses' text, the records of the Constitutional Convention, and the laws that existed at the time of the Utah Constitution's adoption. *See Am. Bush*, 2006 UT 40, ¶¶16-58. There, this Court was asked to decide "whether the Utah Constitution protects nude dancing," *id.* ¶9, and analyzed how "the citizens of Utah in adopting" the free speech guarantee would have understood the text based on historical evidence, *id.* ¶29. The Court concluded that "the common law and statutory law then in effect" informed "the values and policy judgments of the Utah citizens who ratified our constitution." *Id.* ¶41. Because the laws in existence at the time "forbade activities such as nude dancing," the Court found it to be "punishable abuse of [the] freedom of speech," not protected expressive activity. *Id.* ¶55 (citing Utah Rev. Stat. §4244 (1898)).

When the Utah Constitution was adopted, partisan gerrymandering was commonplace virtually everywhere. *See, e.g.*, *Rucho*, 139 S.Ct. at 2494-96; *Vieth*, 541 U.S. at 274-75 (plurality op.). Yet *no* Founding-era source suggests that a political gerrymander implicates free-speech or free-association guarantees—much less provides guidance on how to assess partisan activity that burdens free speech and free association. *See Rucho*, 139 S.Ct. at 2504-05.

CONCLUSION

The Court should reverse the district court's denial of the Legislature's motion to dismiss and order Plaintiffs' complaint dismissed.

Dated: March 31, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief contains 15,895 words, excluding any tables or attachments, in compliance with this Court's March 16, 2023, Order allowing briefs of up to 16,000 words.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Garamond font in compliance with the typeface requirements of Utah Rule of Appellate Procedure 27(a).
3. This brief contains no non-public information and complies with Utah Rule of Appellate Procedure 21(h).

/s/ *Tyler R. Green*

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, a true, correct, and complete copy of the foregoing **Brief of Petitioners** was filed with the Utah Supreme Court and served via electronic mail as follows:

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ATTACHMENTS

A. Constitutional Provisions

B. Complaint (filed Mar. 17, 2022)

C. Summary Ruling Denying in Part and Granting in Part Defendant' Motion to Dismiss (Oct. 24, 2022)

D. Ruling and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Nov. 22, 2022)

Attachment A

I. UTAH CONSTITUTIONAL PROVISIONS

Utah Const. art. I, §1 [Inherent and inalienable rights.]
All persons have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Utah Const. art. I, §2 [All political power inherent in the people.]
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.

Utah Const. art. I, §15 [Freedom of speech and of the press -- Libel.]
No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Utah Const. art. I, §17 [Elections to be free -- Soldiers voting.]
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. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law.

Utah Const. art. I, §24 [Uniform operation of laws.]
All laws of a general nature shall have uniform operation.

Utah Const. art. IV, §1 [Equal political rights.]
The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

Utah Const. art. IV, §2 [Qualifications to vote.]
Every citizen of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, shall be entitled to vote in the election.

Utah Const. art. IV, §3 [Voters -- Immunity from arrest.]
In all cases except those of treason, felony or breach of the peace, voters shall be privileged from arrest on the days of election, during their attendance at elections, and going to and returning therefrom.

Attachment002

Utah Const. art. IV, §4 [Voters -- Immunity from militia duty.]
No voter shall be obliged to perform militia duty on the day of election except in time of war or public danger.

Utah Const. art. IV, §5 [Prohibition on qualifying non-U.S. citizens to vote]
No person shall be deemed a qualified voter of this State unless such person be a citizen of the United States.

Utah Const. art. IV, §6 [Prohibition on mentally incompetent individuals or convicted felons from voting until the right is restore]
Any mentally incompetent person, any person convicted of a felony, or any person convicted of treason or a crime against the elective franchise, may not be permitted to vote at any election or be eligible to hold office in this State until the right to vote or hold elective office is restored as provided by statute.

Utah Const. art. IV, §7 [Prohibiting property qualification on the right to vote]
No property qualification shall be required for any person to vote or hold office.

Utah Const. art. IV, §8 [Election to be by secret ballot.]
(1) All elections, including elections under state or federal law for public office, on an initiative or referendum, or to designate or authorize employee representation or individual representation, shall be by secret ballot.
(2) Nothing in this section may be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, as long as secrecy in voting is preserved.

Utah Const. art. IV, §9 [General and special elections -- Terms -- Election of local officers.]
(1) Each general election shall be held on the Tuesday next following the first Monday in November of each even-numbered year.
(2) Special elections may be held as provided by statute.
(3) The term of each officer, except legislator, elected at a general election shall commence on the first Monday in January next following the date of the election.
(4) The election of officers of each city, town, school district, and other political subdivision of the State shall be held at the time and in the manner provided by statute.

Utah Const. art. V, §1 [Three departments of government.]
The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art. VIII, §8, cl. 4 [Vacancies -- Nominating commissions -- Senate approval.]
(4) Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration.

Utah Const. art. IX, §1 (2008) [Dividing the state into districts.]
No later than the annual general session next following the Legislature's receipt of the results of an enumeration made by the authority of the United States, the Legislature shall divide the state into congressional, legislative, and other districts accordingly.

Utah Const. art. IX, §1 (1988) [Dividing the state into districts.]
No later than the annual general session next following the Legislature's receipt of the results of an enumeration made by the authority of the United States, the Legislature shall divide the state into congressional, legislative, and other districts accordingly.

Utah Const. art. IX, §1 (1895) [Election of congressman.]
One Representative in the Congress of the United States shall be elected from the State at large on the Tuesday next after the first Monday in November, A. D. 1895, and thereafter at such times and places, and in such manner as may be prescribed by law. When a new apportionment shall be made by Congress, the Legislature shall divide the State into congressional districts accordingly.

Utah Const. art. X, §8 [No religious or partisan tests in schools.]
No religious or partisan test or qualification shall be required as a condition of employment, admission, or attendance in the state's education systems.

Utah Const. art. XI, §5 [Cities and towns not to be created by special laws -- Legislature to provide for the incorporation, organization, dissolution, and classification of cities and towns -- Charter cities.]
The legislative authority of the city may, by two-thirds vote of its members, and upon petition of qualified electors to the number of fifteen per cent of all votes cast at the next preceding election for the office of the mayor, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election. The ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation. Such candidates shall be nominated in the same manner as required by law for nomination of city officers. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving a majority of the votes cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.

Utah Const. art. XIII, §6, cl. 1 [State Tax Commission.]
There shall be a State Tax Commission consisting of four members, not more than two of whom may belong to the same political party.

II. OTHER STATES' CONSTITUTIONAL PROVISIONS

Ark. Const. art. 3, §2 (1874)
Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted, whereby the right to vote at any election shall be made to depend upon any previous registration of the elector's name; or whereby such right shall be impaired or forfeited, except for the Commission of a felony at common law, upon lawful conviction thereof.

Colo. Const. art. II, §5 (1876)
All elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Del. Const. art. I, §3 (1831) [Free and equal elections.]
All elections shall be free and equal.

Del. Decl. of Rts. §6 (1776)
That the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent, and every freeman, having sufficient evidence of a permanent common interest with, and attachment to the community, hath a right of suffrage.

Fla. Const., Art. III, §20(a) [Standards for establishing congressional district boundaries.]
No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

Idaho Const. art. I, §19 (1890) [Right of suffrage guaranteed.]
No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage.

Ill. Const. art. III, §3 (1870) [Elections]
All elections shall be free and equal.

Ind. Const. art. 2, §1 (1851) [Elections.]
All elections shall be free and equal.

Ga. Const. art. X (1777)
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.

Ky. Const. §6 (1891) [Elections.]
All elections shall be free and equal.

Md. Decl. of Rts. art. VII (1867) [Elections.]
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.

Mass. Const. pt. I, art. IX (1780) [Elections.]
All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

Mo. Const. art. I, §25 (1875) [Elections.]
That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Mo. Const. art. III, §3 (2020) [Election of representatives – legislative redistricting methods – house independent bipartisan citizen commission, appointment, duties, compensation – court actions, procedure]
(b) The house independent bipartisan citizens commission shall redistrict the house of representatives using the following methods, listed in order of priority: ***
(5) Districts shall be drawn in a manner that achieves both partisan fairness and, secondarily, competitiveness, but the standards established by subdivisions (1) to (4) of this subsection shall take precedence over partisan fairness and competitiveness. **"Partisan fairness"** means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency. **"Competitiveness"** means that parties' legislative representation shall be substantially and similarly responsive to shifts in the electorate's preferences.

Mont. Const. art. II, §13 (1884) [Right of Suffrage]
That all elections shall be free and open; and no power, civil or military shall at any time interfere to prevent the free exercise of the right of suffrage.

Neb. Const. art. I, §22 (1875)
All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise.

N.H. Const. pt. I, art. 11 (1784)
All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.

N.C. Const. art. I, §10 (1868)
All elections ought to be free.

Ore. Const. art. II, §2 (1857)
All elections shall be free and equal.

Pa. Const. art. I, §5 (1874)
Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

S.C. Const. art. I, §31 (1868)
All elections shall be free and open, and every inhabitant of this Commonwealth possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.

S. Dak. Const. art. VII, §1 (1889)
Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Tenn. Const. art. I, §5 (1870)
That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Va. Const. art. I, §8 (1870) [Free Elections; consent of the governed]
That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.

Va. Const. art. II, §6-A(b)(2)(A) [Virginia Redistricting Commission]
There shall be a Redistricting Commission Selection Committee (the Committee) consisting of five retired judges of the circuit courts of Virginia. By November 15 of the year ending in zero, the Chief Justice of the Supreme Court of Virginia shall certify to the Speaker of the House of Delegates, the leader in the House of Delegates of the political party having the next highest number of members in the House of Delegates, the President pro tempore of the Senate of Virginia, and the leader in the Senate of Virginia of the political party having the next highest number of members in the Senate a list of retired judges of the circuit courts of Virginia who are willing to serve on the Committee, and these members shall each select a judge from the list. The four judges selected to serve on the Committee shall select, by a majority vote, a judge from the list prescribed herein to serve as the fifth member of the Committee and to serve as the chairman of the Committee.

Vt. Const. ch. I, art. 8 (1793) [Elections]
That all elections ought to be free and without corruption, and that all freemen, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution.
Wash. Const. art. I, §19 (1889) [Elections]
All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Wyo. Const. art. I, §27 (1889) [Elections]
Elections shall be open, free and equal, and no power, civil or military, shall at any time interfere to prevent an untrammeled exercise of the right of suffrage.

III. FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, §4
The Times, Places and Manner of holding Elections for Senators and 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. The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

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Attachment B

If you do not respond to this document within applicable time limits, judgment could be entered against you as requested.

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**Pro Hac Vice Motion forthcoming*

THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, 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,

v.

UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Tier 2)

Civil Action No.

Judge

ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity,

Defendants.

The Utah Legislature has a history of drawing electoral maps that dilute the voting strength of some voters based on their party affiliation, a practice known as partisan gerrymandering. In 2018, Utah voters passed Proposition 4, a bipartisan citizen initiative that, among other reforms, prohibited partisan gerrymandering. In 2020, the Utah Legislature repealed Proposition 4, thereby negating its reforms, in particular, the prohibition on partisan gerrymandering. Then, in 2021, the Legislature adopted a congressional electoral map (HB2004 or the "2021 Congressional Plan") that is an extreme partisan gerrymander.

The 2021 Congressional Plan violates multiple provisions of the Utah Constitution, including the Free Elections Clause, the Uniform Operation of Laws Clause, protections of free speech and association, and the right to vote. Consequently, Plaintiffs—two nonpartisan, nonprofit membership-based organizations and seven individual voters who have been adversely affected by the 2021 Congressional Plan's excessive gerrymandering—seek an order enjoining the implementation of the 2021 Congressional Plan in the 2024 congressional election and all future congressional elections.

In addition, the Legislature's repeal of Proposition 4 violated the people's constitutionally guaranteed lawmaking power and right to alter and reform their government. Accordingly, Plaintiffs also seek an order enjoining the Legislature's replacement law (SB200) and reinstating Proposition 4.

INTRODUCTION

1. Partisan gerrymandering is "incompatible with democratic principles" and the

"core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (internal citations and quotations omitted). By diluting the voting power of some categories of voters and entrenching the incumbents' control of election outcomes for a decade, partisan gerrymandering violates voters' "fundamental and critical rights to which the Utah Constitution has accorded special sanctity." *Gallivan v. Walker*, 2002 UT 89, ¶ 41, 54 P.3d 1069, 1086. Negating the people's initiative-enacted redistricting reforms to then devise an excessive partisan gerrymander violates both "the right of the people to exercise their reserved legislative power and their right to vote." *Id.*

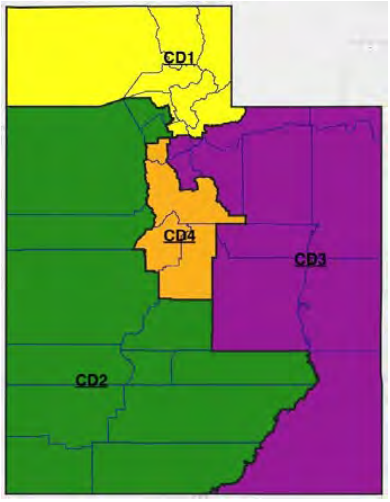
2. Over the last several years, the Legislature's approach to redistricting has violated these core principles of republican government and voters' fundamental rights. In the November 2018 election, Utahns passed a citizen ballot initiative titled the Utah Independent Redistricting Commission and Standards Act—numbered Proposition 4 and popularly named Better Boundaries—to establish anti-gerrymandering redistricting standards binding on the Legislature. Among other things, Proposition 4 created the Utah Independent Redistricting Commission (the "Commission"), a group of independent, nonpartisan citizen commissioners who would draw the State's new district lines after the decennial census based on neutral, nonpartisan criteria.

3. In 2020, right before the decennial census that triggers the redistricting process, the Utah Legislature repealed Proposition 4. The Legislature then replaced it with a new redistricting law, SB200, which rescinded Proposition 4's most critical reforms, including the prohibition on redistricting that favors or disfavors any particular person, group, or political party. At the time of the repeal, the Legislature nonetheless assured Utah's voters that it would allow the Commission to conduct a transparent mapmaking process, and that the Legislature would consider the

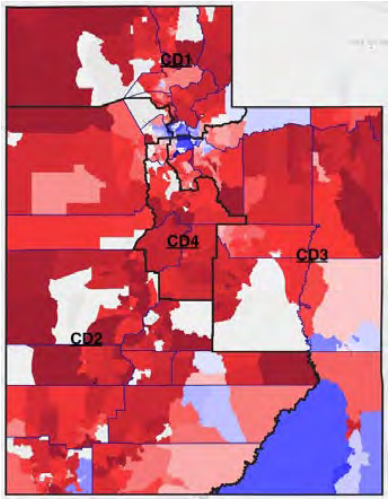
Commission's proposals. But come November 2021, the Legislature discarded the Commission's nonpartisan recommendations. Instead, before the Commission had even finished its work, the Legislature devised a partisan gerrymandered map—in violation of the neutral traditional redistricting principles applied under Proposition 4—that would consolidate Republican control of Utah's congressional delegation for a decade while subordinating voters of minority political viewpoints.

4. The Legislature has acted to the detriment of all Utahns, but especially non-Republican voters living in urban areas along the Wasatch Front. The 2021 Congressional Plan typifies how a ruling political party uses redistricting to resist demographic shifts and skew the electoral process by disaggregating concentrated regions where supporters of a minority political party reside—a practice known as "cracking." The effect is to disperse non-Republican voters among several districts, diluting their electoral strength and stifling their contrary viewpoints.

5. No neutral redistricting criteria can explain the Legislature's irregular design of the resulting electoral districts. The 2021 Congressional Plan sunders counties and unnecessarily splits municipalities and geographic communities of interest—*i.e.*, communities sharing common policy, cultural, economic, and other social characteristics and needs.



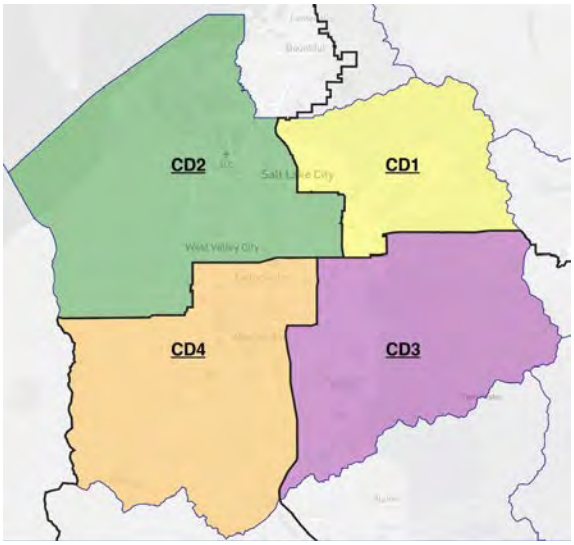
This image displays the 2021 Congressional Plan



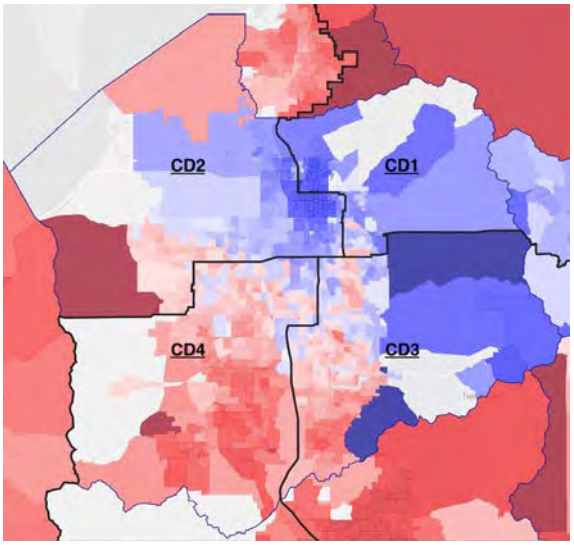
This image displays the partisan elections data

Attachment014

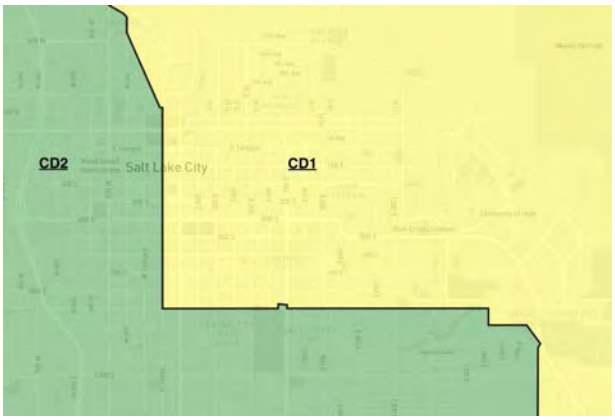
6. The 2021 Congressional Plan carves up Salt Lake County—Utah's largest concentration of non-Republican voters—among all four congressional districts, when a map drawn according to neutral criteria would have divided it at most three times. The district lines go through the middle of Salt Lake City's Main Street across the heart of Temple Square, and then cut sharply to the east and south, fragmenting major non-Republican residential areas.



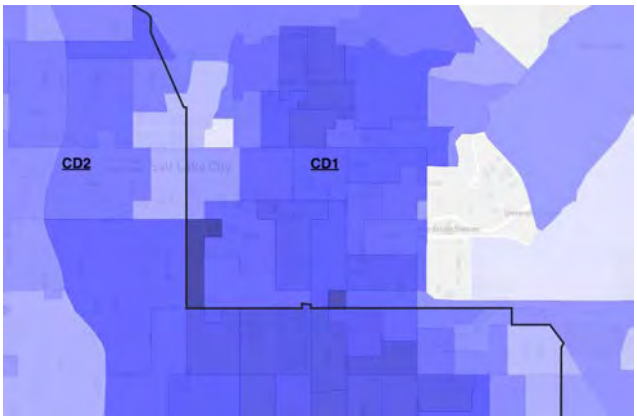
This image displays Salt Lake County quartered between all four districts



This image displays the distribution of Democratic voters in Salt Lake County



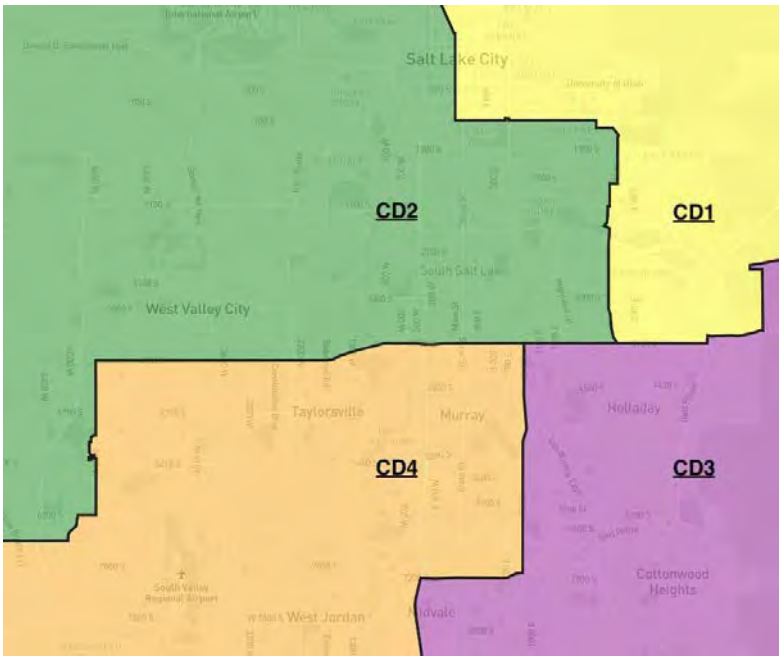
This image displays the Salt Lake City divides



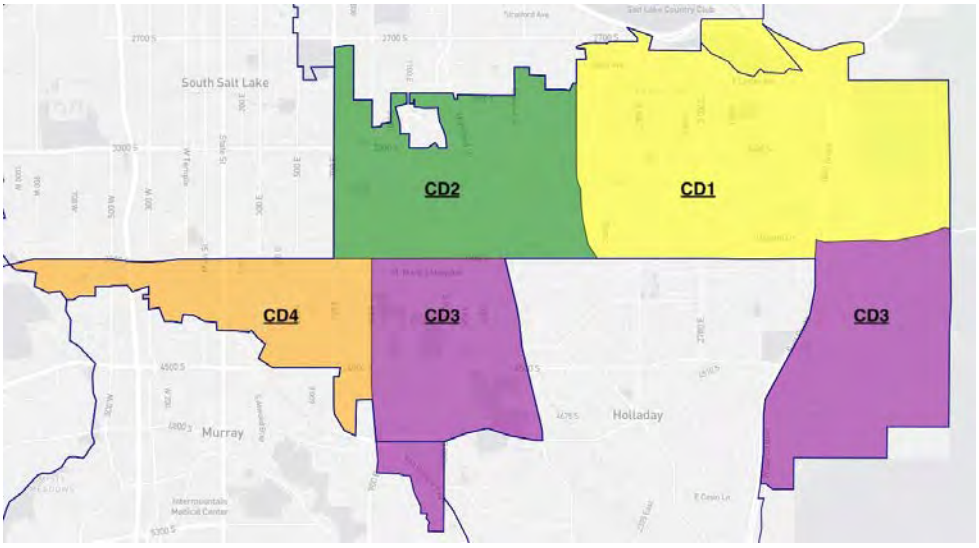
This image displays the partisan elections data

7. The Salt Lake City dividing border continues south to a point where all four district boundaries meet near the center of Millcreek, a growing city in central Salt Lake County where most voters identify as non-Republican. The four districts then fan out from Millcreek in multiple

directions to partition other increasingly non-Republican urban areas, such as Murray, Midvale, West Valley City, and mountain communities near Park City. Across the State, the 2021 Congressional Plan divides numerous communities of interest that have common and cohesive needs.



This image displays the four-way split in the middle of Salt Lake County



This image shows the Millcreek city boundaries divided between all four districts

8. After dividing these non-Republican areas along the Wasatch Front, the Legislature

crafted four large districts, each of which takes a slice of Salt Lake County and grafts it onto large swaths of the rest of Utah. Drawing the map in this manner subordinates the votes of non-Republican urban voters within districts where a majority of Republican voters—scattered among suburban areas and faraway midsized cities—will dictate the outcome of elections. By creating four homogenous districts, each containing roughly two-thirds Republican voters and one-third non-Republican voters, the 2021 Congressional Plan will reliably produce exclusive Republican membership in the State's congressional delegation for the foreseeable future.

9. The Legislature devised its extreme partisan gerrymander despite the people's popular mandate for a transparent, impartial Commission to take the lead in drawing district lines free of partisan considerations.

10. Generated through an impartial process using nonpartisan criteria, the Commission's congressional map proposals would have created a competitive district centered on Salt Lake County that allowed non-Republican voters in the impacted area to effectively participate in the political process. The Commission unanimously arrived at its map proposals after hundreds of hours of engaging with community members, livestreaming its collaborative redistricting process online, and then openly debating its line-drawing decisions to increase accountability to the people.

11. Even though the Commission followed a model process of transparency and commitment to the public good and traditional redistricting criteria, the Legislature cast aside the Commission's work in favor of its own partisan map developed outside public view. In early November 2021, the Legislature released its gerrymandered map to Utah voters late on a Friday night in a manner that limited the opportunity for public input. The following Monday, the Legislature rushed to pass the 2021 Congressional Plan through pro forma hearings and floor

debates; the Governor reluctantly signed it into law a few days later. In the end, both the Legislature's redistricting committee leadership and the Governor conceded that partisan politics had affected the Legislature's redistricting process.

12. The Legislature repeatedly used anti-democratic measures—repealing Proposition 4 and then ignoring the Commission's nonpartisan map recommendations—to perpetuate one-party rule over Utah's congressional delegation despite the State's changing demographics. At a time when public trust in government is already low, the Legislature has ignored the will of the people, abandoned neutral criteria, and reduced the redistricting process to a partisan exercise.[1] Rather than leaving their complaints to "echo into a void," Plaintiffs turn to their "state constitution[] [to] provide standards and guidance for state courts to apply" to vindicate their rights against the partisan gerrymandered 2021 Congressional Plan. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

PARTIES

A. Plaintiffs

Organizational Plaintiffs

13. The League of Women Voters of Utah (the "LWVUT") is a nonpartisan nonprofit membership-based organization located in Salt Lake City, Utah that is dedicated to empowering voters and defending democracy. LWVUT encourages active participation in government and works to increase its members and voters' understanding of major public policy issues.

[1] Public Trust in Government: 1958-2021, Pew Research Center (May 17, 2021), https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/ (last accessed Mar. 15, 2022).

14. LWVUT has diverse members throughout the State of Utah. LWVUT has members who are registered voters living in each of Utah's four congressional districts. Its members are Republicans, Democrats, and individuals who are unaffiliated with either major political party.

15. LWVUT's membership includes Democratic voters living in Salt Lake County whose votes are diluted and rendered ineffective, whose voices are muted, and whose interests are impaired because of the 2021 Congressional Plan. Placing these members in a remedial district drawn using neutral traditional nonpartisan criteria through an impartial redistricting process would remedy their harms.

16. As part of its mission, LWVUT engages in substantial nonpartisan voter education and mobilization efforts throughout Utah, including get-out-the-vote events, voter registration drives, and advocacy of increased electoral participation and access to voting. LWVUT specifically seeks to combat partisan gerrymandering, including through public advocacy for fair maps and a transparent and impartial redistricting process, and public education on redistricting, such as teaching members and voters how to engage with the redistricting process.

17. The partisan gerrymandered 2021 Congressional Plan threatens LWVUT's voter mobilization mission by silencing the voices of LWVUT's members, making their representatives less accountable, and reducing voter interest in now noncompetitive congressional races.

18. The partisan gerrymandered 2021 Congressional Plan requires LWVUT to expend additional resources, and divert those resources from other programs, in order to engage and mobilize voters whose votes are diluted, whose voices are muted, and whose interests are impaired by 2021 Congressional Plan.

19. LWVUT actively supported Proposition 4, including through public messaging, voter education, and signature gathering, among other activities. Numerous League members

voted in favor of Proposition 4. LWVUT opposes the Legislature's repeal of Proposition 4 that enabled it to enact partisan gerrymandered maps.

20. LWVUT has standing on its own behalf and on behalf of its members who, on their own, would have standing to challenge the 2021 Congressional Plan and repeal of Proposition 4.

21. Mormon Women for Ethical Government (MWEG) is a nonpartisan nonprofit membership organization based in Riverton, Utah. MWEG's purpose is to inspire women of faith—across the political spectrum—to be ambassadors of peace who transcend partisanship and advocate for ethical government. MWEG and its members are guided by its four core values: faithful, nonpartisan, peaceful, and proactive.

22. MWEG has diverse nationwide membership. Many of MWEG's members live in Utah, and MWEG has members who are registered voters in each of Utah's four congressional districts. MWEG's members are Republicans, Democrats, and individuals who are unaffiliated with either major political party.

23. MWEG's membership includes Democratic voters living in Salt Lake County whose votes are diluted and rendered ineffective, whose voices are muted, and whose interests are impaired because of the 2021 Congressional Plan. Placing these members in a remedial district drawn using neutral traditional criteria through an impartial redistricting process would remedy their harms.

24. A key part of MWEG's mission is to educate and empower its members to participate in every phase of the democratic process. The partisan gerrymandered 2021 Congressional Plan threatens MWEG's mission by diluting the voices and political power of its members, making its members' representatives less accountable, and reducing the members' interest in now noncompetitive races.

25. The partisan gerrymandered 2021 Congressional Plan requires MWEG to expend scarce resources, including diversion of resources from other programs, in order to mobilize voters and members who have been disenfranchised and feel disaffected by the 2021 Congressional Plan.

26. MWEG leaders and members actively supported Proposition 4, including through organizational messaging, voter education, and signature gathering, among other activities. Numerous MWEG members affiliated with both major political parties voted in favor of Proposition 4. MWEG opposes the Legislature's repeal of Proposition 4 that enabled enactment of partisan gerrymandered maps.

27. MWEG has standing on its own behalf and on behalf of its members who, on their own, would have standing to challenge the 2021 Congressional Plan and repeal of Proposition 4.

Individual Plaintiffs

28. The individual voter plaintiffs (collectively, "Individual Plaintiffs") are seven qualified, registered voters in Utah who reside in each of the State's four congressional districts but would live in the same congressional district in a neutral remedial redistricting plan.

29. Plaintiff Stefanie Condie is a marketing executive residing in downtown Salt Lake City near Temple Square. Plaintiff Condie is a registered voter who resides and will vote in District 2 under the 2021 Congressional Plan. Plaintiff Condie is registered to vote as a Democrat, has consistently voted for Democratic candidates for Congress, and intends to vote for Democratic candidates in 2022, 2024, and future elections. Plaintiff Condie lives in a congressional district where Democratic voters are cracked from other Democratic voters to ensure that Republican candidates will win the district. This cracking dilutes her voting power, impairs her ability to express her views and associate with likeminded voters, and negates her fair opportunity to elect

the representatives of her choice. Plaintiff Condie voted in favor of Proposition 4, opposed the Legislature's repeal of the initiative in 2020, and continues to oppose the repeal.

30. Plaintiff Wendy Martin is a retired business professional and a U.S. Army veteran. Plaintiff Martin lives in downtown Salt Lake City a block east of Temple Square, within District 1 in the 2021 Congressional Plan. She is located steps away from the District 1 and District 2 border along Main Street through downtown Salt Lake City. Plaintiff Martin is registered to vote as a Democrat, has consistently voted for Democratic candidates for Congress, and intends to vote for Democratic candidates in 2022, 2024, and in future elections. Plaintiff Martin lives in a congressional district where Democratic voters are cracked from other Democratic voters, ensuring that Republican candidates will win the district. This cracking dilutes her voting power, impairs her ability to express her views and associate with likeminded voters, and negates her fair opportunity to elect representatives of her choice. Plaintiff Martin voted in favor of Proposition 4, opposed the Legislature's repeal of the initiative in 2020, and continues to oppose the repeal. She advocated before the Commission in support of neutral redistricting maps during fall 2021.

31. Plaintiff Malcolm Reid is a retired professional who worked as a technologist, market researcher, and data manager for two Fortune 200 companies. Plaintiff Reid has long advocated for nonpartisan redistricting and penned an op-ed in the Deseret News calling for Utahns to participate in the Commission's impartial mapmaking process. He lives and will vote in Millcreek, in District 2 of the 2021 Congressional Plan—two blocks from the border with District 1 and about a half mile from the border with District 3. Plaintiff Reid is registered to vote as a Democrat, has consistently voted for Democratic candidates for Congress, and intends to vote for Democratic candidates in 2022, 2024, and in future elections. He lives in a congressional district where Democratic voters are cracked from other Democratic voters, ensuring that Republican

candidates will win the district. This cracking dilutes his voting power, impairs his ability to express his views and associate with likeminded voters, and negates his fair opportunity to elect the representatives of his choice. Plaintiff Reid voted in favor of Proposition 4, opposed the Legislature's repeal of the initiative in 2020, and continues to oppose the repeal. He advocated before the Commission in support of neutral redistricting maps during fall 2021.

32. Plaintiff Jack Markman is a grant manager and recent college graduate. He is a registered voter living in Murray, in District 4 of the 2021 Congressional Plan. Plaintiff Markman is registered as a Democrat. He has consistently voted for Democratic candidates for Congress, and intends to vote for Democratic candidates in 2022, 2024, and in future elections. He lives in a congressional district where voters who support Democrats are cracked from other voters who support Democrats, ensuring that Republican candidates will win the district. This cracking dilutes his voting power, impairs his ability to express his views and associate with likeminded voters, and negates his fair opportunity to elect the representatives of his choice. Plaintiff Markman voted in favor of Proposition 4, opposed the Legislature's repeal of the initiative in 2020, and continues to oppose the repeal.

33. Plaintiff Eleanor Sundwall is a trained biochemist and an active volunteer for school and community groups. She is a registered voter residing in Murray, in District 3 of the 2021 Congressional Plan. Plaintiff Sundwall is registered as a Democrat. She has consistently voted for Democratic candidates for Congress, and intends to vote for Democratic candidates in 2022, 2024, and in future elections. She lives in a congressional district where voters who support Democrats are cracked from other voters who support Democrats, ensuring that Republican candidates will win the district. This cracking dilutes her voting power, impairs her ability to express her views and associate with likeminded voters, and negates her fair opportunity to elect

the representatives of her choice. Plaintiff Sundwall voted in favor of Proposition 4, opposed the Legislature's repeal of the initiative in 2020, and continues to oppose the repeal. She advocated before the Commission in support of neutral redistricting maps that would reflect her designated community of interest during fall 2021.

34. Plaintiff Victoria Reid is a Republican registered voter living in Millcreek in District 2 of the 2021 Congressional Plan. She is a former adjunct professor, public relations professional, and community volunteer. Plaintiff Victoria Reid is a longtime supporter of Republican causes and campaigns and has worked in formal roles for Republican candidates and officeholders. She has also consistently advocated against partisan gerrymandering. Plaintiff Victoria Reid voted in favor of enacting the Proposition 4 initiative in 2018, opposed the Legislature's repeal of the initiative in 2020, and continues to oppose the Legislature's repeal. Plaintiff Victoria Reid actively supported the neutral redistricting maps advanced by the Commission in 2021.

35. Plaintiff Dale Cox is a Republican registered voter living in Murray in District 4 of the 2021 Congressional Plan. He is a former Murray city councilmember and president emeritus of the Utah AFL-CIO labor union. Plaintiff Cox is an advocate for ethical and transparent government that is accountable to the people, and he opposes partisan gerrymandering. He is registered as a Republican and votes in Republican primaries in order to have a political voice in Utah's elections, including in its elections for congressional representatives. Plaintiff Cox does not register as a Democrat to vote in congressional elections and primaries for his preferred moderate Democratic candidates in part because the partisan gerrymandered 2021 Congressional Plan impairs and renders ineffective his ability to express those political viewpoints and engage in associations with likeminded moderate Democratic voters. Plaintiff Cox voted in favor of

Proposition 4, opposed the Legislature's repeal of the initiative in 2020, and continues to oppose the Legislature's repeal.

36. Each Individual Plaintiff who is a voter supporting Democratic candidates has standing to challenge the 2021 Congressional Plan because it dilutes their voting power, negates their expressed political viewpoints and interferes with their political associations, and prevents them from electing the representatives of their choice. Each Democratic-voting plaintiff lives in Salt Lake County, which has a sufficient number of voters with shared political preferences, interests, and social values to allow Democrats to elect a candidate of choice in a single congressional district. The 2021 Congressional Plan cracks Democratic Individual Plaintiffs' voting communities between four congressional districts and then submerges them in districts where Republicans comprise a majority of the voting population. The effect is to block Democratic voters from electing a candidate of their choice to Utah's congressional delegation.

37. Each Individual Plaintiff who voted in favor of Proposition 4 has standing to challenge SB200 because the Legislature's repeal of Proposition 4 exceeded its constitutional authority and violated Plaintiffs' rights, as citizens of Utah, "to alter or reform their government," Utah Const. art. I, § 2, through their lawmaking authority exercised in the citizen initiative process, *see id.* art. VI, § 1.

38. LWVUT and MWEG have standing to challenge HB2004 and SB200 on behalf of their members for the same reasons as Individual Plaintiffs. LWVUT and MWEG also have standing because HB2004 and SB200 impair their functions as organizations and require them to expend resources and divert resources from other programs that fulfill their missions.

39. LWVUT and MWEG additionally have standing because they assert an issue of significant constitutional and public importance, and they have an interest in the case that will

effectively assist the court in resolving the legal and factual questions.

B. Defendants

40. Defendant Utah State Legislature is the legislative branch of the government of the State of Utah. Utah Const. art. VI, § 1. The Legislature enacted HB2004, which designates the boundaries of Utah's 2021 Congressional Plan, and SB200, which repealed Proposition 4.

41. Defendant Utah Legislative Redistricting Committee (the "LRC") is the committee of the Legislature tasked with recommending electoral boundaries for Utah's four congressional districts to the full body of the Legislature. It is comprised of twenty members of the Utah Legislature, including fifteen Republicans and five Democrats, who are either state senators or state representatives. Before recommending a map to the full body of the Legislature, the LRC is tasked with holding a hearing and reviewing the Commission's map submissions. Utah Code §§ 20A-20-102(2); 20A-20-303. The LRC devised, adopted, and recommended to the Legislature the 2021 Congressional Plan.

42. Defendant Senator Scott Sandall is a member of the Utah State Senate and a co-chair of the Legislative Redistricting Committee. Senator Sandall led the LRC in rejecting the Commission's neutral redistricting plans and devising the 2021 Congressional Plan. Defendant Sandall is sued in his official capacity.

43. Defendant Representative Brad Wilson is Speaker of the Utah House of Representatives. Defendant Wilson is sued in his official capacity.

44. Defendant Senator J. Stuart Adams is President of the Utah State Senate. Defendant Adams is sued in his official capacity.

45. Defendant Lt. Gov. Diedre Henderson ("the Lieutenant Governor") is Utah's chief election officer. The Lieutenant Governor coordinates with local, state, and federal officials to ensure compliance with state and federal election laws and oversees voter registration activities

and compliance with the National Voter Registration Act and the Help America Vote Act. Utah Code § 20A-2-300.6. The Lieutenant Governor is further charged with accepting declarations of candidacy or intent to gather signatures in elections for federal office from candidates directly or from county clerks on behalf of candidates. *See id.* §§ 20A-9-201–202. The Lieutenant Governor likewise implements the final 2021 Congressional Plan. *See id.* §§ 20A-13-102–102.2. Defendant Henderson is sued in her official capacity.

JURISDICTION AND VENUE

46. This Court has subject-matter jurisdiction over this action under Utah Code §§ 78A-5-102, 78B-6-401 and Utah R. Civ. P. 57 and Utah R. Civ. P. 65A.

47. This Court has personal jurisdiction over the Defendants. *See* Utah R. Civ. P. 17. Defendants are state government entities and officials, sued in their official capacities, who reside and conduct their official business in the State of Utah.

48. Venue in this Court is proper because the causes of action arise in Salt Lake City in Salt Lake County, Utah. *See* Utah Code §§ 78B-3-302, 78B-3-307.

49. This case is classified as Tier 2 for discovery purposes.

FACTUAL ALLEGATIONS

A. Decennial census figures revealed large population increases and demographic shifts in Utah between 2010 and 2020.

50. Every ten years, the federal government conducts the decennial census count of all persons living in the United States.

51. After the release of new census data, Congress reapportions the number of congressional representatives for each State based on changes in total population.

52. States then conduct redistricting processes in which they draw new congressional single-member district lines in the state to reflect changes in population distribution.

53. Delays in completing the 2020 census count and publishing state-level data because

of disruptions from the COVID-19 pandemic compressed the 2021 redistricting process across the country and in Utah. Census data for 2020 became available for Utah's redistricting on August 12, 2021, and the Census Bureau published the data with tables on September 16, 2021.

54. The 2020 decennial census showed that Utah experienced the largest percentage population increase of any state in the country between 2010 and 2020, adding about half a million new residents at a staggering 18.4% rate of growth, which far exceeded the nationwide average of 7.4%.[2]

55. Utah's population growth was not equally distributed across the State. Urban areas along the Wasatch Front in Salt Lake County and Utah County drew the bulk of the State's new residents. Eighty percent of Utahns now live in urban centers along the Wasatch Front. Salt Lake County, the State's most populous county, increased its population to 1,185,238 in 2020—adding 155,583 people, a 15.1% jump since 2010. By contrast, rural areas of the State are losing population.

56. With this greater concentration of population along the Wasatch Front, Utah has become the seventh most urbanized state in the United States.

57. Utah's population is also rapidly diversifying in terms of racial and/or ethnic identities, religious beliefs, and political affiliations.

58. For example, in 2010, 19.6% of Utahns identified as racial and/or ethnic minorities. In 2020, that number increased to 24.6%. Utah's Latino population in particular grew by almost 38% during that time and now comprises 15% of the State's total population.

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[2] 2020 Census Apportionment Results, U.S. Census Bureau (Apr. 26, 2021), https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html; Utah Was Fastest-Growing State From 2010 to 2020, U.S. Census Bureau (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/utah-population-change-between-census-decade.html.

59. 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.

60. Multiple municipalities in Salt Lake County are now majority-minority cities, meaning racial minority populations constitute a majority of the city's population. For example, in West Valley City—Utah's second largest city—the overall population grew significantly since 2010, and West Valley City's minority groups now make up 51.4% of the 136,166 residents. Census data likewise show that neighboring Kearns is also now a majority-minority city.[3]

B. Utah's redistricting history is contentious, but even under prior gerrymanders there have been competitive districts.

61. Partisan gerrymandering has been a consistent problem and contentious issue in Utah's history.

62. For example, in 2001, the Wall Street Journal Editorial Board aptly described Utah's congressional map for that decade as a blatant partisan gerrymander that was a "scam" to unseat Democratic Representative Jim Matheson by cracking his Salt Lake City-based seat.[4]

63. Also, in 2011, Utah gained an additional seat in Congress because of the State's growing population. During the 2011 redistricting cycle, the Legislature conducted its mapmaking behind closed doors to devise a map that would increase Republican advantage in the State's now-four districts. According to public polling at the time, both Democrats and Republicans supported

[3] Bethany Rodgers, *Salt Lake City has never been bigger, one place grew by nearly 9,000%, and more census surprises*, Salt Lake Trib. (Aug. 14, 2021), https://www.sltrib.com/news/2021/08/14/salt-lake-city-has-never/.

[4] *See* Editorial, *The Gerrymander Scandal*, Wall Street Journal (Nov. 7, 2001), https://www.wsj.com/articles/SB1005097828258686800; Lisa Riley Roche, *Matheson: 'There's no question I'm a target' in redistricting*, Deseret News (Aug. 30, 2011), https://www.deseret.com/2011/8/30/20386950/matheson-there-s-no-question-i-m-a-target-in-redistricting.

drawing a district that would keep urban voters together in a single district covering Salt Lake City. Instead, the Legislature divided Salt Lake County into three narrow urban slices that were then combined with large tracts of the rest of Utah. As the ostensible justification, the Legislature asserted that it sought to achieve a mix of urban and rural areas in all four districts—a goal that a majority of polled Utahns opposed at that time.[5]

64. Among other things, the 2011 congressional map again targeted Democratic Representative Matheson's Salt Lake City-centered district. The 2011 map split Matheson's former district three ways and forced him to shift to the newly created 4th Congressional District, which contained only the southern parts of his former district.

65. Despite Republican efforts, the 4th Congressional District in the 2011 congressional map became one of the most competitive congressional races in the country.

66. Representative Matheson defied the partisan gerrymander to retain his seat and narrowly defeated Republican Saratoga Springs Mayor Mia Love in 2012. The 4th Congressional District then changed hands between Democratic and Republican representatives four times in five elections over the decade. In November 2020, Republican Burgess Owens won the district by roughly 3,700 votes over incumbent Democrat Ben McAdams.

67. Technological advancements over the last decade ensure that the 2021 Congressional Plan will precisely guarantee exclusive Republican membership in Utah's congressional delegation compared to previous maps.

[5] Lee Davidson, *Utah poll: 'Doughnut hole' ahead of 'pizza slices' in redistricting*, Salt Lake Trib. (Aug. 17, 2011), https://archive.sltrib.com/article.php?id=52391191&itype=CMSID; *Fair Redistricting: A Better Deal for Rural Utah*, Better Utah Inst. (Sept. 2019), https://betterutahinstitute.org/wp-content/uploads/2019/09/Rural-Redistricting-Report.pdf (last accessed Mar. 15, 2022).

C. Exercising their legislative power, the voters passed Proposition 4 in 2018 to reform the government's redistricting authority, process, and standards.

68. The Utah Constitution provides that redistricting is a legislative function in the first instance, stating that "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1. The Legislature shares authority over the State's congressional map-drawing function. Under the Utah Constitution, the regular legislative process the Legislature employs to adopt redistricting plans is subject to gubernatorial veto and judicial review. Indeed, in previous redistricting cycles, the Legislature's adopted redistricting bill has been vetoed by the Utah governor and the redistricting power has been reviewed in the Utah courts.

69. Utah has historically employed citizen-led, bipartisan county commissions to independently draw certain state legislative district lines.

70. Utah has also subjected aspects of the redistricting process to statewide referenda approval votes by Utah's electorate.

71. In addition, the Utah Constitution recognizes the people's lawmaking power to enact legislation through ballot initiatives that are not subject to gubernatorial veto, and the people's authority to use that process to alter or reform their government.

72. The people's lawmaking and reform authority extends to redistricting, like any other legislative subject.

73. In the November 2018 election, the people exercised their sovereign, legislative power to pass Proposition 4, a government reform that established anti-gerrymandering redistricting standards binding on the Legislature, among other provisions.

74. Proposition 4 started from a grassroots effort led by prominent leaders of both major political parties. The diverse coalition behind Proposition 4 sought to create an independent commission of citizens who would prepare neutral redistricting maps in a transparent process that

transcended partisan manipulation.

75. A local nonpartisan nonprofit named Utahns for Responsive Government, Inc. (doing business as "Better Boundaries") sponsored the initiative and the primary advertisement advocating for Proposition 4, which featured former President Ronald Reagan describing partisan gerrymandering as an "un-American practice," "anti-democratic," and a "national disaster," and advocating that "[t]here should be a bipartisan commission appointed every ten years" to conduct impartial redistricting.[6] The Proposition 4 reforms sought to have redistricting controlled by citizen appointees whom the public could trust to undertake a transparent and impartial redistricting process applying nonpartisan criteria.

76. Nearly 200,000 Utahns from across the State and political spectrum signed the petition circulated by Better Boundaries to put Proposition 4's government reforms of the redistricting process to a statewide vote, far more than the 113,143 signatures required.[7]

77. In addition to the Proposition 4 language on the 2018 statewide ballot, voters received an impartial analysis by the Office of Legislative Research and General Counsel describing the practical effects of the initiative, plus arguments for and against the measure from its proponents and opponents. The proponents of Proposition 4 emphasized that gerrymandering

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[6] Prop4 Utah, *What is Proposition 4 trying to achieve for Utah?*, YouTube (Sept. 20, 2018), https://youtu.be/1qP7nVIK8hk; Lisa Riley Roche, *Ronald Reagan used to help make case for Better Boundaries ballot proposition*, Deseret News (Oct. 2, 2018), https://www.deseret.com/2018/10/2/20654979/ronald-reagan-used-to-help-make-case-for-better-boundaries-ballot-proposition.

[7] Proposition 4 asked voters: "Shall a law be enacted to: create a seven member commission to recommend redistricting plans to the Legislature that divide the state into Congressional, legislative, and state school board districts; provide for appointments to that commission: one by the Governor, three by legislative majority party leaders, and three by legislative minority party leaders; provide qualifications for commission members, including limitations on their political activity; require the Legislature to enact or reject a commission-recommended plan; and establish requirements for redistricting plans and authorize lawsuits to block implementation of a redistricting plan enacted by the Legislature that fails to conform to those requirements?"

"has gotten out of control" in Utah because "[s]ophisticated computer modeling allows incumbents to craft districts with a precision" to "divide[Utahns] into districts that empower politicians, not voters." The proponents informed voters that Proposition 4 was a government reform measure invoking the people's constitutional lawmaking authority, and it was designed to "return[] power to the voters and put[] people first in our political system."

78. Proposition 4's supporters echoed these calls in the public sphere and in the press, arguing that "[v]oters should choose their representatives, not vice versa. Yet under current law, Utah politicians can choose their voters" because "Legislators draw their own districts with minimal transparency, oversight or checks on inherent conflicts of interest."[8]

79. Former Senate Majority Leader Ralph Okerlund, who chaired the Legislature's 2011 redistricting committee that devised the prior decade's partisan gerrymandered congressional map, spoke out against Proposition 4 for taking redistricting away from politicians and giving it to the people.

80. Proposition 4 created the Commission—a seven-member appointed commission to take the lead in formulating Utah's congressional, state house, state senate, and state schoolboard redistricting plans. Utah Code § 20A-19-203, *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

81. A bipartisan group of Utah's elected leaders were to appoint the Commission's members. The designated appointers were the incumbent governor, the president of the Utah Senate, the speaker of the Utah House of Representatives, the leader of the largest minority

[8] Lee Davidson, *Utahns favor Prop 4 to create an independent redistricting commission by a big margin, poll shows*, Salt Lake Trib. (Oct. 17, 2018), https://www.sltrib.com/news/politics/2018/10/17/utahns-favor-prop-create/.

political party in the Utah Senate, the leader of the largest minority political party in the Utah House of Representatives, the Utah Senate and House leadership jointly who represent the political party that is the majority party in the Utah Senate, and the Utah Senate and House leadership jointly who represent the political party that is the largest minority party in the Utah Senate. *See* Utah Code § 20A-19-201(3), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

82. Proposition 4 carefully limited the eligibility of potential appointees to the Commission to ensure its independence. Among other things, it required proof of nonpartisanship over the preceding five years for two of the seven commission positions, and it required all potential appointees to lack recent elective officeholding or candidacies, and recent state lobbying work, among other considerations. *Id.* § 20A-19-201(5)-(6), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020. The measure also restricted commissioners from engaging in certain political activities during their service on the Commission and for four years after completing their terms. *Id.* § 20A-19-201(6)(b), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

83. To promote transparency and public accountability, Proposition 4 prevented Commissioners from engaging in *ex parte* communications about redistricting plans pending before the Commission or proposed for Commission consideration without making such communications available to the public. *Id*. § 20A-19-202(12), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

84. Proposition 4 required the Commission to conduct its activities in an independent, transparent, and impartial manner, and it required each Commissioner to certify that they would similarly faithfully discharge their duties in an independent, transparent, and impartial manner. *Id.* §§ 20A-19-201(7)(a)(iii), 20A-19-202(a), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

85. Proposition 4 devised public access procedures to ensure that all the redistricting plans under the Commission's consideration were available for public comment. *Id.* § 20A-19-202, *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020. It also required the Commission to engage the public in numerous fora across the State. *Id.* § 20A-19-202(9), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

86. Proposition 4 drew from traditional nonpartisan redistricting standards to establish neutral mapmaking criteria that would govern the process and bind both the Commission and the Legislature. Proposition 4's enacted provisions provided that Utah's final maps must "abide by the following redistricting standards to the greatest extent practicable and in the following order of priority:"

a. "(a) adhering to the Constitution of the United States and federal laws, such as the Voting Rights Act, 52 U.S.C. Secs. 10101 through 10702, including, to the extent required, achieving equal population among districts using the most recent national decennial enumeration made by the authority of the United States;"

b. "(b) minimizing the division of municipalities and counties across multiple districts, giving first priority to minimizing the division of municipalities and second priority to minimizing the division of counties;"

c. "(c) creating districts that are geographically compact;"

d. "(d) creating districts that are contiguous and that allow for the ease of transportation throughout the district;"

e. "(e) preserving traditional neighborhoods and local communities of interest;"

f. "(f) following natural and geographic features, boundaries, and barriers; and"

g. "(g) maximizing boundary agreement among different types of districts." Utah

Code § 20A-19-103(2), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

87. Critically, Proposition 4 proscribed the excessive partisan gerrymandering and incumbent favoritism that had tarnished Utah's prior redistricting cycles, including the 2011 process. Proposition 4 prohibited the Commission and the Legislature from adopting district lines that "purposefully or unduly" favor or disfavor any incumbent elected official or political party. *Id.* § 20A-19-103(3), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020. Proposition 4 allowed officials to consider partisan election data only as necessary to evaluate already selected maps for compliance with the neutral criteria under established metrics. *Id.* § 20A-19-103(5), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

88. To prevent the Legislature from overriding the people's expressed objective to take undue partisanship out of redistricting, 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. *Id*. § 20A-19-204(2)(a), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020. If the Legislature rejected the Commission's selected map(s), 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. *Id.* § 20A-19-204(5)(a), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

89. To ensure the enforcement of the reforms, Proposition 4 authorized Utahns to sue to block a redistricting plan that failed to conform to the initiative's structural, procedural, and substantive standards. *Id.* § 20A-19-301(2), *repealed by* Laws 2020, c. 288, § 12, eff. March 28, 2020.

90. 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.

91. In passing Proposition 4, the people of Utah exercised their lawmaking authority under the Utah Constitution to reform their government and fix the broken redistricting process. In Proposition 4, the people delivered a mandate that drawing the State's district lines should be an independent, neutral process following binding nonpartisan redistricting criteria. They reaffirmed that redistricting should empower communities of voters to choose their representatives, not allow legislators to pick their constituents for personal or political advantage. And they designed a redistricting method that safeguards Utahns' constitutional rights to free elections and an undiluted vote and voice.

D. The Legislature overturned the voters' reform by repealing the citizen-enacted laws from Proposition 4 and replacing them with SB200.

92. Shortly after Utahns approved Proposition 4, Utah's Republican-controlled Legislature began devising a strategy to repeal Proposition 4 and nullify the voters' mandate to make the redistricting process nonpartisan.

93. On March 11, 2020, the Legislature voted to repeal the Utah Independent Redistricting Commission and Standards Act created by Proposition 4. The Legislature enacted a new redistricting law, titled SB200, that rescinded critical Proposition 4 reforms and enacted watered-down versions of others.[9]

94. Unlike in Proposition 4, SB200 provided that the Legislature could reject the Commission's impartial maps for any reason or no reason at all and with no explanation. The Legislature did not even have to vote on the Commission-adopted maps. Utah Code § 20A-20-303(5).

95. SB200 also repealed Proposition 4's ban on district boundaries drawn to unduly

[9] Redistricting Amendments, S.B. 200, 2020 Gen. Sess. (Utah 2020), https://le.utah.gov/~2020/bills/static/SB0200.html.

favor or disfavor an incumbent or political party. SB200 required the Commission to craft its own standard "prohibiting the purposeful or undue favoring or disfavoring" of parties, incumbents, or candidates, but the Legislature could follow its own preferences, permitting the gerrymandering of Utah's maps for partisan advantage. *Id*. § 20A-20-302(5).

96. SB200 eliminated all mandatory anti-gerrymandering restrictions imposed by the people on the Legislature as well as Proposition 4's enforcement mechanisms.

97. SB200 returned redistricting to the pre-Proposition 4, unreformed status quo where the Legislature could freely devise anti-democratic maps—as if the people had never spoken. The Legislature eliminated the binding neutral criteria and enforcement mechanisms so that it could draw maps to empower Republicans and disempower non-Republicans.

98. SB200 also eliminated vital transparency and public accountability safeguards at the core of Proposition 4. *See, e.g.*, *id.* § 20A-20-303(3).

99. Even after SB200 repealed Proposition 4, many legislators represented that the Legislature would still honor the people's lawmaking decision to reform redistricting. Legislators assured voters that the Legislature would not disregard the people's will to prevent undue partisanship from infecting the mapmaking process.

100. For example, Senator Curt Bramble, the chief sponsor of SB200, said he was "committed to respecting the voice of the people and maintaining an independent commission[.]" Then -Senate Majority Leader Evan Vickers said he agreed with Senator Bramble and vowed that SB200 would still "meet the will of the voters" who supported Proposition 4, and the Legislature purportedly "agreed to [reinstate in SB200] almost everything they've asked for."[10]

[10] Lisa Riley Roche, *Is Utah's voter-approved Better Boundaries redistricting initiative headed for repeal?*, Deseret News (Feb. 21, 2020),

101. Similarly, Defendant Wilson indicated that the Proposition 4 anti-gerrymandering advancements would be "tweaked" in SB200 but would largely remain intact. Representative Steinquist assured that SB200's repeal of Proposition 4 would still "make sure that we have an open and fair process when it comes time for redistricting."[11]

102. And then-Governor Gary Herbert reinforced that because Utah has "an overwhelmingly more conservative population, more Republican," the government "need[s] to make sure that the minorities are not frozen out of this, that there's fairness in the redistricting," and promised that SB200 would "help [Utah] have the ability to see what a more fair redistricting process would be."[12]

103. The Legislature did not abide by these assurances.

E. The Commission completed a transparent and impartial redistricting process, unanimously proposing three congressional maps based on nonpartisan criteria.

104. The Commission performed its duties under the SB200 advisory redistricting process from April to November 2021.

105. In February and April 2021, the elected officials tasked with appointing commissioners to the Commission announced their nominees. Governor Spencer Cox named Brigham Young University faculty member Rex Facer, an associate professor of public

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https://www.deseret.com/utah/2020/2/21/21147285/gerrymandering-repeal-utah-legislature-independent-redistricting-commission; *Senate - 2020 General Session - Day 36*, Senate Floor Debate and Vote on S.B. 200 Redistricting Amendments, Utah State Legislature (Mar. 11, 2020), https://le.utah.gov/av/floorArchive.jsp?markerID=110722 (last accessed Mar. 15, 2022).

[11] Bethany Rodgers & Benjamin Wood, *Utah's new anti-gerrymandering law is at risk, group warns*, Salt Lake Trib. (Feb. 21, 2020), https://www.sltrib.com/news/politics/2020/02/21/utahs-new-anti/; *House - 2020 General Session - Day 44*, House Floor Debate and Vote on S.B. 200 Redistricting Amendments, Utah State Legislature at 0:49:10 (Mar. 11, 2020), https://le.utah.gov/av/floorArchive.jsp?markerID=111527 (last accessed Mar. 15, 2022).

[12] Utah Education Network, Transcript of Governor's Mar. 7, 2020 Monthly News Conference, https://www.uen.org/govnews/article.php?id=174 (last accessed Mar. 15, 2022).

management in the Romney Institute of Public Service and Ethics, as chair of the Commission. Utah Senate President Stuart Adams appointed Lyle Hillyard, a former Republican state senator who represented Utah's 25th Senate District covering parts of Cache and Rice Counties. House Speaker Brad Wilson selected Rob Bishop, a former Republican congressman who represented Utah's 1st Congressional District from 2003 to 2021. Senate Minority Leader Karen Mayne selected former Utah Supreme Court Chief Justice Christine Durham. House Minority Leader Brian King picked former Utah Senate Minority Leader Pat Jones, a retired Democratic legislator who represented Utah's 4th Senate District covering Salt Lake County from 2006 to 2014.[13] The two nonpartisan commissioners were selected jointly by the Legislature's majority and minority party leadership. The choices were N. Jeffrey Baker, a geographic information systems specialist from Davis County, and former Utah Court of Appeals Judge William A. Thorne.[14]

106. Five of the commissioners reside in typically urban areas along the Wasatch Front. Two commissioners reside in less urban regions of the State. This allocation, selected by the bipartisan group of Utah's top elected officials, gives outsized representation on the Commission to rural residents because 80% of Utah's population lives in urban areas along the Wasatch Front.

107. Overall, the commissioners met 32 times between April and November 2021. The Commission livestreamed all public meetings and hearings and then posted recordings online, including all 17 of its working meetings.

108. The Commission began by receiving presentations about the redistricting process from numerous renowned academics and experts.

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[13] Commissioner Jones resigned before the Commission's first meeting, citing personal reasons, and was replaced by Karen Hale, a former Democratic state senator who represented Utah's 7th Senate District covering Salt Lake County from 1999 to 2006.

[14] Utah Independent Redistricting Commission, UIRC Members, https://uirc.utah.gov/uirc-commissioners/ (last accessed Mar. 15, 2022).

109. The Commission then deliberated regarding the nonpartisan criteria and transparent process it would use to draw the State's redistricting plans. It published the proposed criteria and other planning proposals on the Commission website, giving the public time and the ability to participate prior to the final adoption of the Commission's governing policies.

110. The Commission voted unanimously on August 27, 2021, to adopt a set of seven affirmative neutral redistricting criteria and one prohibition on favoring candidates, incumbents, and/or political parties.[15]

111. The Commission first agreed that it must draw contiguous districts of roughly equal population. It then provided that, "to the extent practicable," district lines should: minimize dividing counties and municipalities across multiple districts; be reasonably compact and avoid contortions unexplainable by other criteria; preserve communities of interest in geographic areas that share common policy interests or other cultural, religious, social, or economic bonds; follow natural or manmade boundaries such as mountain ranges or freeways; preserve cores of prior districts in "lines as previously drawn"; and seek boundary agreements among the different map types.[16] *See also* Utah Code § 20A-20-302(5) (describing the SB200 framework for the Commission's neutral criteria).

112. Additionally, the Commission sought to draw district lines that would avoid splitting precincts, with the goal of assisting county clerks to revise county precincts to accommodate overlaps between the new congressional and state legislative maps. The Commission contacted every county clerk in the State to identify areas that had precincts requiring

[15] Utah Independent Redistricting Commission, UIRC Meeting – August 27, 2021, https://uirc.utah.gov/uirc-meeting/uirc-august-27-2021/ (last accessed Mar. 15, 2022).

[16] Utah Independent Redistricting Commission, Synopsis of Threshold Criteria and Redistricting Standards, https://uirc.utah.gov/uirc-meeting/synopsis-criteria-and-standards/ (last accessed Mar. 15, 2022).

additional attention.

113. Importantly, the Commission's adopted criteria prohibited any process or redistricting decision-making that could facilitate "the purposeful or undue favoring or disfavoring of an incumbent elected official, a candidate or prospective candidate for elected office, or a political party."[17]

114. To abide by this prohibition on partisan redistricting, the Commission drew maps blind to partisan data of any sort, and it did not have access to or consider the residential addresses of incumbents, candidates, or any prospective candidates.

115. Commission Chair Facer explained that "[b]y not knowing that information, we're making an explicit effort to not favor or disfavor anybody. If we were looking at that, we could get mired of discussing whether we're favoring someone. We don't . . . want to do that[.]"[18] Facer later reaffirmed in an op-ed that "[t]o facilitate compliance with this [nonpartisan redistricting] criterion, the commission chose to not use political data in drawing maps. I can state with confidence that partisan information did not shape the commission's maps."[19]

116. SB200 requires the Commission to hold at least seven public testimony hearings in designated regions of the State: Bear River, Southwest, Mountain, Central, Southeast, Uintah, and Wasatch Front. *See* Utah Code § 20A-20-301(1). At the public hearings, the public had to be provided "a reasonable opportunity to submit written and oral comments to the commission and

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[17] *Id.*

[18] Bryan Schott, *Here come the redistricting maps: What you need to know about who draws them*, Salt Lake Trib. (Aug. 12, 2021), https://www.sltrib.com/news/politics/2021/08/12/here-come-maps-what-you/.

[19] Opinion, *Rex Facer: Independent Redistricting Commission provides nonpartisan map options*, Salt Lake Trib. (Nov. 8, 2021), https://www.sltrib.com/opinion/commentary/2021/11/08/rex-facer-independent/.

to propose redistricting maps." *Id.* § 20A-20-301(2).

117. The Commission spent hundreds of hours traveling the State to hear Utahns' opinions on the redistricting process. The Commission held 15 total hearings across Utah to solicit public testimony, including in each of the seven regions specified. It added additional public hearing stops as the community requested. Despite strains on the Commission's process from the COVID-19 pandemic and delays in the 2020 census, these public outreach efforts far exceeded the opportunities for citizen participation and comment that SB200 required.

118. The Commission supplemented its hearing schedule with additional outreach over social and other media. It also reached out directly to organizations and community leaders in Utah. For example, Commission staff contacted hundreds of organizations throughout the State—including universities, faith-based organizations, chambers of commerce, tribal leaders, and other military, ethnic and cultural groups—to educate and involve identified communities in the redistricting process. The Commission additionally hired a communications consulting firm to conduct a robust digital, print, and social media outreach program. It raised awareness about the independent redistricting process by attending large community events in the State, such as the Jordan Stampede, the Wasatch County Fair, and the Brigham City Peach Days.

119. At each public hearing, the Commission invited voters' participation through in-person comments, online submissions, and virtual contributions and attendance. The Commission also educated the public about its governing nonpartisan criteria, its process for drawing neutral district lines, and the many opportunities for the public to have their voices heard.

120. Following their governing criteria, the Commission obtained exhaustive public input about communities of interest in Utah and labored to draw district lines to keep those designated communities together. The Commission treated economic, educational, environmental,

ethnic, industrial, language, local government, neighborhood, and religious communities as communities of interest.

121. Early in the process, the Commission created a website that allowed members of the public to identify communities of interest by selecting a geographic area on a map and describing why the area comprised a community of interest. The Commission received about 1,000 public comments defining communities of interest in Utah and over 2,000 other comments about specific maps, many of which identified particular issues concerning communities of interest.[20]

122. Commission staff also collected many communities-of-interest maps during public outreach and hearing testimony, and it received additional public input on communities of interest from an online tool called Representable.[21]

123. Aggregating the submitted communities of interest and ensuring their consistency with the Commission's criteria, the Commission ultimately identified 590 communities of interest in Utah. Once the Commission staff categorized Utahns' communities-of-interest submissions, the staff turned the data into viewable layers within the redistricting software, allowing the commissioners to evaluate whether their drafted maps preserved recognized communities.

124. SB200 instructed the Commission to "maintain a website where the public may . . . submit a map . . . [and] comments on a map presented to, or under consideration by, the commission." Utah Code § 20A- 20-201(13). To that end, the Commission launched a public-oriented, design-your-own map feature in August 2021, which provided an innovative way for the Commission to engage with the community. This tool empowered Utahns to try their hand at

[20] Utah Independent Redistricting Commission, Communities of Interest, https://uirc.maps.arcgis.com/apps/MapSeries/index.html?appid=6ceab895212242fa888144d31d111a47 (last accessed Mar. 15, 2022).

[21] Representable, Utah State Map, www.representable.org/map/ut/ (last accessed Mar. 15, 2022).

redistricting by submitting their own citizen-drawn maps. The Commission published on its website the publicly submitted maps that complied with the neutral criteria, and it actively considered submitted maps in public meetings as a basis for the Commission's proposals.

125. The Commission also exceeded its baseline transparency requirements by livestreaming team mapping sessions on YouTube as they drew Utah's political boundaries for anyone in the State to scrutinize in real time.[22] The Commission publicly posted all its draft maps online to maximize the time for Utahns to access the maps and provide meaningful feedback to inform the Commission's revisions.

126. The Commission's iterative mapmaking process with the community enabled it to compile public comments and submissions to improve its maps based on citizen feedback. The Commission received and considered thousands of public comments and submissions in response to its maps. Making redistricting choices in the open ensured that the Commission had to justify its choices to the public.

127. Despite the overall collaborative efforts of the Commission throughout the redistricting process, one commissioner, Rob Bishop, appointed by Defendant Wilson, abruptly resigned on October 25, 2021, one week before the Commission's final deadline.

128. Bishop is a former Republican representative of Utah's 1st Congressional District and former Chair of the Utah Republican Party. In explaining his resignation, Bishop claimed that the Commission was biased in favor of urban areas because commissioners residing in urban areas along the Wasatch Front outnumbered commissioners residing in rural areas—notwithstanding rural areas' outsized representation on the Commission relative to Utah's population. In addition,

[22] Utah Independent Redistricting Commission, Videos, YouTube www.youtube.com/c/utahindependentredistrictingcommission (last accessed Mar. 15, 2022).

the Commission spent most of its hearing time in areas outside of urban settings along the Wasatch Front. It provided virtual access and opportunity for public access across Utah to contribute to all Commission business, eliminating a need for any physical proximity to the meetings. It actively considered differing urban and rural needs in its communities-of-interest analyses. And one of the Commission's final congressional maps was designed and measured to contain significant urban and rural elements in each district.

129. Bishop also revealed a partisan reason for his resignation, citing the proposed map that he believed would result in one Democrat being elected to Congress. Bishop argued that all four congressional districts needed to be politically cohesive and represented by the same political party. He stated that "[f]or Utah to get anything done" in Congress, the State "need[s] a united House delegation . . . having everyone working together to oppose" proposals he perceived as unfavorable based on his political viewpoint.[23]

130. Soon after Bishop's announcement, Defendant Wilson stated during a news conference that the Commission's work was in jeopardy. Defendant Wilson reasoned that because Utah is "in terms of landmass, a rural state," he believed the Commission's maps should reflect that perceived rural nature. Specifically, he asserted that "there's a lot of importance and benefits to this state of having the members of our congressional delegation all understand, and working for rural Utah, back in Congress."[24] Of course, as the Supreme Court held in *Reynolds v. Sims*,

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[23] *See* Bryan Schott, *Is Utah's independent redistricting commission a success? Depends on who you ask.*, Salt Lake Trib. (Oct. 28, 2021), https://www.sltrib.com/news/politics/2021/10/28/is-utahs-independent/; Utah Independent Redistricting Commission, *UIRC 10/25/21 Meeting*, YouTube (Oct. 25, 2021), https://www.youtube.com/watch?v=z4EuuDmG588 (last accessed Mar. 15, 2022).

[24] Katie McKellar, *'Ink still wet' on proposed maps, but Utah House speaker says Legislature may reevaluate redistricting process*, Deseret News (Oct. 27, 2021), https://www.deseret.com/utah/2021/10/27/22749057/ink-still-wet-utah-redistricting-independent-maps-house-speaker-legislature-reevaluate-commission.

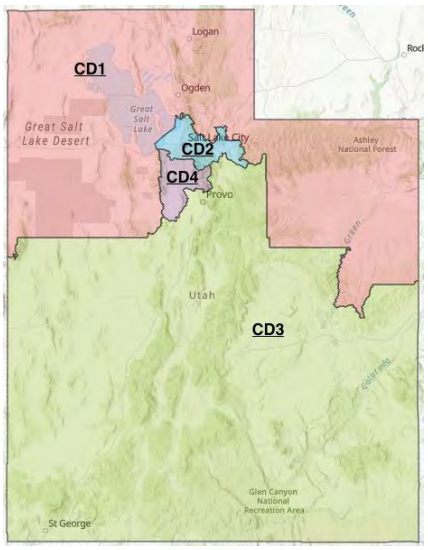
"Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." 377 U.S. 533, 562 (1964).

131. To fill Bishop's vacancy, Defendant Wilson appointed Republican former state legislator Logan Wilde, who previously served as the Utah commissioner of Agriculture and Food.

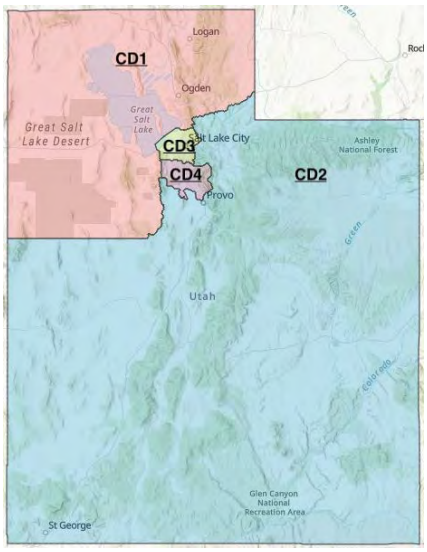
132. On October 25, 2021, soon after Bishop's resignation, the remaining six commissioners approved three Commission congressional maps by unanimous vote. The three impartial maps redrew the State's congressional boundaries by using nonpartisan criteria and reflected the vast public input that the Commission had gathered over the course of several months.

133. The Commission published the three final maps online for all Utahns to evaluate. The final Commission maps, described in more detail below, are entitled "Purple Congressional 4," "Orange Congressional 3," and "Public Congressional SH 2." The images below show the Commission's three maps, which it posted online to maximize time for public scrutiny.[25]

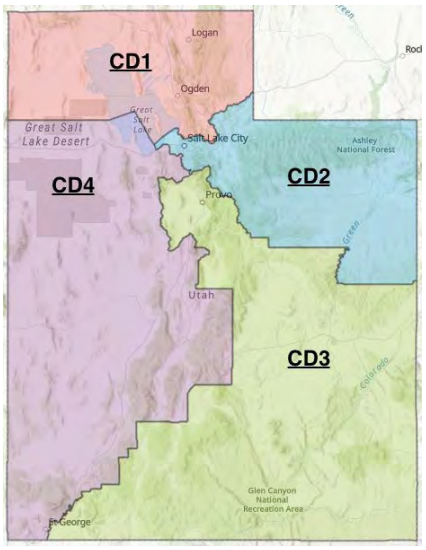
[25] Interactive versions of the Commission's maps are available online. *See* Utah Independent Redistricting Commission, Draft Congressional Maps, https://arcg.is/1uT4y4 (last accessed Mar. 15, 2022).



Commission's Purple Congressional 4 Map



Commission's Orange Congressional 3 Map



Commission's Public Congressional SH 2 Map

134. Six commissioners—of differing political affiliations, backgrounds, and locations in the State—labored together in full view of the public to draw impartial maps for all Utahns, and each of them attested to this neutral process and outcome.

135. For example, Defendant Adams' appointee, former Republican state senator Lyle Hillyard from Logan, lauded the Commission and its transparent process as one that was balanced and nonpartisan. Hillyard confirmed that he was "convinced [that] if we had gotten into partisan politics," rather than focusing on neutral criteria such as "keeping cities together" and ensuring needed county splits had a "clean cut," the maps "would have never been completed."[26]

136. Retired Judge William Thorne, a nonpartisan joint appointee, agreed and summarized that the process demonstrated how "[b]ipartisanship is possible. Fair maps are

[26] Katie McKellar, *'Good luck': Independent redistricting commission pitches its maps, but decision rests with Utah lawmakers*, Deseret News (Nov. 1, 2021), https://www.deseret.com/utah/2021/11/1/22757313/independent-redistricting-commission-pitches-maps-but-decision-made-by-legislature-politics-voting.

possible."[27]

137. Commissioner Karen Hale, a retired state senator, added that the "public process was really helpful to us as we felt like we wanted to truly reflect what the people desired in this mapmaking process."[28]

138. Commission Chair Facer stated that "[t]he commission used a broad and robust set of criteria, . . . and as a result has drawn high quality maps that accomplish its mandate."[29]

139. Meeting the Commission's statutory deadline, the Commission presented its three map proposals to the LRC on November 1, 2021. The Commission accompanied its map submission with a 196-page report of thorough quantitative and qualitative analysis, 700 pages of community comments, and additional context on the Commission's nonpartisan criteria and community-driven process.[30]

140. Throughout the Commission's November 1 presentation to the LRC, members of the Commission explained in painstaking detail the methods they used to draft their maps and the criteria applied, while fielding lawmakers' questions about the maps. "I can say with confidence that partisan information did not shape the commission's maps. We were prohibited from the purposeful or undue favoring or disadvantaging of an incumbent elected official," Chairman Facer

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[27] Ben Winslow, *Independent redistricting commission presents maps to the Utah legislature*, Fox13 News (Nov. 5, 2021), https://www.fox13now.com/news/local-news/independent-redistricting-commission-presents-maps-to-the-utah-legislature.

[28] Bryan Schott, *Independent redistricting commission delivers proposed voting district maps to Utah lawmakers*, Salt Lake Trib. (Nov. 1, 2021), https://www.sltrib.com/news/politics/2021/11/01/independent-redistricting/.

[29] Opinion, *Rex Facer: Independent Redistricting Commission provides nonpartisan map options*, *supra* note 19.

[30] Utah Independent Redistricting Commission, Redistricting Report (Nov. 2021), https://uirc.utah.gov/wp-content/uploads/Utah_Independent_Redistricting_Commission.zip (hereafter "UIRC Report").

reaffirmed during the presentation.[31]

F. The Legislature conducted its own redistricting process parallel to the Commission's that lacked transparency and commitment to respecting nonpartisan criteria.

141. Despite representations in early 2020 that the Legislature would take undue partisanship out of the redistricting process even under SB200, the Legislature ignored the Commission's neutral maps in favor of its own maps reflecting excessive partisan gerrymandering.

142. In April 2021, the Legislature formed a twenty-member Legislative Redistricting Committee, made up of fifteen Republican and five Democratic state legislators. Representative Paul Ray, a now-retired Republican representative from Clearfield, and Defendant Sandall, a Republican senator representing Tremonton, co-chaired the LRC.

143. After the census data became available in late summer 2021, the LRC conducted its own closed-door mapmaking process that ran parallel to the Commission's community-driven and transparent process.

144. The LRC's process was designed to achieve—and did in fact achieve—an extreme partisan gerrymander.

145. Unlike the Commission, the LRC did not explain or publish the full list of criteria that guided its redistricting decisions. Instead, it offered only a one-page infographic for public map submissions that stated three baseline criteria the Legislature claimed it would consider: population parity among districts, contiguity, and reasonable compactness.[32]

146. The LRC affirmatively voted not to preserve Utah's communities of interest as one

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[31] Schott, *Independent redistricting commission delivers proposed voting district maps to Utah lawmakers*, *supra* note 28.

[32] Utah Legislative Redistricting Committee, Criteria, https://redistricting.utah.gov/wp-content/uploads/2021/09/How-To-Graphics-4-dragged-2.pdf (last accessed Mar. 15, 2022); Utah Legislative Redistricting Committee, Draft 2021 Redistricting Principles (May 18, 2021), https://le.utah.gov/interim/2021/pdf/00002126.pdf (last accessed Mar. 15, 2022).

of its guiding principles.[33]

147. The LRC also did not commit to avoid unduly favoring or disfavoring incumbents, prospective candidates, and/or political parties in its redistricting process.

148. In addition, in contrast to the Commission, the LRC conducted its map-drawing and decision-making processes almost entirely behind closed doors. Although the LRC solicited some public input about Utah's communities and voters' preferences during hearings, the LRC does not appear to have used that testimony to guide its redistricting process. The LRC declined to use Utahns' extensive public input on communities of interest, solicited by either the LRC or the Commission.

G. The Legislature unjustifiably rejected the Commission's impartial maps.

149. In early November 2021, the Legislature adopted its own maps and set aside the Commission's painstaking efforts to follow neutral traditional redistricting criteria, implement community feedback, and produce transparent and impartial congressional district boundaries.

150. The timing and content of the Legislature's final redistricting plan reveals that the Legislature decided to adopt its own partisan gerrymandered maps and prescreened them with Republican party leaders long before the Commission even reached the deadline for completing its work.

151. Defendant Sandall conceded that political considerations affected the Legislature's congressional redistricting decisions. He stated that the LRC "never indicated the legislature was nonpartisan." He continued: "I don't think there was ever any idea or suggestion that the legislative

[33] Utah Legislature Redistricting Committee, Minutes (May 18, 2021), https://le.utah.gov/interim/2021/pdf/00002847.pdf (last accessed Mar. 15, 2022).

work wouldn't include some partisanship."[34]

152. After the Commission presented its plan to the Legislature on November 1, 2021, the LRC leadership told reporters that they would take the Commission's proposals "into consideration."[35] But the LRC did not do so.

153. LRC co-chair Paul Ray admitted that he had not paid attention to the Commission's process. He instead claimed that he would later look at "how close [the LRC's maps are] to [the Commission's maps] and what their explanation of their maps" were because the LRC must "see where [the Commission's maps] fit into what we're working on."[36]

154. Defendant Sandall faulted the Commission for presenting the Legislature with three map options instead of only one. Sandall stated that the Legislature "can't adopt their maps" because "[w]e would have to adopt one map, and they did not just bring us one map."[37] However, in SB200—the statute the Legislature passed to repeal Proposition 4 and that Defendant Sandall voted to approve—the Legislature expressly required that the Commission submit "three different maps for congressional districts." Utah Code § 20A-20-302(2)(a).

155. The Legislature's Republican caucus received advance notice of the LRC's proposed maps in a closed-door meeting that occurred at least a week before the Commission

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[34] Shane Burke, *Did costly public participation efforts matter in redistricting? Experts say no.*, Salt Lake Trib. (Nov. 20, 2021), https://www.sltrib.com/news/politics/2021/11/20/did-costly-public/.

[35] McKellar, *'Good luck': Independent redistricting commission pitches its maps, but decision rests with Utah lawmakers*, *supra* note 26.

[36] Bethany Rodgers, *Independent commission's proposed congressional maps would give Utah Dems a slight boost, analysis shows*, Salt Lake Trib. (Oct. 26, 2021), https://www.sltrib.com/news/politics/2021/10/26/independent-commissions/.

[37] Daniel Woodruff, *Utah redistricting co-chair defends new maps as Democrats vow to fight them*, KJZZ14 News (Nov. 7, 2021), https://kjzz.com/news/utah-redistricting-cochair-defends-new-maps-democrats-vow-to-fight.

completed its work on October 25, 2021. During this closed-door session, the Republican caucus discussed partisan voting trends, and used that information to inform its redistricting decisions.[38]

156. On Friday, November 5, 2021, around 10:00 pm, the LRC for the first time publicly posted its own congressional map, which, with slight adjustment, would become the 2021 Congressional Plan.

157. The LRC's posted map bore no resemblance to the impartial maps the Commission presented just four days earlier on November 1.

158. Co-chairs Sandall and Ray issued an accompanying statement on behalf of the LRC explaining that they decided to divide voters in Salt Lake County between four districts, ostensibly 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."[39]

159. The LRC gave the public two weekend days to study the 2021 Congressional Plan that would shape the next decade of elections.

160. The timing of the LRC's initial public release of its map late on Friday evening was incompatible with the goal of accommodating public input at a hearing that was set for the following Monday, November 8, 2021.

161. Nonetheless, Utahns rushed to organize and prepare public testimony to confront the LRC's partisan gerrymandered 2021 Congressional Plan.

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[38] *See, e.g.*, Robert Gehrke, *Utah's redistricting process was — as always — rigged from the start, Robert Gehrke writes*, Salt Lake Trib. (Oct. 29, 2021), https://www.sltrib.com/news/politics/2021/10/29/utahs-redistricting/; Robert Gehrke, *Born in the dark, Utah's redistricting maps are the worst in decades, Robert Gehrke writes*, Salt Lake Trib. (Nov. 9, 2021), https://www.sltrib.com/news/politics/2021/11/09/born-dark-utahs/.

[39] Katie McKellar, *Utah lawmakers released their proposed redistricting maps. Accusations of gerrymandering swiftly followed*, Deseret News (Nov. 6, 2021), https://www.deseret.com/2021/11/6/22766845/utah-lawmakers-released-their-proposed-redistricting-maps-accusations-of-gerrymandering-salt-lake.

162. So many Utahns joined together to submit their online statements opposing the LRC's proposed electoral boundaries that they crashed the LRC's public comment website.[40]

163. Despite the LRC's eleventh-hour notice, Utahns also gathered in large numbers on the steps of the state Capitol to protest the LRC's map and advocate in favor of the Commission's neutral maps.

164. A group of eighty-four prominent Utah business and community leaders, including some Plaintiffs, condemned the LRC's map as a partisan gerrymander. They held a press conference at the Capitol to emphasize a letter they signed urging lawmakers and Governor Spencer Cox to adopt the Commission's proposed neutral maps.[41]

165. During this time, the Legislature received 930 emails criticizing the LRC's partisan gerrymandered congressional plan and urging it to use one of the Commission's neutral maps. Comments advocated for the Commission's work because "[i]t provides accountability to the redistricting process;" voters had decided that they "want [the LRC] to consider and pass maps presented by the independent redistricting commission;" Utahns "need representation that understands the diversity of this area;" and "splitting [Salt Lake City] into two districts and the county into four districts is absolutely unacceptable for ensuring proper representation at the federal level. The maps created by the independent commission do a much better job at keeping communities together." [42]

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[40] Jeff Parrott, *Legislative Redistricting website overwhelmed leaving public unable to comment online on maps*, Salt Lake Trib. (Nov. 8, 2021), https://www.sltrib.com/news/politics/2021/11/08/traffic-jams-legislative/.

[41] Carter Williams, *Utah business, community leaders call for Legislature, Cox to adopt nonpartisan voting maps*, KSL News (Nov. 8, 2021), https://www.ksl.com/article/50279002/utah-business-community-leaders-call-for-legislature-cox-to-adopt-nonpartisan-voting-maps.

[42] Kyle Dunphey & Cindy St. Clair, *Lawmakers received hundreds of emails in support of the independent redistricting commission. Why didn't they listen?*, KSL News (Jan. 19, 2022),

166. Only eleven Utahns wrote to the Legislature in support of the LRC's map.[43]

167. On Monday, November 8, 2021, the LRC held the single statutorily mandated public hearing on its proposed congressional map. Utah Code § 20A-20-303(3).

168. Shortly beforehand, the LRC made a slight adjustment to the map to move southeastern San Juan County back into proposed District 3 instead of proposed District 2. This adjusted version became the final 2021 Congressional Plan, later numbered as HB2004.

169. An overwhelming majority of the hundreds of Utahns who attended the November 8 hearing on the LRC's 2021 Congressional Plan expressed their outrage about the LRC overriding the Commission and the public will.

170. For over three hours of live and online testimony, public speakers urged the LRC to abandon its proposed partisan gerrymander and instead adopt one of the Commission's neutral maps.

171. Among other things, the public speakers praised the Commission's transparent and community-driven process that produced three impartial maps. One speaker pleaded for the Legislature to "please listen to the independent commission's recommendations and stop playing politics." Another Utahn emphasized that in 2018 "[t]he voters asked for nonpartisan redistricting," and criticized the Legislature for reversing that progress. A commenter further added that "[t]his is a blatant gerrymander with Salt Lake County divided between all four districts. Please use the IRC maps." As Salt Lake City Mayor Erin Mendenhall summarized during the

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https://ksltv.com/481760/lawmakers-received-hundreds-of-emails-in-support-of-the-independent-redistricting-commission-why-didnt-they-listen/; Kyle Dunphey & Cindy St. Clair, *Lawmakers received hundreds of emails in support of the independent redistricting commission. Why didn't they listen?*, Deseret News (Jan. 18, 2022), https://www.deseret.com/utah/2022/1/18/22889744/utah-redistricting-why-didnt-utah-politicians-listen-to-emails-brian-king-congressional-district.

[43] *Id.*

hearing: "I have heard more unified Utah here" in opposition to the LRC's map "than I've heard in any public hearing for a very long time."[44]

172. Ignoring these presentations, the LRC voted immediately at the conclusion of the hearing to approve the LRC's partisan gerrymandered map and advance HB2004 to the full Legislature for a vote. The committee's vote was along party lines, with 15 Republicans voting in favor of the map and five Democrats voting against it.

173. The next day, on November 9, 2021, the Utah State House voted 50-22 to approve the 2021 Congressional Plan. Five House Republicans joined all House Democrats in voting against the Legislature's partisan gerrymandered 2021 Congressional Plan.

174. In total, the House allowed only approximately 10 minutes of debate. Nonetheless, numerous legislators managed to briefly express their opposition to the 2021 Congressional Plan.[45]

175. A Republican representative, Raymond Ward, first spoke out against the 2021 Congressional Plan. He emphasized that it eliminated Utah's lone competitive district from the prior decade's congressional map, former District 4. The 2021 Congressional Plan instead maintains four homogenous, Republican-advantaged congressional districts. Representative Ward proposed an alternative that retained the 2011 congressional map's competitive district and met other basic redistricting criteria. The Republican House majority rejected the proposal by voice vote.

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[44] McKellar, *Utah lawmakers released their proposed redistricting maps. Accusations of gerrymandering swiftly followed*, *supra* note 39; Ben Winslow, *Utah's legislature rejects every map proposed by independent redistricting committee*, Fox13 News (Nov. 8, 2021), https://www.fox13now.com/news/local-news/utahs-legislature-rejects-every-map-proposed-by-independent-redistricting-committee.

[45] *See House - 2021 Second Special Session - Day 1*, House Floor Debate and Vote on H.B. 2004 Congressional Boundaries Designation, Utah State Legislature at 0:06:52 – 0:17:35 (Nov. 9, 2021), https://le.utah.gov/av/floorArchive.jsp?markerID=116334 (last accessed Mar. 15, 2022).

176. Democratic Representative Clare Collard also criticized the HB2004 map because it divides communities of interest. She proposed an alternative that would keep such communities intact. The Republican majority in the House rejected Representative Collard's alternative map.

177. Democratic House Minority Whip Jennifer Dailey-Provost proposed adopting the Commission's Congressional SH2 map, and asked LRC co-chair Ray to explain the basis for LRC's decision to prioritize having "rural-urban mix" in all four districts. Ray acknowledged that no such requirement exists. Ensuring an "urban-rural mix" is not derived from Utah law. It is not even among the guiding principles the LRC adopted at the beginning of its redistricting process. It is not a criterion designated in Proposition 4 or SB200. And it is not among the list of traditional neutral redistricting criteria. Rather, Ray admitted that the LRC adopted the urban-rural mix rationale on an *ad hoc* basis as an unofficial policy.

178. The Republican majority in the House voted to reject Representative Dailey-Provost's proposal of the Commission's SH2 Plan. That rejection makes clear that ensuring four districts with an urban and rural mix does not explain the 2021 Congressional Commission Plan's district lines. By any plausible measure, the Commission's SH2 Plan achieves a superior mix of urban and rural components in all four districts than the LRC's partisan gerrymandered map.

179. The House Republican leadership cut off the floor debate before Democratic representatives supporting the Commission's other neutral redistricting plans could present them for discussion.[46]

180. The following day, November 10, 2021, the Utah State Senate took up the 2021

[46] Katie McKellar, *Utah House approves new congressional map. Here's why Gov. Spencer Cox says he likely won't veto*, Deseret News (Nov. 9, 2021), https://www.deseret.com/2021/11/9/22772357/utah-legislature-special-session-lawmakers-tackle-redistricting-vaccine-mandate-dixie-state-name.

Congressional Plan. The Senate voted 21-7 to approve the 2021 Congressional Plan before transmitting it to Governor Spencer Cox. Republican Senator Daniel Thatcher, representing West Valley City, joined all Democratic Senators to vote against HB2004.

181. Democrats in the Utah Senate were outspoken against the 2021 Congressional Plan. Many described how the map did not actually serve urban and rural interests but diluted urban voters, with one senator emphasizing that the 2021 Congressional Plan ignoring that "Utah is the seventh most urbanized state in the Nation."[47]

182. Other senators opposing HB2004 described how the LRC drew the map for partisan advantage to carve Salt Lake County into four districts and to divide areas that tended to vote against Republicans. Democratic Senator Derek Kitchen, for example, said the 2021 Congressional Plan was "unconscionable" because "it serves no other purpose than diluting the franchise of its residents. One-third of the State's population is in Salt Lake County."[48]

183. Senator Kitchen proposed an alternative plan that was a close variation of the Commission's Orange Congressional 3 map. The alternative map included a district centered on Salt Lake County that avoided the community, municipality, and county divides characteristic of the 2021 Congressional Plan. But the Republican-controlled Senate rejected Senator Kitchen's proposed alternative map.[49]

184. Rebuffing one legislator's plea for the Legislature to adopt a map reflecting Utah's

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[47] *See, e.g.*, *Senate - 2021 Second Special Session - Day 2*, Senate Floor Debate and Vote on H.B. 2004 Congressional Boundaries Designation, Utah State Legislature at 0:22:49–0:25:17 (Nov. 10, 2021), https://le.utah.gov/av/floorArchive.jsp?markerID=116361 (last accessed Mar. 15, 2022).

[48] Ben Winslow, *Redistricting maps clear legislature, ballot initiative possible*, Fox13 News (Nov. 10, 2021), https://www.fox13now.com/news/local-news/utah-senate-passes-controversial-congressional-map-heads-to-governor.

[49] *See, e.g.*, Senate Floor Debate and Vote on HB2004, *supra* note 47, at 0:35:40–0:39:44.

communities of interest, Defendant Sandall insisted that "[w]e are one Utah . . . in one combined community of interest."[50]

185. Defendant Sandall claimed during the Senate floor debate that the LRC modeled its gerrymandered map on the Commission's draft so-called Green Map.[51] The Green Map was a working draft of a redistricting plan, championed only by former Commissioner Bishop, that the Commission considered but opted not to include among its three recommended maps.

186. In any event, the final 2021 Congressional Plan does not reflect the Commission's draft Green Map. Unlike the 2021 Congressional Plan, for example, the draft Green Map does not split Salt Lake County four ways. The draft Green Map also keeps communities intact in areas in Salt Lake City, West Valley City, Midvale, and Murray, among other municipalities.

H. The 2021 Congressional Plan is an extreme partisan gerrymander.

187. Proponents of the 2021 Congressional Plan repeatedly claimed that the map's peculiar district lines were necessary to balance urban and rural interests in Utah. Nonetheless, the Legislature failed to explain how they measured that purported criterion or how the 2021 Congressional Plan accomplishes that goal.

188. In any event, seeking to amplify representation of rural interests at the cost of urban interests is an illegitimate redistricting consideration. *See Reynolds*, 377 U.S. at 562.

189. The purported need to amplify Utah's rural interests by having rural areas in all four districts was also a pretext to unduly gerrymander the 2021 Congressional Plan for partisan

[50] Lindsey Whitehurst, *Utah Legislature passes congressional districts over protest*, Associated Press (Nov. 10, 2021), https://apnews.com/article/congress-utah-salt-lake-city-redistricting-legislature-966ab9c764a69d8a4242013d0405af09.

[51] Utah Redistricting Staff, *Green Congressional Districts 1 Draft 9/2/2021 8:00 a.m. (a.k.a Draft 2)*, ArcGIS (Oct. 8, 2021), https://www.arcgis.com/home/item.html?id=3f64041779674b3a970399ca77c16d2f (last accessed Mar. 15, 2022).

advantage.

190. The Legislature sought to divide urban voters in Salt Lake County in order to maximize Republican advantage in all four congressional districts, not to ensure an urban-rural mix.

191. The Legislature used the same pretextual justification to divide Salt Lake County in the 2011 redistricting cycle in its effort to unseat Representative Jim Matheson from Congress. But, unlike the 2011 map, the 2021 Congressional Plan employed computational advancements in statistical and mapping tools to guarantee the absence of any competitive districts in Utah for the foreseeable future.

192. The 2021 Congressional Plan cracks urban voters in Salt Lake County four ways, and through the middle of mountain communities in Summit County, because those voters tend to oppose Republican candidates. By contrast, the 2021 Congressional Plan avoids community divisions through the middle of urban and suburban voters in Davis County and Utah County, because those voters tend to support Republican candidates.

193. The Legislature rejected the Commission's Congressional SH2 Plan, which would have achieved a superior mix of urban and rural components in all four congressional districts, because the Commission's SH2 Map did not contain a mix that would consolidate Republican advantage across the congressional map.

194. Even rural Utahns opposed the Legislature's urban-rural mix justification. One commenter expressed to the Legislature before it voted on HB2004 that "[a]s a voter in a rural area I'm entirely uncomfortable with my vote being used to dilute the power of another." Another rural voter wrote: "As a Republican who lives in a more rural part of the state, I have the same complaint as those living in Salt Lake. Please do not dilute our vote by splitting us up between all four

districts! I'm far more interested in having everybody fairly represented than I am in electing more people from my own party."[52]

195. Rural elected officials likewise opposed being combined with urban areas as a justification for maximizing suburban Republicans' control over all four districts in the 2021 Congressional Plan. Numerous rural mayors opposed being combined in a district with slices of urban Salt Lake County. Other elected officials from rural areas conveyed similar sentiments to the LRC.[53]

196. All four members of Utah's current congressional delegation live in urban and suburban areas along the Wasatch Front, not in rural Utah.

197. The 2021 Congressional Plan seeks to protect preferred Republican incumbents and draws electoral boundaries to optimize their chances of reelection.

198. In particular, the Legislature converted the competitive 4th District into a safe Republican district to enhance Republican Representative Burgess Owens' prospects to win reelection.

I. Governor Cox reluctantly signed the partisan gerrymandered 2021 Congressional Plan into law.

199. As the Legislature has done in every prior redistricting cycle, it submitted the 2021 Congressional Plan approved as HB2004 through the normal legislative process to be enacted or vetoed by the Governor.

200. Before signing HB2004 into law, Governor Cox held a regularly scheduled Facebook Q&A on November 9, 2021, in which he received more than 500 questions focused on

[52] *See, e.g.*, Utah Legislative Redistricting Committee, MyRedistricting, Committee Chairs Proposal – Congressional, https://citygate.utleg.gov/legdistricting/comments/plan/132/12 (last accessed Mar. 15, 2022).

[53] Dunphey & St. Clair, *supra* note 42.

redistricting. While answering the public's questions about the 2021 Congressional Plan, Governor Cox acknowledged there was "certainly a partisan bend" in the Legislature's redistricting process and conceded that "Republicans are always going to divide counties with lots of Democrats in them, and Democrats are always going to divide counties with lots of Republicans in them" when redistricting is left in partisan hands. Governor Cox agreed that "it is a conflict of interest" for the Legislature to "draw the lines within which they'll run." Governor Cox also stated that he supports a redistricting process that focuses on preserving "communities of interest," such as the Commission's neutral undertaking, which he reaffirmed is "certainly one area where that is a good way to make maps, try to keep people similarly situated together, communities together is something that I think is positive."[54]

201. Despite these misgivings, Governor Cox eventually signed HB2004 on November 12, 2021. *See* Utah Code §§ 20A-13-101–104.

202. In the end, less than seven days passed between the time the Legislature disclosed its 2021 Congressional Plan to the public and enacted it into law.

203. A post-enactment Deseret News/Hinckley Institute of Politics poll shows the outrage Utahns expressed during the redistricting process has not subsided. Only about a quarter of Utahns approve of the 2021 Congressional Plan. And less than 20% of Utahns agree with the Legislature's adoption of its own map rather than using one of the Commission's neutral maps.

204. The Legislature has now indicated that it is considering a repeal of the watered-

[54] Katie McKellar, *Utah Gov. Spencer Cox signs off on controversial congressional map that 'cracks' Salt Lake County*, Deseret News (Nov. 12, 2021), https://www.deseret.com/utah/2021/11/12/22778945/utah-governor-signs-legislature-controversial-congressional-map-cracks-salt-lake-city-gerrymander; Gov. Spencer J. Cox, *Live Q&A with Utah Gov. Spencer J. Cox*, Facebook (Nov. 9, 2021), https://www.facebook.com/watch/live/?ref=watch_permalink&v=980426705869206.

down redistricting provisions remaining in SB200 and will consider the future of the Commission in the 2022 Legislative interim session. *See* Utah Code § 20A-20-103.

J. The 2021 Congressional Plan dilutes the vote and silences the political voice of non-Republican voters, and entrenches Republican control over all four congressional districts.

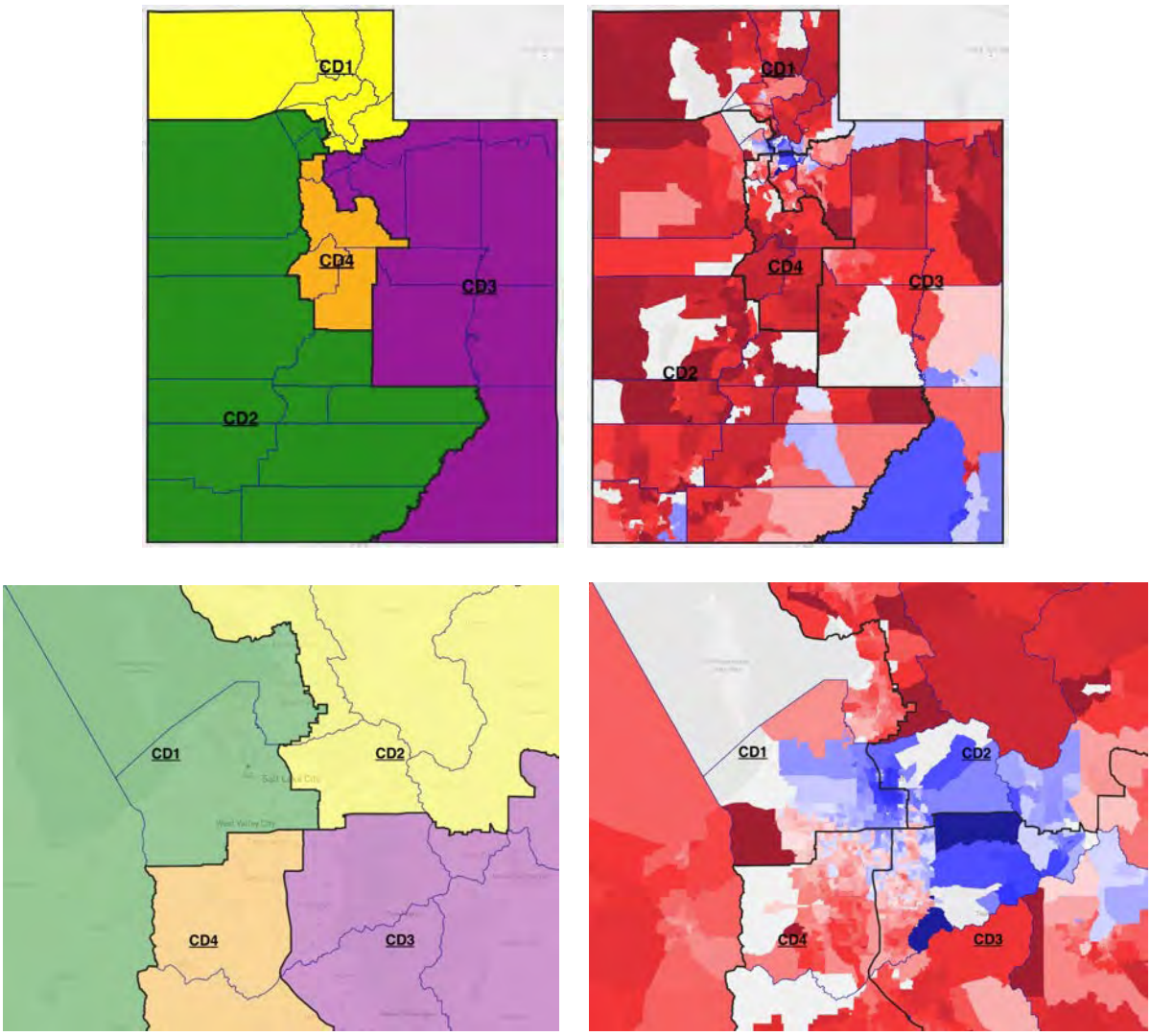
205. The enacted 2021 Congressional Plan "subordinate[s] adherents of one political party and entrench[es] a rival party in power." *Ariz. State Legislature*, 576 U.S. at 791.

206. In Utah's 2020 congressional election, 1,431,777 votes were cast statewide across all four districts. Of these, 873,347, or approximately 61%, were cast for Republican candidates, while 505,946, or approximately 35%, were cast for Democratic candidates.[55] Yet the 2021 Congressional Plan ensures that 100% of Utah's four Congressional seats will be held by Republicans for a decade.

207. The 2021 Congressional Plan achieves this extreme partisan advantage for Republicans primarily by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to eliminate the strength of their voting power. The 2021 Congressional Plan takes slices of non-Republican voting areas in Salt Lake County and immerses them into sprawling districts reaching all corners of the State.

208. The images below demonstrate the excessive partisan gerrymandering created by the 2021 Congressional Plan. The first image on the left displays the full 2021 Congressional Plan, and the image on the right shows the partisan makeup of the State, displaying data at the precinct level. The bottom two images display the same data, focused on Salt Lake County and its surrounding suburban areas.

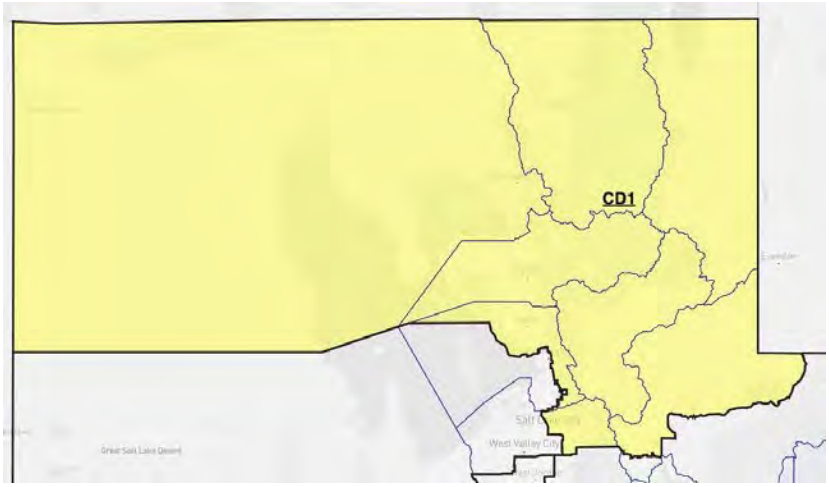
[55] Election returns data are compiled from https://electionresults.utah.gov/elections/uscongress/0.

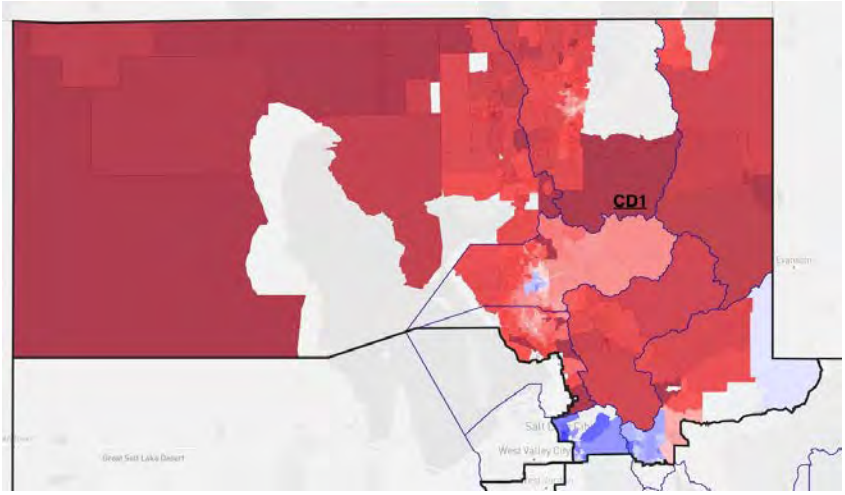


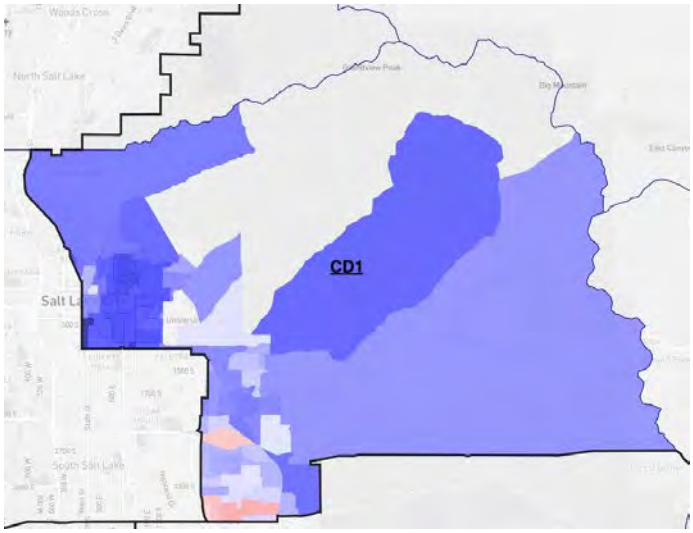
209. As these images make clear, the 2021 Congressional Plan guarantees that reliably Republican voters living in Salt Lake City suburbs and faraway, midsized areas across Utah will account for a durable majority of the voting population in each district. This durable Republican majority will consistently outvote Utah's non-Republican minority to elect Republicans for the next decade.

210. District 1 in the 2021 Congressional Plan emanates from the northeast quadrant of Salt Lake County and extends to cover the entire northern part of the State up to the Utah-Idaho border. The images below demonstrate District 1. The first image shows the entire district. The

second image displays the partisan composition of the district. The third image shows the partisan composition of the District 1 slice in Salt Lake County.







211. As the images show, District 1 begins in the northeast section of Millcreek—a city that is split between all four districts. The District 1 line then shoots north to grab Democratic voters living along Foothill Drive in eastern Salt Lake City before breaking west to carve out historically Democratic-voting areas in northeast Salt Lake City, including cohesive neighborhoods around the University of Utah, the Avenues, Liberty Park, and Yalecrest.

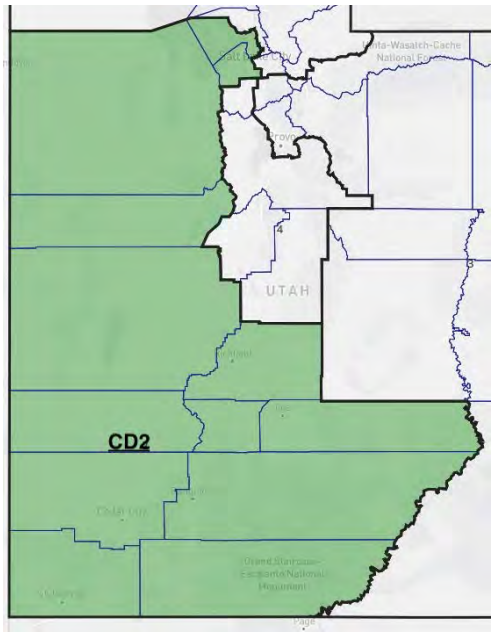
212. District 1 then turns north to split Democratic-favoring downtown Salt Lake City in half, running though Temple Square and dividing the Marmalade District and Capitol Hill areas. From there, District 1 stretches further north, covering the entire Interstate 15 corridor past Farmington, to reach the Utah-Idaho border.

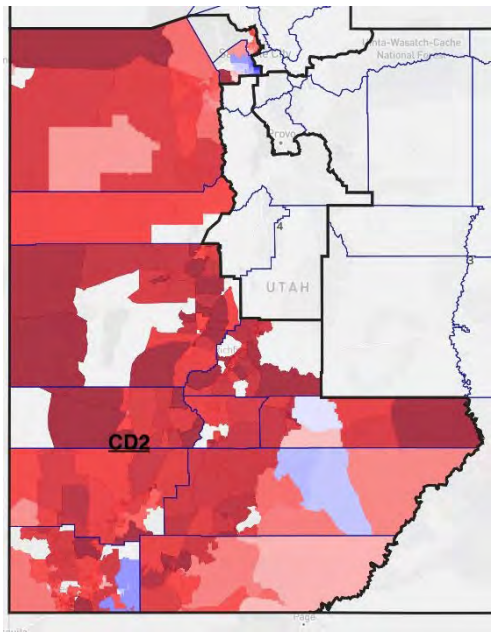
213. From Millcreek, District 1 also cuts across 3900 South to the east over Grandeur Peak and through Summit County, jaggedly dividing Democratic-voting and connected mountain communities located between Park City and Kimball Junction.

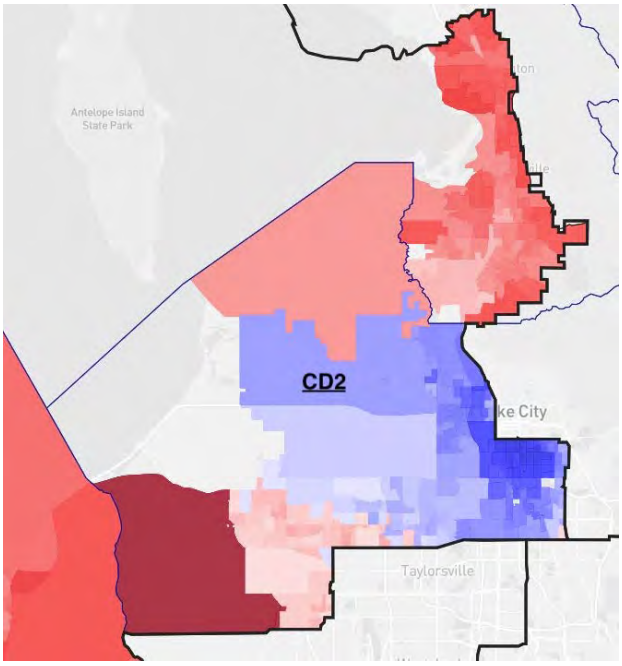
214. In short, District 1's electoral boundaries divide Millcreek, run through residential and downtown sections of Salt Lake City, and cut above Park City before stretching to Utah's northern border to dilute the heavily Democratic-voting areas in Salt Lake and Summit Counties. District 1 submerges these disfavored voters in a district containing substantial blocks of Republican voters in northern municipalities, such as Layton, Ogden, Brigham City, and Logan—voters who will reliably vote for Republican candidates. District 1 slices Salt Lake and Summit Counties and combines voters in those areas with more numerous voters in northern Utah, ensuring the enduring Republican control of the congressional district.

215. District 2 covers the northwest quadrant of Salt Lake County and extends over 300 miles south and west to reach most of Utah's borders with Nevada and Arizona, and nearly another 300 miles southeast to the eastern tip of Wayne County, covering parts of Canyonlands National

Park. The images below display District 2. The first image on the left is the entire district. The second image on the right shows the partisan composition of the district. The third image on the bottom displays the partisan composition of District 2's section of Salt Lake County combined with the Republican voting suburbs in Davis County from Bountiful to Farmington.







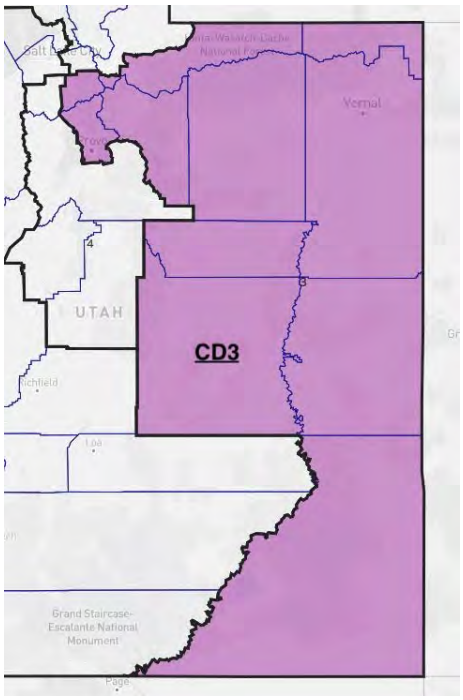
Attachment067

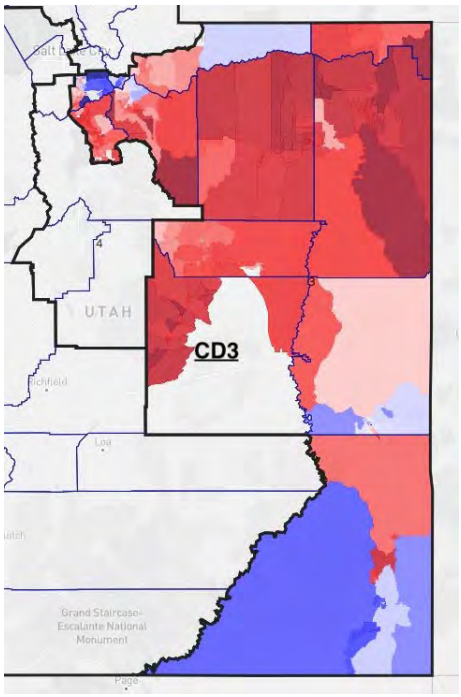
216. District 2 begins on the other side of the District 1, splitting Democratic voters in Salt Lake City and immersing those fragments in a sweeping district. District 2 runs north from the four-way split of Millcreek mostly along 2000 East before sharply cutting west along 900 South through residential areas in Salt Lake City, dividing communities of interest. It then tracks north along Main Street through Temple Square to capture the western half of downtown Salt Lake City.

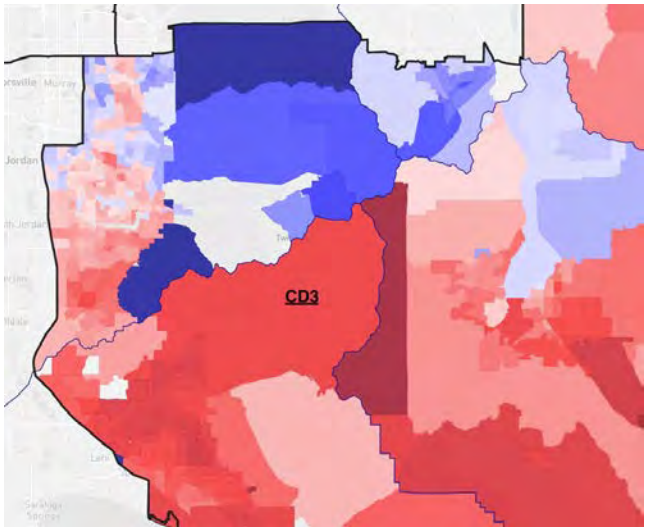
217. From the northwestern part of Millcreek, District 2 is also drawn west along 3900 South to divide West Valley City and Kearns, before continuing to Utah's southwest corner.

218. District 2 takes slivers of heavily Democrat-favoring areas in Salt Lake County—including halves of downtown Salt Lake City, the Marmalade District, Sugar House, Liberty Park, Yalecrest, and West Valley City—and lumps those voters in with a combined block of Republican-voting suburban areas in Bountiful, Tooele, and Farmington, as well as distant Republican-voting cities in southern Utah, such as Cedar City and St. George. District 2 thus ensures that a sufficient majority of Republican voters can overpower non-Republican voters living along the Wasatch Front to lock in Republican victories in District 2.

219. District 3 encompasses the southeast section of Salt Lake County and then widens to include Utah's entire eastern border as well as part of the northern border in Summit and Daggett Counties and part of the Southern border in San Juan County. The images below display District 3. The first image on the left displays the entire district. The second image on the right displays the partisan composition of the district. The third image on the bottom shows the partisan composition of the district slice in Salt Lake County combined with the Republican voting cities in Utah County.





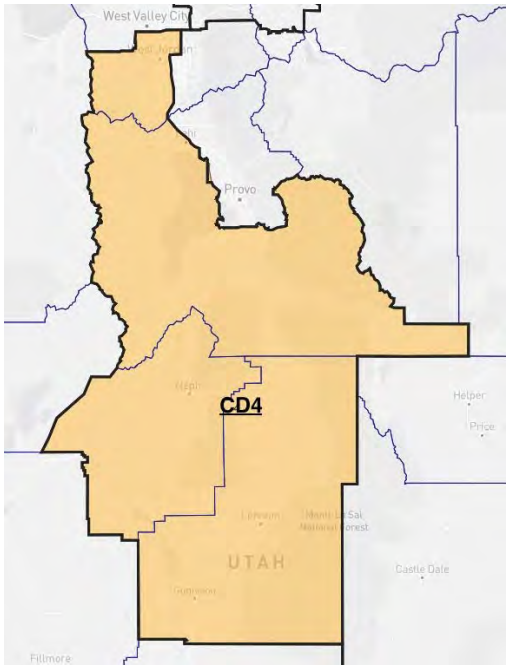


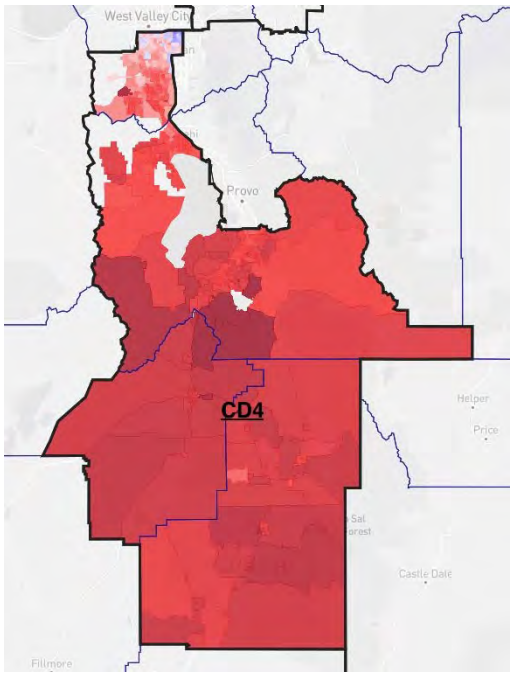
220. District 3 meets District 1 and District 2 at the four-way split in Millcreek along 3900 South. District 3 combines burgeoning Democratic-voting areas in southeast Salt Lake County—including the southeast portion of Millcreek, all of Cottonwood Heights and Holladay, and halves of Murray and Midvale—with large reliably Republican-voting stronghold cities in Utah County, such as the highly populated Orem and Provo.

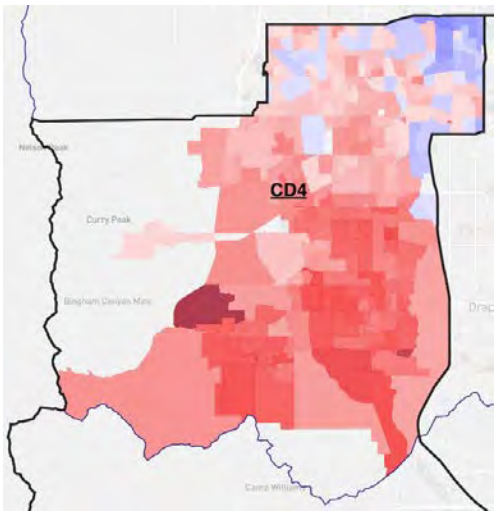
221. District 3 also abuts District 1 in Summit County to split the Democratic-voting mountain communities, capturing Park City and eliminating the strength of its sizable non-Republican voting population. District 3 then continues east to cover the entire Utah border with Colorado and follows Lake Powell south to the southern border with Arizona.

222. By starting in Salt Lake County and then reaching to these distant parts of the State, District 3 picks up Republican-voting areas in midsized cities, such as Heber City and Vernal, ensuring that the slices of Democratic-voting areas from Salt Lake County are subordinated to Republican-voting areas.

223. District 4 takes the southwest quarter of Salt Lake County and combines it with a central Utah district ending at the bottom of Sanpete County. The images below depict District 4. The first image on the left shows the full district boundaries. The second on the right displays the partisan composition of the district. The third image on the bottom displays the portion of District 4 in Salt Lake County.







224. District 4 divides Millcreek starting along the four-way split of the municipality near the 3900 South and 900 East intersection. District 4's electoral boundary moves west from the Millcreek divide to further sever West Valley City and Kearns, Utah's cities with the state's largest proportion of racial and ethnic minority communities. District 4's line then cuts south along 900 East toward Interstate 15 to grab Taylorsville and divide Democratic areas in Murray and Midvale.

225. District 4 places these segments of Democratic-voting areas of southwest Salt Lake County in a central Utah district where heavily Republican-voting municipalities along the Wasatch Front in Utah County—such as Eagle Mountain, Spanish Fork, Payson, and Lehi—will consistently overwhelm opposing non-Republican voters.

226. All four congressional districts contain a substantial minority of Democratic voters that will be perpetually overridden by the Republican majority of voters in each district, blocking these disfavored Utahns from electing a candidate of choice to any seat in the congressional delegation.

227. The Legislature ensured this result by devising four districts with homogenous political demographic configurations that will secure Republican congressional victories over the

next decade.

228. Based on preliminary estimates of election returns and population demographics data, District 1 is comprised of approximately 32.0% Democrats, while 62.8% of the district's voting population consistently supports Republicans.[56]

229. Likewise, District 2 is made up of an estimated 34.2% Democrats, while 60.1% of the district's voting population reliably votes Republican.

230. District 3 similarly contains an estimated 30.3% Democrats, while 64.7% of the district invariably votes Republican.

231. District 4 is made up of an estimated 28.3% Democrats, while 66.4% of the population reliably votes Republican.

232. The largest political demographic shift between last cycle's congressional map and the 2021 Congressional Plan is District 4. District 4, covering southwestern Salt Lake County and large swaths of Utah County, moved from the least Republican and most competitive district last decade to one of the most Republican-advantaged districts in the 2021 Congressional Plan.

233. Even looking only at the Legislature's announced baseline criteria—contiguity, reasonable compactness, and population parity—the Legislature's 2021 Congressional Plan is an extreme outlier when compared with maps drawn without partisan bias.[57]

234. The Legislature's partisan gerrymandered map is also not explainable by adherence to other traditional redistricting principles, such as the neutral criteria that voters adopted in

[56] The election returns figures are based on statewide composite election data from the 2012, 2016, and 2020 elections for U.S. President; 2016 and 2018 elections for U.S. Senate; 2016 and 2020 election for Utah Governor; and 2016 and 2020 election for Utah Attorney General. *See* Dave's Redistricting, UT 2022 Congressional, https://davesredistricting.org/maps#viewmap::b4d46a7e-4366-4f6c-ac54-ff6640d4e13f.

[57] Utah Legislative Redistricting Committee, Criteria (Sept. 2021), https://redistricting.utah.gov/wp-content/uploads/2021/09/How-To-Graphics-4-dragged-2.pdf.

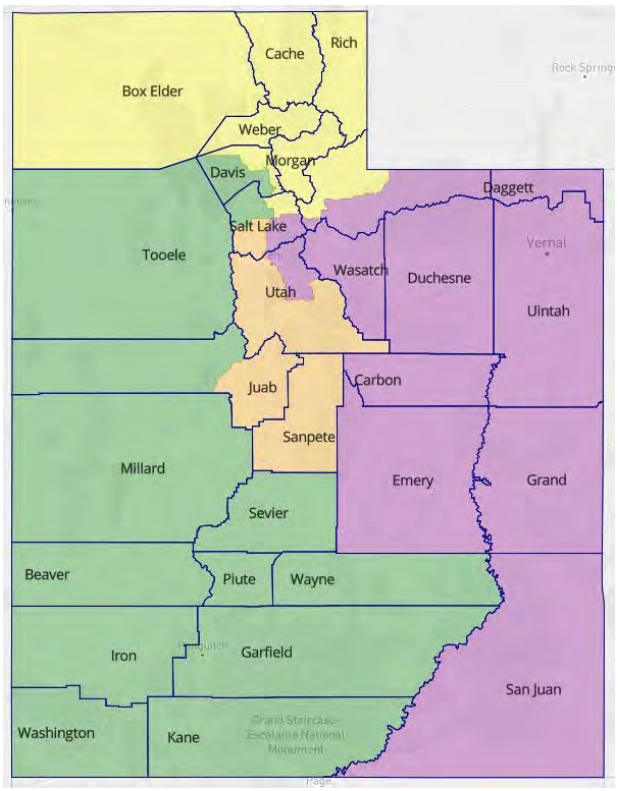
Proposition 4. The 2021 Congressional Plan instead achieves partisan advantage for Republicans by subordinating traditional redistricting criteria.

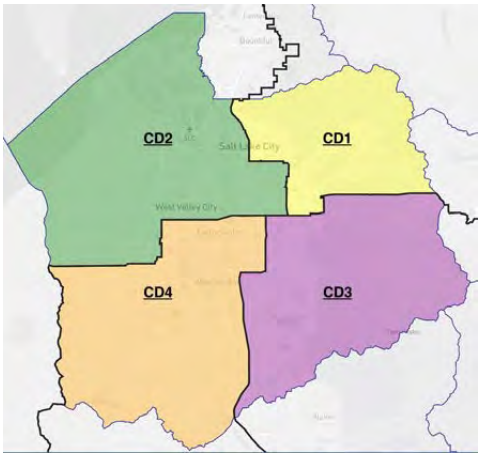
235. For example, the 2021 Congressional Plan divides far more counties, municipalities, and communities of interest than a map based on neutral criteria.

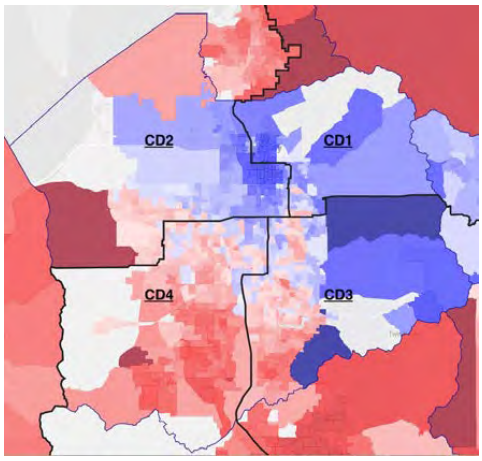
236. The 2021 Congressional Plan splits five of Utah's twenty-nine counties between two or more congressional districts—even though estimates suggest that a map would have to split no more than three counties to achieve population parity among Utah's districts. The 2021 Congressional Plan fragments those five counties into 12 pieces—far more than necessary to achieve equal population among districts.

237. The county splits affect a sizeable majority of the State's population. Based on preliminary estimates, approximately 58% of Utahns live in an area affected by the county splits in the 2021 Congressional Plan. The county splits are most striking in Salt Lake County, which is quartered between all four congressional districts. The Salt Lake County separations in the 2021 Congressional Plan crack the more heavily Democratic areas of Salt Lake City and its surrounding municipalities, diluting their voting strength and silencing their voices.

238. The images below depict the 2021 Congressional Plan's county splits. The first shows the county divides statewide: Davis County is halved between Districts 1 and 2, Juab County is divided between Districts 2 and 4, Summit County is split between Districts 1 and 3, and Utah County is divided between Districts 3 and 4. The second image shows the four-way split in Salt Lake County. The third image shows the partisan elections data for Salt Lake County.



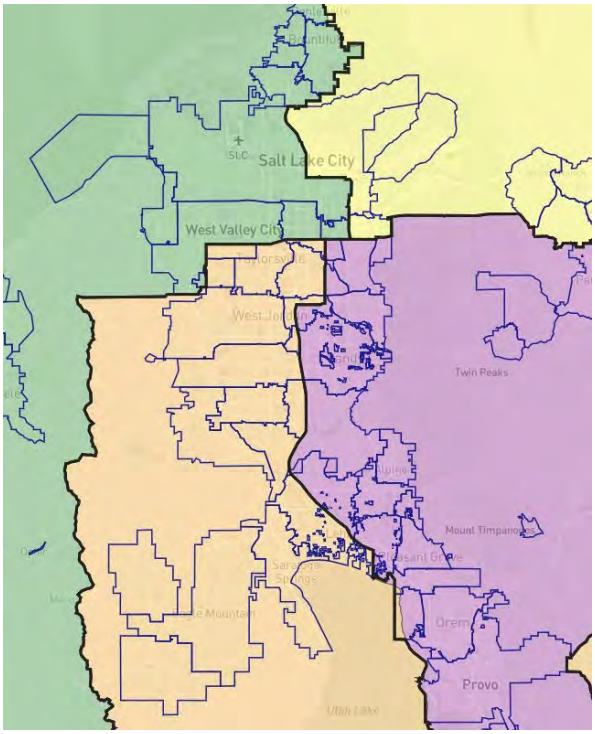




239. By way of contrast, two of the Commission's maps drawn—which were drawn without regard to partisanship—split fewer counties than the 2021 Congressional Plan.[58] Both the Commission's Orange Congressional 3 and Public Congressional SH 2 maps split only four counties in just nine and eight ways, respectively.

[58] *See* UIRC Report, *supra* note 30, at 47.

240. Utah's municipalities are also divided between different districts in the 2021 Congressional Plan. For example, numerous cities along the Wasatch Front—such as Salt Lake City, Millcreek, Murray, Kearns, West Valley City, Midvale, Sandy, Draper, Lehi, and American Fork—are divided between districts. In total, the 2021 Congressional Plan splits fifteen municipalities into thirty-two pieces, which far exceeds what would be expected if the redistricting plan followed a neutral process. Fourteen of the municipalities are divided in two, including through the middle of Salt Lake City. Millcreek is split four ways. The image below shows some of the 2021 Congressional Plan's divisions of municipalities between districts.

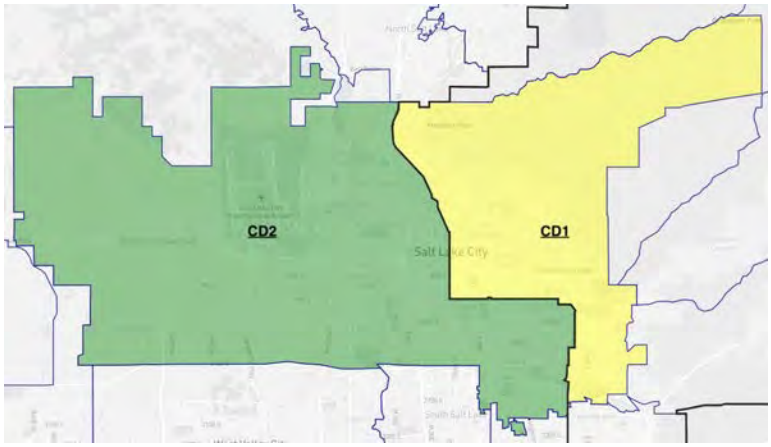


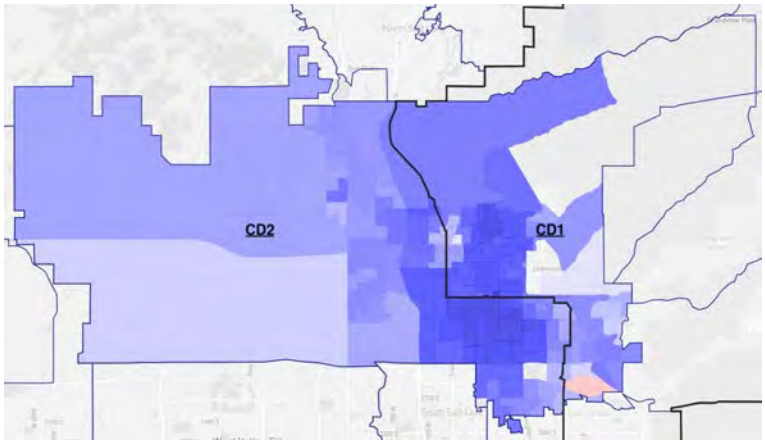
241. Salt Lake City is split down the middle along both north-south and east-west axes, dividing the City's major metropolitan area and residential areas in half. These divisions set apart Utahns who have common characteristics, experiences, and political and social cohesion.

242. For example, Plaintiff Condie and Plaintiff Martin live approximately a quarter mile from each other—a five-minute walk—with Plaintiff Condie living just south of Temple

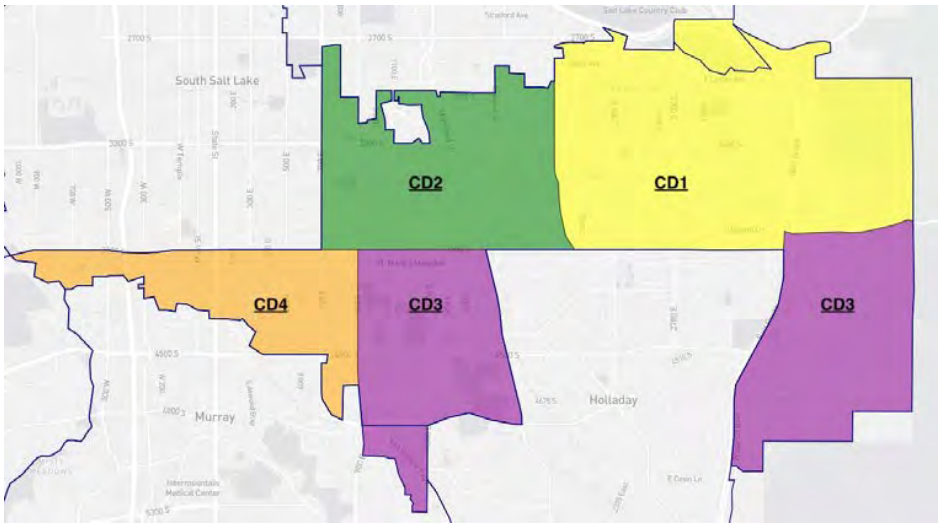
Square and Plaintiff Martin living across the street to the east. But because District 1 and District 2 separate along Main Street, Plaintiff Martin is in District 1 and must vote for a congressional representative with residents in Logan—nearly eighty miles away. Plaintiff Condie is in District 2 and must vote for a representative with St. George residents located over 300 miles away.

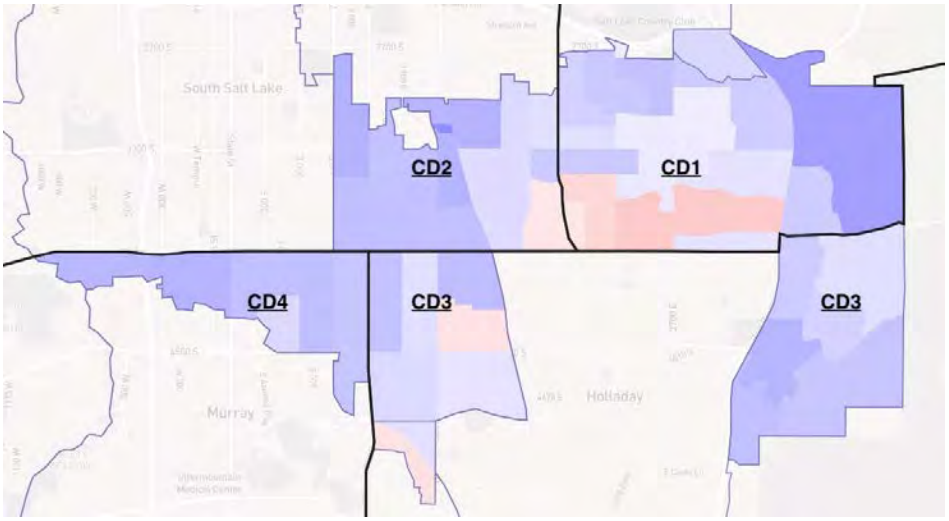
243. The images below show the District 1 and District 2 divisions in Salt Lake City, along with the partisan election results shading within the city's boundaries.





244. Millcreek is divided across all four congressional districts. Depending on which side of 3900 South they reside, Millcreek residents in walking distance of each other will be voting in four different congressional districts under the 2021 Congressional Plan despite their common interests and community connection. The images below show the district configurations within Millcreek's city boundaries and the elections results data showing the city's partisan composition.





245. Standing at the corner of 3900 South and 900 East—in the center of Millcreek—is the confluence of District 2, District 3, and District 4. If a resident lives beyond the north side of the 3900 South, such as Plaintiffs Malcolm Reid and Victoria Reid, they will be represented in District 2 by a representative whose district extends about 300 miles to Utah's southern border near St. George and western border near Wendover. By contrast, a resident living past the southeast corner of the Millcreek intersection is lumped into District 3, which then reaches over 150 miles to the far eastern border of the state to also include Vernal and then another 300 miles to the southern border past Moab and down to Blanding. And a person voting in District 4 will share

representation with Republican voters roughly 120 miles away in Ephraim and Gunnison at the bottom of Sanpete County. Walking a short distance east on 3900 South to the beginning of District 1, a resident living in this section of Millcreek will compete for representation with heavily Republican-favoring voters over 100 miles away along the northern Utah border.

246. By contrast, all three of the Commission's impartial maps split fewer municipalities. The Commission's Public Congressional SH 2 map split seven municipalities into only fourteen pieces. The Commission's Purple Congressional 4 split eight into sixteen pieces. And the Commission's Orange Congressional 3 split thirteen cities into twenty-six pieces.

247. The Commission's maps also show that other neutral traditional redistricting considerations cannot explain the Legislature's decisions for the 2021 Congressional Plan because the Commission's proposals performed as well as or better than 2021 Congressional Plan on all other metrics for measuring impartial redistricting.

248. For instance, the Commission maps are as compact as or more compact than the Legislature's 2021 Congressional Plan based on reliable statistical measures.

249. The Commission maps use natural and manmade geographic features, such as rivers, mountains ranges, lakes, and freeways, as district boundaries wherever possible. The 2021 Congressional Plan frequently disregards those features.

250. The 2021 Congressional Plan cannot be explained as an effort to preserve communities of interest, because the district lines divide communities of interest having common policy and social characteristics across the State. Preserving these communities in the same congressional district, as the Commission made significant effort to do, empowers individual voters to join with their neighbors for joint advocacy to their representatives. The 2021 Congressional Plan fractures rather than maintains communities of interest.

251. The 2021 Congressional Plan's disregard for communities of interest is apparent in its division of communities tied to school district and zoning boundaries. School communities in Utah form a key part of civic life, as the public emphasized to the Commission and the LRC during the redistricting process. While the Commission's maps frequently keep school communities together in, for example, the East High School, West High School, Highland High School, and Olympus High School boundaries, the 2021 Congressional Plan separates those communities and diminishes their ability to advocate together.

252. As part of their map-drawing efforts, the Commission additionally conducted a study of 100,000 randomly computer-generated congressional district maps. These simulated maps were drawn at random to be contiguous, have a maximum population deviation of 0.5 percent from the ideal district size, and favor county preservation and compactness.[59]

253. In the Commission's analysis, the overwhelming majority of randomly drawn plans among thousands included a Democratic-leaning or swing district that did not divide Democratic-voting areas in Salt Lake County.[60] The randomly drawn and impartial maps stand in a stark contrast to the four safe Republican seats in the Legislature's 2021 Congressional Plan.

254. Locking in Republican control in all four congressional districts for the decade, the 2021 Congressional Plan abandoned traditional redistricting principles in favor of partisan advantage. It divided Salt Lake County four ways and separated numerous municipalities and communities of interest, cracking Democratic voters to subordinate their votes and voices and render them ineffective in homogenous Republican-advantaged districts.

[59] UIRC report, *supra* note 30, at 44.

[60] *Id.* at 60.

K. The Legislature rejected attempts during the 2022 legislative session to restore impartial maps to Utah's electoral process.

255. On February 24, 2022, Senator Derek Kitchen introduced SB252, which attempted to restore the Proposition 4 reforms and repeal SB200 by statute.

256. SB252 failed in the Senate without receiving a single hearing.[61]

CAUSES OF ACTION

Count One
Partisan Gerrymander in Violation of Utah Constitution's Free Elections Clause — Article I, Section 17

257. Plaintiffs restate and incorporate by reference all allegations above as though fully set forth in this paragraph.

258. Article I, Section 17 of the Utah Constitution protects Utahns' right to free elections.

259. Article I, Section 17 states: "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. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law." Utah Const. art. I, § 17.

260. Utah's Free Elections Clause has no counterpart in the U.S. Constitution.

261. The right to vote is a fundamental right in the Utah Constitution.

262. The partisan gerrymandering in the 2021 Congressional Plan violates Plaintiffs' Free Elections Clause, including their fundamental right to vote.

263. Numerous other state constitutions contain a Free Elections Clause materially indistinguishable from Article I, Section 17. State supreme courts have held that their state

[61] Legislative Redistricting Amendments, S.B. 252, 2022 Gen. Sess. (Utah 2022), https://le.utah.gov/~2022/bills/static/SB0252.html (last accessed Mar. 15, 2022).

constitution's Free Elections Clause prohibits partisan gerrymandering. *See, e.g.*, *Harper v. Hall*, No. 413PA21, 2022 WL 496215 (N.C. Feb. 14, 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

264. For an election to be free under the Free Elections Clause, the will of the people must be fairly ascertained and accurately reflected.

265. In the 2021 Congressional Plan, Utah's partisan mapmakers manipulated the configuration of electoral districts to unduly advantage or disadvantage certain voters and ensure single-party control of all four Congressional seats, despite a substantial population of minority party voters. This manipulation violates Utah's Free Elections Clause by diminishing and/or diluting the voting power of certain voters on the basis of partisan affiliation.

266. The 2021 Congressional Plan denies Plaintiffs and other similarly situated voters the representation they otherwise would have received if the redistricting plan were devised in an impartial and free process using neutral redistricting criteria.

267. Defendants have no legitimate, much less compelling, interest in denying voters and Plaintiffs substantially equal voting power on a partisan basis and frustrating the will of the people.

268. Even if Defendants had a purported compelling interest in the 2021 Congressional Plan, the gerrymandered map is not narrowly tailored to serve any legitimate state interest.

269. Plaintiffs are therefore entitled to declaratory and injunctive relief as more fully set forth below.

Count Two
Partisan Gerrymander in Violation of Utah Constitution's Equal Protection Rights — Article I, Sections 2 and 24

270. Plaintiffs restate and incorporate by reference all allegations above as though fully

set forth in this paragraph.

271. The 2021 Congressional Plan violates Article I, Section 24 of the Utah Constitution because it has the purpose and effect of depriving a disfavored class of Utah voters of an equal opportunity to elect congressional representatives.

272. Article I, Section 24 provides: "All laws of a general nature shall have uniform operation." Utah Const. art. I, § 24.

273. Article I, Section 2 states in relevant part that the government is "founded on [the people's] authority for their equal protection and benefit." Utah Const. art. I, § 2.

274. The 2021 Congressional Plan violates Plaintiffs' rights under Article I, Section 2 and Article I, Section 24 because it arbitrarily classifies voters based on partisan affiliation and geographic location, then targets the disfavored class of voters for negative differential treatment compared to other similarly situated Utahns.

275. The 2021 Congressional Plan intentionally cracks Plaintiffs and other likeminded voters supporting Democratic candidates living in urban areas along the Wasatch Front to prevent them from translating their votes into victories at the ballot box.

276. The 2021 Congressional Plan dilutes Plaintiffs' fundamental right to vote and precludes their equal opportunity to elect their preferred congressional candidates. By systematically disfavoring non-Republican voters and favoring Republican voters, the 2021 Congressional Plan shifts political power from all the people and instead places it in a subset of the people.

277. Heightened scrutiny applies because the 2021 Congressional Plan implicates Plaintiffs' fundamental rights and creates impermissible and suspect classifications. *See Gallivan*, 2002 UT 89, ¶¶ 40-42.

278. Defendants lack a compelling, or even reasonable, justification for the adverse differential treatment of Plaintiffs in the 2021 Congressional Plan.

279. Defendants seeking partisan advantage through redistricting is not a legitimate objective.

280. Defendants seeking to amplify the interests of rural or suburban voters at the cost of urban voters is not a legitimate interest.

281. In any event, the 2021 Congressional Plan does not substantially further any legitimate state interest.

282. Plaintiffs are therefore entitled to declaratory and injunctive relief as more fully set forth below.

Count Three
Partisan Gerrymander in Violation of Utah Constitution's Free Speech & Association Rights — Article I, Sections 1 and 15

283. Plaintiffs restate and incorporate by reference all allegations above as though fully set forth in this paragraph.

284. Article I, Section 1 states in full: "All persons have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, § 1.

285. Article I, Section 15 states in full: "No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and

was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." Utah Const. art. I § 15.

286. Article I, Sections 1 and 15 of the Utah Constitution must be "read in concert" to protect the right of Utahns to free speech and association. *See American Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 20, 140 P.3d 1235, 1241.

287. The Utah Constitution provides greater protections against government restraint or abridgment of Utahns' free speech and association compared to the U.S. Constitution's First Amendment, which is not at issue here.

288. The 2021 Congressional Plan violates Plaintiffs' Article I, Section 1 and Article I, Section 15 free speech and association rights because it discriminates against Plaintiffs based on their protected political views and past votes.

289. The 2021 Congressional Plan violates Plaintiffs' Article I, Section 1 and Article I, Section 15 free speech and association rights because it restrains and mutes Plaintiffs' ability to express their viewpoints.

290. The 2021 Congressional Plan violates Plaintiffs' Article I, Section 1 and Article I, Section 15 free speech and association rights because it abridges the ability of voters with disfavored views to effectively associate with other people holding similar viewpoints.

291. The 2021 Congressional Plan impairs Plaintiffs' ability to recruit volunteers, secure contributions, and energize other voters to support Plaintiffs' expressed political views and associations.

292. The 2021 Congressional Plan violates Plaintiffs' Article I, Section 1 and Article I, Section 15 free speech and association rights because it retaliates against Plaintiffs for exercising political speech that Defendants disfavor.

293. The 2021 Congressional violates Plaintiffs' Article I, Section 1 and Article I, Section 15 free speech and association rights by targeting voters based upon their historical voting and expressive preferences, and by surgically drawing district lines to prevent them from being able to associate and elect their preferred candidates who share their political views.

294. Defendants used the 2021 Congressional Plan to divide the voters of opposing political viewpoints to make their voices too diluted to be heard and guarantee they are not represented in any meaningful way because of their disfavored views.

295. Defendants have no legitimate, much less compelling, interest in restraining, abridging, or retaliating against Plaintiffs for their political views and associations.

296. In any event, the 2021 Congressional Plan is not narrowly tailored to serve any legitimate state interest.

297. Plaintiffs are therefore entitled to declaratory and injunctive relief as more fully set forth below.

Count Four
Partisan Gerrymander in Violation of Utah Constitution's Affirmative Right to Vote Protections — Article IV, Section 2

298. Plaintiffs restate and incorporate by reference all allegations above as though fully set forth in this paragraph.

299. Article IV, Section 2 states: "Every citizen of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, shall be entitled to vote in the election." Utah Const. art. IV, § 2.

300. The right to vote is a fundamental right in the Utah Constitution. The right to vote protects "the fundamental rights of citizens and upon the overall functioning of our democratic

system of government" because "[t]he foundation and structure which give [government] life depend upon participation of the citizenry in all aspects of its operation." *Shields v. Toronto*, 395 P.2d 829, 832-33 (Utah 1964).

301. The Utah Constitution affirmatively protects citizens' right to a meaningful and effective vote.

302. The Utah Constitution affirmatively protects citizens' right to be free from the denial, abridgment, undue impairment, and/or dilution of their vote.

303. Utah's regulations of elections are meant to reflect, not distort, the public will.

304. The 2021 Congressional Plan gives greater effect to the vote of some favored voters while giving lesser effect to disfavored voters.

305. The 2021 Congressional Plan dilutes, impairs, and abridges Plaintiffs' fundamental right to vote.

306. The 2021 Congressional Plan improperly defeats the public will by drawing district lines to predetermine winners and losers.

307. Defendants have no legitimate regulatory interest in adopting the 2021 Congressional Plan that dilutes, impairs, and abridges Plaintiffs' fundamental right to vote and defeats the public will.

308. Even if Defendants pursued a legitimate regulatory interest, the 2021 Congressional Plan is not tailored to achieve any legitimate state interest.

309. Plaintiffs are therefore entitled to declaratory and injunctive relief as more fully set forth below.

Count Five
Unauthorized Repeal of Proposition 4 in Violation of Utah Constitution's Citizen Lawmaking Authority to Alter or Reform Government — Article I, Section 2; Article VI, Section 1

310. Plaintiffs restate and incorporate by reference all allegations above as though fully set forth in this paragraph.

311. Article I, Section 2 provides: "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." Utah Const. art. I, § 2.

312. Article VI, Section 1 states in relevant part: "The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, 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).

313. Article I, Section 2 and Article VI, Section 1 of the Utah Constitution guarantee that all governmental "power derives from the people, who can delegate it to representative instruments which they create," but "the people are the ultimate source of sovereign power." *Carter v. Lehi City*, 2012 UT 2, ¶¶ 25, 30, 269 P.3d 141, 149-50 (internal citation and quotation omitted).

314. Article I, Section 2 and Article VI, Section 1 establish enforceable, fundamental rights, and authorize Utah citizens to exercise their lawmaking authority to alter or reform their government.

315. In enacting Proposition 4's redistricting reforms—including shifting primary responsibility for drawing electoral maps from the Legislature to an independent commission and

establishing mandatory anti-gerrymandering standards—the people of Utah, including Plaintiffs, exercised their constitutional right to alter or reform their government.

316. The Legislature violated the Utah Constitution when it repealed the Utah Independent Redistricting Commission and Standards Act.

317. The Legislature exceeded its constitutionally granted power when it repealed Proposition 4 and negated the people's government reform measure.

318. The Legislature additionally cannot unduly burden the people's authority to make laws through initiatives, or their right to reform the government. In repealing the Utah Independent Redistricting Commission and Standards Act, the Legislature engaged in a *post-hoc* nullification of the voters' initiative power that unduly burdened the people's lawmaking authority and right to alter or reform their government.

319. Plaintiffs are therefore entitled to declaratory and injunctive relief as more fully set forth below.

RELIEF SOUGHT

For the foregoing reasons, Plaintiffs request that this Court:

a. Declare that the 2021 Congressional Plan is unconstitutional and invalid because it violates Plaintiffs' rights under Article I, Section 1; Article I, Section 2; Article I, Section 15; Article I, Section 17; Article I, Section 24; and Article IV, Section 2 of the Utah Constitution;

b. Enjoin Defendants and their agents, officers, and employees from administering, preparing for, or moving forward with Utah's 2024 primary and general elections for Congress using the 2021 Congressional Plan;

c. Compel Defendants and their agents, officers, and employees to perform their official redistricting duties in a manner that comports with the Utah Constitution;

d. Set a deadline by which a new redistricting plan that complies with the Utah Constitution shall be enacted, and failing such enactment or failing the enactment of a plan that satisfactorily remedies the violations, order a Court-imposed plan that complies with the Utah Constitution;

e. Declare that the Legislature's 2020 repeal of the Utah Independent Redistricting Commission and Standards Act enacting the citizen-initiated Proposition 4 redistricting reforms exceeded the Legislature's constitutional authority and violated Plaintiffs' rights under Article I, Section 2 and Article IV, Section 1 of the Utah Constitution;

f. Enjoin Defendants and their agents, officers, and employees from administering SB200, the law that repealed and replaced the voters' Proposition 4 redistricting reforms, and order the Utah Independent Redistricting Commission and Standards Act be reinstated in full;

g. Retain jurisdiction of this action to render any further orders that this Court may deem appropriate, including determining the constitutionality of any new congressional redistricting plans adopted by the Legislature;

h. Award Plaintiffs their reasonable attorneys' fees and costs as available; and

i. Grant such other and further relief as the Court deems just and appropriate.

Date: March 17, 2022

Respectfully submitted,

PARR BROWN GEE & LOVELESS

/s/ David C. Reymann_____
David C. Reymann
Briggs Matheson

CAMPAIGN LEGAL CENTER

/s/ Mark Gaber_____
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/s/ Troy L. Booher_____
Troy L. Booher
J. Frederic Voros, Jr.
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Attorneys for Plaintiffs

**Pro Hac Vice Motion forthcoming*

Attachment C

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, 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, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**SUMMARY RULING DENYING IN PART and GRANTING IN PART DEFENDANTS' MOTION TO DISMISS** Case No. 220901712 Judge Dianna M. Gibson

Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator Stuart Adams (collectively, "Defendants")[1] filed a Motion to Dismiss ("Motion") Plaintiffs' Complaint on May 2, 2022. The Court heard oral argument on August 24, 2022. The Court carefully considered Defendants'

[1] Lieutenant Governor Deidre Henderson is not a party to named Defendants' Motion.

Motion, the memoranda submitted both in support and opposition to the Motion, and counsel's arguments made on August 24, 2022. The Court now issues this Summary Ruling to apprise the parties of the Court's decision. The Court, however, requires additional time to finalize the legal analysis supporting the Ruling and will issue a full written decision in short order.

The Court's Summary Ruling is as follows:

(1) The Court DENIES Defendants' Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

(2) The Court DENIES Defendants' Motion to Dismiss certain Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator J. Stuart Adams.

(3) The Court DENIES Defendants' Motion to Dismiss Count One (Free Elections Clause), Count Two (Equal Protection Rights), Count Three (Free Speech and Association Rights), and Count Four (Affirmative Right to Vote) of Plaintiffs' Complaint.

(4) The Court GRANTS Defendants' Motion as to Plaintiffs' Count Five. Therefore, Count Five, "Unauthorized Repeal of Proposition 4 in Violation of Utah Constitution's Citizen Lawmaking Authority to Alter or Reform Government" is DISMISSED, with prejudice.

Dated October 24, 2022.

By the Court:

Dianna M. Gibson

Dianna M. Gibson
Third District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 220901712 by the method and on the date specified.

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Date: 10/24/2022

/s/ ALEXANDER GUARDADO

Signature

Attachment094

Attachment D

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, 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, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**RULING AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS** Case No. 220901712 Judge Dianna M. Gibson

Before the Court is the Motion to Dismiss filed by Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator Stuart Adams (collectively, "Defendants")[1] on May 2, 2022 ("Motion"). The Court heard oral argument on August 24, 2022. On October 14, 2022, Defendants filed a Notice of Supplemental Authority Regarding Legislative Defendants' Motion to Dismiss and Memorandum in Support. Having considered the Motion, the memoranda submitted both in support and opposition to it, and the arguments of counsel at oral argument, the Court issued a Summary Ruling on October 24, 2022. The Court now issues the legal analysis supporting that Ruling.

BACKGROUND

Defendants move to dismiss this action for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the Utah Rules of Civil Procedure. In reviewing a motion to dismiss under Rule 12(b)(6), courts accept all the facts alleged in the Complaint as true. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226. Legal conclusions or opinions couched as facts are not "facts," and therefore are not accepted as true. *Koerber v. Mismash*, 2013 UT App 266, ¶ 3, 315 P.3d 1053.

With respect to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), when a defendant mounts only a "facial attack" to the court's jurisdiction, courts presume that "all of the factual allegations concerning jurisdiction are . . . true."[2] *Salt Lake County v. State*, 2020 UT 27, ¶¶ 26-27, 466 P.3d 158. Here, Defendants have mounted a facial

[1] Lieutenant Governor Deidre Henderson is not a party to this Motion.

[2] "Motions under rule 12(b)(1) fall into two different categories: a facial or a factual attack on jurisdiction." *Salt Lake County*, 2020 UT 27, ¶26. Because a factual challenge "attacks the factual allegations underlying the assertion of jurisdiction," courts do not presume the truth of plaintiff's factual allegations. *Id.* However, in a facial challenge, "all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id.*

attack on jurisdiction. Therefore, under Rule 12(b)(1) and 12(b)(6), the Court accepts the allegations in the Complaint as true in reciting the facts of this case. In addition, the Court views those facts and all reasonable inferences drawn from them in the light most favorable to Plaintiffs as the non-moving party." *Oakwood Vill. LLC.*, 2004 UT 101, ¶ 9. The facts recited below are taken from Plaintiffs' Complaint.

In November 2018, Utah voters passed Proposition 4, titled the Utah Independent Redistricting Commission and Standards Act, which was a bipartisan citizen initiative created specifically to reform the redistricting process and establish anti-gerrymandering standards that would be binding on the Utah Legislature. (Compl. ¶¶ 2, 73, 75.) Proposition 4 was presented to Utah voters as a "government reform measure invoking the people's constitutional lawmaking authority." (*Id.* ¶ 77.) Proponents of the measure argued "[v]oters should choose their representatives, not vice versa." (*Id.* ¶ 78.) Under then-existing laws, proponents maintained, "'Utah politicians can choose their voters' because 'Legislators draw their own districts with minimal transparency, oversight or checks on inherent conflicts of interest.'" (*Id.*)

Proposition 4 created the Independent Redistricting Commission, a seven-member bipartisan-appointed commission that would take the lead in formulating various state-wide redistricting plans. (*Id.* ¶¶ 2, 80-82.) The Independent Redistricting Commission was required to conduct its activities in an independent, transparent, and impartial manner, to apply "traditional non-partisan redistricting standards" to establish neutral map-making standards and to abide by certain listed redistricting standards. (*Id.* ¶¶ 83-84, 86.) Specifically, Proposition 4 provided that final maps must "abide by the following redistricting standards to the greatest extent practicable and in the following order of priority:" (a) "achieving equal population among districts" using the most recent census; (b) "minimizing the division of municipalities and counties across

multiple districts;" (c) "creating districts that are geographically compact;" (d) "creating districts that are contiguous and that allow for the ease of transportation throughout the district;" (e) "preserving traditional neighborhoods and local communities of interest;" (f) "following natural and geographic features, boundaries, and barriers;" and (g) "maximizing boundary agreement among different types of districts." (Compl. ¶ 86.)

In addition, all redistricting plans were to be open for public comment, considered in a public hearing, and voted on by the Legislature. (*Id.* ¶¶ 85, 88.) If the Legislature voted to reject the redistricting 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." (*Id.* ¶ 88.) Proposition 4 also authorized "Utahns to sue to block a redistricting plan that failed to conform to the initiative's structural, procedural, and substantive standards." (*Id.* ¶ 89.) "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." (*Id.* ¶ 90.)

Sixteen months later, on March 11, 2020, Plaintiffs contend that the Legislature effectively repealed the Utah Independent Redistricting Commission and Standards Act and instead passed SB 200, which established new redistricting criteria. (*Id.* ¶ 93.) SB 200 effectively "eliminated all mandatory anti-gerrymandering restrictions imposed by the people on the Legislature as well as Proposition 4's enforcement mechanisms." (*Id.* ¶ 96.) While SB 200 retained the Independent Redistricting Commission, its role is now wholly advisory; the Legislature is not required to consider any recommended redistricting maps and in fact, the Legislature may disregard any recommended maps without explanation. (*Id.* ¶ 94.) "SB200 returned redistricting to the pre-Proposition 4, unreformed status quo where the Legislature could freely devise anti-democratic maps—as if the people had never spoken." (*Id.* ¶ 97.) SB200

eliminated neutral redistricting criteria, enforcement mechanisms and all transparency and public accountability provisions. (*Id.* ¶¶ 97-98.) In April 2021, the Utah Legislature formed its twenty-member Legislative Redistricting Committee (LRC). (*Id.* ¶¶ 142-143.)

Even after SB200's reforms, many legislators represented that the Legislature would honor the people's will to prevent undue partisanship in the mapmaking process. (*Id.* ¶ 99.) For example, Senator Curt Bramble, the chief sponsor of SB200 said he was "committed to respecting the voice of the people and maintaining an independent commission." (*Id.* ¶ 100.) Then-Senate Majority Leader Evan Vickers vowed that the Legislature would "meet the will of the voters" and reinstate in SB200 "almost everything they've asked for." (*Id.*) Representative Brad Wilson indicated the Legislature would leave Proposition 4's anti-gerrymandering provisions largely intact, and Representative Steinquist represented the Legislature would "make sure that we have an open and fair process when it comes time for redistricting." (*Id.* ¶ 101.)

Despite these representations, the LRC conducted a "closed-door" mapmaking process. (*Id.* ¶¶ 142-143.) The LRC did not publish the full list of criteria that guided its redistricting decisions, but instead offered a one-page infographic for public map submissions that stated three criteria the Legislature said it would consider: "population parity among districts, contiguity, and reasonable compactness." (*Id.* ¶ 145.) The LRC "did not commit to avoid unduly favoring or disfavoring incumbents, prospective candidates, and/or political parties in its redistricting process." (*Id.* ¶ 147.) The LRC solicited some public input about Utah's communities and voters' preferences during hearings, but Plaintiffs allege "the LRC does not appear to have used that testimony to guide its redistricting process." (*Id.* ¶ 148.)

Notwithstanding SB200, the Independent Redistricting Commission met thirty-two times from April to November 2021, and fulfilled its duties as originally contemplated under

Proposition 4. (*See generally id.* ¶¶ 104-126, 132-140.) Just before the Commission's final deadline, former Republican Congressman Rob Bishop abruptly resigned from the Commission. (*Id.* ¶ 127.) He cited the proposed map, which he believed would result in one Democrat being elected to Congress, as a reason for his resignation. (*Id.* ¶ 129.) He stated that "[f]or Utah to get anything done" in Congress, the State "need[s] a united House delegation . . . having everyone working together." (*Id.*) On November 1, 2021, the Independent Redistricting Committee presented three maps to the Utah Legislature's LRC and explained in detail the non-partisan process used to prepare the maps. (*Id.* ¶¶ 139-140.)

In early November 2021, the Legislature adopted its own map – the 2021 Congressional Plan ("Plan") – over the three maps created and proposed by the Independent Redistricting Committee. (*Id.* ¶¶ 141, 149.) Despite the Legislature's ostensible goal of hearing public input on the Plan at a public hearing scheduled on Monday, November 8, 2021, the LRC released the Plan publicly on Friday, November 5, 2021 around 10:00 pm, giving the public just two weekend days to review the Plan. (*Id.* ¶¶ 156, 159-60.) The LRC received significant public response at the public hearing and through comments on the LRC's website, hundreds of emails, protests at the Capitol, and a letter to the Legislature from prominent Utah business and community leaders. (*Id.* ¶¶ 161-65, 169.)

Notwithstanding significant public opposition to the LRC's map, on November 9, 2021, the Utah State House voted to approve the 2021 Congressional Plan. (*Id.* ¶¶ 171, 173.) Five House Republicans joined all House Democrats in voting against the Plan. (*Id.*) The next day, November 10, 2021, the Senate voted 21-7 to approve the Plan. (*Id.* ¶ 180.) One Republican Senator joined all Democratic Senators to vote against the Plan. (*Id.*) On November 12, 2021, Governor Cox signed the bill into law. (*Id.* ¶ 201.) While answering questions from the public

about the Plan, Governor Cox "acknowledged there was 'certainly a partisan bend' in the Legislature's redistricting process and conceded that 'Republicans are always going to divide counties with lots of Democrats in them, and Democrats are always going to divide counties with lots of Republicans in them.'" (*Id.* ¶ 200.) Governor Cox additionally "agreed that 'it is a conflict of interest' for the Legislature to 'draw the lines within which they'll run.'" (*Id.*)

The 2021 Congressional Plan splits both Salt Lake and Summit Counties, the two counties that typically oppose Republican candidates. (*Id.* ¶ 192.) The Plan "cracks" urban voters in Salt Lake County—Utah's largest concentration of non-Republican voters—dividing them between all four congressional districts and immersing them into sprawling districts reaching all four corners of the state. (*Id.* ¶¶ 192, 207.) It also divides Summit County into two. (*Id.* ¶ 192.) The Plan, however, leaves intact urban and suburban voters in both Davis and Utah counties, because those voters tend to support Republican candidates. (*Id.*) In addition, fifteen municipalities were divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities were divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty and up to three hundred miles away. (*Id.* ¶¶ 242-251.)

Proponents of the Plan maintain that the boundaries were drawn with the intent of ensuring a mix of urban and rural interests in each district. (*Id.* ¶ 158.) In a statement explaining the decision to divide Salt Lake County between all four districts, the LRC said, "[w]e are one Utah, and believe both urban and rural interests should be represented in Washington, D.C. by the entire federal delegation." (*Id.*) Notably, rural voters and rural elected officials opposed the

Legislature's urban-rural justification. Two reported commenters stated: "[a]s a voter in a rural area I'm entirely uncomfortable with my vote being used to dilute the power of another"; and "[a]s a Republican who lives in a more rural part of the state, I have the same complaint as those living in Salt Lake. Please do not dilute our vote by splitting us up between all four districts! I'm far more interested in having everybody fairly represented than I am in electing more people from my own party." (*Id.* ¶¶ 194, 195.) This sentiment was also echoed by Governor Cox, who "stated that he supports a redistricting process that focuses on preserving 'communities of interest,' such as the Commission's neutral undertaking, which he reaffirmed is 'certainly one area where that is a good way to make maps, try to keep people similarly situated together, communities together is something that I think is positive." (*Id.* ¶ 200.)

Plaintiffs assert that the "LRC's process was designed to achieve—and did in fact achieve—an extreme partisan gerrymander." (*Id.* ¶ 144.) Plaintiffs assert the Plan was intentionally created to maximize Republican advantage in all four congressional districts, not to ensure an urban-rural mix. (*Id.* ¶ 190.) Plaintiffs contend that "amplifying representation of rural interests at the cost of urban interests" is not a legitimate redistricting consideration, and the "purported need" to have rural interests represented in all four districts was "a pretext to unduly gerrymander the 2021 Congressional Plan for partisan advantage." (*Id.* ¶¶ 188, 189.)

Based on the 2021 Congressional Plan, each district contains a minority of non-Republican voters "that will be perpetually overridden by the Republican majority of voters in each district, blocking these disfavored Utahns from electing a candidate of choice to any seat in in the congressional delegation." (*Id.* ¶ 226.) While congressional plans from previous years had contained at least one competitive congressional district, all four districts under the 2021 Plan contain a substantial majority of Republican voters. (*Id.* ¶¶ 65, 175, 226, 232.) Notably, Senator

Scott Sandall admitted that political considerations affected the Legislature's redistricting decisions. (*Id.* ¶ 151.) He said the LRC "never indicated the legislature was nonpartisan. I don't think there was ever any idea or suggestion that the legislative work wouldn't include some partisanship." (*Id.*)

Some partisanship is inherent in the redistricting process. Here, however, Plaintiffs contend that the 2021 Congressional Plan subordinates the voice of Democratic voters and entrenches the Republican party in power for the next decade. (*Id.* ¶ 205, 206.) The Plan "protects preferred Republican incumbents and draws electoral boundaries to optimize their chances of reelection." (*Id.* ¶ 197.) And it converts "the competitive 4th District into a safe Republican district to enhance Republican Representative Burgess Owens' prospects to win reelection." (*Id.* ¶ 198.)

As a result, on March 17, Plaintiffs, including two organizational plaintiffs—the League of Women Voters of Utah and Mormon Women for Ethical Government—and seven individual plaintiffs, filed suit, alleging that Defendants violated Plaintiffs' constitutional rights by repealing Proposition 4 and adopting the intentionally-gerrymandered 2021 Congressional Plan. All Defendants, except for Defendant Lieutenant Governor Deidre Henderson, moved to dismiss Plaintiffs' Complaint.[3]

ANALYSIS

Defendants filed a Motion to Dismiss the action, in its entirety, arguing the Court lacks subject matter jurisdiction under Rule 12(b)(1) of the Utah Rules of Civil Procedure. In addition, they move to dismiss each of Plaintiffs' five claims for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Utah Rules of Civil Procedure. Essentially, Defendants

[3] Because Lieutenant Governor Henderson did not join in the Motion, any claims against her are unaffected by this Court's ruling.

contend that claims of partisan gerrymandering are not justiciable. And, if they are, partisan gerrymandering does not violate the Utah Constitution. Many of the issues raised in this case are matters of first impression, including whether partisan redistricting / gerrymandering presents a purely political question.

A motion to dismiss under Rule 12(b)(1) of the Utah Rules of Civil Procedure "is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Salt Lake County v. State*, 2020 UT 27, ¶ 26, 466 P.3d 158 (quoting *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993)). A motion under Rule 12(b)(6) challenges a plaintiffs' right to relief based on the alleged facts. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8, 104 P.3d 1226 (citation omitted). At this stage of the litigation, the Court's "inquiry is concerned solely with the sufficiency of the pleadings, and not the underlying merits of the case." *Id.* ¶ 8 (cleaned up).

I. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED. This Court Has Jurisdiction to Hear Plaintiffs' Redistricting Claims. Plaintiffs' Constitutional Claims are Justiciable.

Defendants argue that this Court lacks subject matter jurisdiction because Plaintiffs' redistricting claims (Counts One through Four) present nonjusticiable political questions. (Defs.' Mot. at 5.) The Court disagrees.

Under the political question doctrine, a claim is not subject to the Court's review if it presents a nonjusticiable political question. *See Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995). "The political question doctrine, rooted in the United States Constitution's separation-of-powers premise, prevents judicial interference in matters wholly within the control and discretion of other branches of government. Preventing such intervention preserves the integrity of functions lawfully delegated to political branches of government." *Id.* (cleaned up).

Political questions are those questions which have been wholly committed to the sole discretion of a coordinate branch of government, and those questions which can be resolved only

by making "policy choices and value determinations." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). When presented with a purely political question, "the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer." *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). In deciding whether a claim presents a nonjusticiable political question, the Court must consider two questions: (1) whether it "involve[es] 'a textually demonstrable constitutional commitment of the issue to a coordinate political department[]"or (2) whether there is "a lack of judicially discoverable and manageable standards for resolving it.'" *Matter of Childers-Gray*, 2021 UT 13, ¶ 64, 478 P.3d 96 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Defendants contend that Plaintiffs' claims involve political questions for both these reasons. For the reasons discussed below, Defendants are incorrect on both points.

A. Redistricting is not exclusively within the province of the Legislature.

Defendants first assert that Article IX, Section 1 of the Utah Constitution represents a "textually demonstrable constitutional commitment" of the redistricting power to the Legislature." (Defs.' Mot. at 6.) Article IX, Section 1 states, in relevant part: "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1. Defendants argue this provision delegates the responsibility for drawing congressional districts to the Legislature, and because no other provision in the Utah Constitution confers redistricting authority on any other branch or to the people, redistricting authority rests exclusively with the Legislature and is exempt from judicial review. (Defs.' Mot. at 7.)

The Utah Constitution does give the Legislature authority to "divide the state into congressional, legislative and other districts," but nothing in the Utah Constitution restricts that power to the Legislature or states that such power is exclusively within the province of the

Legislature. Even a cursory analysis reveals that the redistricting power is not exercised solely by the Legislature. While redistricting is primarily a legislative function, the governor and the people also exercise some degree of redistricting power. Redistricting laws and maps are submitted to the governor for veto like any other law under Article VII, Section 8 of the Utah Constitution. In addition, the Utah Constitution makes clear that "[a]ll political power is inherent in the people." Utah Const. art. I, § 2. In line with this authority, Utah's citizens have historically exercised power over redistricting through initiatives and referendums, including Proposition 4. *See also Parkinson v. Watson*, 291 P.2d 400, 403 (Utah 1955) (describing redistricting referendum proposing a constitutional amendment, which was submitted to the people in 1954 after the Legislature failed to reach a compromise regarding congressional district apportionment). And in the past, independent citizen redistricting committees have conducted redistricting. *See* 1965 Utah Laws, H.B. No. 8, Section 4, eff. May 11, 1965. At a minimum, because the executive branch and the people share in the redistricting power, both under the Utah Constitution and historically, this Court concludes that redistricting power is not solely committed to the Legislature.

Further, the constitutionality of legislative action is not beyond judicial review. Courts regularly review legislative acts for constitutionality. The United States Supreme Court in *Marbury v. Madison* famously stated that reviewing statutes to determine if they are constitutional is "the very essence of judicial duty" under our constitutional form of government. 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803). In fact, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Courts have a duty to review acts of the Legislature to determine whether they are constitutional. *Matheson v. Ferry*, 641 P.2d 674, 680 (Utah 1982) (stating courts cannot "shirk [their] duty to find an act of the Legislature

unconstitutional when it clearly appears that it conflicts with some provision of our Constitution."); *see also Skokos,* 900 P.2d at 541 ("If a claim involves the interpretation of a statute or questions the constitutionality of a particular political policy, courts are acting within their authority in scrutinizing such claims."). Courts also cannot "simply shirk" their duty by finding a claim nonjusticiable, merely because the case involves "significant political overtones." *Matter of Childers-Gray*, 2021 UT 13, ¶ 67 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230). Were it otherwise, the legislature would be the sole judge of whether its actions are constitutional, which is inconsistent with our Constitution, separation of powers, and longstanding principles of judicial review. *See, e.g.*, *Matheson*, 641 P.2d at 680; *Marbury*, 5 U.S. at 178; *see also Ritchie v. Richards,* 14 Utah 345, 47 P. 670, 675 (1896) (Batch, J., concurring) ("[t]he power to declare what the law shall be is legislative. The power to declare what is the law is judicial.").

Other constitutional provisions designate various duties to the Legislature—e.g., the compensation of state and local officers in art. VII, § 18; public education in art. X, § 2; and gun regulation in art. I, § 6—but that does not mean that the Legislature's power in those areas is beyond judicial review. For example, in the case of public education, the Utah Supreme Court has held:

> [t]he legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. . . . However, its authority is not unlimited. The legislature, for instance, cannot 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 . . . the Utah Constitution.

Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 2001 UT 2, ¶ 14, 17 P.3d 1125. Even though the Utah Constitution explicitly grants authority over education to the Legislature, that authority must be exercised in a manner consistent with the Utah Constitution.

This principle equally applies to redistricting. As Defendants' counsel acknowledged during oral argument, the Legislature is bound to follow the United States and Utah Constitutions when engaging in the redistricting process. And outside the context of this litigation, Defendants have acknowledged that "[t]he redistricting process is subject to the legal parameters established by the United States and the Utah Constitutions, state and federal laws, and caselaw."[4] Given these acknowledgements, it follows that "the mere fact that responsibility for reapportionment is committed to the [Legislature] does not mean that the [Legislature's] decisions in carrying out its responsibility are fully immunized from any judicial review." *Harper*, 868 S.E.2d at 534. That proposition would be wholly inconsistent with this Court's obligation to enforce the provisions of the Utah Constitution. *See Matheson*, 641 P.2d at 680.

In addition, the Utah Supreme Court has previously reviewed the Utah Legislature's redistricting actions. In *Parkinson*, the plaintiffs challenged the Legislature's redistricting act alleging that it created districts with vastly unequal populations. *Parkinson*, 291 P.2d at 401. In its decision, the Utah Supreme Court initially expressed reluctance to interfere with the Legislature's redistricting actions given the importance that the three branches of government remain separate. *See id.* at 403. The Utah Supreme Court, however, did not dismiss the claim as a nonjusticiable political question. *Id.* at 400. Instead, it engaged in judicial review and reviewed the map for constitutionality, ultimately determining that congressional districts with unequal populations were not unconstitutional.

Notably, after previously reviewing partisan gerrymandering cases, the United States Supreme Court, in a 5 - 4 decision, recently concluded that such claims are nonjusticiable in

[4] Plaintiffs cited this quote from a report by Utah State Legislature on Utah's redistricting in 2001. Office of Legislative Research and General Counsel, 2001 Redistricting in Utah (Jan. 2022), le.utah.gov/documents/redistricting/redist.htm (last accessed May 25, 2022). The Court takes judicial notice of the report pursuant to Utah Rules of Evidence 201(b)(2).

federal courts. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506 (2019). While the United States Supreme Court has backed away from evaluating redistricting claims, it does not follow that such claims are nonjusticiable in Utah courts for several reasons. First and foremost, the *Rucho* Court specifically stated: "Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void.... Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507.

Utah courts also are not bound by the same justiciability requirements as federal courts under Article III. Several Utah cases have noted that, on matters like standing and justiciability, a lesser standard may apply. *See, e.g.*, *Laws v. Grayeyes*, 2021 UT 59, ¶ 77, 498 P.3d 410 (Pearce, J., concurring); *Gregory v. Shurtleff*, 2013 UT 18, ¶ 12, 299 P.3d 1098; *Brown v. Div. of Water Rts. of Dep't of Nat. Res.*, 2010 UT 14, ¶¶ 17-18, 228 P.3d 747; *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).

Utah courts at times decline to merely follow and apply federal interpretations of constitutional issues. *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 27, 450 P.3d 1092. They "do not presume that federal court interpretations of federal constitutional provisions control the meaning of identical provisions in the Utah Constitution." *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935. They do not merely presume that federal construction of similar language is correct, *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106. And they recognize that federal standards are sometimes "based on different constitutional language and different interpretative case law." *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 45. Utah courts have also interpreted the Utah constitution to provide more protection than its federal counterpart when federal law was an "inadequate safeguard" of state constitutional rights. *Tiedmann*, 2007 UT 49, ¶¶ 33, 42-44.

While the *Rucho* majority decision conclusively resolved the issue justiciability for federal courts, given the split in the decision and the dissent authored by Justice Kagan, the issue was clearly not that cut and dry, even for the federal courts. Justice Kagan wrote that most members of the Supreme Court agree that partisan gerrymandering is unconstitutional. And four of the nine justices agreed that partisan gerrymandering is justiciable, judicially manageable standards exist, and the dissent discussed tests that exist and have been applied by the federal courts. *Rucho v. Common Cause*, 139 S. Ct. at 2509-2525 (Kagan, J., dissenting) (stating, in reference to the majority opinion, "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks it is beyond judicial capabilities."). Federal caselaw may prove helpful in this case as the litigation proceeds, but the majority's holding in *Rucho* – that partisan gerrymandering is not justiciable – is not binding on this Court and this Court declines to follow it.

B. Judicially discoverable and manageable standards exist.

Defendants argue that the Court lacks jurisdiction because there are no judicially discoverable or manageable standards for resolving redistricting claims because redistricting is a purely political exercise, based entirely on the Legislature's consideration and weighing of competing policy interests in deciding where to draw boundary lines. (Defs.' Mot. at 10.) The Court disagrees.

Plaintiffs' Complaint challenges the constitutionality of the 2021 Congressional Plan and the Utah Legislature's action. Determining whether the 2021 Congressional Plan violates the Utah Constitution involves no "policy determinations for which judicially manageable standards are lacking." *Baker*, 369 U.S. at 226. Instead, it involves legal determinations, the standards for which are provided both in the Utah Constitution and in caselaw. Utah courts have previously

addressed the Free Elections, Uniform Operation of Laws, Freedom of Speech and Association and the Right to Vote clauses of the Utah Constitution and, for some clauses, there are well-developed standards that have been applied by Utah courts in various scenarios.[5] And Utah courts are regularly asked to address issues of first impression, to interpret constitutional provisions and statutes for the first time and to apply established constitutional principles to new legal questions and factual contexts.[6] There is no reason why this Court cannot do the same here.

In reviewing Plaintiffs' redistricting claims, the Court will simply be engaging in the well-established judicial practice of interpreting the Utah Constitution and applying the law to the facts. The Utah Supreme Court has stated that "the Utah Constitution enshrines principles, not application of those principles," and it is the court's duty to determine "what principle the constitution encapsulates and how that principle should apply." *Maese,* 2019 UT 58, ¶ 70 n. 23. In applying constitutional principles to new types of claims, the Court uses "traditional methods of constitutional analysis," which starts with analyzing the plain language of the constitution and taking into consideration "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper

[5] While the constitutional provisions Plaintiffs cite have never been applied by Utah courts for redistricting claims, they have been applied in a variety of other contexts. The following are examples, not an exhaustive list. The Utah Supreme Court has applied Article I, Section 17 of the Utah Constitution (Free Elections Clause, Plaintiffs' Count One) while analyzing the right of a political candidate to appear on a party's ticket. *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942). It has applied Sections 2 and 24 of Article I (Uniform Operation of Laws, Count Two) in the context of a citizen initiative. *Gallivan v. Walker,* 2002 UT 89, 54 P.3d 1069. It has applied Sections 1 and 15 of Article I in an obscenity case. *American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235. And the Utah Supreme Court has applied Article IV, Section 2 in a case in which a prison inmate challenged a residency requirement in registering to vote. *Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985).

[6] For example, in *State v. Roberts*, the Utah Supreme Court applied the Utah Constitution to determine whether a reasonable expectation of privacy exists for electronic files shared in a "peer-to-peer file sharing network." 2015 UT 24, ¶ 1, 345 P.3d 1226. *See also State v. Limb*, 581 P.2d 142, 144 (Utah 1978) (addressing automobile exception); *Dexter v. Bosko*, 2008 UT 29, ¶ 19 (unnecessary rigor provision applied to seatbelts); *State v. James*, 858 P.2d 1012, 1017 (Utah Ct. App. 1993) (due process applied to video recorded interrogations).

interpretation of the provision in question." *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921, n.6 (Utah 1993).

In addition, in addressing redistricting, Utah's court are not without judicially-discoverable or manageable standards. *Rucho* specifically recognized that "provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 139 S. Ct. at 2507. Here, the people of Utah passed Proposition 4, which codified into law the people's will to apply traditional redistricting criteria in congressional districting. *See supra* pp. 3-4. Other state courts have addressed claims involving partisan gerrymandering. In fact, seven state courts in North Carolina, Pennsylvania, Florida, Ohio, Maryland, New York, and Alaska have concluded that partisan gerrymandering claims are cognizable under their respective state constitutions.[7] Some have set forth criteria and factors that may be considered in such analyses. *See, e.g., League of Women Voters v. Commonwealth*, 645 Pa. 1, 118-21 (Pa. 2018) (discussing consideration of traditional redistricting criteria, including contiguity, compactness, and respect for political subdivisions, and establishing "neutral benchmarks" for evaluating gerrymandering claims). Federal courts have applied various tests to address partisan gerrymandering. *See, e.g., Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (discussing application of a three-part test, including consideration of intent, effects, and causation, and discussing generally other tests previously applied). Utah courts have historically relied on case law from other state and federal courts in addressing questions that arise under Utah law. *See, e.g., Am. Bush,* 2006 UT 40, ¶ 11; *Ritchie v. Richards*, 47 P. 670, 677-79 (1896).

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[7] *See Harper*, 868 S.E.2d at 558-60; *League of Women Voters v. Commonwealth*, 645 Pa. 1, 128 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371-72 (Fla. 2015); *Adams v. DeWine*, 2022 WL 129092 at *1-2 (Ohio Jan. 14, 2022); *Szeliga v. Lamone*, Nos. C-02-cv-21-001816 & C-02-CV-21-001773 at 93-94 (Anne Arundel Cnty. Cir. Ct. Mar. 25, 2022), https://redistricting.lls.edu/wp-content/uploads/MDSzeliga-20220325-order-granting-relief.pdf; *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022); *In the Matter of the 2021 Redistricting Cases*, S-18419 (Alaska May 24, 2022) (applying *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987)) (opinion forthcoming).

This Court can do the same here, taking into consideration material differences in our constitutions and state laws.

This case is in the beginning stages. The parties have not conducted discovery. No evidence has been presented and the parties have not yet presented their positions regarding appropriate tests or criteria that should be considered and applied. As this case proceeds through litigation and with specific input from both parties, this Court can determine what criteria or factors should be considered in this case, under Utah law. *See Harper*, 868 S.E.2d at 547-48 (stating specific standards for evaluating state legislative apportionment schemes should be developed in the context of actual litigation); *accord Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment.").

Utah courts, including this one, recognize the separation of powers. To be clear, this Court will not review the Legislature's legitimate weighing of policy interests. The judiciary is not a political branch of government; policy determinations are for the Legislature to decide. As the Utah Supreme Court has stated, "[i]t is a rule of universal acceptance that the wisdom or desirability of legislation is in no wise for the courts to consider. Whether an act be ill advised or unfortunate, if it should be, does not give rise to an appeal from the legislature to the courts." *Parkinson*, 291 P.2d at 403. However, even in cases involving political issues, the Court is bound to review the Legislature's actions, not to weigh in on policy matters, but to determine whether there has been a constitutional violation. *Matheson*, 641 P.2d at 680.

Judicial review of legislative action to determine constitutionality does not derogate from the primacy of the state legislature's role in redistricting. However, because redistricting is not wholly within the control of the Legislature, the constitutional claims presented here are not political questions, and because judicially discoverable and manageable standards exist to review constitutional challenges and redistricting claims, the Court concludes that it has jurisdiction in this case to review the Legislature's actions to determine if they are constitutional.

Therefore, Defendants' Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is DENIED.

II. Defendants' Motion to Dismiss the Committee and Individual Defendants is DENIED.

Defendants move to dismiss Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Senator J. Stuart Adams, and Representative Brad Wilson (collectively, Committee and Individual Defendants). (Defs.' Mot. at 14.) Defendants' Motion is based on two arguments. First, they argue that the Committee and Individual Defendants are immune from suit based on claims related to their actions as legislators. Second, the Committee and Individual Defendants assert they are unable to provide Plaintiffs' requested relief, and as such, should be dismissed. (*Id.*).

Regarding immunity, the Committee and Individual Defendants are correct that Utah law grants them immunity from certain lawsuits. However, that grant of immunity does not make them immune to all claims. To the contrary, Utah law only grants legislators immunity from claims of *defamation* related to their actions as legislators. Utah has adopted the common law legislative immunity and legislative privilege doctrines through its Speech or Debate Clause,[8]

[8] Utah's Speech or Debate Clause states: "[m]embers of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding

which Utah courts interpret as providing legislative immunity only from *defamation* liability. *See Riddle v. Perry*, 2002 UT 10, ¶ 10, 40 P.3d 1128. In *Riddle*, the Utah Supreme Court declined to provide absolute legislative immunity in all instances. It explained that the policy consideration behind the legislative immunity doctrine is "the importance of full and candid speech by legislators, even at the possible expense of an individual's right to be free from defamation." *Id.* ¶ 8. Here, Plaintiffs are not seeking relief from defamation. Under this limited view of legislative immunity,[9] the Committee and the Legislative Defendants are not immune.

The Committee and Individual Defendants also assert that they cannot provide the relief requested and that any order from this Court directed at them "would blatantly violate the separation of powers." (Reply at 15.) The Committee's and Individual Defendants' argument on this point is less than two pages. They do not cite any authority, legal or otherwise, to support that the Committee and the Defendants cannot provide *any* relief requested or that any order from the Court, directed at them, would violate the separation of powers.[10] Such unsupported arguments are insufficient to satisfy Defendants' burden on a motion to dismiss. *See Bank of Am. v. Adamson*, 2017 UT 2, ¶ 13, 391 P.3d 196 ("A party must cite the legal authority on which its

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each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place." Utah Const. art. VI, § 8.

[9] The *Riddle* Court explained the limits of the Utah's legislative immunity doctrine:

> In determining the contours of the legislative proceeding privilege, we adopt the privilege as set forth in section 590A of the Restatement (Second) of Torts: "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he [or she] is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding."

Id. ¶ 11 (alteration in original).

[10] Notably, Utah courts have allowed lawsuits against individual legislators to proceed. *See, e.g.*, *Matheson v. Ferry*, 657 P.2d 240, 244 (Utah 1982); *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978); *Rampton v. Barlow*, 23 Utah 2d 383, 384, 464 P.2d 378 (1970); *Romney v. Barlow*, 24 Utah 2d 226, 227, 469 P.2d 4497 (1970). This Court is not aware of any legal authority, either at the state or federal level, that prohibits all lawsuits naming legislators. If any legal precedent exists to justify the dismissal of any defendant, it is incumbent on the moving party to present that authority to the Court.

argument is based and then provide reasoned analysis of how that authority should apply in the particular case."). While Defendants certainly raise important issues that the parties and this Court will consider as this case proceeds,[11] the arguments made at this stage are simply insufficient to justify dismissing the Committee and the Individual Defendants. *See Gardiner v. Anderson*, 2018 UT App 167, ¶ 21 n.14, 436 P.3d 237 ("[I]t is not the district court's burden to research and develop arguments for a moving party.").

Regarding the Committee and Legislative Defendants' separation of powers argument, the Court has a duty to review the Legislature's acts if it appears they conflict with the Utah Constitution. *Matheson*, 657 P.2d at 244. Indeed, to hold otherwise would make the Legislature the ultimate arbiter of what is constitutional, which would in fact violate the separation of powers principle by intruding on this Court's constitutional role. *See id.* At this stage, it appears this Court can give Plaintiffs at least some of the relief requested without intruding on the Legislature's powers, which is sufficient to defeat Defendants' Motion to Dismiss.

Defendants' Motion to Dismiss the Committee and the Legislative Defendants is DENIED.

III. Defendants' Motion to Dismiss Counts One through Four is DENIED; Defendants' Motion to Dismiss Count Five is GRANTED.

Defendants' move to dismiss each of Plaintiffs' four constitutional challenges to the 2021 Congressional Plan asserting that Utah's Constitution, and specifically the Free Elections Clause, Equal Protection Clause, Free Speech and Association Clause and the Right to Vote Clause, does not expressly prohibit partisan gerrymandering. Defendants

[11] The precise relief that Plaintiffs seek and might be entitled to is not entirely clear at this stage of the litigation. Thus, any ruling the Court could make would be merely advisory and the Court declines to do so. *Salt Lake County v. State*, 2020 UT 27, ¶36, 466 P.3d 158 ("[W]e do not issue advisory opinions."). The Court recognizes, however, that the issues raised by Defendants are legitimate questions that the Court will address if and when the issues are fully ripe and briefed.

take the position that these provisions should be interpreted narrowly to protect *only* every citizen's right to cast a vote in an election. Nothing more. They argue generally that the 2021 Congressional Plan does not prohibit any citizen from voting in an election. New boundary lines do not prohibit each citizen from physically casting a vote or from freely speaking and associating with like-minded voters on political issues. Further, they argue that the Utah Constitution does not guarantee "equal voting power," a vote that is politically "equal in its influence," any political success, or a beneficial political outcome. In addition, Defendants move to dismiss Plaintiffs' fifth claim, asserting that the Utah Constitution does not prohibit the Legislature from either amending or repealing the Utah Independent Redistricting Commission and Standards Act, Title 20A, Chapter 19, of the Utah Code, which is the law that went into effect with the successful passage of Proposition 4.

Defendants' motion is made under Rule 12(b)(6) of the Utah Rules of Civil Procedure, asserting that Plaintiffs have failed to state a claim under the Utah Constitution.

> "The purpose of a rule 12(b)(6) motion is to challenge the *formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case*." *Van Leeuwen v. Bank of Am. NA*, 2016 UT App 212, ¶ 6, 387 P.3d 521 (cleaned up). Accordingly, "dismissal is justified *only* when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim." *Id.* (cleaned up).

Pioneer Homeowners Ass'n v. TaxHawk Inc., 2019 UT App 213, ¶ 19, 457 P.3d 393, *cert. denied sub nom., Pioneer Home v. TaxHawk, Inc.*, 466 P.3d 1073 (Utah 2020) (emphasis added). The Court's review of Defendant's Motion at this stage is limited to considering only "the legal viability of a plaintiff's underlying claim as presented in the pleadings." *Lewis v. U.S. Bank Tr. NA*, 2020 UT App 55, ¶ 9, 463 P.3d 694, 697 (internal quotation marks excluded).

Each of Plaintiffs' claims is based on the Utah Constitution. Constitutional interpretation starts with evaluating the plain text to determine "the meaning of the text as understood when it

was adopted." *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 18, 450 P.3d 1092 (discussing generally process of constitutional interpretation). "The goal of this analysis is to discern the intent[12] and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235. "While we first look to the text's plain meaning, we recognize that constitutional language is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." *Id.* ¶ 10. The Court's focus is on "how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." *Patterson v. State of Utah*, 2021 UT 52, ¶ 91, 405 P.3d 92.

In addition to analyzing the text, prior caselaw guides us to analyze "historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting.'" *Maese,* 2019 UT 58, ¶ 18 (quoting *Am. Bush*, 2006 UT 40, ¶ 12). The language of the text, in certain circumstances, may begin and end the analysis. However, "[w]here doubt exists about the constitution's meaning, we can and should consider all relevant materials. Often that will require a deep immersion in the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Maese,* 2019 UT 58, ¶ 23 (cleaned up) (explaining merely "asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact is not a recipe for sound constitutional interpretation.").[13] The Court may also

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[12] The Utah Supreme Court has explained that "[w]hile we have at times used language of 'intent' in discussing our constitutional interpretation analysis, our focus is on the objective original public meaning of the text, not the intent of those who wrote it. Evidence of framers' intent can inform our understanding of the text's meaning, but it is only a means to this end, not an end in itself." *Maese*, 2019 UT 58, ¶ 59 n.6.

[13] In interpreting the Utah Constitution, "we consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy. Our primary search is for intent and purpose. Consistent with this view, this court has a very long history of interpreting constitutional provisions in light

consider caselaw from sister states, with similar provisions made contemporaneously to the framing/ratification of Utah's Constitution, and federal caselaw interpreting similar provisions from the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 11.

Both parties have provided to the Court some relevant material to support their competing interpretations of the Utah Constitution, of which this Court may take judicial notice of under Rule 201 of the Utah Rules of Evidence. At this stage, the Court cannot consider factual matters outside the pleadings on a motion to dismiss without converting the motion into to one for summary judgment. Utah R. Civ. P. 12(b); *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 12, 104 P.3d 1226. Neither party has made such a request. Therefore, at this stage, the Court need only decide whether Plaintiffs have stated a claim, not whether Plaintiffs will succeed on those claims. Because each claim involves separate legal issues, the Court addresses each individually below.

a. Plaintiffs Sufficiently State a Claim under the Free Elections Clause (Count One).

Defendants assert that Plaintiffs have failed to, and cannot, state a claim under the Free Elections Clause. Defendants argue the plain language of the Free Elections Clause does not expressly prohibit partisan gerrymandering and that it guarantees only "the freedom to *cast a vote* without interference from civil or military power." (Defs.' Reply at 17 (emphasis added).) The Court disagrees.

The Free Elections Clause states: "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." Utah

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of their historical background and the then-contemporary understanding of what they were to accomplish. This case, like many others, proves the wisdom of the axiom that '[a] page of history is worth a volume of logic.'" *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 23, 450 P.3d 1092, 1098 (discussing and quoting *Society of Separationists v. Whitehead*, 870 P.2d 916, 920–21, and n. 6 (Utah 1993)).

Const. art. I, § 17. Defendants argue that this Court must interpret the provision as a whole, arguing that the second clause, which states that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," necessarily modifies or limits the first. (Defs.' Reply at 17.) The Court rejects this interpretation.

1. The Plain Meaning of "All *elections* shall be *free.*"

There are two express rights guaranteed by the Free Elections Clause, not just one. First and foremost, "all *elections* shall be *free*." The second, "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The clause is constructed as a compound sentence, separating two independent clauses by the conjunction "and." This sentence construction supports that these two clauses are to be given equal value. Nothing in the construction or choice of conjunction suggests to this Court that the second independent clause was intended to limit the first. Defendants also provide no authority, legal or otherwise, to support such interpretation.

What did the term "all *elections* shall be *free*" mean to the people of Utah in 1895, when the Utah Constitution was adopted? There is little historical information on Utah's Free Elections Clause. While the Clause was discussed during the Proceedings and Debates of the Convention Assembled to Adopt a Constitution for State of Utah, in Mar. 25, 1895,[14] the discussion provides no guidance as to what the clause was intended to protect or how to interpret the key words. The reported transcript of the proceedings reflects that the Free Elections Clause was passed with no debate. One modification was made to the final text. As originally proposed, the Free Elections Clause stated that "[a]ll elections shall be free and equal." A successful motion was made to remove "equal," but with no discussion. Defendants argue the removal is significant, revealing

[14] Found at le.utah.gov/documents/conconv/22.htm ("Convention Proceedings").

the drafter's intent to not guarantee "voting power." (Defs.' Mot. at 21, n.16.) Plaintiffs, on the other hand, argue that "equal" was removed because it was "superfluous," because the term "free," as defined in 1891, already contained an equality component. (Pls' Opp'n at 26.) Neither party, however, provided any authority to support their respective arguments.[15] And the debate regarding this clause is of little assistance.

There are no early Utah common law cases discussing the Free Elections Clause. There are no Utah cases from any time period defining the term "elections." Notably, neither party focused on this term nor provided a definition or any legal analysis of it.[16] The meaning of the term "elections," however, is critical to this analysis and critical to interpreting this clause.

An "election" is defined by Merriam-Webster as the "act or process of electing." *Election*, Merriam-Webster, https://www.merriam-webster.com/dictionary/elections (noting first known use of this term, with this definition, was the 13th century). To "elect" is "to select by vote for an office, position or membership." *Elect,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elect. Other dictionary sources define the term similarly: "An election is a process in which people vote to choose a person or group of people to hold an official position." *Election*, (noun), Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/election.[17]

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[15] The Court agrees with Defendants that the removal means something. But there is insufficient historical information before the Court to determine what was intended by the removal. The Court need not determine why it was removed; instead, the Court focuses on interpreting the clause as it is written.

[16] Notably, neither party provided a definition of "elections." Both parties focused primarily on and provided definitions for the word "free." Based on the Court's analysis, the definition of "elections" does not appear to have changed over time and it does not appear to be subject to widely different interpretations. This Court is not a linguistics expert and did not undertake independent scientific research, but it did resort to standard dictionary definitions to assist in interpreting the plain language of the Free Elections Clause. *See generally State v. Rasabout*, 356 P.3d 1258 (2015) (discussing generally interpretation methods under Utah law).

[17] "*Election* (noun), the act or process of choosing someone for a public office by voting." *Election*, Britannica Dictionary, https://www.britannica.com/dictionary/election. An "election" is "the process of choosing a person or a

"Election" also means the "right, power, or privilege of making a choice." *Election,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elections. Similar definitions were used in the late 1800s. *See e.g., State v. Hirsch,*[18] 125 Ind. 207, 24 N.E. 1062, 1063 (1890) (discussing various definitions of "election" and stating it "is not limited in its definition and meaning to the act or process of choosing a person for a public office by a vote of the qualified electors at the time, place, and manner prescribed by law.").

The term "free" as defined in the 1891 Black's Law Dictionary means: "[u]nconstrained; having power to follow the dictates of his own will;" "[e]njoying full civic rights;" and "[n]ot despotic; assuring liberty;[19] defending individual rights against encroachment by any person or class; instituted by a free people; said of governments, institutions, etc." *Free*, Black's Law Dictionary, 1st ed. 1891. (Pls.' Opp'n at 26-29; Defs.' Reply at 16-20). "Free" was also defined as "[o]pen to all citizens alike[.]" *Free,* Anderson, Dictionary of Law, 1889.

Two notable terms justify further analysis. First, "unconstrained" means "not held back or constrained." *Unconstrained*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unconstrained (noting definition first used in the 14th century). "Constrained" means "to force by imposed stricture, restriction or limitation;" "to force or produce in an unnatural or strained manner." *Constrained*, Merriam-Webster,

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group of people for a position, especially a political position, by voting." *Election (noun)*, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/election.

[18] In *State v. Hirsch*, 125 Ind. 207, 24 N.E. 1062, 1063 (Ind. 1890), the Indiana Supreme Court analyzed the meaning of the term "elections" to interpret a state statute prohibiting liquor sales on "election day." Notably, the Court recognized that "[u]nder our form of government we have a well-defined system of choosing or electing officers, regulated by law." *Id.*

[19] "Liberty" is defined as "the quality or state of being free; the power to do as one pleases; freedom from physical restraint; freedom from arbitrary or despotic control; the positive enjoyment or various social, political, or economic rights and privileges; the power of choice." *Liberty,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/liberty (noting the definition has been used since the 14th century).

https://www.merriam-webster.com/dictionary/constrain (noting definition used in the 14th century).

Second, "despotic" means "of, or relating to, or characteristic of a despot // a despotic government." *Despotic*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despotic#h1 (noting this term, with this definition, was first used in 1604). "Despot" in turn means "a ruler with absolute power and authority; one exercising power tyrannically; a person exercising absolute power in a brutal or oppressive way." *Despot*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despot (noting this definition came into being with the beginning of democracy at the end of the 18th century). The United States Supreme Court in 1866 explained what it means to be despotic: "In a despotism the autocrat is unrestricted in the means he may use for the defence of his authority against the opposition of his own subjects or others; and that is what makes him a despot." *Ex parte Milligan*, 71 U.S. 2, 81, 18 L. Ed. 281 (1866).

The first clause "all elections shall be free" guarantees to Utah's citizens an election *process* that is free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained process, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process to either ensure continued control or to attain an electoral advantage. This right given to Utah citizens, necessarily imposes a limit on the legislature's authority when overseeing the election process.

The second clause specifically provides that "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 portion of the clause prohibits a civil or military power from interfering with the free exercise of the right of suffrage. It does not, however, expressly preclude a governmental power, like the

legislature, from providing "by law for the conduct of elections, and the means of voting, and the methods of selecting nominees." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942).

Anderson v. Cook is the only Utah case discussing the Free Elections Clause. In *Anderson,* a potential candidate submitted a petition to appear on a primary election ballot, but the acting county clerk refused to certify the nomination of the candidate for the primary election. *Id.* at 280. In affirming the county clerk's decision, the *Anderson* Court concluded that the petition was not timely filed, that the political party could not designate a candidate without an effective petition, and that the primary election laws did not provide for a "write in" candidate (while noting that general election laws did). *Id.* at 281-82. The candidate argued to deny him the right to appear on the ballot would violate the Free Elections Clause. *Id.* at 285. The *Anderson* Court did not fully interpret or analyze the clause. More importantly, it did not conclude that the Free Elections Clause did not apply to the issues presented. Rather, it held:

> While this provision guarantees the qualified elector the free exercise of his right of suffrage, it does not guarantee any person the unqualified right to appear as a candidate upon the ticket of any political party. It cannot be construed to deny the legislature the power to provide regulations, machinery and organization for exercising the elective franchise, or inhibit it *from prescribing reasonable methods and proceedings* for determining and selecting the persons who may be voted for at the election.

Anderson v. Cook, 102 Utah 265, 130 P.2d 278, 285 (1942) (emphasis added).

While the *Anderson* Court found no constitutional violation (i.e., because the candidate's petition was not filed in accordance with the law), the case does support that claims regarding the election *process* cannot be made under the Free Elections Clause. It supports that the Legislature necessarily has a role in providing "reasonable" regulation, machinery, and organization of the exercise of the right to vote. Additionally, the Legislature must "provide by law for the conduct

of elections, and the means of voting, and the methods of selecting nominees." *Anderson*, 130 P.2d at 285.

Based on the Court's analysis, and contrary to Defendants' arguments, Utah's Free Elections clause guarantees more than merely the right to vote.

2. Free Election Clauses and the English Bill of Rights

The history of free election clauses also supports that they were intended to prohibit tyrannical or despotic governmental manipulation of the election process to either ensure continued power or to attain electoral advantage. The first state free election clauses derived from a provision in the English Bill of Rights of 1689. *See Harper v. Hall*, 868 S.E.2d 499, 540 (N.C. 2022) (quoting historical sources discussing the origin of Free Elections Clauses in Virginia, Pennsylvania, and North Carolina). The original provision provided: "election of members of parliament ought to be free," and "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain electoral advantage." *Id.* (citing Bill of Rights, 1689, 1 W. & M. Sess. 2 c. 2 (Eng.)). The key principle driving these reforms was "avoiding the manipulation of districts that diluted votes for electoral gain." *Id.* North Carolina's free election clause was enacted following passage of similar provisions in Virginia and Pennsylvania, with the intent to "end the dilution of the right of the people to select representatives to govern their affairs," and to "codify an explicit provision to establish protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* (cleaned up). While not identical to Utah's, North Carolina's free election clause states simply: "All elections shall be free."

Defendants argue there is no evidence that Utah's Free Elections Clause, specifically, was based on the English Bill of Rights. This is true. Utah does not have the same well-

developed caselaw like North Carolina, specifically tracing the origin of this specific constitutional provision directly to the English Bill of Rights. However, the Utah Supreme Court has recognized that at least one provision in the Utah Constitution arose from the English Bill of Rights of 1689. *See, e.g.*, *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) (discussing Utah's cruel and unusual punishment clause), *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, ¶¶ 166-170, 353 P.3d 55, 99-100 (Lee, J. concurring) (discussing English Bill of Rights and English origins of protection against "cruel and unusual punishment"). Based on *Bott,* the English Bill of Rights certainly had some influence on Utah's Constitution, as did other state constitutions and the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 31 (stating "the drafters of the Utah Constitution borrowed heavily from other state constitutions and the United States Constitution" and English common law.).

The history and evolution of our representative democracy in the United States was well known to the Utah Supreme Court in 1896, as it evaluated legislative action and various challenges to an election process. *See Ritchie v. Richards*, 14 Utah 345, 47 P. 670, 675 (1896) (stating elections should be "honest and fair"). In a concurring opinion, Justice Batch rejected the proposition that all legislative action is presumed constitutional and beyond judicial review. *Id.* at 675. Specifically, he rejected an interpretation of the Utah Constitution that would vest the legislature with "a power so arbitrary" that it likened it to "the parliament of Great Britain, under a monarchial form of government." *Id.*; *see also id.* at 681 (Miner, J., concurring in J. Batch's opinion).

Utah caselaw from 1891 reflects the strong sentiment at that time regarding the fundamental nature of the right to vote and the importance of protecting it from illegal acts of

election/government officials. *See Ferguson v. Allen,* 7 Utah 263, 26 P. 570, 574 (1891). The Utah Supreme Court in *Ferguson*, while analyzing allegations of election fraud, stated that the right to vote is fundamental and "[t]hat no legal voter should be deprived of that privilege by an illegal act of the election authorities is a fundamental principle of law." *Id.* at 573. The *Ferguson* court stated: "[a]ll 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 574 (emphasis added). It further reasoned that the "rights and wishes of all people are too sacred to be cast aside and nullified by the illegal and wrongful acts of their servants, no matter under what guise or pretense such acts are sought to be justified." *Id.*

3. *Harper v. Hall* and Defendants' cited cases.

In line with the reasoning in *Ferguson*, the North Carolina Supreme Court in *Harper v. Hall* held that partisan gerrymandering is a cognizable claim under North Carolina's free elections clause, stating:

> partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. *Partisan gerrymandering prevents election outcomes from reflecting the will of the people* and such a claim is cognizable under the free elections clause.

Harper v. Hall, 868 S.E.2d 499, 542, *cert. granted sub nom. Moore v. Harper,* 142 S. Ct. 2901 (2022) (emphasis added).

Defendants cite two cases from Colorado and Idaho, suggesting that those states narrowly interpret their free elections clauses. They do not. In fact, in reviewing both cases, the Colorado

and Idaho courts apply their respective free elections clauses to address the "process" and not just merely the act of casting voting.

Defendants cite the Colorado case *Neelley v. Farr*, 158 P. 458 (Colo. 1916), stating that the Colorado Supreme Court interpreted Colorado's "free and open elections" provision to mean that "voters' right to the act of suffrage [be] free from coercion." *Id.* at 467. While that quote is part of the analysis, the *Neelley* court's decision does not support that the Court narrowly interpreted the Colorado free and open election clause to mean only that it protects against vote coercion. Notably, the case did not address redistricting. Rather, it addressed whether votes obtained from a "closed precinct," where the non-preferred candidates' party and voter information were prohibited (due to alleged industrial necessity), violated the free and open elections clause. The *Neelley* Court concluded that it did, and it excluded all votes cast, legal and illegal, from the precinct. *Id.* at 515.[20] While there are numerous quotes from the case regarding "free and open elections" that support that free and open elections means more than simply casting a vote, one quote is particularly instructive:

> There can be no free and open election in precincts where the legitimate activity of a political organization is interfered with and its members excluded either by private interests or public agencies or by the co-operation of both. So here a private, extrinsic agency, assisted by a public agency, the board of county commissioners, obtruded itself between a political organization and the electorate, and excluded one side to the controversy from the public territorial entity wherein the right of suffrage must be exercised.

Neelley v. Farr, 61 Colo. 485, 526, 158 P. 458, 472 (1916). This case supports that Colorado's free and open elections clause protects the *process*. In addition, congressional

[20] The *Neelley* court also stated: "under our form of government, if there is anything that should be held sacred, it is the ballot; and, if the aspirants for office, the election officials, and the party leaders so far forget themselves as to commit, or permit the commission of, gross frauds, so that the will of the legal electors cannot be determined, there is nothing left for the courts to do but to set aside the election in the precincts contaminated by such fraudulent conduct." *Neelley v. Farr*, 61 Colo. 485, 515, 158 P. 458, 468 (1916).

districts drawn through partisan gerrymandering to ensure one parties' election success to the exclusion of others does not meet the *Neelley* court's definition of a "free and open" election.

Defendants also cite *Adams v. Lansdon*, 110 P. 280 (Idaho 1910). *Adams* also does not deal with redistricting. Rather, the issue before the *Adams* court was whether requiring voters to vote for a first and second choice violated the portion of the Idaho's free and lawful elections clause, which stated: "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." *Id.* at 282. In rejecting the argument, the *Adams* court interpreted the provision to prevent only "civil or military officers" from "meddl[ing] with or intimidat[ing] electors" at polls; it ruled that imposing the requirement to vote for a first and second choice was a reasonable exercise of the legislature's power. *Id.* Notably, the *Adams* courts' ruling does not generally determine what "free elections" means. It also does not hold that a congressional map that predetermines elections is a reasonable exercise of the legislature's power and that such map does not meddle or interfere with the lawful exercise of the right to vote.

Based on the plain text of the Free Elections Clause, Utah caselaw, and decisions from other state courts, Utah's Free Elections Clause guarantees more than merely the right to cast a vote. It guarantees an election *process* free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained *process*, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process, including through redistricting, to either ensure continued control or to attain an electoral advantage. As such, this Court concludes that partisan gerrymandering is a cognizable claim under Utah's Free Elections Clause.

4. Application of Plaintiffs' "effects-based" test.

Plaintiffs assert that this Court should assess Plaintiffs' Free Elections Clause claim under an effects-based test, which evaluates whether: "(1) the Enacted Plan has the effect of substantially diminishing or diluting the power of voters based on their political views, and (2) no legitimate justification exists for the dilution." (Pls.' Opp. at 17, 29.) The Court notes that this is Defendants' Motion, but Defendants neither address nor object to Plaintiffs' proposed test. Under the circumstances, and without adequate briefing, the Court adopts Plaintiffs' test solely for the purposes of deciding the current motion.

Assuming the allegations in the Complaint to be true, the Court concludes that Plaintiffs have sufficiently pled a claim under Utah's Free Elections Clause. First, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan has the effect of substantially diminishing or diluting the power of democratic voters, based on their political views. Plaintiffs allege that the Plan achieves extreme and durable partisan advantage by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to diminish their electoral strength. (Compl. ¶ 207.) In doing so, the Plan makes it systematically harder for non-Republican voters to elect a congressional candidate. It entrenches a single party in power and will reliably ensure Republicans and Republican incumbents are elected in all of the State's congressional seats for the next decade, despite a compact and sizeable population of non-Republican voters that, in a partisan-neutral map, would comprise a majority of a district covering most of Salt Lake County. (*Id.* ¶¶ 6, 206-209, 226-231.)

Second, there is no legitimate justification to dilute Plaintiffs' vote, and the dilution cannot be explained by application of traditional redistricting principles. (*Id.* ¶¶ 187-98, 233-54.)

The only stated justification is that Defendants intended "to ensure a mix of urban and rural areas in each congressional district." (Defs.' Mot. at 5, 23, 26.) Defendants contend that explanation is nothing more than a pretext. (Compl. ¶¶ 128-130, 177-78, 180-81, 187-198.) At this stage, the Court cannot resolve any disputes of fact. Therefore, it must accept Plaintiffs' well-pled allegations as true.

Further, Plaintiffs allege that the Plan was enacted for partisan advantage, based on the nature of the boundary lines, lack of transparency in the redistricting process, and the actions and statements made by elected officials involved in approving the Plan. (*Id.* ¶¶ 3-5, 141-198, 200, 233-235, 254, 275.) Finally, seeking partisan advantage is neither a compelling nor a legitimate governmental interest, because it "in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government." *Harper*, 868 S.E.2d at 549.

Based on the facts alleged in the Complaint, and the Court's legal analysis above, the Court concludes that Plaintiffs have sufficiently stated a claim under the "effects-based" test for violation of Utah's Free Elections Clause.

This Court recognizes that there will always be incidental political considerations and partisan effects during redistricting, even when neutral and traditional redistricting criteria are applied. The United States Supreme Court recognizes that "[n]ot every limitation on the right to vote requires judicial intervention. Some administrative burdens on the franchise are unavoidable. But some so alter the nature of the franchise that they deny a citizen's 'inalienable right to full and effective participation in the political process.'" *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). "Because self-government is fundamentally predicated upon voters choosing winners and losers in the political marketplace, elections must reflect the voters' judgments and

not the state's." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J. concurring) ("In a free society the State is directed by political doctrine, not the other way around."). Key to the success of our government is "public confidence in the integrity of the electoral process," which ultimately "encourages citizen participation in the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). What is clear in a representative democracy, and under Utah's Free Elections clause, is that the way in which a government/legislature regulates, manages, provides for, and ultimately shapes the electoral process matters. As such, government/legislative action in this area should not be, and in this case is not, beyond constitutional challenge.

Plaintiffs should have the opportunity to present their case. Defendants' Motion to Dismiss Count One is DENIED.

b. **Plaintiffs Sufficiently State an Equal Protection Claim (Count Two)**.

Next, Defendants maintain that Plaintiffs fail to state an equal protection claim because the Congressional Plan does not impact any fundamental right or the right to vote because each voter can freely vote for the candidate of their choice. Defendants also argue the 2021 Congressional Plan doesn't create a suspect classification. And, Defendants argue, any "perceived inequality" is the "product of the imbalance in the political makeup in the state and the corresponding political outcomes that reflect that imbalance of political opinion." (Defs.' Mot. at 22; Defs.' Rep. at 21.) The Court disagrees. Based on the well-established three-part test set forth in *Gallivan v. Walker*, 2002 UT 89, ¶ 31, 54 P.3d 1069, Plaintiffs sufficiently state a claim for violation of Utah's Equal Protection Clause.

Plaintiffs' equal protection claim is based on their contention that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their equal protection rights

under the Uniform Operation of Laws Clause of the Utah Constitution. (Compl. ¶¶ 187-198, 271-82.) The Utah Constitution states that "all free governments are founded on their authority for their equal protection and benefit." Utah Const. art. I, § 2. The Uniform Operation of Laws Clause states that "[a]ll laws of a general nature shall have uniform operation." *Id.* art. I, § 24. Equal protection is inherent in the basic concept of justice. *Malan v. Lewis,* 693 P.2d 661, 670 (Utah 1984).

In comparing the federal Equal Protection Clause and Utah's equal protection guarantees (which are embodied in the Uniform Operation of Laws Clause), the Utah Supreme Court noted that both embody similar fundamental principles, generally that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Gallivan*, 2002 UT 89, ¶ 31 (internal quotation marks omitted). Utah courts have noted that Utah's constitutional protections are "in some circumstances, more rigorous than the standard applied under the federal constitution." *Id.* ¶ 33.[21] In other words, Utah's protections are "at least as exacting," *id.,* but in some cases more protective that its federal counterpart. *Blue Cross & Blue Shield of Utah v. State Tax Comm'n,* 779 P.2d 634, 637 (Utah 1989). For instance, "article I, section 24 demands more than facial uniformity; the law's *operation* must be uniform." *Gallivan*, 2002 UT 89, ¶ 37. The test applied

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[21] The *Gallivan* Court reasoned:

> Even though there is a similitude in the "fundamental principles" embodied in the federal Equal Protection Clause and the Utah uniform operation of laws provision, "our 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 Ryan v. Gold Cross Servs., Inc.,* 903 P.2d 423, 426 (Utah 1995), and "[w]e have recognized that article I, section 24 ... establishes different requirements from the federal Equal Protection Clause." *Whitmer v. City of Lindon,* 943 P.2d 226, 230 (Utah 1997).

Gallivan v. Walker, 2002 UT 89, ¶ 33.

to determine compliance with the Uniform Operation of Laws Clause remains the same in all cases; however, the level of scrutiny given to legislative enactments varies. *Blue Cross*, 779 P.2d at 637 (stating this provision operates to restrain the legislature from "classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by the law").

Under Utah law,

> A law does not operate uniformly if persons similarly situated are not treated similarly or if persons in different circumstances are treated as if their circumstances were the same. In other words, [w]hen persons are similarly situated, it is unconstitutional to single out one person or group of persons from among the larger class on the basis of a tenuous justification that has little or no merit."

Id. ¶ 37 (cleaned up). The Uniform Operation of Laws Clause "protects against discrimination within a class and guards against disparate *effects* in the application of laws." *Id.* ¶ 38 (emphasis added). The courts have a responsibility to determine "whether a classification operates uniformly on all persons similarly situated within constitutional parameters." *Id.* Utah laws must not "operate unequally, unjustly, and unfairly upon those who come within the same class." *Blackmarr v. City Ct. of Salt Lake City,* 86 Utah 541, 38 P.2d 725, 727 (1934).

Gallivan v. Walker is not a redistricting case, however, the principles espoused in the context of apportionment are no less applicable here. Notably, the *Gallivan* Court stated: "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Gallivan*, 2002 UT 89, ¶ 72 (citing *Reynolds v. Sims,* 377 U.S. 533,

565–66, 84 S. Ct. 1362 (1964) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686 (1954))). *Gallivan* also recognized that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems just." *Id.*

Plaintiffs assert that the right to vote is fundamental, and therefore heightened scrutiny applies based on the test set forth in *Gallivan*, 2002 UT 89, ¶¶ 42-43. Defendants, on the other hand, argue that because no fundamental or critical right or suspect classifications are implicated, the "rational basis" test, set forth in *State v. Angilau,* 2011 UT 3, ¶ 12, 245 P.3d 745, applies. At this stage, the Court need not decide which test applies as a matter of law because Plaintiffs have alleged facts sufficient to satisfy both standards.

Plaintiffs sufficiently allege facts to support that heightened scrutiny should apply. Plaintiffs have alleged that the 2021 Congressional Plan affects their fundamental right to vote. (Compl. ¶¶ 2, 261-262, 276-277, 301-307.) They have alleged that their right to vote has been burdened, diluted, impaired, abridged and is effectively meaningless, solely because of their political views and past votes. (*Id.*) The *Gallivan* court recognizes the right to vote as fundamental, stating:

> [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.

Id. (citing *Reynolds*, 377 U.S. at 560 (1964)).

Under the Uniform Operation of Laws analytical model set forth in *Gallivan*, at this stage, Plaintiffs must allege that (1) the challenged law creates a classification, (2) that the "classification is discriminatory" or "treats the members of the class or subclasses disparately," and that it is (3) reasonably necessary to further a legitimate legislative goal. *Id.* ¶¶ 42-43.

First, Plaintiffs allege that the 2021 Congressional Plan, like the multi-county signature requirement in *Gallivan*, operates to create classifications. (Pls.' Opp'n at 34.) Plaintiffs allege that the district boundary arbitrarily classifies voters based on partisan affiliation and geographic location. (Compl. ¶¶ 4, 207-227, 274-275.) *Gallivan* recognized that the multi-county signature requirement created two subclasses of registered voters based on where they lived, rural and urban voters. *Gallivan*, 2002 UT 89, ¶ 44. Defendants contend that party affiliation is not a "suspect classification." However, at this stage, Plaintiffs have alleged, and this Court accepts as true, that the 2021 Congressional Plan operates to classify voters by both partisan affiliation and geographic location.

Second, Plaintiffs allege that the 2021 Congressional Plan treats similarly situated voters disparately. (*Id.* ¶¶ 4, 15, 23, 29-33, 36, 130, 187-198, 271-276.) Plaintiffs allege that Utah's Republican and non-Republican voters are similarly situated for redistricting purposes because both groups are entitled to equally weighted votes. The same is true for voters living in both urban and rural settings. Plaintiffs allege that the 2021 Congressional Plan diminishes the voting strength of non-Republican and urban voters, while amplifying the strength of Republican and rural voters. (*Id.* ¶¶ 30-33, 36, 188, 265, 276.)

Third, Plaintiffs sufficiently allege that there is no "legitimate" legislative goal in seeking a partisan advantage through redistricting, which effectively pre-determines election outcomes, targets disfavored voters, dilutes their vote and shifts voting power from all the people to a subset of people. (*Id.* ¶¶ 270-82.) They also allege there is no legitimate interest in amplifying the interests of rural or suburban voters to the detriment of urban voters.[22] (*Id.* ¶ 280.) Plaintiffs

[22] The *Gallivan* Court held that the multi-county signature requirement did not further a legitimate legislative purpose because it "invidiously discriminates against urban registered voters in violation of the one person, one vote principle." *Gallivan*, 2002 UT 89, ¶ 49.

also allege that Defendants' stated justification for the placement of district boundaries, to ensure an urban/rural mix, was merely a pretext to ensure partisan advantage and dilution of non-Republican votes. (*Id.* ¶¶ 177, 187-197.) Accepting these facts and the facts in the Complaint as true, Plaintiffs have stated a claim for equal protection under the Uniform Operation of Laws Clause.

Defendants contend that no fundamental right is implicated, and that partisan affiliation is not a suspect classification. As such, they maintain the Court should apply the rational basis standard. Based on that standard, Defendants assert that "the Legislature voted on congressional district lines for the *reasonable* purpose of ensuring balance of urban and rural areas in each congressional district." (Defs.' Mot. at 26 (citing Compl. ¶ 187).). Defendants' argument goes to the merits of Plaintiffs' claim, rather than to whether they have sufficiently stated a claim. While the Complaint does reflect that proponents of the 2021 Congressional Plan represented that the district lines were "necessary" to balance urban and rural interests, it does not state that the purpose was reasonable. In addition, Defendants ignore paragraphs 188 to 198 of the Complaint, in which Plaintiffs allege that rationale was a pretext. On a motion to dismiss, this Court does not decide the merits. Rather, it assumes the well-pleaded facts in the Complaint to be true. Plaintiffs allege that Defendants' urban/rural justification is merely a pretext. For purposes of this motion, this Court assumes that fact to be true. This Court cannot, at this stage, resolve disputes of fact or make credibility determinations.

Even reviewed under the rational basis test, Plaintiffs' Complaint still states a claim. Under that standard, this Court considers: "(1) whether the classification is reasonable; (2) whether the objectives of the legislative action are legitimate, and (3) whether there is a

reasonable relationship between the classification and the legislative purpose."[23] *State v. Angilau*, 2011 UT 3, ¶ 21, 245 P.3d 745 (internal quotation marks omitted). Courts will "uphold a statute under the rational basis standard if [the statute] has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory." *Id.* ¶ 10 (internal quotation marks omitted) (second alteration in original) (emphasis added). Assuming factors one and three are established, the Complaint alleges sufficient facts to show that there is no legitimate legislative objective in either seeking partisan advantage through redistricting or in establishing districts to predetermine the outcome of elections and to ensure that incumbents continue to hold their seats.

For the reasons stated above, Plaintiffs have stated an equal protection claim under both a heightened scrutiny and rational basis standard. The Motion to Dismiss Count Two is DENIED.

c. Plaintiffs Sufficiently State a Claim for Violation of Plaintiffs' Right to Free Speech and Association (Count Three).

Defendants assert that the 2021 Congressional Plan and the congressional district boundaries established therein neither implicate nor violate Plaintiffs' Free Speech and Association rights. The Court disagrees.

Article I, Section 1 of the Utah Constitution states that "[a]ll persons have the inherent and inalienable right to . . . assemble peaceably, . . . petition for redress of grievances, [and to] communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, § 1. Article I, Section 15 states, in pertinent part, that "[n]o law shall be passed to abridge or restrain the freedom of speech." Utah Const. art. I, § 15. The Utah Supreme Court has explained that together, Sections 1 and 15 of Article I "prohibit laws which either directly

[23] The Court also notes that whether a classification is in fact "reasonable" or whether legislative objectives are "legitimate" are inherently factual determinations. At this stage, the Court cannot "find facts" nor decide if the classification is "reasonable" or if the legislative objectives are "legitimate," without a developed factual record. On a motion to dismiss, the only issue before the Court is whether Plaintiffs have alleged sufficient facts to state a claim under Utah's Uniform Operation of Laws Clause.

limit protected [free speech] rights or indirectly inhibit the exercise of those rights." *Am. Bush*, 2006 UT 40, ¶ 21 (noting drafter of Utah's Constitution borrowed heavily from other state constitutions and the United States Constitution and finds its roots in English common law). Notably, the United States Supreme Court has recognized a First Amendment interest in voting. *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)); *Burdick*, 504 U.S. at 438 (observing that "voters express their views in the voting booth.").

The role of free speech is central to our representative democracy. In *American Bush*, the Utah Supreme Court discussed the history of free speech in Utah. 2006 UT 40, ¶ 13. That court recognized that "[t]he framers of Utah's constitution saw the will of the people as the source of constitutional limitations upon our state government." *Id.* And, because "'[a]ll political power is inherent in the people,' only Utah's citizens themselves had the right to limit their own sovereign power to act through their elected officials." *Id.* ¶ 14 (citing Utah Const. art. I, § 2). "'Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.'" *Harper*, 868 S.E.2d at 545 (citing Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970)).

Plaintiffs allege that the 2021 Congressional Plan divides up the only two predominately Democratic counties in Utah. Salt Lake County is divided among the four congressional districts; Summit County is divided among two. Fifteen municipalities are divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities are divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Plaintiffs allege free

speech and association rights have in fact been burdened by these new boundaries. Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty to three hundred miles away. (*Id.* ¶¶ 242-251.) The proximity between voters discourages, burdens, or effectively impacts free speech and association. Plaintiffs allege that these predominately democratic communities were intentionally divided or "cracked" solely because of their political views and past votes. (*Id.* ¶¶ 192, 275.) The effect of the "cracking" is that their non-Republican views are subordinated, votes are diluted, voices are silenced, and Republican-advantage and control is locked in in all four congressional districts for the next decade. (*Id.* ¶¶ 36, 275, 293-94.)

Plaintiffs allege that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their free speech and association protections. They allege the 2021 Congressional Plan is both discriminatory and retaliatory and based solely on their protected political views and past votes. (Compl. ¶ 3-4, 36, 205-207. 209, 283-97.) Plaintiffs allege that the 2021 Congressional Plan burdens free speech and association in multiple ways. Specifically, it "restrains and mutes Plaintiffs' ability to express their viewpoints," "abridges the ability of voters with disfavored views to effectively associate with other people holding similar viewpoints," "impairs Plaintiffs' ability to recruit volunteers, secure contributions, and energize other voters to support Plaintiffs' expressed political views and associations," "retaliates against Plaintiffs for exercising political speech that Defendants disfavor," "prevent[s] [voters] from being able to associate and elect their preferred candidates who share their political views," divides Plaintiffs "to make their voices too diluted to be heard and guarantee they are not represented in any meaningful way because of

their disfavored views," and dilutes non-Republican votes. (*See generally* Compl., Compl. ¶¶ 289-294.)

Defendants assert that the Free Speech and Association Clauses do not apply to the redistricting process. (Defs.' Mot. at 26.) Defendants contend that the placement of a congressional district boundary "does not in any way restrict an individual's speech or impair an individual's ability to communicate," citing two federal district court cases, *Radogno v. Ill. State Bd. Of Elections*, No. 11-CV-04884, 2011 WL 5025251 (N.D. Ill. Oct. 21, 2011) and *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 487, but without any legal analysis. (Defs.' Reply at 26-27.)

In *Radogno*, the federal district court rejected Plaintiffs' First Amendment claims, holding that such rights were not burdened by the redistricting plan at issue. Specifically, the *Radogno* Court reasoned:

> Plaintiffs are every bit as free under the new redistricting plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression. Plaintiffs' freedom of expression is simply not burdened by the redistricting plan. It may very well be that Plaintiffs' ability to successfully elect their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights.

Radogno, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011).[24] *Radogno*'s First Amendment analysis of partisan political gerrymandering, under federal law, makes sense and is persuasive generally. However, that rationale may not apply to every case or to every fact scenario. In addition, it is not binding on this Court.

[24] Notably, the *Radogno* court did not dismiss outright plaintiffs' equal protection claim under the Fourteenth Amendment, but instead granted plaintiffs' leave to amend to plead a "workable test" or "reliable standard" to evaluate such claim. *Radogno*, 2011 WL 5025251, at *6 (discussing generally partisan gerrymandering cases under federal law, noting that some have reached the conclusion that they are justiciable, but not solvable).

In *Johnson v. Wis. Elections Comm'n*, the Wisconsin Supreme Court noted that in *Rucho v. Common Cause*, 204 L. Ed. 2d 931, 139 S. Ct. 2484, 2499–500 (2019), "[t]he United States Supreme Court recently declared there are no legal standards by which judges may decide whether maps are politically 'fair.'" *Johnson*, 2021 WI 87, ¶ 3, 399 Wis. 2d 623, 631. The *Johnson* court agreed that "fairness" is not a judicially manageable standard and that "deciding what constitutes 'fair' partisan divide . . . would encroach on the constitutional prerogatives of the political branches." *Id.* ¶ 45. The court emphasized that it would not decide whether the maps were fair but would fulfill its judicial role of "declaring what the law is and affording the parties a remedy for its violation." Like the *Johnson* court, this Court is not asserting that it has a role in deciding "fairness." And Plaintiffs here are not arguing that the 2021 Congressional Plan is unfair. They assert that it violates the Utah Constitution, and, as previously emphasized, the Court does not hesitate to engage in constitutional review.

Defendants also assert that the Free Speech and Association clauses of the Utah Constitution do not protect the redistricting process because "the framers of our [Utah] constitution . . . envisioned a limited freedom of speech." *Am. Bush*, 2006 UT 40, ¶ 42. The *American Bush* case, however, has only minimal relevance, if any, to this specific issue. *American Bush* did not involve redistricting, allegations of gerrymandering or voting rights. Instead, the *American Bush* court characterized the right to free speech as "limited" while discussing whether obscenity—in that case, nude dancing—was protected speech. *Am. Bush*, 2006 UT 40, ¶¶ 31-58. Consequently, the holding that the Utah Constitution's free speech protections do not extend to obscenity has little, if any, relevance to the issues at bar. Notably, unlike obscenity, voting is a fundamental right, and its exercise is a form of protected speech.

Laws v. Grayeyes, 2021 UT 59, ¶ 61 (stating "the right to vote is sacrosanct"); *Doe v. Reed*, 561 U.S. at 224 (recognizing a First Amendment interest in voting).

Defendants also assert there can be no First Amendment violation because Plaintiffs have no right to political success. *See Cook v. Bell*, 2014 UT 46, ¶ 34, 344 P.3d 634 (addressing whether the Legislature's limits on the right to initiative imposed severe restrictions on free speech and association). The Court does agree that "First Amendment jurisprudence . . . does not guarantee unlimited participation in political activity, nor does it establish a right to political success." *Id.* ¶ 57. However, it does protect "individuals from regulations that directly discourage or prohibit political expression." *Id.*

This Court notes there is a distinction between incidental political impacts that flow from neutral government action and government action aimed at discouraging, burdening, or prohibiting speech and association in order to secure an electoral advantage. Where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward," courts cannot and should not intervene in a neutrally administered electoral system. *New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S. Ct. 791 (rejecting argument that "one-party rule" demands application of First Amendment to ensure competition or a "fair shot at party endorsement"). But when a state takes steps, under either election laws or by redistricting, to grant its preferred party a durable monopoly, this deviation from neutrality undermines the competitive mechanism that undergirds the democratic process, and it burdens a voters' right to participate in a fair election. *See Williams v. Rhodes*, 393 U.S. 23, 31-32, 89 S. Ct. 5, 10-11 (1968) (holding Ohio's ballot-access laws, which favored the long-established Republican and Democratic parties, placed an unequal burden on the right to vote

and the right to associate to form a new political party).[25] "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC,* 572 U.S. 185, 191, 134 S. Ct. 1434, 1444 (2014). As such, the government cannot and should not "restrict political participation of some in order to enhance the relative influence of others." *Id.*

In *Harper v. Hall,* the North Carolina Supreme Court recognized that there is a cognizable claim for violation of free speech and association rights based on partisan gerrymandering. *Harper v. Hall*, 868 S.E.2d 499, 546 (N.C. 2022). The North Carolina Supreme Court stated:

> When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny."

Id. (holding congressional map subject to strict scrutiny and requiring it to be "narrowly tailored to advance a compelling governmental interest"). This practice "distorts the expression of the people's will." *Id.* Under these circumstances, "[t]he diminution or dilution of voting power based of partisan affiliation . . . suffices to show a burden on that voter's speech and associational rights." *Id.* ¶ 161. This Court is persuaded that partisan gerrymandering that effectively entrenches a state's preferred party in office discriminates on the basis of viewpoint dilutes the

[25] In *Williams,* the State of Ohio asserted "that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . to choose a President and Vice President." *Williams*, 393 U.S. at 28–29. While noting that there "can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors," the Court stated: "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. *Id.*

non-favored party's vote, burdens / impairs the citizens' rights to exercise a meaningful vote and to associate. *See Vieth*, 541 U.S. at 314 (Kennedy, J, concurring); *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658.

Plaintiffs assert that heightened scrutiny applies to the free speech and association claims. Plaintiffs have also cited several cases in support of that assertion. *See, e.g., Reed v. Town of Gilbert*, Ariz., 135 S. Ct 2218, 2227 (2015); *Harper v. Hall*, 868 S.E.2d at 546. In their Reply, Defendants do not challenge that contention or seek to distinguish these cases with respect to this issue. Thus, in the absence of any contrary argument or authority, the Court assumes, for purposes of analyzing the motion at bar, that strict scrutiny applies to the free speech and association claims.[26] Based on the factual allegations in the Complaint, which this Court must accept as true, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan violates their rights to free speech and association because it discourages and burdens political expression, is discriminatory and retaliatory based on disfavored political views and past voting history, and it dilutes Plaintiffs' voting power. (*See generally* Compl.; Compl. ¶¶ 288-294.) Plaintiffs also allege that Defendants have "cracked" and "packed" the congressional voting districts to intentionally dilute the voting power of those who have disfavored views, namely Democrats.

Plaintiffs also have sufficiently alleged that there is no compelling or legitimate government interest in drawing congressional district boundaries to give Republicans an electoral advantage, to the detriment of non-Republican voters' right to free speech and association. (*Id.* ¶ 295.) Plaintiffs also allege the 2021 Congressional Plan is not narrowly

[26] By applying strict scrutiny for purposes of this Motion, the Court is not necessarily ruling that Plaintiffs' assertion is correct. But given the briefing and accepting the factual allegations in the Complaint as true, including that the Legislature intentionally drawing the maps to punish Plaintiffs for expressing disfavored views, the Court adopts this standard solely for the purpose of determining if Plaintiffs have stated a viable claim for relief.

tailored to serve any legitimate state interest. (*Id.* ¶ 296.) Plaintiffs have sufficiently stated a claim for violation of their Free Speech and Association rights.

For the reasons stated above, Defendants' Motion to Dismiss Count Three is DENIED.

d. Plaintiffs Sufficiently State a Right to Vote Claim (Count Four).

Defendants assert Plaintiffs fail to state a claim for violation of the Right to Vote Clause. Defendants also argue, without citation to any legal authority, that the Right to Vote Clause was intended to deal solely with voter qualifications and that there is no basis in Utah law to interpret the provision to guarantee anything other than the right to physically cast a ballot. Defendants also argue that the 2021 Congressional Plan does not prevent Plaintiffs or any other qualified Utah citizens from voting, therefore there can be no constitutional violation. (Defs.' Mot. at 27-28; Defs.' Rep. at 25-26.) The Court disagrees.

The Right to Vote Clause provides that "[*e*]*very citizen* of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, *shall be entitled to vote in the election.*" Utah Const. art. IV, § 2 (emphasis added).[27] Utah law unequivocally acknowledges that the right to vote is fundamental to our democracy and our representative form of government. *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).[28] In fact, it is said to be "more precious in a free country" than any other right. *Gallivan*, 2002 UT 89, ¶ 24 (quoting *Reynolds*, 377 U.S. at 560). If the right "of having a voice in the election of those who

[27] The Court notes that neither party presented any arguments regarding the plain meaning of this clause, historical evidence regarding the drafting or adoption of this clause or discussed any particular test to be applied.

[28] "The right to vote and to actively participate in its processes is among the most precious of the privileges for which our democratic form of government was established. The history of the struggle of freedom-loving men to obtain and to maintain such rights is so well known that it is not necessary to dwell thereon. But we re-affirm the desirability and the importance, not only of permitting citizens to vote but of encouraging them to do so." *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).

make the laws under which, as good citizens, we must live," is undermined, "[o]ther rights, even the most basic, are illusory. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right." *Id.*

Defendants argue that the Right to Vote Clause deals solely with voter qualifications, implying that it only applies when voter qualifications are at issue. While this clause includes qualifications required to exercise the right, the right to vote is nonetheless expressly guaranteed.

Defendants also assert that this clause guarantees only the right to physically cast a vote. Defendants cite no authority to support such a limited interpretation of this specific clause. To the contrary, when interpreting constitutional provisions, the Utah Supreme Court has stated that individual constitutional provisions

> cannot properly be regarded as something isolated and absolute but must be considered in the light of its background and the purpose it was designed to serve; and in relation to other fundamental rights of citizens set forth in the entire Constitution which are essential to the proper functioning of our democratic from of government. One of the principal merits of our system of law and justice is that it does not function by casting reason aside and clinging slavishly to a literal application of one single provision of law to the exclusion of all others. Its policy is rather to follow the path of reason in order to avoid arbitrary and unjust results and to give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions.

Shields v. Toronto, 16 Utah 2d 61, 63, 395 P.2d 829, 830 (1964) (interpreting Article VI, Section 7 of the Utah Constitution in reference to the right to vote).[29] In interpreting this provision, the Court should consider the entire Utah Constitution and its purpose, including the Free Elections Clause, the Equal Protection Clause, the Free Speech and Association Clauses and the long line

[29] Notably, the *Shields* Court recognized the historical and "continuing expansion of the right of suffrage in this country." *Shields v. Toronto*, 16 Utah 2d 61, 66 n. 12, 395 P.2d 829, 833 n. 12 (1964). While discussing the right to vote in the context of voting "freely for the candidate of one's choice," the Court stated that voting "is of the essence of a democratic society, and any restrictions on that right strike at the essence of a representative government." *Id.* Every citizen should have a "right to a vote free of arbitrary impairment by state action." *Id.*

of cases generally discussing the "right to vote." The plane language of the Right to Vote clause guarantees the right. But, read in light of the entire Utah Constitution, the right to vote clearly guarantees more than the physical right to cast a ballot.

Utah law has recognized that the right to vote must be "meaningful." *Shields*, 395 P.2d at 832-33 (explaining "[t]he foundation and structure which give [our democratic system of government] life depend upon participation of the citizenry in all aspects of its operation."). The right must not be "unnecessarily abridged" or "diluted." *Gallivan*, 2002 UT 89, ¶ 72 (stating "'[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.'" (quoting *Reynolds*, 377 U.S. at 565-66, 84 S.Ct.). And the right to vote "cannot be abridged, impaired, or taken away, even by an act of the Legislature." *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 237-38 (Utah 1904). The goal of an election "is to ascertain the popular will, and not to thwart it," and "aid" in securing "a fair expression at the polls." *Id.*[30]

Here, Plaintiffs allege that the Legislature drew the 2021 Congressional Map in a way to render Plaintiffs' votes meaningless. While they still can engage in the act of voting, Plaintiffs' votes no longer have any effect. Specifically, Plaintiffs allege that the 2021 Congressional Plan "achieves this extreme partisan advantage for Republicans primarily by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to eliminate the strength of their

[30] There is only one Utah case specifically addressing the Right to Vote Clause. *See Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985). In *Dodge*, a prison inmate challenged a law requiring him to vote in the county in which he resided prior to incarceration rather than in the county in which he was incarcerated. Plaintiff alleged that his right to vote under the Right to Vote Clause was in effect denied. *Id.* at 272-73. In analyzing that claim, the Utah Supreme Court stated, "Dodge made no contention that his right to vote was improperly burdened, conditioned or diluted." *Id.* at 273. The implication is that a claim under the right to vote clause may include an allegation that the right was "improperly burdened, conditioned or diluted."

voting power." (Compl. ¶ 207.) The result is that the 2021 Congressional Plan "draw[s] district lines to predetermine winners and losers." (Compl. ¶ 306.) Their disfavored vote is meaningless, diluted, impaired and infringed due to the intentional partisan gerrymandering. (*Id.* ¶ 304-06.) In addition, because the election outcomes are now predetermined for the next ten years, the true public will cannot be ascertained and is effectively distorted. (*Id.* ¶ 305-09.) Plaintiffs also allege that this impairment serves no legitimate public interest.[31] (*Id.*) Assuming these facts in the Complaint to be true, the Court concludes that Plaintiffs have properly stated a claim under the Right to Vote Clause.

Defendants' Motion to Dismiss Count Four is therefore DENIED.

IV. Plaintiffs Fail to State a Claim Under Count Five the "Unauthorized Repeal of Proposition 4."

Finally, Defendants assert that the fifth claim should be dismissed because the Legislature's amendment or repeal of Proposition 4 does not violate the Inherent Political Powers and Initiative Clauses of Utah Constitution. The Court agrees.

Plaintiffs' fifth claim alleges that when the Legislature replaced the citizen-enacted Proposition 4 with SB 200, the Legislature infringed on the people's inherent political powers and initiative rights under the Utah Constitution. (Compl. ¶¶ 315-17). The Initiative Clause of the Utah Constitution states, in relevant part: "The legal voters of the state of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, 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). The Inherent Political Powers Clause provides that "All political power is inherent

[31] The Court notes that neither party has addressed the appropriate standard to be applied in this case, i.e., strict scrutiny or rational basis, for Plaintiffs' Right to Vote claim. However, reviewing Plaintiffs' Complaint, the Court concludes that Plaintiff has sufficiently pled a claim under either standard.

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." Utah Const. art. I, § 2. Plaintiffs argue that the Legislature violated these clauses by passing SB 200, effectively repealing Proposition 4, which had been put in place via citizen initiative.

The Utah Supreme Court has explained that "[u]nder [Article I, Section 2], 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 v. Lehi City*, 2012 UT 2, ¶ 21, 269 P.3d 141. Under this authority, "the people of Utah divided their political power," vesting

> "The Legislative power of the State" in two bodies: (a) "the Legislature of the State of Utah," and (b) "the people of the State of Utah as provided in Subsection (2)." [Utah Const.] art. VI, § 1(1). On its face, article VI recognizes a single, undifferentiated "legislative power," vested both in the people and in the legislature. Nothing in the text or structure of article VI suggests any difference in the power vested simultaneously in the "Legislature" and "the people." *The initiative power of the people is thus parallel and coextensive with the power of the legislature*. This interpretation is reinforced by the history of the direct-democracy movement, by constitutional debates in states with constitutional provisions substantially similar to Utah's article VI, and by early judicial interpretations of those provisions.

Id. ¶ 22 (emphasis added). In further explaining this shared legislative power, the Utah Supreme Court has stated, "[t]he power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share equal dignity." *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069.

The Utah Constitution and Utah law unequivocally recognizes the importance of its citizens' right to initiate legislation to alter or reform their government. Utah Const. art. I, § 2; *Gallivan*, 2002 UT 89, ¶ 23; *Utahns For Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 2007 UT 97, ¶ 10. This is clear. The Constitution, however, does not restrict or limit, in any way, the Legislature's ability to amend or repeal citizen-initiated laws after they become effective.

Through their coequal power, both the Legislature and the people can enact, amend, and repeal legislation. The people can repeal legislation enacted by the Legislature through their referendum power, with some limitation. *See* Utah Const. art. VI, § (2)(a)(1)(B). The Utah Constitution, caselaw, and historical practice, however, shows that the Legislature can amend and repeal legislation enacted by citizen initiative, without limitation.

When we interpret the Utah Constitution, the starting point is the text itself. *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 19, 144 P.3d 1109 (internal quotation marks omitted). In evaluating legislative authority, the provisions in the Utah Constitution are construed as "limitations, rather than grants of power." *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955); *Shurtleff*, 2006 UT 51, ¶ 18 ("The Utah Constitution is not one of grant, but one of limitation."). Article VI of the Utah Constitution vests legislative authority in both the Legislature and the people. *See* Utah Const. art. VI, § 1(1). Notably, the text of article VI broadly confers legislative authority on the Legislature without any express limitation on the Legislature's ability to pass or repeal laws. *See id.* art. VI, § 1(a).

In contrast, the ability of the people to enact or repeal legislation, however, is specifically limited by the text of the Constitution.[32] *See id.* art. VI, § 1(b) (stating that "Legislative power" is "vested in ... the people of the State of Utah as provided in Subsection (2)"). In fact, subsection 2 of article VI explicitly restricts the people's referendum power—or the ability to repeal laws

[32] The citizens' right to legislate through the initiative process is also limited by the plain language of the Utah Constitution. *Gallivan v. Walker*, 2002 UT 89, ¶ 172, 54 P.3d 1069, 1118. Article VI, section (2)(a)(i)(A) states: "The legal voters of the State of Utah, in the numbers, *under the conditions, in the manner, and within the time provided by statute*, may initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, *as provided by statute.*" Utah Const. art. VI, § 2(a)(i)(A). Notably, it is the Legislature that establishes the statutory requirements to initiate, submit and vote on any citizen initiative. *See Sevier Power Co., LLC v. Bd. of Sevier Cty. Comm'rs*, 2008 UT 72, ¶ 10, 196 P.3d 583.

enacted by the Legislature—to laws that were passed with less than a 2/3 majority vote by the Legislature. *See id.* art. VI, § 2(a)(1)(B).

Given 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. Reading the Utah Constitution to limit the Legislature's authority to amend or repeal laws originally enacted via citizen initiative would require the Court to read something into the Constitution that is simply not there.[33] The Court declines to do so.

Moreover, Utah law also clearly indicates that the Legislature has power to amend and repeal laws that are passed via citizen initiative.[34] In explaining that the legislative powers of the Legislature and the people are coequal or "parallel," the Utah Supreme Court approvingly quoted the Oregon Supreme Court, which stated that "'[l]aws proposed and enacted by the people under the initiative . . . are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will.'" *Carter*, 2012 UT 2, ¶ 27 (quoting *Kadderly v.*

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[33] The Court further notes that Plaintiffs have not provided any facts from the historical record to suggest that such a restriction was intended. Rather, the historical practice and the caselaw indicate that such a restriction was not intended. In contrast to the Utah Constitution, the constitutions of ten other states expressly restrict their respective legislatures' authority to amend or repeal the statutes/law enacted from a successful citizen initiative. *See* Alaska (Alaska Const. art. XI, § 6); Arizona (Ariz. Const. art. IV, pt. 1, § 1(6)(B)-(C)); Arkansas (Ark. Const. art. V, § 1); California (Cal. Const. art. II, § 10); Michigan (Mich. Const. art. II, § 9; art. XII, § 2); Nebraska (Neb. Const. art. III, § 2); Nevada (Nev. Const. art. XIX, §§ 1-2); North Dakota (N.D. Const. art. III, § 8); Washington (Wash. Const. art. II, § 1); and Wyoming (Wyo. Const. art. III, § 52). Given the lack of any textual limitation, the history of the Legislature repealing citizen initiatives, and examples of other state constitutions that do contain express limits on their respective legislature's ability to make changes to citizen-initiated laws, it would clearly be improper for the Court to read such a limitation into Utah's Constitution.

[34] Utah law also specifically authorizes the Legislature to amend citizen-initiated or approved laws. Under Utah Code Ann. Section 20A-7-212(3)(b), "[t]he Legislature may amend any initiative approved by the people at any legislative session" and Subsection 20A-7-311(5)(b) provides that "[t]he Legislature may amend any laws approved by the people at any legislative session after the people approve the law." The Court agrees with Defendants that adopting Plaintiffs' argument *could* create certain practical challenges to the maintenance of the Utah Code in that the Legislature would be precluded from correcting typographical errors and making any changes, substantive or otherwise. Other than the authority provided in the above-cited statutes, there is no other process or procedure to manage changes to citizen-initiated laws.

City of Portland, 44 Or. 118, 74 P. 710, 720 (1903). Thus, the Utah Supreme Court has seemingly recognized that the Legislature may repeal initiative-enacted law.

Likewise, the Legislature's amendment or effective repeal of Proposition 4 / Title 20A, Chapter 19, Utah Independent Redistricting Commissions Standards Act is in line with historical practice. In 2018, Governor Herbert called a special session of the Utah Legislature to address citizen initiative Proposition 2, the Utah Medical Cannabis Act, the day before it was set to go into effect. *Grant v. Herbert*, 2019 UT 42, ¶ 5, 449 P.3d 122. The Legislature heavily amended the statute, changing many key aspects of the law. *Id.* In response, voters attempted to place the amended statute on the ballot through referendum but were not able to do so because the amendment had passed by a two-thirds vote in the Legislature, making it exempt from referendum. *Id.* ¶ 7. The Utah Supreme Court ultimately upheld Governor Herbert's decision to call the special legislative session which amended Proposition 2. *Id.* ¶¶ 21-24.

In view of the foregoing, including the text of the Utah Constitution, statutory language, the caselaw, and historical practice, the Legislature's exercise of its coequal legislative authority to repeal citizen initiatives does not violate the Citizen Initiative or Inherent Powers Clauses of the Utah Constitution. Therefore, even accepting the factual allegations as true, the Legislature did not act unconstitutionally by either substantially amending or effectively repealing Proposition 4. Plaintiffs' Fifth cause of action, therefore, does not state a valid claim for relief under Utah law. Accordingly, the Court GRANTS Defendants' Motion to Dismiss with respect to Count Five in the Complaint.

CONCLUSION

For the reasons stated above:

(1) The Court DENIES Defendants' Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

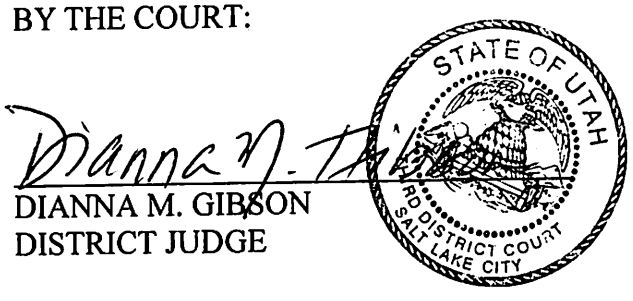
(2) The Court DENIES Defendants' Motion to Dismiss certain Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator J. Stuart Adams.

(3) The Court DENIES Defendants' Motion to Dismiss Count One (Free Elections Clause), Count Two (Equal Protection Rights), Count Three (Free Speech and Association Rights), and Count Four (Affirmative Right to Vote) of Plaintiffs' Complaint.

(4) The Court GRANTS Defendants' Motion as to Plaintiffs' Count Five. Therefore, Count Five, "Unauthorized Repeal of Proposition 4 in Violation of Utah Constitution's Citizen Lawmaking Authority to Alter or Reform Government" is DISMISSED, with prejudice.

DATED November 22, 2022.

BY THE COURT:



DIANNA M. GIBSON
DISTRICT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 220901712 by the method and on the date specified.

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11/22/2022 /s/ KAYLA DRAKE

Date: _____ _____

Signature