No. 20220991-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

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

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

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

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Parties below not parties to the appeal

Plaintiff Dale Cox (voluntarily dismissed)

TABLE OF CONTENTS

ADDENDA
(Separately bound in one paper volume)

(pdf Addendum Part 1 of 3)

A *President's Message*, Deseret Evening News (Dec. 9, 1891)

B *The Party of Gerrymanders*, Provo Daily Enquirer (Aug. 16, 1892)

C *Local News*, *Salt Lake Herald-Republican* (Aug. 2, 1892)

D *Gerrymandering*, Salt Lake Herald-Republican (Dec. 24, 1892)

E *The Legislature*, Deseret Evening News (March 9, 1886)

(pdf Addendum Part 2 of 3)

F *Murray's Message*, Salt Lake Herald-Republican (Jan. 16, 1884)

G *The Utah Apportionment*, Salt Lake Tribune (March 11, 1891)

H Edmunds Act, 22 Stat. 30b (1882)

I Edmunds-Tucker Act, 24 Stat. 635 (1887)

J Annual report of Utah Commission (1887)

K Memorial of the Constitutional Convention of Utah (1887)

L *Hon. John T. Craine*, Salt Lake Tribune (Apr. 15, 1894)

M *The Utah Gerrymander*, Salt Lake Herald-Republican (Apr. 2, 1892)

N *Is Ready for Statehood*, Salt Lake Herald-Republican (Dec. 25, 1892)

O *How it Now Stands*, Provo Daily Enquirer (Jan. 1, 1895)

(pdf Addendum Part 3 of 3)

P *The New Constitution*, Salt Lake Herald-Republican (Aug. 26, 1894)

Q *The Way to Win Success*, Ogden Daily (Jan. 2, 1895)

R *The Constitutional Convention*, Salt Lake Herald-Republican (March 4, 1895)

S *The Political Arena*, Salt Lake Herald-Republican (July 9, 1895)

T *Governor Vetoes One Bill*, Salt Lake Tribune (Nov. 11, 1981)

U O. N. Malmquist, *Revamp Law Flunks First Test in Court*, Salt Lake Tribune (Aug. 6, 1955)

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Partisan gerrymandering is repugnant to democracy. It offends a fundamental principle that Utahns cherish: we the people are free to express our political viewpoints and choose our representatives without fear that the government will respond by effectively silencing our voices and votes.

In 2021, the Utah Legislature enacted one of the most extreme partisan gerrymandered congressional maps in the country—and the most lopsided in Utah's history. It cynically divided voters in Salt Lake City and County across multiple districts, using sophisticated technology to "crack" this cohesive community and effectively nullify their votes. No legitimate policy justification supports this perversion of our electoral process.

Unwilling to face these facts, the Legislature instead asks this Court to look the other way; to abandon its obligation to enforce the Constitution and permit Utahns to be subjected to distorted elections, discrimination, and retaliation for their political views. By doing so, the Legislature seeks to arrogate unchecked power to choose the voters' representatives without this Court enforcing constitutional limitations.

This is wrong. As this Court has explained, its judicial power "may have significant political overtones" but "that does not mean [the judiciary] can simply 'shirk' those roles by announcing [issues] nonjusticiable." *Matter of Childers-Gray,*

2021 UT 13, ¶ 67, 487 P.3d 96 (citation omitted). This Court has never shirked its duty to adjudicate a constitutional claim before, and Utahns cannot afford for it to start now.

STATEMENT OF THE ISSUES

1. Are partisan gerrymandering claims justiciable under the Utah Constitution?
2. Is the legislative redistricting responsibility categorically shielded from judicial review under the separation-of-powers doctrine?
3. Does extreme partisan gerrymandering violate fundamental individual rights protected in the Utah Constitution?

Standard of Review: This Court reviews the denial of a motion to dismiss for correctness. *Castro v. Lemus*, 2019 UT 71, ¶ 11, 456 P.3d 750 (citation omitted). It must "assum[e] the truth of the allegations in the complaint and draw[] all reasonable inferences" for Plaintiffs. *Id.*

Preservation: These issues are preserved. [R.276-329.]

STATEMENT OF THE CASE

I. Legal and Factual Background

Partisan gerrymandering is a tool politicians use to predetermine election results through "the devaluation of one citizen's vote as compared to others." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting). They do so "to subordinate adherents of one political party and entrench a rival party in power" in a manner that is "incompatible with democratic principles." *Ariz. State*

Legislature v. Ariz. Indep. Redistricting Comm'n (AIRC), 576 U.S. 787, 791 (2015) (quotations and alterations omitted).

A. U.S. founding history

Although partisan gerrymanders have occurred at various times in history, the practice has been regarded since at least the eighteenth century as "one of the most flagrant evils and scandals of the time, involving notorious wrong to the people and open disgrace to republican institutions." *League of Women Voters v. Commonwealth (LWVPA)*, 178 A.3d 737, 815 (Pa. 2018); *accord Rucho*, 139 S. Ct. at 2511-13 (Kagan, J., dissenting).

The Framers of the U.S. Constitution were wary of the "mischiefs of faction." Federalist No. 10, at 81 (Rossiter ed., 1961). Gerrymandering is the epitome of faction run amok, using political distortions to "enable the representatives of the people to substitute their will." *Id.* No. 78, at 467; 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution, 257 (Elliot ed. 1891) [hereinafter Debates]. The Framers feared "manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *AIRC*, 576 U.S. at 815; *Wesberry v. Sanders*, 376 U.S. 1, 7-17 (1964) (similar). Alexander Hamilton decried "the destruction of the right of free election" in England and explained that parliamentary elections "stigmatized with the appellation of rotten boroughs"—the historical cognate of

gerrymandering—were "the true source of the corruption which has so long excited the severe animadversion of zealous politicians and patriots." 2 Debates 264.

The perceived antidote was two-fold. First, the Framers created structures designed to ensure congressional representatives have "an immediate dependence on ... the people." Federalist No. 52, at 327; *see also id.* Nos. 37, 39, 56. Second, they sought robust speech rights "to check [the] excesses of the majority." *Id.* No. 70, at 427; *see also* 4 Annals of Cong. 934 (1794); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 254-56, 259 (1961).

B. Utah founding history

In the years before Utah's founding, anti-gerrymandering agitation hit an inflection point after the 1890 redistricting cycle. President Benjamin Harrison's 1891 Annual Address, widely broadcast in Utah, denounced "these gerrymanders" as "evil" and "political robbery," calling for an end to the practice to "effectually preserve the right of the people to a free and equal representation." [Add. A.]

Many state courts heeded this call by ruling unconstitutional gerrymanders that drew districts of unequal size or with boundaries designed for partisan ends. The Wisconsin Supreme Court, for example, held that gerrymandering violated the state constitution's right to "equal representation in the legislature" and core

anti-entrenchment principles, which the court was empowered to enforce because "[i]f the remedy for these great public wrongs cannot be found in this court, it exists nowhere." *Attorney Gen. v. Cunningham*, 51 N.W. 724, 729-30 (Wis. 1892); *see also id.* 735-37 (Pinney, J., concurring). Supreme Courts in Michigan and Indiana came to the same conclusion. *Giddings v. Blacker*, 52 N.W. 944, 946-47 (Mich. 1892); *id.* at 947-48 (Morse, C.J., concurring); *Parker v. Powell*, 32 N.E. 836, 842 (Ind. 1892); *id.* at 846 (Elliot, J., concurring). Numerous other state courts followed suit to prevent unconstitutionally malapportioned plans (*i.e.*, plans containing districts with impermissible population variations), rejecting arguments against their justiciability.[1]

The Utah territorial press widely reported these decisions, hailing the judiciary's role in protecting constitutional rights against gerrymanders. [Add. B; Add. C.] The *Salt Lake Herald-Republican*, for example, decried gerrymandering as "all wrong no matter which party is to blame" and advocated that "courts can be

[1] *See, e.g.*, *Ragland v. Anderson*, 100 S.W. 865, 866-67 (Ky. 1907); *Donovan v. Apportionment Comm'rs*, 113 N.E. 740, 741 (Mass. 1916); *Morris v. Wrightson*, 28 A. 56, 63-65 (N.J. 1893); *Harmison v. Ballot Comm'rs*, 31 S.E. 394, 395 (W. Va. 1898); *Ballentine v. Willey*, 31 P. 994, 997 (Idaho 1893); *State v. Moorhead*, 156 N.W. 1067, 1068 (Neb. 1916); *accord State v. Weatherill*, 147 N.W. 105, 107 (Minn. 1914) (accepting jurisdiction but declining to hold a map unconstitutional in part because there was "no evidence ... that political consideration played any part in the enactment of the law"); *People v. Rice*, 31 N.E. 921, 930 (N.Y. 1892) (similar).

appealed to, as in the Indiana case, with an assurance of the right being vindicated, the evil receives an efficient check." [Add D.]

In Utah, territorial Governor Eli Murray twice vetoed legislative reapportionment plans in the years leading up to Utah's statehood in 1884 and 1886, including because the map violated "the fundamental principles of fair apportionment." [Add. E; *see also* Add. F; Add. G.] Congress then altered the process for redistricting in Utah, creating the new Utah Commission to administer the territory's elections. [Add. H at 32; Add. I at 639; Add. J at 15-18, 26-28.] Starting in 1887, the Utah Commission's purview included redistricting, which by law had to provide "for an equal representation of the people." [Add. I at 639.]

Criticism of the Utah Commission's unaccountable control over Utah's elections generally, and redistricting specifically, was widespread. *See, e.g.*, Jean Bickmore White, Charter for Statehood 34-35, 38 (1996); [Add. K at 1-2.] Numerous Utah newspapers, as well as prominent figures—including the former congressional delegate—condemned the Commission's 1890 redistricting plan as an unlawful partisan gerrymander. [Add. D; Add. L; Add. M.] And several publications tied their advocacy for statehood to the need to stop gerrymandering and return Utah's elections to popular control. [Add. N; Add. O.]

Thus, by 1895, there were two key goals for Utah's Constitutional Convention that are pertinent here: (1) gain statehood by assuring Congress that

Utah would sufficiently protect the political interests of minority groups; and (2) rebuke the Utah Commission's unaccountable control of the electoral process that favored some voters over others. *See, e.g.*, White, *supra*, at 34-35, 38, 43, 47, 54.

At the same time, the "fear and distrust" of state legislative excesses that pervaded the Progressive Era informed Utah's constitutional design. Bruce Hafen, *The Legislative Branch in Utah*, 2 Utah L. Rev. 416, 417-19 & n.15 (1966); *accord* White, *supra*, at 8-9, 102. For these reasons, Utahns sought equality and nonpartisanship at the 1895 Convention, including the protection for "honest districting." [Add. P; *see also* Add. Q; Add. R.]

C. Reapportionment revolution in Utah

Commentators viewed Utah's first state legislative maps as nonpartisan. [Add. S.] But over subsequent decades, the Legislature repeatedly failed to enact reapportionment legislation at all, resisting population shifts in the State. Frank Jonas & Brad Hainsworth, *Utah*, *in* Impact of Reapportionment in the Thirteen Western States 264-67 (Eleanore Bushnell ed., 1970). Because "the rural areas were reluctant to give up any control" over the Legislature, the failure to reapportion started an enduring urban-rural conflict when it comes to redistricting. *Id.* at 266-67; *accord* Hafen, *supra*, at 420-21; *Petuskey v. Clyde* (*Petuskey I*), 234 F. Supp. 960, 968 (D. Utah 1964) (three-judge court) (Ritter, J., concurring in part dissenting in part).

Eventually, the Legislature decided to refer a reapportionment act to Utahns for approval, but voters resoundingly rejected the proposal because of its significant representation inequities. Jonas & Hainsworth, *supra*, at 269. Utah's state legislative redistricting was later conducted through bipartisan citizen commissions for several cycles, which drew the interior lines after the Legislature allocated seats by county. *Id.* at 271.

When the Legislature enacted an egregiously malapportioned plan in 1955, some of the Salt Lake County citizen commissioners challenged the formula used to determine the number of senators from each district based on a now-defunct provision of the Utah Constitution. *Id.* at 271; *Parkinson v. Watson*, 291 P.2d 400, 401 (Utah 1955). This Court exercised jurisdiction over the dispute but ultimately rejected the challenge on the merits. *Parkinson*, 291 P.2d at 409.

In 1961, Governor George Clyde vetoed a proposed map that "he did not think ... was constitutional." Jonas & Hainsworth, *supra*, at 274.

Later in the 1960s, the federal courts made clear that challenges to malapportioned redistricting plans are justiciable and that such plans violate the federal Equal Protection Clause. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). In these cases and others, the U.S. Supreme Court "confronted th[e] ingrained structural inequality" in

unlawful redistricting and ended the "[j]udicial abstention [that] left pervasive malapportionment unchecked." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016).

The Utah Legislature resisted these decisions, refusing to enact a fair redistricting plan in their wake. Jonas & Hainsworth, *supra*, at 276-81. But federal courts intervened, striking down Utah's 1963 and 1965 state legislative plans on federal constitutional grounds. *Petuskey I*, 234 F. Supp. at 963-65; *Petuskey v. Rampton* (*Petuskey II*), 243 F. Supp. 365, 367-74 (D. Utah 1965) (three-judge court); *Petuskey v. Rampton* (*Petuskey III*), 307 F. Supp. 235, 253 (D. Utah 1969), *rev'd on other grounds*, 431 F.2d 378 (10th Cir. 1970); Hafen, *supra*, at 423. And the federal courts retained remedial jurisdiction for years to ensure that the Legislature complied with the federal Constitution and stopped "continu[ing] themselves in office as long as possible." *Petuskey II*, 243 F. Supp. at 369.

Rather than comply, the Legislature openly revolted and led a movement to amend the Constitution to overturn *Baker* and its progeny; those efforts failed. *Petuskey III*, 307 F. Supp. at 253.

D. Recent history of Utah redistricting

The "sad chronicle of legislative irresponsibility, rationalization, and downright dishonesty" concerning redistricting did not end with the reapportionment revolution and the Legislature's failed attempt to amend the U.S. Constitution. Jonas & Hainsworth, *supra*, at 271, 276-77. In 1981, Governor Scott

Matheson vetoed the Legislature's state house redistricting plan and criticized the state senate and congressional plans as gerrymanders. [Add. T.] Similarly, during the 2001 redistricting cycle, the Legislature distorted the congressional district lines in a plan that the *Wall Street Journal* denounced as a "scam" to unseat Democratic Representative Jim Matheson by divvying up his Salt Lake City-based district. [R.21.]

In 2011, the Legislature again endeavored to eliminate the congressional district won by Democrats by further cracking Salt Lake County, this time into three parts. [R.21-22.] Despite further skewing the map, the gerrymander did not go far enough, and Democratic-supporting voters were still able to compete for the district, electing Matheson and Ben McAdams to Congress multiple times over the decade. [R.22.]

E. The 2021 redistricting cycle

In response to the Legislature's longstanding efforts to manipulate the electoral process, Utah voters enacted Proposition 4, a bipartisan initiative that, among other things, established binding, anti-gerrymandering redistricting standards and created the Utah Independent Redistricting Commission (UIRC) to lead the mapmaking process. [R.23-29,735-36.] But the Legislature unconstitutionally repealed and negated this reform. [R.29-31,79-80,736-37.] Doing

so enabled the Legislature to ignore the UIRC's partisan-neutral proposals[2] and enact the most extreme partisan gerrymandered congressional map yet.

The Legislature enacted the 2021 Congressional Plan (the "Plan") to crack the large but compact population of Democratic-supporting voters in Salt Lake County, precisely and artificially dividing them across all four districts to ensure their votes would be wasted. [R.5-10,55-71,739.][3] The Plan halves Salt Lake City, cutting across Main Street through the heart of Temple Square while fragmenting major residential areas along 2000 East and 900 South. [R.58-60.] And it quarters Salt Lake County to ensure that its Democratic-supporting voters are sufficiently outnumbered by voters in expanses reaching to all corners of the State. [R.55-64,739.] The maps below show the surgical cracking of Democratic-supporting voters in Salt Lake County (shown in blue), whom the Legislature divided across all four districts.

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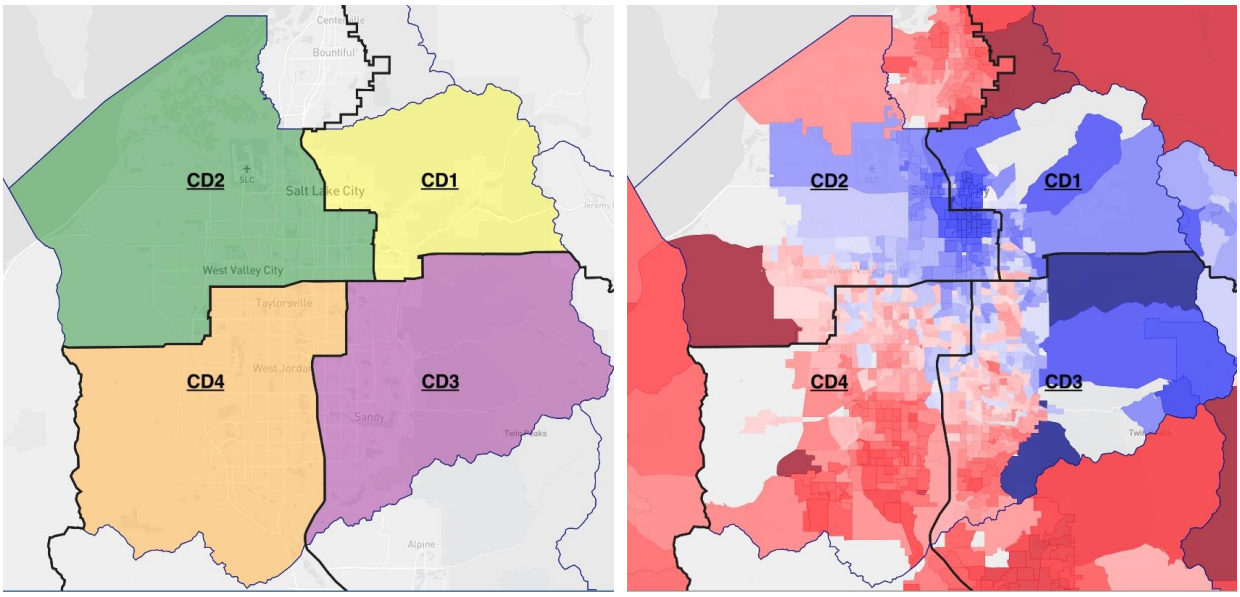
[2] Interactive versions of the UIRC's maps are available online: https://davesredistricting.org/join/240f4306-1d84-4b14-bc4a-22de0f12aee7 (Orange 3 Map); https://davesredistricting.org/join/39aa8a6c-7909-4849-b0f1-21de04f94074 (Public SH 2 Map); https://davesredistricting.org/join/4680ee33-d243-44be-83d2-3928c41820f1 (Purple 4 Map).

[3] An interactive version of the enacted Plan is available at https://davesredistricting.org/join/b4d46a7e-4366-4f6c-ac54-ff6640d4e13f.



[R.7.]

The need for equipopulous districts cannot explain the Legislature's cracking of Democratic-supporting areas. Salt Lake County has a population of 1,186,257, meaning the County must contain all or part of two (not four) districts.[4] And Salt Lake City's population is 200,478, meaning there is no population-based reason to divide the City's cohesive voters.

In enacting the Plan, the Legislature disregarded neutral, traditional redistricting criteria, such as those Utahns adopted in Proposition 4. [R.27-28,64-71.] Moreover, it employed a process that limited public scrutiny and

[4] *See* "Salt Lake County, Salt Lake City," U.S. Census Bureau, www.census.gov/quickfacts/fact/table/saltlakecitycityutah,saltlakecountyutah,UT/PST045222. In their brief, Defendants mistakenly cite the County's population as 1.85 million, leading to their incorrect contention that the County must contain all or part of three districts. (Br. at 4.)

debate. [R.9-10,40-51,737-39]. The resulting lines can be explained only by a desire to maximize partisan advantage. [R.5-6,42-54,64-65,71,74,738-41.] Indeed, both the Governor and members of the Legislature admitted partisan considerations permeated the redistricting process. [R.43-44,53-54,738-41.] Its purported "urban-rural" balancing justification is a transparent post-hoc pretext. [R.37-39,49-53,739-40,487,769.]

Avoiding the shortcomings of past failed gerrymanders, the Legislature capitalized on advancements in redistricting technology and data—and, for the first time, divided Democrat-supporting voters in Salt Lake County four ways—to ensure with precision that Republicans will have a durable and efficient majority to control the outcomes of all four Congressional elections over the next decade. [R.22,55-71,741.]

II. Procedural History

Plaintiffs sued to invalidate the Legislature's extreme partisan gerrymander and vindicate their constitutional rights. [R.3-82.] Legislative Defendants moved to dismiss. [R.209-47.] Following a hearing, the district court issued a summary ruling denying the motion to dismiss Plaintiffs' partisan gerrymandering claims (Counts I-IV) but granting the motion concerning Plaintiffs' challenge to the Legislature's repeal of Proposition 4 (Count V). [R.566-68.] It issued a separate memorandum opinion. [R.733-93.] This Court granted the parties' cross-petitions

for interlocutory appeal to review the entirety of the district court's decision. [R.1466-47.]

SUMMARY OF ARGUMENT

The district court correctly denied the Legislature's motion to dismiss with respect to Plaintiffs' partisan gerrymandering claims.

As that court correctly concluded, Utah courts have broad judicial review authority—and a duty—to uphold individual rights and ensure the proper functioning of the democratic process. Redistricting legislation is, like all laws, subject to the usual lawmaking process and the constitutional restraints this Court enforces. The subject is not categorically committed to the Legislature alone. And, as numerous other state courts have held, manageable standards exist to adjudicate partisan gerrymandering claims. The Legislature's efforts to excise redistricting from the normal lawmaking and constitutional adjudication processes ask the Court to create an exception that goes against text, precedent, and over a century of history.

The district court also rightly sustained Plaintiffs' claims on the merits. Plaintiffs seek to uphold their and other voters' fundamental constitutional rights. The Plan's extreme and durable partisan gerrymander represents the Legislature's manipulation of the electoral process to predetermine election results for a decade. It achieves this goal by discriminating and retaliating against voters based on their

political viewpoints and then diluting their votes. This violates Plaintiffs' fundamental rights. No legitimate justification explains the surgical division of Salt Lake County voters to negate their electoral strength. The skewed district lines for partisan gain cannot withstand scrutiny.

ARGUMENT

I. Utah Courts Can Adjudicate the Constitutionality of Redistricting Laws.

Deciding the constitutionality of redistricting laws is a judicial function. Such adjudication neither violates the separation of powers nor requires this Court to resolve an unreviewable political question.

The judicial branch violates the separation of powers when it exercises a function that is "categorically … so inherently legislative" that it "must be exercised exclusively by" the legislative department. *In re Young*, 1999 UT 6, ¶ 14, 976 P.2d 581 (quotations omitted). An issue may be a nonjusticiable political question where it involves "a textually demonstrable constitutional commitment ... to a coordinate political department." *Childers-Gray*, 2021 UT 13, ¶ 64 (citing *Baker*, 369 U.S. at 217). This Court has treated the two questions as intertwined. *Id.*

The Legislature cites *not a single case* in which this Court declined jurisdiction on either basis.[5] That failure is unsurprising. The Court is broadly

[5] (*See, e.g.*, Br. at 15,23-24.) For example, the Legislature's citation to *State v. Davis* is to a footnote quoting *the dissent*, and the second quoted passage does not appear in the decision at all. 2011 UT 57, ¶ 33 n.57, 266 P.3d 765.

empowered to "declare any law unconstitutional under [the Utah] constitution." Utah Const. art. VIII, § 2. Nothing in the Constitution provides an "express limitation" on the Court's jurisdiction. *Laws v. Grayeyes*, 2021 UT 59, ¶ 33, 498 P.3d 410 (quotations omitted). The Utah judiciary thus has the "power and duty" to "ascertain[] the meaning of a constitutional provision." *Utah Sch. Bds. Ass'n*, 2001 UT 2, ¶ 9, 17 P.3d 1125. So long as an issue is not wholly committed to a separate branch, the Utah "constitution grants the district courts, as general jurisdiction courts, the authority to adjudicate matters that affect a citizen's legal rights." *Childers-Gray*, 2021 UT 13, ¶ 65.

A. The legislative duty to enact redistricting laws does not extinguish the judiciary's power to adjudicate the constitutionality of those laws.

Article IX, section 1 of the Utah Constitution provides: "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." While Defendants repeatedly use the modifiers "exclusively" and "solely" to describe the Legislature's power over redistricting (*see, e.g.*, Br. at 15,17,19,23), those words appear nowhere in the text. *Cf.* Utah Const. art. VI, § 17(1) ("The House of Representatives shall have the *sole power* of impeachment." (emphasis added)). The Legislature nonetheless contends that article IX, section 1 precludes

the judiciary from adjudicating constitutional challenges to redistricting legislation. (Br. at 17-18.) That argument fails for numerous reasons.

1. Redistricting legislation is subject to judicial review like any other legislation

There is no dispute that redistricting legislation, like all laws, follows the normal lawmaking process. That process includes the usual procedural requirements, Utah Const. art. VI, §§ 2, 15, 22, 24, 25, as well as substantive restraints, such as gubernatorial review, *id.* art. VII, § 8, and substantively coextensive direct democracy powers, *id.* art. I § 2, art. VI, § 1. There is no basis for exempting redistricting laws from the standard judicial review by courts of "general jurisdiction" that are empowered to "declare any law unconstitutional." *id.* art. VIII, §§ 1, 2.

Arguing otherwise, the Legislature erroneously confuses the legislative responsibility to draw district lines with the judiciary's duty to adjudicate their constitutionality. (Br. at 17-22.) Of course, all statutes must originate in the Legislature (or by popular initiative). That fact does not insulate them from judicial review. Even where the Legislature has an avowed "exclusive constitutional power" to enact a law, that law "must comport with … other applicable provisions of the Constitution." *Matheson v. Ferry*, 641 P.2d 674, 677 (Utah 1982).

The Legislature compounds its error by repeatedly conflating the Court's power to adjudicate the constitutionality of a statute and its power to order an

appropriate remedy. (*E.g.*, Br. at 36 ("Adopting plaintiffs' arguments will make this Court the State's final redistricting policymakers.").) This appeal only involves the former.

Regardless, most courts addressing partisan gerrymanders have afforded the Legislature the opportunity to make policy judgments and propose a remedial plan after the finding of a constitutional violation, so long as the violations are timely corrected. But distorting the electoral process by discriminating and retaliating against the political expression of disfavored voters is not a permissible policy judgment, and the Court does not become "the State's final redistricting policymaker[]" by calling out that fact and enjoining the Legislature's constitutional violations. *See LWVPA*, 178 A.3d at 823. Rather, "state courts have a significant role in redistricting" to fulfill their essential judicial duties, including, at times, to devise a remedial map. *Growe v. Emison*, 507 U.S. 25, 33 (1993).

Far from bestowing unlimited legislative authority, article IX *limits* legislative discretion. Both the Legislature and the People (by initiative) hold the power to enact redistricting legislation by virtue of their status as the "Legislative Department" of the State. S*ee* Utah Const. art. VI, § 1. In most contexts, the Legislature and the People have discretion to legislate or not as they see fit. But article IX limits that discretion, concerning both whether and when to enact

redistricting legislation. Article IX imposes an obligation to draw new electoral maps after each decennial Census.

The U.S. Supreme Court agrees. In *Lawyer v. Department of Justice*, the Court considered a provision in Florida's constitution akin to article IX, section 1. 521 U.S. 567, 577 n.4 (1997) (discussing Fla. Const. art. III, § 16). It rejected the argument that the provision "provides the exclusive means by which redistricting can take place," because "this article in terms provides only that the state legislature is bound to redistrict within a certain time period after each decennial census, for which it may be required to convene." *Id.* The same reasoning applies here.

Further, as the district court explained, "[o]ther constitutional provisions designate various duties to the Legislature"—e.g., compensation of officers, Utah Const. art. VII, § 18; taxation, *id.* art. XIII § 2; public education, *id.* art. X, § 2; and firearm regulation, *id.* art. I, § 6—"but that does not mean that the Legislature's power in those areas is beyond judicial review." [R.745.] This Court has ruled in these contexts that authority constitutionally assigned to the "legislature" is not "unlimited" but is subject to judicial review. *E.g.*, *Utah Sch. Bds. Ass'n*, 2001 UT 2, ¶ 14 (public education); *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 18 & n.2, 144 P.3d 1109 (firearm regulation). Moreover, far from granting exclusive control to the Legislature, such a reference in the text indicates a legislative function that is also

subject to citizen initiatives. *Carter v. Lehi City*, 2012 UT 2, ¶¶ 79-80, 269 P.3d 141; *Mawhinney v. City of Draper*, 2014 UT 54, ¶¶ 15-18, 342 P.3d 262.

Tellingly, the Legislature concedes that Utah courts have the power to adjudicate other constitutional challenges to redistricting plans, namely on malapportionment or racial discrimination grounds. (Br. at 20.) This concession is irreconcilable with the Legislature's contention that article IX places redistricting beyond judicial review.

Unsurprisingly, this Court has already rejected the Legislature's jurisdictional argument. In *Parkinson*, the Court concluded that it was "required to adjudicate the limitations upon the authority of other departments of government," rejecting any claim that the Legislature has plenary, unreviewable control of redistricting. 291 P.2d at 402-03. The Legislature and its supporting *amici* are thus wrong to contend that *Parkinson* forecloses this Court's review. To be sure, the Court emphasized that enacting redistricting laws is a legislative function *in the first instance*. (Br. at 19-20.) But the Court exercised its judicial power to decide the constitutional claim before it.[6]

In fact, the *Legislature itself* has granted this Court jurisdiction to hear redistricting cases, without limitation to particular claims. This Court's

[6] *Parkinson* did not involve partisan gerrymandering, much less foreclose this Court's review. 291 P.2d at 403, 409; Add. U.

jurisdictional statute, for example, provides that the Court "has original appellate jurisdiction" over disputes concerning the "reapportionment of election districts." Utah Code § 78A-3-102(4)(c). And the Legislature has previously acknowledged that redistricting laws are subject to state constitutional restraints. [R.746.]

The Legislature also misplaces its reliance (at 21-22, 48) on the Constitution's specific prohibition on using partisan tests for certain public offices, when it contends that the Declaration of Rights would require similar specificity if it proscribed partisan gerrymandering. Specific prohibitions in one part of the Constitution do not nullify broadly worded rights elsewhere in the same document, which, after all, "enshrines principles, not application of those principles." *S. Salt Lake City* v. *Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092.[7]

For example, although the Constitution generally prohibits sex discrimination and property ownership requirements for eligibility to hold public office, it does not expressly prohibit partisan tests. *See* Utah Const. art. IV, §§ 1, 7. Under Defendants' logic, nothing in the Constitution would prohibit the Legislature from banning Democrats from holding the office of mayor. But Utah's

[7] The ban on partisan tests in article X, section 8 is simply in addition to the general free speech guarantee that prohibits the government from firing civil servants for expressing their political preferences, even though that prohibition is not specifically delineated. *See, e.g.*, *Cassidy v. Salt Lake Cnty. Fire Civ. Serv. Council*, 1999 UT App 65, ¶¶ 18, 20, 976 P.2d 607 ("The State may not condition public employment on conditions that infringe on a public employee's right to free speech," including partisan beliefs).

general rights to free speech and equal protection (among others) would undoubtedly prevent such a law. Defendants' contrary contention that the Declaration of Rights must speak *specifically* about political views is inconsistent with the structure and purpose of the Constitution to provide enduring rights of general applicability.

2. Utah's founding era history demonstrates a commitment to judicial review of redistricting legislation.

History confirms the propriety of judicial review of redistricting legislation. In the years preceding statehood, anti-partisan gerrymandering sentiments were pervasive and included support for the judiciary's role in upholding individual rights against gerrymandering. (*See supra* at 4-7.) Utahns would have understood the judiciary's vital role given the widely publicized decisions from, e.g., Wisconsin, Michigan, and Indiana. *Id.*

More broadly, the Framers of the Utah Constitution devised its electoral provisions with the dual goals of assuring Congress that the State would protect minority rights while ensuring popular control over the electoral process. The latter goal was largely a response to the Utah Commission and its unaccountable control over reapportionment. (*See supra* at 6-7.) Given these goals, the people would not have enacted a redistricting framework that purported to give exclusive authority to self-interested legislators to insulate themselves from electoral accountability through gerrymandering.

3. Federal and sister state precedent supports Utah courts' power to adjudicate partisan vote-dilution claims.

By the time of statehood, numerous state courts had rejected the argument that a constitutional provision referencing the legislature's apportionment power precluded judicial review. (*See supra* at 4-5.) These courts exercised jurisdiction because redistricting laws are "like all other laws which this court has declared unconstitutional." *Cunningham*, 51 N.W. at 729. A contrary rule would make the judiciary "a useless appendage of the government," *id.* at 728, and fundamental "Constitutional guaranties would amount to nothing if there was no way to protect them," *Ragland*, 100 S.W. at 866-67 (quotations omitted). Notably, several of these courts exercised jurisdiction to prevent their legislatures from drawing districts of unequal size and with boundaries designed for partisan ends. *See, e.g.*, *Parker*, 32 N.E. at 842; *Cunningham*, 51 N.W. at 730; *Giddings*, 52 N.W. at 947-48 (Morse, C.J., concurring). They applied broad constitutional provisions to enforce equality and the "just and fair representation" of the people. *See, e.g.*, *Ballentine*, 31 P. at 997 (legislative redistricting); *Moorhead*, 156 N.W. at 1070-71 (county commission).

More recently, several courts have exercised jurisdiction over partisan gerrymandering claims much like those Plaintiffs pursue here. *See, e.g.*, *LWVPA*, 178 A.3d at 801-21; *Matter of 2021 Redistricting Cases*, No. 18332, 2023 WL 3030096, at *1, 6-7, 23-31 (Alaska Apr. 21, 2023); *Szeliga v. Lamone*, No. C-02-CV-21-001816,

2022 WL 2132194, at *2 & n.6 (Md. Cir. Ct. Mar. 25, 2022); *accord Harkenrider v. Hochul*, 197 N.E.3d 437, 440-41 (N.Y. 2022) (stating that redistricting disputes have historically been "subject to state ... constitutional restraint and ... judicial review"); *LWV of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 417-20 (Ohio 2022) (Brunner, J., concurring) (discussing jurisdiction over equal protection claim).[8]

In a range of other contexts—impasse litigation, racial gerrymandering, malapportionment—state courts have rejected arguments seeking to curtail their jurisdiction. Courts have done so despite references to "legislature" or "general assembly" in constitutional provisions similar to article IX, section 1. *See, e.g.*, *LWVPA*, 178 A.3d at 823-24; *Salazar v. Davidson*, 79 P.3d 1221, 1225-26, 1235-36 (Colo. 2003).

The Legislature mistakenly relies on the U.S. Supreme Court's decision in *Rucho* and decisions of certain state courts interpreting their state constitutions in lockstep with that decision. (*E.g.*, Br. at 18.) Although *Rucho* acknowledged that partisan "gerrymandering is 'incompatible with democratic principles,'" it nevertheless ruled that Article III's "case or controversy" requirement placed the

[8] Even years ago, state courts evaluated claims of partisan gerrymandering on the merits. *See Parella v. Montalbano*, 899 A.2d 1226, 1233, 1244-46, 1256-57 (R.I. 2006) (incorporating trial court reasoning); *Hellar v. Cenarrusa*, 682 P.2d 539, 544 (Idaho 1984).

issue "beyond the reach of the federal courts." 139 S. Ct. at 2506-07 (quoting *AIRC*, 576 U.S. at 791). But the Court emphasized that it did not "condemn complaints about districting to echo into a void" because "state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507.

The Legislature contends (at 18-20) that *Rucho*'s Article III holding should also control here. But this Court has long refused to adopt federal justiciability standards. Unlike federal courts, "the power of Utah's judiciary is not constitutionally restricted to 'cases' and 'controversies.'" *Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*, 2004 UT 32, ¶ 19, 94 P.3d 217. As the district court correctly concluded, Utah courts "are not bound by the same justiciability requirements as federal courts under Article III," so "on matters like standing and justiciability, a lesser standard may apply." [R.747.][9]

The North Carolina Supreme Court's recent decision in *Harper v. Hall* (*Harper III*) is not persuasive and should not be followed here. No. 413PA21-2, 2023 WL 3137057 (N.C. Apr. 28, 2023). The decision arose from peculiar circumstances. In early 2021, the court ruled partisan gerrymandering was justiciable and unconstitutional. North Carolina then held elections that changed the partisan

[9] In general, the Court resists "lockstep" interpretations, emphasizing that the Utah judiciary is empowered to interpret the Utah Constitution to "afford more rights than the federal Constitution." *Jensen v. Cunningham*, 2011 UT 17, ¶ 46, 250 P.3d 465. This is a quintessential role of state courts. Jeffrey Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 174-82 (2018).

composition of the supreme court, and the new court then overruled its recent decisions in *Harper* and other cases. *Id.* at *54-56 (Earls, J., dissenting).

In any event, the decision is distinguishable because, as the majority recites, North Carolina has distinct redistricting history. *Id.* at *20-22. Unlike Utah, the North Carolina constitution exempts redistricting from the regular lawmaking process by explicitly barring gubernatorial veto. *Id.* at *22. And unlike here, state statutes purport to limit judicial review. *Id.* at *22-23. Even still, the *Harper III* majority's conclusion that the legislature has exclusive redistricting authority is logically inconsistent with its decision not to overrule numerous prior cases in which state courts exercised judicial review over redistricting disputes. *Id.* at *69-72, 78-80 (Earls, J., dissenting). *Harper III* is an outlier among over a century of sister state courts that have rejected Defendants' same political question and separation-of-powers arguments.

B. The Legislature's federal Election Clause argument is unpreserved and meritless.

The Legislature makes a passing reference to the federal Elections Clause to argue that this case exceeds the Court's judicial power. (Br. at 17-18.) Its *amici* assert an even more radical theory. (*See* Br. of Amicus Curiae Honest Elections Project at 12-15; Br. of Amici Curiae Reps. Moore, Stewart, Curtis, & Owens (Congressmen's Br.) at 9-12.) But the federal Elections Clause is not at issue in this appeal and the Court should not address this fringe argument.

As a threshold matter, the argument is unpreserved. *State v. Johnson*, 2017 UT 76, ¶¶ 15-16, 416 P.3d 443. Below, Defendants abstractly mentioned the Federal Elections Clause in a footnote, but they did not develop a jurisdictional argument based on it, much less provide the trial court an opportunity to consider it. And Defendants failed to appeal a decision denying a stay that touched on the Elections Clause. [R.434-37.] Even on this appeal, Defendants do not substantively brief the issue. While *amici* make the argument, it should be disregarded. *State v. Green*, 2004 UT 76, ¶ 35, 99 P.3d 820.

Even if the Court were to address the federal Elections Clause theory, it would fail based on text, history, and precedent. The federal Elections Clause states "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]" U.S. Const. art. I, § 4. At the U.S. Founding and since, "the public meaning of state 'legislature' was clear and well accepted"—it meant a legislative process performed by "an entity *created and constrained by the state constitution*," including state judicial review. Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. 1, 19 (2021); *see also* Br. of Amicus Curiae Conference of Chief Justices, *Moore v. Harper*, No. 21-1271, 2022 WL 4117470, *7-15 (2022) (CCJ *Moore* Brief). A clear line of precedent reaches

the same conclusion. *AIRC*, 576 U.S. at 817-18; *Wesberry*, 376 U.S. at 6-7; *Smiley v. Holm*, 285 U.S. 355, 367 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567-68 (1916). State courts have uniformly rejected the argument.[10] This Court should, too.

II. Manageable Standards Govern Plaintiffs' Partisan Gerrymandering Claims.

Plaintiffs' claims also are justiciable because manageable standards govern their adjudication.

A. Utah courts are equipped to adjudicate Plaintiffs' constitutional claims.

It is the Court's role to determine "what principle the constitution encapsulates and how that principle should apply." *Maese*, 2019 UT 58, ¶ 70 n.23. Utah's Constitution was "framed by practical men, who aimed at useful and practical results." *Patterson v. State*, 2021 UT 52, ¶ 137, 504 P.3d 92 (citation omitted). Adaptability for "future operation" was key. *People v. City Council of Salt Lake City*, 64 P. 460, 462-63 (Utah 1900). Thus, the Court's duty is to adapt constitutional principles to applicable contexts and develop standards that "safeguard [constitutional] protections" and prevent the "exercise of despotic power or unreasoning action by any official." *Super Tire Mkt., Inc. v. Rollins*, 417

[10] *See Rivera v. Schwab*, 512 P.3d 168, 177-78 (Kan. 2022); *LWVPA*, 178 A.3d at 821-24; *LWV of Florida v. Detzner*, 172 So. 3d 363, 370 n.2 (Fla. 2015); *Davidson*, 79 P.3d at 1232; *State v. Polley*, 127 N.W. 848, 849, 850-51 (S.D. 1910).

P.2d 132, 135 (Utah 1966); *accord Matheson v. Ferry*, 657 P.2d 240, 245 (Utah 1982) (Stewart, J., concurring).

As the district court recognized, Utah courts have successfully engaged this function by developing standards applying general constitutional principles in a range of contexts. [R.749-52 nn.5-6 (collecting cases).] Plaintiffs ask the Court to perform the same role here, as at least six sister state courts have done. [R.750.] And there is nothing out of the ordinary about exercising judicial review to secure an "honest and fair election." *Ritchie v. Richards*, 47 P. 670, 675 (Utah 1896).[11] The Constitution ensures that "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Gallivan v. Walker*, 2002 UT 89, ¶ 72, 54 P.3d 1069 (quoting *Reynolds*, 377 U.S. at 565-66).

Defendants' arguments about the manageability of redistricting claims, though new to Utah, have long been rejected in other courts. Malapportionment claims illustrate the point. As noted (at 4-5), over a century ago state courts prevented partisan gerrymandering through malapportioned and distorted districts without providing a definitive numerical threshold for liability. Similarly, the U.S. Supreme Court long ago rejected Defendants' same "political thicket" argument (Br. at 30), by first holding that malapportionment claims are justiciable,

[11] *See also Page v. Letcher*, 39 P. 499, 501 (Utah 1895) (denouncing "danger to fair elections"); *Payne v. Hodgson*, 97 P. 132, 138 (Utah 1908) (stressing the "fair opportunity to exercise the elective franchise").

see Baker, 369 U.S. at 209, and then refining the "one-person, one-vote" framework in subsequent decisions, *Evenwel*, 578 U.S. at 57-60. For decades, state and federal courts have successfully applied this framework and provided guidance to avoid litigation. *See, e.g.*, *Petuskey II*, 243 F. Supp. at 368. Utah's Constitution secures the necessary principles to evaluate partisan gerrymandering claims, and the judiciary can similarly apply those principles to develop manageable standards.

In fact, many of Plaintiffs' claims rely on constitutional provisions that have been subject to decades of litigation and have generated frameworks that can be applied to partisan gerrymandering. [R.749-51.] For example, with respect to Plaintiffs' free speech and Uniform Operations claims, this Court can employ well-established tests that it has applied in other contexts. *E.g.*, *Gallivan*, 2002 UT 89, ¶ 40. Here, the Court need only ask: Did the Legislature discriminatorily retaliate against particular voters based upon how those voters expressed their political views at the ballot box? Defendants do not explain how answering this question is somehow unmanageable or foreign to the work of courts.

Moreover, the overarching standard for Plaintiffs' Free Elections Clause claim—(1) the government action manipulates the electoral process by substantially diminishing or diluting the power of voters based on their political views, and (2) no legitimate justification exists for the diminishment or dilution—is a manageable framework that the district court applied, and Defendants did not

contest below. [R.767-70.] It is akin to the standard used in other states (*infra* at 32-35), and consistent with the effects-oriented analysis used in other areas of Utah law. *See, e.g.*, *Gallivan*, 2002 UT 89, ¶¶ 36-38; *Cook v. Bell*, 2014 UT 46, ¶ 29, 344 P.3d 634.[12]

Defendants' demand that the Utah Constitution detail the precise "standard of partisan fairness *in redistricting*" (at 27) is foreign to almost all constitutional analysis. Because constitutional protections are intended to apply in an array of contexts and for future applicability, they are usually drafted in general terms and do not define with precision the gamut of prohibited conduct. *See* CCJ *Moore* Brief, *supra*, at *5-6, 17, 24-25.

Plaintiffs' claims are precisely the type that seek the protection of the Court to determine how the relevant constitutional "principle[s] should apply." *Maese*, 2019 UT 58, ¶ 70 n.23. The Court does so by engaging in traditional constitutional analysis considering text, precedent, history, and appropriate policy factors, *id.* ¶ 23, with an eye toward "recurrence to fundamental principles" and protecting the residuum of political power and liberty guaranteed to the people, Utah Const. art. I, §§ 2, 25, 27.

[12] Even if the Court required a further showing of partisan intent, Plaintiffs alleged and will prove such intent. [R.5-6,9-10,37-39,42-54,64-65,71,74,737-40,769.]

B. Sister state court decisions confirm the manageability of adjudicating partisan gerrymandering claims.

At least six sister-state courts—in Alaska, Pennsylvania, Maryland, Ohio, Florida, and New York—have successfully applied their state constitutions to protect against partisan gerrymandering. [R.750 & n.7.] Many have done so engaging constitutional provisions directly analogous to those at issue here, and all using the same basic frameworks and evidentiary sources. Defendants have not explained why this Court should find "impossible" (at 34) a task that other state courts have found quite possible.

For example, the Pennsylvania Supreme Court applied general constitutional protections to enjoin a 2018 congressional partisan gerrymander. *LWVPA*, 178 A.3d at 802. The court noted that Pennsylvania's Free and Equal Elections Clause does not provide "explicit standards" for evaluating partisan gerrymandering. *Id.* at 814. Nonetheless, the Court developed a framework from the provision's principles looking to evidence concerning deviations from traditional neutral redistricting criteria and applying established partisan bias metrics. *Id*. at 814-18; *accord Carter v. Chapman*, 270 A.3d 444, 462, 470 (Pa. 2022). The *Szeliga* Court in Maryland additionally applied state constitutional equal protection and free speech rights to enjoin a partisan gerrymander. 2022 WL 2132194, at *7-21, 40-46. And last month, the Alaska Supreme Court similarly held that a partisan gerrymander violated the state's equal protection mandate. *2021*

Redistricting Cases, 2023 WL 3030096, at *6-7, 41-43, 48-50. The *LWVPA* Court, like others, declined to provide a threshold numerical cutoff for unconstitutional partisan gerrymanders; it recognized that, like one-person-one-vote cases, future litigation in real contexts would further concretize the evidence and set of circumstances required to prove liability under the Court's standard. 178 A.3d at 817-18.

In response to these cases, Defendants essentially assert that Utah courts are not up to the task other state courts have readily accomplished. In so arguing, however, they wrongly conflate the *standards* applied in partisan gerrymandering cases with what types of *evidence* the Court can consider in applying those standards. (Br. at 27-31.) To be sure, Plaintiffs ultimately will have to establish their claims through factual and expert evidence. Some future cases could prove to be closer calls. But this is not such a case, and none of that bears on justiciability.

For example, employment discrimination cases are not nonjusticiable just because the U.S. Supreme Court has declined to pick a precise statistical threshold, applicable in all cases, for establishing that a challenged policy is unlawful. *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting) ("'[T]he law is full of instances' where a judge's decision rests on 'estimating rightly ... some matter of degree.'" (citation omitted)). Courts adjudicating those cases consider a range of *evidence* and apply a familiar burden-shifting standard, akin to what Plaintiffs propose here.

In any event, the typical evidence used in partisan gerrymandering cases is well-tested. *See, e.g.*, *LWVPA*, 178 A.3d at 769-79; *Szeliga*, 2022 WL 2132194, at *31-34, 41; *Adams v. DeWine*, 195 N.E.3d 74, 85-93 (Ohio 2022); *2021 Redistricting Cases*, 2023 WL 3030096, at *35; *Harkenrider*, 197 N.E.3d at 453 & n.14. These courts, building on similar evidence used for decades in racial gerrymandering and malapportionment cases, have relied on expert and factual testimony showing statistical evidence of partisan bias and asymmetry that reveal whether a map cracks and/or packs disfavored-party voters to advantage the other party. Such evidence can reliably demonstrate, for example, that the challenged maps were statistical outliers when compared to an array of often thousands of simulated non-partisan plans. And courts employ traditional redistricting criteria, such as those devised in Proposition 4, to examine whether the partisan effects are explainable by neutral conditions, like compactness or avoiding political subdivision splits. [R.27-28.] Defendants' attacks on the reliable evidence these courts have applied are both unfounded and simply unresponsive to the manageability of the overarching standards applied.

Defendants' contrary reliance on decisions in Wisconsin and Kansas (at 25-26, 58) is misplaced. Neither state's constitution contains a Free Elections Clause. Further, the Wisconsin Supreme Court's decision in *Johnson v. Wisconsin Elections Commission* resolved a malapportionment claim, but *no partisan*

gerrymandering claims. 967 N.W.2d 469, 488-89 (Wis. 2021). While a plurality opined on partisan gerrymandering without briefing or argument, *id*. at 489-91, the court's abstract analysis—on which Defendants rely—is unpersuasive dicta, *see id*. at 501-02 (Dallet, J., dissenting).

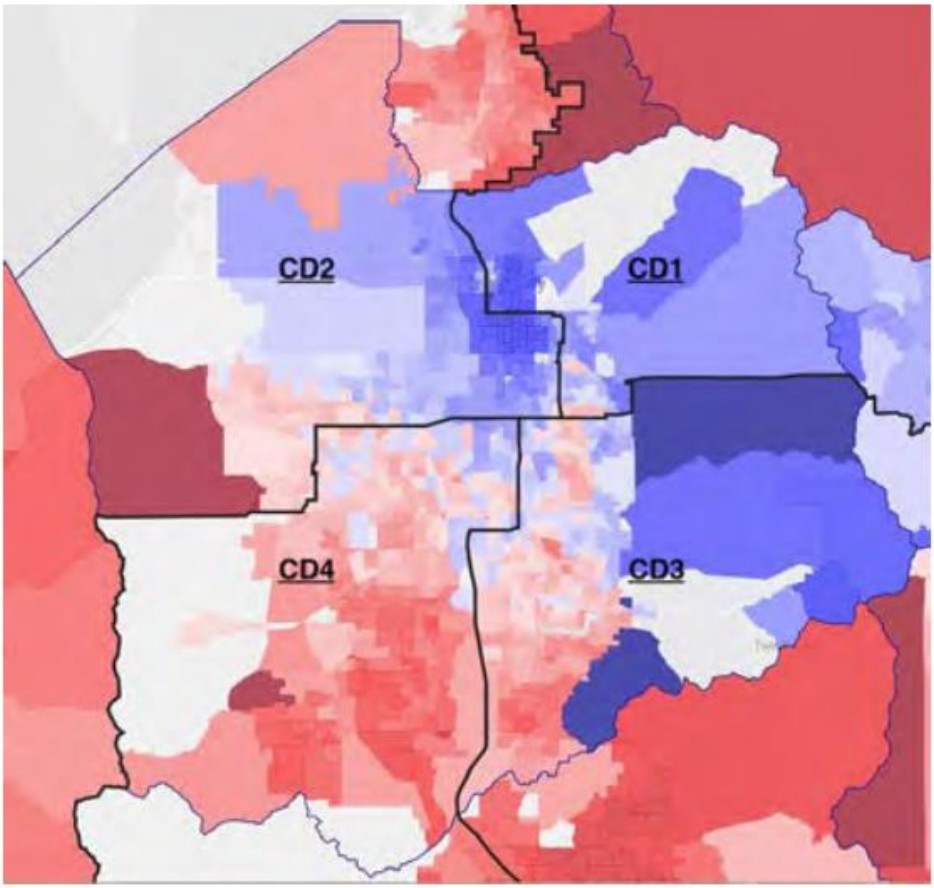
The *Rivera* case in Kansas is also inapposite. There, the majority's decision turned entirely on its ruling that the identified state constitutional provisions were in lockstep with federal law and that *Rucho* therefore controlled. 512 P.3d at 179-84; *cf. id.* at 196-97 (Rosen, J., dissenting) (describing flawed lockstep reasoning). The *Harper III* Court made a similar error. 2023 WL 3137057, at *12 n.6, *19.

But that is not the law in Utah, which disfavors lockstep approaches, especially with respect to the provisions underlying Plaintiffs' claims. *See, e.g.*, *State v. Tiedemann*, 2007 UT 49, ¶¶ 33-37, 162 P.3d 1106; *Gallivan*, 2002 UT 89, ¶¶ 33, 36-38 (Uniform Operation); *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994) (speech). Plaintiffs here also pursue state constitutional claims that lack any federal counterparts. Utah Const. art. I, § 17; art. IV, § 2. At a minimum, *Rucho* (and state courts adopting it) poses no manageability hurdle to these provisions.

C. The extreme and durable gerrymander here makes this an easy case.

The Legislature dwells on the potential for close-call cases in which it would be difficult for courts to decide "how much partisanship is too much." (*E.g.*, Br. at

32.) But as Justice Kagan commented in her *Rucho* dissent, "[h]ow about this for a first-cut answer: This much is too much." 139 S. Ct. at 2521. Consider the map:



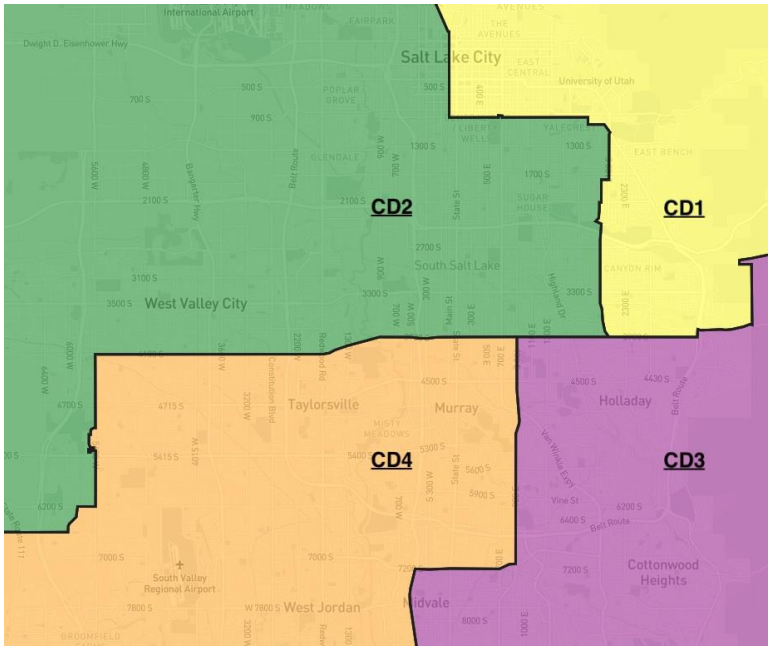
[R.7.] Deciding whether the Legislature has distorted the electoral process and retaliated against Democratic-supporting voters in Salt Lake County based on the expression of their political views is not a difficult task. Plaintiffs' evidence will prove their allegations, taken as true here, that the Plan cracks Democratic-supporting voters to guarantee Republican control over Utah's four districts, and it is an extreme outlier among scores of possible neutral alternatives.

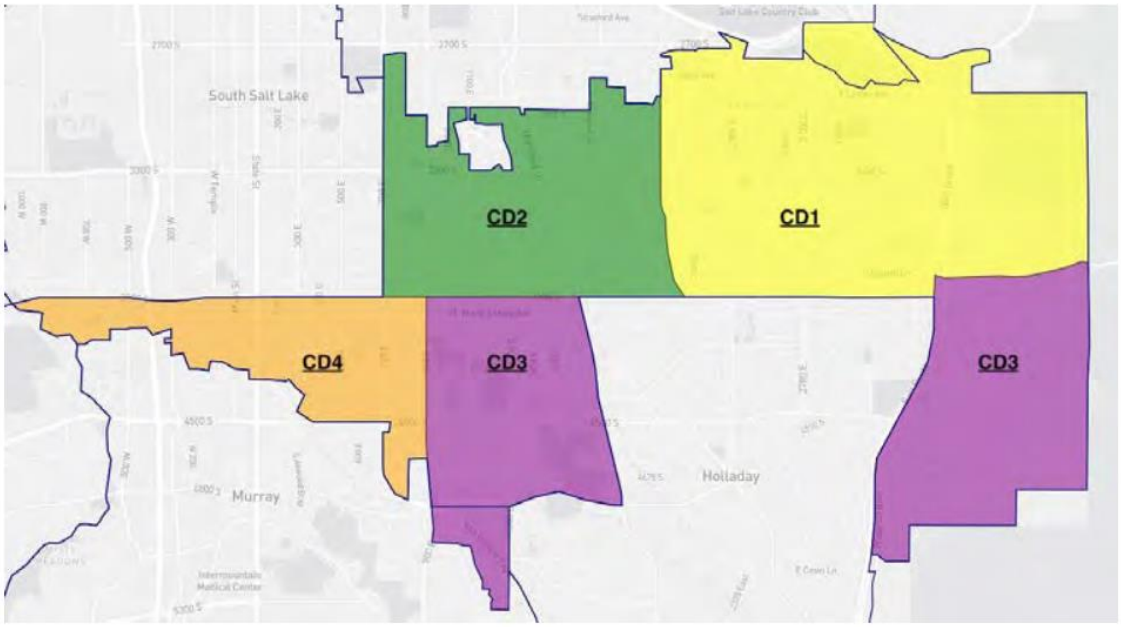
[R.5-10,55-71,739.] That some *future* speculative case may present a closer call does not require this Court to close its eyes to the constitutional violations here.

In any event, Plaintiffs contend that only extreme, durable partisan gerrymanders—like the Plan here—rise to the level of constitutional infirmity, making the Legislature's question as to "how much is too much" an overstated concern. This recognizes the myriad policy considerations the Legislature appropriately balances while simultaneously ensuring that core constitutional rights are not infringed.

But the congressional plan at issue here is not the product of balanced policy considerations. No neutral traditional redistricting criteria can explain the Plan's irregular design and extreme partisan bias. [R.25-26,64-71.] Among other things, the Plan shows little "regard for political subdivision or natural or historical boundary lines," which is telltale sign of "partisan gerrymandering." *Reynolds*, 377 U.S. at 578-79.; *accord* Utah Code §§ 20A-7-204.1(1)(a) (listing established regional areas), 20A-20-301(1)(a) (same).

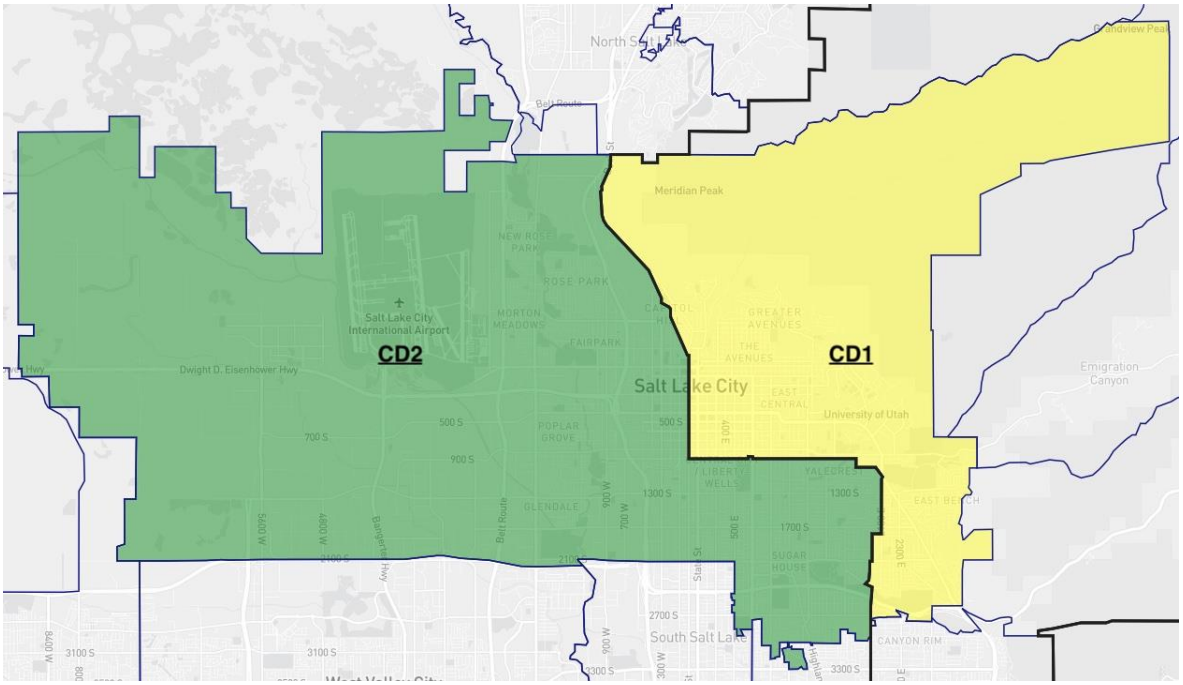
Under the Plan, Salt Lake County is quartered, with all four districts converging to divide Millcreek four ways:

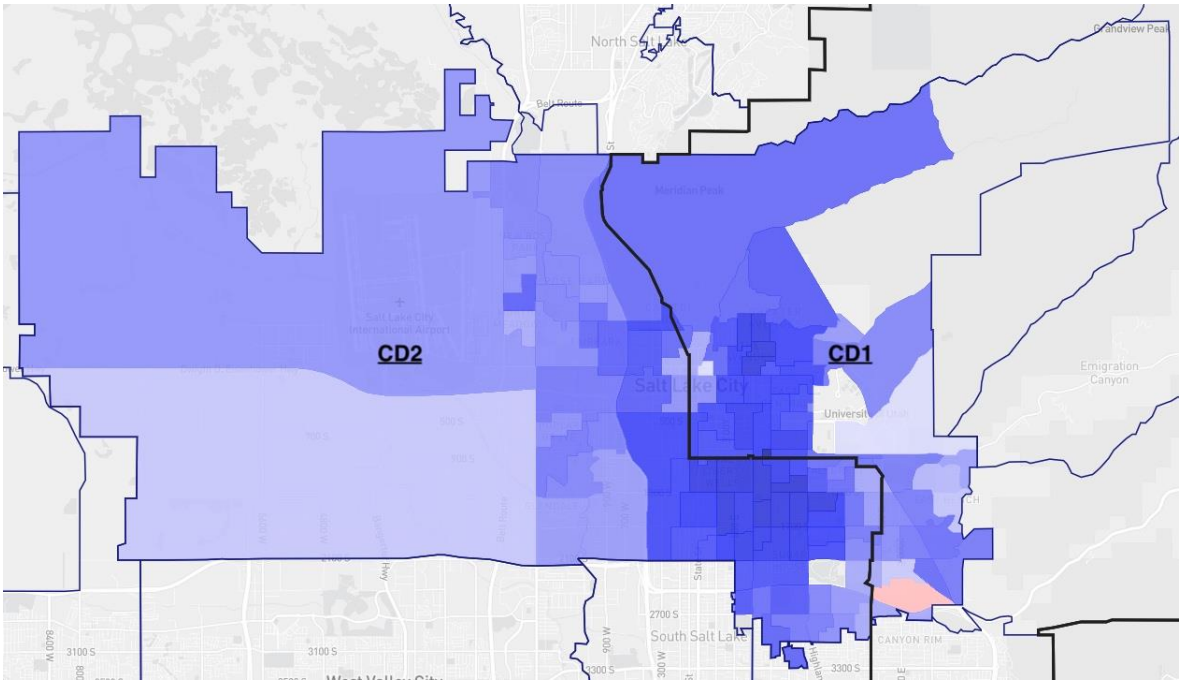


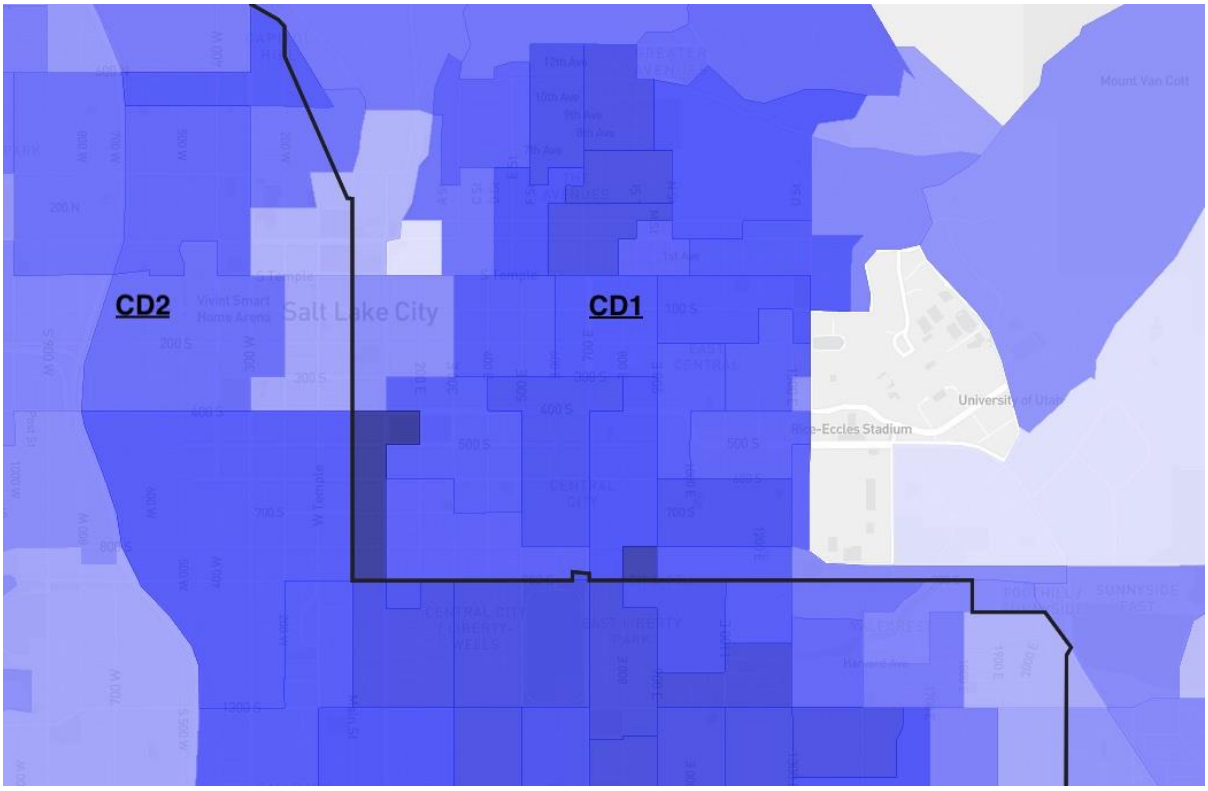


[R.8,69.]

And Salt Lake City is cut in half to optimally sunder Utah's base of Democratic-supporting voters:


CD2
CD1
Salt Lake City
Salt Lake City International Airport
Dwight D. Eisenhower Hwy
Meridian Peak
Emigration Canyon
University of Utah
South Salt Lake


CD2
CD1
Salt Lake City
Emigration Canyon
South Salt Lake



[R.7-8,68.]

Although some proponents of the map claimed it was necessary to balance urban and rural interests in Utah, this is contrary to the complaint's fact-based allegations and is legally impermissible. [R.37-39,49-53,739-40,769.] Factually, the Legislature did not proclaim "urban-rural balancing" as a redistricting criteria during its process, rejecting proposals that could heighten consideration of rural interests. [Add. V at 4, 7.] It waited until *after* gerrymandering the Plan to contrive this justification. [R.43-45.] Testimony during the Legislature's and UIRC's redistricting processes likewise shows that urban and rural voters did not want to be combined. [R.52-53,774-75.] And the Legislature neither defined what

urban-rural balancing meant nor how it was measured, and it disregarded established delineations in Utah law. [Add. W at 2-4.] And the Legislature *rejected* a UIRC proposal that scored better on a plausible measure of this invented criterion. [R.39-43.] Defendants' opposing factual contentions and cherry-picked, self-serving legislative statements (at 12-13,20,35,55) are improper in response to Plaintiffs' sufficiently alleged facts. *Castro*, 2019 UT 71, ¶ 11.

Regardless, seeking to balance urban voters' electoral preferences against rural interests is constitutionally impermissible. This Court has so held in the citizen-initiative context. *Gallivan*, 2002 UT 89, ¶ 80. Federal courts have repeatedly rejected states' "claim[s] that ... apportionment is sustainable as involving an attempt to balance urban and rural power." *Davis v. Mann*, 377 U.S. 678, 692 (1964); *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1142 & n.20 (E.D. Cal. 2018) (collecting cases); *Petuskey I*, 234 F. Supp. at 963. And other state courts have recognized that the "dispersion of urban populations into larger rural areas" is a hallmark of gerrymandering. *Hellar*, 682 P.2d at 544 (citing unrefuted evidence); *accord Moorhead*, 156 N.W. at 1070.

Instead, as the district court detailed, partisan discrimination explains the district lines. [R.740-41.] The history shows that the Legislature sought to achieve what past gerrymanders failed to do—eliminate Utah's competitive congressional district that often elected Democrats. [R.42-54,64-65,71,740.] The Legislature

devised the Plan before it even considered the unanimous UIRC's neutral, community-driven alternatives. [R.5-6,43-45.] And it enacted the Plan in a manner that stifled public scrutiny and debate. [R.9-10,43-51,737-39]. All of this provides circumstantial support to the direct evidence that partisan advantage—not any neutral justification—explains the gerrymandered Plan.

D. The legislature's policy arguments opposing this Court's judicial power are unpersuasive.

Defendants' additional policy arguments (at 26-34) either misstate the law or facts, or amount to unsupported slippery-slope assertions that this Court disfavors. *Childers-Gray*, 2021 UT 13, ¶ 117. For instance, Defendants proclaim (at 35) that any consideration of partisan gerrymandering claims is akin to this Court "hang[ing] up their robes and print[ing] yard signs" for political campaigns. These over-the-top assertions misunderstand the posture of this case, the nature of gerrymandering, and the critical role of the judiciary.

To start, Defendants' supposed concerns about evidentiary difficulties are overwrought. (*See* Br. at 26-34.) Other state courts have not encountered such difficulties. (*Supra* at 32-35.) Regardless, Defendants' run of rhetoricals and hypotheticals about the evidence do not present intractable "political questions" (at 27) but *factual* questions to be answered through litigation. In this interlocutory, motion-to-dismiss posture, the Court must reject Defendants' unsupported assertions of fact (e.g., at 5-7,12,14,20-21,32,35) and instead "assum[e] the truth of

the allegations ... and draw[] all reasonable inferences" for Plaintiffs. *Castro*, 2019 UT 71, ¶ 11.

For example, Defendants make several assertions about the nature of electoral data and voting patterns. (Br. at 27-32.) But Plaintiffs pled that the Legislature's extreme partisan gerrymander relies on verifiable voting patterns to reliably guarantee single-party control of the congressional delegation for a decade. [R.5-9,55-69.][13] Indeed, this is the whole point of gerrymandering—using granular voter data, the increasing durability of voters' political preferences, and rapidly advancing mapping technology to efficiently manipulate the electoral process. *Rucho*, 139 S. Ct. at 2523-25 (Kagan, J., dissenting). But the same technologies and data used to gerrymander also make it possible to reliably evaluate the partisan bias of such plans. *Id.* at 2517. As a result, courts routinely rely on expert testimony about past and likely future voting patterns to resolve gerrymandering claims. (*Supra* at 28-35.) Factfinding on remand concerning the relevant empirical evidence—not Defendants' suppositions about voting behavior—should inform the Court's decision on this point.

[13] Defendants' attempt to raise factual questions about independent voters or party registration figures (at 28) is both misleading and irrelevant. Partisan gerrymanders are created by displaying election-result shading during the map-drawing process. That is likewise how they are assessed, using actual election results. *Easley v. Cromartie*, 532 U.S. 234, 244-45 (2001); *Hunt v. Cromartie*, 526 U.S. 541, 550-51 (1999).

Additionally, Defendants suggest that single-member districts make it impossible to eliminate extreme partisan gerrymandering. (Br. at 29-30.) The exact opposite is true—single-member districts are designed to give political minorities *more say* in the electoral process compared to statewide elections. *Chapman v. Meier*, 420 U.S. 1, 20 (1975).[14] The current Speaker of the U.S. House, for example, would not hold office if California lacked single-member districts. Regardless, it is not the electoral system that harms Plaintiffs, but the Legislature's manipulation of it. That all of the UIRC's plans (and even the last two decades' congressional maps) have produced a Salt Lake County-based district in which Democratic-supporting voters could elect candidates of their choice confirms that it is the extreme gerrymandering—not single-member districts or Utah's political geography—that is the source of Plaintiffs' harm. [R.21-22,39-41,55-69.]

Finally, Defendants claim that if Utah courts consider partisan gerrymandering claims, they would be refereeing "fairness" or serving as "policymakers." (Br. at 36.) Defendants again wrongly conflate the difference between seeking legitimate *policy* objectives in redistricting with manipulating district lines for illegitimate *political* advantage. Partisan gerrymandering "reflect[s] no policy" at all, "but simply arbitrary and capricious action."

[14] Defendants' own *amici* agree. Congressmen's Br. at 8-9.

Vieth v. Jubelirer, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring) (quoting *Baker*, 369 U.S. at 226). Plaintiffs ask the Court to uphold their constitutional rights against this unlawful action—in the district court's words, "to review the Legislature's actions, not to weigh in on policy matters, but to determine whether there has been a constitutional violation." [R.751 (citing *Matheson*, 641 P.2d at 680)]. When state courts "resolve the meaning of a general constitutional provision," they are "engaged in judging, not legislating or policymaking." CCJ *Moore* Brief, *supra*, at *20-21. The political implications of a case do not make it nonjusticiable or require courts to "shirk" their duty to uphold the Constitution. *Childers-Gray*, 2021 UT 13, ¶ 67.[15]

III. The District Court Correctly Concluded That Extreme Partisan Gerrymanders Violate the Utah Constitution.

Plaintiffs state cognizable partisan gerrymandering claims under the Utah Constitution's guarantees of free elections, uniform operation of laws, free speech and association, and the right to vote. Each claim requires heightened scrutiny because gerrymandering implicates core constitutional rights. *Gallivan*, 2002 UT 89, ¶ 40.

[15] The Court's long-established role deciding election contests—determining winners and losers in the political process—proves the point. *Beauregaard v. Gunnison City*, 160 P. 815, 820 (Utah 1916); *Ellison v. Barnes*, 63 P. 899, 902 (Utah 1901); *Page*, 39 P. at 502.

A. The Free Elections Clause prohibits extreme partisan gerrymanders.

Utah's Free Election Clause prohibits the manipulation of the electoral process, including through partisan gerrymandering. The Legislature's contrary arguments read critical language out of the Constitution, distort the pertinent history, and misconstrue precedent.

1. The plain meaning and structure of the Free Election Clause prohibit extreme partisan gerrymandering.

By its text and structure, the Free Elections Clause prohibits extreme partisan gerrymandering: "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. Engaging in a close textual analysis, the district court correctly held that the provision creates two related but independent rights. [R.758-63.] This is because the provision "is constructed as a compound sentence, separating two independent clauses by the conjunction 'and,'" which means the "two clauses are to be given equal value." [R.758.]; *see also* Bryan Garner, *Garner's Modern English Usage* 1199-201 (5th ed. 2022) (describing independent clauses and comma splice). The first part—"all elections shall be free"—is designed to prevent the type of manipulation of the electoral process inherent in partisan gerrymandering. [R.761.]

The meaning of this provision, from Utah's founding to today, makes clear that elections are only free when the process is not manipulated and all voters have

an equal opportunity to elect candidates. At Utah's statehood, "free" meant "[u]nconstrained; having power to follow the dictates of his own will;" and "[n]ot despotic; assuring liberty; defending individual rights against encroachment by any person or class; instituted by a free people; said of governments, institutions, etc." Black's Law Dictionary (1891). Other definitions included "determining ones' own course of action; not dependent; at liberty" and "[n]ot under an arbitrary or despotic government; ... enjoying political liberty." *Free*, Webster's Complete Dictionary of the English Language (1886). This essential meaning of the term "free" remains true today. *See* Black's Law Dictionary (2019).

Moreover, the meaning of "elections" goes beyond activity on election day. It is instead the full "process in which people vote to choose a person ... to hold an official position." [R.759 (quoting *Election*, Collins Dictionary)]. As courts understood at Utah's founding, "elections" include the complete "system of choosing or electing officers." *State v. Hirsch*, 24 N.E. 1062, 1063 (Ind. 1890).

Thus, as the district court explained, manipulating district lines prevents the electoral system from being "free" under its accepted meaning. [R.758-61.] District lines that artificially amplify the influence of majority-party voters distort election results to be "dependent" upon not free will but "arbitrary and despotic government" control. It denies minority-party voters their political "liberty" and "constrains" their opportunity to engage "the dictates of [their] own will."

Guaranteeing "free" elections also inherently requires equal opportunity. As understood in 1895, "free" meant "[o]pen to all citizens alike[.]" William C. Anderson, A Dictionary of Law (1889). And to be "free," all people must equally "[e]njoy[] full civic rights." Black's Law Dictionary (1891). The Utah Constitution itself demands that free governments must be equal. Utah Const. art. I, § 2; *see also Lee v. Gaufin*, 867 P.2d 572, 581 n.12 (Utah 1993).[16] This Court and the U.S. Supreme Court have also repeatedly recognized that equality is embedded in the concept of "free" in the electoral context. *See Gallivan*, 2002 UT 89, ¶ 32; *Reynolds*, 377 U.S. at 555; *Wesberry*, 376 U.S. at 17-18. Numerous other provisions guarantee equality in Utah's elections, which the Free Elections Clause reinforces. *See* Utah Const. art. I, § 24; art. IV, §§ 1, 2.

Thus, a free election is one that is not manipulated for partisan advantage. And the guarantee of a free election is inseparable from an equal one. Partisan gerrymandering violates both of these commands.

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[16] While the Framers removed the words "and equal" from the clause, the lack of discussion about the change suggests it was non-substantive. Official Report of the Proceedings and Debates of the Convention 323 (Salt Lake City, Star Printing Co. 1898). It is better understood as removing surplusage, given the accepted definition of free as itself containing an equality component. Indeed, just five days before, the Framers also removed "equal" from a different provision for stylistic reasons to "improve the rhetorical construction, without changing the meaning." *Id.* at 229. Other convention proceedings, including about elections and suffrage, reinforce that removing repetition was a common reason for non-substantive phrasing changes. *Id.* at 777.

2. The Legislature's contrary reading disregards the text.

The Legislature effectively asks this Court to read "all elections shall be free" out of the Constitution. That argument is wrong in at least three ways.

First, Defendants err when they claim (at 39) that the first clause is merely an unenforceable "prefatory statement." They argue, without support, that the Framers intended to make enforceable only the second clause, which 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.

That reading ignores the interpretative requirement that "[t]he provisions of this Constitution are mandatory and prohibitory, unless" declared otherwise. Utah Const. art. I, § 26. And the word "shall" in "all elections shall be free" means the provision is "clearly restrictive and mandatory." *State v. Beddo*, 63 P. 96, 96-97 (Utah 1900); *accord McMurdie v. Chugg*, 107 P.2d 163, 165 (Utah 1940). Such mandatory and declaratory provisions, under article I, section 26, are to be "rivet[ed]" "into the fundamental law of the State"—not rendered meaningless. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985).

Defendants' reading is also inconsistent with common interpretive rules. Signatures of prefatory clauses are terms like "notwithstanding" before a separate subsection, *see, e.g.*, *Bright v. Sorensen*, 2020 UT 18, ¶ 28, 436 P.3d 626, or phrases that have no operation apart from accompanying clauses, such as "upon such

terms as are just," *Interstate Excavating, Inc. v. Agla Dev. Corp.*, 611 P.2d 369, 371 (Utah 1980). These phrases cannot exist as a stand-alone rule; they depend on their context to make grammatical or logical sense. Not so for "all elections shall be free."

But even if only the second clause were operative, there is no "free exercise of the right of suffrage" when gerrymandering deliberately blocks some voters from affecting the political process. Other constitutional provisions protect voters when they cast their votes. *See, e.g.*, Utah Const. art. IV, §§ 2, 3. The Free Elections Clause must mean something more: no manipulation of the electoral process for political gain.

If Defendants were correct that the first part of article I, section 17 is prefatory and the second part protects only voters' ability to cast a vote, the government could render elections not free. For instance, the Legislature could decree that votes cast for Republican candidates count as one vote, but votes for other candidates count for some fraction. Or it could enact a law that says no congressional district can be comprised of more than 36% Democratic-supporting voters. Voters can still cast their votes in these electoral systems, but they are certainly not free.

Second, Defendants are also wrong when they claim the "all elections shall be free" language is not self-executing. (Br. at 37.) A constitutional provision is

self-executing "if it articulates a rule sufficient to give effect to the underlying rights and duties." *Jensen*, 2011 UT 17, ¶ 59. The determination requires "careful analysis of the precise terms ... and its original meaning." *Zimmerman v. Univ. of Utah*, 2018 UT 1, ¶ 19, 417 P.3d 78.

Here, that analysis shows that the free elections mandate is self-executing. As explained above (at 49), the word "shall" indicates the provision is mandatory, not directory. And requiring elections to be free from manipulation and discrimination is an enforceable requirement, not merely a "philosophical statement." *Berry*, 717 P.2d at 676. The provision is at least as clear as other Declaration of Rights provisions that are self-executing. *Jensen*, 2011 UT 17, ¶¶ 62-63 (article I, §§ 1, 14); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 630 (Utah 1990) (article I, § 22); *Bott v. DeLand*, 922 P.2d 732, 737-38 (Utah 1996) (article I, § 9), *abrogated on other grounds*, *Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533. Indeed, this Court has never held a provision in the Declaration of Rights is not self-executing, regardless of whether "the language [is] stated in relatively general terms." *Harvey v. Ute Indian Tribe Uintah & Ouray Reservation*, 2017 UT 75, ¶ 75, 416 P.3d 401.

Statehood era history confirms that the provision is self-executing. By 1895, numerous sister state courts had applied their Free Elections Clause protections, regardless of implementing legislation. *See, e.g.*, *Patterson v. Barlow*, 60 Pa. 54, 62

(1869) (emphasizing that the provision is "not intended as directory merely" but is "to be applied and enforced by appropriate sanctions and remedies" in court).[17] Free Elections Clauses were widely seen as core to the "declaration of rights for the protection of individual and minorities" across the states. Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 45 (5th ed. 1883)

The Legislature's contrary argument (at 38) relies wholly on one misconstrued sentence in *Anderson v. Cook*, 130 P.2d 278 (Utah 1942). However, Defendants failed to develop this point before the district court, which did not consider the argument. [R.314,762-63.] It is therefore not preserved for this appeal. *Johnson*, 2017 UT 76, ¶¶ 15-16.

In any event, the Legislature overreads *Anderson*. The *Anderson* Court observed that the Free Elections Clause was not self-executing, in a colloquial sense, because election administration "requires the legislature to provide by law for the conduct of elections." 130 P.2d at 285. The Legislature having provided such procedures, the Court reached the merits of the dispute and declared the Legislature's choice not to accommodate late-filing candidates did not to violate the Free Elections Clause. *Id.* That unremarkable proposition situates *Anderson* in

[17] *See also Jones v. Glidewell*, 13 S.W. 723, 726 (Ark. 1890); *Brown v. McMillan*, 18 S.W. 784, 787 (Mo. 1891); *Leeman v. Hinton*, 62 Ky. 37, 40 (1864).

the line of cases merely ruling that a candidate "filing deadline is mandatory." *Utah State Democratic Comm. v. Monson*, 652 P.2d 890, 892 (Utah 1982) (citing *Anderson*, 130 P.2d 278); *accord Pugh v. Draper City*, 2015 UT 12, ¶ 8, 114 P.3d 546.

If the Court somehow reads *Anderson* as a barrier to Plaintiffs' claims, the case should be overruled. The fleeting reference to self-execution is poorly reasoned and not firmly established in subsequent precedent. *Eldridge v. Johndrow*, 2015 UT 21, ¶¶ 22, 23-25, 28, 345 P.3d 553.

Third, Defendants invent an "executive-only" limit on the Free Elections Clause (at 40) that has no basis in text or precedent. The commands of the Declaration of Rights "safeguard the rights of the individual ... from whatever source." *State v. Holtgreve*, 200 P. 894, 900 (Utah 1921). There are no provisions in article I that apply only to one branch. Elsewhere when the Constitution means to restrict only the executive, it says so. *See e.g.*, Utah Const. art. VII, § 12(3)(a). The Free Elections Clause text contains no such limitation. And Defendants point to no precedent supporting this "executive-only" exception. (Br. at 41-43.)

3. History shows that the Free Elections Clause proscribes extreme partisan gerrymandering.

Relevant history confirms that the Free Elections Clauses is enforceable and proscribes gerrymandering.

First, this Court's historical cases show that Utah's Framers intended for the Constitution to prevent electoral manipulation. For instance, Utah's Territorial

Supreme Court in *Ferguson v. Allen* ruled 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." 26 P. 570, 574 (Utah 1891). The Court reinforced that the right to fair elections is "sacred" and "fundamental," and "[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.* In the years that followed, this Court repeatedly stressed the constitutional imperative to guarantee "honest and fair election[s]," *Ritchie*, 47 P. at 675, and to "secure[] a fair expression at the polls," *Earls v. Lewis*, 77 P. 235, 238 (Utah 1904); *accord Payne*, 97 P. at 138; *Park v. Rives*, 119 P. 1034, 1036 (Utah 1911).

Second, Utah's territorial context informs the purpose of the Free Elections Clause. Utah's Constitution, like prior failed versions, sought to achieve two goals concerning elections: (1) assure Congress that the State would sufficiently protect the rights of political (and religious) minorities, and (2) depart from the Utah Commission's largely unaccountable administration of elections that distorted the electoral process. (*Supra* at 6-7.) Guaranteeing that "all elections shall be free" was a solution for both problems.

Third, as the district court recited, the Free Elections Clause's English historical roots support its application here. [R.763-64.] Utah's provision, like all

other Free Elections Clauses, originates in the English Bill of Rights, which stated: "Election of Members of Parlyament ought to be free." Bill of Rights, 1689, 1 W. & M., Sess. 2 c. 2 (Eng.). The history of this provision is pertinent because "when a word or phrase is transplanted from another legal source ... it brings the old soil with it." *Maxfield v. Herbert*, 2012 UT 44, ¶ 31, 284 P.3d 647 (quotations omitted); *accord Bott*, 922 P.2d at 737 (noting other provisions "arose from the English Bill of Rights of 1689").

The provision sought to prevent the electoral manipulation in England's "rotten borough" system—an "attempt to pack parliament" by distorting district boundaries and their composition to ensure results favoring the monarch. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 256, 281, 286 (2021); *see also Wesberry*, 376 U.S. at 14 (discussing rotten borough history). Such manipulation, as well as other tactics, rendered elections in many boroughs a mere formality in favor of the King's party patrons. *Ross*, *supra*, at 269; J.R. Jones, *The Revolution of 1688 in England* 129-75 (1972).

The Free Elections Clause was seen as a solution to stop the King's effort to "manipulate the law" in his "campaign to pack Parliament," Jones, *supra*, at 318, though it failed to be fully enforced given local government corruption and the

monarch's continued broad, unilateral authority.[18] *Id.* at 326-31; Courtenay Ilbert, Parliament: Its History, Constitution and Practice 32-47 (rev. ed. 1920). But the principle remained prominent in early American history. Hamilton, for example, decried "the destruction of the right of free election" in England's politically manipulated rotten borough districting system. 2 Debates 264. To prevent similar manipulation, the early American state constitutions—on which Utah's Constitution was modeled—copied the English Free Elections Clause, with slight modifications, and applied it *to all elections*. *See, e.g.*, Ross, *supra*, at 289; *LWVPA*, 178 A.3d at 804-07.

Partisan gerrymandering is the modern-day analogue of the electoral distortion in England's rotten boroughs. When mapmakers manipulate district lines by artificially dividing or concentrating voters for partisan advantage, they skew elections the same way that those devising rotten boroughs did in seventeenth-century England. But the Utah Constitution does not vest the Legislature with "a power so arbitrary" that it is "beyond the control of the

[18] The *Harper III* court erroneously reasoned that the provision's failure to immediately cure the rotten boroughs indicates it was not designed to do so. 2023 WL 3137057, at *41 & n.21. If this reasoning were applied to the Fourteenth and Fifteenth Amendments, one would conclude that the persistence of Jim Crow meant those amendments were not intended to eradicate racial discrimination in voting. *Cf. Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966) (courts "have never been confined to historic notions of equality"); *Am. Fork City v. Crosgrove*, 701 P.2d 1069, 1073 (Utah 1985) ("[T]he scope of constitutional guarantees is not limited by their historical roots.").

sovereignty itself" akin to "the parliament of Great Britain, under a monarchial form of government." *Ritchie*, 47 P. at 675 (Bartch, J., concurring, joined by Miner, J.).

Defendants accept that the Free Elections Clause's English historical origins are pertinent (at 41-43), but their argument confuses how the provision was applied in *practice* for the *principle* that it enshrines. Though the English provision was enacted in response to the King's electoral manipulation, that is merely the circumstance in which it originated. In 1689, efforts to skew the election system came from the Crown, because the King then exercised executive, judicial, and legislative powers. *See, e.g.*, *Tite v. State Tax Comm'n*, 57 P.2d 734, 737 (Utah 1936). Therefore, like here, the provision applied across government functions. Defendants misinterpret Professor Ross's research on this point (at 41), who evaluates the circumstances of the monarch's anti-democratic practices but reinforces that "as in seventeenth-century England," the meaning of preserving free elections "should be understood as a key constitutional tool for preventing the distortions of the American form of government" regardless of the distorting actor. Ross, *supra*, at 290.

4. Persuasive sister state decisions hold Free Election Clauses to prohibit extreme partisan gerrymandering.

Because there is no federal Free Elections Clause, federal case law is not instructive. *See Gallivan*, 2002 UT 89, ¶ 33; *LWVPA*, 178 A.3d at 802. Sister state

Free Elections Clause cases, however, are persuasive and support Plaintiffs. *Jensen*, 2011 UT 17, ¶ 69.

For example, the Pennsylvania Supreme Court concluded that Pennsylvania's analogous Free and Equal Elections Clause should be given "the broadest interpretation, one which governs all aspects of the electoral process" and guarantees voters "equally effective power to select the representative of his or her choice." *LWVPA*, 178 A.3d at 814. After surveying the text, history, precedent, and principles concerning the judicial role, the court held that an "election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not 'free and equal,'" but the legislature had "interfere[d] to prevent the free exercise of the right of suffrage" under the Pennsylvania Constitution. *Id.* at 821.[19]

The *Szeliga* Court analyzed similar sources to conclude that Maryland's provision must be "broadly interpreted to apply to legislation that infringes upon the right of political participation" and prevent "the manipulation of Congressional district boundaries." 2022 WL 2132194, at *12-14, 46. Other state

[19] In 1789, Pennsylvania amended its provision from its original language: "all elections ought to be free[.]" 178 A.3d at 806-07. The *LWVPA* Court recognized that this original provision had the same essential meaning as its successor, "establish[ing] a uniform right of the people … to select their representatives in government." *Id.* at 807. Moreover, throughout *LWVPA*, the court applies the current "free and equal" as a single, integrated term that simply continues this identical protection against partisan gerrymandering today. *See, e.g.*, *id.* at 804, 809-14. Thus, the presence of "and equal" is an immaterial difference between *LWVPA* and this case. (*See supra* n.16.)

courts have applied analogous Free Elections Clauses beyond casting votes to generally secure "the very purpose of elections … to obtain a full, fair, and free expression of the popular will." *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915).[20]

Defendants misread these and other cases. For example, the Legislature incorrectly claims that the Missouri Supreme Court "specifically rejected" a Free Elections Clause partisan gerrymandering claim. (Br. at 44.) Far from it, the court in one paragraph referenced a *different part* of Missouri's Free Elections Clause, which the plaintiffs had raised in an after-thought argument that the court noted had "cite[d] no separate law" to develop the claim. *Pearson v. Koster*, 359 S.W.3d 35, 42-43 & n.4 (Mo. 2012). Defendants' citation to *Adams v. Landon*, 110 P. 280 (Idaho 1910), is puzzling given that the Idaho Constitution does not provide that "all elections shall be free." [R.767.] And Defendants' focus on the history and lack of precedent in Vermont and Virginia—where no plaintiff has pursued a Free Elections Clause partisan gerrymandering claim—is irrelevant. (Br. at 45-47.)

The *Harper III* court also gets the Free Elections Clause wrong. Without support, the Court equates the provision with the federal article I, section 4

[20] *See also Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 758, 762-63 (Del. Ch. 2017) (discussing application beyond casting votes); [R.766-67 (discussing *Neelley v. Farr*, 168 P. 458, 472 (Colo. 1916)]; *People v. Fox*, 128 N.E. 505, 506 (Ill. 1920) (distorted county primary districts deprived voters' right to be "practically equal in [their] influence").

Elections Clause and views the two in lockstep under *Rucho*. *Harper III*, 2023 WL 3137057, at *12 n.6, *19. Even viewed separately, the dissent has the better of the argument analyzing the language, criticizing the "distorted picture of ... historical understanding," and applying precedent. *Id.* at *61-64 (Earls., J., dissenting).

B. The Plan violates the Uniform Operation of Laws Clause.

Partisan gerrymandering violates Plaintiffs' state equal protection rights. The Constitution provides: "All laws of a general nature shall have uniform operation," and the government is "founded on [the people's] authority for their equal protection and benefit." Utah Const. art. I, §§ 2, 24. These protections are "essential to a free society" and "are inherent in the very concept of justice." *Gallivan*, 2002 UT 89, ¶ 32 (quotations omitted). They prohibit "arbitrary laws that favor the interests of the politically powerful over the interests of the politically vulnerable." *Lee*, 867 P.2d at 581. The Plan violates these guarantees by discriminating against Democratic-supporting urban voters.

The Uniform Operation Clause is an effects-oriented standard that "protects against discrimination within a class and guards against *disparate effects* in the application of laws." *Gallivan*, 2002 UT 89, ¶ 38 (emphasis added). A law can be "unconstitutional both on its face and for any de facto disparate effects on similarly situated parties." *Cook*, 2014 UT 46, ¶ 29. Although the Clause embodies similar principles as the Fourteenth Amendment, it affords "more protection" because it

"demands more than facial uniformity; the law's *operation* must be uniform." *State v. Drej*, 2010 UT 35, ¶ 33, 233 P.3d 476 (emphasis added).

The Uniform Operation Clause specifically protects against disparate burdens on the fundamental rights of voters—including the right to an undiluted vote. In *Gallivan*, for example, the Court invalidated an initiative signature requirement because it diluted urban Utahns' voting power based on only tenuous justifications. 2002 UT 89, ¶ 64. The Court recognized that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside" violates equal protection guarantees. *Id.* ¶¶ 32, 72 (citing *Reynolds*, 377 U.S. at 563).

The Legislature does not dispute that the district court applied the correct Uniform Operation standard, which asks whether (1) the "law creates a classification;" (2) the "classification is discriminatory" or "treats the members of the class or subclass disparately;" and (3) the classification "is reasonably necessary to further a legitimate legislative goal." [R.773 (citing *Gallivan*, 2002 UT 89, ¶¶ 42-43).] The district court concluded correctly that Plaintiffs sufficiently pled each element. [R.771-73.]

First, the Plan creates discriminatory classifications. A classification exists even if it is "not expressly created by the statute" but "result[s] from the application and operation of the statute." *Gallivan*, 2002 UT 89, ¶ 44. Like in

Gallivan, the Plan creates "subclasses" of similarly situated voters, *id.*, and its district lines operate differently on voters based on their partisan preferences and residence in what the Legislature arbitrarily deems an urban or rural area. [R.774.]

Second, the Plan disparately affects voters. [R.774.] The class of all voters—Republican-supporting and Democratic-supporting, urban and rural—are similarly situated because they must all live in districts that afford them an equal opportunity to affect the political process. But the Plan dilutes the voting strength of the Democratic-supporting and urban voters while amplifying the strength of Republican-supporting and rural voters. [R.774.] Similar to *Gallivan*, the Plan "in effect creates a discriminatory classification because of its disparate impact" diminishing urban, Democratic-supporting voters and boosting rural, Republican voters. 2002 UT 89, ¶ 45.

The Legislature misses the point when it responds (at 53) that the districts are mathematically equipopulous. As *Gallivan* instructs, discriminatory burdens on voting "power" can arise from distortions in the "election process" beyond numerical malapportionment. *Id.* ¶¶ 26, 45.

Third, the Plan is subject to heightened scrutiny because it implicates the right to vote, which is a "fundamental and critical right[] to which the Utah Constitution has accorded special sanctity." *Id.* ¶ 41. The burden therefore shifts to Defendants to show that the Plan is tailored to advance a compelling state

interest. *Lee*, 867 P.2d at 582-83. As explained above (at 28-35), Defendants cannot do so because the Plan lacks any legitimate, much less tailored, justification.

Seeking a lower level of scrutiny, Defendants insist (at 55) that the Plan leaves everyone with the "same right to vote" and makes it no "harder to exercise" that right. But Defendants ignore *Gallivan*: Utahns' fundamental right to vote is burdened not only by restraints on *access* to the franchise but also by laws that undermine "the right of qualified voters, regardless of their political persuasion, to cast their votes *effectively*." 2002 UT 89, ¶ 26 (emphasis added); *see also Shields v. Toronto*, 395 P.2d 829, 832 (Utah 1964) (right to vote must be "meaningful").

Defendants further resist heightened scrutiny on the grounds that partisan affiliation is not a suspect classification. (Br. at 55-56.) But heightened scrutiny applies regardless because the Plan "implicates" fundamental rights, especially the "critical" right to vote. *Gallivan*, 2002 UT 89, ¶¶ 40-41. For example, although one's status as an urban or rural resident is not a suspect classification, in *Gallivan*, this Court held that heightened scrutiny applied where a "multi-county signature requirement ha[d] the effect of diluting the power of urban registered voters" and "invidiously discriminate[d] against urban registered voters in favor of rural registered voters." *Id.* ¶¶ 45, 49, 72.

Defendants are also wrong to the extent they argue that partisan preference is too "transient" a trait to sustain scrutiny. (Br. at 55.) While transience is a factual

question, it is not a relevant one here. The Legislature targeted Plaintiffs for unequal treatment based upon their *past* voting behavior. That discriminatory action was unconstitutional regardless of whether voters' *future* behavior changes.

Regardless, Uniform Operation protections apply to classifications beyond those involving immutable traits. *See Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 17, 108 P.3d 701; *State v. Angilau*, 2011 UT 3, ¶ 24, 245 P.3d 745; *State v. Outzen*, 2017 UT 30, ¶ 18, 408 P.3d 334. A law that targets Catholics for discriminatory treatment does not become nonjusticiable merely because they may in the future leave that faith.

The Legislature also argues that because the Uniform Operation Clause has not historically applied to gerrymandering, it categorically "has no application here." (Br. at 55-56.) But constitutional guarantees do not come with expiration dates, nor may the Legislature usurp them by adverse possession. Regardless of whether anyone has previously asked this Court to apply the Uniform Operation Clause to gerrymandering, Plaintiffs do so now.

If anything should be gleaned from Defendants' observation (at 56) that the Framers enacted the provision with "no substantive discussion," it is that none was needed to codify a principle so foundational as the demand for equality in all government action. *See Maese*, 2019 UT 58, ¶ 70 n.23. Indeed, the Framers discussed *none* of the endless types of enactments to which the Uniform Operation Clause

has since been applied, including laws burdening voting rights. They wrote the provision to apply to "*all* laws of general nature," without an unstated "not partisan gerrymandering" exception.

Rucho does not control here because Utah's Uniform Operation Clause guarantees exceed a federal equal protection floor. *Gallivan*, 2002 UT 89, ¶¶36-40; *Drej*, 2010 UT 35, ¶ 33. More persuasive are the decisions of sister state courts, *see* Sutton, *supra*, at 175, which have struck down extreme partisan gerrymanders under analogous equal protection provisions. The Alaska Supreme Court recently held that the state's analogous equal protection provision "requires a more demanding review than its federal analog" and bars gerrymandering. *2021 Redistricting Cases*, 2023 WL 3030096, at *6-7; 45, 48-49. The *Szeliga* Court reached a similar conclusion. 2022 WL 2132194, at *11-12, 15-18, 43-46.

The contrary *Rivera* decision is unpersuasive because the constitutional text is materially different and the court followed a lockstep approach to equal protection analysis that this Court rejects. 512 P.3d at 178. *Harper III* is distinguishable for the same reason. And in the court's abrupt reversal of its precedent, it came to the unpersuasive, atextual, and ahistorical conclusion that vote dilution occurs only in malapportioned districts. 2023 WL 3137057, at *64-65 (Earls, J., dissenting).

C. The Plan violates Plaintiffs' rights to free speech and association.

The Plan violates Plaintiffs' freedoms of speech and association by retaliating against their political viewpoints. Utah's Constitution guarantees that "[a]ll persons have the inherent and inalienable right to ... assemble peaceably," "petition for redress of grievances," and "communicate freely their thoughts and opinions," while commanding that "[n]o law shall be passed to abridge or restrain the freedom of speech." Utah Const. art. I, §§ 1, 15. Together, these clauses define Utahns' free speech and association rights and proscribe laws that either "discourage or prohibit political expression." *Cook*, 2014 UT 46, ¶ 57.

Safeguarding free speech and association in the electoral process is critical. These freedoms are "not only the hallmark of free people, but [are], indeed, an essential attribute to the sovereignty of citizenship." *Cox v. Hatch*, 761 P.2d 556, 558 (Utah 1988). As such, numerous courts have recognized the constitutionally protected expressive interest in voting. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).[21] Article I, sections 1 and 15 protect this expression and guarantee the "healthy political exchange [that] is the foundation of our system of free speech and free elections." *Jacob v. Bezzant*, 2009 UT 37, ¶ 29, 212 P.3d 535.

[21] *See* J. Gerald Hebert & Armand Derfner, *Voting Is Speech*, 34 Yale L. & Pol'y Rev. 471, 485-91 (2016) (collecting other cases).

Partisan gerrymandering violates these guarantees and does so in a manner "distinct from vote dilution." *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring)). *First*, as the district court correctly held, Plaintiffs sufficiently allege that, by cracking Democratic-supporting voters, the Plan is "discriminatory and retaliatory based on [Plaintiffs'] disfavored political views" and it thus "discourages and burdens political expression." [R.781-83.] The Legislature's extreme partisan gerrymander effectively rewards voters holding favored views and punishes voters holding disfavored views, disrupting the "free functioning of" debate among competing ideas by "tip[ping] the electoral process in favor of the incumbent party." *Elrod v. Burns*, 427 U.S. 347, 356 (1976); *see also Cal. Dem. Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J., concurring). This discrimination violates Utahns' free speech rights because the government cannot constitutionally retaliate against expression and "restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014).

Second, the Plan separately abridges Plaintiffs' right "to associate for the advancement of political beliefs." *Gallivan*, 2002 UT 89, ¶ 26 (citation omitted). Affiliating with a political party and supporting candidates are associational activities "through which the individual citizen in a democracy such as ours undertakes to express his will in government." *Anderson v. Utah Cnty.*, 368 P.2d

912, 913 (Utah 1962). Voters have a protected right "to band together in promoting among the electorate candidates who espouse their political views" on the same terms as other voters. *Jones*, 530 U.S. at 574. By dividing voters who would otherwise associate together to build support for a congressional candidate, the Plan abridges these rights. [R.13-17,75-77,781-83.] It artificially depresses Plaintiffs' ability to recruit volunteers, secure contributions, and advocate together for their views supporting preferred congressional candidates. *See Whitford*, 138 S. Ct. at 1938 (Kagan, J., concurring).

Plaintiffs are not advocating for a "right to political success," as Defendants claim. (Br. at 59.) Plaintiffs merely seek an open political forum in which the government does not use gerrymandering to retaliate against and abridge minority viewpoints and association. The Legislature's accusation is ironic, considering that predetermining political success is precisely the goal of its extreme partisan gerrymander.

Nor do Plaintiffs need to establish that they are wholly prevented from speaking or associating. (*Cf.* Br. at 58.) The Constitution guards against "abridge[ment]" and "restrain[t]" of speech—not just prohibition. Utah Const. art. I, § 15. Utah's speech protections "prohibit laws which either directly limit [those] protected rights or indirectly inhibit the exercise of those rights," even if short of outright silencing speech. *Am. Bush v. City of S. Salt Lake*, 2006 UT 40,

¶¶ 17-18, 21, 140 P.3d 1235; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011) ("[T]he distinction between laws burdening and laws banning speech is but a matter of degree."). It is therefore "no answer to say that [Plaintiffs] can still be 'seen and heard'" expressing their views supporting congressional candidates when the gerrymander "ha[s] effectively stifled [their] message." *McCullen v. Coakley*, 573 U.S. 464, 489-90 (2014).

Defendants' principal response is that none of the Constitution's free speech provisions uses the words "redistricting" or "voting." But this proves too much. For example, nowhere does the First Amendment mention "campaign contributions" or "independent corporate expenditures," but the U.S. Supreme Court has held those to be protected speech. *See generally Citizens United v. FEC*, 558 U.S. 310 (2010). If transferring money to a political candidate is protected speech, then surely *voting* for one is too. Indeed, at the time of the Constitution's adoption, "speech" meant "as expressing ideas," and "vote" meant "to express or signify the mind, will, or preference," and to provide an "opinion of a person," Webster's Practical Dictionary (1884). Defendants themselves emphasize that voting is how a voter "express[es] ... his will, preference, or choice." (Br. at 52 (quoting *Vote*, Black's Law Dictionary (1891)).) Defendants cannot disentangle speech from voting, and partisan gerrymandering infringes both.

Defendants' reliance on *Rucho* (at 58) is again unconvincing because Utah's speech protections are broader than their federal counterpart. *West*, 872 P.2d at 1007; *Provo City Corp. v. Willden*, 768 P.2d 455, 456 n.2 (Utah 1989). Utah's text protects rights not found in the First Amendment, *e.g.*, the right to "communicate freely their thoughts and opinions." Such textual differences mean that Utah's protections are broader than the First Amendment and, by their plain language, proscribe even the indirect abridgment of political speech that partisan gerrymandering imposes.

The history of article I, sections 1 and 15 also support their application here. At the provisions' core is the belief that "the framers of Utah's constitution saw the will of the people as the source of constitutional limitations upon our state government," with free speech being essential to "guard … against the encroachments of tyranny." *Am. Bush*, 2006 UT 40, ¶ 13; *accord Stromberg v. California*, 283 U.S. 359, 369 (1931) (describing the free speech purpose to keep the government "responsive to the will of the people"). Free speech has long been understood to safeguard a political system that facilitates dissent and a neutral forum for political debate—not one that is distorted to amplify the ideas of some over others. (*See supra* at 3-4.)

Other courts have recognized that partisan gerrymandering implicates speech and association protections. In *Szeliga*, for example, the court applied strict

scrutiny to bar a congressional gerrymander "that dilute[d] the influence of certain voters based upon their prior political expression—*i.e.*, their partisan affiliation and their voting history." 2022 WL 2132194 at *19; *id.* 18-21, 43-46; *see also Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *Whitford*, 138 S. Ct. at 1938 (Kagan, J., concurring).

Defendants' contrary reliance on *Johnson*, *Rivera*, and *Harper III* is unpersuasive. As noted (at 34-35), there were no partisan gerrymandering claims before the Wisconsin Supreme Court in *Johnson*, based on free speech or otherwise. The *Rivera* Court—which dealt with distinct constitutional text lacking many of Utah's protections—summarily dismissed the claim because it ruled that "the sole mechanism relied on for judicial enforcement" against partisan gerrymandering "is the constitutional guarantee of equal protection" that was in federal lockstep. 512 P.3d at 179. The *Harper III* decision is unpersuasive for similar reasons. The court ruled that its speech protections followed the federal First Amendment.[22] 2023 WL 3137057, at *48. But Utah's guarantees are not limited by any federal floor. The Utah Constitution's text protects additional rights and prohibits the abridgment *or* restraint of speech, while North Carolina's constitution is narrower

[22] *Harper III*'s reasoning is also unpersuasive because *Rucho* held that it did not have Article III jurisdiction to decide the merits questions, not that the First Amendment permits extreme partisan gerrymandering.

and only mentions restraints. *Compare* Utah Const. art. I, §§ 1, 15, *with* N.C. Const. art. I, §§ 12, 14.

D. The Right to Vote Clause prohibits extreme partisan gerrymandering.

Article IV, section 2's Right to Vote Clause affirmatively guarantees the right to a meaningful, undiluted vote.

The text provides an affirmative mandate to protect the right to vote: "[e]very citizen" who meets certain eligibility requirements "*shall be entitled to vote*." Utah Const. art. IV, § 2 (emphasis added). The use of "shall" signifies a command and a right secured to the people. And the text lacks a counterpart in the U.S. Constitution, meaning it provides a broader and distinct protection of Utahns' rights. *Gallivan*, 2002 UT 89, ¶ 33.

There is no merit to Defendants' contrary argument (at 49) that article IV, section 2 does nothing more than list voter qualifications. Their argument might apply to Arizona's constitution, which provides that "*[n]o person* shall be entitled to vote" in any election "*unless*" that person meets the eligibility requirements. Ariz. Const. art. VII, § 2 (emphasis added). But here, the voter qualifications listed in article IV, section 2 merely provide bounds to what the provision affirmatively guarantees: an effective right to vote.

The Legislature's argument also disregards precedent. For over a century, this Court has emphasized that the right to vote must be meaningful and

undiluted. It has held that the right to vote is "among the most precious of the privileges for which the democratic form of government was established." *Rothfels v. Southworth*, 356 P.2d 612, 617 (Utah 1960). It cannot be "abridged, impaired, or taken away, even by an act of the Legislature," which must instead "secure[] a fair expression at the polls." *Earl*, 77 P. at 237-38; *accord Nowers v. Oakden*, 169 P.2d 108, 117 (Utah 1946) (reinforcing *Earl*).

The judiciary is charged with ensuring this fair expression, including by "mak[ing] the [right to vote] *meaningful*." *Shields*, 395 P.2d at 832 (emphasis added); *Dodge v. Evans*, 716 P.2d 270, 273 (1985). Thus, as the district court recognized, the government violates article VI, section 2 if it renders the "right to vote ... improperly burdened, conditioned, *or diluted*." [R.786 (quoting *Dodge*, 716 P.2d at 273).]

Defendants fail to engage with this precedent. Without support, they attempt to limit *Dodge* to malapportionment. (Br. at 52.) And they then dismiss this Court's other holdings and reasoning as no more than "penumbral emanations." (Br. at 51.) That is wrong. This precedent requires that the right to vote be meaningful and undiluted. The right must not be "denied by a debasement ... of [its] weight," which is "just as effective[]" at negating the right "as by wholly prohibiting the free exercise of the franchise. *Reynolds*, 377 U.S. at 555; *accord Johnson*, 2021 WL 5578395, at *26 (Dallet, J., dissenting) ("[T]he problem with

extreme partisan gerrymandering isn't that it literally denies people the right to vote" but that it "distorts the political process so thoroughly that those rights can become meaningless."). The gerrymandered Plan violates these rights.

Sidestepping precedent, Defendants principally rely on convention history. (Br. at 49-51.) Such "undue reliance" is misplaced. *Maese*, 2019 UT 58, ¶ 20. In any event, that history shows the Framers *rejected* added voter qualifications in the form of longer residency requirements and literacy tests. Their efforts to make voting more inclusive suggest that Utah's right to vote is *even more* expansive than other states'. (*Cf.* Br. at 50.)

Because the right to vote is fundamental, article VI, section 1 claims require heightened scrutiny. *See Count My Vote v. Cox*, 2019 UT 60, ¶¶ 83-86, 452 P.3d 1109 (Himonas, J., concurring); *accord Montana Democratic Party v. Jacobsen*, No. DV 21-0451, 2022 WL 16735253, at *66-67 (Mont. Dist. Sep. 30, 2022) (collecting sister state cases). Plaintiffs sufficiently alleged that the partisan gerrymandered Plan fails this review. [R.784-87.]

CONCLUSION

The district court's order denying the Legislature's motion to dismiss should be affirmed and the case remanded for an expedited trial to permit relief for the 2024 election.

DATED this 12th day of May, 2023.

RESPECTFULLY SUBMITTED,

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Certificate of Compliance

I hereby certify that:

1. This brief contains 15,975 words, excluding any tables or attachments, in compliance with this Court's March 16, 2023, Order allowing principal briefs of up to 16,000 words.

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

DATED this 12th day of May, 2023.

/s/ Troy L. Booher

CERTIFICATE OF SERVICE

This is to certify that on the 12th day of May, 2023, I caused the *Response Brief of League of Women Voters of Utah, Mormon Women for Ethical Government, Stephanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, and Jack Markman* and *Addendum* to be served via email on:

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