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IN THE SUPREME COURT OF THE STATE OF UTAH

Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Brad Wilson, Sen. J. Stuart Adams, and Lt. Gov. Deidre Henderson,

Petitioners,

v.

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

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR INTERLOCUTORY APPEAL

No. 20220991-SC

Exhibits[1]

A	Ruling and Order Granting in Part and Denying in Part Defendants' Mot. to Dismiss (Nov. 22, 2022)
B	Order Denying Mot. for Stay of Proceedings Without Prejudice (Dec. 2, 2022, reflecting Nov. 30, 2022 oral ruling)
C	Amended Scheduling Order (Dec. 2, 2022)
D	Mot. for Amended Scheduling Order (Nov. 14, 2022)
E	Lt. Gov. Deidre Henderson's Response to Plaintiffs' Mot. for Scheduling Order (Nov. 21, 2022)
F	Legislative Defendants' Mot. to Dismiss (May 2, 2022)
G	Memo. Opposing Legislative Defendants' Mot. to Dismiss (June 1, 2022)
H	*Free*, Black's Law Dictionary (1891)
I	*Free*, Anderson Dictionary of Law (1889)

[1] Citations to exhibits attached to the petition for interlocutory review will be designated as "Pet. Ex. _," while citations to exhibits attached to this brief will be designated as "Ex. _."

INTRODUCTION

The Court should deny the petition because an interlocutory appeal would hinder, not materially advance, the termination of this litigation.

This case is set for trial in May 2022. That schedule ensures final resolution before the 2024 election calendar begins, including a decision from this Court on appeal. Petitioner's "appeal first" proposal not only would upend this schedule, but also would deprive this Court of the full factual record it needs to consider the justiciability question Petitioners raise, a full record the Court will have after final judgment. An appeal now will also needlessly delay the termination of the litigation, and Petitioners are wrong on the merits in any event.

The Court should decide any appeal with a full record after final judgment.

BACKGROUND

In 2018, Utah's voters enacted Proposition 4, invoking their guaranteed right to "alter or reform their government" by prohibiting partisan gerrymandering. *See* Utah Const. art. I, § 2. The Legislature subsequently repealed the voter-passed reform, and, in the fall of 2021, it enacted an extreme partisan gerrymander (the "Plan") guaranteeing one-party control of Utah's congressional delegation. It did so by carefully dividing the large and concentrated population of non-Republican, urban voters in the Wasatch Front across all four of Utah's districts, cleaving neighborhoods and communities in Salt Lake City and numerous other municipalities. Numerous neutral map proposals—based on Utah's political geography and legitimate redistricting principles—would have resulted in at least one competitive district. Instead, the Legislature manipulated the redistricting process for partisan gain by drawing four districts that ensure Republicans are securely elected for a decade. Legislators involved in the redistricting process and the Governor admit that raw partisanship infected the process.

In March 2022, Plaintiffs—nonpartisan civic organizations and a bipartisan group of voters—challenged the Plan and the repeal of Prop 4. [Pet. Ex. A.] The Legislative Defendants filed a motion to dismiss in May 2022, which the Lieutenant Governor did not join. [Ex. F.] Defendants also asked the district court to issue a stay based on the U.S. Supreme Court's grant of certiorari in *Moore v. Harper*, 142 S. Ct. 2901 (2022). The court denied the stay on August 22. [Pet. Ex. C at 4.][2] After briefing and argument, the court also denied the motion to dismiss, except for Respondents' Article I § 2 challenge to the repeal of Prop 4. [Pet. Ex. B at 2; Ex. A at 60.] On December 2, the court denied a second stay request. [Ex. B.] The court also entered an expedited scheduling order, setting trial to start May 22, 2023. [Ex. C.]

ISSUES PRESENTED

1. Whether partisan gerrymandering claims are justiciable?
2. Whether the Legislature's redistricting responsibility is shielded from judicial review under the separation-of-powers doctrine?
3. Whether extreme partisan gerrymandering violates the Utah Constitution?

ARGUMENT

I. INTERLOCUTORY APPEAL WILL NOT MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION

At the outset, the Court should deny the petition because an interlocutory review will not materially advance the termination of the litigation. *See* Utah R. App. P. 5(c)(1)(D). The case is set for trial in May 2023 and discovery is already underway. Interlocutory review would result only in piecemeal litigation and significantly delay final resolution of the case,

[2] Petitioners make a glancing reference to pending litigation in *Moore v. Harper* (Pet. at 6 n.3), but that is insufficient to "allow[] the [Court] to meaningfully evaluate" their alternative request for a stay. *US W. Commc'ns v. Public Serv. Comm'n of Utah*, 901 P.2d 270, 278 (Utah 1995). Petitioners failed to timely appeal the district court's stay decision on this basis. [Pet. Ex. C.]

jeopardizing the possibility of Respondents' securing relief in time for the 2024 election. What's more, interlocutory review would deprive the Court of the kind of fully developed record that has benefitted every other state high court to consider similar claims to date.

Petitioners do not address either problem or otherwise present "good reasons for departing from the general rule that appeals should be taken only from final judgments." *Kennecott Corp. v. Utah State Tax Comm'n*, 814 P.2d 1099, 1102 (Utah 1991). Allowing the parties to finish discovery and proceed to a trial "will better serve the administration and interests of justice" because the Court will have a full record to review the appeal. Utah R. App. P. 5(g).

A. This Court's appellate review will be enhanced with a full record

Granting review would deprive this Court of the factual record critical to resolving the issues. "[T]horoughness and efficiency in the administration of justice" are "best served by refusing to entertain an interlocutory appeal and letting the case proceed to trial." *Manwill v. Oyler,* 361 P.2d 177, 178 (Utah 1961). Here, "permit[ting] discovery of information . . . will aid in eliminating non-controversial matters, and in identifying, narrowing, and clarifying the issues on which the contest may prove necessary." *State ex rel. Road Comm'n v. Petty*, 412 P.2d 914, 917 (Utah 1966). By allowing the district court to find facts, the Court will have a "clear factual record" that it requires to make "informed decisions." *SUWA v. Kane Cnty. Comm'n*, 2021 UT 7, ¶ 3 n.2, 484 P.3d 1145 (quoting *Carter v. Lehi City*, 2012 UT 2, ¶ 93, 269 P.3d 141).

Petitioners have argued that Respondents' claims are nonjusticiable because there are no meaningful standards to resolve partisan gerrymandering disputes. Discovery will further rebut that assertion. Among other things, discovery and further proceedings in the trial court will elucidate whether Respondents' proposed standards are judicially manageable, the evidence suffices to prove a violation of these standards, and qualitative and historical aspects

of the constitutional analysis. *See Harper v. Hall*, 868 S.E.2d 499, 546-52 (N.C. 2002), *cert. granted*, 142 S. Ct. 2901; *LWV of Pa. v. Commonwealth*, 178 A.3d 787, 814-21 (Pa. 2018). As the district court emphasized in its opinion, Petitioners *did not contest* the standards Respondents presented below. [Ex. A at 36.] This includes the Free Elections Clause test that examines partisan effects and the lack of legitimate justification that "Defendants neither address nor object to," [*id.*,] and the other well-established analyses under the uniform operation, free speech and association, and right to vote clauses. *See infra* Part II.B. Through fact and expert discovery, Respondents will present direct and circumstantial evidence establishing that the Plan imposes extreme partisan effects and has no legitimate justification.

By denying interlocutory review, the Court would follow the example set by eight other state high courts in recent years that have addressed partisan gerrymandering claims. The North Carolina Supreme Court in *Harper v. Hall* ruled the Legislature's gerrymandered maps unconstitutional only after instructing the trial court to first "hold proceedings on the merits" while "expediting discovery and scheduling a trial" to allow time for an appeal. 868 S.E.2d at 514. The resulting fact finding and explication of historical sources proved critical to the Supreme Court's decision. *Id.* at 515-24, 547-51. Likewise, the Florida Supreme Court rejected a partisan gerrymander based on its examination of a thorough trial record demonstrating the legislature's unlawful intent. *LWV of Fla. v. Detzner*, 172 So. 3d 363, 378-86 (Fla. 2015). Six other state high courts have taken appeals in other redistricting cases after first having a developed evidentiary record and trial court evaluation of fact and expert witnesses.[3]

[3] *See LWV of Pa.*, 178 A.3d at 766-67; *Adams v. DeWine*, 195 N.E.3d 74, 82, 100 (Ohio 2022); Order, *In re 2021 Redistricting Cases*, No. S-18419, at 6 (Alaska May 24, 2022), tinyurl.com/y73zyac7; *Harkenrider v. Hochul*, 197 N.E.3d 437, 443-44, 453-54 (N.Y. 2022). The Maryland high court did not review a trial decision rejecting a gerrymandered congressional

To Respondents' knowledge, there are no state appeals courts that have decided a partisan gerrymandering case without a developed record.[4] That is likewise true of many of the federal cases Petitioners cite, which conducted discovery and a trial before the U.S. Supreme Court took up the justiciability and merits legal questions. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492-93 (2019); *Gill v. Whitford*, 138 S. Ct. 1916, 1924-25 (2018); *LULAC v. Perry*, 548 U.S. 399, 451 (2006) (Stevens, J., concurring); *Davis v. Bandemer*, 478 U.S. 109, 115 (1986).

A post-trial appeal has the "additional advantage" of having "the issues of facts . . . determined" so "the record [can be] viewed in the light most favorable to the judgment, instead of the reverse." *Manwill*, 361 P.2d at 178. The district court frequently admonished Petitioners for misstating facts and making assumptions to be tested through evidence. [Ex. A at 37, 42-44, 51.] Petitioners repeat the mistake here. (*See, e.g.*, Pet. at 2 (misstating complaint), 8-9 (assuming empirical facts about voting behavior), 18 (assuming conclusion that gerrymandering does not "discourage . . . political expression").) At present, the Court must reject Petitioners' version of the facts and "assum[e] the truth of the allegations in the complaint and draw[] all reasonable inferences" for Respondents. *Castro v. Lemus*, 2019 UT 71, ¶ 11, 456 P.3d 750. By denying the petition, the Court can later review a developed record, which has benefitted all other state courts in deciding the important issues presented.

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map, but it did assign a special magistrate to first conduct discovery in a state legislative case. Mem. Op. & Order, *Szeliga v. Lamone*, No. C-02-CV-21-001773, at 93-94 (Anne Arundel Cnty. Cir. Ct. Mar. 25, 2022), tinyurl.com/3uhunz9s (congressional case settled); Amended Order, *In re 2022 Legislative Redistricting*, Misc. No. 21, at 2 (Md. Feb. 3, 2022), tinyurl.com/8rt8tzze (legislative case). And although the Kansas Supreme Court rejected a partisan gerrymandering case, it did so with a developed trial record. *Rivera v. Schwab*, 512 P.3d 168, 173 (Kan. 2022).

[4] Petitioners cite the Wisconsin Supreme Court's decision reviewing maps following an impasse between the Legislature and Governor. *Johnson v. WEC*, 967 N.W.2d 469 (Wis. 2021). That case is inapposite. Because no maps were enacted, the petitioners pled malapportionment claims. But no partisan gerrymandering claims were advanced in that case, and the plurality's consideration of the topic is dicta that binds neither that court nor this one. *Id.* at 489-90.

B. An interlocutory appeal would result in piecemeal appeals and delay

The Court should deny the petition to avoid the high risks of delay and piecemeal appeals. "[I]nterlocutory appeals should be avoided because they present appellate courts with multiple appeals involving narrow issues taken out of the context of the whole case which slow down the final determination." *Kennecott Corp.*, 814 P.2d at 1101. The decision whether to grant interlocutory review should "take into account the one- or two-year delay" that is "occasioned by an interlocutory appeal." *A.J. Mackay Co. v. Okland Constr. Co.*, 817 P.2d 323, 326 (Utah 1991). Here, such delay weighs strongly against granting interlocutory review.

Given the fundamental rights at stake, Respondents seek to have this case resolved in time to obtain relief before the 2024 election. To do so, the parties need to complete trial and remedial proceedings before certain candidate filing deadlines. According to the Lieutenant Governor, it would be ideal to have district lines set by November 2023. [Ex. E.] Interlocutory review now would result in substantial delays and make it more difficult to obtain timely relief. Petitioners even conceded in a district court hearing last week that an interlocutory appeal would likely prevent relief for 2024. Respondents have already suffered one election under an unconstitutional map. The most efficient route is to proceed with the May 2023 trial and then take "one appeal after final judgment" to "permit[] resolution of all issues together, . . . with an ultimate savings in cost and time." *A.J. Mackay Co.*, 817 P.2d at 326.

Petitioners argue that the justiciability questions they assert are threshold issues that could terminate the case. (Pet. at 5.) But every case has threshold questions that *could* terminate the case. That does not warrant interlocutory review, which should be granted "only when it is '*essential* to adjudicate principles of law or procedure in advance as a necessary foundation . . . ; or if there is *a high likelihood* that the litigation can be finally disposed of on such an

appeal.'" *Williams v. State*, 716 P.2d 806, 808 (Utah 1986) (emphasis added) (quoting *Manwill,* 361 P.2d at 178). In fact, the Court has denied a Rule 5 petition even when it "invoke[d] a threshold issue" and "appellate clarification of the operative legal standards could conceivably advance the ultimate disposition," in part because the legal question was "a difficult one," and to "resolve [it], . . . the district court may have to wade into factual questions that cannot be resolved on the current record." *Washington Townhomes, LLC v. Washington Cnty. Water Conservancy Dist.*, 2016 UT 43, ¶¶ 9, 16-26, 388 P.3d 753.

Here, the threshold legal question—whether courts can capably apply the *law* to the *facts* in a partisan gerrymandering case—is inextricably intertwined with the factual record. There is no better way to determine whether a case is justiciable than for a court to endeavor to adjudicate it. This Court cannot determine whether a question is justiciable if its adjudication has never been attempted in Utah courts. The district court should be permitted to hold trial and enter final judgment—a process that will greatly inform this Court's review on appeal.

II. PARTISAN GERRYMANDERING CLAIMS ARE JUSTICIABLE

Petitioners' justiciability arguments also lack merit. These arguments are antithetical to Utah's basic system of "constitutional checks and balances" that is "designed to ensure against the abuse of power." *Matheson v. Ferry*, 657 P.2d 240, 245 (Utah 1982) (Stewart, J., concurring). Petitioners are also incorrect that Utah's justiciability standards are "the same" as federal law. (Pet. at 6, 9-10.) Utah courts routinely deviate from federal Article III standards on justiciability questions. [Ex. A at 15 (collecting cases).] Indeed, in *Rucho v. Common Cause*, the U.S. Supreme Court endorsed state court constitutional review of gerrymandering. 139 S. Ct. 2484, 2507 (2019). The Court should not entertain Petitioners' invitation to "shirk [its] duty" to uphold individual rights and prevent unconstitutional acts of the Legislature. *Matheson v. Ferry*, 641

P.2d 674, 680 (Utah 1982); *accord In re Childers-Gray*, 2021 UT 13, ¶ 67, 487 P.3d 96. "[W]hether the [Legislature's] actions pass constitutional muster is certainly a justiciable issue" for the Court to resolve. *Skokos v. Corradini*, 900 P.2d 539, 542 (Utah Ct. App. 1995). It is "'the very essence of judicial duty' under our constitutional form of government." [Ex. A at 12 (quoting *Marbury v. Madison*, 5 U.S. 137, 178 (1803)).]

A. The Legislature does not have exclusive redistricting authority

Petitioners wrongly assert that the Legislature has exclusive, unreviewable authority over redistricting. (Pet. at 6-11.) That argument means the Court would be categorically barred from reviewing redistricting laws, no matter how extreme the gerrymander or the basis of its discrimination. This exceptional proposition demands exceptional proof that redistricting involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *In re Childers-Gray*, 2021 UT 13, ¶ 64, or is "categorically . . . 'so inherently legislative . . . that [it] must be exercised exclusively by [that] respective department[],'" *In re Young*, 1999 UT 6, ¶ 14, 976 P.2d 581. The district court rejected this argument because "[e]ven a cursory analysis reveals that the redistricting power is not exercised solely by the Legislature." [Ex. A at 12.] The text's "language, other provisions in the constitution . . . , historical materials, and policy" favor judicial review. *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 23, 450 P.3d 1092.

First, the Utah's Constitution's text does not suggest redistricting is wholly committed to the Legislature. Article IX 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." Utah Const. art. IX, § 1. The modifiers "solely" and "exclusively" feature prominently in Petitioners' argument. (Pet. at 1.) [Ex. F at 1-3, 5-7, 9, 18, 28-29, 32.]

But they appear nowhere in the provision. When the Constitution grants exclusive authority, it says so expressly. Utah Const. art. VI, § 17 ("The House of Representatives shall have the *sole power* of impeachment" (emphasis added)); *id.* art. XIV, §§ 1, 2, 5; *id.* art. X, § 8; *id.* art. XIII, § 3. The language here merely establishes that redistricting is a legislative function in the first instance, and the Constitution imposes a time restraint to perform that function.

Bare reference to "the Legislature" cannot mean *only* the Legislature, as Petitioners claim. (Pet. at 7, 10.) If that mode of constitutional analysis prevailed, numerous constitutional provisions that mention the Legislature—from public education, Utah Const. art. X, § 2; to taxes, *id.* art. XIII, § 2; to gun regulation, *id.* art. I, § 6; to officer compensation, *id.* art. VII, § 18—would be beyond judicial review. But this Court has held that references to the "Legislature" are intended to designate a legislative function, which is subject to constitutional limits. *E.g.*, *Rampton v. Barlow*, 464 P.2d 378, 380 (Utah 1970) (judicial review of education law); *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 18 n.2, 144 P.3d 1109 (same for gun regulation); *Carter v. Lehi City*, 2012 UT 2, ¶ 93, 269 P.3d 141 (recognizing citizen lawmaking power under Compensation Clause); *Mawhinney v. City of Draper*, 2014 UT 54, ¶ 18, 342 P.3d 262 (same for taxes). Thus, the Legislature's authority "is not unlimited" simply because the Constitution grants the "Legislature" lawmaking authority in the first instance. *Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ.*, 2001 UT 2, ¶ 14. The Legislature's acts are subject to gubernatorial veto and judicial review—not to mention citizen initiatives.

Second, history confirms that redistricting is not wholly committed to the Utah Legislature. *Carter*, 2012 UT 2, ¶ 78 (considering historical practice to interpret the Constitution). As the district court thoroughly discussed, the redistricting power has *never* been an exclusive function of the Legislature. [Ex. A at 11-16.] Instead, redistricting laws have

previously been subjected to judicial review, rejected by gubernatorial veto, and enacted by citizen initiative. [*Id.*; *see also* Ex. G at 9-10 (describing gubernatorial veto, redistricting citizen initiatives, and the Court's merits decision in *Parkinson v. Watson*, 291 P.2d 400, 402 (Utah 1955)).] Indeed, *this Court's jurisdictional statute* states that the Court "has original appellate jurisdiction" over the "reapportionment of election districts." Utah Code 78A-3-102(4)(c).[5]

Third, interpreting similar text, other state courts have rejected the contention that redistricting is beyond judicial review. For example, in *Harper v. Hall*, the North Carolina Supreme Court ruled that it had jurisdiction over partisan gerrymandering cases, even though the constitution assigned the role to North Carolina's General Assembly and specifically excluded the governor. 868 S.E.2d 499, 533 (N.C. 2002), *cert. granted*, 142 S. Ct. 2901; N.C. Const. art. II, §§ 5, 22. The Court explained that nothing in the state constitution divested the courts of their power to enforce "constitutional limitations contained in other constitutional provisions." *Harper*, 868 S.E.2d at 533; *see also Salazar v. Davidson*, 79 P.3d 1221, 1226 (Colo. 2003). Even the cases Petitioners cite rejected the claim that redistricting is solely for the Legislature. *Rivera v. Schwab*, 512 P.3d 168, 177-79 (Kan. 2022); Amended Order, *Johnson v. Wisc. Elections Comm'n*, No. 2021AP1450-OA, at 2 (Wis. Sept. 24, 2021), tinyurl.com/3nsyk7x2.

Fourth, practical considerations make judicial review vital. "[B]ecause gerrymanders benefit those who control the political branches," and they will "[m]ore effectively every day . . . enable[] politicians to entrench themselves in power against the people's will," it is "only the courts [who] can do anything to remedy the problem." *Gill v. Whitford*, 138 S. Ct. 1916,

[5] This Court, rather than the Court of Appeals, would have appellate jurisdiction over the district court's decision here. *See id.* (Supreme Court has original appellate jurisdiction over cases involving reapportionment of districts); *id.* § 78A-3-102(3)(g) (providing direct appellate jurisdiction over orders declaring statute unconstitutional).

1935 (2018) (Kagan, J., concurring). Judicial review is critical because gerrymandering threatens the "political processes which can ordinarily be expected" to provide democratic legitimacy. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Utahns endeavored to reform redistricting by prohibiting partisanship, but the Legislature brazenly repealed that initiative-enacted law and then disregarded the partisan-neutral proposals from the hamstrung Commission. [Compl. ¶¶ 68-184.] Courts must intervene to uphold the "fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them," not the other way around. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (internal quotation omitted).

B. There are manageable standards to invalidate the Legislature's extreme partisan gerrymander

Petitioners also fail to show that courts categorically "lack . . . judicially discoverable and manageable standards for resolving" partisan gerrymandering claims. *In re Childers-Gray*, 2021 UT 13, ¶ 64 (citation omitted). They are incorrect that "no rule of decision guides" this case. (Pet. at 19.) The district court correctly detailed the applicable analyses and ruled that this case "involves no 'policy determinations for which judicially manageable standards are lacking,'" but rather "legal determinations, the standards for which are provided both in the Utah Constitution and in caselaw." [Ex. A at 16.] Here, "the Court will simply be engaging in the well-established judicial practice of interpreting the Utah Constitution and applying the law to the facts." [*Id.* at 17.] The standards Respondents present are derived from sister-state precedent or the "well-developed standards that have been applied by Utah courts in various scenarios." [*Id.*] A complete trial record will help shape whether these standards are in fact

manageable here. *Supra* Part I.[6]

Petitioners oversimplify the issues when they contend that the Constitution does not bar partisan gerrymandering because it lacks an express prohibition. "The 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). As such, it "enshrines principles, not application of those principles," and courts must determine "what principle the constitution encapsulates and how that principle should apply." *Maese*, 2019 UT 58, ¶ 70 n.23. Courts have long crafted extensive yet manageable legal doctrines from seemingly general language—*e.g.*, "elections shall be free" or laws must have "uniform operation,"—without compromising the separation of powers. Utah Const. art. I, §§ 17, 24. [*See* Ex. A at 17-20 & nn.5-6.] Petitioners' demand for an express prohibition on partisan gerrymandering is inscrutable given their repeal of Proposition 4's express prohibition on partisan gerrymandering. And their reliance (Pet. at 13) on Article VIII, § 8 and Article X, § 8—enacted in 1992 and 1986—sheds little light on the original meaning or manageability of Respondents' constitutional claims, much less the scope of the Legislature's redistricting role.

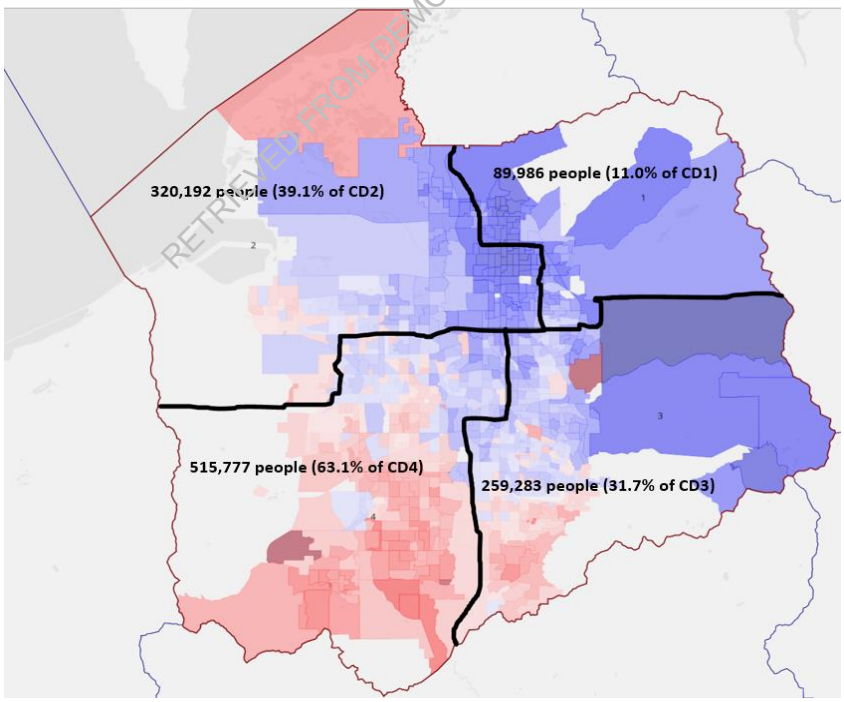
Petitioners' justiciability arguments also betray a fundamental misunderstanding of the difference between legitimate *policy considerations* and unlawful *partisan objectives* in redistricting. Mapmakers should consider neutral policy aspects of redistricting, such as compactness and maintaining whole counties and municipalities that are outlined in Proposition 4. [*See* Ex. A at 3-4.] But when legitimate policy considerations are set aside to maximize partisan advantage

[6] Petitioners offer a series of rhetorical hypotheticals about restraining gerrymandering, but they fail to substantively engage with, or even cite, the "seven state courts . . . [that] have concluded that partisan gerrymandering claims are cognizable under their respective state constitutions." [Ex. A at 18.] These courts had no difficulty affixing common sense restraints on gerrymandering, assessing the evidence, and ruling what is "off limits." (*Cf.* Pet. at 8.)

and lock out disfavored voters, courts can and should intervene to protect constitutional rights.

To resolve Respondents' claims, the court will use standard evidentiary tools to examine whether the Plan has extreme partisan effects. It will then probe whether the Legislature's adherence to neutral, non-pretextual policy considerations explains that result. This mode of analysis—examining the discriminatory or unlawful infringement on a constitutional right and then probing whether legitimate interests justify that infringement—is at the core of judicial review in numerous areas with unquestionably manageable standards, from workplace discrimination to free exercise of religion to free speech protections.

The judiciary will not struggle to adjudicate this case. A glance at the map's treatment of Salt Lake County voters illustrates how judicially manageable the court's task will be:



The Legislature did not seek to sever Salt Lake County evenly to ensure an urban-rural balance among all four districts, as some legislators claimed. Rather, the Legislature acted with

Goldilocks-like precision to ensure that there were not too many, not too few, but *just enough* Salt Lake County voters in each district to achieve near-equal Republican dominance of them all. The smallest—and most Democratic—slice was assigned to District 1. Substantial population outside the County was necessary to ensure Republican domination of this district. Kitty-corner District 4, on the other hand, spans heavily Republican territory. So District 4 got half a million of the County's residents. "Urban-rural mix" is only a concern, apparently, if the urban people at issue vote Democratic. This case presents no close call about the partisan effects the Plan achieves and the pretextual nature of the Legislature's claimed explanation.

III. THE DISTRICT COURT DID NOT ERR

The district court's meticulous analysis of the merits reinforces the prudence of denying this appeal. [Ex. A at 22-55.] Respondents assert their constitutional rights to free elections, equal protection, free speech and association, and to vote. These claims seek to uphold that voting is "a fundamental right," *Gallivan v. Walker*, 2002 UT 89, ¶ 24, 54 P.3d 1069; "healthy political exchange … is the foundation of our system of free speech and free elections," *Jacob v. Bezzant*, 2009 UT 37, ¶ 29, 212 P.3d 535; and fair "representation . . . is fundamental to the democratic processes of both Utah and the United States." *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 74, 452 P.3d 1109 (emphasis omitted). Petitioners fail to show any error in the district court's decision meriting immediate appellate review.

A. The Plan violates the Free Elections Clause

The district court's careful Free Elections Clause ruling does not merit immediate review. Text, history, and persuasive caselaw all compel the conclusion that the Free Elections Clause bars partisan gerrymandering in Utah. [Ex. A at 25-38.]

First, the text provides in two independent clauses that "[a]ll elections shall be free," and 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. An election is not "free" when manipulated district lines predetermine the results. And gerrymandering both "interfere[s]" with and "prevent[s] the free exercise of the right of suffrage" when the map diminishes the electoral strength of certain voters, amplifies the influence of others, and entrenches incumbents. Petitioners provide no support for their contrary reading that the free elections language is merely prefatory. (Pet. at 12, 14.) The district court correctly "reject[ed] this interpretation," concluding instead that "[t]here are two express rights guaranteed by the Free Elections Clause, not just one." [Ex. A at 26.]

Dictionaries from the founding era confirm this plain-text reading of the Clause. [*Id.* at 26-31.] At the time, the word "Free" was defined to mean "[u]nconstrained; having power to follow the dictates of his own will;" "[e]njoying full civic rights;" 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." *Free*, Black's Law Dictionary (1891).[7] It also meant "[o]pen to all citizens alike[.]" *Free*, Anderson Dictionary of Law (1889). Applying these definitions and others, the district court correctly concluded that the clauses "were intended to prohibit tyrannical or despotic governmental manipulation of the election process . . . to attain electoral advantage." [*Id.* at 29-31.] The term free also has an inherent equality component. Partisan gerrymanders are not "open to all citizens alike," but favor some voters over others. Because "all free governments" must provide for the people's "equal protection

[7] Petitioners agree with this definition but omit "having power" in their use of it to elide that gerrymandering diminishes the disfavored voters' power to follow their will. (*See* Pet. at 12.)

and benefit," free elections are equivalent to equal elections. Utah Const. art. I, § 2; *Gallivan*, 2002 UT 89, ¶ 32 (equating free and equal); [Ex. G at 27 (collecting cases).]

Against this plain-text reading, Petitioners argue that the Clause is not implicated so long as a law does not deny Utahns "from physically casting a vote." [Ex. A at 23.] (Pet. at 11-13.) But that cramped reading of the text's broad commands cannot be right. Under Petitioners' view, the Legislature could require that votes for one candidate count twice and votes for another count for half, because all voters could still ostensibly cast a vote. That anti-democratic result cannot be reconciled with the text's broad language. *See Patterson v. State*, 2021 UT 52, ¶ 122, 504 P.3d 92

Second, history supports Respondents.[8] Utah's Free Elections Clause—like similar clauses in other states constitutions—originates from the English Bill of Rights of 1689. Ex. A at 31. That provision "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain electoral advantage." *Id.* (quoting *Harper v. Hall*, 868 S.E.2d 499, 540 (N.C. 2022), *cert. granted*, 142 S. Ct. 2901). The Framers copied much of the Constitution from other states and, in doing so, "br[ought] the old soil with it." *Maxfield v. Herbert*, 2012 UT 44, ¶ 31, 284 P.3d 647. Precedent at the time of statehood also reflects the desire for robust protection of "honest and fair" elections. *Ritchie v. Richards*, 47 P. 670, 675 (Utah 1896); *see also Ferguson v. Allen*, 26 P. 570, 574 (Utah 1891); *Earl v. Lewis*, 77 P. 235, 237-38 (Utah 1904). This history—not what Patrick Henry was doing to James Madison in Virginia in 1788—is most instructive of the analysis here. (*Cf.* Pet. at 15.)[9]

[8] The district court identified areas where historical sources will further aid the analysis. [Ex. A at 26-27.] Deciphering those sources will be most efficiently done first in the district court.

[9] Regardless, the widespread anti-gerrymandering sentiment at the founding of the U.S. Constitution supports Respondents. Brief of Historians as Amici Curiae in Support of Appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2017) (No. 16-1161), tinyurl.com/cc9vwa7y.

Third, case law in other states with free elections clauses also supports plaintiffs. Every state partisan gerrymandering case that has addressed a Free Elections Clause claim has ruled the claim is cognizable and applied it to reject a gerrymandered plan. *See Harper*, 868 S.E.2d at 547-49, 559, *Szeliga v. Lamone*, No. C-02-CV-21-001773, at 94–94 (Anne Arundel Cnty. Cir. Ct. Mar. 25, 2022), tinyurl.com/3uhunz9s; *LWV of Pa. v. Commonwealth*, 178 A.3d 737, 817-18, 825. The only state high courts to cast doubt on the merits of partisan gerrymandering claims are in states that *lack* a Free Elections Clause. *See Rivera v. Schwab*, 512 P.3d 168; *Johnson v. Wisc. Elections Comm'n*, 967 N.W.2d 469, 488-89 (Wisc. 2021). Petitioners' emphasis on the absence of precedent from Vermont and Virginia—states in which no plaintiff has pursued a Free Elections Clause gerrymandering claim—is irrelevant. (*Cf.* Pet. at 13-14.)

Contrary to Petitioners' claims based on *Anderson v. Cook*, Respondents are not asking for the Free Elections Clause to be interpreted to "deny the legislature the power to provide regulations" for elections. (Pet. at 13 (citing 130 P.2d 278, 285 (Utah 1942)).) The lesson from *Anderson* is that a reasonable regulation of the electoral process, such as making a candidate's statutory "filing deadline . . . mandatory," does not violate the Free Elections Clause when the regulation then keeps a candidate off the ballot. *Utah St. Demo. Committee v. Monson*, 652 P.2d 890, 892 (Utah 1982) (citing *Anderson*, 130 P.2d at 283-84), Petitioners' strained "[s]o too here" analogy from the uncontroversial holding in *Anderson* that the Clause "does not guarantee any person the unqualified right to appear as a candidate upon the ticket of any political party" must be rejected. (Pet. at 12.) Far from a neutral, reasonable regulation of candidates like the deadline in *Anderson*, the Plan's *manipulation of the electoral process* for partisan advantage makes Utah's elections not free—it predetermines the results and arbitrarily empowers one group of

favored majority voters to elect their preferred congressional candidates while guaranteeing that the large, concreted political minority has no opportunities at all. That is unconstitutional.

B. The Plan violates Utahns' rights to equal protection of uniform laws

Petitioners erroneously conflate Respondents' Uniform Operation Clause claim with a federal Equal Protection claim, contending the two are coterminous. (Pet. at 12.) Precedent forecloses this view. *Gallivan*, 2002 UT 89, ¶ 33; *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984); *Ryan Gold Cross Servs., Inc.*, 903 P.2d 423, 426 (Utah 1995). Utah's Constitution guarantees more because it "demands . . . the law's *operation* must be uniform." *State v. Drej*, 2010 UT 35, ¶ 33, 233 P.3d 476 (emphasis added).

This Court has recognized that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside" implicates principles inherent in the Uniform Operation Clause. *Id.* ¶¶ 32, 72 (citation omitted). Article III of the U.S. Constitution is not a bar to this Court's adjudication of Utah's Constitution. *See Rucho v. Common Cause*, 139 S. Ct. 2184, 2507 (2019) ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").[10] Federal rights provide a "'floor' or minimum level of protection that state law must respect." *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994). Respondents seek to vindicate state rights.

Petitioners also err when they insist that Respondents' Uniform Operation claim fails because "[p]artisan affiliation is not a suspect classification," and the districts drawn by the legislature satisfy rational basis. (Pet. at 17-18.) Heightened scrutiny is warranted in this case

[10] Petitioners' argument misreads *Rucho*. The Court held only that Article III of the U.S. Constitution bars federal courts from *considering* whether partisan gerrymandering violates the Equal Protection Clause. 139 S. Ct. at 2493-94, 2508. It did not hold that the Clause allows it.

because the Plan implicates "a fundamental or critical right," including the right to vote, independent of whether a suspect class is affected. *Gallivan*, 2002 UT 89, ¶¶ 24, 40.[11]

C. The Plan violates Respondents' freedom of speech and associations

Petitioners also fail to justify immediate review of Respondents' free speech and association claims. [Ex. A at 44-52.] The Utah Constitution protects free speech and association, "prohibit[ing] laws which either directly limit [those] protected rights or indirectly inhibit the exercise of those rights." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 21; Utah Const. art. I, §§ 1, 15. "[V]oters . . . express their views in the voting booth." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). And the expressive "harm[s] of a partisan gerrymander [are] distinct from vote dilution." *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring).

The Utah Constitution safeguards "individuals from regulations that directly discourage or prohibit political expression." *Cook v. Bell*, 2014 UT 46, ¶ 34, 344 P.3d 634. The government cannot "restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014). The Plan disfavors voters who advocate for non-Republican candidates by "discourag[ing] and burden[ing] [their] political expression" and "is discriminatory and retaliatory" treatment "based on [their] disfavored political views." [Ex. A at 49-51.] It also abridges Plaintiffs' freedom of association. [*Id.*; Compl., ¶¶ 36, 283-97.] Affiliating with a political party and supporting candidates are inherent 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

[11] Petitioners' view that the Uniform Operations Clause is only "directed to . . . enforcement of the law by the executive," misreads both cited cases. (Pet. at 17 n.6.) *See DIRECTV v. Utah St. Tax Comm'n*, 2015 UT 93, ¶¶ 47-50, 364 P.3d 1036; *In re J.S.*, 2014 UT 51, ¶¶ 66-68, 358 P.3d 1009.

(Utah 1962); *accord Cal. Dem. Party v. Jones*, 530 U.S. 567, 574 (2000). The Plan divides voters to limit their collective action, which hinders their ability to recruit volunteers, secure contributions, and advocate their cause. *See Whitford*, 138 S. Ct. at 1938 (Kagan, J., concurring).

D. The Plan violates the Right to Vote Clause

The Plan violates Utahns' constitutional right to a meaningful, undiluted vote. Article IV, § 2 provides that "[e]very citizen" meeting eligibility requirements "shall be entitled to vote." Because this right is "of vital importance to both individual citizens and to the public," the judiciary must endeavor "to make the [right to vote] *meaningful*." *Shields v. Toronto*, 395 P.2d 829, 832 (Utah 1964) (emphasis added). Article IV, § 2 not only prohibits regulating elections in a manner that will wholly "take away" the right to vote, but also that "abridge or impair" it. *Nowers v. Oakden*, 169 P.2d 108, 117 (Utah 1946) (quoting *Earl*, 77 P. at 238). Any law that renders the "right to vote . . . improperly burdened, conditioned, *or diluted*" violates Article IV, § 2. [Ex. A at 54 n.30 (quoting *Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985) (emphasis added)).] Petitioners simply ignore the precedent Respondents recite and the district court applied in detail. *See id.* at 52-55. And they do not contest here or below that such restrictions must pass heightened scrutiny. *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000) (applying strict scrutiny); *Mont. Dem. Party v. Jacobsen*, 518 P.3d 58, 65 (Mont. 2022) (assuming same).

CONCLUSION

For the foregoing reasons, the Court should deny the interlocutory appeal.

Date: December 6, 2022

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

1. This petition does not exceed 20 pages, excluding any tables or attachments, in compliance with Utah Rule of Appellate Procedure 5(d).
2. This petition has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Garamond font in compliance with the typeface requirements of Utah Rule of Appellate Procedure 27(a).
3. This brief contains no non-public information and complies with Utah Rule of Appellate Procedure 21(h).

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Certificate of Service

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EXHIBIT A

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX, Plaintiffs, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**RULING AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS** Case No. 220901712 Judge Dianna M. Gibson

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

BACKGROUND

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

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

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

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

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

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

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

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

In addition, all redistricting plans were to be open for public comment, considered in a public hearing, and voted on by the Legislature. (*Id.* ¶¶ 85, 88.) If the Legislature voted to reject the redistricting map, "Proposition 4 required the Legislature to issue a detailed written report explaining its decision and why the Legislature's substituted map(s) better satisfied the mandatory, neutral redistricting criteria." (*Id.* ¶ 88.) Proposition 4 also authorized "Utahns to sue to block a redistricting plan that failed to conform to the initiative's structural, procedural, and substantive standards." (*Id.* ¶ 89.) "A majority of Utah citizens from a range of geographic areas and across the political spectrum voted to approve Proposition 4 and enact it into law." (*Id.* ¶ 90.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [t]he legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. . . . However, its authority is not unlimited. The legislature, for instance, cannot establish schools and programs that are not open to all the children of Utah or free from sectarian control . . . for such would be a violation of . . . the Utah Constitution.

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

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

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

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

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

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

Utah courts also are not bound by the same justiciability requirements as federal courts under Article III. Several Utah cases have noted that, on matters like standing and justiciability, a lesser standard may apply. *See, e.g.*, *Laws v. Grayeyes*, 2021 UT 59, ¶ 77, 498 P.3d 410 (Pearce, J., concurring); *Gregory v. Shurtleff*, 2013 UT 18, ¶ 12, 299 P.3d 1098; *Brown v. Div. of Water Rts. of Dep't of Nat. Res.*, 2010 UT 14, ¶¶ 17-18, 223 P.3d 747; *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).

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

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

B. Judicially discoverable and manageable standards exist.

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

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

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

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

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

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

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

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

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

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

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

Utah courts, including this one, recognize the separation of powers. To be clear, this Court will not review the Legislature's legitimate weighing of policy interests. The judiciary is not a political branch of government; policy determinations are for the Legislature to decide. As the Utah Supreme Court has stated, "[i]t is a rule of universal acceptance that the wisdom or desirability of legislation is in no wise for the courts to consider. Whether an act be ill advised or unfortunate, if it should be, does not give rise to an appeal from the legislature to the courts." *Parkinson*, 291 P.2d at 403. However, even in cases involving political issues, the Court is bound to review the Legislature's actions, not to weigh in on policy matters, but to determine whether there has been a constitutional violation. *Matheson*, 641 P.2d at 680.

Judicial review of legislative action to determine constitutionality does not derogate from the primacy of the state legislature's role in redistricting. However, because redistricting is not wholly within the control of the Legislature, the constitutional claims presented here are not political questions, and because judicially discoverable and manageable standards exist to review constitutional challenges and redistricting claims, the Court concludes that it has jurisdiction in this case to review the Legislature's actions to determine if they are constitutional.

Therefore, Defendants' Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is DENIED.

II. Defendants' Motion to Dismiss the Committee and Individual Defendants is DENIED.

Defendants move to dismiss Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Senator J. Stuart Adams, and Representative Brad Wilson (collectively, Committee and Individual Defendants). (Defs.' Mot. at 14.) Defendants' Motion is based on two arguments. First, they argue that the Committee and Individual Defendants are immune from suit based on claims related to their actions as legislators. Second, the Committee and Individual Defendants assert they are unable to provide Plaintiffs' requested relief, and as such, should be dismissed. (*Id.*).

Regarding immunity, the Committee and Individual Defendants are correct that Utah law grants them immunity from certain lawsuits. However, that grant of immunity does not make them immune to all claims. To the contrary, Utah law only grants legislators immunity from claims of *defamation* related to their actions as legislators. Utah has adopted the common law legislative immunity and legislative privilege doctrines through its Speech or Debate Clause,[8]

[8] Utah's Speech or Debate Clause states: "[m]embers of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding

which Utah courts interpret as providing legislative immunity only from *defamation* liability. *See Riddle v. Perry*, 2002 UT 10, ¶ 10, 40 P.3d 1128. In *Riddle*, the Utah Supreme Court declined to provide absolute legislative immunity in all instances. It explained that the policy consideration behind the legislative immunity doctrine is "the importance of full and candid speech by legislators, even at the possible expense of an individual's right to be free from defamation." *Id.* ¶ 8. Here, Plaintiffs are not seeking relief from defamation. Under this limited view of legislative immunity,[9] the Committee and the Legislative Defendants are not immune.

The Committee and Individual Defendants also assert that they cannot provide the relief requested and that any order from this Court directed at them "would blatantly violate the separation of powers." (Reply at 15.) The Committee's and Individual Defendants' argument on this point is less than two pages. They do not cite any authority, legal or otherwise, to support that the Committee and the Defendants cannot provide *any* relief requested or that any order from the Court, directed at them, would violate the separation of powers.[10] Such unsupported arguments are insufficient to satisfy Defendants' burden on a motion to dismiss. *See Bank of Am. v. Adamson*, 2017 UT 2, ¶ 13, 391 P.3d 196 ("A party must cite the legal authority on which its

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each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place." Utah Const. art. VI, § 8.

[9] The *Riddle* Court explained the limits of the Utah's legislative immunity doctrine:

> In determining the contours of the legislative proceeding privilege, we adopt the privilege as set forth in section 590A of the Restatement (Second) of Torts: "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he [or she] is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding."

Id. ¶ 11 (alteration in original).

[10] Notably, Utah courts have allowed lawsuits against individual legislators to proceed. *See, e.g.*, *Matheson v. Ferry*, 657 P.2d 240, 244 (Utah 1982); *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978); *Rampton v. Barlow*, 23 Utah 2d 383, 384, 464 P.2d 378 (1970); *Romney v. Barlow*, 24 Utah 2d 226, 227, 469 P.2d 4497 (1970). This Court is not aware of any legal authority, either at the state or federal level, that prohibits all lawsuits naming legislators. If any legal precedent exists to justify the dismissal of any defendant, it is incumbent on the moving party to present that authority to the Court.

argument is based and then provide reasoned analysis of how that authority should apply in the particular case."). While Defendants certainly raise important issues that the parties and this Court will consider as this case proceeds,[11] the arguments made at this stage are simply insufficient to justify dismissing the Committee and the Individual Defendants. *See Gardiner v. Anderson*, 2018 UT App 167, ¶ 21 n.14, 436 P.3d 237 ("[I]t is not the district court's burden to research and develop arguments for a moving party.").

Regarding the Committee and Legislative Defendants' separation of powers argument, the Court has a duty to review the Legislature's acts if it appears they conflict with the Utah Constitution. *Matheson*, 657 P.2d at 244. Indeed, to hold otherwise would make the Legislature the ultimate arbiter of what is constitutional, which would in fact violate the separation of powers principle by intruding on this Court's constitutional role. *See id.* At this stage, it appears this Court can give Plaintiffs at least some of the relief requested without intruding on the Legislature's powers, which is sufficient to defeat Defendants' Motion to Dismiss.

Defendants' Motion to Dismiss the Committee and the Legislative Defendants is DENIED.

III. Defendants' Motion to Dismiss Counts One through Four is DENIED; Defendants' Motion to Dismiss Count Five is GRANTED.

Defendants' move to dismiss each of Plaintiffs' four constitutional challenges to the 2021 Congressional Plan asserting that Utah's Constitution, and specifically the Free Elections Clause, Equal Protection Clause, Free Speech and Association Clause and the Right to Vote Clause, does not expressly prohibit partisan gerrymandering. Defendants

[11] The precise relief that Plaintiffs seek and might be entitled to is not entirely clear at this stage of the litigation. Thus, any ruling the Court could make would be merely advisory and the Court declines to do so. *Salt Lake County v. State*, 2020 UT 27, ¶36, 466 P.3d 158 ("[W]e do not issue advisory opinions."). The Court recognizes, however, that the issues raised by Defendants are legitimate questions that the Court will address if and when the issues are fully ripe and briefed.

take the position that these provisions should be interpreted narrowly to protect *only* every citizen's right to cast a vote in an election. Nothing more. They argue generally that the 2021 Congressional Plan does not prohibit any citizen from voting in an election. New boundary lines do not prohibit each citizen from physically casting a vote or from freely speaking and associating with like-minded voters on political issues. Further, they argue that the Utah Constitution does not guarantee "equal voting power," a vote that is politically "equal in its influence," any political success, or a beneficial political outcome. In addition, Defendants move to dismiss Plaintiffs' fifth claim, asserting that the Utah Constitution does not prohibit the Legislature from either amending or repealing the Utah Independent Redistricting Commission and Standards Act, Title 20A, Chapter 19, of the Utah Code, which is the law that went into effect with the successful passage of Proposition 4.

Defendants' motion is made under Rule 12(b)(6) of the Utah Rules of Civil Procedure, asserting that Plaintiffs have failed to state a claim under the Utah Constitution.

> "The purpose of a rule 12(b)(6) motion is to challenge the *formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case*." *Van Leeuwen v. Bank of Am. NA*, 2016 UT App 212, ¶ 6, 387 P.3d 521 (cleaned up). Accordingly, "dismissal is justified *only* when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim." *Id.* (cleaned up).

Pioneer Homeowners Ass'n v. TaxHawk Inc., 2019 UT App 213, ¶ 19, 457 P.3d 393, *cert. denied sub nom., Pioneer Home v. TaxHawk, Inc.*, 466 P.3d 1073 (Utah 2020) (emphasis added). The Court's review of Defendant's Motion at this stage is limited to considering only "the legal viability of a plaintiff's underlying claim as presented in the pleadings." *Lewis v. U.S. Bank Tr. NA*, 2020 UT App 55, ¶ 9, 463 P.3d 694, 697 (internal quotation marks excluded).

Each of Plaintiffs' claims is based on the Utah Constitution. Constitutional interpretation starts with evaluating the plain text to determine "the meaning of the text as understood when it

was adopted." *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 18, 450 P.3d 1092 (discussing generally process of constitutional interpretation). "The goal of this analysis is to discern the intent[12] and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235. "While we first look to the text's plain meaning, we recognize that constitutional language is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." *Id.* ¶ 10. The Court's focus is on "how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." *Patterson v. State of Utah*, 2021 UT 52, ¶ 91, 405 P.3d 92.

In addition to analyzing the text, prior caselaw guides us to analyze "historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting.'" *Maese,* 2019 UT 58, ¶ 18 (quoting *Am. Bush*, 2006 UT 40, ¶ 12). The language of the text, in certain circumstances, may begin and end the analysis. However, "[w]here doubt exists about the constitution's meaning, we can and should consider all relevant materials. Often that will require a deep immersion in the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Maese,* 2019 UT 58, ¶ 23 (cleaned up) (explaining merely "asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact is not a recipe for sound constitutional interpretation.").[13] The Court may also

[12] The Utah Supreme Court has explained that "[w]hile we have at times used language of 'intent' in discussing our constitutional interpretation analysis, our focus is on the objective original public meaning of the text, not the intent of those who wrote it. Evidence of framers' intent can inform our understanding of the text's meaning, but it is only a means to this end, not an end in itself." *Maese*, 2019 UT 58, ¶ 59 n.6.

[13] In interpreting the Utah Constitution, "we consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy. Our primary search is for intent and purpose. Consistent with this view, this court has a very long history of interpreting constitutional provisions in light

consider caselaw from sister states, with similar provisions made contemporaneously to the framing/ratification of Utah's Constitution, and federal caselaw interpreting similar provisions from the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 11.

Both parties have provided to the Court some relevant material to support their competing interpretations of the Utah Constitution, of which this Court may take judicial notice of under Rule 201 of the Utah Rules of Evidence. At this stage, the Court cannot consider factual matters outside the pleadings on a motion to dismiss without converting the motion into to one for summary judgment. Utah R. Civ. P. 12(b); *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 12, 104 P.3d 1226. Neither party has made such a request. Therefore, at this stage, the Court need only decide whether Plaintiffs have stated a claim, not whether Plaintiffs will succeed on those claims. Because each claim involves separate legal issues, the Court addresses each individually below.

a. <u>Plaintiffs Sufficiently State a Claim under the Free Elections Clause (Count One).</u>

Defendants assert that Plaintiffs have failed to, and cannot, state a claim under the Free Elections Clause. Defendants argue the plain language of the Free Elections Clause does not expressly prohibit partisan gerrymandering and that it guarantees only "the freedom to *cast a vote* without interference from civil or military power." (Defs.' Reply at 17 (emphasis added).) The Court disagrees.

The Free Elections Clause states: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah

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of their historical background and the then-contemporary understanding of what they were to accomplish. This case, like many others, proves the wisdom of the axiom that '[a] page of history is worth a volume of logic.'" *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 23, 450 P.3d 1092, 1098 (discussing and quoting *Society of Separationists v. Whitehead*, 870 P.2d 916, 920–21, and n. 6 (Utah 1993)).

Const. art. I, § 17. Defendants argue that this Court must interpret the provision as a whole, arguing that the second clause, which states that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," necessarily modifies or limits the first. (Defs.' Reply at 17.) The Court rejects this interpretation.

1. The Plain Meaning of "All *elections* shall be *free.*"

There are two express rights guaranteed by the Free Elections Clause, not just one. First and foremost, "all *elections* shall be *free*." The second, "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The clause is constructed as a compound sentence, separating two independent clauses by the conjunction "and." This sentence construction supports that these two clauses are to be given equal value. Nothing in the construction or choice of conjunction suggests to this Court that the second independent clause was intended to limit the first. Defendants also provide no authority, legal or otherwise, to support such interpretation.

What did the term "all *elections* shall be *free*" mean to the people of Utah in 1895, when the Utah Constitution was adopted? There is little historical information on Utah's Free Elections Clause. While the Clause was discussed during the Proceedings and Debates of the Convention Assembled to Adopt a Constitution for State of Utah, in Mar. 25, 1895,[14] the discussion provides no guidance as to what the clause was intended to protect or how to interpret the key words. The reported transcript of the proceedings reflects that the Free Elections Clause was passed with no debate. One modification was made to the final text. As originally proposed, the Free Elections Clause stated that "[a]ll elections shall be free and equal." A successful motion was made to remove "equal," but with no discussion. Defendants argue the removal is significant, revealing

[14] Found at le.utah.gov/documents/conconv/22.htm ("Convention Proceedings").

the drafter's intent to not guarantee "voting power." (Defs.' Mot. at 21, n.16.) Plaintiffs, on the other hand, argue that "equal" was removed because it was "superfluous," because the term "free," as defined in 1891, already contained an equality component. (Pls' Opp'n at 26.) Neither party, however, provided any authority to support their respective arguments.[15] And the debate regarding this clause is of little assistance.

There are no early Utah common law cases discussing the Free Elections Clause. There are no Utah cases from any time period defining the term "elections." Notably, neither party focused on this term nor provided a definition or any legal analysis of it.[16] The meaning of the term "elections," however, is critical to this analysis and critical to interpreting this clause.

An "election" is defined by Merriam-Webster as the "act or process of electing." *Election*, Merriam-Webster, https://www.merriam-webster.com/dictionary/elections (noting first known use of this term, with this definition, was the 13th century). To "elect" is "to select by vote for an office, position or membership." *Elect*, Merriam-Webster, https://www.merriam-webster.com/dictionary/elect. Other dictionary sources define the term similarly: "An election is a process in which people vote to choose a person or group of people to hold an official position." *Election*, (noun), Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/election.[17]

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[15] The Court agrees with Defendants that the removal means something. But there is insufficient historical information before the Court to determine what was intended by the removal. The Court need not determine why it was removed; instead, the Court focuses on interpreting the clause as it is written.

[16] Notably, neither party provided a definition of "elections." Both parties focused primarily on and provided definitions for the word "free." Based on the Court's analysis, the definition of "elections" does not appear to have changed over time and it does not appear to be subject to widely different interpretations. This Court is not a linguistics expert and did not undertake independent scientific research, but it did resort to standard dictionary definitions to assist in interpreting the plain language of the Free Elections Clause. *See generally State v. Rasabout*, 356 P.3d 1258 (2015) (discussing generally interpretation methods under Utah law).

[17] "*Election* (noun), the act or process of choosing someone for a public office by voting." *Election*, Britannica Dictionary, https://www.britannica.com/dictionary/election. An "election" is "the process of choosing a person or a

"Election" also means the "right, power, or privilege of making a choice." *Election,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elections. Similar definitions were used in the late 1800s. *See e.g., State v. Hirsch,*[18] 125 Ind. 207, 24 N.E. 1062, 1063 (1890) (discussing various definitions of "election" and stating it "is not limited in its definition and meaning to the act or process of choosing a person for a public office by a vote of the qualified electors at the time, place, and manner prescribed by law.").

The term "free" as defined in the 1891 Black's Law Dictionary means: "[u]nconstrained; having power to follow the dictates of his own will;" "[e]njoying full civic rights;" and "[n]ot despotic; assuring liberty;[19] defending individual rights against encroachment by any person or class; instituted by a free people; said of governments, institutions, etc." *Free*, Black's Law Dictionary, 1st ed. 1891. (Pls.' Opp'n at 26-29; Defs.' Reply at 16-20). "Free" was also defined as "[o]pen to all citizens alike[.]" *Free,* Anderson, Dictionary of Law, 1889.

Two notable terms justify further analysis. First, "unconstrained" means "not held back or constrained." *Unconstrained*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unconstrained (noting definition first used in the 14th century). "Constrained" means "to force by imposed stricture, restriction or limitation;" "to force or produce in an unnatural or strained manner." *Constrained*, Merriam-Webster,

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group of people for a position, especially a political position, by voting." *Election (noun)*, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/election.

[18] In *State v. Hirsch*, 125 Ind. 207, 24 N.E. 1062, 1063 (Ind. 1890), the Indiana Supreme Court analyzed the meaning of the term "elections" to interpret a state statute prohibiting liquor sales on "election day." Notably, the Court recognized that "[u]nder our form of government we have a well-defined system of choosing or electing officers, regulated by law." *Id.*

[19] "Liberty" is defined as "the quality or state of being free; the power to do as one pleases; freedom from physical restraint; freedom from arbitrary or despotic control; the positive enjoyment or various social, political, or economic rights and privileges; the power of choice." *Liberty,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/liberty (noting the definition has been used since the 14th century).

https://www.merriam-webster.com/dictionary/constrain (noting definition used in the 14th century).

Second, "despotic" means "of, or relating to, or characteristic of a despot // a despotic government." *Despotic*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despotic#h1 (noting this term, with this definition, was first used in 1604). "Despot" in turn means "a ruler with absolute power and authority; one exercising power tyrannically; a person exercising absolute power in a brutal or oppressive way." *Despot*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despot (noting this definition came into being with the beginning of democracy at the end of the 18th century). The United States Supreme Court in 1866 explained what it means to be despotic: "In a despotism the autocrat is unrestricted in the means he may use for the defence of his authority against the opposition of his own subjects or others; and that is what makes him a despot." *Ex parte Milligan*, 71 U.S. 2, 81, 18 L. Ed. 281 (1866).

The first clause "all elections shall be free" guarantees to Utah's citizens an election *process* that is free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained process, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process to either ensure continued control or to attain an electoral advantage. This right given to Utah citizens, necessarily imposes a limit on the legislature's authority when overseeing the election process.

The second clause specifically provides that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. Art. I, § 17. This portion of the clause prohibits a civil or military power from interfering with the free exercise of the right of suffrage. It does not, however, expressly preclude a governmental power, like the

legislature, from providing "by law for the conduct of elections, and the means of voting, and the methods of selecting nominees." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942).

Anderson v. Cook is the only Utah case discussing the Free Elections Clause. In *Anderson,* a potential candidate submitted a petition to appear on a primary election ballot, but the acting county clerk refused to certify the nomination of the candidate for the primary election. *Id.* at 280. In affirming the county clerk's decision, the *Anderson* Court concluded that the petition was not timely filed, that the political party could not designate a candidate without an effective petition, and that the primary election laws did not provide for a "write in" candidate (while noting that general election laws did). *Id.* at 281-82. The candidate argued to deny him the right to appear on the ballot would violate the Free Elections Clause. *Id.* at 285. The *Anderson* Court did not fully interpret or analyze the clause. More importantly, it did not conclude that the Free Elections Clause did not apply to the issues presented. Rather, it held:

> While this provision guarantees the qualified elector the free exercise of his right of suffrage, it does not guarantee any person the unqualified right to appear as a candidate upon the ticket of any political party. It cannot be construed to deny the legislature the power to provide regulations, machinery and organization for exercising the elective franchise, or inhibit it *from prescribing reasonable methods and proceedings* for determining and selecting the persons who may be voted for at the election.

Anderson v. Cook, 102 Utah 265, 130 P.2d 278, 285 (1942) (emphasis added).

While the *Anderson* Court found no constitutional violation (i.e., because the candidate's petition was not filed in accordance with the law), the case does support that claims regarding the election *process* cannot be made under the Free Elections Clause. It supports that the Legislature necessarily has a role in providing "reasonable" regulation, machinery, and organization of the exercise of the right to vote. Additionally, the Legislature must "provide by law for the conduct

of elections, and the means of voting, and the methods of selecting nominees." *Anderson*, 130 P.2d at 285.

Based on the Court's analysis, and contrary to Defendants' arguments, Utah's Free Elections clause guarantees more than merely the right to vote.

2. Free Election Clauses and the English Bill of Rights

The history of free election clauses also supports that they were intended to prohibit tyrannical or despotic governmental manipulation of the election process to either ensure continued power or to attain electoral advantage. The first state free election clauses derived from a provision in the English Bill of Rights of 1689. *See Harper v. Hall*, 868 S.E.2d 499, 540 (N.C. 2022) (quoting historical sources discussing the origin of Free Elections Clauses in Virginia, Pennsylvania, and North Carolina). The original provision provided: "election of members of parliament ought to be free," and "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain electoral advantage." *Id.* (citing Bill of Rights, 1689, 1 W. & M. Sess. 2 c. 2 (Eng.)). The key principle driving these reforms was "avoiding the manipulation of districts that diluted votes for electoral gain." *Id.* North Carolina's free election clause was enacted following passage of similar provisions in Virginia and Pennsylvania, with the intent to "end the dilution of the right of the people to select representatives to govern their affairs," and to "codify an explicit provision to establish protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* (cleaned up). While not identical to Utah's, North Carolina's free election clause states simply: "All elections shall be free."

Defendants argue there is no evidence that Utah's Free Elections Clause, specifically, was based on the English Bill of Rights. This is true. Utah does not have the same well-

developed caselaw like North Carolina, specifically tracing the origin of this specific constitutional provision directly to the English Bill of Rights. However, the Utah Supreme Court has recognized that at least one provision in the Utah Constitution arose from the English Bill of Rights of 1689. *See, e.g.*, *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) (discussing Utah's cruel and unusual punishment clause), *abrogated by Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533; *see also State v. Houston,* 2015 UT 40, ¶¶ 166-170, 353 P.3d 55, 99-100 (Lee, J. concurring) (discussing English Bill of Rights and English origins of protection against "cruel and unusual punishment"). Based on *Bott,* the English Bill of Rights certainly had some influence on Utah's Constitution, as did other state constitutions and the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 31 (stating "the drafters of the Utah Constitution borrowed heavily from other state constitutions and the United States Constitution" and English common law.).

The history and evolution of our representative democracy in the United States was well known to the Utah Supreme Court in 1896, as it evaluated legislative action and various challenges to an election process. *See Ritchie v. Richards*, 14 Utah 345, 47 P. 670, 675 (1896) (stating elections should be "honest and fair"). In a concurring opinion, Justice Batch rejected the proposition that all legislative action is presumed constitutional and beyond judicial review. *Id.* at 675. Specifically, he rejected an interpretation of the Utah Constitution that would vest the legislature with "a power so arbitrary" that it likened it to "the parliament of Great Britain, under a monarchial form of government." *Id.*; *see also id.* at 681 (Miner, J., concurring in J. Batch's opinion).

Utah caselaw from 1891 reflects the strong sentiment at that time regarding the fundamental nature of the right to vote and the importance of protecting it from illegal acts of

election/government officials. *See Ferguson v. Allen,* 7 Utah 263, 26 P. 570, 574 (1891). The Utah Supreme Court in *Ferguson*, while analyzing allegations of election fraud, stated that the right to vote is fundamental and "[t]hat no legal voter should be deprived of that privilege by an illegal act of the election authorities is a fundamental principle of law." *Id.* at 573. The *Ferguson* court stated: "[a]ll other rights, civil or political, depend on the *free* exercise of this one, and *any material impairment* of it is, to that extent, a subversion of our political system." *Id.* at 574 (emphasis added). It further reasoned that the "rights and wishes of all people are too sacred to be cast aside and nullified by the illegal and wrongful acts of their servants, no matter under what guise or pretense such acts are sought to be justified." *Id.*

3. *Harper v. Hall* and Defendants' cited cases.

In line with the reasoning in *Ferguson*, the North Carolina Supreme Court in *Harper v. Hall* held that partisan gerrymandering is a cognizable claim under North Carolina's free elections clause, stating:

> partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. *Partisan gerrymandering prevents election outcomes from reflecting the will of the people* and such a claim is cognizable under the free elections clause.

Harper v. Hall, 868 S.E.2d 499, 542, *cert. granted sub nom. Moore v. Harper,* 142 S. Ct. 2901 (2022) (emphasis added).

Defendants cite two cases from Colorado and Idaho, suggesting that those states narrowly interpret their free elections clauses. They do not. In fact, in reviewing both cases, the Colorado

and Idaho courts apply their respective free elections clauses to address the "process" and not just merely the act of casting voting.

Defendants cite the Colorado case *Neelley v. Farr*, 158 P. 458 (Colo. 1916), stating that the Colorado Supreme Court interpreted Colorado's "free and open elections" provision to mean that "voters' right to the act of suffrage [be] free from coercion." *Id.* at 467. While that quote is part of the analysis, the *Neelley* court's decision does not support that the Court narrowly interpreted the Colorado free and open election clause to mean only that it protects against vote coercion. Notably, the case did not address redistricting. Rather, it addressed whether votes obtained from a "closed precinct," where the non-preferred candidates' party and voter information were prohibited (due to alleged industrial necessity), violated the free and open elections clause. The *Neelley* Court concluded that it did, and it excluded all votes cast, legal and illegal, from the precinct. *Id.* at 515.[20] While there are numerous quotes from the case regarding "free and open elections" that support that free and open elections means more than simply casting a vote, one quote is particularly instructive:

> There can be no free and open election in precincts where the legitimate activity of a political organization is interfered with and its members excluded either by private interests or public agencies or by the co-operation of both. So here a private, extrinsic agency, assisted by a public agency, the board of county commissioners, obtruded itself between a political organization and the electorate, and excluded one side to the controversy from the public territorial entity wherein the right of suffrage must be exercised.

Neelley v. Farr, 61 Colo. 485, 526, 158 P. 458, 472 (1916). This case supports that Colorado's free and open elections clause protects the *process*. In addition, congressional

[20] The *Neelley* court also stated: "under our form of government, if there is anything that should be held sacred, it is the ballot; and, if the aspirants for office, the election officials, and the party leaders so far forget themselves as to commit, or permit the commission of, gross frauds, so that the will of the legal electors cannot be determined, there is nothing left for the courts to do but to set aside the election in the precincts contaminated by such fraudulent conduct." *Neelley v. Farr*, 61 Colo. 485, 515, 158 P. 458, 468 (1916).

districts drawn through partisan gerrymandering to ensure one parties' election success to the exclusion of others does not meet the *Neelley* court's definition of a "free and open" election.

Defendants also cite *Adams v. Lansdon*, 110 P. 280 (Idaho 1910). *Adams* also does not deal with redistricting. Rather, the issue before the *Adams* court was whether requiring voters to vote for a first and second choice violated the portion of the Idaho's free and lawful elections clause, which stated: "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." *Id.* at 282. In rejecting the argument, the *Adams* court interpreted the provision to prevent only "civil or military officers" from "meddl[ing] with or intimidat[ing] electors" at polls; it ruled that imposing the requirement to vote for a first and second choice was a reasonable exercise of the legislature's power. *Id.* Notably, the *Adams* courts' ruling does not generally determine what "free elections" means. It also does not hold that a congressional map that predetermines elections is a reasonable exercise of the legislature's power and that such map does not meddle or interfere with the lawful exercise of the right to vote.

Based on the plain text of the Free Elections Clause, Utah caselaw, and decisions from other state courts, Utah's Free Elections Clause guarantees more than merely the right to cast a vote. It guarantees an election *process* free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained *process*, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process, including through redistricting, to either ensure continued control or to attain an electoral advantage. As such, this Court concludes that partisan gerrymandering is a cognizable claim under Utah's Free Elections Clause.

4. Application of Plaintiffs' "effects-based" test.

Plaintiffs assert that this Court should assess Plaintiffs' Free Elections Clause claim under an effects-based test, which evaluates whether: "(1) the Enacted Plan has the effect of substantially diminishing or diluting the power of voters based on their political views, and (2) no legitimate justification exists for the dilution." (Pls.' Opp. at 17, 29.) The Court notes that this is Defendants' Motion, but Defendants neither address nor object to Plaintiffs' proposed test. Under the circumstances, and without adequate briefing, the Court adopts Plaintiffs' test solely for the purposes of deciding the current motion.

Assuming the allegations in the Complaint to be true, the Court concludes that Plaintiffs have sufficiently pled a claim under Utah's Free Elections Clause. First, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan has the effect of substantially diminishing or diluting the power of democratic voters, based on their political views. Plaintiffs allege that the Plan achieves extreme and durable partisan advantage by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to diminish their electoral strength. (Compl. ¶ 207.) In doing so, the Plan makes it systematically harder for non-Republican voters to elect a congressional candidate. It entrenches a single party in power and will reliably ensure Republicans and Republican incumbents are elected in all of the State's congressional seats for the next decade, despite a compact and sizeable population of non-Republican voters that, in a partisan-neutral map, would comprise a majority of a district covering most of Salt Lake County. (*Id.* ¶¶ 6, 206-209, 226-231.)

Second, there is no legitimate justification to dilute Plaintiffs' vote, and the dilution cannot be explained by application of traditional redistricting principles. (*Id.* ¶¶ 187-98, 233-54.)

The only stated justification is that Defendants intended "to ensure a mix of urban and rural areas in each congressional district." (Defs.' Mot. at 5, 23, 26.) Defendants contend that explanation is nothing more than a pretext. (Compl. ¶¶ 128-130, 177-78, 180-81, 187-198.) At this stage, the Court cannot resolve any disputes of fact. Therefore, it must accept Plaintiffs' well-pled allegations as true.

Further, Plaintiffs allege that the Plan was enacted for partisan advantage, based on the nature of the boundary lines, lack of transparency in the redistricting process, and the actions and statements made by elected officials involved in approving the Plan. (*Id.* ¶¶ 3-5, 141-198, 200, 233-235, 254, 275.) Finally, seeking partisan advantage is neither a compelling nor a legitimate governmental interest, because it "in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government." *Harper*, 868 S.E.2d at 549.

Based on the facts alleged in the Complaint, and the Court's legal analysis above, the Court concludes that Plaintiffs have sufficiently stated a claim under the "effects-based" test for violation of Utah's Free Elections Clause.

This Court recognizes that there will always be incidental political considerations and partisan effects during redistricting, even when neutral and traditional redistricting criteria are applied. The United States Supreme Court recognizes that "[n]ot every limitation on the right to vote requires judicial intervention. Some administrative burdens on the franchise are unavoidable. But some so alter the nature of the franchise that they deny a citizen's 'inalienable right to full and effective participation in the political process.'" *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). "Because self-government is fundamentally predicated upon voters choosing winners and losers in the political marketplace, elections must reflect the voters' judgments and

not the state's." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J. concurring) ("In a free society the State is directed by political doctrine, not the other way around."). Key to the success of our government is "public confidence in the integrity of the electoral process," which ultimately "encourages citizen participation in the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). What is clear in a representative democracy, and under Utah's Free Elections clause, is that the way in which a government/legislature regulates, manages, provides for, and ultimately shapes the electoral process matters. As such, government/legislative action in this area should not be, and in this case is not, beyond constitutional challenge.

Plaintiffs should have the opportunity to present their case. Defendants' Motion to Dismiss Count One is DENIED.

b. **Plaintiffs Sufficiently State an Equal Protection Claim (Count Two).**

Next, Defendants maintain that Plaintiffs fail to state an equal protection claim because the Congressional Plan does not impact any fundamental right or the right to vote because each voter can freely vote for the candidate of their choice. Defendants also argue the 2021 Congressional Plan doesn't create a suspect classification. And, Defendants argue, any "perceived inequality" is the "product of the imbalance in the political makeup in the state and the corresponding political outcomes that reflect that imbalance of political opinion." (Defs.' Mot. at 22; Defs.' Rep. at 21.) The Court disagrees. Based on the well-established three-part test set forth in *Gallivan v. Walker*, 2002 UT 89, ¶ 31, 54 P.3d 1069, Plaintiffs sufficiently state a claim for violation of Utah's Equal Protection Clause.

Plaintiffs' equal protection claim is based on their contention that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their equal protection rights

under the Uniform Operation of Laws Clause of the Utah Constitution. (Compl. ¶¶ 187-198, 271-82.) The Utah Constitution states that "all free governments are founded on their authority for their equal protection and benefit." Utah Const. art. I, § 2. The Uniform Operation of Laws Clause states that "[a]ll laws of a general nature shall have uniform operation." *Id.* art. I, § 24. Equal protection is inherent in the basic concept of justice. *Malan v. Lewis,* 693 P.2d 661, 670 (Utah 1984).

In comparing the federal Equal Protection Clause and Utah's equal protection guarantees (which are embodied in the Uniform Operation of Laws Clause), the Utah Supreme Court noted that both embody similar fundamental principles, generally that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Gallivan*, 2002 UT 89, ¶ 31 (internal quotation marks omitted). Utah courts have noted that Utah's constitutional protections are "in some circumstances, more rigorous than the standard applied under the federal constitution." *Id.* ¶ 33.[21] In other words, Utah's protections are "at least as exacting," *id.,* but in some cases more protective that its federal counterpart. *Blue Cross & Blue Shield of Utah v. State Tax Comm'n,* 779 P.2d 634, 637 (Utah 1989). For instance, "article I, section 24 demands more than facial uniformity; the law's *operation* must be uniform." *Gallivan*, 2002 UT 89, ¶ 37. The test applied

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[21] The *Gallivan* Court reasoned:

> Even though there is a similitude in the "fundamental principles" embodied in the federal Equal Protection Clause and the Utah uniform operation of laws provision, "our construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause," *Malan,* 693 P.2d at 670; *see also Ryan v. Gold Cross Servs., Inc.,* 903 P.2d 423, 426 (Utah 1995), and "[w]e have recognized that article I, section 24 ... establishes different requirements from the federal Equal Protection Clause." *Whitmer v. City of Lindon,* 943 P.2d 226, 230 (Utah 1997).

Gallivan v. Walker, 2002 UT 89, ¶ 33.

to determine compliance with the Uniform Operation of Laws Clause remains the same in all cases; however, the level of scrutiny given to legislative enactments varies. *Blue Cross*, 779 P.2d at 637 (stating this provision operates to restrain the legislature from "classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by the law").

Under Utah law,

> A law does not operate uniformly if persons similarly situated are not treated similarly or if persons in different circumstances are treated as if their circumstances were the same. In other words, [w]hen persons are similarly situated, it is unconstitutional to single out one person or group of persons from among the larger class on the basis of a tenuous justification that has little or no merit."

Id. ¶ 37 (cleaned up). The Uniform Operation of Laws Clause "protects against discrimination within a class and guards against disparate *effects* in the application of laws." *Id.* ¶ 38 (emphasis added). The courts have a responsibility to determine "whether a classification operates uniformly on all persons similarly situated within constitutional parameters." *Id.* Utah laws must not "operate unequally, unjustly, and unfairly upon those who come within the same class." *Blackmarr v. City Ct. of Salt Lake City,* 86 Utah 541, 38 P.2d 725, 727 (1934).

Gallivan v. Walker is not a redistricting case, however, the principles espoused in the context of apportionment are no less applicable here. Notably, the *Gallivan* Court stated: "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Gallivan*, 2002 UT 89, ¶ 72 (citing *Reynolds v. Sims,* 377 U.S. 533,

565–66, 84 S. Ct. 1362 (1964) (citing *Brown v. Bd. of Educ.,* 347 U.S. 483, 74 S.Ct. 686 (1954))). *Gallivan* also recognized that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems just." *Id.*

Plaintiffs assert that the right to vote is fundamental, and therefore heightened scrutiny applies based on the test set forth in *Gallivan*, 2002 UT 89, ¶¶ 42-43. Defendants, on the other hand, argue that because no fundamental or critical right or suspect classifications are implicated, the "rational basis" test, set forth in *State v. Angilau,* 2011 UT 3, ¶ 12, 245 P.3d 745, applies. At this stage, the Court need not decide which test applies as a matter of law because Plaintiffs have alleged facts sufficient to satisfy both standards.

Plaintiffs sufficiently allege facts to support that heightened scrutiny should apply. Plaintiffs have alleged that the 2021 Congressional Plan affects their fundamental right to vote. (Compl. ¶¶ 2, 261-262, 276-277, 301-307.) They have alleged that their right to vote has been burdened, diluted, impaired, abridged and is effectively meaningless, solely because of their political views and past votes. (*Id.*) The *Gallivan* court recognizes the right to vote as fundamental, stating:

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

Id. (citing *Reynolds*, 377 U.S. at 560 (1964)).

Under the Uniform Operation of Laws analytical model set forth in *Gallivan*, at this stage, Plaintiffs must allege that (1) the challenged law creates a classification, (2) that the "classification is discriminatory" or "treats the members of the class or subclasses disparately," and that it is (3) reasonably necessary to further a legitimate legislative goal. *Id.* ¶¶ 42-43.

First, Plaintiffs allege that the 2021 Congressional Plan, like the multi-county signature requirement in *Gallivan*, operates to create classifications. (Pls.' Opp'n at 34.) Plaintiffs allege that the district boundary arbitrarily classifies voters based on partisan affiliation and geographic location. (Compl. ¶¶ 4, 207-227, 274-275.) *Gallivan* recognized that the multi-county signature requirement created two subclasses of registered voters based on where they lived, rural and urban voters. *Gallivan*, 2002 UT 89, ¶ 44. Defendants contend that party affiliation is not a "suspect classification." However, at this stage, Plaintiffs have alleged, and this Court accepts as true, that the 2021 Congressional Plan operates to classify voters by both partisan affiliation and geographic location.

Second, Plaintiffs allege that the 2021 Congressional Plan treats similarly situated voters disparately. (*Id.* ¶¶ 4, 15, 23, 29-33, 36, 130, 187-198, 271-276.) Plaintiffs allege that Utah's Republican and non-Republican voters are similarly situated for redistricting purposes because both groups are entitled to equally weighted votes. The same is true for voters living in both urban and rural settings. Plaintiffs allege that the 2021 Congressional Plan diminishes the voting strength of non-Republican and urban voters, while amplifying the strength of Republican and rural voters. (*Id.* ¶¶ 30-33, 36, 188, 265, 276.)

Third, Plaintiffs sufficiently allege that there is no "legitimate" legislative goal in seeking a partisan advantage through redistricting, which effectively pre-determines election outcomes, targets disfavored voters, dilutes their vote and shifts voting power from all the people to a subset of people. (*Id.* ¶¶ 270-82.) They also allege there is no legitimate interest in amplifying the interests of rural or suburban voters to the detriment of urban voters.[22] (*Id.* ¶ 280.) Plaintiffs

[22] The *Gallivan* Court held that the multi-county signature requirement did not further a legitimate legislative purpose because it "invidiously discriminates against urban registered voters in violation of the one person, one vote principle." *Gallivan*, 2002 UT 89, ¶ 49.

also allege that Defendants' stated justification for the placement of district boundaries, to ensure an urban/rural mix, was merely a pretext to ensure partisan advantage and dilution of non-Republican votes. (*Id.* ¶¶ 177, 187-197.) Accepting these facts and the facts in the Complaint as true, Plaintiffs have stated a claim for equal protection under the Uniform Operation of Laws Clause.

Defendants contend that no fundamental right is implicated, and that partisan affiliation is not a suspect classification. As such, they maintain the Court should apply the rational basis standard. Based on that standard, Defendants assert that "the Legislature voted on congressional district lines for the *reasonable* purpose of ensuring balance of urban and rural areas in each congressional district." (Defs.' Mot. at 26 (citing Compl. ¶ 187).). Defendants' argument goes to the merits of Plaintiffs' claim, rather than to whether they have sufficiently stated a claim. While the Complaint does reflect that proponents of the 2021 Congressional Plan represented that the district lines were "necessary" to balance urban and rural interests, it does not state that the purpose was reasonable. In addition, Defendants ignore paragraphs 188 to 198 of the Complaint, in which Plaintiffs allege that rationale was a pretext. On a motion to dismiss, this Court does not decide the merits. Rather, it assumes the well-pleaded facts in the Complaint to be true. Plaintiffs allege that Defendants' urban/rural justification is merely a pretext. For purposes of this motion, this Court assumes that fact to be true. This Court cannot, at this stage, resolve disputes of fact or make credibility determinations.

Even reviewed under the rational basis test, Plaintiffs' Complaint still states a claim. Under that standard, this Court considers: "(1) whether the classification is reasonable; (2) whether the objectives of the legislative action are legitimate, and (3) whether there is a

reasonable relationship between the classification and the legislative purpose."[23] *State v. Angilau*, 2011 UT 3, ¶ 21, 245 P.3d 745 (internal quotation marks omitted). Courts will "uphold a statute under the rational basis standard if [the statute] has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory." *Id.* ¶ 10 (internal quotation marks omitted) (second alteration in original) (emphasis added). Assuming factors one and three are established, the Complaint alleges sufficient facts to show that there is no legitimate legislative objective in either seeking partisan advantage through redistricting or in establishing districts to predetermine the outcome of elections and to ensure that incumbents continue to hold their seats.

For the reasons stated above, Plaintiffs have stated an equal protection claim under both a heightened scrutiny and rational basis standard. The Motion to Dismiss Count Two is DENIED.

c. Plaintiffs Sufficiently State a Claim for Violation of Plaintiffs' Right to Free Speech and Association (Count Three).

Defendants assert that the 2021 Congressional Plan and the congressional district boundaries established therein neither implicate nor violate Plaintiffs' Free Speech and Association rights. The Court disagrees.

Article I, Section 1 of the Utah Constitution states that "[a]ll persons have the inherent and inalienable right to . . . assemble peaceably, . . . petition for redress of grievances, [and to] communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, § 1. Article I, Section 15 states, in pertinent part, that "[n]o law shall be passed to abridge or restrain the freedom of speech." Utah Const. art. I, § 15. The Utah Supreme Court has explained that together, Sections 1 and 15 of Article I "prohibit laws which either directly

[23] The Court also notes that whether a classification is in fact "reasonable" or whether legislative objectives are "legitimate" are inherently factual determinations. At this stage, the Court cannot "find facts" nor decide if the classification is "reasonable" or if the legislative objectives are "legitimate," without a developed factual record. On a motion to dismiss, the only issue before the Court is whether Plaintiffs have alleged sufficient facts to state a claim under Utah's Uniform Operation of Laws Clause.

limit protected [free speech] rights or indirectly inhibit the exercise of those rights." *Am. Bush*, 2006 UT 40, ¶ 21 (noting drafter of Utah's Constitution borrowed heavily from other state constitutions and the United States Constitution and finds its roots in English common law). Notably, the United States Supreme Court has recognized a First Amendment interest in voting. *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)); *Burdick*, 504 U.S. at 438 (observing that "voters express their views in the voting booth.").

The role of free speech is central to our representative democracy. In *American Bush*, the Utah Supreme Court discussed the history of free speech in Utah. 2006 UT 40, ¶ 13. That court recognized that "[t]he framers of Utah's constitution saw the will of the people as the source of constitutional limitations upon our state government." *Id.* And, because "'[a]ll political power is inherent in the people,' only Utah's citizens themselves had the right to limit their own sovereign power to act through their elected officials." *Id.* ¶ 14 (citing Utah Const. art. I, § 2). "'Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.'" *Harper*, 868 S.E.2d at 545 (citing Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970)).

Plaintiffs allege that the 2021 Congressional Plan divides up the only two predominately Democratic counties in Utah. Salt Lake County is divided among the four congressional districts; Summit County is divided among two. Fifteen municipalities are divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities are divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Plaintiffs allege free

speech and association rights have in fact been burdened by these new boundaries. Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty to three hundred miles away. (*Id.* ¶¶ 242-251.) The proximity between voters discourages, burdens, or effectively impacts free speech and association. Plaintiffs allege that these predominately democratic communities were intentionally divided or "cracked" solely because of their political views and past votes. (*Id.* ¶¶ 192, 275.) The effect of the "cracking" is that their non-Republican views are subordinated, votes are diluted, voices are silenced, and Republican-advantage and control is locked in in all four congressional districts for the next decade. (*Id.* ¶¶ 36, 275, 293-94.)

Plaintiffs allege that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their free speech and association protections. They allege the 2021 Congressional Plan is both discriminatory and retaliatory and based solely on their protected political views and past votes. (Compl. ¶ 3-4, 36, 205-207. 209, 283-97.) Plaintiffs allege that the 2021 Congressional Plan burdens free speech and association in multiple ways. Specifically, it "restrains and mutes Plaintiffs' ability to express their viewpoints," "abridges the ability of voters with disfavored views to effectively associate with other people holding similar viewpoints," "impairs Plaintiffs' ability to recruit volunteers, secure contributions, and energize other voters to support Plaintiffs' expressed political views and associations," "retaliates against Plaintiffs for exercising political speech that Defendants disfavor," "prevent[s] [voters] from being able to associate and elect their preferred candidates who share their political views," divides Plaintiffs "to make their voices too diluted to be heard and guarantee they are not represented in any meaningful way because of

their disfavored views," and dilutes non-Republican votes. (*See generally* Compl., Compl. ¶¶ 289-294.)

Defendants assert that the Free Speech and Association Clauses do not apply to the redistricting process. (Defs.' Mot. at 26.) Defendants contend that the placement of a congressional district boundary "does not in any way restrict an individual's speech or impair an individual's ability to communicate," citing two federal district court cases, *Radogno v. Ill. State Bd. Of Elections*, No. 11-CV-04884, 2011 WL 5025251 (N.D. Ill. Oct. 21, 2011) and *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 487, but without any legal analysis. (Defs.' Reply at 26-27.)

In *Radogno*, the federal district court rejected Plaintiffs' First Amendment claims, holding that such rights were not burdened by the redistricting plan at issue. Specifically, the *Radogno* Court reasoned:

> Plaintiffs are every bit as free under the new redistricting plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression. Plaintiffs' freedom of expression is simply not burdened by the redistricting plan. It may very well be that Plaintiffs' ability to successfully elect their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights.

Radogno, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011).[24] *Radogno*'s First Amendment analysis of partisan political gerrymandering, under federal law, makes sense and is persuasive generally. However, that rationale may not apply to every case or to every fact scenario. In addition, it is not binding on this Court.

[24] Notably, the *Radogno* court did not dismiss outright plaintiffs' equal protection claim under the Fourteenth Amendment, but instead granted plaintiffs' leave to amend to plead a "workable test" or "reliable standard" to evaluate such claim. *Radogno*, 2011 WL 5025251, at *6 (discussing generally partisan gerrymandering cases under federal law, noting that some have reached the conclusion that they are justiciable, but not solvable).

In *Johnson v. Wis. Elections Comm'n*, the Wisconsin Supreme Court noted that in *Rucho v. Common Cause*, 204 L. Ed. 2d 931, 139 S. Ct. 2484, 2499–500 (2019), "[t]he United States Supreme Court recently declared there are no legal standards by which judges may decide whether maps are politically 'fair.'" *Johnson*, 2021 WI 87, ¶ 3, 399 Wis. 2d 623, 631. The *Johnson* court agreed that "fairness" is not a judicially manageable standard and that "deciding what constitutes 'fair' partisan divide . . . would encroach on the constitutional prerogatives of the political branches." *Id.* ¶ 45. The court emphasized that it would not decide whether the maps were fair but would fulfill its judicial role of "declaring what the law is and affording the parties a remedy for its violation." Like the *Johnson* court, this Court is not asserting that it has a role in deciding "fairness." And Plaintiffs here are not arguing that the 2021 Congressional Plan is unfair. They assert that it violates the Utah Constitution, and, as previously emphasized, the Court does not hesitate to engage in constitutional review.

Defendants also assert that the Free Speech and Association clauses of the Utah Constitution do not protect the redistricting process because "the framers of our [Utah] constitution . . . envisioned a limited freedom of speech." *Am. Bush*, 2006 UT 40, ¶ 42. The *American Bush* case, however, has only minimal relevance, if any, to this specific issue. *American Bush* did not involve redistricting, allegations of gerrymandering or voting rights. Instead, the *American Bush* court characterized the right to free speech as "limited" while discussing whether obscenity—in that case, nude dancing—was protected speech. *Am. Bush*, 2006 UT 40, ¶¶ 31-58. Consequently, the holding that the Utah Constitution's free speech protections do not extend to obscenity has little, if any, relevance to the issues at bar. Notably, unlike obscenity, voting is a fundamental right, and its exercise is a form of protected speech.

Laws v. Grayeyes, 2021 UT 59, ¶ 61 (stating "the right to vote is sacrosanct"); *Doe v. Reed*, 561 U.S. at 224 (recognizing a First Amendment interest in voting).

Defendants also assert there can be no First Amendment violation because Plaintiffs have no right to political success. *See Cook v. Bell*, 2014 UT 46, ¶ 34, 344 P.3d 634 (addressing whether the Legislature's limits on the right to initiative imposed severe restrictions on free speech and association). The Court does agree that "First Amendment jurisprudence . . . does not guarantee unlimited participation in political activity, nor does it establish a right to political success." *Id.* ¶ 57. However, it does protect "individuals from regulations that directly discourage or prohibit political expression." *Id.*

This Court notes there is a distinction between incidental political impacts that flow from neutral government action and government action aimed at discouraging, burdening, or prohibiting speech and association in order to secure an electoral advantage. Where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward," courts cannot and should not intervene in a neutrally administered electoral system. *New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S. Ct. 791 (rejecting argument that "one-party rule" demands application of First Amendment to ensure competition or a "fair shot at party endorsement"). But when a state takes steps, under either election laws or by redistricting, to grant its preferred party a durable monopoly, this deviation from neutrality undermines the competitive mechanism that undergirds the democratic process, and it burdens a voters' right to participate in a fair election. *See Williams v. Rhodes*, 393 U.S. 23, 31-32, 89 S. Ct. 5, 10-11 (1968) (holding Ohio's ballot-access laws, which favored the long-established Republican and Democratic parties, placed an unequal burden on the right to vote

and the right to associate to form a new political party).[25] "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC,* 572 U.S. 185, 191, 134 S. Ct. 1434, 1444 (2014). As such, the government cannot and should not "restrict political participation of some in order to enhance the relative influence of others." *Id.*

In *Harper v. Hall,* the North Carolina Supreme Court recognized that there is a cognizable claim for violation of free speech and association rights based on partisan gerrymandering. *Harper v. Hall*, 868 S.E.2d 499, 546 (N.C. 2022). The North Carolina Supreme Court stated:

> When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny."

Id. (holding congressional map subject to strict scrutiny and requiring it to be "narrowly tailored to advance a compelling governmental interest"). This practice "distorts the expression of the people's will." *Id.* Under these circumstances, "[t]he diminution or dilution of voting power based of partisan affiliation . . . suffices to show a burden on that voter's speech and associational rights." *Id.* ¶ 161. This Court is persuaded that partisan gerrymandering that effectively entrenches a state's preferred party in office discriminates on the basis of viewpoint dilutes the

[25] In *Williams,* the State of Ohio asserted "that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . to choose a President and Vice President." *Williams*, 393 U.S. at 28–29. While noting that there "can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors," the Court stated: "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. *Id.*

non-favored party's vote, burdens / impairs the citizens' rights to exercise a meaningful vote and to associate. *See Vieth*, 541 U.S. at 314 (Kennedy, J, concurring); *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658.

Plaintiffs assert that heightened scrutiny applies to the free speech and association claims. Plaintiffs have also cited several cases in support of that assertion. *See, e.g., Reed v. Town of Gilbert*, Ariz., 135 S. Ct 2218, 2227 (2015); *Harper v. Hall*, 868 S.E.2d at 546. In their Reply, Defendants do not challenge that contention or seek to distinguish these cases with respect to this issue. Thus, in the absence of any contrary argument or authority, the Court assumes, for purposes of analyzing the motion at bar, that strict scrutiny applies to the free speech and association claims.[26] Based on the factual allegations in the Complaint, which this Court must accept as true, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan violates their rights to free speech and association because it discourages and burdens political expression, is discriminatory and retaliatory based on disfavored political views and past voting history, and it dilutes Plaintiffs' voting power. (*See generally* Compl.; Compl. ¶¶ 288-294.) Plaintiffs also allege that Defendants have "cracked" and "packed" the congressional voting districts to intentionally dilute the voting power of those who have disfavored views, namely Democrats.

Plaintiffs also have sufficiently alleged that there is no compelling or legitimate government interest in drawing congressional district boundaries to give Republicans an electoral advantage, to the detriment of non-Republican voters' right to free speech and association. (*Id.* ¶ 295.) Plaintiffs also allege the 2021 Congressional Plan is not narrowly

[26] By applying strict scrutiny for purposes of this Motion, the Court is not necessarily ruling that Plaintiffs' assertion is correct. But given the briefing and accepting the factual allegations in the Complaint as true, including that the Legislature intentionally drawing the maps to punish Plaintiffs for expressing disfavored views, the Court adopts this standard solely for the purpose of determining if Plaintiffs have stated a viable claim for relief.

tailored to serve any legitimate state interest. (*Id.* ¶ 296.) Plaintiffs have sufficiently stated a claim for violation of their Free Speech and Association rights.

For the reasons stated above, Defendants' Motion to Dismiss Count Three is DENIED.

d. Plaintiffs Sufficiently State a Right to Vote Claim (Count Four).

Defendants assert Plaintiffs fail to state a claim for violation of the Right to Vote Clause. Defendants also argue, without citation to any legal authority, that the Right to Vote Clause was intended to deal solely with voter qualifications and that there is no basis in Utah law to interpret the provision to guarantee anything other than the right to physically cast a ballot. Defendants also argue that the 2021 Congressional Plan does not prevent Plaintiffs or any other qualified Utah citizens from voting, therefore there can be no constitutional violation. (Defs.' Mot. at 27-28; Defs.' Rep. at 25-26.) The Court disagrees.

The Right to Vote Clause provides that "[*e*]*very citizen* of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, *shall be entitled to vote in the election.*" Utah Const. art. IV, § 2 (emphasis added).[27] Utah law unequivocally acknowledges that the right to vote is fundamental to our democracy and our representative form of government. *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).[28] In fact, it is said to be "more precious in a free country" than any other right. *Gallivan*, 2002 UT 89, ¶ 24 (quoting *Reynolds*, 377 U.S. at 560). If the right "of having a voice in the election of those who

[27] The Court notes that neither party presented any arguments regarding the plain meaning of this clause, historical evidence regarding the drafting or adoption of this clause or discussed any particular test to be applied.

[28] "The right to vote and to actively participate in its processes is among the most precious of the privileges for which our democratic form of government was established. The history of the struggle of freedom-loving men to obtain and to maintain such rights is so well known that it is not necessary to dwell thereon. But we re-affirm the desirability and the importance, not only of permitting citizens to vote but of encouraging them to do so." *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).

make the laws under which, as good citizens, we must live," is undermined, "[o]ther rights, even the most basic, are illusory. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right." *Id.*

Defendants argue that the Right to Vote Clause deals solely with voter qualifications, implying that it only applies when voter qualifications are at issue. While this clause includes qualifications required to exercise the right, the right to vote is nonetheless expressly guaranteed.

Defendants also assert that this clause guarantees only the right to physically cast a vote. Defendants cite no authority to support such a limited interpretation of this specific clause. To the contrary, when interpreting constitutional provisions, the Utah Supreme Court has stated that individual constitutional provisions

> cannot properly be regarded as something isolated and absolute but must be considered in the light of its background and the purpose it was designed to serve; and in relation to other fundamental rights of citizens set forth in the entire Constitution which are essential to the proper functioning of our democratic from of government. One of the principal merits of our system of law and justice is that it does not function by casting reason aside and clinging slavishly to a literal application of one single provision of law to the exclusion of all others. Its policy is rather to follow the path of reason in order to avoid arbitrary and unjust results and to give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions.

Shields v. Toronto, 16 Utah 2d 61, 63, 395 P.2d 829, 830 (1964) (interpreting Article VI, Section 7 of the Utah Constitution in reference to the right to vote).[29] In interpreting this provision, the Court should consider the entire Utah Constitution and its purpose, including the Free Elections Clause, the Equal Protection Clause, the Free Speech and Association Clauses and the long line

[29] Notably, the *Shields* Court recognized the historical and "continuing expansion of the right of suffrage in this country." *Shields v. Toronto*, 16 Utah 2d 61, 66 n. 12, 395 P.2d 829, 833 n. 12 (1964). While discussing the right to vote in the context of voting "freely for the candidate of one's choice," the Court stated that voting "is of the essence of a democratic society, and any restrictions on that right strike at the essence of a representative government." *Id.* Every citizen should have a "right to a vote free of arbitrary impairment by state action." *Id.*

of cases generally discussing the "right to vote." The plane language of the Right to Vote clause guarantees the right. But, read in light of the entire Utah Constitution, the right to vote clearly guarantees more than the physical right to cast a ballot.

Utah law has recognized that the right to vote must be "meaningful." *Shields*, 395 P.2d at 832-33 (explaining "[t]he foundation and structure which give [our democratic system of government] life depend upon participation of the citizenry in all aspects of its operation."). The right must not be "unnecessarily abridged" or "diluted." *Gallivan*, 2002 UT 89, ¶ 72 (stating "'[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.'" (quoting *Reynolds*, 377 U.S. at 565-66, 84 S.Ct.). And the right to vote "cannot be abridged, impaired, or taken away, even by an act of the Legislature." *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 237-38 (Utah 1904). The goal of an election "is to ascertain the popular will, and not to thwart it," and "aid" in securing "a fair expression at the polls." *Id.*[30]

Here, Plaintiffs allege that the Legislature drew the 2021 Congressional Map in a way to render Plaintiffs' votes meaningless. While they still can engage in the act of voting, Plaintiffs' votes no longer have any effect. Specifically, Plaintiffs allege that the 2021 Congressional Plan "achieves this extreme partisan advantage for Republicans primarily by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to eliminate the strength of their

[30] There is only one Utah case specifically addressing the Right to Vote Clause. *See Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985). In *Dodge*, a prison inmate challenged a law requiring him to vote in the county in which he resided prior to incarceration rather than in the county in which he was incarcerated. Plaintiff alleged that his right to vote under the Right to Vote Clause was in effect denied. *Id.* at 272-73. In analyzing that claim, the Utah Supreme Court stated, "Dodge made no contention that his right to vote was improperly burdened, conditioned or diluted." *Id.* at 273. The implication is that a claim under the right to vote clause may include an allegation that the right was "improperly burdened, conditioned or diluted."

voting power." (Compl. ¶ 207.) The result is that the 2021 Congressional Plan "draw[s] district lines to predetermine winners and losers." (Compl. ¶ 306.) Their disfavored vote is meaningless, diluted, impaired and infringed due to the intentional partisan gerrymandering. (*Id.* ¶ 304-06.) In addition, because the election outcomes are now predetermined for the next ten years, the true public will cannot be ascertained and is effectively distorted. (*Id.* ¶ 305-09.) Plaintiffs also allege that this impairment serves no legitimate public interest.[31] (*Id.*) Assuming these facts in the Complaint to be true, the Court concludes that Plaintiffs have properly stated a claim under the Right to Vote Clause.

Defendants' Motion to Dismiss Count Four is therefore DENIED.

IV. Plaintiffs Fail to State a Claim Under Count Five the "Unauthorized Repeal of Proposition 4."

Finally, Defendants assert that the fifth claim should be dismissed because the Legislature's amendment or repeal of Proposition 4 does not violate the Inherent Political Powers and Initiative Clauses of Utah Constitution. The Court agrees.

Plaintiffs' fifth claim alleges that when the Legislature replaced the citizen-enacted Proposition 4 with SB 200, the Legislature infringed on the people's inherent political powers and initiative rights under the Utah Constitution. (Compl. ¶¶ 315-17). The Initiative Clause of the Utah Constitution states, in relevant part: "The legal voters of the state of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute." Utah Const. art. VI, § 1(2)(a)(i)(A). The Inherent Political Powers Clause provides that "All political power is inherent

[31] The Court notes that neither party has addressed the appropriate standard to be applied in this case, i.e., strict scrutiny or rational basis, for Plaintiffs' Right to Vote claim. However, reviewing Plaintiffs' Complaint, the Court concludes that Plaintiff has sufficiently pled a claim under either standard.

in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Utah Const. art. I, § 2. Plaintiffs argue that the Legislature violated these clauses by passing SB 200, effectively repealing Proposition 4, which had been put in place via citizen initiative.

The Utah Supreme Court has explained that "[u]nder [Article I, Section 2], upon which all our government is built, the people have the inherent authority to allocate governmental power in the bodies they establish by law." *Carter v. Lehi City*, 2012 UT 2, ¶ 21, 269 P.3d 141. Under this authority, "the people of Utah divided their political power," vesting

> "The Legislative power of the State" in two bodies: (a) "the Legislature of the State of Utah," and (b) "the people of the State of Utah as provided in Subsection (2)." [Utah Const.] art. VI, § 1(1). On its face, article VI recognizes a single, undifferentiated "legislative power," vested both in the people and in the legislature. Nothing in the text or structure of article VI suggests any difference in the power vested simultaneously in the "Legislature" and "the people." *The initiative power of the people is thus parallel and coextensive with the power of the legislature*. This interpretation is reinforced by the history of the direct-democracy movement, by constitutional debates in states with constitutional provisions substantially similar to Utah's article VI, and by early judicial interpretations of those provisions.

Id. ¶ 22 (emphasis added). In further explaining this shared legislative power, the Utah Supreme Court has stated, "[t]he power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share equal dignity." *Gallivan v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069.

The Utah Constitution and Utah law unequivocally recognizes the importance of its citizens' right to initiate legislation to alter or reform their government. Utah Const. art. I, § 2; *Gallivan*, 2002 UT 89, ¶ 23; *Utahns For Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 2007 UT 97, ¶ 10. This is clear. The Constitution, however, does not restrict or limit, in any way, the Legislature's ability to amend or repeal citizen-initiated laws after they become effective.

Through their coequal power, both the Legislature and the people can enact, amend, and repeal legislation. The people can repeal legislation enacted by the Legislature through their referendum power, with some limitation. *See* Utah Const. art. VI, § (2)(a)(1)(B). The Utah Constitution, caselaw, and historical practice, however, shows that the Legislature can amend and repeal legislation enacted by citizen initiative, without limitation.

When we interpret the Utah Constitution, the starting point is the text itself. *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 19, 144 P.3d 1109 (internal quotation marks omitted). In evaluating legislative authority, the provisions in the Utah Constitution are construed as "limitations, rather than grants of power." *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955); *Shurtleff*, 2006 UT 51, ¶ 18 ("The Utah Constitution is not one of grant, but one of limitation."). Article VI of the Utah Constitution vests legislative authority in both the Legislature and the people. *See* Utah Const. art. VI, § 1(1). Notably, the text of article VI broadly confers legislative authority on the Legislature without any express limitation on the Legislature's ability to pass or repeal laws. *See id.* art. VI, § 1(a).

In contrast, the ability of the people to enact or repeal legislation, however, is specifically limited by the text of the Constitution.[32] *See id.* art. VI, § 1(b) (stating that "Legislative power" is "vested in … the people of the State of Utah as provided in Subsection (2)"). In fact, subsection 2 of article VI explicitly restricts the people's referendum power—or the ability to repeal laws

[32] The citizens' right to legislate through the initiative process is also limited by the plain language of the Utah Constitution. *Gallivan v. Walker*, 2002 UT 89, ¶ 172, 54 P.3d 1069, 1118. Article VI, section (2)(a)(i)(A) states: "The legal voters of the State of Utah, in the numbers, *under the conditions, in the manner, and within the time provided by statute*, may initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, *as provided by statute.*" Utah Const. art. VI, § 2(a)(i)(A). Notably, it is the Legislature that establishes the statutory requirements to initiate, submit and vote on any citizen initiative. *See Sevier Power Co., LLC v. Bd. of Sevier Cty. Comm'rs*, 2008 UT 72, ¶ 10, 196 P.3d 583.

enacted by the Legislature—to laws that were passed with less than a 2/3 majority vote by the Legislature. *See id.* art. VI, § 2(a)(1)(B).

Given the absence of anything in the Utah Constitution that restricts the Legislature's ability to repeal laws enacted via initiative, there is a clear implication that the Legislature has broad authority to enact and repeal laws, including those enacted by citizen initiatives. Reading the Utah Constitution to limit the Legislature's authority to amend or repeal laws originally enacted via citizen initiative would require the Court to read something into the Constitution that is simply not there.[33] The Court declines to do so.

Moreover, Utah law also clearly indicates that the Legislature has power to amend and repeal laws that are passed via citizen initiative.[34] In explaining that the legislative powers of the Legislature and the people are coequal or "parallel," the Utah Supreme Court approvingly quoted the Oregon Supreme Court, which stated that "'[l]aws proposed and enacted by the people under the initiative . . . are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will.'" *Carter*, 2012 UT 2, ¶ 27 (quoting *Kadderly v.*

[33] The Court further notes that Plaintiffs have not provided any facts from the historical record to suggest that such a restriction was intended. Rather, the historical practice and the caselaw indicate that such a restriction was not intended. In contrast to the Utah Constitution, the constitutions of ten other states expressly restrict their respective legislatures' authority to amend or repeal the statutes/law enacted from a successful citizen initiative. *See* Alaska (Alaska Const. art. XI, § 6); Arizona (Ariz. Const. art. IV, pt. 1, § 1(6)(B)-(C)); Arkansas (Ark. Const. art. V, § 1); California (Cal. Const. art. II, § 10); Michigan (Mich. Const. art. II, § 9; art. XII, § 2); Nebraska (Neb. Const. art. III, § 2); Nevada (Nev. Const. art. XIX, §§ 1-2); North Dakota (N.D. Const. art. III, § 8); Washington (Wash. Const. art. II, § 1); and Wyoming (Wyo. Const. art. III, § 52). Given the lack of any textual limitation, the history of the Legislature repealing citizen initiatives, and examples of other state constitutions that do contain express limits on their respective legislature's ability to make changes to citizen-initiated laws, it would clearly be improper for the Court to read such a limitation into Utah's Constitution.

[34] Utah law also specifically authorizes the Legislature to amend citizen-initiated or approved laws. Under Utah Code Ann. Section 20A-7-212(3)(b), "[t]he Legislature may amend any initiative approved by the people at any legislative session" and Subsection 20A-7-311(5)(b) provides that "[t]he Legislature may amend any laws approved by the people at any legislative session after the people approve the law." The Court agrees with Defendants that adopting Plaintiffs' argument *could* create certain practical challenges to the maintenance of the Utah Code in that the Legislature would be precluded from correcting typographical errors and making any changes, substantive or otherwise. Other than the authority provided in the above-cited statutes, there is no other process or procedure to manage changes to citizen-initiated laws.

City of Portland, 44 Or. 118, 74 P. 710, 720 (1903). Thus, the Utah Supreme Court has seemingly recognized that the Legislature may repeal initiative-enacted law.

Likewise, the Legislature's amendment or effective repeal of Proposition 4 / Title 20A, Chapter 19, Utah Independent Redistricting Commissions Standards Act is in line with historical practice. In 2018, Governor Herbert called a special session of the Utah Legislature to address citizen initiative Proposition 2, the Utah Medical Cannabis Act, the day before it was set to go into effect. *Grant v. Herbert*, 2019 UT 42, ¶ 5, 449 P.3d 122. The Legislature heavily amended the statute, changing many key aspects of the law. *Id.* In response, voters attempted to place the amended statute on the ballot through referendum but were not able to do so because the amendment had passed by a two-thirds vote in the Legislature, making it exempt from referendum. *Id.* ¶ 7. The Utah Supreme Court ultimately upheld Governor Herbert's decision to call the special legislative session which amended Proposition 2. *Id.* ¶¶ 21-24.

In view of the foregoing, including the text of the Utah Constitution, statutory language, the caselaw, and historical practice, the Legislature's exercise of its coequal legislative authority to repeal citizen initiatives does not violate the Citizen Initiative or Inherent Powers Clauses of the Utah Constitution. Therefore, even accepting the factual allegations as true, the Legislature did not act unconstitutionally by either substantially amending or effectively repealing Proposition 4. Plaintiffs' Fifth cause of action, therefore, does not state a valid claim for relief under Utah law. Accordingly, the Court GRANTS Defendants' Motion to Dismiss with respect to Count Five in the Complaint.

CONCLUSION

For the reasons stated above:

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

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

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

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

DATED November 22, 2022.

BY THE COURT:

Dianna M. Gibson

DIANNA M. GIBSON
DISTRICT JUDGE

STATE OF UTAH
3RD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

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

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EMAIL: MARK GABER mgaber@campaignlegalcenter.org

Date: 11/22/2022

/s/ KAYLA DRAKE

Signature

EXHIBIT B

The Order of the Court is stated below:
Dated: December 02, 2022 11:30:27 AM **/s/** DIANNA GIBSON
District Court Judge

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Attorneys for Plaintiffs

**Pro Hac Vice*

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

LEAGUE OF WOMEN VOTERS OF UTAH, et al., Plaintiffs, v. UTAH STATE LEGISLATURE, et al., Defendants.	**ORDER DENYING MOTION FOR STAY OF PROCEEDINGS WITHOUT PREJUDICE** Civil Action No. 220901712 Honorable Dianna M. Gibson

This matter came before the Court on the Motion for Stay of Proceedings ("Motion") filed by the Legislative Defendants. The Court heard oral argument on the Motion on November 30, 2022. Plaintiffs were represented by David C. Reymann, Mark Gaber, Annabelle Harless, Hayden Johnson, Aseem Mulji, Troy Booher, and J. Frederic Voros. The Legislative Defendants were represented by Tyler R. Green and Robert H. Rees. The Lt. Governor was represented by David N Wolf.

For the reasons stated by the Court in its bench ruling following the hearing, the Motion is hereby DENIED without prejudice. The Court will reconsider if the Utah Supreme Court grants Legislative Defendants' petition for interlocutory appeal.

END OF ORDER
Entered as indicated by the signature above

Approved as to Form:

/s/ Tyler R. Green (*with permission by email*)
Attorneys for Legislative Defendants

/s/ David N. Wolf (*with permission by email*)
Attorneys for the Lt. Governor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November 2022, pursuant to Rule 7(j)(2) of the Utah Rules of Civil Procedure, I served the foregoing proposed **ORDER DENYING MOTION FOR STAY OF PROCEEDINGS WITHOUT PREJUDICE** via email on the following:

John L. Fellows (jfellows@le.utah.gov)
Robert H. Rees (rrees@le.utah.gov)
Eric N. Weeks (eweeks@le.utah.gov)
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Attorneys for the Lt. Governor

/s/ David C. Reymann

EXHIBIT C

The Order of the Court is stated below:
Dated: December 02, 2022 11:31:52 AM **/s/** DIANNA GIBSON
District Court Judge

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

LEAGUE OF WOMEN VOTERS OF UTAH, et al., Plaintiffs, v. UTAH STATE LEGISLATURE, et al., Defendants.	**AMENDED SCHEDULING ORDER** Civil Action No. 220901712 Honorable Dianna Gibson

Pursuant to Rule 16 of the Utah Rules of Civil Procedure, the Court received Plaintiffs' Motion for Amended Scheduling Order. The Court, having reviewed the Motion and Defendants' responses, having heard argument from counsel on November 30, 2022, being fully informed, and for good cause shown, hereby grants Plaintiffs' Motion for Amended Scheduling Order with certain modifications and sets the following scheduling deadlines:

Plaintiffs' Initial Disclosures	December 2, 2022
Defendants' Initial Disclosures	December 9, 2022
Plaintiffs' Expert Report(s) Due	January 18, 2023
Defendants' Expert Report(s) Due	February 17, 2023
Plaintiffs' Rebuttal Expert Report(s) Due	March 3, 2023
Discovery Deadline	March 15, 2023
Certificate of Readiness for Trial	March 15, 2023
Dispositive Motions Due / Expert Disqualification Motions Due	March 24, 2023
Exchange of Rule 26(a)(5)(A) Pretrial Disclosures	March 31. 2023
Exchange of Rule 26(a)(5)(B) Objections and Counter-designations	April 21, 2023
Motions in Limine Due	April 21, 2023
Joint Pretrial Order Due	April 28, 2023
Trial Briefs and Trial Exhibits Due	April 28, 2023
Final Pretrial Conference	May 17, 2023, 9:30 a.m.
Trial	May 22-26, 2023

END OF ORDER
Entered as indicated by the signature above

Approved as to Form:

/s/ Tyler R. Green (*with permission by email*)
Attorneys for Legislative Defendants

/s/ David N. Wolf (*with permission by email*)
Attorneys for the Lt. Governor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of December 2022, pursuant to Rule 7(j)(2) of the Utah Rules of Civil Procedure, I served the foregoing proposed **AMENDED SCHEDULING ORDER** via email on the following:

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/s/ David C. Reymann

EXHIBIT D

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

LEAGUE OF WOMEN VOTERS OF UTAH, et al.,

Plaintiffs,

v.

UTAH STATE LEGISLATURE, et al.,

Defendants.

MOTION FOR AMENDED SCHEDULING ORDER

(Expedited Briefing and Hearing Requested)

Civil Action No. 220901712

Honorable Dianna Gibson

RELIEF REQUESTED AND SUPPORTING GROUNDS

Pursuant to Rule 16 of the Utah Rules of Civil Procedure, Plaintiffs in the above captioned matter respectfully move this Court for an Amended Scheduling Order setting the dates for discovery, pre-trial, and trial proceedings as proposed by Plaintiffs below and in the accompanying

proposed order. The parties have conferred but were unable to come to agreement on a joint proposed schedule. Defendants have indicated that they will file an opposition to this motion with an alternative proposal.

Because of the highly time-sensitive nature of these issues, and the fact that some of the proposed dates set forth below will lapse in an ordinary motion briefing and hearing process, Plaintiffs respectfully request that this Court order an expedited opposition from Defendants to be filed by **November 21**, a reply from Plaintiffs by **November 23**, and a hearing to be set at the earliest available date beginning the week of **November 28**.

PROCEDURAL HISTORY

Nearly eight months ago, on March 17, 2022, Plaintiffs filed a complaint alleging that Utah's recently enacted congressional districts violate various provisions of the Utah Constitution. Defendants sought and received an extension of their answer deadline to May 2, 2022. Legislative Defendants moved to dismiss, asserting the Court lacks jurisdiction and that Plaintiffs failed to allege claims for which relief may be granted. Defendant Lieutenant Governor Henderson also filed an answer on May 2, which triggered the Court generating a Notice of Event Due Dates pursuant to Utah R. Civ. P. 26. On May 19, the parties filed a Stipulated Motion for Scheduling Order that proposed a schedule for briefing on Legislative Defendants' Motion to Dismiss and pausing discovery and other due dates until the Court ruled on the Motion to Dismiss. The Court entered a Scheduling Order that granted the Stipulated Motion, and also ordered the parties to meet and confer within 14 days of the Court's ruling on the Motion to Dismiss pursuant to Rule 16(a) to propose an Amended Scheduling Order to the Court.

Before hearing argument on the Motion to Dismiss on August 24, the Court denied Defendants' Joint Motion to Stay the case pending resolution of *Moore v. Harper* in the U.S. Supreme Court. In denying the stay, the Court concluded that delaying resolution of the case would not "achieve the just, speedy, and inexpensive determination of" the action and the Court must "afford litigants every reasonable opportunity to be heard on the merits of their cases." Aug. 22, 2022 Order and Ruling Denying Defendants' Joint Motion to Stay at 2 (citations omitted).

On October 24, the Court denied Legislative Defendants' Motion to Dismiss in part, permitting Plaintiffs' partisan gerrymandering claims (Counts 1-4) to proceed to trial. Under Rule 12(a)(1)(A), Legislative Defendants' answer would have been due last week on November 7, but Legislative Defendants requested, and Plaintiffs granted, a two-week extension to November 21. In accord with the Court's May 19, 2022 partial Scheduling Order, counsel for Plaintiffs and counsel for Defendants conferred by phone on November 4 and November 14 regarding an Amended Scheduling Order on other dates. Plaintiffs and Legislative Defendants were unable to come to agreement on a joint proposed schedule. Counsel for Defendant Lieutenant Governor Henderson did not take a position on Plaintiffs' proposed schedule other than to encourage a schedule that would resolve the case in time to minimize disruption to the electoral process.

ARGUMENT

The Court should adopt Plaintiffs' proposed amended schedule. Plaintiffs' proposed schedule is in accord with the pace of redistricting litigation around the country, with almost all cases proceeding in a shorter period of time than Plaintiffs' proposal. Plaintiffs' proposed schedule is necessary to achieve a just and speedy resolution and afford Plaintiffs the opportunity to seek relief in this time-sensitive matter. The proposed deadlines are manageable and will provide

sufficient time for the parties to litigate this matter, complete any potential appeals, and then redraw the unconstitutional congressional plan in advance of the 2024 election if Plaintiffs prevail.

Utah Rule of Civil Procedure 16 gives the Court "a great deal of latitude in determining the most fair and efficient manner to conduct court business," *State v. Rhinehart*, 2006 UT App 517, ¶ 9, 153 P.3d 830 (quoting *Morton v. Continental Baking Co.*, 938 P.2d 271, 275 (Utah 1997), including with respect to setting case deadlines in a scheduling order, *Segota v. Young 180 Co.*, 2020 UT App 105, ¶ 9, 470 P.3d 479; *Coroles v. State*, 2015 UT 48, ¶ 19, 349 P.3d 739. "The purpose behind a scheduling order is to allow the parties to properly prepare for trial and to save the parties from unnecessary expenses." *A.K. & R. Whipple Plumbing and Heating v. Aspen Const.*, 1999 UT App 87, ¶ 36, 977 P.2d 518. "Recognition of the trial court's prerogative to manage its docket serves a number of beneficial interests, including promoting judicial efficiency and economy, creating a predictable system of advocacy, . . . and reducing litigation expenses." *State v. Gonzalez*, 2015 UT 10, ¶ 48, 345 P.3d 1168.

Plaintiffs' proposed schedule sets forth fair and reasonable deadlines to advance the case to expeditious resolution while affording the parties and the Court ample time to prepare for trial. *See* Utah R. Civ. P. 1 (calling for courts to exercise discretion in a manner that "achieve[s] the just, speedy, and inexpensive determination of every action"). Plaintiffs propose as follows:

Legislative Defendants' Answer	November 21, 2022
Plaintiffs' Initial Disclosures	November 28, 2022
Defendants' Initial Disclosures	December 5, 2022
Plaintiffs' Expert Report(s) Due	January 9, 2023
Defendants' Expert Report(s) Due	January 30, 2023

Plaintiffs' Rebuttal Expert Report(s) Due	February 13, 2023
Discovery Deadline	February 24, 2023
Certificate of Readiness for Trial	February 24, 2023
Dispositive Motions Due / Expert Disqualification Motions Due	March 1, 2023
Motions in Limine Due	March 22, 2023
Joint Pretrial Order Due	March 27, 2023
Trial Briefs and Trial Exhibits Due	April 3, 2023
Trial	April 10-14, 2023

As an initial matter, Plaintiffs' proposed schedule provides both parties and the Court ample time—more than four months—to prepare the case for trial. Given the expert-driven nature of partisan gerrymandering claims, the schedule centers expert discovery but also provides for about three months of simultaneous fact discovery. Nothing prevents fact discovery and expert discovery from proceeding concurrently in this matter and the facts that are pertinent to Plaintiffs' claims are conducive to such a schedule. And this timeline for expert discovery is consistent with the nature of the default expert discovery rules electing a report or deposition. Utah R. Civ. P. 24(a)(4)(B)-(C). Plaintiffs' proposed discovery schedule is more than manageable for the parties.

In fact, Plaintiffs' proposed schedule provides much more time for discovery and pre-trial preparation than virtually every other partisan gerrymandering case tried in state court. The two consolidated cases challenging North Carolina's congressional map, for example, were filed on November 16 and 18, 2021, in the state's trial court and went to trial less than two months later on

January 3, 2022.[1] The consolidated cases challenging Ohio's congressional districts were filed in the state supreme court on November 22 and 30, 2021, presented with fact and expert testimony and reports, and *decided* in plaintiffs' favor on January 14, 2022. *See Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022). In Kansas, two consolidated actions challenging the state's congressional map were filed in the trial court on February 14, 2022, and went to trial seven weeks later on April 4, 2022.[2] In the challenge to Pennsylvania's 2011 congressional maps, the state's supreme court ordered a trial court on November 9, 2017, and provided about a month-and-a-half time to conduct discovery, hold a trial, and issue findings of fact and conclusions of law by December 31, 2017, which the trial court completed two days early. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 766-67 (Pa. 2018). And in Maryland, the plaintiffs filed their partisan gerrymandering complaint on December 23, 2021, and the parties conducted fact and expert discovery in approximately two weeks before the court held a trial in mid-March 2022 and rendered a decision ten days later. *See* Scheduling Order, *Szeliga v. Lamone*, C-02-CV-21-001816 (Anne Arundel Cnty. Cir. Ct. Feb. 23, 2022), www.democracydocket.com/cases/maryland-congressional-redistricting-challenge-szeliga/. Plaintiffs' proposed schedule—spanning nearly six months between now and the beginning of trial—is more than sufficient in this context.

Moreover, Plaintiffs' trial schedule is tailored to the specific needs and realities of redistricting litigation. Holding trial in April 2023 will ensure sufficient time before the 2024

[1] *See* Judgment, *North Carolina League of Conservation Voters v. Harper*, No. 21 CVS 500085, at 5-6, 11-12 (N.C. Super., Wake Cty. Jan. 11, 2022), https://redistricting.lls.edu/wp-content/uploads/NC-league-20220111-judgment.pdf.

[2] *See* Court's Scheduling Order, *Rivera v. Schwab*, No. 2022-CV-000089 (Wyandotte Cty. Dist. Ct. Mar. 20, 2022), https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/Scheduling_Order_3.20.22.pdf.

congressional election for the Court to consider the evidence, rule on the merits, and, if Plaintiffs prevail, complete the at times lengthy remedial and appellate proceedings characteristic of redistricting suits. The remedial process in redistricting cases requires time for the legislature and other parties to propose new district plan(s), for the Court and parties to review such plan(s) via briefing and hearings, and, if necessary, for the Court to appoint a special master to review remedial submissions or draw a remedial map.[3] Indeed, the Supreme Court has repeatedly approved that court-devised plans are an entirely permissible feature of resolving redistricting litigation.[4] An April trial also affords the necessary time to resolve any appeals and for the State to administer new congressional districts in time for the currently set candidate filing deadlines in early 2024. In short, Plaintiffs' proposed schedule provides sufficient time to obtain meaningful

[3] *See, e.g.*, Order on Remedial Plans, *North Carolina League v. Hall*, No. 21 CVS 500085, at 4-6 (N.C. Super., Wake Cty. Feb. 23, 2022) (summarizing remedial process on remand from partisan gerrymandering decision in *Harper v. Hall*, 888 S.E.2d 499, 403-04 (N.C. 2022)), https://www.nccourts.gov/assets/inline-files/22.02.23%20-%20Order%20on%20Remedial%20Plans.pdf?E9mkhJLRatLIbqax0vvfwDCYgiunTgIB; *Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) (ordering the Texas legislature to develop remedial plans in federal VRA lawsuit within seven months before remedial hearings would be held on the "status" of the redistricting efforts); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 557 (E.D. Va. 2016) (ordering a court-drawn map in federal VRA suit after the Virginia General Assembly failed to act within its three-month deadline).

[4] In *Growe v. Emison*, for example, the U.S. Supreme Court went so far as to call a federal district court's failure to recognize the legitimacy of state judicial redistricting "clear error." 507 U.S. 25, 33-34 (1993). There are numerous other examples supporting the same recognition of the appropriateness of judicial remedial map drawing. *See, e.g.*, *Perry v. Perez*, 565 U.S. 388, 392-97 (2012) (per curiam) (providing guidance on how courts should draw remedial maps); *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) (approving court-drawn map when the legislature was "unable to reach a solution"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam) ("The power of the judiciary of a State ... to formulate a valid redistricting plan has not only been recognized by this Court but ... has been specifically encouraged.").

relief and avoid irreparable constitutional harms in the next election, should Plaintiffs ultimately prevail on their claims. *See* Pls.' Opp'n to Defs.' Mot. to Stay at 12.

Plaintiffs' proposed schedule would impose no undue burden on Defendants, particularly given the expected expedited timeline typical of redistricting litigation. Defendants have had more than seven months to engage with Plaintiffs' claims, retain necessary counsel and experts, and otherwise begin preparing for discovery and trial in this case. Plaintiffs have made clear to Defendants beginning in Spring 2022—and again during the briefing on Defendants' Stay Motion—that this case must proceed on an expedited schedule to secure the just and speedy determination of Plaintiffs' claims. Plaintiffs' proposed schedule provides all parties significant time to develop a thorough evidentiary record while ensuring swift resolution in time to implement a potential remedy prior to the 2024 congressional election.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court adopt Plaintiffs' proposed Amended Scheduling Order submitted herewith.

Date: November 14, 2022

RESPECTFULLY SUBMITTED,

/s/ David C. Reymann

PARR BROWN GEE & LOVELESS
David C. Reymann

ZIMMERMAN BOOHER
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Caroline Olsen

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Attorneys for Plaintiffs

**Pro Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of November 2022, I filed the foregoing **MOTION FOR AMENDED SCHEDULING ORDER** via electronic filing, which served all counsel of record.

/s/ David C. Reymann

EXHIBIT E

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

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX,

Plaintiffs,

v.

UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity,

Defendants.

LIEUTENANT GOVERNOR DEIDRE HENDERSON'S RESPONSE TO PLAINTIFFS' MOTION FOR SCHEDULING ORDER

Case No.: 220901712

Honorable Diana Gibson

INTRODUCTION

In this lawsuit, Plaintiffs complain of actions taken by the Utah Legislature, its redistricting committee, and individual members of the Legislature ("Legislative Defendants"), but do not complain of any action taken by the Lt. Governor. Rather, Plaintiffs have included the Lt. Governor in this action to enjoin her from administering future Congressional elections pursuant to the Congressional districts enacted by the Legislature in 2021 and used for the 2022 Congressional election ("the 2022 Districts"). Virtually all of the allegations of Plaintiffs' Complaint are directed to the Legislative Defendants, not the Lt. Governor. In determining the appropriate management of the case moving forward, the Court should, of course, consult the arguments of the parties most invested in the underlying dispute – Plaintiffs and Legislative Defendants.

However, the Lt. Governor and the people of Utah have a very strong interest in one aspect of this case's management due to the Lt. Governor's role as Utah's chief elections officer and due to the people's interest in free and fair elections. And that interest is to have the 2024 election runs as smoothly as possible. Part of that process is to ensure that the Congressional district maps upon which voters, candidates, and election administrators rely as authorized for the 2024 Congressional election are in place no later than November 1, 2023.

RELEVANT LAW

The Lt. Governor is the State's chief election officer. UTAH CODE § 20A-2-300.6(1). *See also* Declaration of Director of Elections Ryan Cowley ("Cowley Dec."), attached hereto as Exhibit A, ¶ 3. She is statutorily obligated to make available to county clerks and the general public Congressional district maps submitted to her by the Legislature. UTAH CODE § 20A-13-

102(2) & 102.2; Cowley Dec., ¶ 4. Such maps are the legal boundaries of Utah's Congressional districts. UTAH CODE § 20A-13-102(2) & 102.2; Cowley Dec., ¶ 5. The Lt. Governor and county clerks are statutorily obligated to conduct elections pursuant to those maps unless otherwise ordered by a court of competent jurisdiction. UTAH CODE § 20A-13-102(2) & 102.2; Cowley Dec., ¶ 6.

Congressional candidates may declare their candidacy by filing the appropriate paperwork with the Lieutenant Governor's Office "on or after January 1 of the regular election year." UTAH CODE § 20A-9-202(1)(a)(i); Cowley Dec., ¶ 7. Utah's primary system allows Congressional candidates to qualify for the primary ballot through a political party's convention or by signature gathering. UTAH CODE § 20A-9-408; Cowley Dec. ¶ 8. An individual seeking to qualify for the primary ballot through signature gathering may begin gathering signatures after filing a Notice of Intent to gather signatures, which Notice may be submitted to the Lt. Governor's office with the individual's Declaration of Candidacy as early as the first week of January of the year of the general election. UTAH CODE § 20A-9-408(3); Cowley Dec. ¶ 9. To be valid, a signature in support of a Congressional candidate's petition for ballot qualification must be from an individual who lives in the candidate's Congressional district and meets other statutory requirements. UTAH CODE § 20A-9-408(b)(ii); Cowley Dec. ¶ 10.

Thus, as candidates organize their signature gathering campaigns, they must know the boundaries of that district so that they may seek signatures from statutorily qualified voters. Cowley Dec., ¶ 11. Further, voters have constitutional rights of speech and association to support ballot qualification for candidates of their choosing. In order to exercise that right, voters, too,

must know the Congressional district in which they live. Otherwise, they risk providing an invalid signature for out-of-district candidates through no fault of their own. Cowley Dec., ¶ 12.

To prepare administratively for candidate declarations and signature gathering in January 2024, the Lt. Governor's Office must have Congressional district maps in hand no later than November 1, 2023. Cowley Dec., ¶ 13. The administrative tasks involved in preparing for candidate declaration and signature gathering include production of candidate filing forms and signature gathering packets. *See* UTAH CODE § 20A-9-408(9)(b)(i) and (10)(b)(ii); Cowley Dec., ¶ 14. The Lt. Governor's Office must also prepare electronic forms for an electronic candidate qualification process described in UTAH CODE § 20A-9-405(4); Cowley Dec., ¶ 15.

ARGUMENT

"A state indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (internal citation omitted). Further, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The *Purcell* case, which gave rise to the "Purcell principle," is particularly instructive because it dealt with the timing of judicial decisions involving elections. There, the Court held that "Court orders affecting elections . . . can themselves result in voter confusion . . . As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4.

The Lt. Governor will conduct the 2024 Congressional election pursuant to the 2022 Congressional Districts unless otherwise ordered by this Court or another court of competent jurisdiction. If such an order were to issue prior to the 2024 Congressional election, it must be issued with sufficient time for new Congressional maps to be supplied to the Lt. Governor no

later than November 1, 2023. Otherwise, such an order would risk introducing an element of uncertainty into the 2024 election for voters, candidates, the Lt. Governor's Office, and the county clerks who do much of the administrative work for an election.

Accordingly, if the Court seeks to resolve this dispute in advance of the 2024 election, the Lt. Governor respectfully requests that the scheduling order adopted in this case be set such that the Court's final resolution of the dispute occur with sufficient time for any remedial measures, if necessary, to occur in advance of November 1, 2023.

DATED: November 21, 2022.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/ Lance Sorenson
DAVID N. WOLF
LANCE F. SORENSON
JEFFREY B. TEICHERT
Assistant Utah Attorneys General
Counsel for Defendant Lieutenant Governor Deidre Henderson

ELECTRONIC FILING CERTIFICATE

I hereby certify that on this 21st day of November 2022, I electronically filed the foregoing, **LIEUTENANT GOVERNOR DEIDRE HENDERSON'S RESPONSE TO PLAINTIFFS' MOTION FOR SCHEDULINE ORDER**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX, Plaintiffs, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**DECLARATION OF RYAN COWLEY** Case No.: 220901712 Honorable Diana Gibson

1. I am over the age of 18 and have personal knowledge of the facts set forth in this Declaration.

2. I am the Director of Elections in the Lt. Governor's Office and have served in that position since December 2021. In that capacity I, together with the Elections Office staff, administer Utah elections as authorized and directed under the Utah Elections Code. *See* UTAH CODE 20A-1-101, *et. seq*.

3. The Lt. Governor is the State's chief election officer. UTAH CODE § 20A-2-300.6(1).

4. The Lt. Governor is statutorily obligated to make available to county clerks and the general public Congressional district maps submitted to her by the Legislature. UTAH CODE § 20A-13-102(2) & 102.2.

5. Such maps are the legal boundaries of Utah's Congressional districts. UTAH CODE § 20A-13-102(2) & 102.2.

6. The Lt. Governor and county clerks are statutorily obligated to conduct elections pursuant to those maps unless otherwise ordered by a court of competent jurisdiction. UTAH CODE § 20A-13-102(2) & 102.2.

7. Congressional candidates may declare their candidacy by filing the appropriate paperwork with the Lieutenant Governor's Office "on or after January 1 of the regular election year." UTAH CODE § 20A-9-202(1)(a)(i).

8. Utah's primary system allows Congressional candidates to qualify for the primary ballot through signature gathering. UTAH CODE § 20A-9-408.

9. An individual seeking to qualify for the primary ballot through signature gathering may begin gathering signatures after filing a Notice of Intent to gather signatures, which Notice may

be submitted to the Lt. Governor's office with the individual's Declaration of Candidacy as early as the first week of January of the year of the general election. UTAH CODE § 20A-9-408(3).

10. To be valid, a signature in support of a Congressional candidate's petition for ballot qualification must be from an individual who lives in the candidate's Congressional district and meets other statutory requirements. UTAH CODE § 20A-9-408(b)(ii).

11. Thus, as candidates organize their signature gathering campaigns, they must know the boundaries of that district so that they may seek signatures from statutorily qualified voters.

12. Voters, too, must know the Congressional district in which they live. Otherwise, they risk providing an invalid signature for out-of-district candidates through no fault of their own.

13. To prepare administratively for candidate declarations and signature gathering in January 2024, the Lt. Governor's Office must have Congressional district maps in hand no later than November 1, 2023.

14. The administrative tasks involved in preparing for candidate declaration and signature gathering include production of candidate filing forms and signature gathering packets. *See* UTAH CODE § 20A-9-408(9)(b)(i) and (10)(b)(ii).

15. The Lt. Governor's Office must also prepare electronic forms for an electronic candidate qualification process described in UTAH CODE § 20A-9-405(4).

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that the above statements are true and based upon my personal knowledge.

DATED: November 21, 2022.

/s/ *Ryan Cowley*
Ryan Cowley
(Signed copy of document bearing signature of Ryan Cowley is being maintained in the office of the Filing Attorney)

EXHIBIT F

This motion requires you to respond. Please see the Notice to Responding Party.

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IN THE THIRD JUDICIAL DISTRICT COURT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX, Plaintiffs, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**LEGISLATIVE DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** Case No: 220901712 Honorable Dianna Gibson

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This motion requires you to respond. Please see the Notice to Responding Party.

Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson ("Speaker Wilson"), and Senator Stuart Adams ("President Adams") (collectively, "Legislative Defendants"), by and through their undersigned counsel, respectfully move the Court to dismiss Plaintiffs' Complaint under Rule 12(b)(1) and (b)(6).

SUMMARY OF RELIEF REQUESTED AND GROUNDS FOR RELIEF

Plaintiffs' claims boil down to a political disagreement over how congressional boundaries should be drawn. Plaintiffs would transform the highly political task of drawing congressional boundaries into a judicial exercise based on illusory standards of political equality in a highly unequal partisan landscape. They ask the Court to ignore the Utah Constitution's mandate for "the Legislature [to] divide the state into congressional . . . districts." For Plaintiffs to prevail on any of their claims would require an unprecedented reading of the Utah Constitution, which would distort beyond recognition provisions never intended to apply to the Legislature's constitutional duty to draw congressional boundaries. The Utah Constitution has committed the responsibility for the redistricting of congressional boundaries exclusively to the Legislature. The Court should honor the Constitution's framing.

Plaintiffs' claims against Legislative Defendants should be dismissed in their entirety and with prejudice for the following reasons:

I. As a threshold matter, the Court lacks subject matter jurisdiction over Plaintiffs' claims related to alleged partisan redistricting as a nonjusticiable political question because:

A. the Utah Constitution places the authority and discretion for redistricting solely with the Legislature; and

B. these claims lack any judicially discoverable or manageable standards for providing Plaintiffs' requested relief.

II. Plaintiffs fail to state any claim upon which relief may be granted against the Individual Legislative Defendants and the Legislative Redistricting Committee because those defendants cannot themselves provide the requested relief and because the Individual Legislative Defendants are protected by legislative immunity.

III. Plaintiffs fail to state any claim upon which relief may be granted against Legislative Defendants because:

A. the separation of powers doctrine precludes the Court from providing relief;

B. there is no provision in the Utah Constitution that would be violated if the Legislature passed a congressional plan that allegedly included partisan considerations or produced an effect that favored one political party over another; and

C. article I, section 2 and article VI, section 1 of the Utah Constitution do not prohibit the Legislature from passing legislation to enact or amend the Utah Code.

For these reasons, the Court should dismiss Plaintiffs' Complaint in its entirety.

FACTUAL BACKGROUND AND RULE 12(b) STANDARD

Legislative Defendants reject Plaintiffs' descriptions of the legislative process,[1] conclusions of law,[2] mischaracterizations,[3] irrelevant information, and conjecture found in the Complaint for Declaratory and Injunctive Relief ("Complaint"). However, for the purpose of Legislative Defendants' motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6), the Court should accept Plaintiffs' factual allegations as true and consider reasonable inferences drawn from those facts in the light most favorable to Plaintiffs. *Salt Lake City v. State*, 2020 UT 27, ¶ 26, 466 P.3d 158, 166; *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226, 1230. But the Court "need not accept extrinsic facts not pleaded nor . . . accept legal conclusions in contradiction of the pleaded facts." *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 7, 342 P.3d 224, 228. Additionally, the Court need not "accept legal conclusions or opinion couched as facts." *Koerber*

[1] For example, both a citizen initiative and the Legislature's bills have the same effect of enacting or modifying statutes in the Utah Code. The Legislature has not modified or repealed an initiative but rather statutes in the Utah Code. Similarly, the Legislature has chosen to exercise its exclusive authority to redistrict through legislation that enacts a statute that incorporates by reference a congressional map that assigns over 70,000 individual census blocks to individual districts. The legislation incorporating by reference a congressional map is what the Legislature passed, and the Governor signed, and the resulting statute is the proper focus of the constitutional evaluation.

[2] For example, Plaintiffs suggest that political redistricting should be met with strict scrutiny on par with race-based discrimination without identifying a single phrase in the Utah Constitution that identifies a constitutional entitlement to a desired political outcome or any justification as to why the Court should apply strict scrutiny. Similarly, Plaintiffs suggest that it is constitutionally acceptable for an entity other than the Legislature to exercise the redistricting authority granted exclusively to the Legislature by the Utah Constitution.

[3] For example, Plaintiffs dramatize the parallel processes of the Legislative Redistricting Committee and the Independent Redistricting Commission and theatricalize the Governor's signing of the congressional map.

v. Mismash, 2013 UT App 266, ¶ 3, 315 P.3d 1053, 1054 (citations and internal quotation marks omitted). Finally, when a court is presented with a challenge to the constitutionality of a statute, it "presume[s] the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality." *South Salt Lake City v. Maese*, 2019 UT 58, ¶ 8, 450 P.3d 1092, 1095. Applying these standards of review, the Court should dismiss the Complaint for the reasons stated herein.

The alleged facts that are material to the legal questions presented are as follows:

1. Every ten years, the federal government conducts a census enumeration of all persons living in the United States, Congress reapportions congressional representation for each State based on relational population changes, and states draw new congressional district boundaries to reflect changes in the state's population. (Compl., ¶¶ 50–52.)
2. The Utah Constitution states that "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." (*Id.*, ¶ 68 (citing Utah Const. art. IX, § 1).)
3. The Utah Constitution recognizes the people's lawmaking power through ballot initiatives that are not subject to gubernatorial veto. (*Id.*, ¶ 71.)
4. In the November 2018 general election, the people passed Proposition 4 to enact statutory redistricting requirements and establish a non-legislative redistricting commission. (*Id.*, ¶ 73.)
5. On March 11, 2020, the Legislature passed SB 200 Redistricting Amendments, repealing some of the statutory provisions that Proposition 4 enacted and amending others. (*Id.*, ¶ 93.)
6. On November 9, 2021, the Utah State House of Representatives voted 50-22 to pass new congressional district boundaries; on November 10, 2021, the Utah State Senate voted 21-7

to pass the new congressional district boundaries; and on November 12, 2021, Governor Cox signed the bill adopting the new congressional district boundaries. (*Id.*, ¶¶ 173, 180, 201.)

7. Proponents of the new congressional district boundaries stated an intent to ensure a mix of urban and rural areas in each congressional district. (*Id.*, ¶ 187.)

8. All four congressional districts contain a minority of registered Democratic voters. (*Id.*, ¶ 226.)

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS THAT PRESENT NONJUSTICIABLE POLITICAL QUESTIONS.

The Court lacks subject matter jurisdiction related to Plaintiffs' political redistricting claims (Counts One through Four) because those claims present nonjusticiable political questions. When a Court lacks subject matter jurisdiction, it lacks authority to hear the merits of a case. *See, e.g., Johnson v. Johnson*, 2010 UT 28, ¶ 8, 234 P.3d 1100, 1102. Accordingly, as a threshold matter, the Court should dismiss the political redistricting claims asserted in Counts One through Four as nonjusticiable political questions because (A) the Utah Constitution places the authority and discretion for redistricting solely with the Legislature, and (B) these claims lack any judicially discoverable or manageable standards for providing Plaintiffs' requested relief. Federal courts have tried for over twenty years to find manageable judicial standards to address claims of partisan gerrymandering but have been unable to do so.[4] Plaintiffs now ask this Court to engage in the same futile exercise.

[4] *See generally, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019); *Vieth v. Jubelirer*, 541 U.S. 267, 270 (2004). Although some state courts have found partisan gerrymandering to be justiciable based on those states' existing constitutions and statutes, *see, e.g., Harper v. Hall*, 868

A. The Utah Constitution places the authority and discretion for redistricting solely with the Legislature.

The Court should dismiss Plaintiffs' political redistricting claims (Counts One though Four) as nonjusticiable political questions because the Utah Constitution explicitly grants the Legislature the sole authority and discretion to redistrict: "No later than the annual general session next following the Legislature's receipt of the results of an enumeration made by the authority of the United States, the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1.

A court lacks subject matter jurisdiction when there is no justiciable controversy, *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995), and political questions are prime examples of nonjusticiable claims that a court must dismiss for lack of jurisdiction. A political question—and the political question doctrine—"prevents judicial interference in matters wholly within the control and discretion of other branches of government." *Id.*; *see also In re Childers-Gray*, 2021 UT 13, ¶ 64, 487 P.3d 96.

The political question doctrine is rooted in the separation of powers requirement. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Skokos*, 900 P.2d at 541; *see infra* Part III.A. The Utah Constitution's separation of powers provision, article V, section 1, "regulates and guides the apportionment of authority and function between the branches of government." *In re Childers-Gray*, 2021 UT 13, ¶ 64 (internal quotations and citations omitted). Similarly, "the political question doctrine . . . focus[es] on the proper roles of each branch of government and aim[s] to

S.E.2d 499 (N.C. 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), Utah's Constitution does not permit a court to re-draw district maps for reasons set forth herein.

curtail interference of one branch in matters controlled by the others." *Id.* To determine whether an issue poses a nonjusticiable political question, courts consider several factors, including whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker,* 369 U.S. at 217.

Article IX, section 1 of the Utah Constitution vests the power to divide the state into congressional districts solely with the Legislature, and no other provision in the Utah Constitution expressly confers redistricting authority on any other branch or to the people. Contrary to article VI, section 1, in which the Utah Constitution explicitly grants legislative authority to both the Legislature and the people, article IX, section 1 explicitly grants redistricting authority solely to the Legislature. Furthermore, the Utah Constitution does not limit the Legislature's exercise of that authority.[5] Absent an express constitutional limitation on legislative power, the Court does not have jurisdiction to opine on the political decision of the political branch regarding where to draw district lines and the resulting effect on the potential success of a given political party's efforts to gain political power. Thus, the constitutional authority to redistrict—the political decision of where to draw district lines—lies exclusively with the Legislature and presents a nonjusticiable political question.

[5] In contrast to the Utah Constitution's unrestricted delegation of authority to the Legislature to divide congressional districts, other constitutional provisions expressly limit grants of authority. Examples include article VIII, section 4, which grants the Utah Supreme Court the power to "adopt rules of procedure and evidence to be used in the courts of the state," but permits the Legislature to amend those rules "upon a vote of two thirds of all members of both houses of the Legislature;" and article VII, section 10, which grants the Governor authority to nominate and appoint state and district officers, but limits this power to the "consent of the Senate."

Claims of political gerrymandering have been raised since the nation was in its infancy, and the framers of the Utah Constitution were certainly aware of it leading up to Utah's statehood in 1896. *See Rucho*, 139 S. Ct. at 2494–95 (discussing framers' understanding of political gerrymandering when drafting the United States Constitution). "Political gerrymanders are not new to the American scene. One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia . . ." *Vieth*, 541 U.S. at 274.[6] Notwithstanding the Utah framers' familiarity with the American redistricting context, the only "political equality" the framers addressed was to confer "upon women the right to vote and exercise political privileges equal with men." Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah, Day 19 (Mar. 22, 1895).[7]

Redistricting has historically been a legislative function. "For the first 160-plus years of our nation's history, all redistricting was performed by state legislatures, with little guidance on when or how to do it—or whether to do it at all" and "changing redistricting systems is a relatively new phenomenon in American democracy."[8] While this new phenomenon is now the

[6] Indeed, the concept predates Utah's statehood by more than 80 years: the namesake for the 1812 term "gerrymander," Massachusetts governor Elbridge Gerry, signed the Declaration of Independence and served as a delegate to the constitutional convention. National Archives and Records Administration, The Founding Fathers: Massachusetts, Mar. 5, 2018, https://www.archives.gov/founding-docs/founding-fathers-massachusetts#gerry.

[7] https://le.utah.gov/documents/conconv/19.htm.

[8] National Conference of State Legislatures, Redistricting Systems: A 50-State Overview, https://www.ncsl.org/research/redistricting/redistricting-systems-a-50-state-overview.aspx (last visited Apr. 12, 2022).

practice in some states, the reassignment of the redistricting power was accomplished by amending the constitutions of those states.[9]

If the framers of the Utah Constitution thought it necessary to avoid political gerrymandering in redistricting, they would certainly have expressed this intention as an exception to article IX, section 1. Instead, the framers expressly reserved the redistricting function exclusively to the Legislature. As recognized by the Utah Supreme Court:

> It is plainly apparent from the discussions in our own Constitutional Convention that they proceeded upon the assumption that the Convention had full power to determine the basis of representation in the state legislature, and that the state legislature would succeed to such power except as to such restrictions as the Constitution should specifically prescribe.

Parkinson v. Watson, 4 Utah 2d 191, 199, 291 P.2d 400, 405 (1955).

The nature of Plaintiffs' claims as a non-justiciable political question is revealed in the term "*partisan* gerrymandering." Although Utah's constitutional framers did not seek to constitutionally guarantee a particular political outcome for redistricting, Plaintiffs now ask the Court to invent a judicial standard of redistricting that would guarantee a particular political outcome. While reasonable minds may differ on whether vesting redistricting power solely with the Legislature is the best policy, that policy is enshrined in the Utah Constitution and may not be unilaterally changed by the judicial branch, which is the least political of the three branches of government and, thus, the least suited to make policy decisions. Because the Utah Constitution vests the authority to divide the state into congressional districts solely with the Legislature,

[9] National Conference of State Legislatures, Creation of Redistricting Commissions, Dec. 10, 2021, https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx, (last visited Apr. 12, 2022).

where the Legislature draws those divisions is a political question. Therefore, the Court lacks subject matter jurisdiction regarding Plaintiffs' Counts One through Four and must dismiss them.[10]

B. There are no judicially discoverable or manageable standards for providing Plaintiffs' requested relief.

The Court lacks subject matter jurisdiction related to Plaintiffs' political redistricting claims (Counts One through Four) as nonjusticiable political questions because there are no judicially discoverable or manageable standards for providing Plaintiffs' requested relief. Political questions arise in claims that lack "judicially discoverable and manageable standards for resolving [them]." *Baker*, 369 U.S. at 217. Unlike malapportionment of congressional districts based on population (the "one person one vote" principle) or racial gerrymandering claims, both of which the United States Supreme Court has concluded violate the United States Constitution, standards to address political gerrymandering claims are not judicially discoverable and manageable, and therefore, the Court lacks subject matter jurisdiction to consider Plaintiffs' claims.

Political gerrymandering claims are not judicially discoverable and manageable because there are unlimited ways to divide the state's tens of thousands of census blocks into districts

[10] Moreover, under the independent state legislature doctrine, which several United States Supreme Court Justices appear sympathetic to, the Elections Clause of the United States Constitution assigns the task of congressional redistricting "to the state legislatures, expressly checked and balanced by the Federal Congress." *See Rucho,* 139 S. Ct. at 2496 (discussing why federal courts have a limited role to play); *See Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting with two other Justices and J. Kavanaugh, in his concurrence, also agreeing) (dissenting from denial of stay and raising the Elections Clause argument as having merit). According to the doctrine, state courts may be limited when reviewing state legislatures' federal election regulations. *Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting).

based on the federal census data upon which a redistricting map is based. Because of this reality, the Legislature is tasked with making difficult policy decisions by weighing various and frequently competing redistricting principles. These conflicting policy decisions carry political consequences, and those decisions are constitutionally assigned to, and best handled by, the political branch of government. For a court to evaluate and opine on the political outcomes of these policy decisions, the court would plunge itself into "one of the most intensely partisan aspects of American political life." *Rucho,* 139 S. Ct. at 2507.

Rather than discovering *whether* the placement of a district line carries a political outcome, the "'central problem' . . . is 'determining when political gerrymandering has gone too far,'" *Rucho,* 139 S. Ct. at 2497 (quoting *Vieth,* 541 U.S. at 296 (plurality opinion)). What method or standard should the Court divine from the dearth of express language in the Utah Constitution? The requirement that the population of congressional districts must be as nearly equal as practicable makes it impossible to draw districts that genuinely reflect partisan equality while also ensuring that the districts are geographically contiguous and compact. Voters favoring major political parties are not uniformly geographically disbursed, voters favoring smaller political parties are widely disbursed, and voters who are unaffiliated, nonpartisan, or anti-partisan are randomly scattered among them. Furthermore, the way any of those individual voters may vote, or whether they will vote at all, in a given election is subject to change and dependent on the circumstances of the given election and consequently entirely unknowable.[11]

[11] Plaintiffs' arguments assume that voters who self-identify as members of a particular political party will always vote for that political party's candidates and ignore the possibility that members of a political party who vote in one election may not vote at all in a subsequent election.

The Utah Constitution simply does not require any proportional leveling of these disparate and unknowable interests, let alone provide any discernable standards by which either the legislature or a court could weigh potential political outcomes.

The United States Supreme Court described this impossibility in the Court's plurality opinion in *Vieth*: "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Vieth,* 541 U.S. at 287. Recognizing a political gerrymandering claim would require this Court "to indulge a fiction—that partisan affiliation is permanent and invariably dictates how a voter casts every ballot." *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 483 (Wis. 2021). Moreover, Plaintiffs conspicuously allege that the Legislature drew congressional district lines based on partisan data to reach an expected political outcome while they ask the Court for relief that commits the same alleged impropriety: providing new congressional district lines also drawn based on partisan data to reach an expected political outcome, but instead *their* desired political outcome.[12]

In holding that partisan gerrymandering claims are nonjusticiable under Wisconsin's constitution, the Wisconsin Supreme Court stated that "[e]ven if a state's partisan divide could be accurately ascertained, what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law. 'Deciding among . . . different visions of fairness . . . poses basic questions that are political, not legal.'" *Id.* (citing *Rucho,* 139 S. Ct. at 2500). The

[12] Plaintiffs allege that the legislature engaged in *cracking* (i.e., politically benefiting one party by diffusing members of the other party among multiple districts), but appear to advocate, instead, for packing (i.e., politically benefiting one party by concentrating its members into a district to give that party a safe district).

Wisconsin Supreme Court found that nothing in Wisconsin's constitution "authorizes this court to recast itself as a redistricting commission in order 'to make [its] own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end.'" *Id.* (citing *Rucho,* 139 S. Ct. at 2499). Similarly, the Utah Constitution contains no authorization for Utah's courts to assume this role.

Plaintiffs appear to request some sort of proportional parliamentary system in which a given political persuasion is entitled to a number of representatives that is equal to the proportion of votes cast in support of that political persuasion. *See, e.g.*, Compl., ¶ 206 (forecasting that the newly enacted congressional map will ensure that a Republican wins each of Utah's four congressional seats for the next decade even though 100% of votes would not be cast for Republicans). However, this proportional distribution of political power has no grounding in American redistricting law or history:

> "It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." . . . Perhaps the easiest way to see the flaw in proportional party representation is to consider third party candidates. Constitutional law does not privilege the "major" parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties. If Libertarian Party candidates receive approximately five percent of the statewide vote, they will likely lose every election; no one deems this result unconstitutional.

Johnson, 967 N.W.2d at 482–484 (quoting *Rucho,* 139 S. Ct. at 2501) (additional quotations and citations omitted).

There is simply no judicially discoverable or manageable method of guessing how a given district's population may vote and no judicially discoverable or manageable standards for determining whether the imagined outcome of a given election in a given district is beyond the imagined constitutional boundary for political outcomes. Therefore, Plaintiff's political redistricting claims are nonjusticiable, and the Court must dismiss Counts One through Four for lack of subject matter jurisdiction. The Court need not engage in the constitutional contortions that would be required to invent a legal standard to provide Plaintiffs relief under the merits of these claims.

II. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST DEFENDANTS' UTAH LEGISLATIVE REDISTRICTING COMMITTEE, SENATOR SCOTT SANDALL, SPEAKER WILSON, AND PRESIDENT ADAMS.

Because this case involves a nonjusticiable political question, the Court need not entertain the merits of the claims against the Legislative Defendants. However, in addition to nonjusticiability, Plaintiffs have failed to state a claim upon which relief may be granted against Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Speaker Wilson, and President Adams (collectively, "Committee and Individual Legislative Defendants") for two reasons. First, the Committee and Individual Legislative Defendants are unable to act on the Legislature's behalf and provide the relief Plaintiffs request. Second, the Individual Legislative Defendants are immune from claims related to their actions as legislators.

A. Plaintiffs fail to state a claim because the Committee and Individual Legislative Defendants are unable to act on the Legislature's behalf to provide the relief Plaintiffs seek.

The Legislature as a whole divides the state into congressional districts; the Committee and Individual Legislative Defendants do not. Plaintiffs assume, incorrectly, that the Committee,

by recommending a map, and the Individual Legislative Defendants, by virtue of their chair status and leadership positions, act as surrogates for the Legislature. (*See* Compl., ¶¶ 41–43, 142). This simply is not the case. The Committee merely recommended the map to the Legislature. Despite their chair status and leadership positions, the Individual Legislative Defendants are members of a 104-member Legislature that acts by majority vote. The Committee and Individual Legislative Defendants are not responsible for the Legislature's actions or inactions, nor do they have the authority to compel legislative action. Even if, *arguendo*, the Court grants Plaintiffs' request for relief and compels the Legislative Defendants to redraw and pass a redistricting plan, the Committee and Individual Legislative Defendants are unable to act on the Legislature's behalf and provide the relief Plaintiffs request. Because Plaintiffs fail to state a claim upon which relief can be granted as to the Committee and Individual Legislative Defendants, the Court must dismiss these defendants from the case.

B. Plaintiffs fail to state a claim because Individual Legislative Defendants are immune from claims related to their actions as legislators.

The Court should dismiss Plaintiffs' claims against the Individual Legislative Defendants because they are immune from claims related to their actions as legislators. Like the federal government and forty-three other states, Utah has adopted the common law legislative immunity and legislative privilege doctrines into its constitution through a Speech or Debate Clause.[13] *See*

[13] Utah's Speech or Debate Clause provides that "[m]embers of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place." Utah Const. art. VI, § 8.

generally William M. Howard, *Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions*, 24 A.L.R. 6th 255 (2013).

Legislative immunity applies to legislators performing a legitimate legislative function or acting in the sphere of legislative activity. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Legislative immunity "enables legislators to be free, not only from 'the consequences of litigation's results, but also from the burden of defending themselves.'" *2BD Assocs. Ltd. P'ship v. County Comm'rs*, 896 F.Supp. 528, 531 (D. Md. 1995) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). "Thus the effect of the doctrine [of legislative immunity] is twofold; it protects legislators from civil liability, and it also functions as an evidentiary and testimonial privilege." *Id.* (citing *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 46 (4th Cir. 1988)); *Marylanders For Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992)).

Legislative immunity has two critical features. First, it "applies broadly to evidence or testimony about all 'acts that occur in the regular course of the legislative process.'" *In re Grand Jury*, 821 F.2d 946, 953 (3d Cir. 2006) (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)). Second, it "is 'absolute;' hence, it cannot be overcome by any countervailing interest no matter how strong." *Id.* (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509–10 n.16 (1975)). While there is little case law interpreting Utah's Speech or Debate Clause, Utah courts look to federal case law interpreting the federal clause for guidance.[14] *See generally Riddle v. Perry*, 2002 UT 10, ¶ 8, 40 P.3d 1128, 1131 (repeatedly quoting and citing *Tenney*).

[14] Additionally, Utah courts routinely rely on federal precedent when interpreting a state constitutional provision that is substantially similar to its federal counterpart. *See e.g.*, *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 29, 67 P.3d 436 (applying federal law to interpret the Utah Due Process Clause); *State v. Daniels*, 2002 UT 2, ¶ 42, 40 P.3d 611, 623 (applying federal

To the extent Plaintiffs make allegations against the Individual Legislative Defendants in the Complaint, they entirely relate to the Individual Legislative Defendants' performance of legitimate legislative functions—lawmaking and their constitutional duty in enacting a congressional map. Accordingly, legislative immunity is an absolute bar to Plaintiffs' claims against the Individual Legislative Defendants and those claims must be dismissed.

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM UNDER THE UTAH CONSTITUTION AGAINST LEGISLATIVE DEFENDANTS.

Because this case involves a nonjusticiable political question, the Court need not entertain the merits of Plaintiffs' claims under specific provisions of the Utah Constitution. However, in addition to nonjusticiability, the Complaint fails to state a claim upon which relief can be granted because: (A) the requested relief is barred by the separation of powers doctrine; (B) the Utah Constitution does not guarantee a beneficial political outcome for a given political affiliation and does not prohibit drawing districts in a way that may impact the political power of a political party; and (C) article I, section 2 and article VI, section 1 of the Utah Constitution do not prohibit the Legislature from passing legislation to enact or amend the Utah Code as alleged in Count Five.

law to interpret Utah's ex post facto clause); *State v. Anderson*, 910 P.2d 1229, 1238 (Utah 1996) (applying federal law to interpret article I, section 14 of the Utah Constitution).

A. Plaintiffs fail to state a claim because the relief they seek is barred by the separation of powers doctrine.

Counts One through Four of Plaintiffs' Complaint should be dismissed for failure to state a claim upon which the Court may grant relief. In addition to being grounds for dismissal as a nonjusticiable political question, the separation of powers doctrine stands alone as a basis for the Court's dismissal of Plaintiffs' claims.

Plaintiffs ask the Court to compel Legislative Defendants to perform their redistricting duties "in a manner that comports with the Utah Constitution"; set a deadline for Legislative Defendants to enact a compliant map; and failing this, "order a Court-imposed plan that complies with the Utah Constitution." (Compl., pages 78–79). Plaintiffs' requested relief would require the Court to exercise a function that is constitutionally the exclusive province of the Legislature.

Article V, section 1 of the Utah Constitution provides:

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

This constitutional provision explicitly prohibits the exercise of *any* function of one branch of government that belongs to another branch unless the constitution *expressly* provides otherwise. Or, as the Utah Supreme Court states, "[t]he latter phrase of this clause establishes that there may be exceptions to the separation-of-powers doctrine, but any exception must be found within the Utah Constitution." *State v. Drej*, 2010 UT 35, ¶ 25, 233 P.3d 476, 484. As explained above, *see supra* Part I.A, the Utah Constitution provides no express exception to the exclusive grant of redistricting authority to the Legislature set forth in article IX, section 1.

Although court review of a redistricting plan may be proper in some circumstances, it is not proper for a court to substitute its judgment in the political arena for that of the Legislature. As explained by the Utah Supreme Court in a decision relating to a previous version of Utah Constitution article IX, section 2:

> The legislature having performed its function, if we are obliged to review it, we must do so with the highest possible degree of understanding of the multifarious problems the legislative process is fraught with, including the makeup of the legislature and its variety of interests. It must be realized that there is plenty of room within the framework of the Constitution for legislation with which we might not agree, were we legislators. It is a rule of universal acceptance that the wisdom or desirability of legislation is in no wise for the courts to consider. Whether an act be ill advised or unfortunate, if such it should be, does not give rise to an appeal from the legislature to the courts. But the remedy for correction of legislation remains with the people who elect successive legislatures.

Parkinson, 4 Utah 2d at 196, 291 P.2d at 403 (internal citations omitted).[15] Because Counts One through Four of Plaintiffs' Complaint ask the Court to violate the separation of powers doctrine, these Counts must be dismissed for failure to state a claim upon which relief may be granted.

[15] *Parkinson* involved a challenge to population deviations between districts. While the deviations upheld by the court in that case would have been held unconstitutional under subsequent caselaw interpreting the federal constitution (in violation of the principle of *one person, one vote*), the separation of powers principles discussed in that case are relevant to the matter before the court in this action. In the present case, the Court is asked to read into the Utah Constitution a mandate to balance the political outcome between the two major political parties while ignoring the remaining parties, the unaffiliated voters, and the fact that not all members of a political party consistently vote for that party's candidates.

B. Plaintiffs fail to state a claim under the Utah Constitution because the constitution does not guarantee a beneficial political outcome for a given political affiliation and does not prohibit drawing districts in a way that may impact the political power of a political party.

Plaintiffs fail to state a claim upon which the Court can grant relief in this case because the Utah Constitution contains no provision that guarantees a redistricting map that benefits a given political party based on anticipated outcomes in future elections. Similarly, the Utah Constitution contains no provision that prohibits drawing districts in a way that may impact the political power of a political party. Plaintiffs complain of a violation of a constitutional right that simply does not exist and request that the Court invent legal standards that benefit one political party and disregard smaller political parties and unaffiliated voters as a remedy for relief. More specifically, (1) article I, section 17 of the Utah Constitution does not prohibit political redistricting as alleged in Count One; (2) article I, sections 2 and 24 of the Utah Constitution do not prohibit political redistricting as alleged in Count Two; (3) article I, sections 1 and 15 of the Utah Constitution do not prohibit political redistricting as alleged in Count Three; and (4) article IV, section 2 of the Utah Constitution does not prohibit political redistricting as alleged in Count Four.

(1) Count One fails to state a claim upon which relief may be granted under article I, section 17 of the Utah Constitution.

Plaintiffs fail to state a claim upon which relief may be granted under Utah's Free Elections Clause in article I, section 17. The Free Elections Clause guarantees a qualified voter the right to cast a vote, but there is nothing in the Free Elections Clause's text or precedent to suggest that it prohibits political redistricting or guarantees that each vote holds substantially

equal political power as measured by the voter's political party affiliation or lack of political party affiliation. (*See* Compl., ¶¶ 264, 267).

Utah's Free Elections Clause states: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17 (1896).[16] If the framers had intended for the Free Elections Clause to guarantee each voter's "voting power" based on their partisan affiliation, then they would have expressly guaranteed this theoretical concept. Nothing in the text of the Constitution suggests the Free Elections Clause meant that the second largest political party was entitled to a packed congressional district that could be considered a *safe* district in their favor, while not guaranteeing anything to smaller political parties or unaffiliated voters.

In the only decision interpreting Utah's Free Elections Clause, the Utah Supreme Court did not expand the Clause's meaning to guarantee equal voting power based on partisan affiliation. Rather, the court held that the Clause did not guarantee a person's "right to appear as a candidate upon the ticket of any political party." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942). The Utah Supreme Court explained that voters' right to suffrage is subject to

[16] Utah framers of the Free Elections Clause at Utah's 1895 Constitutional Convention explicitly chose to remove "and equal" from the Free Elections Clause. In contrast, many state constitutions' have "free *and equal* clauses." After reading a draft of section 17: "All elections shall be free and equal, and no power . . . .", one of the delegates moved to strike "and equal" from the line. This motion was directly agreed to without further debate. *See* Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah, Day 22 (Mar. 25, 1895), https://le.utah.gov/documents/conconv/22.htm (remarks of delegate William Grant Van Horne). If the framers had intended for the Free Elections Clause to guarantee each voter's "voting power" based on their partisan affiliation, then they arguably would not have removed "and equal" from the Free Elections Clause.

the Legislature's power to prescribe means and methods for elections, voting, and selecting nominees.

> While this provision guarantees the qualified elector the free exercise of his right of suffrage, it does not guarantee any person the unqualified right to appear as a candidate upon the ticket of any political party. It cannot be construed to deny the legislature the power to provide regulations, machinery and organization for exercising the elective franchise, or inhibit it from prescribing reasonable methods and proceedings for determining and selecting the persons who may be voted for at the election.

Id. The Utah Supreme Court also explained that the Clause is not self-executing but requires the Legislature "to provide by law for the conduct of elections, and the means of voting, and the methods of selecting nominees." *Id.* The court's focus was fixed on the *exercise* of the right to cast a vote, not on voting power.

The Court should dismiss Plaintiffs' Free Elections claim, Count One in the Complaint, because they have not alleged facts that would constitute a violation of a right guaranteed under article I, section 17 of the Utah Constitution.

(2) Count Two fails to state a claim under article I, sections 2 and 24 of the Utah Constitution.

Plaintiffs fail to state a claim under article I, sections 2 and 24 of the Utah Constitution. The 2021 Congressional Plan does not violate Plaintiffs' fundamental right to vote or preclude Plaintiffs' equal opportunity to vote for their preferred congressional candidates under article I, sections 2 and 24, because political redistricting does not affect a fundamental or critical right guaranteed to the voters of Utah, and does not create a suspect classification. The Court should accordingly review the 2021 Congressional Plan under a rational basis standard, and should conclude that any classification that ensued from the 2021 Congressional Plan was reasonable

and that a reasonable relationship exists between the classification and the Legislature's legitimate objective of ensuring that congressional districts contain both urban and rural areas. (Compl., ¶ 187.)

Article I, section 2 of the Utah Constitution provides that "[a]ll political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Utah Const. art. I, § 2 (1896). Article I, section 24 provides that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24 (1896). The Court's analysis of Plaintiffs' uniform operation of laws challenge is "guided by the well-settled proposition that all statutes are presumed to be constitutional and the party challenging a statute bears the burden of proving its invalidity." *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989).

The Court applies a heightened degree of scrutiny to a law that implicates a "fundamental or crucial right" or creates a classification that is "impermissible or suspect." *Gallivan v. Walker*, 2002 UT 89, ¶ 40, 54 P.3d 1069, 1085 (internal quotations and citation omitted). But, if there is no fundamental or critical right and no impermissible or suspect classification, the Court applies a "rationally related" test, or what is essentially rational basis review. *See State v. Angilau*, 2011 UT 3, ¶ 12, 245 P.3d 745, 750.

Plaintiffs allege that the 2021 Congressional Plan "arbitrarily classifies voters based on partisan affiliation and geographic location, then targets the disfavored class of voters for negative differential treatment compared to other similarly situated Utahns," (Compl., ¶ 274) but fail to state a claim under article I, sections 2 or 24: Plaintiffs do not identify any fundamental

right that the 2021 Congressional Plan violates, or suspect classification that the 2021 Congressional Plan creates. The Court should accordingly analyze Plaintiffs' claims under rational basis review.

The 2021 Congressional Plan does not impact Utahns' right to vote freely for the candidate of one's choice and, therefore, does not implicate a fundamental right. In the 2021 Congressional Plan, voters in each district have a vote exactly equal to that of voters in the same district and in the other districts. Each voter may choose to vote with other Democratic voters or with other Republican voters. Moreover, this map does not preclude a Republican from voting for a Democrat, an independent, or another party's candidate nor does it preclude a Democrat from voting for a Republican, an independent, or another party's candidate, and it does not preclude an unaffiliated voter from doing the same. The outcome in a future election is undetermined, and Plaintiffs have not alleged that an individual's party affiliation (ignoring unaffiliated voters) is somehow immutable and controlling for all future elections. Even if the Utah Constitution guarantees a population deviation-based one person, one vote principle that parallels the federal constitution, there is nothing in the text of article I, Sections 2 or 24, in the history of those provisions, or in any subsequent precedent to suggest there is a right to voting outcomes based on one's political affiliation.

Moreover, Plaintiffs complain that the 2021 Congressional Plan "intentionally cracks Plaintiffs" who support Democratic candidates to prevent them from achieving a ballot box victory (Compl., ¶ 275), but then asks that this court provide legal relief by intentionally packing Plaintiffs. If cracking a partisan group violates the invented constitutional right Plaintiffs seek to protect, then packing by the Court would certainly violate the same invented constitutional right.

Just as the United States Supreme Court noted that the Founders of the United States Constitution did not think proportional representation was required, the same is true for the framers of the Utah Constitution. *See Rucho*, 139 S. Ct. at 2499. Neither the text nor history contains any suggestion that "a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *See id.* at 2501. The bottom line is that "[i]f members of the major political parties are protected by the [Uniform Operation of Law provision] from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims." *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring), *abrogated by Rucho*, 139 S. Ct. at 2484. If the invented constitutional guarantee protects Plaintiffs' partisan ambitions, it must also do so with all Utah voters' partisan ambitions. "There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group." *Id.* Thus, Plaintiffs fail to allege the 2021 Congressional Plan implicates a fundamental or critical right.

Plaintiffs also fail to allege any facts suggesting that the 2021 Congressional Plan creates a suspect classification. Instead, they state a legal conclusion couched as fact. (Compl., ¶ 275.) The Court need not "accept legal conclusions or opinion couched as facts." *Koerber*, 2013 UT App 266, ¶ 3, 315 P.3d 1053, 1054 (citations and internal quotation marks omitted). Unlike race-based laws, which are inherently suspect, *see State v. Canton*, 2013 UT 44, ¶ 36, 308 P.3d 517, 525, there is no authority suggesting that classifications based on voters' party affiliations, expected alliance with a political party, or imagined voting outcome are suspect classifications.

Simply stated, the "right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength." *Davis*, 478 U.S. at 150 (O'Connor, J., concurring in the judgment).

Because Plaintiffs fail to allege facts sufficient to show infringement of a fundamental right or a suspect classification, the Court should apply rational basis review. *See Angilau*, 2011 UT 3, ¶ 21, 245 P.3d 745, 752. The Court's rational basis review involves determining "whether the classification is reasonable, whether the objectives of the legislative action are legitimate, and whether there is a reasonable relationship between the classification and the legislative purpose." *Blue Cross & Blue Shield of Utah*, 779 P.2d at 637. The Court gives broad deference to the Legislature and will sustain a classification if "facts can reasonably be conceived which would justify the distinctions or differences in state policy [expressed by the challenged legislation] as between different persons." *Id.*

Accepting Plaintiffs' factual allegations as true, and even in the light most favorable to Plaintiffs, Plaintiffs' allegations trigger only rational basis review of the Legislature's action. The Legislature voted on congressional district lines for the reasonable purpose of ensuring a balance of urban and rural areas in each congressional district. (Compl., ¶ 187). Having an alleged rational basis in hand, the Court should dismiss Plaintiffs' claims under article I, Sections 2 and 24 of the Utah Constitution.

(3) Count Three fails to state a claim under article I, sections 1 and 15 of the Utah Constitution.

The Utah Constitution's guarantees of freedom of speech and an inalienable right to freely communicate thoughts and opinions under article I, sections 1 and 15 of the Utah Constitution, respectively, simply do not relate to the redistricting process. Where the Legislature

chooses to place a congressional district boundary does not in any way restrict an individual's speech or impair an individual's ability to communicate. *See Radogno v. Ill. State Bd. Of Elections*, No. 11-CV-04884, 2011 WL 5025251 at *7 (N.D. Ill. Oct. 21, 2011); *Johnson*, 967 N.W.2d at 487. As previously noted, *see supra* Part I.A, the framers were fully aware of partisan redistricting, and had they intended to prohibit redistricting for partisan gain, they would have done so.

Nevertheless, these constitutional rights were not intended to be distorted in the manner Plaintiffs suggest. "The minutes of the 1895 Utah constitutional convention point to the fact that the framers of our constitution . . . envisioned a limited freedom of speech." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 42, 140 P.3d 1235, 1248. As clearly expressed by the Utah Supreme Court, "First Amendment jurisprudence in this case does not guarantee unlimited participation in political activity, nor does it establish a right to political success. Rather, it protects individuals from regulations that directly discourage or prohibit political expression." *Cook v. Bell*, 2014 UT 46, ¶ 57, 344 P.3d 634, 642. Clearly, a map of a district boundary is not a regulation that directly discourages or prohibits political expression. And the right to political expression does not guarantee a voter's right to political success. There is no way to grant Plaintiffs' relief under article I, sections 1 and 15 that comports with the text of those sections and relevant case law, and, therefore, the Court should dismiss Count Three of the Complaint.

(4) Count Four fails to state a claim under article IV, section 2 of the Utah Constitution.

Plaintiffs fail to state a claim under article IV, Section 2 of the Utah Constitution because the congressional map does not restrict a citizen's right to vote when that citizen is eighteen years of age or over and presents proper proof of residence. Utah Const. art. IV, § 2. As

evidenced by the plain text of the provision, the intent of the ratifiers was to address a citizen's qualifications to cast a vote. There is no pertinent Utah history or case law that expands this constitutional provision to ensure a desired political outcome. This provision is simply inapplicable to the present circumstances and, to the extent that it is based on this provision, Count Four of the Complaint should be dismissed forthwith.

C. Plaintiffs fail to state a claim under article I, section 2 and article VI, section 1 of the Utah Constitution.

Count Five of Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief may be granted because article I, section 2 and article VI, section 1 of the Utah Constitution do not prohibit the Legislature from passing legislation to enact or amend the Utah Code. To grant the relief sought under that Count, the Court would need to impose an unconstitutional restriction on the legislative power of the Legislature.

Plaintiffs argue that "[i]n enacting Proposition 4's redistricting reforms—including shifting primary responsibility for drawing electoral maps from the Legislature to an independent commission and establishing mandatory anti-gerrymandering standards—the people of Utah, including Plaintiffs, exercised their constitutional right to alter or reform their government." (Compl., pages 77–78).[17]

[17] Plaintiffs' allegations should be accepted as true for the purpose of this Rule 12 motion, and the legal question of the Legislature's plenary power to enact, amend, or repeal statutes through legislation does not depend on a factual question. As a point of information irrelevant to the legal determination of this motion against Count five, Plaintiffs' argument that the Legislature "repealed Proposition 4" (*see* Compl., ¶¶ 317–318) is incorrect based on the Utah Code. Through Proposition 4, voters enacted Title 20A, Chapter 19, Utah Independent Redistricting Commission and Standards Act. Later, through S.B. 200, 2020 General Session, the Legislature repealed and replaced Title 20A, Chapter 19 with an alternate version in Title 20A, Chapter 20, Utah Independent Redistricting Commission. Chapter 20 provides for an advisory redistricting

Article I, section 2 of the Utah Constitution provides: "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require."

While the people clearly have the right to alter or reform their government, any alteration or reformation must be accomplished in accordance with the Utah Constitution, which is an expression of the will of the people regarding the power delegated by them.[18] Article IX, section 1 of the Utah Constitution expressly grants the power to "divide the state into congressional, legislative, and other districts" to the Legislature. A change to this authority can only be accomplished through a constitutional amendment or revision, and the people have expressed their will regarding how this must be done in article XXIII of the Utah Constitution.[19]

commission but does not include the unconstitutional provisions of Chapter 19 related to the Legislature's authority. The Legislature could have made these statutory changes by amending Chapter 19 or repealing it and replacing it with chapter 20, but either approach is well within the Legislature's plenary power to pass legislation. Simply stated, Chapter 19 is not Proposition 4, and Chapter 20 is not S.B. 200: they are statutes contained within the Utah Code. The Legislature's amendment or repeal of a statute is not an amendment or repeal of the method, be it initiative or bill, that originally enacted that statute. The method of enacting a statute does not in any way restrict the Legislature's plenary authority to later amend or repeal that statute.

[18] "[T]he people have the inherent authority to allocate governmental power in the bodies they establish by law. Acting through the state constitution, the people of Utah divided their political power, vesting it in the various branches of government. Article VI vests 'The Legislative power of the State' in two bodies: (a) 'the Legislature of the State of Utah,' and (b) 'the people of the State of Utah as provided in Subsection (2).'" *Carter v. Lehi City*, 2012 UT 2, ¶ 22, 269 P.3d 141.

[19] Article XXIII provides that the constitution may be amended by a vote of the people: after a favorable vote on a proposal of "two-thirds of all the members elected to each of the two houses;" or after revision during a convention called by the same super-majority of the Legislature. Utah Const. art. XXIII.

Article VI, section 1, provides that "the Legislative power of the State shall be vested in" both a Senate and House of Representatives and "the people of the State of Utah." Utah Const. Art. VI, § 1. "The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share 'equal dignity.'" *Gallivan*, 2002 UT 89, ¶ 23, 54 P.3d 1069, 1080 (citing *Utah Power & Light Co. v. Provo City*, 94 Utah 203, 235–36, 74 P.2d 1191, 1205 (1937) (Larson, J., concurring)). "On its face, article VI recognizes a single, undifferentiated 'legislative power,' vested both in the people and in the legislature. Nothing in the text or structure of article VI suggests any difference in the power vested simultaneously in the 'Legislature' and 'the people.' The initiative power of the people is thus parallel and coextensive with the power of the legislature." *Carter*, 2012 UT 2, ¶ 22, 269 P.3d 141, 148.

Because the power of the Legislature and the people to legislate is coequal, the people may amend or repeal legislation passed by the Legislature, and the Legislature may repeal or amend legislation passed by the people.[20] The only limitations placed on this coequal power are those expressly provided in the Constitution: for example, the limitation on the people's referendum power in relation to legislation "passed by a two-thirds vote of the members elected to each house of the Legislature." Utah Const. art. VI, § 1(2). Thus, subject to such express limitations, the Court should not differentiate between a legislative action taken by the Legislature, and one taken by the people. If a statute may be amended or repealed by either the

[20] This occurred, for example, with the initiative on medical marijuana, which was the subject of *Grant v. Herbert*, 2019 UT 42, 449 P.3d 141. In that case, the court held that the constitutional prohibition of a referendum when legislation passes by two-thirds of both houses of the Legislature applies even when the law sought to be challenged by referendum repealed an initiative. *Id.* ¶¶ 32–33.

Legislature or the people, it is irrelevant whether the Legislature or the people enacted the underlying legislation.

If the people intended to limit the Legislature's power to repeal or amend law created via an initiative, the limitation would have been included in our Constitution, as it has been in other states.

> Initiative and referendum states commonly provide in their constitutions that a law enacted by initiative or referendum cannot be amended or repealed by the legislature, either absolutely or for a limited period of time, unless otherwise provided. Where a statute was originally enacted by initiative, the legislature cannot adopt amendments to that statute without approval by the electorate. Such a limitation was considered necessary to protect the right of the people to enact laws directly. *In the absence of any such limitation, the legislature can immediately render such laws ineffective by amendment.*

Statutes subject to amendment—Acts enacted by initiative and referendum, 1A Sutherland Statutory Construction § 22:6 (7th ed.) (emphasis added).

Though such a limitation does not exist in Utah's Constitution, the people are not left without a remedy. If voters disagree with subsequent action by the Legislature in relation to an initiative, they can hold their elected officials accountable at the polls or they can further amend or repeal provisions of the statute by initiative.

Count Five of the Complaint must be dismissed for failure to state a claim upon which relief may be granted. While the people have the right to alter or reform their government, Utah's Constitution requires that this right be exercised by amendment or revision to the Constitution. The people of Utah, via its Constitution, delegated the redistricting power to the Legislature, and revocation of this delegation can only be accomplished by amending or revising the constitution, not by statute. Further, the power of the people to legislate via initiative or referendum is coequal

with the power of the Legislature to legislate. Thus, both can, without limitation other than those expressly provided in the Constitution or by statute authorized by the Constitution, repeal or modify the legislative action of the other.

CONCLUSION

The Court should dismiss Plaintiffs' Complaint in its entirety. In this case of first impression, Plaintiffs seek for the Court to invent new law to prohibit partisan cracking and to, paradoxically, grant them a remedy of partisan packing. First, and dispositive of Counts One through Four, the Court lacks subject matter jurisdiction over Plaintiffs' claims related to partisan redistricting because they are nonjusticiable political questions and nonjusticiable for lack of judicially discoverable or manageable standards. Second, Plaintiffs fail to state any claim upon which relief may be granted against the Individual Legislative Defendants and the Legislative Redistricting Committee because the Individual Legislative Defendants are protected by legislative immunity and neither the Individual Legislative Defendants nor the Legislative Redistricting Committee can provide any of the requested relief. Third, Plaintiffs fail to state any claim upon which relief may be granted because the Utah Constitution does not contain any provision requiring the Legislature to draw a district line based on the political affiliations or preferences of the two largest political parties to the exclusion of all other political parties and unaffiliated voters. Additionally, the constitutional provisions cited in Counts One through Four do not prohibit political redistricting, and the constitutional provisions cited in Count Five do not restrict the Legislature's plenary power to pass legislation to enact or modify the Utah Code. For the above reasons, the Court should dismiss Plaintiffs' Complaint in its entirety.

DATED this 2nd day of May, 2022.

OFFICE OF LEGISLATIVE RESERCH AND GENERAL COUNSEL

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CERTIFICATE OF FILING

I certify that on this 2nd day of May 2022, I electronically filed the foregoing, **LEGISLATIVE DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX,

Plaintiffs,

v.

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

MEMORANDUM OPPOSING LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

(Hearing Requested)

Civil Action No. 220901712

Honorable Dianna Gibson

LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity,

Defendants.

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INTRODUCTION

This case asks the Utah judiciary to uphold Utahns' constitutional rights and provide a needed check on the Legislature's excesses that damage the democratic process. Partisan gerrymandering is repugnant to democracy. It offends the values Americans and Utahns cherish: that all people are created equal and that ours is a government of, by, and for the people. The Utah Legislature manipulated Utah's new congressional map to amplify the votes of some Utahns and diminish the votes of others based on how and where they vote. They did so only after repealing a citizen initiative seeking to prevent precisely that outcome. This exercise of raw partisan power undermines Utah's constitutional guarantees that all citizens enjoy free elections, equal votes, the right to express support for candidates of their choice, freedom to associate with likeminded voters, and a meaningful right to vote. And it undermines Utahns' core right to reform their government.

Only the courts can safeguard these constitutional guarantees. Despite its assertion, the Legislature has no power to act beyond the restraints of the Utah Constitution. This Court should not condemn Plaintiffs' well-founded claims to "echo into a void" but instead engage Utah's "state constitution[] [to] provide standards and guidance" to protect voters' constitutional rights. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Accordingly, for reasons explained below, this Court should reject Defendants' categorical attacks on Plaintiffs' well-founded and thorough Complaint and allow this case to proceed to the merits.

FACTS

Excessive Partisan Gerrymandering Interferes with Democratic Elections

Partisan gerrymandering occurs when district lines are manipulated to dilute the electoral influence of some voters and amplify the influence of others on a partisan basis, often by subordinating traditional neutral redistricting principles, such as compactness and respect for

political subdivisions. Compl. ¶¶ 3-12, 205. Partisan gerrymandering operates through two primary techniques: cracking, which involves dividing a concentrated group of targeted voters to minimize their influence on any district; and packing, which involves over-concentrating the targeted voters to limit their influence to one district instead of many. *Id*. As the U.S. Supreme Court recognizes, partisan gerrymandering—whether by cracking or packing—"is 'incompatible with democratic principles.'" *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)).

Utahns Exercised Their Legislative Power to Prohibit Partisan Gerrymandering in the Redistricting Process, and the Legislature Repeals Their Efforts

In November 2018, Utahns used their lawmaking authority to enact the Utah Independent Redistricting Commission and Standards Act in Proposition 4 ("Prop 4"), a government reform initiative designed to curb excessive partisan gerrymandering. *Id.* ¶¶ 73-78. Prop 4 established mandatory redistricting standards, including a requirement that Utah's final redistricting plans abide by neutral redistricting criteria and a prohibition on adopting any district lines that purposefully or unduly favor or disfavor any incumbent or political party. *Id.* ¶¶ 86-87. Prop 4 shifted primary map-drawing responsibility to the bipartisan, citizen-led Utah Independent Redistricting Commission (UIRC). *Id.* ¶¶ 80-85. Prop 4 required the Legislature to consider and vote on the UIRC's proposals and, if it rejected the maps, to explain its reasons for doing so in writing. *Id.* ¶ 88. It also authorized a private right of action allowing any Utah resident the ability challenge a final redistricting plan that failed to conform with the law's mandatory standards, procedures, and requirements. *Id.* ¶ 89. A majority of Utah citizens from a range of geographic areas and political backgrounds voted to enact Prop 4. *Id.* ¶¶ 90-91.

On March 11, 2020, the Legislature repealed Prop 4's Utah Independent Redistricting Commission and Standards Act. In its place, the Legislature enacted a different redistricting law entitled SB 200. *Id.* ¶ 93; *see* S.B. 200, Enrolled Copy, at 2 (repealing all code sections enacted by Prop 4).[1] Unlike Prop 4, SB 200 created a watered-down UIRC that was advisory-only; permitted the Legislature to ignore the UIRC's impartial maps; and eliminated Prop 4's mandatory redistricting criteria, including its prohibition on the drawing of district boundaries to unduly favor or disfavor an incumbent or political party. *Id.* ¶¶ 94-98. SB200 also eliminated Prop 4's transparency and public accountability safeguards, and its private right of action. *Id*.

The Legislature Enacts a Redistricting Plan That Reflects an Extreme Partisan Gerrymander

Despite the watering down of Prop 4's requirements, the UIRC conducted a transparent and impartial map-drawing process under SB 200's new framework. It produced three partisan-neutral congressional maps, which it presented to the Utah Legislature's Legislative Redistricting Committee (LRC) on November 1, 2021. *Id.* ¶¶ 41, 104-40. Meanwhile, the LRC was conducting its own closed-door map-drawing process designed to achieve an extreme partisan gerrymander. *Id.* ¶¶ 142-44. Before the UIRC presented its maps to the LRC, the Legislature's Republican caucus considered the partisan effects of the LRC's maps in a closed-door meeting. *Id.* ¶ 155.

On Friday, November 5, 2021, around 10:00 pm, the LRC publicly posted a proposed congressional map, which would become the 2021 Congressional Plan (the "Plan"). *Id.* ¶ 156. The LRC adopted the Plan at a hearing held on November 8. *Id.* ¶¶ 159-60. Despite the highly compressed schedule, thousands of Utahns rushed to condemn the LRC map, which split Salt Lake

[1] Available at https://le.utah.gov/~2020/bills/sbillenr/SB0200.pdf (last accessed May 31, 2022).

County into four congressional districts, and urged the LRC to instead adopt one of the UIRC's neutral proposals. *Id.* ¶¶ 161-71. Nonetheless, on November 9, the Utah House adopted the Plan with the support of all but five Republicans and no Democrats. *Id.* ¶¶ 173-79. On November 10, the Utah Senate adopted the map with the support of all but one Republican and no Democrats. *Id.* ¶¶ 180-85. Before signing the bill into law on November 12, 2021, Governor Cox acknowledged the partisan nature of the Legislature's map-drawing process. *Id.* ¶¶ 200-01.

The 2021 Congressional Plan achieves extreme partisan advantage for Republicans by cracking the large and concentrated population of non-Republican voters centered in Salt Lake County and dividing them between all four of Utah's congressional districts—thereby diminishing the strength of their voting power. *Id.* ¶¶ 207-08, 210-25. Every district has a substantial minority of non-Republican voters who will be perpetually outvoted by a Republican majority, artificially blocking them from electing a candidate of choice in the congressional delegation. *Id.* ¶ 226.

Even in comparison to prior gerrymandered maps in Utah, the 2021 Congressional Plan is extreme. Utah's 2011 Congressional Plan—which the Legislature devised for Republicans' benefit—still produced one competitive congressional district. *Id.* ¶ 64-66. But the 2021 Congressional Plan now includes four safe Republican districts, locking in Republican control of each seat for the next decade. *Id.* ¶ 227. The Plan's extreme partisan bias cannot be explained by adherence to any traditional redistricting criteria. *Id.* ¶¶ 233-54. Proponents claimed that the Plan was necessary to balance urban and rural interests, but this purported reason was a pretext to unduly gerrymander the Plan for partisan advantage. *Id.* ¶¶ 187-91.

LEGAL STANDARD

In deciding Legislative Defendants' Motion to Dismiss ("Mot."), the Court must "assume the truth of all the allegations in the complaint and draw[] all reasonable inferences therefrom in the light most favorable to [Plaintiffs]." *Castro v. Lemus*, 2019 UT 71, ¶ 11. Such a "motion is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case." *Whipple v. American Fork Irr. Co.*, 910 P.2d 1218, 1220 (Utah 1996). As such, "[a] dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *America West Bank Members, L.C. v. State,* 2014 UT 49, ¶ 13 (citation omitted). "[I]f there is any doubt about whether a claim should be dismissed for lack of factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof." *Ho v. Jim's Enters., Inc.*, 2001 UT 63, ¶ 6 (citation omitted).

ARGUMENT

Defendants do not dispute that extreme partisan gerrymanders are anti-democratic. Nonetheless, Defendants offer an extreme view of legislative authority that leaves the courts and the people of Utah powerless to prevent such anti-democratic practices. According to them, the Legislature possesses sole authority over redistricting, which it can exercise to draw maps that dilute the strength of certain voters and predetermine election results without being subject to judicial review. They further contend that a supermajority of legislators can, without recourse, repeal citizens' government-reform initiatives designed to prevent such electoral manipulation.

Defendants are wrong. Their vision of absolute authority is antithetical to Utah's basic system of "constitutional checks and balances," which is "designed to ensure against the abuse of power." *Matheson v. Ferry*, 657 P.2d 240, 245 (Utah 1982) (Stewart, J., concurring). This system

prevents the "exercise of despotic power or unreasoning action by any official or functionary," and it is "the duty of the courts to safeguard these protections" by enforcing structural limitations and upholding individual rights. *Super Tire Mkt., Inc. v. Rollins*, 18 Utah 2d 122, 125, 417 P.2d 132 (1966).

Plaintiffs here, a bipartisan mix of individual voters and nonpartisan civic organizations, ask this Court to fulfill this vital constitutional function. Far from pursuing a "beneficial political outcome"—a strawman Defendants repeatedly make without regard to the Complaint (Mot. at 17)—Plaintiffs request a partisan-*neutral* map adopted in an impartial process using traditional, nonpartisan criteria. *See, e.g.*, Compl. ¶¶ 12-39, 91, 161-66, 234-45. It is the 2021 Congressional Plan—which Defendants themselves described as an outgrowth of a "political decision" and "highly political task" capitalizing on a "highly unequal partisan landscape" (Mot. at 5-7)—that was enacted for unlawful partisan advantage and should be ruled unconstitutional. *See* Compl. ¶¶ 4-12, 205-07, 226-27, 234, 254.

The Court can and should reject Defendants' extreme positions. As explained below, this Court has jurisdiction to resolve Plaintiffs' constitutional claims, the Legislative Defendants are proper defendants, and Plaintiffs have sufficiently alleged that the 2021 Congressional Plan and the Legislature's repeal of Prop 4 are unconstitutional.

I. This Court has jurisdiction to decide Plaintiffs' partisan gerrymandering claims.

Partisan gerrymandering claims are justiciable under the Utah Constitution. Utah courts have an unflagging duty to declare "an act of the Legislature unconstitutional when it clearly appears that it conflicts with some provision of our Constitution." *Matheson v. Ferry*, 641 P.2d 674, 680 (Utah 1982). Even in cases with "significant political overtones," Utah courts cannot

"simply 'shirk'" their duty by declaring the issues nonjusticiable. *Matter of Childers-Gray*, 2021 UT 13, ¶ 67 (citation and alterations omitted). "[W]hether the [Defendants'] actions pass constitutional muster is certainly a justiciable issue" for the Court to resolve on the merits. *Skokos v. Corradini*, 900 P.2d 539, 542 (Utah Ct. App. 1995).

Defendants ask the Court to abandon its general duty to review the constitutionality of legislative acts, arguing that partisan gerrymandering presents a nonjusticiable political question, and that a court cannot resolve a redistricting challenge because the Utah Constitution does not provide judicially manageable standards. Both arguments lack merit.

A. The judiciary is empowered to review the Legislature's redistricting maps.

To be a nonjusticiable political question, the issue must be "*wholly within* the control and discretion of other branches of government." *Matter of Childers-Gray*, 2021 UT 13, ¶ 64 (emphasis added). In evaluating that constitutional question, this Court must "consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 23.

Here, each source makes clear that redistricting is not wholly committed to the Legislature. Rather, they establish that redistricting is a legislative function that, like all other lawmaking, is subject to gubernatorial veto, shared with Utah's voters through their initiative power, and subject to judicial review. *See* Compl. ¶¶ 68-72. Indeed, outside the context of this litigation, Defendants themselves have acknowledged that "[t]he redistricting process is subject to the legal parameters established by the United States *and Utah Constitutions*, state and federal laws, and case law."[2]

[2] Office of Legislative Research and General Counsel, 2001 Redistricting in Utah (Jan. 2022), le.utah.gov/documents/redistricting/redist.htm (last accessed May 25, 2022). The court may take judicial notice of the report. *See Lee v. Gaufin*, 867 P.2d 572, 585 & n.19 (Utah 1993).

First, nothing in the text of Utah's Constitution suggests that redistricting is wholly committed to the Legislature and thus a political question exempt from judicial review. Utah's reapportionment provision 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." Utah Const. art. IX, § 1. At most, this provision establishes that redistricting is, in the first instance, a legislative function, and that the Constitution imposes certain time constraints on the performance of that function.

Although Defendants themselves repeatedly describe redistricting as a general "legislative function" (Mot. at 8, 16, 17), they exaggerate the Legislature's role by grafting onto Article IX § 1 words the Framers chose to omit. While the modifiers "exclusively" and "solely" feature prominently in Defendants' argument (*see, e.g.*, Mot. at 1, 2, 3, 5, 6, 7, 9, 18, 28, 29, 32), they appear nowhere in the constitutional text. Moreover, Defendants' preferred interpretation—that Article IX § 1 gives unrestrained "power to divide the state into congressional districts solely with the Legislature," (Mot. at 7)—is fundamentally at odds with the long-recognized principle that "[t]he Utah Constitution is not one of grant, but one of limitation." *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 18 (citation omitted).

The fact that the Constitution assigns the redistricting task to the legislative branch in the first instance does not suggest that the issue is solely within the Legislature's domain. Numerous other Utah constitutional provisions also designate duties to the Legislature by name. *See, e.g.*, Utah Const. art. VII, § 18 (compensation of state and local officers); *id.* art. XIII, § 2 (taxes); *id.* art. X, § 2 (public education); *id.* art. I, § 6 (gun regulation). But none of these functions has been

declared a political question exempt from judicial review. To the contrary, the Utah Supreme Court has held that the Constitution's reference to the "Legislature" is intended to designate a legislative function, which the lawmaking authority may carry out through the normal legislative process under Article VI § 1. *See Shurtleff*, 2006 UT 51, ¶ 18 & n.2 (discussing gun regulation). Such lawmaking authority under these references to "Legislature" "is not unlimited." *Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ.*, 2001 UT 2, ¶ 14. All laws must heed structural constitutional restraints and individual rights. *Rampton v. Barlow*, 23 Utah 2d 383, 384, 464 P.2d 378 (1970) (ruling unconstitutional law enacted under Article X § 2).

Further undermining Defendants' "exclusive" reading, the Utah Supreme Court has ruled that constitutional provisions referring to the "Legislature" provide a textual indication that the people may exercise the same authority under their citizen initiative power. In *Carter v. Lehi City*, for example, the Court ruled that the compensation of state and local officers is a subject "appropriate for legislative control" through citizen initiatives, even though Article VII § 18—like Article IX § 1—refers to "Legislature." 2012 UT 2, ¶ 80. Similarly, in *Mawhinney v. City of Draper*, the Court held that levying taxes is a subject of "legislative action that is properly referable to the voters," even though Article XIII § 2 provides that "levying taxes is a power given to the Legislature by the Utah Constitution[,] [a]nd it is a power the Legislature has traditionally exercised." 2014 UT 54, ¶ 18. For similar reasons, the reference to the "Legislature" in Article IX § 1 must be understood to include the legislative power of the people. Thus, the redistricting power cannot be wholly committed to the Legislature.

Second, history confirms that redistricting is not wholly committed to the Utah Legislature. *See Carter*, 2012 UT 2, ¶ 78 (applying historical use as interpretive methodology); *Ferry*, 641 P.2d

at 678 (same). In Utah's history, the redistricting power has never been an exclusive function of the Legislature that is performed outside the normal legislative process or beyond constitutional restraint. Redistricting laws are presented to the governor for veto like any other law under the normal Article VII § 8 procedures. Indeed, the law enacting the 2021 Congressional Plan itself recognizes that the bill must receive "approval by the governor." HB 2004 § 7. And Utah's governor has historically exercised this constitutional check to veto redistricting legislation. Compl. ¶¶ 68, 199. By formulating the "legislative authority" over redistricting in Utah to include "a make-or-break role for the Governor," Article IX cannot be read to give exclusive authority to the Legislature. *See Ariz. State Legis.*, 576 U.S. at 806.

Beyond the governor, the judiciary and the people themselves have historically exerted control over redistricting. In *Parkinson v. Watson*, for example, the Utah Supreme Court evaluated the plaintiffs' constitutional claim that a legislative map was unconstitutional, although it ultimately rejected the claim on the merits. 291 P.2d 400, 402 (Utah 1955). Historically, the redistricting process has also been subject to the people's referenda power. And there is a long history of independent citizen redistricting committees conducting redistricting for state legislative plans. *See, e.g.*, *id.* at 403 (describing redistricting referendum submitted to the people in 1954 and the role of the independent redistricting committee in Salt Lake County); *see also* 1965 Utah Laws, H.B. No. 8, Section 4, eff. May 11, 1965 (detailing county redistricting committees). Defendants' notion of absolute legislative authority over redistricting is foreign to Utah's constitutional history.

Third, other state courts, interpreting similar constitutional text, have held that redistricting is subject to judicial review and not wholly committed to the state legislature. In *Harper v. Hall*, for example, the North Carolina Supreme Court recently ruled that the court had jurisdiction over

partisan gerrymandering cases, even though the Constitution assigned North Carolina's General Assembly the role of preparing congressional maps that were not subject to gubernatorial veto. 868 S.E.2d 499, 533 (N.C. 2022); N.C. Const. art. II, §§ 5, 22. The Court explained that nothing in the provision divested the courts of their power to enforce "constitutional limitations contained in other constitutional provisions." *Harper*, 868 S.E.2d at 533. The Colorado Supreme Court also exercised jurisdiction over a redistricting case, despite the state constitution's reference to "General Assembly." *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1226 (Colo. 2003). As the court explained, that provision is to be "interpreted broadly to include the Governor's power to approve or disapprove the legislature's redistricting plan, *and the voters' power to redistrict by initiative*[.]" *Id.* (emphasis added). Numerous other state courts have reached similar conclusions, rejecting similar arguments to Defendants' reading of "Legislature" in Article IX § 1.[3]

Fourth, practical considerations further support that judicial review is vital when it comes to partisan gerrymandering. Although "[t]he widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy" and "both Democrats and Republicans have decried [gerrymandering] when wielded by their opponents," legislators "nonetheless continue to gerrymander in their own self interest when given the opportunity." *Benisek v. Lamone*, 348 F. Supp. 3d 493, 511 (D. Md. 2018). This "cancerous" problem that "undermin[es] the fundamental tenets of our form of democracy" is often not susceptible to political solutions. *Id.* Thus, "because gerrymanders benefit those who

[3] *League of Women Voters v. Commonwealth* ("*LWVPA*"), 645 Pa. 1, 128-34 (2018); *Johnson v. Wisconsin Elections Comm'n*, 399 Wis. 2d 623, 638-39 (2021); *see also* Nathaniel Persily, *When Is A Legislature Not A Legislature? When Voters Regulate Elections by Initiative*, 77 Ohio St. L.J. 689, 701–03 & n.92 (2016) (collecting other states).

control the political branches," and they will "[m]ore effectively every day … enable[] politicians to entrench themselves in power against the people's will," it is "only the courts [who] can do anything to remedy the problem." *Gill v. Whitford*, 138 S. Ct. 1916, 1935 (Kagan, J., concurring).[4]

In arguing to the contrary, Defendants' erroneously rely on *Parkinson v. Watson*. Mot. at 9. As explained above, the *Parkinson* Court adjudicated the merits of the plaintiffs' malapportionment claim, confirming that challenges to redistricting are subject to judicial review. While the Court upheld the challenged maps by relying on a now-inoperative provision in the Utah Constitution that the Court interpreted as approving "the idea of area representation" in redistricting, *see* 291 P.2d at 404-09, its holding and reasoning have been superseded by basic one-person, one-vote principles. *See Reynolds v. Sims*, 377 U.S. 533, 560 (1964); *Petuskey v. Clyde*, 234 F.Supp. 960, 962-64 (D. Utah 1964) (three-judge court). Moreover, none of the constitutional provisions at issue here were before the Court in *Parkinson*.

Defendants' citation to *Parkinson* (Mot. at 9) is also incomplete, omitting the following key sentence: "This is so, because of the well recognized principle that in state governments, the legislature being the representatives of the people, wherein lies the residuum of governmental power, *constitutional provisions are limitations, rather than grants of power*." 291 P.2d at 405

[4] In support of their contention that the Utah Constitution vests the authority to divide the state into congressional districts solely with the Legislature, and therefore that where the Legislature draws those divisions is a political question, Defendants in a footnote mention the federal Elections Clause. Mot. at 10 n.10. The analogy is inapt, and the two authorities they cite offer no support for it. *Rucho* did not discuss, much less adopt, this supposed theory of the Elections Clause. 139 S. Ct. at 2495–96. The other opinion is an unpersuasive dissent from a denial of a stay. *See Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting). Controlling Supreme Court precedent holds that the Elections Clause reference to "'the Legislature' [does] not mean the representative body alone." *Ariz. State Legis.*, 576 U.S. at 805 (quoting *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916)); *accord Smiley v. Holm*, 285 U.S. 355, 365–66 (1932).

(emphasis added). Far from enshrining the Legislature's absolute power over redistricting, *Parkinson* confirms that Utah courts have jurisdiction to hear redistricting claims and that Article IX § 1 is a *limit* on the exercise of the legislative function, not an exclusive grant of power.

B. The Utah Constitution provides manageable standards to adjudicate partisan gerrymandering claims.

This Court also is equipped to conduct the factfinding and legal rulings necessary to resolve Plaintiffs' partisan gerrymandering claims. Utah courts routinely adopt and apply manageable standards in novel contexts, and they can do the same here—just as other state courts across the country have done. Compl., ¶¶ 86-88. Defendants' contrary arguments lack merit.

As an initial matter, Defendants ignore that Utah courts regularly determine and apply novel standards to enforce the Utah Constitution. "The Utah Constitution enshrines principles, not application of those principles," and it is the court's duty to determine "what principle the constitution encapsulates and how that principle should apply." *Maese*, 2019 UT 58, ¶ 70 n.23; *see also Matheson*, 641 P.2d at 674; *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).

The Framers drafted the Declaration of Rights to reflect broad and adaptable principles. *See, e.g.*, Utah Const. art. I, § 27. As the Utah Supreme Court has recognized, "[t]he constitution was framed by practical men, who aimed at useful and practical results." *Patterson v. State*, 2021 UT 52, ¶ 137 (quoting *State v. Elliot*, 13 Utah 200, 44 P. 248, 250 (1896)). As such, Utah courts are often called upon to apply long-established constitutional principles to new factual contexts. The Court does so through "traditional methods of constitutional analysis … look[ing] primarily to the language of the constitution itself" in addition to "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist [] in arriving at a proper interpretation of the provision in question." *State v. Tiedemann*, 2007 UT 49, ¶ 37

(citation omitted). For example, in *State v. Roberts*, the Court applied the Utah Constitution to determine whether a reasonable expectation of privacy exists for electronic files shared in a "peer-to-peer file sharing network." 2015 UT 24, ¶¶ 1, 25.[5] Defendants make no argument for why this Court cannot do the same with respect to partisan gerrymandering.

Defendants observe that federal courts have ruled partisan gerrymandering claims nonjusticiable (Mot. at 5), but that has no bearing on whether such claims are justiciable in Utah. While *Rucho* held that partisan gerrymandering claims are nonjusticiable under the U.S. Constitution, "the special limitations that Article III … imposes on the jurisdiction of federal courts are not binding on the state courts." *New York State Club Ass'n v. New York,* 487 U.S. 1, 8 & n.2 (1988) (citation omitted). *Rucho* itself invites a state solution to extreme partisan gerrymandering:

> Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.

139 S. Ct. at 2507.

Precedent confirms that Utah courts chart their own course on questions of state constitutional law and justiciability. Federal Article III standards "are not necessarily relevant to the development of the … rules that apply in Utah's state courts." *Provo City Corp. v. Williden*, 768 P.2d 455, 456-57 (Utah 1989) (citations omitted). This is because federal standards "are based on different constitutional language and different interpretive case law." *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 45. Thus, any "[p]rior reliance on federal precedent and federal

[5] *See also State v. Limb*, 581 P.2d 142, 144 (Utah 1978) (addressing automobile exception); *Dexter v. Bosko*, 2008 UT 29, ¶ 19 (unnecessary rigor provision applied to seatbelts); *State v. James*, 858 P.2d 1012, 1017 (Utah Ct. App. 1993) (due process applied to video recorded interrogations).

constitutional provisions [does] not preclude [Utah courts] from taking a more expansive view of [the state constitution] where the United States Supreme Court determines to further limit federal guarantees." *State v. Larocco*, 794 P.2d 460, 465 (Utah 1990) (plurality op.) (citation omitted); *see also Tiedemann*, 2007 UT 49, ¶¶ 33, 42-44 (applying separate rule where federal law "serve[d] as an [in]adequate safeguard of" state constitutional rights).

Utah's Constitution provides more than sufficient standards for Utah courts to apply. Indeed, most of Plaintiffs' claims rely on constitutional provisions that have been subject to decades of litigation and have established standards applicable to partisan gerrymandering. *See, e.g.*, *Gallivan v. Walker*, 2002 UT 89 (Uniform Operations of Law); *Am. Bush v. City of S. Salt Lake*, *Am. Bush*, 2006 UT 40, ¶¶ 17-18 (free speech).

Case law from other state courts confirms that Utah courts are more than capable of developing and applying manageable standards to adjudicate partisan gerrymandering claims. *See, e.g., Am. Bush*, 2006 UT 40, ¶ 11 (evaluating process from sister states). The North Carolina, Florida, Ohio, Pennsylvania, Maryland, New York, and Alaska judiciaries have all applied their state constitutions to protect against partisan gerrymandering.[6] And many have done so applying state constitutions with language similar to Utah's Constitution.

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

For example, the North Carolina Supreme Court in *Harper v. Hall* held that the partisan gerrymandered congressional map violated the North Carolina Constitution's Free Elections, Equal Protection, Free Speech, and Freedom of Assembly Clauses. 868 S.E.2d at 558-60. The court determined that each of these clauses independently provides "manageable judicial standards" to restrain partisan gerrymandering. *Id.* North Carolina's provisions offer as much substantive guidance as Utah's. For example, North Carolina's Free Elections Clause states simply that "All elections shall be free." N.C. Const. art. I, § 10; *cf*. Utah Const. art. I, § 17 ("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."). Based on that language, the Court devised a manageable framework for partisan gerrymandering claims to be further developed "'in the context of actual litigation.'" *Harper*, 868 S.E.2d at 547-48 (quoting *Reynolds*, 377 U.S. at 578).

The Pennsylvania Supreme Court relied on similarly broad language to block a partisan gerrymander. *LWVPA*, 645 Pa. at 97. The court noted that the State's Free Elections Clause does not provide "explicit standards" for evaluating partisan gerrymandering. *Id.* at 118. Nonetheless, the court ruled that traditional redistricting criteria—*e.g.*, contiguity, compactness, and respect for political subdivisions—provide "neutral benchmarks" for evaluating partisan gerrymandering. *Id.* at 118-21. As in *Harper*, the *LWVPA* court declined to provide an exhaustive framework for partisan gerrymandering claims, recognizing that future litigation would allow courts to concretize the doctrine over time. *Id*. at 122-23. But the court held that one method of proving that a map is an unconstitutional partisan gerrymander is to show that it subordinates traditional neutral redistricting criteria to "extraneous considerations such as gerrymandering for unfair partisan

political advantage." *Id.* at 122. Based on that framework, it found the congressional plan before it constituted precisely that type of unlawful subordination. *Id*. at 128.

Like the Pennsylvania, North Carolina, and numerous other state courts, this Court can discern the necessary manageable standards to evaluate Plaintiffs' constitutional claims. While black-and-white standards based on statistical evidence are available, *see, e.g., Harper*, 868 S.E.2d at 547-50 (discussing such possible rules), the Court can also choose, like other sister states, to adopt a framework and allow the precise parameters of the analysis to develop over time.

Although Plaintiffs contend they can meet any of the available standards, they propose that this Court assess Plaintiffs' Free Elections Clause claim by evaluating whether: (1) the Enacted Plan has the effect of substantially diminishing or diluting the power of voters based on their political views, and (2) no legitimate justification exists for the dilution. This standard is similar to those employed by other state courts, *see supra*, and it is modeled after the effects-based analysis used in other areas of Utah law. *See, e.g.*, *Gallivan*, 2002 UT 89, ¶¶ 36-38; *Cook v. Bell*, 2014 UT 46, ¶ 29 ("[U]nder the Utah Constitution, a statute may be held unconstitutional both on its face and for any de facto disparate effects on similarly situated parties."). Of course, even if the Court were to require a showing of intent for Plaintiffs' partisan gerrymandering claims, the complaint alleges such intent, and Plaintiffs will be able to prove such intent at trial. *See, e.g.*, Compl. ¶¶ 3, 5, 141-198, 200, 233-235, 254, 275.

Past decisions striking down partisan gerrymanders also demonstrate how Utah courts can rely on expert evidence to adjudicate these claims and develop coherent standards. For example, courts have relied on statistical evidence of partisan bias reflecting that the map packs and cracks disfavored-party voters in order to advantage the other party. *See, e.g.*, *Harper*, 868 S.E.2d at 515-

21. This includes demonstrating that the challenged maps were statistical outliers when compared to an array of simulated plans. *See, e.g.*, *id.*; *LWVPA*, 645 Pa. at 44-59; *Szeliga*, *supra*, at 88. Or the Court can follow other courts and rely on simulations and statistical measures—like the efficiency gap—to objectively quantify the Plan's partisan effects and to determine that it did not comply with traditional neutral redistricting criteria, such as preservation of political subdivisions or compactness. *See, e.g., Adams*, 2022 WL 129092, at *10-11; *Harper*, 868 S.E.2d at 516-21, 547-49, 552; *LWVPA*, 645 Pa. at 44-59; *Szeliga*, *supra*, at 88-93. These sister state precedents show that Utah courts are likewise perfectly capable of making the necessary factual findings and legal conclusions to adjudicate partisan gerrymandering claims.

Ignoring the clear line of decisions in *Harper*, *LWVPA*, and *Szeliga*, among others, Defendants rely on the inapposite Wisconsin Supreme Court decision in *Johnson v. WEC*, 967 N.W.2d 469 (Wis. 2021). In *Johnson*, the Wisconsin Supreme Court reviewed redistricting maps following an impasse between the Legislature and Governor. *Id.* at 473. Because no maps had been officially enacted, the petitioners pled malapportionment claims; no partisan gerrymandering claims were before the court. *Id.* While a plurality of the court opined on partisan gerrymandering without briefing and argument, the court's superficial analysis was not necessary to the resolution of the case. *See, e.g., id.* at 663-67; *see also id.* at 688-89 (Dallet, J., dissenting) (describing the relevant passage as an "advisory opinion about whether such claims are cognizable under the Wisconsin Constitution"). The portions of *Johnson* that Defendants cite are not binding in

Wisconsin, much less in Utah. The case is further inapposite because Wisconsin's constitution differs from Utah. For example, unlike Utah, Wisconsin lacks a Free Elections Clause.[7]

Defendants' other arguments merely invent and respond to strawman arguments that Plaintiffs do not make. For example, Defendants assert that Plaintiffs "ask the Court to invent a judicial standard of redistricting that would guarantee a particular political outcome," and that Plaintiffs are seeking "proportional leveling" or a "proportional parliamentary system." Mot. at 9, 12-13. This appears nowhere in Plaintiffs' Complaint, which the Court must accept as true at this stage. As the Complaint alleges, it was Defendants—through the systematic cracking of voters to diminish their electoral power—that sought to guarantee a particular political outcome in Utah's congressional districts. *See, e.g.,* Compl., ¶¶ 67, 189-92, 209. Plaintiffs here seek only a level playing field where all voters may participate equally, rather than a preordained outcome for candidates of one party (much less a change to a parliamentary system). *See id.* ¶¶ 61-67, 175.

Defendants also assert that undoing the extreme vote dilution in the Plan would necessarily result in "packing" these same voters instead. *See, e.g.*, Mot. at 12, n. 12, 24, 32. But uncracking does not mean packing—it means returning to an undiluted neutral map where voters have equal opportunity to affect the electoral process. Regardless, packing (or cracking) is only harmful if it leads to the *dilution* of certain voters. Democratic voters in Utah cannot be "packed," as there are not currently enough of them to form a majority in more than one congressional district. *See, e.g.*,

[7] In their reply, Defendants may argue that the Kansas Supreme Court's recent summary decision reversing a lower court's finding that the congressional map violated the state constitution also demonstrates that such claims are nonjusticiable. As of this filing, an opinion explaining the Court's decision is forthcoming. But there are important distinctions between this case and Kansas, including that the Kansas Constitution does not provide a Free Elections Clause.

Thornburg v. Gingles, 478 U.S. 30, 46 & n.11 (1986) (defining packing vote dilution as the "concentration of [voters] into districts where they constitute an excessive majority").

Next, Defendants suggest that voting patterns are too unpredictable to allow for judicial resolution of Plaintiffs' claims, and that the State's equal population requirement "makes it impossible to draw districts that genuinely reflect partisan equality while also ensuring that the districts are geographically contiguous and compact." *See* Mot. at 11. But those assertions are *factual questions* to be evaluated through litigation. At this stage, the Court accepts as true Plaintiffs' allegations that the partisan gerrymander relies on voting patterns to lock in single-party control for a decade. *See, e.g.*, Compl., ¶¶ 3-8, 67, 206-33, 252-54.

Regardless, Defendants' notions about voting patterns are empirically incorrect, as established by numerous courts and experts. As the *Harper* Court summarized: "programs and algorithms now available for drawing electoral districts have become so sophisticated that it is possible to implement extreme and durable partisan gerrymanders that can enable one party to effectively guarantee itself a supermajority for an entire decade, even as electoral conditions change and voter preferences shift." 568 S.E.2d at 509. Legislatures recognize this fact—taking advantage of predictable voter behavior to ensure favorable electoral outcomes is the *entire point of gerrymandering*. *Id.* Fortunately, those same technologies "make[] it possible to reliably evaluate the partisan asymmetry of such plans." *Id.*; *see also* Compl., ¶ 67. As such, courts routinely rely on expert testimony about past and likely future voting patterns to resolve gerrymandering and vote dilution claims. *See, e.g.*, *Harper*, 568 S.E.2d at 509, 516-21, 547-49, *Adams*, 2022 WL 129092, at *10-11; *Szeliga*, *supra*, at 89-90; *Gingles*, 478 U.S. at 55-58.

If the Court accepts Defendants' argument that partisan gerrymandering claims are nonjusticiable, Utahns have nowhere to turn to vindicate their state constitutional rights. They already passed a redistricting reform initiative in 2018 that the Legislature swiftly repealed and then ignored voters' pleas to re-implement through new legislation. Compl. ¶¶ 73-103, 255-56. As a result, legislators representing gerrymandered districts can insulate themselves from democratic accountability, locking in a permanent supermajority and locking out voters holding minority viewpoints for the foreseeable future. While "the framers of the Utah Constitution saw the will of the people as the source of constitutional limitations upon [Utah's] state government," *Am. Bush*, 2006 UT 40, ¶ 13, partisan gerrymandering skews the electoral process to undermine this principle. This Court should hear the merits of Plaintiffs' state constitutional claims and provide an opportunity to prove that the partisan gerrymandered 2021 Congressional Plan violates their rights.

II. The Legislative Defendants are proper defendants and not absolutely immune.

Defendants' effort to dismiss some of the Legislative Defendants is unwarranted. They are properly named as defendants in their official capacities and are not absolutely immune.

A. The Legislative Defendants can provide relief.

Defendants' argument that the identified Legislative Defendants "are unable to act" to "provide the relief Plaintiffs' seek" is misplaced and lacks support from any authority. Mot. at 14-15. Utah law and legislative rules authorize these Defendants to introduce legislation and conduct proceedings to remedy the constitutional violations and provide Plaintiffs relief. Compl. at 78-80.

The Utah Constitution vests legislative authority in both the Legislature and in the people. Utah Const. art. VI, § 1(1). Members of the Legislature, particularly Legislative Defendants, may introduce legislation for consideration by the full Legislature and legislative committees may do the same. *See, e.g.*, JR4-2-101, -102. The leaders of the respective houses are charged with driving

the legislative process, calling the chamber to order, announcing business, putting issues to a vote, appointing committees, and "represent[ing] the [House or Senate], declaring its will and obeying its commands." *See* HR1-3-102(1); SR1-3-102(1). They can also call a special session. Utah Const. art. VI, § 2(3). If this Court orders relief, Legislative Defendants can use their authority to call a special session, introduce remedial legislation, and advance its passage through the Legislature. Additionally, SB 200, the law that replaced Prop 4, vests additional redistricting authority in Defendants Sandall and the LRC. Senator Sandall is charged with setting the schedule in the case of "special redistricting," which may be implicated in a remedy here. Utah Code § 20A-20-301. And, under SB 200, the LRC holds the hearing on potential maps. *Id.* § 20A-20-303.

Permitting suit against Legislative Defendants is consistent with Utah precedent, as well as caselaw from other courts. Utah courts have routinely entertained lawsuits against individual legislators and representatives of a committee.[8] Federal courts in redistricting matters often permit suits against state legislators. For example, in the seminal Voting Rights Act redistricting case, *Thornburg v. Gingles*, the U.S. Supreme Court permitted a case against the State Senate President and House Speaker. 478 U.S. 30 (1988).[9] State courts this year have similarly decided redistricting lawsuits against state legislators without questioning whether they were proper defendants. *See Harper*, 868 S.E.2d at 514; *Harkenrider*, 2022 NY Slip Op 2833. Here, Legislative Defendants are sued in their official capacities, and any remedy would merely require them to carry out their

[8] *Matheson*, 657 P.2d at 244 (senate president); *Rampton*, 23 Utah 2d at 384 (senate president and house speaker); *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978) (same); *Romney v. Barlow*, 24 Utah 2d 226, 227, 469 P.2d 497 (1970) (members of Legislative Council).

[9] *See also, e.g.*, *Karcher v. Daggett*, 462 U.S. 725 (1983); *Cano v. Davis*, 191 F. Supp. 2d 1135 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003); *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1294 (N.D. Ga. 2001); *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004).

duties as elected officials. Defendants provide no authority showing what prevents Legislative Defendants from carrying out these duties pursuant to a court order.

B. The Legislative Defendants are not absolutely immune from suit.

Defendants assert that "[l]egislative immunity applies to legislators performing a legitimate legislative function or acting in the sphere of legislative activity." Mot. at 16. But Defendants' sweeping interpretation of legislative immunity is unfounded. Absolute immunity is a rare exception from liability applied only in specific circumstances and for "persons whose special position or status requires that they be as free as possible from fear that their actions in their position might subject them to legal action." *Allen v. Ortez*, 802 P.2d 1307, 1311 (Utah 1990). Given the sensitive roles judges and prosecutors play, for example, the Supreme Court grants them special immunities from suit. *Id.* But it has never broadly held the same protections for legislators.

Instead, the Court has carefully cabined immunity for legislators, recognizing only an "absolute privilege to speak and participate in legislative proceedings without *defamation* liability." *Riddle v. Perry*, 2002 UT 10, ¶ 7 (emphasis added). The *Riddle* Court expressly limited its holding to defamation suits, reasoning that the Utah Constitution "emphasizes the importance of full and candid speech by legislators, even at the possible expense of an individual's right to be free from defamation." *Id.* It declined to provide absolute legislative immunity in all instances, to extend it to constitutional litigation vindicating fundamental rights, or to recognize any testimonial or evidentiary privilege. [10] Importantly, Plaintiffs do not seek to hold individual legislators liable

[10] Even if this Court holds that some Legislative Defendants are entitled to immunity from suit, it should not extend that concept to a testimonial or evidentiary privilege. Doing so has no basis in Utah law and would be inconsistent with the majority trend that "nearly every court to address the issue in the redistricting context, concludes that state legislators enjoy only a qualified evidentiary

in defamation for what they said or did on the dais, and do not pursue damages against legislators. Thus, because the Utah Supreme Court has declined to read absolute privilege as broadly as Defendants urge, this Court should not invent such a rule. In any event, the Court can provide adequate relief absent the contested Legislative Defendants if they are dismissed.

III. Plaintiffs properly state claims that the 2021 Congressional Plan is an unconstitutional partisan gerrymander.

Plaintiffs challenge the Plan under the Utah Constitution's guarantees of free elections, equal protection, free speech and association, and the right to vote. Plaintiffs invoke their rights under each of these provisions because the Plan violates them all. And each claim implicates the Utah Constitution's principles that voting is "a fundamental right," *Gallivan*, 2002 UT 89, ¶ 24; "healthy political exchange . . . is the foundation of our system of free speech and free elections," *Jacob v. Bezzant*, 2009 UT 37, ¶ 29; and fair "representation … is fundamental to the democratic processes of both Utah and the United States." *Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 74 (emphasis omitted).

That Plaintiffs "advocat[e] a novel application of a state constitutional provision" is no reason to reject the claims, particularly on a motion to dismiss. *State v. Hoffman*, 2013 UT App 290, ¶ 56. As described *supra* Part I.B., Plaintiffs ask the Court to perform its quintessential judicial function to safeguard constitutional rights by engaging "traditional methods of constitutional analysis" evaluating "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to … arriv[e] at a proper interpretation." *Tiedemann*,

privilege." *Favors v. Cuomo*, 285 F.R.D. 187, 217 (E.D.N.Y. 2012); *see also Bethune-Hill v. Virginia State Bd. of Elections*, 114 F.Supp.3d 323, 334 (E.D. Va. 2015).

2007 UT 49, ¶ 37. In this analysis, "different sources will be more or less persuasive depending on the constitutional question and the content of those sources." *Maese*, 2019 UT 58, ¶ 19.[11]

A. Plaintiffs properly allege a Free Elections Clause claim.

Plaintiffs sufficiently pled that the Plan violates Utah's Free Elections Clause, Compl. ¶¶ 257-68, which states: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17. Although Utah voters have not before pursued a partisan gerrymandering challenge and Utah courts are therefore yet to apply the Free Elections Clause in this context, the provision's text and history, and persuasive caselaw interpreting indistinguishable provisions in other states all support that the provision prohibits extreme partisan gerrymanders, like the Plan at issue here.

First, the text of Article I § 17 prohibits extreme partisan gerrymandering. An election is not "free" when its results are predetermined by manipulated district lines. And gerrymandering both "interfere[s]" with and "prevent[s] the free exercise of the right of suffrage" when the lines are drawn to diminish the electoral strength of certain voters, amplify the influence of other favored voters, and entrench incumbent officials in power.

The term "free" means "[h]aving legal and political rights; enjoying political and civil liberty," and it is "characterized by choice, rather than by compulsion or constraint." *Free*, Black's Law Dictionary, 11th ed. 2019. Similar meaning attached to the term "free" at the time of Utah's statehood, with dictionaries commonly defining free in terms of open political rights and equality. For example, "free" was defined as "[u]nconstrained; having power to follow the dictates of his

[11] Plaintiffs' claims arise solely under the Utah Constitution; they cite federal cases for their persuasive value. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Tiedemann*, 2007 UT 49, ¶ 33.

own will[;]" "[e]njoying full civic rights;" 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." *Free*, Black's Law Dictionary, 1st ed. 1891. Another source defined "free" as "[o]pen to all citizens alike[.]" *Free*, Anderson, Dictionary of Law, 1889.

Partisan gerrymandering, by definition, makes elections neither free nor open from interference. When partisan gerrymanders amplify the votes of people belonging to one party over those of voters belonging to another party, elections cannot be "open to all citizens alike," and certain voters are denied the opportunity to "[e]njoy[] full civic rights." And manipulating district lines to guarantee, in advance, the election of preferred candidates is far from a system in which voters engage "the dictates of [their] own will" to prevent "despotic" rule; "assur[e] liberty; [and] defend[] individual rights against encroachment" to ensure their government is "instituted by a free people." Permitting such manipulation of the democratic process "would not only run counter to our fundamental sense of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the [U.S.] Constitutional Convention." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). By its text, the Free Elections Clause prohibits laws that diminish the power of the electorate to dictate their own political will.

Defendants note that Utah's Framers removed the term "and equal" from the Free Elections Clause during the Constitutional Convention (Mot. at 21 n.16), but they offer no explanation for why that omission is constitutionally significant. It is not. Context and history make clear that the Framers removed the term "equal" because it was superfluous. As the definitions above show, the meaning of "free" at the time of statehood already included an equality component. And

interpreting Utah's Constitution, this Court must focus on "how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." *Patterson*, 2021 UT 52, ¶ 91 (internal quotation marks omitted).

Other provisions of Utah's Constitution reinforce that all government action, including over elections, must operate on the people equally. *See, e.g.*, Utah Const. art. I, §§ 2, 24. The U.S. Supreme Court has also equated the concepts "free" and "equal," consistently recognizing that the right to vote freely is necessarily tied to equality and vice-versa. *See Baker v. Carr*, 369 U.S. 186, 208 (1962); *Reynolds*, 377 U.S. at 555; *Wesberry*, 376 U.S. at 17-18.

Second, Utah's common law history, and the history of Free Elections Clauses in state constitutions generally, confirm that Utah's Free Elections Clause bars partisan gerrymandering. *See Am. Bush*, 2006 UT 40, ¶¶ 49-50 (looking to common law history). Several provisions of the Utah Constitution "arose from the English Bill of Rights of 1689." *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996), *abrogated on other grounds by Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 2000 UT 87. As other state courts have explained, Free Elections Clauses—like Utah's—derive from a provision in the 1689 English Bill of Rights that "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain 'electoral advantage.'" *Harper*, 868 S.E.2d at 540 (quoting historical sources). "[C]alls for a 'free and lawful parliament' by the participants of the Glorious Revolution" arose in response, and resulted in a Bill of Rights provision designed to "[a]void[] the manipulation of districts" and safeguard free elections—"a key principle of the reforms following the Glorious

Revolution." *Id.*; *accord LWVPA*, 178 A.3d at 104, 108. This history supports that, as an original matter, Free Election Clauses were designed to prohibit partisan gerrymandering.[12]

Utah's common-law history supports this conclusion. Four years before the 1895 Constitutional Convention, Utah's high court 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." *Ferguson v. Allen*, 7 Utah 263, 26 P. 570, 574 (1891). It further described the right to vote as "sacred," explaining that "[a]ll other rights, civil or political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system." *Id.* at 574. Recognizing this important right, the judiciary reinforced a robust protection of the constitutional right to vote during Utah's early history. *See id.*; *Ritchie v. Richards*, 14 Utah 345, 47 P. 670 (1896); *Park v. Rives*, 40 Utah 47, 119 P. 1034 (1911). The sanctity of voting, and the need for a dedicated right to fully protect it, led Utah's Framers to swiftly adopt the Free Elections Clause.[13] This history confirms that, at the time the Constitution was enacted, Utahns understood that elections must be fair and open to be "free." Partisan gerrymandering serves the opposite purpose.

Third, cases from other states with similar constitutional language further support that Utah's Free Election Clause prohibits partisan gerrymandering. As described *supra* Part I.B., numerous state courts have applied their Free Elections Clauses to curtail gerrymandering. The

[12] For the history of anti-gerrymandering sentiment at the time of the founding of the U.S. Constitution, *see, e.g., Brief of Amici Curiae Historians in Support of Appellees*, *Gill v. Whitford*, No. 16-1161 (2017), https://campaignlegal.org/sites/default/files/16-1161bsacHistorians.pdf.

[13] Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah (Mar. 25, 1895), le.utah.gov/documents/conconv/22.htm ("Convention Proceedings").

Pennsylvania Supreme Court did so in 2018. *LWVPA*, 645 Pa. at 122-23. This year, applying nearly identical Free Elections Clauses to Utah's provision, courts in North Carolina and Maryland ruled partisan gerrymanders unconstitutional. *Harper*, 868 S.E.2d at 547-49, *Szeliga*, *supra*, at 93-94.

By expressly guaranteeing the right to "free elections" and "free exercise of the right of suffrage," the Utah Constitution provides greater protection than its federal counterpart. The Free Elections Clause makes the Utah Constitution "more detailed and specific than the federal Constitution in the protection of the rights of its citizens," filling the gap in protecting rights where federal law runs short. *Harper*, 868 S.E.2d at 533; *accord Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. 2006) ("Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.") The Free Elections Clause is precisely the type of "[p]rovision[] in … state constitutions [that] can provide standards and guidance for state courts to apply" against partisan gerrymandering. *Rucho*, 139 S. Ct. at 2507.

Applying the Free Elections Clause to partisan gerrymandering, Plaintiffs have sufficiently alleged their claims. At this early stage, before substantial briefing and argument, the Court need not yet decide exactly what constitutes a violation of the Free Elections Clause because Plaintiffs have stated a sufficient claim for relief under any test this Court may adopt. And for the purposes of this motion, the Court must accept Plaintiffs' allegations as true. If this Court does determine the pleading standard, it should adopt an effects-based test consistent with the Court's precedent in other contexts and other state courts' Free Elections Clause decisions. *See supra* Part I.B.

Plaintiffs' Complaint meets this standard. First, Plaintiffs allege that the Plan achieves extreme and durable partisan advantage by cracking Utah's large and concentrated population of

non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to diminish their electoral strength. Compl. ¶ 207. In doing so, the Plan manipulated the democratic process to make it systematically harder for non-Republican voters to elect a congressional candidate. It entrenches a single party in power and will reliably ensure Republicans are elected in all of the State's congressional seats for the next decade, despite a compact and sizeable population of non-Republican voters that, in a partisan-neutral map, would comprise a majority of a district covering most of Salt Lake County. *Id.* ¶¶ 6, 206-209, 226-231.

Second, this extreme partisan skew cannot be explained by any legitimate justification or traditional redistricting principles. *Id.* ¶¶ 187-98, 233-54. The only justification Defendants offer is "an intent to ensure a mix of urban and rural areas in each congressional district." Mot. at 5, 23, 26. But at the motion to dismiss stage, the Court must accept Plaintiffs well-pled allegations that this justification is a pretext for seeking partisan advantage. Compl. ¶¶ 128-130, 177-78, 180-81, 187-198. The character of the district lines, the faulty redistricting process, and actions and statements made by elected officials involved in approving the Plan make clear that the Plan was enacted for partisan advantage. *Id.* ¶¶ 3-5, 141-198, 200, 233-235, 254, 275. And seeking "partisan advantage … is neither a compelling nor a legitimate governmental interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government." *Harper*, 868 S.E.2d at 549.

In any event, even if the rural-urban mix justification were not pretextual, it is not a legitimate basis for redistricting. Under state law principles, there is no legitimate legislative purpose in allowing rural voters to "wield[] disproportional power" in the state's political processes. *Count My Vote*, 2019 UT 60, ¶ 26. The Legislature cannot enact laws in which the

"legislature intended that the rural minority would act as a check and a balance on the urban majority." *Utah Safe to Learn-Safe to Worship Coal., Inc. v. State*, 2004 UT 32, ¶ 42; *accord Gallivan*, 2002 UT 89, ¶¶ 61, 72. Federal law likewise "reject[s]" any "claim that the … apportionment is sustainable as involving an attempt to balance urban and rural power in the" representative body because "this explanation lack[s] legal merit." *Davis v. Mann*, 377 U.S. 678, 692 (1964); *accord Reynolds*, 377 U.S. at 567 ("The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote"). In sum, Plaintiffs adequately alleged a Free Elections Clause claim.[14]

B. Plaintiffs properly allege state equal protection claims.

Plaintiffs also sufficiently pled that the Plan violates their state equal protection rights. *See, e.g.*, Compl. ¶¶ 187-192, 205-07, 270-82. The Utah Constitution states that "[a]ll laws of a general nature shall have uniform operation," Utah Const. art. I, § 24, and that, at its core, Utah's government is "founded on [the people's] authority for their equal protection and benefit," *id.* § 2. These "[b]asic principles of equal protection of the law are inherent in the very concept of justice and are a necessary attribute of a just society." *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984). Utah's equality guarantees prohibit laws that infringe the rights of some Utahns more than others without a legitimate justification. Evaluating whether the Plan operates toward voters who are "similarly situated within constitutional parameters is an issue that must ultimately be decided by

[14] Defendants make a passing reference to *Anderson v. Cook*, 130 P.2d 278 (Utah 1942), to imply that the Free Elections Clause is not self-executing. Mot. at 22. Such an underdeveloped, one-line argument fails to give Plaintiffs or the Court proper notice of Defendants' contention and is thus not properly presented. If this Court reaches the issue, it should allow Plaintiffs additional briefing to respond to what, if any, arguments Defendants make so that Plaintiffs may discuss how the Free Elections Clause squares with modern self-executing analysis, the extent of the rule in *Anderson v. Cook*, and whether *Anderson* is inconsistent with precedent and should be overruled.

the judiciary," *Lee*, 867 P.2d at 577, with the guiding principle that redistricting must be "free from any taint of arbitrariness or discrimination." *Petuskey*, 234 F.Supp. at 964 (citation omitted).

By its plain terms, the Uniform Operation of Laws Clause is an effects-oriented standard, "protect[ing] against discrimination within a class and guard[ing] against *disparate effects* in the application of laws." *Gallivan*, 2002 UT 89, ¶ 38 (emphasis added); *see also Cook*, 2014 UT 46, ¶ 29 ("[U]nder the Utah Constitution, a statute may be held unconstitutional both on its face and for any de facto disparate effects on similarly situated parties."). The protection "demands more than facial uniformity; the law's operation must be uniform." *State v. Drej*, 2010 UT 35, ¶ 33; *see also Blackmarr v. City Ct. of Salt Lake City*, 86 Utah 541, 38 P.2d 725, 727 (1934) (reinforcing that laws must not "operate unequally, unjustly, and unfairly upon those who come within the same class" (citation omitted)). Although "there is a similitude in the 'fundamental principles' embodied in the federal Equal Protection Clause" and Utah's equality guarantees, the State's constitutional protection is "in some circumstances, more rigorous than the standard applied under the federal constitution." *Gallivan*, 2002 UT 89, ¶ 33 (citation omitted). Here, in contrast to the Equal Protection Clause, the analysis under the Utah Constitution focuses on whether the *operation* of a challenged law is uniform, without regard to discriminatory purpose.[15]

Apart from this core difference, the Utah Supreme Court has adopted several relevant federal principles on the meaning of equality in the democratic process. *See Gallivan*, 2002 UT 89, ¶¶ 24, 60, 72; *Shields v. Toronto*, 16 Utah 2d 61, 66 n.12, 395 P.2d 829 (1964); *Dodge v. Evans*,

[15] Even if the Court required discriminatory purpose, which it should not, Defendants do not contest Plaintiffs' well-pled allegations concerning discriminatory intent, and they must be accepted as true at this stage. *See, e.g.*, Compl., ¶¶ 3, 5, 141-198, 200, 233-235, 254, 275.

716 P.2d 270, 273-74 (Utah 1985). First, "achieving of fair and effective representation for all citizens is concededly the basic aim" of redistricting, which must "guarantee[] the opportunity for equal participation by all voters in the election of" the people's representatives. *Gallivan*, 2002 UT 89, ¶ 72 (quoting *Reynolds*, 377 U.S. at 565-66). Second, the Constitution "amply provides for the protection of minorities by means other than giving them majority control of" representative bodies. *Id.* ¶ 60 (quoting *Reynolds*, 377 U.S. at 565-66). Third, "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights" and is unlawful "just as much as invidious discriminations based upon factors such as race or economic status." *Id.* ¶ 72 (quoting *Reynolds*, 377 U.S. at 565-66). Under these principles, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. Partisan gerrymandering is such a "debasement or dilution" because it deprives certain voters of "an equally effective voice in the election of" their representatives. *Id.* at 565. Numerous other state courts have applied similar rules of electoral equality to curtail partisan gerrymandering under materially indistinguishable state equal protection provisions compared to Utah's provisions. *See, e.g.*, Order at 7, *In the Matter of the 2021 Redistricting Cases*, S-18419 (Alaska May 24, 2022) (applying *Kenai*, 743 P.2d at 1371) (opinion forthcoming); *Harper*, 868 S.E.2d at 542-45; *Szeliga*, at 28-35, 93-94.

Here, Plaintiffs sufficiently alleged that the Plan violates the Utah Constitution's equality guarantees. The applicable test is whether (1) the challenged law creates classifications, (2) the classifications have nonuniform discriminatory effects, and (3) the nonuniformity is not "reasonably necessary to further a legitimate legislative goal." *Gallivan*, 2002 UT 89, ¶¶ 42-43. Plaintiffs' allegations more than satisfy their pleading requirements for this claim.

First, the Plan creates classifications that "result from the application and operation" of the map. *Id.* ¶ 44. The district lines differentiate between similarly situated voters based on both partisanship and an arbitrary urban-rural distinction. Compl. ¶¶ 4, 207-27, 274-75. These classifications are akin to the one ruled unconstitutional in *Gallivan*, where the Utah Supreme Court held that a multi-county signature requirement created "two subclasses of registered voters: those who reside in rural counties and those who reside in urban counties." 2002 UT 89, ¶¶ 44.

Second, the redistricting Plan imposes nonuniform discriminatory effects on similarly situated voters. Compl. ¶¶ 2, 4, 15, 23, 29-33, 36, 130, 187-198, 276. Utah's Republican voters and non-Republican voters are similarly situated for redistricting purposes because both groups are entitled to equally weighted votes. The same is true for voters living in urban settings and rural settings. But the Plan diminishes the voting strength of non-Republican and urban voters while amplifying the strength of Republican and rural voters. *See id.* Plaintiffs have sufficiently alleged, and will prove through evidence, that the Plan's vote dilution and debasement of certain voters based on who they vote for and where they live impose nonuniform discriminatory effects.

Third, Plaintiffs sufficiently alleged that no legitimate or sufficiently tailored justification warrants the Plan's uniformity defects. *Id.* ¶¶ 277-81. Heightened scrutiny applies here because the challenged law "impacts the right of the people to exercise their reserved legislative power and their right to vote" and "both are fundamental and critical rights to which the Utah Constitution has accorded special sanctity." *Gallivan*, 2002 UT 89, ¶ 41. As in *Gallivan*, Utahns' right to vote is implicated not just by direct restrictions on the franchise but also by laws that diminish voters' "substantive and meaningful participation in enacting legislation that impacts society." *Id.* ¶ 25.

In seeking a lower level of scrutiny, Defendants assert that partisan gerrymandering "does not affect a fundamental or critical right." Mot. 22-26. That argument ignores *Gallivan* and the bevy of cases recognizing Utahn's fundamental right to an equal vote. But even if the Court applied a lower level of scrutiny, Plaintiffs still adequately alleged the absence of a legitimate justification for treating voters differently based on how or where they vote. *See supra* Part III.A. This is because "the policy underlying the uniform operation of the laws provision … militates against arbitrary laws that favor the interests of the politically powerful over the interests of the politically vulnerable," *Lee*, 867 P.2d at 581, and "weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." *Gallivan*, 2002 UT 89, ¶ 72 (citation omitted). Plaintiffs sufficiently pled their state equal protection claims.

C. Plaintiffs properly allege free speech and association claims.

Plaintiffs sufficiently pled their free speech and associational claims. Compl., ¶¶ 3-4, 36, 283-97. The Utah Constitution states that "[a]ll persons have the inherent and inalienable right to . . . assemble peaceably," to "petition for redress of grievances," and to "communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, § 1. In addition, it specifies: "No law shall be passed to abridge or restrain the freedom of speech or of the press." Utah Const. art. I, § 15. Together, these clauses define Utahns' free speech and assembly rights and "prohibit laws which either directly limit [those] protected rights or indirectly inhibit the exercise of those rights." *Am. Bush*, 2006 UT 40, ¶ 21.

Partisan gerrymandering violates Utahns' free speech and association protections by unconstitutionally discriminating and retaliating against members of the disfavored party based on viewpoint, and by burdening their freedom of association. Compl., ¶¶ 3-4, 36, 283-97. A "healthy

political exchange . . . is the foundation of our system of free speech and free elections." *Jacob*, 2009 UT 37, ¶ 29. Plaintiffs seek to engage in this healthy political exchange by expressing their viewpoints and voting in favor of non-Republican candidates, while associating with likeminded Utahns expressing similar views. But partisan gerrymandering cuts off this exchange by rewarding popular views with favorable representation and punishing unpopular views with none. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (observing that "voters' express their views in the voting booth").[16] As the *Harper* court explained, when a legislature gerrymanders to "dilute[] the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it … intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny" because it "subjects certain voters to disfavored status based on their views." 868 S.E.2d at 546. These speech and "associational harm[s] of a partisan gerrymander [are] distinct from vote dilution." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

The Plan discriminates and retaliates against Utahns based on their disfavored viewpoints. Compl., ¶¶ 3-4, 36, 288-89, 292-96. The Plan cracks non-Republican voters in the Salt Lake County area, disadvantaging them because of their expressed political beliefs and past voting behavior. *Id*. This violates free speech protections because the government cannot "restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014); *accord Elrod v. Burns*, 427 U.S. 347, 356 (1976) (holding that

[16] First Amendment authority is "persuasive to [the Utah courts'] independent construction of article I, sections 1 and 15." *West v. Thomson Newspapers*, 872 P.2d 999, 1018 (Utah 1994). Plaintiffs cite federal cases for this purpose but argue that these cases should not impose any limitation on Utah courts providing broader protections under the Utah Constitution.

viewpoint-neutrality principles prohibit State action that distorts "[t]he free functioning of the electoral process" or "tips the electoral process in favor of the incumbent party").

Similarly, the Plan abridges Plaintiffs' freedom of association. *See* Compl., ¶¶ 36, 283-297. The Utah Constitution protects "the right of individuals to associate for the advancement of political beliefs." *Gallivan*, 2002 UT 89, ¶ 26 (citation omitted). Affiliating with a political party and supporting candidates of choice are inherent communicative and 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); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views"). The Plan abridges associational freedoms by dividing voters with disfavored political views into separate congressional districts to diminish their collective action, which hinders their ability to recruit volunteers, secure contributions, and effectively join with other voters to advocate for their views. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (applying *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983)).

Defendants' do not dispute Plaintiffs' alleged facts supporting their speech and association claims, which in any event must be accepted as true. *See* Compl, ¶¶ 3-4, 36, 283-97. Instead, they argue that Article I § 1 and § 15 "do not relate to the redistricting process." Mot. at 26. To support this claim, they cite *American Bush* and assert that "the framers of [Utah's] constitution … envisioned a limited freedom of speech." *Id.* at 27. But *American Bush* is about obscenity and simply concludes that the Framers did not intend to protect obscene speech. *Id.* ¶ 54. A lack of

protection for obscenity does not translate into a lack of protection for free speech and association rights related to voting, which were not before the *American Bush* court.

Unlike obscenity, voting is fundamental, protected speech. *See e.g.,* *Laws v. Grayeyes*, 2021 UT 59, ¶ 61 ("the right to vote is sacrosanct"); *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (acknowledging "the existence of a First Amendment interest in voting"). Indeed, "the framers of Utah's constitution saw the will of the people as the source of constitutional limitations upon our state government." *Am. Bush*, 2006 UT 40, ¶ 13. Partisan gerrymandering infringes what Utah's Framers saw as the fundamental source of government—the ability of people to freely express their views and, working together, hold officials accountable to "guard … against the encroachments of tyranny." *Id.* (citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 36-37 (1868)).

The constitutional text confirms that the Framers understood Utah's Constitution to prevent governmental action, like partisan gerrymandering, that abridges the people's ability to express their political will or hold government accountable. Utah's speech and association protections are broader than the federal counterpart. *See, e.g.*, *Provo City Corp. v. Willden*, 768 P.2d 455, 456 n.2 (Utah 1989). Rather than being "limited," as Defendants urge, the Utah Constitution expressly includes the ability to "communicate freely," protections that are not found in the federal First Amendment. Assembling and associating with others to discuss political issues and support candidates, protest against wrongs and grievances through organizing and voting, and freely communicating views are all activities intended to allow expression of the people's will and to serve as a check on elected representatives. Compl., ¶¶ 3-4, 36, 283-97.

Drawing district lines on a partisan basis to elevate the party in power's favored views to the detriment of those expressing opposing views is subject to strict scrutiny. *See Harper*, 868 S.E.2d at 546; *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). Defendants cannot show a compelling, let alone legitimate, justification for this discrimination. *See supra* Part III.A.

D. Plaintiffs properly allege a right to vote claim.

Article IV § 2 of the Utah Constitution expressly guarantees the right to vote, providing that "[e]very citizen" who meets eligibility requirements "*shall be entitled to vote* in the election." Utah Const. art. IV, § 2 (emphasis added). The Utah Supreme Court interprets Article IV § 2 in light of its recognition that the right to vote is "among the most precious of the privileges for which our democratic form of government was established." *Rothfels v. Southworth*, 356 P.2d 612, 617 (Utah 1960). Because the right to vote is critical to the "over-all functioning of our democratic system of government" and "of vital importance to both individual citizens and to the public," the judiciary must endeavor "to make the [right to vote] meaningful." *Shields*, 395 P.2d at 832.

As such, Article IV § 2 prohibits the Legislature from regulating elections in any manner that "defeat[s] the public will" and requires it to "secure[] a fair expression at the polls." *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 238 (1904). The Legislature may neither "take away" the fundamental right to vote nor otherwise "abridge or impair" that right. *Nowers v. Oakden*, 169 P.2d 108, 117 (Utah 1946) (quoting *Earl*, 77 P. at 238). Any law that renders the "right to vote . . . improperly burdened, conditioned, *or diluted*" violates article IV, section 2. *Dodge*, 716 P.2d at 273 (emphasis added); *see also Gallivan*, 2002 UT 89 ¶ 72 (applying *Reynolds*, 377 U.S. at 563).

Here, Plaintiffs adequately plead a violation of Article IV § 2. They allege that the Plan dilutes, impairs, and abridges their right to vote by giving greater effect to favored voters to the

detriment of disfavored votes, and distorting the public will by predetermining election outcomes. Compl., ¶¶ 304-306. This impairment serves no legitimate interest. *Id.* ¶¶ 305-09. For Plaintiffs' right to vote to be meaningful, they must be empowered to vote under a partisan neutral map.

Defendants' only answer is that Article IV § 2 is "inapplicable to the present circumstances" because it merely "addresses the qualifications to cast a vote." Mot. at 28. That argument ignores decades of Utah precedent recognizing that the provision confers substantive rights, entitling "every" qualified Utahn a right to "vote in [] election[s]." Utah Const. art. IV, § 2. It ignores precedent recognizing that this right to vote must be meaningful, and invalidating laws and regulations that render the right illusory via diminishment and dilution—precisely the effect of partisan gerrymandering. Plaintiffs properly pled their Article IV § 2 claim.

E. The presumption of constitutionality and separation of powers doctrines do not bar Plaintiffs' claims.

There is no merit to Defendants' efforts to cast aside Plaintiffs well-pled, cognizable claims based on either the presumption of constitutionality or the separation of powers doctrine. Mot. at 18-19. While the Court is rightfully deferential to the people's representatives in some instances, that is not so when the Legislature violates fundamental rights or, as here, is manipulating the proper functioning of the democratic process.

First, the presumption of constitutionality is no barrier here. When a challenged law "deals with certain particularly sensitive constitutional values or discriminates based on suspect classifications, the Legislature's latitude is substantially narrowed." *State v. Bishop*, 717 P.2d 261, 266 (Utah 1986). These "sensitive constitutional values" includes voting rights. *Id.* (citing *Dodge*, 716 P.2d 270). As the Utah Supreme Court has long ruled, the judiciary must "be ever mindful of the obligation that [it] ha[s] assumed to obey and to defend the Constitution," including, critically,

"the duty of the courts to protect and safeguard the rights of the individual whenever such rights are invaded from whatever source." *State v. Holtgreve*, 58 Utah 563, 200 P. 894, 900 (1921). Thus, the presumption evaporates when a "significant constitutional right is claimed to have been abrogated." *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 43 (Durham, C.J., dissenting) (collecting cases applying heightened scrutiny).

Second, Defendants' separation-of-powers argument fares no better. It rests on a fundamental misinterpretation of Article IX § 1, which is incorrect for multiple reasons. See *supra* Part I.A. Defendants' argument also misapplies precedent interpreting Article V § 1. That provision permits overlapping authority so long as one branch is not usurping authority from the other. *See In re Young*, 1999 UT 6, ¶ 14; *Matheson*, 641 P.2d at 676. To violate the separation of powers, the subject at issue must "categorically … be 'so inherently legislative, executive or judicial in character that they must be exercised exclusively by their respective departments.'" *In re Young*, 1999 UT 6, ¶ 14 (citation omitted). There are "powers and functions which may, in appearance, have characteristics of an inherent function of one branch but which may be permissibly exercised by another branch." *Id.* Thus, "[a]bsent any specific language in the Constitution prohibiting" overlapping authorities of one branch with another," as is the case here, the judiciary serves "a legitimate check and balance on a[legislative] function … to prevent its abuse" and the Court cannot "shirk [its] duty to find an act of the Legislature unconstitutional." *Matheson*, 641 P.2d at 676, 678-80. If necessary, the Court may itself conduct redistricting to remedy the constitutional violation. *See Harper*, 868 S.E.2d at 559-60; *LWVPA*, 645 Pa. at 134.

Gerrymandering is irreconcilable with the basis for legislative deference and judicial review here preserves the separation of powers. The presumption underlying legislative deference

is that the Legislature represents "the will of the people." *Laney v. Fairview City*, 2002 UT 79, ¶ 108 (Russon, J., concurring in part), *abrogated in part on other grounds*, *see Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 95. Such deference—and a host of judicial doctrines premised on such deference—make little sense in a world where legislators choose their own voters, ensuring the will of the people is not accurately expressed. Because partisan gerrymandering compromises both the integrity of the legislative branch and the judicial branch's ability to assume democratic accountability, in these circumstances, the role of courts to enforce the Constitution is crucial.

IV. Plaintiffs properly challenge the Legislature's repeal of Prop 4.

Apart from their partisan gerrymandering claims, Plaintiffs also sufficiently allege that the Legislature lacked the constitutional authority to repeal Prop. In enacting Prop 4, the voters acted on their own co-equal legislative authority to take politics out of redistricting. In repealing that measure, the Legislature violated Plaintiffs' "reserved right and power of initiative," which "is a fundamental right." *Gallivan*, 2002 UT 89, ¶ 24; *see also Utahns For Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 2007 UT 97, ¶ 10 (reinforcing *Gallivan*).

Article I § 2 provides Utah's fundamental commitment to government by the people:

> All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, *and they have the right to alter or reform their government as the public welfare may require*.

Utah Const. art. I, § 2 (emphasis added). It guarantees that all governmental "power derives from the people, who can delegate it to representative instruments which they create," but "the people are the ultimate source of sovereign power." *Carter*, 2012 UT 2, ¶¶ 21, 25 & n.9 (in part quoting *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 672 (1976)); *accord Duchesne Cty. v. State Tax Comm'n*, 140 P.2d 335, 340 (Utah 1943). The provision thus "clearly expresse[s]" the

"allocation of power to alter the most basic expression of our commitment to ordered society" to the people. *Council of Holladay City v. Larkin*, 2004 UT 24, ¶ 19) (citing Utah Const. art. I, § 2). Accordingly, "only Utah's citizens themselves ha[ve] the right to limit their own sovereign power," because negating the people's right to reform their government "would be to deny political powers to the citizens of Utah that they in their wisdom and judgment had retained for themselves," *Am. Bush*, 2006 UT 40, ¶ 14 (quoting Utah Const. art. I, § 2).

The democratic commitments in Article I § 2 offer enforceable and fundamental rights that preserve power in the people and restrain the government. The text specifies Utahns' "*right* to alter or reform their government," Utah Const. art. I, § 2 (emphasis added), and precedent confirms that the provision confers "specifically reserved rights" in the people. *Sevier Power Co., LLC v. Bd. of Sevier Cty. Comm'rs*, 2008 UT 72, ¶ 6; *accord Am. Bush*, 2006 UT 40, ¶ 14. The provision's location in the Declaration of Rights and its mandatory wording further reinforce that the Framers designed Article I § 2 to express enforceable rights. *See* Utah Const. art. I, § 26. And convention history supports that Article I § 2 protects Utahns' fundamental rights.[17]

One method by which Utahns operationalize their Article I § 2 rights is through their citizen-lawmaking authority under Article VI § 1. That provision vests "[t]he Legislative power of the State" in both "(a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in subsection 2." Utah Const. art. VI, § 1(1). Subsection 2 then guarantees "[t]he legal voters of the State of Utah" the right to "initiate any desired legislation and cause it to be submitted to the people for

[17] *See* Convention Proceedings (Mar. 20, 1895), le.utah.gov/documents/conconv/17.htm (debates between Chairman Wells and Delegate Varian concerning applicability of Art. I, § 2).

adoption upon a majority vote of those voting on the legislation," subject to restrictions "in the numbers, under the conditions, in the manner, and within the time provided by statute." *Id.* § 1(2)(a). This division of lawmaking authority gives Utahns "coequal" legislative power through citizen initiatives. *Carter*, 2012 UT 2, ¶ 20. And it affords Utahns a dedicated authority to effectuate their core Article I § 2 rights to reform their government. *See, e.g.*, *Matter of City of W. Valley*, 616 P.2d 604, 606 (Utah 1980) (stating connection between provisions).

Prop 4 passed through the people's initiative authority under Article VI § 1 and engaged their Article I § 2 rights because it created a new entity to take primary responsibility over redistricting and implemented binding standards on the people's representatives to ensure fair and responsive government. Compl. ¶¶ 3, 37, 72-73, 80-91, 314-15. Voters understood that Prop 4 was an exercise of their right to alter or reform government because the initiative drafters expressly invoked those rights. *Id.* ¶¶ 77-78. Utahns have not before passed a citizen initiative that executes their right to reform their government, and the Legislature has never before repealed such a law. The Legislature's repeal of Prop 4's enactments is unprecedented, unconstitutional, and antithetical to the core premise underlying representative government. *Id.* ¶¶ 37, 317-18.

Case law has not determined whether the Legislature could, in exercising "coequal" lawmaking authority under Article VI § 1, wholly repeal an initiative-enacted law concerning subjects other than government reform.[18] Here, however, Article I § 2 is clear that the people

[18] Defendants take for granted an asserted power to repeal citizen-initiated laws in other contexts—an assertion that is far from certain and lacks historical grounding. On the contrary, the people's legislative power "may have 'superior advantages' to the legislature's power" because "the Constitution vests the Governor with veto power on acts of the Legislature, but he has no veto power on legislation enacted by the people through the initiative," *see Carter*, 2012 UT 2, ¶ 22 n.10 (quoting *Utah Power & Light Co. v. Provo City*, 74 P.2d 1191, 1202 (Utah 1937) (Larson, J.,

specifically reserve the right to alter or reform their government, and they may do so via Article VI § 1. But neither provision, nor any other part of the Constitution, gives the Legislature power to *repeal* a citizen-initiated law that invokes the people's government-reform rights.

Thus, Plaintiffs properly assert their rights under Article I § 2 and Article VI § 1, and maintain that the Legislature exceeded its constitutional authority by repealing Prop 4 through SB 200. *See* Compl., ¶¶ 3, 37, 72-77, 314-17. Article VI § 1 limits the Legislature, requiring it to enact laws setting the number, conditions, manner, and time for regulating the *procedures* of the initiative process, which must "*enable* the people to exercise their reserved power and right to directly legislate through initiative," not frustrate their expressed will. *Gallivan*, 2002 UT 89, ¶ 28 (emphasis added). It also specifically grants the people the power to disapprove of laws enacted by the Legislature but contains no such reciprocal power to the Legislature. Article I § 2 gives the Legislature no authority at all, expressing a clear reserved power in the people alone. The Legislature is thus "limited, as a consequence, to the role of providing for the orderly and reasonable use of the initiative power." *Sevier Power*, 2008 UT 72, ¶ 10. The Legislature cannot set substantive restrictions on that power, much less repeal the people's government-reform actions.

Inventing this repeal authority would render Utahns' fundamental rights a dead letter so long as a supermajority of legislators disagreed with the people exercising their lawmaking authority to alter their government. Such a rule is "not consonant with the concept of representative

concurring). Thus, the only defined constitutional limits on the people's lawmaking authority are that they must comply with a procedural framework established in statutes and the subject of the initiative must be legislative in nature. *See id.* at 148-49.

democracy" because "[t]he political power, which the people possess under Article I, Sec. 2, and which they confer on their elected representatives is to be exercised by persons responsible and accountable to the people—not independent of them." *Salt Lake City v. Int'l Ass'n of Firefighters*, 563 P.2d 786, 790 (Utah 1977). Thus, Plaintiffs state a claim that repealing the laws created from Prop 4 was "beyond the power of the legislature to enact," *see Sevier Power*, 2008 UT 72, ¶ 10, because it unconstitutionally "effectively abrogated, severely limited, [and] unduly burdened" the people's fundamental initiative power and right to reform their government. *Gallivan*, 2002 UT 89, ¶ 28.

CONCLUSION

For these reasons, the Court should deny the Legislative Defendants' motion to dismiss. Pursuant to Utah R. Civ. P. 7(h), Plaintiffs respectfully request a hearing.

Date: June 1, 2022

RESPECTFULLY SUBMITTED,

/s/ David C. Reymann

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of June 2022, I filed the foregoing

MEMORANDUM OPPOSING LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

via electronic filing, which served all counsel of record.

/s/ David C. Reymann

EXHIBIT H

A

DICTIONARY OF LAW

CONTAINING

DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN

INCLUDING

THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, AND COMMERCIAL LAW; WITH A COLLECTION OF LEGAL MAXIMS AND NUMEROUS SELECT TITLES FROM THE CIVIL LAW AND OTHER FOREIGN SYSTEMS

BY HENRY CAMPBELL BLACK, M. A.

Author of Treatises on "JUDGMENTS," "TAX-TITLES," "CONSTITUTIONAL PROHIBITIONS," etc.

ST. PAUL, MINN.
WEST PUBLISHING CO.
1891

the numerous frauds which were believed to be perpetrated, and the perjuries which were believed to be committed, when such obligations could be enforced upon no other evidence than the mere recollection of witnesses. It is more fully named as the "statute of frauds and perjuries."

FRAUDULENT CONVEYANCE. A conveyance or transfer of property, the object of which is to defraud a creditor, or hinder or delay him, or to put such property beyond his reach.

Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor. Civil Code Cal. § 3439.

A transfer made by a person indebted or in embarrassed circumstances, which was intended or will necessarily operate to defeat the right of his creditors to have the property applied to the payment of their demands. Abbott.

FRAUDULENT CONVEYANCES, STATUTES OF, OR AGAINST. The name given to two celebrated English statutes,—the statute 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5; and the statute 27 Eliz. c. 4, made perpetual by 29 Eliz. c. 18.

FRAUDULENT PREFERENCES. In English law. Every conveyance or transfer of property or charge thereon made, every judgment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys, in favor of any creditor, with a view of giving such creditor a preference over other creditors, shall be deemed fraudulent and void if the debtor become bankrupt within three months. 32 & 33 Vict. c. 71, § 92.

FRAUNC, FRAUNCHE, FRAUNKE. See FRANK.

FRAUNCHISE. L. Fr. A franchise.

FRAUS. Lat. Fraud. More commonly called, in the civil law, "*dolus*" and "*dolus malus*," (*q. v.*) A distinction, however, was sometimes made between "*fraus*" and "*dolus*;" the former being held to be of the most extensive import. Calvin.

FRAUS DANS LOCUM CONTRACTUI. Lat. A misrepresentation or concealment of some fact that is material to the contract, and had the truth regarding which been known the contract would not have been made as made, is called a "fraud *dans locum contractui*;" *i. e.*, a fraud occasioning the contract, or giving place or occasion for the contract.

Fraus est celare fraudem. It is a fraud to conceal a fraud. 1 Vern. 240; 1 Story, Eq. Jur. §§ 389, 390.

Fraus est odiosa et non præsumenda. Fraud is odious, and not to be presumed. Cro. Car. 550.

Fraus et dolus nemini patrocinari debent. Fraud and deceit should defend or excuse no man. 3 Coke, 78; Fleta, lib. 1, c. 13, § 15; Id. lib. 6, c. 6, § 5.

Fraus et jus nunquam cohabitant. Wing. 680. Fraud and justice never dwell together.

Fraus latet in generalibus. Fraud lies hid in general expressions.

FRAUS LEGIS. Lat. In the civil law. Fraud of law; fraud upon law. See IN FRAUDEM LEGIS.

Fraus meretur fraudem. Plowd. 100. Fraud merits fraud.

FRAXINETUM. In old English law. A wood of ashes; a place where ashes grow. Co. Litt. 4*b*; Shep. Touch. 95.

FRAY. See AFFRAY.

FRECTUM. In old English law. Freight. *Quoad frectum navium suarum*, as to the freight of his vessels. Blount.

FREDNITE. In old English law. A liberty to hold courts and take up the fines for beating and wounding. To be free from fines. Cowell.

FREDSTOLE. Sanctuaries; seats of peace.

FREDUM. A fine paid for obtaining pardon when the peace had been broken. Spelman; Blount. A sum paid the magistrate for protection against the right of revenge.

FREE. 1. Unconstrained; having power to follow the dictates of his own will. Not subject to the dominion of another. Not compelled to involuntary servitude. Used in this sense as opposed to "slave."

2. Not bound to service for a fixed term of

years; in distinction to being bound as an apprentice.

3. Enjoying full civic rights.

4. Available to all citizens alike without charge; as a free school.

5. Available for public use without charge or toll; as a free bridge.

6. Not despotic; assuring liberty; defending individual rights against encroachment by any person or class; instituted by a free people; said of governments, institutions, etc. Webster.

7. Certain, and also consistent with an honorable degree in life; as free services, in the feudal law.

8. Confined to the person possessing, instead of being shared with others; as a free fishery.

9. Not engaged in a war as belligerent or ally; neutral; as in the maxim, "Free ships make free goods."

FREE ALMS. The name of a species of tenure. See FRANK-ALMOIGNE.

FREE-BENCH. A widow's dower out of copyholds to which she is entitled by the custom of some manors. It is regarded as an excrescence growing out of the husband's interest, and is indeed a continuance of his estate. Wharton.

FREE-BORD. In old records. An allowance of land over and above a certain limit or boundary, as so much beyond or without a fence. Cowell; Blount.

The right of claiming that quantity. Termes de la Ley.

FREE BOROUGH MEN. Such great men as did not engage, like the frank-pledge men, for their decennier. Jacob.

FREE CHAPEL. In English ecclesiastical law. A place of worship, so called because not liable to the visitation of the ordinary. It is always of royal foundation, or founded at least by private persons to whom the crown has granted the privilege. 1 Burn, Ecc. Law, 298.

FREE COURSE. In admiralty law. A vessel having the wind from a favorable quarter is said to sail on a "free course."

FREE ENTRY, EGRESS, AND REGRESS. An expression used to denote that a person has the right to go on land again and again as often as may be reasonably necessary. Thus, in the case of a tenant entitled to emblements.

FREE FISHERY. A franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil. 3 Kent, Comm. 410.

FREE ON BOARD. A sale of goods "free on board" imports that they are to be delivered on board the cars, vessel, etc., without expense to the buyer for packing, cartage, or other such charges.

In a contract for sale and delivery of goods "free on board" vessel, the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made. 117 Pa. St. 508, 12 Atl. Rep. 32.

FREE SERVICES. In feudal and old English law. Such feudal services as were not unbecoming the character of a soldier or a freeman to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. 2 Bl. Comm. 60, 61.

FREE SHIPS. In international law. Ships of a neutral nation. The phrase "free ships shall make free goods" is often inserted in treaties, meaning that goods, even though belonging to an enemy, shall not be seized or confiscated, if found in neutral ships. Wheat. Int. Law, 507, et seq.

FREE SOCAGE. In English law. A tenure of lands by certain free and honorable services, (such as fealty and rent,) and which are liquidated and reduced to a certainty. It was called "*free* socage" because the services were not only free, but honorable; whereas in *villein* socage the services, though certain, were of a baser nature. 2 Bl. Comm. 78, 79.

FREE SOCMEN. In old English law. Tenants in free socage. Glanv. lib. 3, c. 7; 2 Bl. Comm. 79.

FREE TENURE. Tenure by free services; freehold tenure.

FREE WARREN. A franchise for the preserving and custody of beasts and fowls of warren. 2 Bl. Comm. 39, 417; Co. Litt. 233. This franchise gave the grantee sole right of killing, so far as his warren extended, on condition of excluding other persons. 2 Bl. Comm. 39.

FREEDMAN. In Roman law. One who was set free from a state of bondage; an emancipated slave. The word is used in the same sense in the United States, respecting negroes who were formerly slaves.

EXHIBIT I

A

DICTIONARY OF LAW,

CONSISTING OF

JUDICIAL DEFINITIONS AND EXPLANATIONS

OF

WORDS, PHRASES, AND MAXIMS,

AND AN

EXPOSITION OF THE PRINCIPLES OF LAW:

COMPRISING A

DICTIONARY AND COMPENDIUM OF AMERICAN AND ENGLISH JURISPRUDENCE.

BY

WILLIAM C. ANDERSON,

OF THE PENNSYLVANIA BAR.

CHICAGO:

T. H. FLOOD AND COMPANY,

LAW PUBLISHERS.

1889.

shall also be in writing, signed by the grantor or assignor (sec. 9); and that estates *pur autre vie* may be taken in execution for debt, or be deemed assets by descent for the payment of debts (sec. 10).[1]

III. As applying to Common Law. Enacts that no action shall be brought whereby: (1) To charge an executor or administrator upon any special promise to answer for damages out of his own estate.[2] (2) To charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another. See PROMISE, Original; GUARANTY, 2. (3) To charge any person upon any agreement made upon consideration of marriage. See SETTLEMENT, Marriage. (4) To charge any person upon any contract or sale of lands, or any interest in or concerning them. See LAND. (5) To charge any person upon any agreement that is not to be performed within one year from the making thereof, — *unless*, in each case (1-5), the agreement or some note or memorandum thereof is in writing and signed by the party to be charged therewith or by his agent thereunto lawfully authorized in writing (sec. 4).[3]

If the performance of the contract depends upon a contingency which may happen within a year, the contract need not be in writing. It is sufficient if the possibility of performance exists.[4]

(6) That in a contract for the sale of goods, wares, or merchandise, for the price of ten pounds or upward, the buyer must actually receive and accept part of the goods, etc., or give something in earnest or in part payment, or the parties, or their agents, sign some note or memorandum of the bargain (sec. 17).[5] See EARNEST; PAYMENT, Part.

(7) That judgments against lands shall bind purchasers from the day of signing, and against goods when the writ of execution is delivered to the sheriff (secs. 14, 15).

(8) Provides for additional solemnities in the execution of wills.[6] See WILL, 2, Statute of Wills.

The provisions as to the transfer of interests in land, and to promises, which at common law could be effected by *parol*, that is, without writing, comprise all that in professional use is meant by the statute.

The theory is that the writing required in any case will secure an exact statement and the best evidence of the terms and conditions of a promise made.[7] See AGREEMENT; PAROL, Evidence.

See also PERFORMANCE, Part; VERBUM, Verba illata.

Statute of 9 Geo. IV (1829), c. 14, called *Lord Tenterden's Act*, enlarged the application of the Statute of Frauds, by rendering a written memorandum necessary in cases of a promise: to bar the Statute of Limitations; by an adult to pay a debt contracted during his infancy; as to a representation of ability in trade, upon the strength of which credit is to be given; and as to contracts for the sale of goods, not yet made or finished, amounting to ten pounds or upward.[1]

FRAUS. L. A cheating; deceit; imposition; fraud. Compare DOLUS.

Fraus est celare fraudem. It is a fraud to conceal a fraud. Concealment (*q. v.*) may amount to fraud.

Fraus latet in generalibus. Fraud lurks in general expressions.

Pia fraus. Pious fraud: evasion of law to advance the interests of a religious institution. See MORTMAIN.

FREE. Not subject to restraint or control; having freedom of will; at liberty; also, that on which no charge is made. Compare FRANK.

1. Liberated from control of parent, guardian, or master; *sui juris:* said of a child, ward, apprentice.

2. Individual; exclusive; privileged; independent; opposed to common: said of a fishery, a warren, and formerly of a city or town, *qq. v.* See also MUNICIPIUM.

3. Clear of offense, guiltless, innocent; also, released from arrest, liberated: used of persons acquitted or released from imprisonment.

4. Open to all citizens alike: as, a free school, *q. v.*

5. Not arbitrary or despotic; assuring liberty; defending individual rights against encroachment by any person or class: as, a free government, free institutions.[2]

6. Certain; honorable; becoming a freeman; opposed to base: as, free-socage, *q. v.*

7. That for which no charge is made for use; opposed to toll: as, a free bridge, *q. v.*

Not gained by purchase: as, free admission, free passage.

Free on board. In a contract for the sale and delivery of goods "free on board" vessel, the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made: until he knows that he could not put the articles on board.[3] Compare FRAIS.

8. Neutral: as in saying that "free ships make free goods."

Freely. Without constraint, coercion, or compulsion.[4] See DURESS; WILL, 1.

[1] 2 Bl. Com. 337, 339; 2 Whart. Ev. § 903.

[2] 2 Bl. Com. 466; 3 Pars. Contr. 19.

[3] 3 Bl. Com. 159; 3 Pars. Contr. 19, 23, 31, 35; 2 Whart. Ev. §§ 878-80; Mahan *v.* United States, 16 Wall. 146 (1872); Becker *v.* Mason, 30 Kan. 700-2 (1883), cases.

[4] Stowers *v.* Hollis, 83 Ky. 548-49 (1886), cases; Doyle *v.* Dixon, 97 Mass. 211 (1867); 93 Am. Dec. 85-90, cases.

[5] 2 Bl. Com. 448; 3 Pars. Contr. 39; 2 Whart. Ev. § 893; 1 Law Q. Rev. 1-24 (1884); 37 Alb. L. J. 493 (1888).

[6] 2 Bl. Com. 376, 500, 515; 2 Whart. Ev. §§ 884-900.

[7] Browne, Stat. Fr. § 346.

[1] Smith, Contr. 95; Reed, St. Frauds.

[2] Webster's Dict.

[3] Dwight *v.* Eckert, 117 Pa. 508 (1888), cases.

[4] Dennis *v.* Tarpenny, 30 Barb. 374 (1855); Meriam *v.* Harsen, 2 Barb. Ch. 229 (1847).