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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

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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