
In the Supreme Court of the State of Utah

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

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

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

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

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Table of Contents

Identity and Interest of *Amici Curiae* 1

Introduction..... 3

Argument..... 6

I. The modern practice of extreme partisan gerrymandering harms democracy. 6

II. The Utah Constitution's normal checks and balances apply to the Legislature's redistricting plans. 14

III. Recent decisions limiting partisan gerrymandering in other states show why extreme partisan gerrymandering violates the Utah Constitution. 23

IV. The judiciary provides the only remedy for voters to prevent partisan gerrymandering. 29

V. Preventing extreme partisan gerrymandering is not a political power grab but rather a means of avoiding partisanship. 30

Conclusion 32

Certificate of Compliance 34

Certificate of Service..... 35

Table of Authorities

Cases

Adams v. DeWine, 195 N.E.3d 74 (Ohio 2022) 31

Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018)..... 7, 31

Bott v. DeLand, 922 P.2d 732 (Utah 1996)..... 25

Burdick v. Takushi, 504 U.S. 428 (1992)..... 28

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Gallivan v. Walker, 2002 UT 89, 54 P.3d 1069 .....*passim*

Gill v. Whitford, 138 S. Ct. 1916 (2018)..... 7

Growe v. Emison, 507 U.S. 25 (1993)..... 20

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League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 8

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Matter of 2022 Legislative Districting of State, 282 A.3d 147 (Md. 2022)..... 12

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Parkinson v. Watson, 291 P.2d 400 (Utah 1955) 18, 19

Reynolds v. Sims, 377 U.S. 533 (1964) 3

Rucho v. Common Cause, 139 S. Ct. 2484 (2019) 4, 6, 7

Shields v. Toronto, 395 P.2d 829 (Utah 1964) 28

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17 P.3d 1125 (Utah 2001) 22

Vieth v. Jubelirer, 541 U.S. 267 (2004) 28

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Rules

Utah R. App. P. 25 1

Constitutional Provisions

Minn. Const. art. IV, § 3 20

N.C. Const. art. II, § 22 16

Utah Const. art. I, § 1 28

Utah Const. art. I, § 2 ..... 3, 26

Utah Const. art. I, § 15 28

Utah Const. art. I, § 17 ..... 5, 24

Utah Const. art. I, § 24 26

Utah Const. art. IV, § 2 28

Utah Const. art. VII, § 8 ..... 11, 15, 16

Utah Const. art. VII, § 18 21

Utah Const. art. IX, § 1 ..... 14, 20, 22

Utah Const. art. X, § 2 ..... 21, 22

Utah Const. art. XIII, § 2 ..... 21, 22

Utah Const. art. XXIII, § 1 ..... 6, 30

Utah Const. art. XXIII, § 2 ..... 6, 30

Identity and Interest of *Amici Curiae*[1]

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

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

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

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

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

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

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

Introduction

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

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

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

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

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

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

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Wattson*, when the legislature failed to enact a new redistricting plan, the Minnesota Supreme Court stepped in and drew districts using "neutral redistricting principles," including drawing districts "without the purpose of protecting, promoting, or defeating any incumbent, candidate, or

political party." *Wattson*, 970 N.W.2d at 46. It applied neutral redistricting principles because "election districts do not exist for the benefit of any particular legislator or political party," but "exist for the people to select their representatives." *Id*. at 51. Courts are thus empowered to apply redistricting principles "that advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process." *Hippert*, 813 N.W.2d at 395. And while those cases were litigated in the context of a legislative impasse, the critical point is undisturbed: state legislatures do not have sole redistricting authority, and state courts are plainly able to analyze maps in accordance with neutral redistricting principles.

Finally, other provisions of the Utah Constitution seemingly confer subject-matter authority to the Legislature, but these provisions have likewise never been interpreted to confer that authority to the exclusion of the other branches. Provisions regarding the compensation of state and local officers, *see* Utah Const. art. VII, § 18, property taxes, *see id*. art. XIII, § 2, and public education, *see id*. art. X, § 2, all imbue the Legislature with authority. But that authority is not unlimited and is still subject to normal constitutional constraints.

The Legislature's constitutional authority to establish public schools provides a telling example. The Utah Constitution provides in relevant part:

"The public education system shall include all public elementary and secondary schools and such other schools and programs as *the Legislature* may designate. . . . Public elementary and secondary schools shall be free, except *the Legislature* may authorize the imposition of fees in the secondary schools." *Id*. (emphases added). This delegation of authority mirrors the provision Petitioners rely on to claim exclusive power to draw congressional maps. *See id*. art. IX, § 1 ("*the Legislature* shall divide the state into congressional, legislative, and other districts accordingly") (emphasis added). There is no mention of the gubernatorial veto or judicial review in either provision. Yet this Court has confirmed that the Legislature's "authority is not unlimited" with respect to the public school system. *Utah Sch. Boards Ass'n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1129 (Utah 2001). The Legislature cannot, for instance, "establish schools and programs that are not open to all the children of Utah or free from sectarian control … for such would be a violation of articles II and X of the Utah Constitution." *Id*.

Likewise, the Utah Constitution grants the Legislature the power to establish various property taxes. For instance, "[t]he *Legislature* may by statute determine the manner and extent of taxing livestock," Utah Const. art. XIII, § 2(4) (emphasis added), and "[t]he *Legislature* may by statute determine the manner and extent of taxing or exempting intangible property," *id*. art. XIII, § 2(5) (emphasis added). But these delegations to the

"Legislature" are still subject to the checks and balances of the Constitution. This Court ruled that, although "levying taxes is a power given to the Legislature by the Utah Constitution," tax legislation is nonetheless "properly referable to the voters," in part because the Constitution grants the people the power to legislate through initiatives and referenda. *Mawhinney v. City of Draper*, 2014 UT 54, ¶ 18, 342 P.3d 262. Moreover, no one would seriously argue that the Legislature could enact a tax structure, free from judicial review, that discriminated on the basis of race or sex in violation of equal protection guarantees. Tax policy, even though delegated to the Legislature in the first instance, must abide by other constitutional provisions.

This same reasoning applies in the redistricting context. The Legislature may, in the first instance, conduct redistricting, but its maps are still subject to other provisions of the Utah Constitution as interpreted by courts, the branch uniquely empowered to enforce state constitutional guarantees that protect the right to vote.

III. Recent decisions limiting partisan gerrymandering in other states show why extreme partisan gerrymandering violates the Utah Constitution.

Heeding the Supreme Court's counsel in *Rucho*, Respondents in this case assert that the Utah Constitution allows state courts to police extreme partisan gerrymandering. They are correct. Utah courts have long recognized

"that the right to vote is a fundamental right." *Gallivan*, 2002 UT 89, ¶ 24. Analyzing parallel provisions in their own state constitutions, courts in Pennsylvania, Maryland, and Alaska limited the role of partisan considerations in redistricting. *League of Women Voters*, 178 A.3d 737; *Szeliga*, 2022 WL 2132194; *Matter of 2021 Redistricting Cases*, 2023 WL 3030096. These courts recognized that when the legislature diminishes voters' ability to elect representatives based on partisan affiliation, it intrudes on free elections, violates equal protection guarantees, tramples on free speech and association, and infringes upon the right to vote. The same is true in Utah, and the same conclusion follows from its Constitution.

The Utah Constitution's guarantee of free elections prohibits extreme partisan gerrymandering. Under article I, section 17 of the Utah Constitution, a provision with no federal counterpart, "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." State constitutions generally provide substantive protections against antidemocratic conduct above and beyond the protections afforded by the federal Constitution.[17] These protections are often construed to include a prohibition on extreme partisan gerrymandering. Interpreting their states' similar constitutional provisions, Pennsylvania and

[17] *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 913 (2021).

Maryland courts have both found extreme partisan gerrymandering to be incompatible with the guarantee of free elections. *See League of Women Voters*, 178 A.3d at 814 (state constitution's Free and Equal Elections Clause prohibits partisan gerrymandering); *Szeliga*, 2022 WL 2132194, at *43 (state constitution's Free Elections Clause prohibits partisan gerrymandering).

As other state courts have noted, Free Elections Clauses trace their roots to the 1689 English Bill of Rights, which declared that "election of members of the parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.); *see also Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) (noting other provisions of Utah Constitution "arose from the English Bill of Rights of 1689"), *abrogated on other grounds by Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533. The English provision was introduced in response to the same type of inequity that arises from extreme partisan gerrymandering. It was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain an "electoral advantage," leading to calls for a "free and lawful parliament" by the participants of the Glorious Revolution.[18] These same concerns resonate today and lead to the conclusion

[18] J.R. Jones, *The Revolution of 1688 in England* 148 (1972); Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 241, 247–48, 250 (2007).

that extreme partisan gerrymandering violates Utah's version of the Free Elections Clause.

Limits on partisan gerrymandering resonate not only in the historical concerns that animated the creation of Free Elections Clauses, but also in their text. Instead of enumerating every form of election tampering that could breach these clauses, they are intended to have a "plain and expansive sweep," necessitating the political system ensure "a voter's right to equal participation in the electoral process[.]" *League of Women Voters*, 178 A.3d at 804. This guarantee to each voter of "an equally effective power to select the representative of his or her choice" cannot be squared with partisan gerrymandering. *Id.* at 814. And it "mandates that all voters have an equal opportunity to translate their votes into representation." *Id*. at 804. Utah's Free Elections Clause likewise should be construed to prohibit "an extreme gerrymander that subordinates constitutional criteria to political considerations." *Szeliga*, 2022 WL 2132194, at *43.

Extreme partisan gerrymandering similarly violates the people's right to the equal protection and uniform operation of laws. *See* Utah Const. art. I, §§ 2, 24. Utah's guarantee of equal protection is "in some circumstances, more rigorous than the standard applied under the federal constitution." *Gallivan*, 2002 UT 89, ¶ 33. This is such a circumstance. Extreme partisan gerrymandering denies equal protection where the disfavored party's "voters

and candidates are substantially adversely impacted" by the redistricting plan without a compelling state interest. *Szeliga*, 2022 WL 2132194, at *46. Utah's Equal Protection Clause does not permit an electoral practice that "effectively discriminates against urban voters in that it affords the registered voters of rural counties a disproportionate amount of voting power." *Gallivan*, 2002 UT 89, ¶ 64. Moreover, there is no compelling interest in subordinating the voting power of a disfavored political group.

The entire goal of partisan gerrymandering is to empower voters of the favored party to elect more representatives than their numbers would justify under a plan not infected with partisan bias. But the equal operation of voting laws requires equal opportunity in the electoral process. That is why the Alaska Supreme Court recently recognized that partisan gerrymandering is unconstitutional under that state's Equal Protection Clause. *Matter of 2021 Redistricting Cases*, 2023 WL 3030096, at *43. That court found that a redistricting board had "intentionally discriminated against certain voters" based on geography and partisan affiliation in violation of equal protection guarantees. *Id*. at *49. Extreme partisan gerrymandering is likewise antithetical to Utah's guarantee of equal protection and the uniform operation of election laws.

Drawing district lines to exaggerate the electoral power of some voters and diminish the electoral power of others based on political affiliation

further violates Utah's guarantee of free speech and association, *see* Utah Const. art. I, §§ 1, 15, because voters "express their views in the voting booth." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). The Legislature cannot "enact[] a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). But that is precisely what it has done: diluted the electoral power of a disfavored group of Utahns based entirely on "their partisan affiliation and their voting history[.]" *Szeliga*, 2022 WL 2132194, at *19. Congressional maps violated the Maryland Constitution's Free Speech Article based on this reasoning, where "the voice of Republican voters was diluted and their right to vote and be heard with the efficacy of a Democratic voter was diminished." *Szeliga*, 2022 WL 2132194, at *46. This extreme form of partisan gerrymandering is a flagrant violation of the freedoms of speech and association because it discriminates against voters based on their political affiliations.

Finally, the dilution of disfavored voters' electoral power violates Utah's guarantee of the right to vote. *See* Utah Const. art. IV, § 2. This is not just the technical right to cast a ballot; rather, the provision encompasses the right to a "meaningful" vote. *See Shields v. Toronto*, 395 P.2d 829, 832 (Utah 1964). To give meaning to the ballot, and consistent with the constitutional right to vote, the Legislature cannot erect an electoral system that operates

to "defeat the public will." *See Earl v. Lewis*, 77 P. 235, 238 (Utah 1904). That would be inconsistent with the Utah Constitution's explicit protection of the right to vote—a provision that has no corollary in the federal Constitution. State constitutions with similar explicit guarantees have been construed to provide "more expansive and concrete protections of the right to vote." *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. 2006) ("[V]oting rights are an area where our state constitution provides greater protection than its federal counterpart."). This Court should similarly conclude that Utah's parallel affirmative right to vote provides robust protection beyond the rights afforded by the federal Constitution. *See State v. Larocco*, 794 P.2d 460, 465 (Utah 1990) (Durham, J.) (noting that Utah Constitution may provide protection beyond the scope mandated by federal Constitution). The Utah Constitution's explicit right to vote should be interpreted to prohibit partisan gerrymandering.

IV. The judiciary provides the only remedy for voters to prevent partisan gerrymandering.

The Court must act to protect these existing constitutional guarantees, particularly where Utah voters are unable to explicitly prohibit partisan gerrymandering without the Legislature's consent. If this Court declines to enforce the Utah Constitution and prohibit extreme partisan gerrymandering, Utah voters will be without recourse. All roads to

redistricting reform run through a Legislature that has entrenched itself through its own partisan gerrymander.[19] The people of Utah cannot take matters into their own hands by explicitly prohibiting partisan gerrymandering through popular initiative or constitutional amendment. The Legislature claims the power to repeal popular initiatives, *see* Opening Brief for Cross-Appellants at 21, and constitutional amendment seemingly requires the Legislature's consent, *see* Utah Const. art. XXIII, §§ 1, 2. To make matters worse, voters cannot so easily resort to the ballot box to replace legislators that have used their power to entrench themselves in office: the very purpose of partisan gerrymandering is to prevent such political competition. This Court is the last and only resort for the people of Utah.

V. Preventing extreme partisan gerrymandering is not a political power grab but rather a means of avoiding partisanship.

There is nothing political about this Court interpreting the Constitution to prohibit extreme partisan gerrymandering. The justiciability of partisan gerrymandering does not inure to the benefit of a particular political party. Nor does it inject partisanship into the redistricting process, as Petitioners suggest. Petitioners have it backward: adjudicating claims of

[19] *See Utah State House Final Plan*, PlanScore (Nov. 30, 2021), https://planscore.org/plan.html?20211130T074239.593773066Z (showing efficiency gap and declination of district map); *Utah State Senate Final Plan*, PlanScore (Nov. 30, 2021), https://planscore.org/plan.html?20211130T074210.576526734Z (same).

extreme partisan gerrymandering will avoid the "exercise [of] raw political power," Pet. Br. at 21, by purging undue political considerations from the redistricting process and applying neutral principles to support fair representation.

State courts have already recognized that there are "neutral benchmarks [] particularly suitable as a measure in assessing whether a congressional districting plan dilutes the potency of an individual's ability to select the congressional representative of his or her choice[.]" *League of Women Voters*, 178 A.3d at 816. They have applied various statical measures of partisan fairness, including the "efficiency gap," "mean-median difference," "partisan bias," and "declination," to determine if a map unduly favors one political party. *Adams v. DeWine*, 195 N.E.3d 74, 91 (Ohio 2022). Other times, they have relied on old-fashioned indicators such as witness testimony, obvious dramatic and unnecessary changes to district boundaries, and comparison to neutral redistricting criteria. *See Benisek*, 348 F. Supp. 3d at 499-507; *League of Women Voters*, 178 A.3d at 816. Courts are well-equipped with the tools necessary to remove undue partisanship from the redistricting process.

Conclusion

As former governors of diverse states, *amici* have experienced how extreme partisan gerrymandering distorts our democracy. It makes our politics more divisive and thwarts the kinds of common-sense compromises that make government work. Like courts in Pennsylvania, Maryland, and Alaska, this Court should hold that extreme partisan gerrymandering violates the Utah Constitution.

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Respectfully submitted,

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Certificate of Compliance

Pursuant to Utah R. App. P. 25(e)(8) and 24(a)(11), I hereby certify that this brief: (1) complies with the word limits set forth in Utah R. App. P. 25(f) because this brief does not exceed 7,000 words, excluding the parts of the brief exempted by Utah R. App. P. 25(f), and was prepared in proportionally spaced typeface using 13-point Century Schoolbook font; and (2) contains no non-public information in compliance with the requirements of Utah R. App. P. 21(h).

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Certificate of Service

I hereby certify that on May 19, 2023, a true, correct, and complete copy of the foregoing brief was filed with the Utah Supreme Court and served via electronic mail on the following recipients:

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