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 Re-districting 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 AMICUS CURIAE
THE HONEST ELECTIONS PROJECT
IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE[1]

The Honest Elections Project (the "Project") is an independent, nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters and their elected representatives put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. The Project has a significant interest in this case, as it implicates the legislature's preeminent Constitutionally delegated role in setting the rules for elections.

INTRODUCTION & SUMMARY OF ARGUMENT

The U.S. Constitution gives states a special role in regulating federal elections. But rather than vesting that power in "each state as an entity," the Constitution vests it in "a particular organ of state government"—the state *legislature*. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 503 (2021). Article I's Elections Clause grants authority to each state's "Legislature" to regulate the "Manner" of conducting congressional elections. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof.") (emphasis added). This "[m]anner of holding

[1] Pursuant to Utah R. App. P. 26(e)(6), no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Utah R. App. P. 26(b)(2) and received timely notice pursuant Utah R. App. P.26(a).

Elections" includes the power of redistricting. *See Ariz. State Legis. v. Ariz. Ind. Redistricting Comm'n*, 576 U.S. 787, 804–05 (2015) (addressing the constitutionality of redistricting commissions under Article I, Section 4 of the U.S. Constitution). The U.S. Constitution thus makes state legislatures the key constitutional actors in redistricting.

Given the "direct grant of authority under the United States Constitution," "only the [Utah] Legislature . . . has plenary authority to establish the manner of conducting" federal elections in Utah. *See Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) (per curiam) (quoting *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000)). In line with the grant of authority from the U.S. Constitution, the Utah Constitution conferred upon the Utah Legislature the power to redistrict. Utah Const. art. IX, § 1 ("[T]he Legislature shall divide the state into congressional, legislative, and other districts accordingly.").

Following the release of the 2020 Census, the Utah Legislature exercised its authority when and passed the now-challenged maps. Respondents seek to usurp the Utah Legislature's role by asking the Court to create a cause of action to decide nonjusticiable political questions—and to re-draw the congressional map—arguing that Democrats do not have a "fair" electoral chance under the map as it currently exists. However, partisan fairness is a political question, not a legal one, and is therefore nonjusticiable. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1260 (11th Cir. 2020) ("[C]hoosing between these different visions of fairness 'poses basic questions that are political, not legal.'") (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019)). Therefore, the Court should decline to accept Respondents' invitation to answer political questions that are wholly the province of the legislature.

ARGUMENT

When considering the constitutionality of Utah's former statutes regarding reapportionment—under the previous iteration of article IX, § 1[2]—this Court explained that "there are two cardinal principles to be kept in mind": (1) that "[i]t is of paramount importance to remember that the constitutional mandate is addressed, *not to the courts*, but to the legislature, whose responsibility it is to carry it out"; and (2) that "all doubts should be resolved in favor of constitutionality." *Parkinson,* 291 P.2d at 403.

These cardinal principles counsel that the Court rule for Petitioners here because (a) Respondents' claims are nonjusticiable political questions, requesting that this Court exercise power that is expressly delegated to a coordinate political branch with no judicially meaningful standard for so doing; (b) Respondents' requested remedies—a court-drawn congressional map or a court-mandated standard of "partisan fairness" imposed on the legislature—violate the Unites States and Utah Constitutions; and (c) none of the constitutional provisions (state or federal) on which Respondents rely require partisan fairness in redistricting. Each of Respondents' failures are taken in turn.

[2] The previous provision provided, in relevant part, that "The Legislature . . . at the session next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration according to ratios to be fixed by law." *Parkinson v. Watson*, 291 P.2d 400, 402 (Utah 1955).

I. Respondents' Claims Are Nonjusticiable Political Questions.

A. Utah Courts Apply Federal Political Question Doctrine to State Constitutional Matters.

The lower court, here, errantly declined to follow the recent United States Supreme Court decision in *Rucho*, 139 S. Ct. 2484, which the lower court in this case recognized "conclusively resolved the issue [of] justiciability [of partisan gerrymandering claims] for federal courts." Petitioners' Merits Brief, Attachment D, at 109–11 (Mar. 31, 2023). The lower court relied on the generalized notions that "Utah courts also are not bound by the same justiciability requirements as federal courts" and "Utah courts at times decline to merely follow and apply federal interpretations of constitutional issues." *See id.* at 110. Its reliance on these general principles, however, was misplaced.

The Utah Constitution provides:

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

Utah Const. art. V, § 1. This Court has "referred to article V, section 1 as the 'Separation of Powers Clause of the Utah Constitution.'" *In re Sex Change of Childers-Gray*, 487 P.3d 96, 114 (Utah 2021). This Court has also opined that "[a]rticle V, section 1 of the Utah Constitution and the political question doctrine both focus on the proper roles of each branch of government and aim to curtail interference of one branch in matters controlled by the others." *Id.* (citing *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995)).

In Utah, the "[t]he political question doctrine . . . is equally applicable to prevent interference by Utah state courts into the powers granted to the executive and legislative

branches of [Utah] state and local governments." *Skokos*, 900 P.2d at 541. Indeed, both the federal political question doctrine and the Utah Separation of Powers Clause prevent "judicial interference in matters wholly within the control and discretion of other branches of government." *Childers-Gray*, 487 P.3d at 114 (quoting *Skokos*, 900 P.2d at 541). This is why—as recently as 2021—this Court applied the federal political question doctrine to issues involving Article V, Section 1 of the Utah Constitution. *See id.* at 114–16..

In *Childers-Gray*, this Court addressed (1) "whether adjudicating sex-change petitions is a nonjusticiable political question," and (2) whether adjudicating sex-change petitions is unconstitutional under the 'Separation of Powers' clause of the Utah Constitution." *Id.* at 114. "Ultimately, [the court's] answer to both queries [was] a resounding no." *Id.* In reaching its decision, the court applied the federal question doctrine expressed in *Baker v. Carr*, 369 U.S. 186 (1962). *See Childers-Gray*, 487 P.3d at 114 (quoting *Baker*, 369 U.S. at 217). It concluded that "Utah courts' adjudication of sex-change petitions neither involves a nonjusticiable political question nor violates article V, section 1 of the Utah Constitution" because the Utah "constitution grants the district courts, as general jurisdiction courts, the authority to adjudicate matters that affect a citizen's legal rights." *Id.* at 115. Or, put differently, Utah did not possess "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker*, 369 U.S. at 217, because "[i]n adjudicating sex-change petitions . . . district courts exercise one of the basic tenets of their judicial role: their common-law authority." *Childers-Gray*, 487 P.3d at 115.

In sum, this Court has plainly adopted the federal political question doctrine when addressing Utah-specific constitutional questions. *See id.* at 114–16. The lower court erred when it held otherwise.

B. The Political Question Doctrine Prohibits Respondents' Partisan Gerrymandering Claims.

> For both federal and Utah courts, a nonjusticiable political questions involves: [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.

Childers-Gray, 487 P.3d at 115 (quoting *Baker*, 369 U.S. at 217). Respondents' attempt at a partisan gerrymander claim fails under all areas of this standard—however, Amicus will only focus on two areas.

1. The Utah Constitution Contains a Textually Demonstrable Commitment That Redistricting Belongs to a Coordinate Branch of Government—Namely, the Legislature.

To determine whether "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department'" a court "must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed." *Nixon v. United States*, 506 U.S. 224, 228 (quoting *Baker*, 369 U.S. at 217).

Here, the Utah Constitution provides that "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1. "When the meaning of a statute can be discerned from its language, no other interpretive tools are needed." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 267 P.3d 863, 866 (Utah 2011)

(quoting *State v. Harker*, 240 P.3d 780, 784 (Utah 2010) (cleaned up)). It is readily apparent from the plain constitutional text that, in Utah, redistricting is the province of the legislature, not the judiciary.

Indeed, redistricting power has always been the province of the Utah Legislature. As noted, *supra* n.2, the current iteration of Article IX, Section 1 is not the first. It previously provided that "[t]he Legislature . . . at the session next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration according to ratios to be fixed by law." *Parkinson*, 291 P.2d at 402. After the United States provided Utah with another congressional seat, Article IX contemplated that "the Legislature shall divide the State into congressional districts accordingly." Utah Const. art. IX, §1 (1895). It was later amended to require that "the Legislature shall divide the state into congressional, legislative, and other districts." Utah Const. art. IX, § 1 (1988) (emphasis added). And again, in 2008, it was amended to specify that "the Legislature" must redistrict at the general session following "the Legislature's receipt" of census results. Utah Const. art. IX, §1 (2008). What is clear from every iteration is that redistricting is the sole providence of the legislature. *See Parkinson*, 291 P.2d at 403 (explaining, more than half a century ago, that one of the "two cardinal principles to be kept in mind" when evaluating redistricting statutes is that "[i]t is of paramount importance to remember that the constitutional mandate is addressed, *not to the courts*, but to the legislature") (emphasis added).

Moreover, Respondents' assertion that Utah Code § 78A-3-102(4)(c) evidences a judicial power of redistricting strains credulity. That statute provides that "original

appellate jurisdiction" over "reapportionment of election districts" belongs to this Court, but it may transfer jurisdiction to the Utah Court of Appeals. That an appellate court may review *certain types* of redistricting cases is an unremarkable notion, which does not alter the analysis here. Unlike Respondents' nonjusticiable partisan gerrymandering claim, there are three types of redistricting claims *are* justiciable: (1) one person, one vote challenges; (2) racial gerrymandering claims; and (3) vote dilution claims under Section 2 of the Voting Rights Act. *Rucho*, 139 S. Ct. at 2495–96; *Thornburg v. Gingles*, 478 U.S. 30, 70–71 (1986); *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring). However, Respondents do not assert any of these claims here but, instead, assert a partisan gerrymandering claim, which is a nonjusticiable political question that is "beyond the reach" of this Court. *See Rucho*, 139 S. Ct. at 2506–07.

By Utah's plain constitutional text, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," which renders partisan gerrymandering claims a nonjusticiable political question. *Childers-Gray*, 487 P.3d at 115 (quoting *Baker*, 369 U.S. at 217).

2. Respondents' Partisan Gerrymandering Claim Lacks Judicially Discoverable and Manageable Standards for Resolving It.

Cases that lack judicially manageable standards to resolve them are also nonjusticiable political questions. *Rucho*, 139 S. Ct. at 2494. Judicially manageable standards to adjudicate partisan gerrymandering claims are elusive. This is because partisanship is expected to happen in redistricting. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Without clear judicially manageable standards, therefore, courts "risk

assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Rucho*, 139 S. Ct. at 2498.

The problem with adjudicating partisan gerrymandering claims is that they are premised upon the "instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Id.* at 2499. But this premise finds no support in our system of elections—a wholly at-large system of elections on party lines, or proportional representation. *Id.* Essentially, partisan gerrymandering claims request that courts "make their own political judgment about how much representation particular parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Id.* at 2499. But courts lack the competence to apportion political power. *Id.* How to apportion political power is not a legal question, but a political one. *Id.* at 2500. This is so because it is the role of a court is to "vindicate the individual rights of the people appearing before it." *Id.* at 2501. Thus, courts are not responsible for "vindicating generalized partisan preferences." *Id.* At bottom, this Court lacks the authority to "allocate political power and influence" in the absence of judicially manageable standards. *Id.* at 2508.

This case is undoubtedly about politics; Respondents ask this Court to allocate political power—to Democrats and away from Republicans—on the abstract bases of "fairness" as they define it. But, as with *Rucho*, "[i]t is not even clear what fairness looks like in this context." *Rucho*, 139 S. Ct. at 2488–89. "Fairness could mean creating the greatest number of competitive districts, districting to ensure that each party receives its proportional share of 'safe' seats, or adhering to traditional districting criteria." *Jacobson*,

974 F.3d at 1260 (quoting *Rucho*, 139 S. Ct. at 2500). Moreover, burdens on political parties' representation, unlike burdens on "individual voting or associational rights," does not allow courts to apply the typical "legal standards to determine whether the burden was unconstitutional." *Jacobson*, 974 F.3d at 1262 ("Under *Anderson* and *Burdick*, we would weigh the burden imposed by the law against the state interests justifying that burden. But because the statute does not burden the right to vote, we cannot engage in that kind of review); *see also Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring) ("[M]embers of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties are the dominant groups.").

"[C]hoosing between these different visions of fairness 'poses basic questions that are political, not legal.'" *Jacobson*, 974 F.3d at 1260 (quoting *Rucho*, 139 S. Ct. at 2500). And there is "no reason to believe that [political parties] are incapable of fending for themselves through the political process." *Davis*, 478 U.S. at 152 (O'Connor, J., concurring). "Indeed, there is good reason to think that political gerrymandering is a self-limiting enterprise." *Id.*

Essentially, Respondents ask this Court to order a map that is "commensurate [with Respondents'] level of political power and influence." *See Rucho*, 139 S. Ct. at 2499. In a post-*Rucho* world, this is impermissible, as courts both federal and Utahn are not responsible for "vindicating generalized partisan preferences." *Id.* Consequently, this Court should resist Respondents' invitation to "allocate political power and influence" in the absence of judicially manageable standards. *Rucho*, 139 S. Ct. at 2508. And, as noted,

supra sec. I.A., Utah simply has not adopted the types of standards that Respondents are seeking to impose through judicial fiat.

II. Respondents' Requested Relief—*i.e.*, a Court-Drawn Congressional Map or s Court-Mandated Standard of Partisan Fairness Imposed on the Legislature—Violates the Utah and United States Constitutions.

A. Respondents' Requested Remedies Violate the Utah Constitution's Separation of Powers Provision.

As detailed in *supra* sec. I.B.1., Utah divides the "powers of [its] government . . . into three distinct departments, the Legislative, the Executive, and the Judicial." Utah Const. art. V, § 1. "[A]nd no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." *Id.* It has been rightly remarked that "[t]here could be no more certain move toward the exercise of autocratic control and the disruption of our greatly valued balance of power than for one branch of the government to usurp prerogatives not belonging to it." *State v. Jones*, 407 P.2d 571, 574 (Utah 1965).

Utah has also "committed its whole law-making power to the Legislature, excepting such as is expressly or impliedly withheld by the State or federal constitution, it has plenary power for all purpose[s] of civil government." *Kimball v. Grantsville City*, 57 P. 1, 4 (Utah 1899). Consequently, "in the absence of any constitutional restraint, express or implied, the Legislature may act upon any subject within the sphere of the government." *Id.* This broad lawmaking power includes redistricting. *See* Utah Const. art. IX, § 1 ("[T]he Legislature shall divide the state into congressional, legislative, and other districts

accordingly."). Which, for reasons explained *supra* sec. I.B.1., is expressly the province of the legislature.

Consequently, Respondents' requested remedies—a court-drawn map or judicially imposed standard of partisan fairness on the legislature's redistricting process—would violate the Utah Constitution's Separation of Powers Clause. *Jones*, 407 P.2d at 574; *see also Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.) (explaining that "unsurprisingly" redistricting is "root-and-branch a matter of politics" that is delegated to "political entities"); *see also Order re Wash. State Redistricting Comm'n's Letter*, 504 P.3d 795, 796 (Wash. 2021) ("Redistricting raises largely political questions best addressed [by the legislative branch] where negotiation and compromise is necessary for agreement.").

B. Given Utah's Constitutional Structure, a Court-Drawn Map, or Court-Imposed "Partisan Fairness" Standard Would Violate the Federal Constitution.

Article I, section 4 of the United States Constitution Provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Elections are "of the most fundamental significance under our constitutional structure." *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Rather than vesting the power to regulate elections to "each state as an entity," the Constitution vests it in "a particular organ of state government"—the state *legislature*. Morley, *supra* at 503. Article I's Elections Clause and Article II's Electors Clause grant authority to each state's "Legislature" to regulate the "Manner" of conducting congressional elections and

appointing presidential electors. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. With these delegations of power, the Constitution vests state legislatures with "plenary" authority over federal elections. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

The "Manner of holding Elections" includes redistricting. *see Ariz. State Legis.*, 576 U.S. at 804–05 (addressing the constitutionality of redistricting commissions under article I, section 4 of the U.S. Constitution). Indeed, "this vested authority" over elections "is not just the typical legislative power exercised pursuant to a state constitution. Rather, when a state legislature enacts statutes governing presidential elections, it operates 'by virtue of a direct grant of authority' under the United States Constitution." *Carson*, 978 F.3d at 1060 (quoting *Palm Beach*, 531 U.S. at 76). That direct grant of authority over election rules necessarily bars other state officials—such as judges—from second-guessing the legislature's actions. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("[T]he legislature possesses plenary authority to direct the manner of appointment[.]"); *id.* at 27 (power belongs "to the legislature exclusively"). "In fact, a legislature's power in this area is such that it 'cannot be taken from them or modified' even through 'their state constitutions.'" *Carson*, 978 F.3d at 1060 (quoting *McPherson*, 146 U.S. at 55); *see also Bush*, 531 U.S. at 112–13 (Rehnquist, J., concurring); *Palm Beach*, 531 U.S. at 76–77.

History confirms this reading. "The U.S. Supreme Court, several state supreme courts, and both chambers of Congress employed [the independent state legislature] doctrine during the nineteenth century." Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 9 (2020). Indeed, "[a]s early as the Massachusetts Constitutional Convention of 1820, it was

understood that state constitutions were legally incapable of limiting the state legislature's power over congressional and presidential elections." *Id.* at 38. When a delegate that early Convention introduced a provision attempting to "limit" the state legislature's "exercise of [] discretion" in redistricting, another delegate—Justice Joseph Story—explained that the Convention had no "right to insert in [the state] constitution a provision which controls or destroys a discretion … which must be exercised by the Legislature, in virtue of powers confided to it by the constitution of the United States." *Id.* at 40 (quoting Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts 3 (Boston Daily Advertiser, rev. ed. 1853)). The amendment was subsequently defeated on that basis. *Id.* Michigan Supreme Court Justice Thomas Cooley's 1890 treatise ascribed to the view: "So far as the election of representatives in Congress and electors of president and vice president is concerned, the State constitutions cannot preclude the legislature from prescribing the 'times, places, and manner of holding' the same, as allowed by the national Constitution." *Id.* at 9 (citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 754 n.1 (6th ed. 1890)). Those examples are just the tip of the iceberg. *See id.* at 37–92.

Moreover, the term "legislature" was not "'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The U.S. Supreme Court "has accordingly defined 'the Legislature' in the Elections Clause as '*the representative body* which ma[kes] the laws of the people.'" *Ariz. State Legis.*, 576 U.S. at 825 (Roberts, C.J., dissenting) (quoting *Smiley*,

285 U.S. at 365). And "every state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." *Id.* at 828 (quoting Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 Nw. U. L. Rev. Online 131, 147, & n. 101 (2015)). "Indeed, [this] Court adopted this interpretation of the term for purposes of Article V of the Constitution, which empowers the "Legislature" of each state to ratify constitutional amendments." Morley, *supra* at 550.

Accordingly, "from a plain meaning, original understanding, and intratextual approach, a state's institutional legislature is the only state entity that may regulate federal elections without relying on a statutory delegation of authority." *Id.* That, coupled with the understanding that Utah's legislative power is vested in the Utah Legislature, *see* Utah Const. art. V, § 1, compels the conclusion that court-exercised power to create new causes of action with respect to Congressional districting would violate both the Utah and U.S. Constitutions. *See Carson,* 978 F.3d at 1060 ("[W]hen a state legislature enacts statutes governing presidential elections, it operates 'by virtue of a direct grant of authority' under the United States Constitution.") (quoting *Palm Beach*, 531 U.S. at 76).

III. The Free Elections Clause, Uniform Operation Clause, Free Speech and Association Clauses, and Qualifications Clause Do Not Limit the Legislature's Consideration of Partisanship in Redistricting, and an Interpretation Purporting to Do So Would Violate Article I, Section 4.

"There is no doubt that [this Court] cannot strike down any legislation unless it *expressly* violates the constitution or it is *clearly prohibited* by 'some *plain mandate* thereof.'" *State v. Herrera*, 895 P.2d 359, 363 (Utah 1995) (quoting *Nelson v. Miller*, 480

P.2d 467, 472 (Utah 1971) (emphasis added)); *see also Parkinson*, 291 P.2d at 404 ("[N]o act should be declared unconstitutional unless it is clearly and palpably so."). None of the clauses on which Respondents rely are clear or plain enough to warrant striking down the Utah Legislature's redistricting plan here.

"It is well settled that when faced with a question of statutory interpretation, '[this Court's] primary goal is to evince the true intent and purpose of the Legislature.'" *Marion Energy*, 267 P.3d at 866 (quoting *Salt Lake Cty. v. Holliday Water Co.*, 234 P.3d 1105, 1111 (Utah 2010)). To that end, "[t]he best evidence of the legislature's intent is the plain language of the statute itself." *Id.* (quoting *State v. Miller*, 193 P.3d 92, 95 (Utah 2008)) (internal quotation marks omitted). Consequently, "[w]hen interpreting a statute, [courts] assume, absent a contrary indication, that the legislature used each term advisedly." *Hutter v. Dig-It, Inc.*, 219 P.3d 918, 926 (Utah 2009). This Court, "therefore seek[s] to give effect to omissions in statutory language by presuming all omissions to be purposeful." *Marion Energy*, 267 P.3d at 866. Accordingly, the absence of partisan fairness language in any of the constitutional provisions upon which Respondents rely dooms their claims as a matter of law.

Indeed, the drafters of Utah's Constitution were cognizant of prohibiting partisanship in certain contexts—not including redistricting. Constitutional provisions that expressly require partisan neutrality include, for example: (1) the selection of judges, *see* Utah Const. art. VIII, § 8, cl. 4 ("Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration."); (2) the role of judges, *see* Utah Const. art. VIII, § 10 ("Supreme court justices, district court

judges, and judges of all other courts of record while holding office may not . . . hold office in a political party."); (3) the non-sectarian nature of public education, *see* Utah Const. art. X, § 8 ("No . . . partisan test or qualification shall be required as a condition of employment, admission, or attendance in the state's education systems."); (4) the process for an incorporated city or town to become a charter city or town, *see* Utah Const. art. XI, § 5 ("The ballot containing [the question of whether a city or town should appoint a charter-framing commission] shall also contain the names of candidates for members of the proposed commission, but without party designation."); and (5) the party composition of the State Tax Commission, *see* Utah Const. art. XIII, § 6, cl.1 ("There shall be a State Tax Commission consisting of four members, not more than two of whom may belong to the same political party."). The constitutional provisions relied on by Respondents here, however, contain no such clear requirement for partisan neutrality.

Take the Free Elections Clause, for example. It provides, in relevant part, that "[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." Utah Const. art. I, § 17. No mention of partisanship, nor requirement for political neutrality, nor mentioning of redistricting or reapportionment.

The Qualifications Clause, likewise, does not mention partisan neutrality or redistricting. *See* Utah Const. art. IV, § 2 ("Every citizen of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, shall be entitled to vote in the election."). Nor does the Uniform Operations Clause. *See* Utah Const. art. I, § 2 ("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, § 24 ("All laws of a general nature shall have uniform operation.").

Nor does the Free Speech and Association Clauses require—or even mention—partisan neutrality in redistricting. *See* Utah Const. art. I, § 1 ("All persons have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."); Utah Const. art. I, § 15 ("No law shall be passed to abridge or restrain the freedom of speech or of the press.").

Presuming, as this Court does, that these omissions were "purposeful," *Marion Energy*, 267 P.3d at 866, none of the provisions cited by Respondents require partisan neutrality in redistricting. Indeed, it can hardly be argued—based on the provisions' plain texts—that they even broach the topic. Though such an analysis may seem simplistic, when a party attempts to stretch a provision far beyond the conceivable meaning of the plain text, nothing more than a simplistic rejection is needed.[3] *See id.* ("When the meaning of a statute

[3] Petitioners proffer multiple, additional, persuasive reasons why these clauses do not contain some implied right to party-neutral districting. Petitioner's Merits Brief at 36–59. Little can be added to their thorough assessment, and, consequently, this brief does not attempt to do so. Amicus simply notes that, should the Court find any of these provisions ambiguous and deploy other methods of construction, s*ee Marion Energy, Inc.*, 267 P.3d

can be discerned from its language, no other interpretive tools are needed.") (quoting *Harker*, 240 P.3d at 784) (cleaned up).

Therefore, the challenged redistricting plan does not violate the Utah Constitution because partisan districting is not clearly prohibited by a plain mandate and, therefore, it cannot be struck down on these grounds. *See Herrera*, 895 P.2d at 363. This Court exercises judicial authority regularly. What Respondents are asking this Court to do is step beyond the normally understood role of courts and into a lawmaking function to create new causes of action from whole cloth. The problem for Respondents is that this particular area of law—namely, regulating the time, place, and manner of elections—is one that Article I, Section IV has already delegated to state legislatures with Congress as a backstop.

Consequently, the lower court erred in denying Petitioners' motion to dismiss for failure to state a claim under the Free Elections Clause, Uniform Operation Clause, Qualification Clause, and Free Speech and Association Clauses.

CONCLUSION

The partisan gerrymandering claims raised by Respondents are nonjusticiable political questions over which the court below had no jurisdiction. Additionally, Respondents' proffered remedy—a court drawn map—would violate the Utah and United States Constitutions. Finally, the constitutional provisions that Respondents contend support their claims do nothing of the sort. For these reasons, the lower court was wrong

at 866, Amicus agrees with Petitioners' analysis on the provisions' respective interpretation.

to deny Petitioners' motion to dismiss, and this Court should reverse that ruling and order this case dismissed.

Respectfully submitted,

April 7, 2023

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CERTIFICATE OF COMPLIANCE

1. This brief contains 5,385 words, excluding any tables or attachments, in compliance with this Utah Rules of Appellate Procedure 24(a)(11) and 25(f), allowing amicus filers up to 7,000 words.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font in compliance with the typeface requirements of Utah Rule of Appellate Procedure 27(a).

3. This brief contains no non-public information and complies with Utah Rule of Appellate Procedure 21(h).

Dated: April 7, 2023

/s/ Dallin Holt
Dallin Holt

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2023, a true, correct, and complete copy of the foregoing **Brief of Amicus Curiae in Support of Petitioners** was filed with the Utah Supreme Court and served via electronic mail as follows:

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