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 REPRESENTATIVES BLAKE MOORE, CHRIS STEWART, JOHN CURTIS, AND BURGESS OWENS IN SUPPORT OF REVERSAL

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae Representatives Blake Moore, Chris Stewart, John Curtis, and Burgess Owens comprise the entirety of the current congressional delegation from Utah to the United States House of Representatives. The Delegation represents the interests of Utahns in the federal government.

The Members of Congress from Utah have an interest in the drawing of Utah's congressional maps. The Members also have an interest in defending their own Article I powers and responsibilities. This case's outcome has the potential to affect both the makeup of the districts represented by the Congressmen as well as their Elections Clause powers under Article I, Section 4 of the United States Constitution, and the persuasive authority of this Court's eventual opinion may impact the interpretation of the U.S. Constitution in other state courts.

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[1] Pursuant to Utah R. App. P. 25(e)(6), the Delegation states that the National Republican Congressional Committee contributed money to fund the preparation and submission of this brief. 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.

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

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

ARGUMENT

I. Article I, Section 4 vests Congress with the power to "make or alter" the "Times, Places, and Manner" of the election of Representatives and override State congressional redistricting choices.

The Framers and Supreme Court of this nation agree: Fixing partisan gerrymanders in congressional redistricting is the province of political bodies—of State Legislatures first and then of Congress. After all, "[a] discretionary power over elections must be vested somewhere." 1 J. Story, Commentaries on the Constitution § 816 (4th ed. 1873). The text of the Constitution plainly and sensibly vests that authority in two political bodies, anticipating accompanying political judgments in the crafting of election regulations.

Redistricting is lawmaking. Lawmaking is done only by those to whom the legislative power is delegated by constitutions. The Utah and United States Constitutions give the role of legislating Utah's congressional districts to Utah's Legislature. Utah Const. art. IX, § 1 ("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."); 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."). The latter, however, gives a second level of review over congressional districting not to state courts, not to federal courts, but to Congress: "the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1.

Respondents insist this case is about fixing partisan gerrymanders. Amici do not disagree. The Delegation understands, however, that the primary responsibility for oversight in this area resides not in state courts but in the Congress of the United States. This Court should not do as Respondents ask and invalidate a congressional districting plan under vague constitutional clauses in the absence of a clear anti-partisan-gerrymandering rule created by the Legislature of the State of Utah.

A. Congress expressly has the power to redraw Utah's congressional maps.

Article I, Section 4 of the United States Constitution imposes a duty on State Legislatures to prescribe "[t]he Times, Places, and Manner of holding elections for . . . Representatives" but in the same sentence specifies that "Congress may at any time by Law make or alter such Regulations." *Id.* There then "can be no dispute that Congress itself may draw a State's congressional-district boundaries." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 812 (2015). And that power supersedes that of the State.

This congressional oversight is neither thoughtless nor purposeless. The Framers knew full well how to vest powers in States as entities but, in this instance, chose to pick a particular organ of state government instead. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 503 (2021). The Supreme Court has characterized the congressional backstop as a "safeguard" to satisfy "the Framers' overriding concern"—"States' abuse of the power to set the 'Times, Places, and Manner' of elections." *United States Term Limits v. Thornton*, 514 U.S. 779, 808–09 (1995). Thus,

"exclusive power of regulating elections for the national government" is not left "in the hands of the State legislatures." The Federalist No. 59, at 290 (Alexander Hamilton) (Dover Thrift ed., 2014). James Madison at the Constitutional Convention likewise "came to [the] defense" of a "supervisory authority" for Congress over setting the places and manners of congressional elections. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019). The Federalists won, empowering the Federal Congress over State legislative power with a quintessential and explicit check and balance. *Id*. at 2496. The Supreme Court recognized this power as "paramount," preemptive, and "exercis[able] at any time, and to any extent which [Congress] deems expedient." *Ex parte Siebold*, 100 U.S. 371, 392 (1879); *see also Arizona v. Inter Tribal Council of Ariz., Inc*., 570 U.S. 1, 9 (2013).

Congress, in exercising its "general supervisory power over the whole subject" of congressional elections, may issue "regulations of the same general character" as those from the State Legislatures: not only those about times and places, but also notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns. *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932). The most central override power of all, though, remains the redrawing of the district lines themselves.

B. Congress bears an Article I responsibility to safeguard United States constitutional protections from State infringement.

When then should Congress exercise its undisputed authority to draw or impose additional requirements on congressional district boundaries? "The federal character of

congressional elections flows from the political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgment by the force of the [U.S.] Constitution itself." *Thornton*, 514 U.S. at 842 (Kennedy, J., concurring). The responsibility to safeguard these protections does not rest solely with the judiciary. "Congress, the Executive, and the Judiciary all have a duty to support and defend the Constitution." *Salazar v. Buono*, 559 U.S. 700, 717 (2010); *see also United States v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."). Congress may determine the constitutionality of a State Legislature's congressional map. Congressional review exists, and Congress may decide if a map tramples constitutional requirements like one-person-one-vote and the prohibition against racial gerrymanders. *See Rucho*, 139 S. Ct. at 2497 ("[I]t is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting."). Indeed, although Congress shares responsibility with the courts to address those two issues, it falls much more naturally to Congress as a political entity. *See Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.) (The Elections Clause "clearly contemplates districting by political entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.").

Congress has exercised its power over districting in several ways. First, it has done so in accordance with Congress' power under the Fourteenth and Fifteenth

Amendments.[2] As the reconstituted nation moved to protect the rights of its citizens in the years following the Civil War, Congress passed the Enforcement Acts. First Enforcement Act, ch. 114, 16 Stat. 140 (1870); Second Enforcement Act, ch. 99, 16 Stat. 433 (1871); Third Enforcement Act, ch. 22, 17 Stat. 13 (1871). The Acts created new election crimes and penalties and causes of action, protecting citizens from those trying to stop citizens from exercising constitutional rights in congressional elections. *Id.*; *see also* 42 U.S.C. § 1985(3). Congress thus worked as a political entity to protect the right to vote at a time and place when doing so was imperative. Second, in 1965, Congress adopted the Voting Rights Act, which contains provisions that impact redistricting. 52 U.S.C. § 10301 *et seq*. Third, Congress has provided for control of districts in a few additional ways. In 2 U.S.C. § 2a, Congress has provided for the apportionment of seats between the states and a "backup" plan in the event a state fails to redistrict timely. Congress has determined that the "method of equal proportions" shall be used to allocate seats between the States in 2 U.S.C. § 2b. And through 2 U.S.C. § 2c, Congress maintains its imposition of a requirement of single-member districts for the U.S. House. Collectively, these actions generally fall under the authority granted to Congress by the U.S. Constitution.

[2] We note here that no plaintiff is asserting a violation of the Fourteenth or Fifteenth Amendments to the U.S. Constitution, nor is any plaintiff asserting a violation of the federal Voting Rights Act.

C. Non-constitutional issues in congressional districting like partisan gerrymandering call only for Congress's political judgment.

Although Congress bears equal responsibility with the other branches to uphold the Constitution and safeguard its protections, including through the Elections Clause, that responsibility ends where the Constitution's protections do.

The Constitution simply does not extend its girdle of protection around a right to be free from partisan gerrymandering. "Partisan gerrymandering claims invariably sound in a desire for proportional representation[,]" but the Constitution does not require proportional representation nor that district lines come as near as possible to allocating seats to the political parties in proportion to what their anticipated statewide votes will be. *Rucho*, 139 S. Ct. at 2499; *see also Davis v. Bandemer*, 478 U.S. 109, 152, 158 (1986) (O'Connor, J., concurring) (lambasting the Court's now-defunct "drift towards proportional representation" for political parties, because the two parties are capable of "fending for themselves through the political process"). The *Rucho* Court in this way recognized what the Founders and Framers of this country knew when drafting the Constitution and its rules on elections. *See Rucho*, 139 S. Ct. at 2499. Because no such right to proportional representation exists, no congressional responsibility exists to rewrite congressional maps that are so gerrymandered.

Instead, Congress retains discretionary authority to step in when a map constitutes a partisan gerrymander. Its members are free to debate and exercise what political will they have to address partisan gerrymandering, but the Constitution neither requires nor charges Congress to do so.

In fact, most of Congress's Elections Clause legislation has been under this umbrella of discretionary "revisionary power" to "counter … malapportionment." *Rucho*, 139 S. Ct. at 2495. Gerrymandering in this country is at least as old as congressional districting itself, but Congress first moved to address it through the Elections Clause in 1842. That year, Congress created the requirement of single-member congressional districts "composed of contiguous territory" and reduced the size of the House of Representatives by upping the person/representative ratio. Apportionment Act of 1842, 5 Stat. 491, 2 U.S.C. § 2c. That first apportionment act was reiterated in 1862, Apportionment Act of 1862, 12 Stat. 572, then followed by one in 1872 requiring equal number of inhabitants, 17 Stat. 28, § 2, another in 1901 adding a compactness requirement, and yet another in 1911 requiring contiguity alongside the others, 37 Stat. 13. It's true that the original purpose of the first Apportionment Act was likely to address gerrymandering and thus was political in nature. *See Vieth*, 541 U.S. at 275 (plurality op.); *see* Elmer Griffith, *The Rise and Development of the Gerrymander* 12 (1974); *Rucho*, 139 S. Ct. at 2495 (citing language that the Apportionment Act of 1842 was "an attempt to forbid the practice of the gerrymander").

But the move was not just political; it was partisan. The single-district approach favored the Whigs—who held a slight majority in the 27th Congress—and the legislation got through almost entirely on partisan lines. *See* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1023–24 (2021). As one Whig Senator explained in support of the legislation, such maneuvering under the Elections Clause to address gerrymandering was "entirely

within [Congress's] own discretion." *See id*. at 1026 (citing Cong. Globe, 27th Cong., 2d Sess. 512 (1842) (statement of Sen. Nathaniel P. Tallmadge, W-N.Y.). To this day, Congress debates whether to use its powers to address political gerrymandering. *See Vieth*, 541 U.S. at 275–76 (plurality op.) (citing H. R. 5037, 101st Cong., 2d Sess. (1990); H. R. 1711, 101st Cong., 1st Sess. (1989); H. R. 3468, 98th Cong., 1st Sess. (1983); H. R. 5529, 97th Cong., 2d Sess. (1982); H. R. 2349, 97th Cong., 1st Sess. (1981)); *see also* H. R. 1, 116th Cong., 1st Sess., §§ 2401, 2411 (2019). "The power bestowed on Congress . . . to restrain the practice of political gerrymandering" has thus "not lain dormant." *Vieth*, 541 U.S. at 276 (plurality op.). And of course, Congress has used its Elections Clause powers in a variety of ways that go beyond gerrymandering. *See, e.g.*, *Inter Tribal Council*, 570 U.S. at 20 (noting Congress's Elections Clause power was used to create the 42 U.S.C. § 1973gg-4(a)(1) uniform federal form to register voters for federal elections); *Rucho*, 139 S. Ct. at 2495 ("Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections.").

Congress may—not must—move to address partisan gerrymandering, and that "avenue for reform established by the Framers, and used by Congress in the past, remains open." *Rucho*, 139 S. Ct. at 2508.

D. Congress and the State Legislatures combine to enjoy double discretion in addressing non-constitutional issues in congressional districting like partisan gerrymandering.

Congress is not the only political entity constitutionally vested with the discretion to address partisan gerrymandering. On the contrary, the Elections Clause makes clear

that the primary entity in congressional districting remains the State Legislature. The result is a kind of double discretion—political judgment layered on political judgment. The State Legislature has first dibs to exercise its judgment to address non-constitutional issues, and Congress then may likewise do so.

As the Supreme Court noted in *Rucho*, the States can, and some are, "actively addressing" partisan gerrymandering on several fronts. *Id.* at 2507. The State Legislatures or voters acting in a legislative capacity may regulate the times, places, and manner of congressional elections through State constitutional amendments creating independent redistricting commissions, specifying redistricting criteria for mapmakers, or restricting partisan gerrymandering directly. *Id*. (citing Colo. Const. art. V, §§ 44, 46; Mich. Const. art. IV, § 6; Fla. Const. art. III, §20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const. art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code § 42.4(5) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, § 804 (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party")).

State courts have no role in this political double discretion. They can, of course, move to enforce state law restrictions such as those referenced immediately above, but

state courts cannot impose substantive mandates on the State Legislatures without such specific grants of authority. The text of the Elections Clause demands that such grants come from the Legislature. Indeed, multiple cases in other States have concluded that state statutory law passed directly by the State Legislature takes precedence over state constitutional provisions. *See Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 692, 694 (Ky. 1944) (finding absentee voting, though "denied by the State Constitution," available because the Legislature was "empowered" to legislate it under the Elections Clause); *In re Opinion of the Justices*, 45 N.H. 595, 605–06 (1864) (upholding allowance of absentee voting by the Legislature that had "exercise[d] that authority untrammeled by the provision of the State constitution, which requires the elector of State representatives to give his vote in the town or place wherein he resides"); *In re Opinion of the Judges*, 37 Vt. 665 (1864) (applying state constitutional provision to state elections but not congressional elections); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887) (construing state constitutional provision as inapplicable to congressional elections because "to that extent it is . . . of no effect"). State courts must not take a general grant of fairness, such as a Free Elections Clause, and use it to invalidate the act of a State Legislature.

The Supreme Court of North Carolina in the *Moore v. Harper* litigation got this precisely wrong, declaring that in North Carolina—which features a constitution quite similar to Utah's in its absence of an anti-partisan-gerrymandering clause—"the only way that partisan gerrymandering can be addressed is through the courts." *Harper v. Hall*, 868 S.E.2d 499, 509 (N.C. 2022) (decision still pending in *Moore v. Harper*, No. 21-1271

(U.S. 2023)).[3] On the contrary: amici themselves may address it with their fellow Representatives at Congress's pleasure.

Finally, when Congress acts in the second part of the double discretion, it is limited by the Constitution's non-delegation principle, one that ought to apply to both Congress and the State Legislatures referenced in the Elections Clause. Congress cannot cede its Elections Clause authority to another body and always retain its override power over any regulating agencies in that space, so the same constraints sensibly would apply to the State Legislatures. Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 Fla. St. U. L. Rev. 717, 738 (2016). "After all, it would seem incongruous for state legislatures to have more power than Congress to allocate their authority without some meaningful explanation for such a distinction." *Id*. Amici find no distinction in the Constitution between the non-delegation requirement binding them and the non-delegation requirement binding State Legislatures.

E. In this case, double discretion applies in Utah to the Utah Legislature and Congress in addressing partisan gerrymandering under the Elections Clause.

The framework above has already found a warm welcome in this Court. Discussing the Utah Constitution's delegation of congressional districting power to the Legislature, this Court pressed:

> It 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. . . . Whether an act be ill advised or unfortunate, if such it

[3] On February 3, 2023, the North Carolina Supreme Court granted a motion for rehearing, and heard oral argument on March 14, 2023. That decision remains pending as of the time of this filing.

> should be, does not give rise to an appeal from the legislature to the courts. But the remedy for correction of legislation remains with the people who elect successive legislatures.

Parkinson v. Watson, 291 P.2d 400, 403 (Utah 1955). This Court was right then, and the same reasoning applies to this case. Plaintiffs bring a claim about gerrymandering, one as to which the Utah Constitution is silent; so this Court should defer to the political judgments of the Utah Legislature and the United States Congress.

Plaintiffs' claims are about a non-constitutional concern—partisan gerrymandering. Everyone agrees this case is about partisan gerrymandering and, more importantly, its justiciability and constitutionality. Under the United States Constitution, no right to proportional representation by political party—and thereby to a condition of "no partisan gerrymandering"—exists. The same is true for the Utah Constitution. Utah, unlike a handful of other States, has not used its legislative prerogatives to address partisan gerrymandering. *Compare* Utah Const. (no clause) *with* Fla. Const. art. III, §20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."). No specific grant of authority exists such that state courts can step in, so the default double discretion kicks in.

First and foremost, the Utah Legislature is free to address partisan gerrymandering. Nothing whatsoever but an absence of political will prevents Utah from adopting an unambiguous anti-partisan-gerrymandering amendment like the ones favorably cited in *Rucho*. Such political will, however, must come from the People of Utah and their elected representatives, not state or federal courts. At any time, Utah may begin the process of passing statutes or amending its constitution, both of which begin in the Legislature.

Second, Congress may step in to address a partisan gerrymander or impose other requirements on Utah's congressional maps, should it so choose. Because partisan gerrymandering as such is not a violation of the United States Constitution, neither Congress nor the courts have a duty to step in to correct such a congressional map. Congress does, however, retain the discretion to do so. In exercising that discretion under the Elections Clause, Congress is exercising its political judgment. Fixing partisan gerrymandering is a political, often partisan, task for political, partisan bodies, not courts. *See Rucho*, 139 S. Ct. at 2500 ("Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal."). From the first time the Elections Clause was invoked by Congress, political actors used it to address gerrymandering in a way that favored one party (the Whigs) over their opponents. And other regulations Congress has passed likewise concern judgments of political, even partisan, timbre. *See id*. This policy discretion is for Congress, not the courts.

* * *

The Constitution does not stutter. Congress, not state courts creating substantive law from vague state constitutional provisions, is the Constitution's backstop to protect constitutional rights from infringement by State Legislatures. There is no constitutional right to be free from partisan gerrymandering. Congress may, but does not have to, step in to address a congressional map that constitutes a partisan gerrymander. This Court should leave it to Congress's discretion whether to do so and should instruct the lower court to do the same.

CONCLUSION

For those reasons, this Court should reverse the district court's denial of the motion to dismiss and order the complaint dismissed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief (1) does not exceed 7,000 words in compliance with the requirements of Utah R. App. P. 25(f); (2) was prepared in proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font in compliance with the requirements of Utah R. App. P. 27(a); and (3) contains no non-public information in compliance with the requirements of Utah R. App. P. 21(h).

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