IN THE UTAH SUPREME COURT

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, vs. Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Brad Wilson, Sen. J. Stuart Adams, Defendants-Petitioners.	Appellate Case No. 20220991-SC On interlocutory appeal from the Third Judicial District Court, the Honorable Dianna M. Gibson, No. 220901712

AMICUS CURIAE BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society, the Brennan Center is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice.

The Brennan Center seeks to bring the idea of representative self-government closer to reality, including by working to ensure fair and non-discriminatory redistricting practices and to protect the right of all Americans to vote. The Brennan Center conducts regular empirical, qualitative, historical, and legal research on redistricting and has participated in a number of voting rights and redistricting cases around the country in state and federal court, both as counsel and as amicus curiae.

The Brennan Center also works to realize a fair and independent judicial system that protects fundamental rights, democratic values, and the rule of law under state constitutions as well as the United States constitution. Recognizing that state courts and state constitutions are critical and distinct sources of protection of rights and democratic institutions, the Brennan Center regularly produces research and resources about state constitutional developments, including in a recently launched publication, State Court

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[1] 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. 25(b)(2) and received timely notice pursuant Utah R. App. P.25(a). This brief does not purport to convey the position, if any, of N.Y.U. School of Law.

Report. The Brennan Center also regularly participates as an amicus before the U.S. Supreme Court, federal circuit courts, and state appellate courts on these issues.

SUMMARY OF ARGUMENT

The Brennan Center for Justice urges this Court to reject the position of the Utah Legislature that the political party in control of redistricting has the unfettered and unreviewable discretion to design electoral maps to intentionally entrench its political power and to target, subordinate, and disadvantage opposing political groups. In so ruling, the Court should hold that intentional partisan gerrymandering violates the Utah Constitution and remand the case to the district court so that it can proceed with a trial to allow the plaintiffs the opportunity to prove the allegations they make in this case.

State courts play an essential role in protecting American democracy. More than 40 years ago, Justice William J. Brennan, Jr. wrote that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 491 (1977). The U.S. Supreme Court reaffirmed that central wisdom in *Rucho v. Common Cause,* 139 S. Ct. 2484, 2507 (2019), writing that while partisan gerrymandering claims might be non-justiciable under the federal constitution, "our conclusion [does not] condemn complaints about districting to echo into a void." Rather, "state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* State constitutions, in fact, are the original and often strongest sources of protections for

democratic rights. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law,* 10–12 (2018) [hereinafter Sutton, *51 Imperfect Solutions*].

These constitutional protections are especially important when disfavored, out-of-power political groups are targeted and subordinated by politicians seeking to artificially entrench their hold on power through intentional partisan gerrymandering. Based on the provisions of their constitutions, a growing number of state courts in recent years have found workable frameworks for assessing partisan gerrymandering claims. Using discernible and manageable standards rooted in the basic democratic values protected by state constitutions, state courts have been vital democracy backstops, striking down intentionally discriminatory maps drawn by both Democrats and Republicans.

The Utah Constitution similarly provides strong protections for democratic rights. Indeed, a review of the Utah Constitution and case law makes clear that (I) the Utah Constitution was enacted with the purpose of preventing exactly the type of governmental overreach alleged in this case; and (II) the Utah Constitution created a system of checks and balances to restrain the political power of each branch—a system in which judicial review of legislative action, including redistricting, is an essential part. Under this constitutional order, judicial review of partisan gerrymandering claims is not only possible, but critical to the continued maintenance of the free government guaranteed by the Utah Constitution. Whether or not the plaintiffs ultimately prevail on the merits at trial, they have made serious allegations about abuse of the legislative process and deserve to have their day in court.

ARGUMENT

I. State Constitutions and State Courts Play a Role in Protecting the Democratic Process that is Distinct from and Broader than that of Federal Courts.

A foundational assumption in the U.S. Constitution's design is that states will be the first-line guarantors of the democratic and individual rights of Americans. Indeed, the Framers' design of the federal constitution was built on the bedrock assumption that state constitutions, and not the federal government, would protect democratic rights. The prominence of rights in founding-era state constitutions, after all, is one of the principal reasons why the Framers initially did not include a bill of rights in the federal constitution. By the time delegates to the Constitutional Convention gathered in Philadelphia, most states had adopted state constitutions enshrining a broad range of democratic and individual rights, typically through a Declaration of Rights included as the very first section of the constitution. Jeffrey S. Sutton, *Who Decides?*: *States as Laboratories of Constitutional Experimentation* 124 (2021) [hereinafter Sutton, *Who Decides?*]; Gordon S. Wood, *The creation of the American Republic*, *1776-1787*, 132-33, 271 (1998 ed.); Robert F. Williams, *"Experience Must Be Our Only Guide"*: *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 Hastings Const. L.Q. 403, 404 (1988). In fact, when the topic of a federal bill of rights came up during the Constitutional Convention, it was quickly rejected in a 10-0 vote of states after Roger Sherman reminded the gathered delegates that "State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient[.]" *The Documentary History of the Ratification of the Constitution*

125 (John P. Kaminski, et al. eds., 2009); Leonard W. Levy, *Origins of the Bill of Rights* 13 (1999).

Even when Congress later faced pressure from state ratifying conventions to add a bill of rights, the pressure was not to create new positive rights, but merely to ensure that the federal government did not trample on rights already protected by state law. Akhil Reed Amar, *America's Constitution: A Biography* 316-17 (2005). Not surprisingly, given the founding generation's state-centric approach to protecting rights, "most of the constitutional-rights litigation of the first 150 years after 1776 took place in the States." Sutton, *51 Imperfect solutions* at 13.

If anything, the rights guaranteed by state constitutions are stronger in later state constitutions than in those of the founding era, particularly in the western United States where, as one scholar has noted, the drafters of state constitutions "wrote ever longer bills of rights" in response to concerns about political and corporate monopolies and the possibility that one group or another would have too much unfettered power. *See* Amy Bridges, *Democratic Beginnings: Founding the Western States* 60, 80-100 (2015). Indeed, a defining feature of later state constitutions is that they almost uniformly become increasingly skeptical of state power in general and legislative power in particular. Robert F. Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 201-2 (1983).

In Utah's case, citizens ratified a constitution with particularly strong protections of rights, a direct outgrowth of discrimination that early Utah settlers experienced as a disfavored political and religious minority. These constitutional protections include both

an exceptionally robust system of checks and balances protecting against abuses of the democratic process and a strong system of constitutionally guaranteed democratic rights, including protections for the rights of political minorities against abuses from those with power. *See*, *e.g.*, *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 46, 250 P.3d 465 (explaining that Utah's "state constitutional provisions [may] afford more rights than the federal Constitution," even where "substantially the same" language is used). [2]

II. Utah Has a Strong System of Checks and Balances in its Constitution Protecting Against Abuses of the Democratic Process.

In drafting a constitution, Utah "adopted many of the provisions of its original 1896 constitution from those of its sister states." Daniel J. H. Greenwood, Christine M. Durham, and Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, 649-665 (2008); available at https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1358. Thus, what makes Utah's constitution unique is not "the text of its provisions," but "Utah's 'unusual history and experience' in struggling to become a state and to draft an acceptable statehood charter." *Id.* (citation omitted); *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 18, 450 P.3d 1092 (holding that the text of the Utah Constitution must be interpreted within the historical context in which it was adopted).

In interpreting the Utah Constitution within its historical context, this Court often considers "Utah's particular traditions at the time of drafting" with the "goal" of "discern[ing] the intent and purpose of both the drafters of our constitution and, more

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[2] While the Reconstruction Amendments made the Bill of Rights applicable to states and gave federal courts an expanded role in protecting rights, it did not divest state courts of their rights-protecting function.

importantly, the citizens who voted it into effect." *See Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235. In this case, that relevant historical context includes the fact that: (A) before adopting Utah's 1896 statehood constitution, Utah citizens had endured years of abuse from state and federal governments, including election-related abuse; and (B) Utah citizens understood that their new constitution's strong system of checks and balances, including a role for judicial review, would protect Utah's citizens from the types of abuses of power they had previously endured.

A. Before Statehood, Utah Citizens Had Endured Years of Abuse From Governments, Including Election-Related Abuses.

Utah's strong commitment to protecting political and other minorities has its roots in the extensive discrimination experienced by members of the Church of Jesus Christ of Latter-Day Saints prior to statehood. James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah Constitutional Law*, 60 Alb. L. Rev. 1515, 1515 (1997). This persecution began with early church communities in eastern states and continued even after the migration of members of the church to what became the Utah Territory, culminating in the Edmonds Act—a law designed to "deny polygamists the right to vote." *Id*. at 782. As part of the Act, "Utah's registration and election offices were declared vacant, and a five-man commission was appointed to oversee Utah elections." *Id*. "During its first year, the Utah Commission barred over 12,000 Mormons from voting in Utah. This was nearly one-fourth of eligible Mormon voters, and far exceeded the number of polygamists in Utah." *Id*.

After the U.S. Supreme Court upheld the Act, Utahns decried what one speaker described as "the extraordinary effort that [was] being made to curse the Territory of Utah with political serfdom."[3] At a "great mass meeting" in Salt Lake City, one speaker—B.H. Roberts (a future, vocal delegate at the Utah State Constitutional Convention who was also later elected to the U.S. House of Representatives)—described the exclusion of so many Utah voters as "the despotic effort that was made to do violence to the expressed wishes of the people of this Territory." This experience left what one scholar has described as "a deep distrust" of government held by many Utah citizens after "enduring such a tortured process of legislative and judicial persecution" for decades. Edwin B. Firmage, *Religion & The Law: The Mormon Experience in the Nineteenth Century*, 12 Cardozo L. Rev. 765, 798.

B. With These Concerns in Mind, the People of Utah Adopted a System of Checks and Balances to Guard Against Abuses of the Democratic Process

Consistent with early Utahns' experience of discrimination, the Utah Constitution's preamble declares that the purpose of Utah's constitution is "to secure and perpetuate the principles of *free* government." UTAH CONST. PREAMBLE (emphasis added). Under a nineteenth-century definition of the term "free," this meant that the purpose of Utah's Constitution was to create a government that is restrained by fixed laws and principles and

[3] B.H. Roberts, "Mormon" Protest Against Injustices, in AN APPEAL FOR CONSTITUTIONAL AND RELIGIOUS LIBERTY: FULL REPORT OF THE GREAT MASS MEETING HELD IN SALT LAKE CITY, MAY 2, 1885, WITH THE FULL TEXT OF THE SPEECHES AND THE PROTEST AND DECLARATION OF GRIEVANCES 41 (reported by John Irvine 1885).

that would be free from arbitrary or despotic control. *See Free*, Webstersdictionary1828.com; https://webstersdictionary1828.com/Dictionary/Free (defining "Free" alternatively as "subject only to fixed laws, made by consent, and to a regular administration of such laws," "not subject to the arbitrary will of a sovereign or lord," or "securing private rights and privileges by fixed laws and principles; not arbitrary or despotic"); *see also State v. Canton*, 2013 UT 44, ¶ 13, 308 P.3d 517 ("In determining the ordinary meaning of nontechnical terms," this Court's "'starting point' is the dictionary.").

To give teeth to this guarantee of a free government, Utahns also adopted a robust tripartite system of government in which each branch of government checks and balances the power of the other branch and where no one branch has unfettered power. UTAH CONST. ART. V, § 1. As a part of this system, the judiciary is granted authority to review the constitutionality of legislative enactments. The drafters of the Utah Constitution did not exempt legislative redistricting from this constitutional system.

i. Utah's Constitution Grants the Judiciary Express Authority to "Declare Any Law Unconstitutional Under Th[e] [Utah] Constitution or the Constitution of the United States."

In contrast to the federal constitution and earlier state constitutions, where judicial review is implicit and developed over time, under Utah's tripartite system, Utah's constitution explicitly acknowledges the judiciary's authority to declare laws "unconstitutional under th[e] [Utah] constitution or the Constitution of the United States." UTAH CONST. ART. VIII, § 2. Under this system, when the constitutionality of a governmental act is challenged, Utah courts have a duty to identify "what principle the

constitution encapsulates" and to determine "how that principle should be applied" in a particular case. *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092. While Utah courts strike down legislative acts "with reluctance," this Court has been clear that the judiciary "cannot shirk [its] duty to find an act of the Legislature unconstitutional when it clearly appears that it conflicts with some provision [or principle] of our Constitution." *Matheson v. Ferry*, 641 P.2d 674, 679-80 (Utah 1982); *see also Jenkins v. Swan*, 675 P.2d at 1149 (Utah "courts have the dual obligation to apply statutory and common law principles to a particular dispute and to evaluate those principles against governing constitutional standards.").

Consistent with this duty, Utah courts have regularly reviewed the constitutionality of legislative acts since Utah's founding. For example, in *State v. Standford*—a 1901 case—this Court considered whether the Legislature had violated the Constitution "by taking the administrative affairs of the county out of [the county's] control." 66 P. 1061, 1061 (Utah 1901). Although Article XI, section 4 of the Utah Constitution authorized the "Legislature [to] by statute provide for option forms of county government," this Court held that this did not provide the Legislature authority "to run and operate the machinery of the local government to the disfranchisement of the people." *Id.* at 1062. Similarly, in *State v. Eldredge*—a 1904 case—this Court determined that "the Legislature ha[d] no power, under the Constitution, to authorize the State Board of Equalization to assess or value property, for the purposes of taxation, . . . which w[as] wholly within one county." 76 P. 337, 341 (Utah 1904).

That same year, this Court declared that even though the Legislature could "rightfully enact a [voter] registration law which merely regulates the exercise of the elective franchise," the right to vote "cannot be abridged, impaired, or taken away, even by an act of the Legislature." *Earl v. Lewis*, 77 P. 235, 238 (Utah 1904). So from this State's earliest days, judicial review of legislative enactments has been an established and accepted part of Utah's tripartite system of government. *See*, *e.g.*, *Matheson v. Ferry*, 641 P.2d 674, 680 (Utah 1982) (striking down a legislative act as a violation of the separation of powers doctrine); *Gallivan v. Walker*, 2002 UT 89, ¶ 49, 54 P.3d 1069 (declaring a voter-initiative requirement that was not "reasonably necessary" to "further [an asserted] intended legislative purpose").

Accordingly, the importance of judicial review within Utah's tripartite system of government is well established. When a constitutional challenge to a governmental action is raised, Utah courts have a duty to review that action against the requirements and principles enshrined in Utah's constitution.

ii. Nothing in Utah's Constitution Exempts Legislative Redistricting from Generally Applicable Constitutional Restrictions on Governmental Authority.

More importantly for the purposes of this case, nothing in Utah's Constitution exempts redistricting from generally applicable constitutional restrictions on governmental authority or from judicial review. Although Article IX, section 1 authorizes the "Legislature" to "divide the state into congressional, legislative, and other districts," that section contains no language suggesting that this authority exempts the Legislature from other constitutional restraints. Thus legislative redistricting remains subject to the "judicial

power" granted to the judiciary in Article VIII, section 1—a power that includes the obligation of judicial review for constitutionality recognized in Article VIII, section 2. So even though the judiciary may lack the authority to draw a congressional district map in the first instance under the separation-of-powers doctrine, it nevertheless has the obligation to review the Legislature's redistricting activity when Utahns challenge the constitutionality of that legislative action as treading on rights held by the people.

Consistent with this obligation, Utah courts have long discussed legislative authority over elections in qualified (or limiting) terms that make clear that the Legislature's power over election procedures is not absolute or immune from judicial review. For example, in *Earl v. Lewis*—a 1904 case—this Court recognized that the Legislature's authority to enact voter registration laws was limited to enacting a law "*which merely regulates* the exercise of the elective franchise, and does not amount to a denial of the right itself, and does not abridge or impair the same." 77 P. 235, 238 (Utah 1904) (emphasis added).

Similarly, in *Anderson v. Cook*—a 1942 case—this Court again discussed the Legislature's unquestioned authority "to provide regulations, machinery, and organization for exercising the elective franchise" and to "prescribe *reasonable* methods and proceedings for determining and selecting the persons who may be voted for at an election." 130 P.2d 278, 285 (Utah 1942). By inserting the qualifier "reasonable" while discussing the "methods and proceedings" the Legislature could establish, this Court recognized a limit to the Legislature's authority in the election arena and, in so doing, the Court also impliedly recognized its authority to review those methods and proceedings.

This principle was reaffirmed more recently in *Gallivan v. Walker*, this Court's 2002 case in which the Court declared a voter-initiative requirement unconstitutional because the requirement was "not reasonably necessary" to "further [an] intended legislative purpose." 2002 UT 89, ¶ 55.

Because the Legislature does not have absolute authority over election-related matters, including redistricting, Utah courts have a duty to ensure that the principles enshrined in the constitution are not violated where an alleged constitutional violation is raised. *See S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092 ("The Utah Constitution enshrines principles," so a "proper inquiry focuses on what principle the constitution encapsulates and how that principle should be applied."). This is something Utah courts do regularly in equally novel contexts that are not susceptible to bright-line rules. *See Matter of Childers-Gray*, 2021 UT 13, ¶ 18, 487 P.3d 96 (establishing, as a matter of first impression, the standard for reviewing sex-change petitions); *State v. Tiedemann*, 2007 UT 49, ¶ 45, 162 P.3d 1106 (applying a "balancing process" to assess "fundamental fairness"); *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 9, 140 P.3d 1235 (analyzing, as a matter of first impression, whether the free-speech clause protects nude dancing). Utah courts have a duty to do similarly in the partisan-gerrymandering context.

III. <u>**The Utah Constitution Contains a Strong Textual Commitment to Democracy Including Guarantees for the Rights of Disfavored Political Groups**</u>

A commitment to democracy lies at the heart of the Utah Constitution, which begins with a lengthy Declaration of Rights. Article 1, section 27 makes clear these constitutional guarantees are not mere laudatory verbiage but rather "fundamental principles" to which

"[f]requent reoccurrence . . . is essential to the security of individual rights and the perpetuity of free government."[4] It is the judiciary's duty, therefore, to identify "what principle [each provision in the] constitution encapsulates" and to determine "how that principle should be applied" in a particular case. *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 70 n.23, 450 P.3d 1092.

In this case, the plaintiffs rely on the fundamental principles found in the following constitutional provisions: (A) Article I, Section 2, which entrusts governmental actors to act as agents of the people in perpetuating principles of a free government; (B) Article I, Section 17, which prohibits actions intended to make elections less "free"; (C) Article I, Sections 1 and 15, which prohibit actions intended to diminish the rights of free speech and association; and (D) Article IV, Section 2, which prohibits intentional acts to make the votes of some voters less meaningful. These provisions operate in concert to safeguard free government. *See Am. Bush.*, 2006 UT 40, ¶ 17, 140 P.3d 1235.

When these provisions are read together, as Utah courts instruct that they should be, they evince a strong textual commitment to democracy and to a level playing field for political minorities. Laws that target out-of-power political groups to artificially

[4] Article 1, section 27 of the Utah Constitution was borrowed from the Washington constitution. *See* Daniel J. H. Greenwood, Christine M. Durham, and Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, 655-56 (2008). The Washington equivalent of Article 1, section 27 has been understood to be rooted in a trust of the people but not the legislature, which could be corrupted. *See* Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 684-86 (1992).

disadvantage or subordinate them, or to advantage or entrench those in power, do violence to this core commitment.

A. The Utah Constitution Bars Governmental Actions Not Taken For the Public Benefit.

Article I, Section 2 states, in part, that "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.

Two fundamental principles are encapsulated by this provision. First, the "political power" is ultimately owned by the people collectively, and is wielded by governmental actors (such as the legislature), as *agents* for the people. *See United States v. Church of Jesus Christ of Latter-Day Saints*, 15 P. 473, 477 (Utah 1887) ("A government based upon the will of the people must ever keep such authority within reach of the people's will. Legislatures are but the agents of the people . . . ."); *People v. Daniels*, 22 P. 159, 160 (Utah 1889) ("[Sovereignty] resides in the people, and they use it through the general government as an agency."); *State v. Eldredge*, 76 P. 337, 339 (Utah 1904) (describing governmental entities as "the agencies by which power was to be exercised"); *Bleon v. Emery*, 209 P. 627, 630 (Utah 1922) ("The Legislature . . . is the direct agency of the people."). Second, this political power is delegated with the express limitation that it be used for the purposes of a "free government[] . . . for [the people's] *equal protection* and *benefit*." *Id.* (emphases added). As a result, the Legislature "cannot . . . perform acts or assert rights or have duties which are not a part or exercise of its governmental obligations or prerogatives." *Duchesne Cnty. v. State Tax Comm'n*, 140 P.2d 335, 340 (Utah 1943). This means that the Legislature

does not have "any power or capacity to be, do or act in an activity . . . which is not within the measure of its creation, 'to secure and perpetuate the principles of free government.'" *Id.* (quoting UTAH CONST. PREAMBLE). Accordingly, if the Legislature acts intentionally in a way that is not aimed at securing and perpetuating the principles of free government it has exceeded the scope of its authority.

In the representative democracy guaranteed by the Utah Constitution, the Legislature performs its functions as an agent and owes the people fiduciary duties. As one scholar has noted, "[t]he idea that rulers stand in a fiduciary relationship to the ruled is not new; its origins date back at least as far as the Middle Ages and can be seen even earlier in the writings of Cicero." D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 708 (2013) [hereinafter Rave, *Politicians as Fiduciaries*]; *see also id.* at 711 ((explaining that "a primary objective of the Constitution was to impose on public officials fiduciary obligations comparable to those duties borne by private law fiduciaries") (citing Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077, 1116, 1124-25, 1128-30 (2004))).

Under this fiduciary-duty view, "[w]hen incumbent politicians manipulate the election laws to entrench themselves," they "breach their fiduciary duty of loyalty" to the people. *Id.* at 715. The harm from such a breach is not necessarily that "one political party suffers discrimination at the hands of another, nor that a group of voters has its votes diluted to less than their proper strength." *Id.* at 717. Instead, "the harm is the disloyalty—the manipulation by self-interested political actors, for their own benefit, of the very mechanisms by which they derive their power and legitimacy." *Id.* at 718. In short, the

harm is the Legislature's "failure to act for the exclusive benefit of the principals"—a failure that is wholly inconsistent with the text of Article I, section 2 of the Utah Constitution. *Id.*

In sum, Article I, section 2 enshrines two important principles: (1) the Legislature is an agent of the people and cannot use its authority in a way that exceeds the scope of that authority; and (2) the preamble and Article I, section 2 of Utah's constitution limits the scope of the government's agency to actions that are consistent with the practices of a "free" government (*i.e.*, a non-arbitrary government) and that are aimed at the "equal protection and benefit" of the people. These principles would be violated by the Legislature intentionally targeting political groups to disadvantage or subordinate them in the exercise of their fundamental political rights.

B. The Utah Constitution Prohibits Actions Aimed at Making Elections Less Free

Similarly, Article 1, section 17 enshrines the constitutional principle that "all elections shall be *free*, and no power, civil or military, shall at any time interfere to prevent the *free* exercise of the right to suffrage." UTAH CONST. ART. I, § 17 (emphases added). So, on its face, this provision prohibits government interference "to" (*i.e.*, with intent)[5] prevent the free exercise of voting rights or make elections less free. As noted above, a nineteenth-century-era dictionary defines the adjective "free" as "not arbitrary or despotic." With this in mind, and in light of the federal government's infamous interference in Utah's

[5] *To*, MERRIAM-WEBSTER'S DICTIONARY (online) ("used as a function word to indicate purpose, intention, tendency, result, or end"), available at https://www.merriam-webster.com/dictionary/to.

congressional election shortly before the time the constitution was adopted, *see, e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 35-36 (1885) (describing the allegedly willful and malicious acts of federal officials in interfering with a Utah citizen's voting rights), Utah citizens in 1896 would have understood the phrases "elections shall be free" and "no power . . . shall at any time interfere to prevent the *free* exercise of the right to suffrage" to prohibit the Legislature from interfering with the outcome of elections by *intentionally* drawing electoral maps in a way that entrenches power of one identifiable sub-set of Utah's population while diminishing or subordinating the political power of another. In other words, the constitutional prohibition against preventing the *free* exercise of the fundamental right to vote secures not only the ability to cast ballots, but also prohibits actions intended to interfere with the results of an election. Accordingly, Article I, section 17 would be violated by intentional acts aimed at securing electoral results favorable to one political party.

C. The Utah Constitution Prohibits Actions Intended to Diminish the Rights of Free Speech and Association

Intentional partisan gerrymandering also implicates principles enshrined in Article I, sections 1 and 15, which prohibit actions intended to diminish the rights of free speech and association. Article I, section 1 states, in part, that "All persons have the inherent and inalienable right . . . to assemble peaceably" and "to communicate freely their thoughts and opinions." UTAH CONST. ART. I, § 1. And Article I, section 15 states that "[n]o law shall be passed to abridge or restrain the freedom of speech." UTAH CONST. ART. I, § 15. This Court has previously explained these provisions "are both directed toward expression" and

"prohibit laws which either directly limit protected rights or indirectly inhibit the exercise of those rights." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 18, 140 P.3d 1235*Id.* ¶¶ 18, 21.

By intentionally drawing a congressional map to elevate the party in power's favored views to the detriment of those expressing opposing views, the Legislature necessarily "either directly limit[s]" or "indirectly inhibit[s]" the exercise of minority voters expression-related rights. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (observing that "voters express their views in the voting booth"); *Gallivan*, 2002 UT 89, ¶ 26 (holding that the Utah Constitution protects "the rights of individuals to associate for the advancement of political beliefs"); *see also Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 17 n.27, 225 P.3d 153 (explaining that under the First Amendment to the U.S. Constitution, laws that have the "predominant purpose" of "suppress[ing], disadvantag[ing], or impos[ing] differential burdens upon speech because of its content" are subject to "the most exacting scrutiny"). Accordingly, Article I, sections 1 and 15 would be violated if the predominant purpose for configuring electoral districts was to inhibit the expressive activity of minority voters in pursuit of entrenching majority view points.

D. The Utah Constitution Prohibits Actions Intended to Make the Votes of Some Utah Voters Less Meaningful.

Finally, intentional partisan gerrymandering runs afoul of principles enshrined in Article IV, section 2. This section states that "Every citizen of the United States, eighteen years of age or over, who [qualifies as a Utah resident], shall be entitled to vote in the election." UTAH CONST. ART. IV, § 2. "The right to vote is sacrosanct." *Laws v. Grayeyes*,

2021 UT 59, ¶ 61, 489 P.3d 410. Because of the importance of this right to the "over-all functioning of our democratic system of government," this Court has stressed that the judiciary must "make the [right to vote] meaningful." *Shields v. Toronto*, 395 P.2d 829, 832 (Utah 1964). Intentional partisan gerrymandering violates this guarantee by decreasing the likelihood of success for some Utah voters, thereby making the votes of those voters less meaningful.

IV. Intentional Partisan Gerrymandering Claims Are Judicially Manageable

As discussed above, the Utah Constitution (I) creates a robust system of checks and balances—including authority for judicial review—to protect against abuses of the democratic process and (II) includes critical protections to guard against the use of political power by governmental actors to target and deliberately disadvantage out-of-power political groups, whether through partisan gerrymandering or other means. Despite this, the Legislature argues that courts cannot review its redistricting activities because there is not a judicially manageable method for doing so. This is incorrect.

Utah courts have long been tasked with making the type of intent determination that is needed in reviewing allegations of partisan gerrymandering. *See*, *e.g.*, *Matter of Childers-Gray*, 2021 UT 13, ¶ 48 ("[I]t is the duty of this court, according to its best knowledge and understanding, to declare the law as it finds it, and determine the intent and purpose.") (quoting *Eames v. Bd. of Comm'rs*, 199 P. 970, 972 (Utah 1921)); *Buscho*, 2009 UT 73, ¶ 19 (reviewing "evidence in the record" to determine the Legislature's "predominant purpose" in enacting a statute). Rather than needing to determine what an appropriate baseline of party strength should be or other such assessments, a court faced

with an allegation of partisan gerrymandering is asked merely to examine the record to see if there is sufficient evidence of improper legislative motive or arbitrariness to overcome a presumption of the map's validity—the type of inquiry that Utah courts have long successfully, and without controversy, performed in other areas. *See Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 18, 452 P.3d 1109 (assessing whether there was a "non-arbitrary basis" for a provision in a voting statute); *Lyon v. Burton*, 2000 UT 19, ¶ 27, 5 P.3d 616 (holding that a constitutional right prohibited the legislature from enacting "arbitrary and unreasonably discriminatory laws"); *State v. Sopher*, 71 P. 482, 485 (Utah 1903) (assessing whether a "statute [wa]s arbitrary").[6]

In recent years, other states around the country—many with identical or substantively similar constitutional provisions—have been asked to rule on the same question and have similarly found partisan gerrymandering claims readily manageable. In fact, since 2018 alone, state courts in Alaska, Florida, Maryland, New York, Ohio, Oregon, and Pennsylvania have found that partisan gerrymandering claims under state constitutional provisions are justiciable. Order at 4-7, In re the 2021 Redistricting Cases, No. S-18419 (Alaska May 24, 2022); Order at 5-6, In re the 2021 Redistricting Cases, No. S-18332 (Alaska Mar. 25, 2022); In re Sen. J. Res. of Legis. Apportionment 100, 334 So.3d 1282, 1290 (Fla. 2022); Memorandum Opinion and Order at 12-43, 88-94, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. 2022); *Harkenrider v. Hochul*, 197 N.E.3d

[6] Under this framework, the Utah Legislature could establish a safe harbor of proper intent by following procedures aimed at preventing intentional partisan gerrymandering, such as the procedures included in the 2018 Utah Independent Redistricting Commission and Standards Act passed by citizen ballot initiative.

437, 440, 452—53 (N.Y. 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 407-13 (Ohio 2022), petition for cert. filed, No. 22-362 (U.S. 2002); *Opinion of the Special Judicial Panel, Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632371, at *3-6 (Or. Cir. Ct. Nov. 24, 2021); *Sheehan v. Or. Legis. Assemb.*, 499 P.3d 1267, 1271-72, 1277-78 (Or. 2021); *League of Women Voters of Penn. v. Pennsylvania*, 178 A.3d 737, 801-21 (Pa. 2018). In contrast, only two state courts have declared the judiciary unavailable to protect voters from intentional incumbent subjugation of a popular majority. *Harper v. Hall*, 2023 WL 3137057 (N.C. Apr. 28, 2023); *Rivera v. Schwab*, 512 P.3d 168, 180-87 (Kan. 2022).

Although the state constitutional provisions in these cases vary, courts approach them in the same way that they approach any other case where the intent of a party is at issue, holistically examining the totality of the direct and circumstantial evidence, including expert testimony. In redistricting cases, evidence of illicit intent can include things such as deviation from traditional districting criteria, procedural irregularities, such as use of a rushed or closed-door process that excludes the public or minority party lawmakers, or ad hoc explanations for a map at odds with the evidence. In this case, for example, the plaintiffs point to fact that the Legislature rejected an alternative map that did better at meeting the Legislature's stated goal of "urban-rural balancing" but was less politically skewed than the enacted plan as strong circumstantial evidence of illicit motive. Response Brief, at 40-41. Additional evidence of intent also can be derived from things like comparison of a challenged map to a broad range of alternatives consistent with state law. Or challenging parties can rely on political science metrics used to ascertain whether

a map is such an extreme outlier compared with expected results that its adoption cannot be explained by anything other than illicit intent. *See* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2043 (2018).

Importantly, in this case as in every partisan gerrymandering case, state decisionmakers will have a chance at trial to rebut evidence of invidious intent with evidence of their own. Indeed, the existence of a cause of action does not mean that every claim should prevail—and the plaintiffs may not prevail on the merits here. Sometimes the sum of the evidence will reveal a pattern clear to any objective fact finder. For example, in 2011, Pennsylvania map-drawers transformed the state's competitive congressional map into one with bizarrely shaped districts that ruthlessly split communities with no rhyme or reason. The map was hard to explain as anything other than the product of rank partisan politics. *League of Women Voters of Penn. v. Pennsylvania*, 818-21.

But other times, state actors will be able to rebut a prima-facie showing—and in that event, the claims are (and should be) rejected. For example, a trier of fact might conclude that a state's explanation for the partisan effects of a map can be credibly explained by a state's political geography or the need to comply with legal requirements or is the unavoidable product of efforts to address legitimate state goals. In the partisan gerrymandering cases that have been heard by courts around the country, some courts have found constitutional infirmity in the challenged plans. In others, the maps were upheld. But all of these courts found the review process manageable. They determined that courts could identify—and, when necessary, reject—the use of state power to insulate particular partisan

officials against popular sentiment and in that way intentionally injure one set of voters based on what those voters believe.

Judicial review, including review of legislative redistricting efforts, is an essential aspect of Utah's tripartite system of government, As has been shown, a review of Utah's Constitution and case law establishes that (I) the Utah Constitution was enacted with the purpose of preventing the type of governmental overreach at issue here; and (II) the Utah Constitution created a system of checks and balances to restrain the political power of each branch—a system in which judicial review of legislative action, including legislative redistricting, is an essential part. Under this system, Utah courts have an ability and obligation to review partisan gerrymandering claims. The Court should allow this case to proceed in the district court so that the plaintiffs can present whatever evidence of the Legislature's intent the plaintiffs can produce.

CONCLUSION

For the forgoing reasons, the Brennan Center for Justice requests the Court to affirm the decision of the district court and allow this case to proceed to trial.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Rules 21 and 25 of the Utah Rules of Appellate Procedure. This brief contains 6,610 words.

2. This brief complies with Utah R. App. P. 21(h) regarding public and non-public filings.

Dated this 19th day of May, 2023

/s/ Joshua Cutler
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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2023, I caused a true, correct, and complete copy of the foregoing **AMICUS CURIAE BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW IN SUPPORT OF RESPONDENTS AND AFFIRMANCE** to be filed with the Utah Supreme Court via email, and to be served via email upon the following:

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