In the Supreme Court of the State of Utah

League of Women Voters of Utah, Mormon Women for Ethical Government, Stefanie Condie, Malcom Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, Jack Markman, Dale Cox,
Plaintiffs-Respondents,

v.

Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Brad Wilson, Sen. J. Stuart Adams,
Defendants-Petitioners.

No. 20220991-SC

On interlocutory review from the Third Judicial District Court
Honorable Dianna M. Gibson
No. 220901712

Reply Brief of Petitioners

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Plaintiffs ask this Court to decide whether congressional districts are "too Republican" or "too Democratic." At bottom, they claim that the congressional districts that the Legislature drew are politically unfair. Those claims are neither justiciable nor cognizable under any part of the Utah Constitution. They should be dismissed.

I. Plaintiffs' partisan-fairness claims are nonjusticiable political questions.

A. The judicial power is a limited power.

1. Plaintiffs appear to view this Court's power as virtually unlimited. They contend that "nothing in the Constitution provides an 'express limitation' on the Court's jurisdiction." Resp.Br.16. (quoting *Laws v. Grayeyes*, 2021 UT 59, ¶33, 498 P.3d 410). But *Laws* itself acknowledges constitutional limits on the Court's judicial power that "emanate from the principle of separation of powers." 2021 UT 59, ¶33 (quotation omitted); *see id.* ¶¶33-34, 64 (dismissing for lack of standing). Consistent with Article V's separation-of-powers guarantee, only some disputes are "efficiently and effectively resolved through the judicial process," while others belong to the political branches. *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).

The Court must assure itself in every case, "vigilantly ... with particular care and all humility," that the matter before it is within its jurisdiction. *Utah Transit Auth. v. Loc. 382 of Amalgamated Transit Union*, 2012 UT 75, ¶26, 289 P.3d 582. Contrary to Plaintiffs' arguments, not everything is. A generalized grievance is not. *Laws*, 2021 UT 59, ¶34. A moot question is not. *Utah Transit Auth.*, 2012 UT 75, ¶¶24-25. A request for an advisory opinion is not. *Id.* ¶21; *Baird v. State*, 574 P.2d 713, 716 (Utah 1978). A claim for which a statute has created an exclusive remedy elsewhere is not. *Sheppick v. Albertson's, Inc.*, 922 P.2d 769, 776 (Utah 1996).

Policymaking is not. *See Redwood Gym v. Salt Lake Cnty. Comm'n*, 624 P.2d 1138, 1143 (Utah 1981) ("It is not the function of this Court to evaluate the wisdom or practical necessity of legislative enactments."); *Ogden City v. Stephens*, 21 Utah 2d 336, 445 P.2d 703, 705 (1968) ("the necessity, expediency, or propriety of opening a public street or way is a political question"). Time and again, this Court has confirmed that the judicial power is not something broadly defined by "preference or whim," "regardless of how interesting or important the matter presented for [the Court's] consideration." *Utah Transit Auth.*, 2012 UT 75, ¶20.

2. Those limitations apply here. The Court should reject Plaintiffs' response that the principle of limited judicial power is good only in theory but not in practice. They incorrectly claim that the Legislature cited no case in which this Court declined jurisdiction over an issue textually committed to a coordinate branch. Resp.Br.15. But take *State ex rel. Skeen v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 P. 120 (1910), which the Legislature cited (at 17) and Plaintiffs ignore. In *Skeen*, a plaintiff asked this Court to require a common carrier's streetcars to make a particular stop in Ogden Canyon. Although it described defendant's refusal to stop at that location as "wholly inexcusable, if not entirely arbitrary," *id.* at 126, the Court concluded that "the courts have no inherent power to determine for themselves when, where, and under what conditions and circumstances a common carrier shall establish and maintain a depot or stopping place for the convenience of the public," *id.* at 124-25. Because such "matter[s]" are "to be regulated by the Legislature, and not by the courts," this Court directed the district court "to dismiss the proceedings." *Id.* at 126.

Plaintiffs also ignore that this Court's justiciability standard for political questions mirrors the federal standard applied in *Rucho* and the cases preceding it. *Compare Matter of Childers-*

Gray, 2021 UT 13, ¶¶62-64, 487 P.3d 96 (applying *Baker v. Carr*, 369 U.S. 186, 217 (1962)), *with Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (applying *Baker*, 369 U.S. at 217). Plaintiffs' contention that "this Court has long refused to adopt federal justiciability standards," Resp.Br.25, is thus flat wrong. Plaintiffs cite *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, but that decision only confirms that even though the Utah Constitution has no "'case' or 'controversy'" language, a suit *cannot* proceed without "'a justiciable controversy.'" 2004 UT 32, ¶19, 94 P.3d 217. And they cite *Jensen v. Cunningham*, but that decision involved possible differences between state and federal law for damages and thus had nothing to do with the limited "judicial power" of Utah courts. 2011 UT 17, ¶49, 250 P.3d 465. No decision of this Court supports the notion that Utah's political-question-doctrine standard differs from that applied in *Rucho*.

B. The judicial power does not encompass adjudicating partisan-gerrymandering claims.

Nothing about the Utah Constitution empowers Utah courts to adjudicate partisan-gerrymandering claims. *Rucho*'s reasons for nonjusticiability apply equally here. The Legislature does not dispute that state "constitutions can provide standards and guidance for state courts to apply." *Rucho*, 139 S. Ct. at 2507. But the question here is not whether a state constitution theoretically *could* do so; the question is whether the Utah Constitution *does*. It does not. *See* Leg.Br.23-25. The lack of any judicially manageable standards for courts to apply confirms that Plaintiffs' claims are nonjusticiable. *See id.* at 25-34. This Court would be doing politics, not law. *Id.* at 34-36.

1. The Constitution does not empower courts to second-guess redistricting policy.

Article V makes the powers of the Legislature and the courts "distinct," and courts cannot exercise powers "belonging to" the Legislature "except in the cases … expressly directed or permitted" by the Utah Constitution. Utah Const. art. V, §1. The redistricting power expressly belongs to the Legislature: After every "enumeration," "the Legislature shall divide the state into congressional … districts." *Id.* art. IX, §1. So the question becomes whether the Utah Constitution "expressly direct[s] or permit[s]" the judicial branch to "exercise any functions appertaining" to that legislative function. *Id.* art. V, §1. For Plaintiffs' particular redistricting claims, it does not.

Plaintiffs respond that Article IX does not insulate redistricting *generally* from judicial review.[1] Resp.Br.17. But the question here is whether the Constitution places Plaintiffs' *partisan-gerrymandering claims* beyond judicial review. *See Rucho*, 139 S. Ct. at 2501-02 (distinguishing malapportionment and racial-gerrymandering claims from partisan-gerrymandering claims); *Ogden Rapid Transit*, 112 P. at 126 (explaining the court could adjudicate certain duties owed by common carriers, just not the particular one pressed by plaintiff). Plaintiffs thus cannot rely on the justiciability of malapportionment or racial-gerrymandering claims to establish the justiciability of their partisan-gerrymandering claims—any more than a plaintiff with only a generalized grievance could rely on another's injury-in-fact to establish standing.

[1] Plaintiffs also rely on *Growe v. Emison*, 507 U.S. 25 (1993), and a footnote in *Lawyer v. Department of Justice*, 521 U.S. 567 (1997), *see* Resp.Br.18-19, but these federalism cases are inapposite where, as here, this Court will decide as a matter of state law whether Utah's own separation-of-powers clause precludes Plaintiffs from asking this Court to adjudicate the political fairness of district lines.

Yet lengthy sections of Plaintiffs' brief conflate these distinct redistricting claims. *See, e.g.*, Resp.Br.20-22. Nearly all of Plaintiffs' cited decisions involve numerical malapportionment. *Cunningham*, for example, concerned whether severely malapportioned districts denied Wisconsinites "equal representation in the legislature," where the state constitution required districts drawn "'according to population.'" *State ex rel. Att'y General v. Cunningham*, 51 N.W. 724, 729-30 (Wis. 1892); *see also id.* at 744 (Lyon, C.J., concurring) (explaining map gave two similarly-sized counties one and three representatives, respectively). Far from extending *Cunningham*'s logic to partisan-gerrymandering claims, the Wisconsin Supreme Court has done exactly the opposite and held such questions nonjusticiable. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶39-63, 967 N.W.2d 469; *see* Leg.Br.25, 30, 32, 34.[2]

Likewise, *Ragland v. Anderson* addressed Kentucky districts that were "grossly and outrageously unequal in population." 100 S.W. 865, 865-66 (Ky. Ct. App. 1907). That malapportionment case did not preclude a Kentucky court from recently dismissing partisan-gerrymandering claims as nonjusticiable, and the issue is now pending before the Kentucky Supreme Court. *See Graham v. Adams*, No. 22-CI-47, at 69 (Ky. Cir. Ct. Nov. 10, 2022) (holding plaintiffs' "unrecognized equal protection claim for partisan gerrymandering" has "no judicially manageable standard"), *appeal pending*, No. 2022-SC-522 (Ky.). And *Parker v. Powell*—another

[2] Citing the dissenting opinion in *Johnson*, Plaintiffs malign *Johnson* as a "plurality" of the Wisconsin Supreme Court "opin[ing] on partisan gerrymandering without briefing or argument." Resp.Br.34. Contrary to Plaintiffs' retelling, the court ordered briefing specifically about whether the court had the power to "redraw the maps to allocate districts equally between [the] dominant parties" to redress some parties' complaint "that the 2011 [Wisconsin] maps reflect[ed] a partisan gerrymander favoring Republican Party candidates at the expense of Democrat Party candidates." 2021 WI 87, ¶¶2, 7. A majority of the court held unequivocally, with extensive reasoning, that it did not have that power. *Id.* ¶¶39-63; *see id.* ¶82 n.4 (Hagedorn, J., concurring) (joining "the entirety of the majority opinion except" six paragraphs unrelated to this issue).

malapportionment case—clarified that Indiana courts could not "compel the general assembly to district the state in a particular manner" beyond abiding by constitutionally required contiguity and population equality. 32 N.E. 836, 839-41 (Ind. 1892). So too in *Giddings v. Blacker*, 52 N.W. 944, 945 (Mich. 1892) (listing malapportioned legislative districts ranging in population from 97,330 to 39,727); *Ballentine v. Wiley*, 31 P. 994, 997 (Idaho 1893) (observing whole counties left unrepresented); and *State v. Moorehead*, 156 N.W. 1067, 1068 (Neb. 1916) (describing malapportioned Omaha-area districts).

Plaintiffs' historical evidence drawn from Framing-era newspapers makes the same mistake. Resp.Br.4-7. Their discussion of President Harrison's message "denounc[ing]" gerrymanders omits that his criticism targeted numerical malapportionment—maps with "65,000" people in one district but "15,000" and "10,000" in others. Resp.Add.A. Plaintiffs also reproduce an 1891 *Salt Lake Tribune* report regarding statewide apportionment, but the report focused exclusively on the "magnitude" of population disparities among districts—for example, "three representative districts in Southern Utah" with a "combined … population of not quite 2000 in excess of the population of Ogden, which has but one representative." Resp.Add.G; *see also, e.g.*, Add.C (decrying "inequality in … representation"); Add.D ("The spirit and purposes of the law which provides that election districts shall be apportioned according to the population … ought to govern strictly.").

Plaintiffs ultimately have no answer to the Legislature's arguments (and the U.S. Supreme Court's conclusion) that partisan-gerrymandering claims cannot be likened to malapportionment or racial-gerrymandering claims. Leg.Br.20-21. Adjudicating the former depends on policy determinations, unmoored from either federal or state constitutional text;

adjudicating the latter turns on well-established constitutional rules of numerical equality or forbidden racial discrimination with standards fit for courts to apply. *See Rucho*, 139 S. Ct. at 2501 (explaining malapportionment claims are grounded in the idea that "each representative must be accountable to (approximately) the same number of constituents," but "[t]hat requirement does not extend to political parties" such that "each party must be influential in proportion to its number of supporters"); *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality) (explaining there is no constitutional command "that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers"); *see also Rucho*, 139 S. Ct. at 2502 (racial-gerrymandering claims seek "the elimination of a racial classification" but "partisan gerrymandering claim cannot ask for the elimination of partisanship"). In *Parkinson v. Watson*, for example, plaintiffs claimed that malapportioned senate districts violated the constitutional provision which then prescribed districts drawn "'on the basis of [census] enumeration according to [population] ratios *to be fixed by law*,'" and even then the Court deferred to the Legislature's mode of reapportionment. 4 Utah 2d 191, 291 P.2d 400, 402, 409 (1955) (emphasis added). No similar constitutional prescription or prohibition exists for this Court to parse here.

2. Article IX contains no partisan-neutrality requirement.

Even though other provisions of the Utah Constitution preclude partisan considerations, Article IX's text tellingly has no partisan-neutrality requirement. *See* Leg.Br.21-22. But Plaintiffs cite *South Salt Lake City v. Maese*, 2019 UT 58, ¶70 n.23, 450 P.3d 1092, and tell this Court to ignore this textual smoking gun. *See* Resp.Br.21-22 ("[s]pecific prohibitions in one part of the Constitution do not nullify broadly worded rights elsewhere in the same

document"). *Maese* is inapposite—it concerns whether the enumerated jury-trial right extends to modern offenses that did not exist at Utah's Framing. 2019 UT 58, ¶2. Here, the question is whether the Framers *silently* required politically "fair" electoral districts, even though claims of partisan gerrymandering were well known then and even though the Framers required political neutrality elsewhere in the Constitution. *See* Leg.Br.18-20, 47.

Article IX's silence is dispositive. Surrounding provisions in the Constitution confirm that the Framers knew how to ban political considerations in governmental functions when they wanted to. They did not in Article IX. Leg.Br.21-22 (citing *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶14, 267 P.3d 863). Thus this Court has no textual basis to review the Legislature's redistricting policy choices for partisan fairness, including Plaintiffs' claims that districts should have combined urban and rural populations differently. Plaintiffs' only remaining response is that "the people would not have enacted a redistricting framework that purported to give exclusive authority to self-interested legislators to insulate themselves from electoral accountability through gerrymandering." Resp.Br.22. That is not a legal argument about what the constitutional text says and does not say.

3. Other state cases are inapposite.

Plaintiffs invoke cases adjudicating partisan-gerrymandering claims in other state courts (at 23-24 & n.8), but those decisions involve either fundamentally different views of the judicial power irreconcilable with current federal or Utah separation-of-powers principles,[3] or

[3] *See League of Women Voters of Pa. v. Commonwealth* (*LWVPA*), 178 A.3d 737, 814, 824 n.79 (Pa. 2018) (not addressing justiciability beyond observing the "mischief to be remedied" in the case and concluding "state courts possess the authority to grant equitable remedies for constitutional violations, including the drawing of congressional maps"); *Hellar v. Cenarrusa*, 682 P.2d 539, 541, 543-44 (Idaho

redistricting-specific state laws that prescribe neutrality.[4] Here, Utah's judicial power is not so sweeping to empower this Court to adjudicate whether districts are politically fair. *See supra*, pp. 4-8. Neither Article IX nor the Free Elections Clause, nor any other Utah constitutional provision that Plaintiffs invoke, contains a political-neutrality requirement. *See* Parts II-IV, *infra.* Accordingly, in Utah, courts lack power to adjudicate the wisdom of redistricting policy, *see* Utah Const. art. V, §1—even if, as Plaintiffs contend, the exercise of such power "would reflect justice in a particular case," *Ogden Rapid Transit Co.*, 112 P. at 125; *see also Bastian v. King*, 661 P.2d 953, 956 (Utah 1983) ("[T]his Court will not substitute our judgment for that of the Legislature with respect to what best serves the public interest. The adjustment and accommodation of conflicting interests, such as are involved in this case, are for the Legislature to resolve, irrespective of the rules applied by other states." (citations omitted)).

4. There are no judicially workable standards.

The Legislature's opening brief explained at length that no judicially manageable standards exist to test Plaintiffs' partisan-gerrymandering claims. Leg.Br.25-34. In response,

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1984) (appearing to adjudicate gerrymandering claims under *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)); *Szeliga v. Lamone*, 2022 WL 2132194, at *2 n.6 (Md. Cir. Ct. Mar. 25, 2022) (not addressing justiciability after defendants "conceded" justiciability).

[4] *See Harkenrider v. Hochul.* 197 N.E.3d 437, 440, 451-53 (N.Y. 2022) (applying N.Y. Const. art III, §4(c)(5), which forbids districts "discourag[ing] competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties"); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022 Ohio 65, ¶6, 192 N.E.3d 379 (Ohio 2022) (applying Ohio Const. art. XI, §9, which forbids legislation "drawn primarily to favor or disfavor a political party," and requires the "statewide proportion of districts" favoring each major party to "correspond closely to the statewide preferences of the voters of Ohio"); *Parella v. Montalbano*, 899 A.2d 1226, 1243 (R.I. 2006) (applying state constitution's compactness provision, which the Rhode Island Supreme Court previously interpreted to require political fairness); *Matter of 2021 Redistricting Cases*, 528 P.3d 40, 52-56 (Alaska 2023) (applying state constitution's compactness and communities-of-interest provisions and concluding amendments' legislative history established "avoiding partisan political influence on redistricting as the amendments' reason and intent").

repeating the same error discussed above, Plaintiffs contend that "[m]alapportionment claims illustrate" that there will be workable standards for partisan gerrymandering claims. Resp.Br.29. But malapportionment claims require courts to ask only whether congressional districts are numerically equal in the number of inhabitants, based on an official count from the U.S. Census. *See Evenwel v. Abbott*, 578 U.S. 54, 61, 66-69 (2016). Partisan-gerrymandering claims, meanwhile, raise questions courts cannot answer: How should the Court measure partisanship? Based on votes cast in past races (which ones)? How should the Court categorize voters who prefer third parties, unaffiliated voters, split-ticket voters? Or voters who switch political parties to shape who becomes the opposing party's nominee? *See, e.g.*, Robert Gehrke, *No time to waste! Register Republican today to help decide Rep. Chris Stewart's replacement, Robert Gehrke writes.*, Salt Lake Trib. (June 9, 2023), https://www.sltrib.com/opinion/2023/06/09/no-time-waste-register-republican/ ("So here's your assignment: If you are registered as a Democrat or are an unaffiliated independent voter in the 2nd Congressional District, or you aren't registered to vote and you want to have even the smallest say in who is representing you in Congress, go to vote.utah.gov and register as a member of the Republican Party."). Even assuming the Court could measure partisanship, how much partisanship is too much? And ultimately, what is fair in redistricting? *See Rucho*, 139 S. Ct. at 2501; *Johnson*, 2021 WI 87, ¶44.

Plaintiffs respond (at 37) that "the Legislature's question as to 'how much is too much'" is "an overstated concern," because Plaintiffs challenge only "extreme, durable partisan gerrymanders." With this concession, Plaintiffs implicitly acknowledge that *some* level of partisanship in redistricting—a level short of "extreme"—is permissible. They've merely rephrased

the question courts cannot answer: What should count as "extreme" and "durable"? How much is "too much"?

Plaintiffs assure this Court that it can figure it out. Resp.Br.29-31, 42-43.[5] These assurances ignore the latest lesson from North Carolina, which Plaintiffs now write off as "peculiar" and an "outlier" despite substantial reliance until now on the North Carolina Supreme Court's earlier decisions. Resp.Br.25-26; *see* Bates#000293-94, 298-301, 303, 305, 310-13, 316, 322, 324. North Carolina's experience confirmed that judicially created partisan fairness standards are not "workable." After *Harper I* announced what it believed to be a justiciable partisan-fairness standard, later litigation revealed that "no one—not even the four justices who created it—could apply it to achieve consistent results." *Harper v. Hall*, 886 S.E.2d 393, 424-25, 427 (N.C. 2023) (*Harper III*). When the legislature passed remedial plans to comply with *Harper I*, a three-judge panel, armed with "advisors and experts" to apply *Harper I*'s standard, invalidated one plan (the congressional map) and approved two others (for the senate and assembly). *Id.* at 425. Then a narrow supreme court majority reversed in part and invalidated the senate plan as well. *Id.* at 426. No amount of "granular voter data," or assumptions about "the increasing durability of voters' political preferences," or "rapidly advancing mapping technology"—the tools that Plaintiffs encourage this Court to deploy, Resp.Br.43—enabled the North Carolina Supreme Court to agree on a "fair" map. Instead, they produced only "inconsistent results,"

[5] Likewise the district court said it could determine what "criteria or factors" should be considered "[a]s this case proceeds." Bates#000751. That contradicts Plaintiffs' contention (at 29-31) that the district court already divined a standard asking whether redistricting "substantially diminish[es] or dilut[es] the power of voters based on their political views" without a "legitimate justification"—which is standardless and only raises more questions. As for Plaintiffs' contention that the Legislature did not contest that "standard," *id.*, the Legislature has denied the existence of judicial standards all along, *e.g.*, Bates#000226-30, 354-60.

"limitless judicial involvement," and a process "dominate[d]" by unconstrained "judicial discretion." *Harper III*, 886 S.E.2d at 427.

Plaintiffs now offer a fallback: this Court may adjudicate the constitutionality of the existing districts even if it could not order an appropriate remedy. Resp.Br.17-18. But Plaintiffs' complaint asks the judiciary to draw new district lines to implement Plaintiffs' view of fairness if the Legislature fails to do so. *See* Bates#000081. And remedies are necessarily relevant to the justiciability analysis. *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (concluding claim was not justiciable because a court could not "assume continuing regulatory jurisdiction over the activities of the Ohio National Guard"). In *Vieth*, for example, the plurality observed that "[t]he issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, *and to design a remedy*." 541 U.S. at 292 (emphasis added). Similarly, in *Rucho*, the Court observed there was no justification "for judges to take the extraordinary step of reallocating power and influence between political parties" by ordering new districts. 139 S. Ct. at 2502. Here, as there, this Court cannot merely declare the Legislature liable and avoid the difficulty of fashioning a remedy. If Plaintiffs' claims proceed, this Court will be no different from *Harper*—perpetually in the position of deciding whether maps are "fair enough." There are no "workable standard[s]" for doing so. *Harper III*, 886 S.E.2d at 424-25.

C. The federal Elections Clause further confirms that Plaintiffs' claims present nonjusticiable political questions.

The federal Elections Clause says that "the legislature" shall "prescribe[] the … manner" of holding congressional elections, including district lines. U.S. Const. art. I, §4. This text further confirms that Plaintiffs' claims would result in Utah's courts interceding in matters

committed to the legislative branch. Plaintiffs label this a "fringe argument" not raised below Resp.Br.26. But the question is still pending before the U.S. Supreme Court in *Moore v. Harper*, No. 21-1271. And the Legislature raised the argument by moving to stay the case pending *Moore*. *See* Bates#000384-91.

On the merits, the text of the federal Elections Clause converges with the Legislature's arguments regarding state law. Whether the Court is parsing the federal Elections Clause's use of "Legislature"; the Utah Constitution's use of "judicial power"; or the absence of partisan-neutrality requirements in Article IX, the Free Elections Clause, or other constitutional provisions, the conclusion is the same: Plaintiffs' particular claims involve matters constitutionally vested solely in the Legislature. The judiciary cannot usurp that power.

II. The Free Elections Clause does not impliedly guarantee Plaintiffs' preferred partisan outcomes.

Plaintiffs contend that five words—"All elections shall be free," Utah Const. art. I, §17—empower this Court to referee whether congressional districts are too favorable to Republicans or Democrats. But that prefatory-clause language does not expressly delegate authority to the judiciary as Plaintiffs claim it does. Plaintiffs again ignore the operative clause, which more specifically prohibits any "power, civil or military," from "at any time interfer[ing] to prevent the right of suffrage," *id.*—for example, by fining citizens for voting against a machine candidate. Beyond that, *the Legislature*—not the courts—provides "for the conduct of elections, and the means of voting, and the methods of selecting nominees." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942). If the Free Elections Clause was not a basis for demanding a write-in option on the ballot in *Anderson*, it follows that Plaintiffs' demand for congressional district lines more favorable to Democrats is not cognizable, either. The clause

does not "inhibit [the Legislature] from prescribing reasonable methods and proceedings for determining and selecting the persons who may be voted for at the election." *Id.*

A. Plaintiffs' arguments are divorced from the constitutional text.

Plaintiffs extrapolate their reading of the Free Elections Clause from dictionary definitions of the word "free" combined with *ipse dixit*. Dictionaries define "free" to mean "[u]constrained," "[n]ot despotic," "assuring liberty," "determining one's own course of action," and similar concepts. Resp.Br.47. From there, Plaintiffs posit that the Free Elections Clause "prevent[s] … manipulation of the electoral process," safeguards the "political 'liberty'" of "minority-party voters," and "requires equal opportunity." Resp.Br.46-48. They conclude from these broad principles that partisan gerrymandering violates the Free Elections Clause because "a free election is one that is not manipulated for partisan advantage." *Id.* at 48.

The principles that Plaintiffs contend are embodied in the Free Elections Clause—equal opportunity, political liberty, and minority protection—do not prescribe any "'judicially definable and enforceable'" formula for redistricting. *See Harvey v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 2017 UT 75, ¶75, 416 P.3d 401. They do not even require the use of single-member electoral districts (as opposed to at-large elections). This single-member-district requirement comes from other federal and state provisions. *See* 2 U.S.C. §2c.; Utah Code §20A-13-101.5. The Free Elections Clause, which is silent about even this requirement, is equally silent about partisan fairness.

Proving the point, Plaintiffs' proposed rule (at 48) that "a free election is one that is not manipulated for partisan advantage" creates more questions than they can answer. To begin with, would it not be equally "manipulative" to draw so-called "safe" districts that

deliberately achieve a predetermined partisan balance in the congressional delegation? Such a map would inevitably require gerrymandering natural pockets of likely Republican or Democratic voters to reach Plaintiffs' desired result. Leg.Br.34-35. The term "manipulation," moreover, provides no self-executing standard for how much partisanship is too much, assuming—as Plaintiffs now concede, *supra* at 37—that the permissible amount of partisanship is more than zero. *See Rivera v. Schwab*, 512 P.3d 168, 183 (Kan. 2022); *Harper III*, 886 S.E.2d at 410. Redistricting is "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality). Plaintiffs offer no way to distinguish *lawful* partisanship from the purportedly *manipulative* kind, and the Free Elections Clause provides no barometer.

As for protecting political "'liberty,'" Resp.Br.47, Plaintiffs never explain why a major political party is the only group that matters for a Free Elections Clause claim. Plaintiffs' rule would apply to elections at all levels of government and appears not to concern third parties, independents, religious minorities, particular trade groups, and other distinct minority interest groups beyond Republicans and Democrats. Plaintiffs would have the judiciary entrench the major political parties with a minimum, judicially guaranteed baseline of electoral success to the detriment of other factions or individual voters who vote for issues and candidates, not blindly for parties. *See* Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness*, 67 Cath. U.L. Rev. 229, 232 (2018) (judicial balancing of partisanship in redistricting "artificially constrain[s] party identity itself" and "intrusively restricts voter control over democratic contestation"). Plaintiffs' version of the Free Elections Clause mistakes the win rates of major political parties for individual liberty.

B. Plaintiffs' Free Elections Clause is contrary to history.

Plaintiffs misread history from the English Bill of Rights to the Utah Framing era. All agree that the Free Elections Clause, like analogous provisions in other state constitutions, has its historical roots in the English Bill of Rights of 1689, which declared that "election of members of Parlyament ought to be free." Leg.Br.41; Resp.Br.54-55. Plaintiffs assert that this text targeted England's "rotten boroughs," and that "[p]artisan gerrymandering is the modern-day analogue of the electoral distortion in England's rotten boroughs." Resp.Br.56. Not so.

First, the hallmark of rotten boroughs was again *numerical* malapportionment, by which locales "with few inhabitants were represented in Parliament on or almost on a par with cities of greater population." *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964). At the U.S. Constitutional Convention, for example, James Wilson condemned "the English system under which one man could send two members of Parliament to represent the borough of Old Sarum while London's million people sent but four." *Id.* at 15; *see also Evenwel*, 578 U.S. at 82.

More to the point, the clause's aim—like much of the English Bill of Rights created after the Glorious Revolution—was to constrain the Crown, not Parliament. *See, e.g.*, *Harper III*, 886 S.E.2d at 437 (citing *Our First Revolution: The Remarkable British Upheaval that Inspired America's Founding Fathers* 231-32 (2007)). This provision, and American analogs inspired by it, did not "limit the [legislative branch's] redistricting authority or … address apportionment at all." *Id.* at 438. It left it to Parliament's legislative discretion to maintain or reform (as it eventually did) these electoral districts. *Id.* at 437 n.21 ("[T]he continued existence of these Rotten Boroughs at the time of the signing of the English Bill of Rights and their continued use

thereafter suggests that the English people did not intend to address apportionment issues with their free elections clause.").

The entire American experience with free elections clauses from the Founding to the Utah Constitution's ratification confirms Plaintiffs' misreading. Throughout this period (as ever), redistricting was a partisan political process. Yet to the Legislature's knowledge, no State's free election clause was ever invoked, much less enforced, against even the most controversial legislatively enacted electoral map. Leg.Br.18-19, 45-46; Elmer Griffith, *The Rise and Development of the Gerrymander* 123 (1907) ("By 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts."), *cited by Rucho*, 139 S. Ct. at 2494-95.

Plaintiffs ignore this history. They refer elsewhere to "anti-gerrymandering" decisions in other courts, Resp.Br.4-5, but these were numerical malapportionment cases. *Supra* 8-9 & n.3. And not one of these cases was decided under a free elections clause at the time of Utah's statehood. Nor do *amici* appear to contribute a single historical example. *See, e.g.*, Ross.Br.8-11, 22 (citing only malapportionment cases to support contention that Utah's Free Elections Clause "Encompassed Freedom from Partisan Districting Abuses"). Plaintiffs have no history for the notion that their political-unfairness claims are cognizable under the Free Elections Clause.

Plaintiffs' other "historical cases" only betray the weakness of their position. Plaintiffs rely (at 53-54) on quotes plucked from elections cases including *Ritchie v. Richards*, 14 Utah 345, 47 P. 670 (1896), for the notion "that Utah's Framers" through the Free Elections Clause "intended for the Constitution to prevent electoral manipulation." Plaintiffs ignore what these

cases actually said. None expressly relies on the Free Elections Clause. All are examples of the separation-of-powers arguments that the Legislature advances here. In *Ritchie*, for example, the court acknowledged that "*the voter* should be allowed to" fill out a ballot "with the least difficulty and inconvenience consistent with an honest and fair election." *Id.* at 675 (emphasis added). But as for the judiciary's role, the court *refused* to question the "wisdom" of the legislative department's ballot rules that "tend[ed] to encourage the voting of straight tickets, and to discourage independent voting." *Id.* Later in *Payne v. Hodgson*, 34 Utah 269, 97 P. 132 (1908), this Court confirmed that election laws protect a voters' ability *to vote* "in accordance with the dictates of his judgment and conscience" and to have that vote counted—not *to win*. *Id.* at 138. That principle came to life in *Ferguson v. Allen*, 7 Utah 263, 26 P. 570 (1891), where the elections registrar, "without any authority of law whatever, erroneously and illegally ordered [individual voters'] names stricken from the lists of qualified electors on the morning of the election," thereby depriving the electors of having their votes "honestly counted." *Id.* at 573-74; *accord Earl v. Lewis*, 28 Utah 116, 77 P. 235, 238-39 (1904) (courts cannot "deny the validity of [voters'] ballots, and withhold the offices from the candidates receiving a majority of the votes"); *Park v. Rives*, 40 Utah 47, 119 P. 1034, 1036 (1911) (suggesting that ballot law precluding write-in candidates would "be an improper interference with the elective franchise").

C. Courts in other states persuasively reject partisanship claims.

Harper III provides the most thorough and persuasive treatment of free election clauses by another state supreme court, and Plaintiffs remark on it the least. That opinion thoroughly analyzed the text, structure, and history of North Carolina's Free Elections Clause, and concluded that "a voter is deprived of a 'free' election if (1) a law prevents a voter from voting

according to one's judgment, or (2) the votes are not accurately counted." 886 S.E.2d at 439. *Harper III* began with the clause's text, finding that "'free' means 'free from interference or intimidation.'" *Id.* at 432. It then considered the clause in the "context" of the 1776 state constitution, including "later articles that give [the clause] more specific application." *Id.* The court also reviewed the clause's history, noting that in the context of English and colonial history, the clause originally "protect[ed] against abuses of executive power." *Id.* at 433-38. Finally, the court reviewed its own decisions after ratification. *Id.* at 438-39. After this extensive review, the court held that "partisan gerrymandering claims do not implicate this provision." *Id.* at 439.

In answer, Plaintiffs say only that *Harper III* wrongly interpreted the North Carolina Free Elections Clause in "lockstep" with the federal Constitution's Elections Clause, requiring congressional redistricting to "be prescribed in each State by the Legislature thereof." Resp.Br.59-60. They offer no response to the court's analysis of text and history. They instead pivot (at 58) to the Pennsylvania Supreme Court's earlier decision that Pennsylvania's Free and Equal Elections Clause "governs all aspects of the electoral process" and gives Pennsylvania courts the power to adjudicate claims that partisan gerrymandering denied voters "an equally effective power to select the representative of his or her choice." *LWVPA*, 178 A.3d at 814; *see also* Fried.Br.13-14 & n.3; ACLU.Br.18. But *LWVPA* went beyond "the plain language" of the constitutional text, and opted to "consider, as necessary, any relevant decisional law and policy considerations." 178 A.3d at 803. In Utah, the Constitution's original meaning controls. *See, e.g., Maese*, 2019 UT 58, ¶¶18-19 & n.6.

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At bottom, Plaintiffs' Free Elections Clause argument is a political one: that certain maps "distort election results" and institute "'arbitrary and despotic government' control." Resp.Br.47. Those are "questions of political philosophy, not questions of law." *Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring in judgment). The Utah Constitution does not vest the judiciary with the power to answer such questions. And tellingly, when *Rucho* observed that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," the Court did not single out Pennsylvania or other States with broadly worded Free Elections Clauses. 139 S. Ct. at 2507-08. *Rucho* instead cited States with laws that specifically require redistricting without political intent and provide methods and standards for doing so. *Id.* (discussing, *inter alia*, Fla. Const., art. III, §20(a)). Those States have more than just a Free Elections Clause, and their laws do not equate to the broadly worded, non-self-executing Utah provision Plaintiffs invoke here. *See Harper III*, 886 S.E.2d at 439.

III. The Uniform Operation Clause does not impliedly guarantee partisan outcomes.

Plaintiffs do not claim that Utah's congressional districts are malapportioned or that their votes are otherwise not counted equally. That suffices to resolve any genuine Uniform Operation claim; there is no alleged discriminatory classification or disparate treatment of voters' ballots. None of Plaintiffs' arguments to the contrary shows otherwise.

A. Plaintiffs stake their Uniform Operation claim primarily on this Court's ruling in *Gallivan v. Walker*, 2002 UT 89, 54 P.3d 1069, which reviewed county-by-county signature requirements for placing initiatives on the ballot. *See* Resp.Br.60-63. According to Plaintiffs,

Gallivan shows that division of "similarly situated voters" is a "discriminatory classification," *id.* at 61-62, and that "discriminatory burdens on voting 'power'" implicate strict scrutiny, *id.* at 62-63. Plaintiffs misread *Gallivan* on both points.

First, absent allegations of numerical malapportionment, congressional district lines do not place "discriminatory burdens" on any citizens' "voting 'power.'" When *Gallivan* referred to "diluting the power" of some voters relative to others, it meant numerical imbalances that objectively gave greater weight to some votes over others. 2002 UT 89, ¶45. The challenged statute required initiative proponents to collect a minimum number of signatures from at least 20 of Utah's 29 counties. *Id.* ¶44. By failing to account for vast population differences among different counties, this scheme "allow[ed] registered voters in rural counties to wield a disproportionate amount of power"—in the objective, numerical sense—over "whether an initiative qualifies to be placed on the ballot." *Id.* ¶45. *Gallivan* had nothing to do with partisan balance, partisan competitiveness, or expected partisan success.

Second, Plaintiffs' gerrymandering claims do not trigger heightened scrutiny merely because they relate to voting. *Gallivan* was more specific: likening ballot-access rules for initiatives to ballot-access rules for third parties and write-in candidates. *Id.* ¶¶81-82 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)). Plaintiffs ask for something different here: the right to cast a "'meaningful'" vote. Resp.Br.63 (quoting *Shields v. Toronto*, 16 Utah 2d 61, 395 P.2d 829, 832 (1964)). Plaintiffs' asserted right moves well beyond the fundamental right to vote described in this Court's cases. What this Court actually said in *Shields* was that to make "the right to vote" a "meaningful" *right*—not a "meaningful" *vote*—voters must be able to cast a vote "for the candidate of one's

choice." 395 P.2d at 832; *accord Payne*, 97 P. at 138 (discussing right to vote one's conscience). *Shields* reasoned that right would be denied if otherwise qualified candidates were disqualified from seeking office, while acknowledging that "there is no question but that other provisions of law can and do limit the rights to vote and to hold office to those properly qualified." 395 P.2d at 833. Similarly, *Gallivan* quoted Supreme Court decisions describing the right of qualified voters to cast their votes "'effectively.'" 2002 UT 89, ¶26. The phrase is traceable to *Williams v. Rhodes*, a ballot-access case challenging an Ohio law that "ma[d]e it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." 393 U.S. 23, 25, 30 (1968). Thus, Plaintiffs' own cases confirm the fundamental right is one that guards against "restraints on *access*" to the polls, Resp.Br.63, not one that guarantees electoral results.

B. Plaintiffs also argue for strict scrutiny because "partisan affiliation" is a "suspect classification." Resp.Br.63. Transient partisan preferences cannot be likened to race or sex. Leg.Br.54. Plaintiffs' suspect-classification argument ignores that voters cast ballots for candidates, not parties. *Id.* at 33. They fail to account for unaffiliated voters, independent voters, split-ticket voters, or voters whose party affiliations change over time. *Id.*; *see also* Eisler, *supra*, at 265 ("[V]oter partisan identity is too unstable a characteristic upon which to base a judicially enforceable right."). Plaintiffs respond that they've been unconstitutionally sorted based on their *past* voting behavior, not future. But the crux of their claim (at 64) is about their preferred candidates' ability to win *future* elections.

Plaintiffs' fallback argument is that the Uniform Operation Clause applies to non-immutable traits. Resp.Br.64. But such classifications ordinarily receive only rational-basis scrutiny, which an electoral map that draws lines to evenly distribute voters into congressional

districts assuredly passes. *See State v. Robinson*, 2011 UT 30, ¶23, 254 P.3d 183 ("Broad deference is given to the legislature when assessing 'the reasonableness of its classifications and their relationship to legitimate legislative purposes.'"). Indeed, the Court applied only rational-basis scrutiny in all three cases Plaintiffs cite. *See Anderson v. Provo City Corp.*, 2005 UT 5, ¶¶19-21, 108 P.3d 701 (holding differential treatment of "occupying and nonoccupying" homeowners was "reasonably justified" by a "legitimate" objective); *State v. Angilau*, 2011 UT 3, ¶¶22, 31-32, 245 P.3d 745 (similar, for different treatment of minors over sixteen charged with murder); *State v. Outzen*, 2017 UT 30, ¶¶19-23, 408 P.3d 334 (similar, for disparate treatment of persons who drive after "voluntarily and illegally ingest[ing] a controlled substance," as opposed to "legally or involuntarily").

C. Beyond these flaws, Plaintiffs' suspect-classification theory would mire the judiciary in partisan-fairness litigation. If partisan "balance" with respect to either influence or outcomes were constitutionally required, it would be impossible to achieve. Redistricting, like congressional elections themselves, is zero-sum: any change that favors likely Democratic voters necessarily disfavors likely Republican voters. If the Legislature, for example, decided to meet all of Plaintiffs' demands in the next redistricting map, then Plaintiffs' political rivals could invoke Plaintiffs' exact theory to claim that they had been "targeted … for unequal treatment based upon *their* past voting behavior" and demand strict scrutiny. Resp.Br.63-64 (emphasis modified). A court could never award to every potential claimant what Plaintiffs demand for themselves—more favorable district lines for their preferred candidates—further proof that the Uniform Operation Clause does not require it.

Plaintiffs cannot evade the historical evidence against their Uniform Operation claim, either. Decades after ratification, the clause did not even require equally populous districts, much less a map with some notion of partisan fairness. That is not simply an implication from silence, as if the issue was never litigated and decided. Rather, this Court squarely held that while "representation must bear reasonable relationship to population," a map could not be set aside unless it "so depart[ed] from that principle as to be wholly unreasonable and arbitrary." *Parkinson*, 291 P.2d at 407; Leg.Br.56. And while federal law has since imposed more stringent malapportionment standards, the opposite has occurred for claims of partisan gerrymandering—there is no federal claim.

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Quite unlike a numerical malapportionment claim—which typically involves only questions of arithmetic—Plaintiffs' view of the Uniform Operation Clause would embroil the courts in questions about representation, voter identity, and partisan political dynamics. The Court should take these unresolved difficulties as a sign that "'this is not law,'" *Rucho*, 139 S. Ct. at 2508, and decline Plaintiffs' invitation.

IV. The Free Speech, Free Association, and Qualifications Clauses do not impliedly guarantee partisan outcomes.

Plaintiffs search for a right to partisan fairness in redistricting in three other constitutional provisions: Article I, §§1 & 15 (freedom of speech and association), and Article IV, §2 (the Qualifications Clause). But that right cannot be found in any of them.

A. Plaintiffs' view of all three clauses suffers a common defect: their reading depends on a heretofore unknown constitutional right to political success. Plaintiffs disclaim any such notion, Resp.Br.68, but Plaintiffs, their *amici*, and the district court all repeatedly referred to an

"effective" or "meaningful" vote. *See, e.g.*, Resp.Br.1, 63, 72-73; Bates#000078 ¶301 (pleading in complaint Plaintiffs' "right to a meaningful and effective vote"); Bates#000773, 778, 782-83, 786; *see also* NYU Br.20 (equating "likelihood of success" and "meaningful" vote); ACLU Br.2, 6, 12; Rural Utah Br.8; Governors Br.28. That turn-of-phrase can only mean political success, which cannot sustain a claim for relief.

B. This Court has already held that "free speech is found in the interplay of ideas during the attempt to capture the voters' curiosity and support." *Utah Safe to Learn*, 2004 UT 32, ¶57 (cleaned up). It is not found in "success" at the ballot box. *Id.* In the voting context, "[f]ree and robust public debate" cannot "be equated with successfully communicating one's ideas." *Id.* ¶59; *see also Cook v. Bell*, 2014 UT 46, ¶34, 344 P.3d 634 ("distinguish[ing] political expression from political activity" and holding free speech doctrine does not "establish a right to political success").

Plaintiffs do not mention *Utah Safe to Learn* in relation to their free-speech claim. They never even *try* to explain how their proposed view of free speech can be reconciled with it. Nor do they explain how electoral map-drawing inhibits "the interplay of ideas during the attempt to capture voters' curiosity and support." *Utah Safe to Learn*, 2004 UT 32, ¶57.

More broadly, Plaintiffs' speech and association claims, as Plaintiffs define them, would be inhibited by *any* district lines that separate voters who might otherwise be in the same district (as all lines do). And any hypothetical remedy for Plaintiffs would only inflict the same purported harm on other voters. In reality, no map truly precludes voters from "associat[ing] together to build support for a congressional candidate." Resp.Br.68. All citizens "are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*,

139 S. Ct. at 2504. Beyond that freedom, there is no further "constitutional right to have a 'fair shot' at winning." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008).

Plaintiffs argue that they need show only that their rights are "'indirectly inhibit[ed],'" not "wholly prevented." Resp.Br.68. But they can't clear even that lower bar. Plaintiffs forget that speech and association rights in the voting context are tied to the *expressive* component of each person's vote—the individual freedom to freely choose between candidates and campaign for them—not the right to determine the election outcomes. Nothing in a redistricting plan stops citizens from running for office, expressing their political views, endorsing candidates, campaigning for them, or voting. *See, e.g.*, *Johnson*, 2021 WI 87, ¶60. Rather, it leaves all voters fully "free … to disseminate their message throughout the state." *Utah Safe to Learn*, 2004 UT 32, ¶57.

Plaintiffs' suggestion that the electoral map "retaliate[es] against their political viewpoints" cannot save their claim. Resp.Br.66. Plaintiffs have conceded, *supra* at 10, the well-established principle that *some* consideration of partisan dynamics in the inherently political process of redistricting is valid. So if partisanship in redistricting were retaliatory, that would mean state legislatures are permitted to "retaliate" against voters for their self-expression at the polls—but only a little bit. That cannot be right. *Cf. Rucho*, 139 S. Ct. at 2504 (under analogous First Amendment theory, "any level of partisanship in districting would constitute an infringement of their First Amendment rights."). And any retaliation theory raises the same unanswerable questions as Plaintiffs' other theories. The difficulties of adjudicating "how much partisanship is too much?" in the ordinary case have already been discussed. *See supra* at 10-11. A cognizable retaliation claim would add more layers of difficulty, perhaps including

inquiry into the motives of legislators, even though the Utah Constitution guarantees legislators immunity and privilege for their legislative acts. Utah Const. art. VI, §8. Or the claim might turn on whether a map confers *enough* of an electoral advantage on one party to attribute it to legislative animus against opposite-party voters. Neither inquiry (and Plaintiffs do not propose others) could bring the Court any closer to answering how much partisanship is too much in redistricting. In short, Plaintiffs' retaliation theory is unsound in theory and unworkable in practice. The Court should reject it.

C. Lastly, Plaintiffs argue that Article IV, §2 "guarantees the right to a meaningful, undiluted vote." Resp.Br.72. No case to the Legislature's knowledge has interpreted the Qualifications Clause to require anything more than the opportunity for qualified voters to vote their conscience. *Supra* at 13-15. The clause's plain text ensures persons meeting the citizenship, age, and proof-of-residence qualifications are entitled to vote. None of Plaintiffs' cited authorities requires more. *See* Resp.Br.73. Plaintiffs' "meaningful" vote depends on shifting syntax in *Shields*. *See supra* at 21. Plaintiffs next invoke *Earls v. Lewis*, which merely rejected a candidate's retroactive bid to "deny the validity of … ballots" of "honest voters" for candidate who should have been deemed qualified. 77 P. at 238. As for *Dodge v. Evans*, the plaintiff claimed "that he was deprived of the right to vote in any county election," and that claim turned on registration requirements—squarely within the Qualifications Clause's text. 716 P.2d 270, 272-73 (Utah 1985).

These cases all teach a common lesson: the Qualifications Clause guarantees qualified voters the right to cast a ballot and have it counted. Redistricting legislation does not deny Plaintiffs that right. And no case approaches extending that right to Plaintiffs' novel view that

voters have a right to demand a certain prospect of success for their preferred candidates or parties. This provision, like all the others that Plaintiffs raise, contains no rule of partisan balance in electoral maps.

CONCLUSION

Plaintiffs' claims are not justiciable and are not cognizable under any provision of the Utah Constitution, and their case should be dismissed.

Dated: June 16, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief contains 7,992 words, excluding any tables or attachments, in compliance with this Court's March 16, 2023, Order allowing reply briefs of up to 8,000 words.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Garamond 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).

/s/ Tyler R. Green

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, a true, correct, and complete copy of the foregoing **Petitioners' Reply Brief** was filed with the Utah Supreme Court and served via electronic mail as follows:

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