This motion requires you to respond. Please see the Notice to Responding Party.

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IN THE THIRD JUDICIAL DISTRICT COURT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEFANIE CONDIE, MALCOLM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX, Plaintiffs, v. UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; SENATOR SCOTT SANDALL, in his official capacity; REPRESENTATIVE BRAD WILSON, in his official capacity; SENATOR J. STUART ADAMS, in his official capacity; and LIEUTENANT GOVERNOR DEIDRE HENDERSON, in her official capacity, Defendants.	**LEGISLATIVE DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** Case No: 220901712 Honorable Dianna Gibson

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Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson ("Speaker Wilson"), and Senator Stuart Adams ("President Adams") (collectively, "Legislative Defendants"), by and through their undersigned counsel, respectfully move the Court to dismiss Plaintiffs' Complaint under Rule 12(b)(1) and (b)(6).

SUMMARY OF RELIEF REQUESTED AND GROUNDS FOR RELIEF

Plaintiffs' claims boil down to a political disagreement over how congressional boundaries should be drawn. Plaintiffs would transform the highly political task of drawing congressional boundaries into a judicial exercise based on illusory standards of political equality in a highly unequal partisan landscape. They ask the Court to ignore the Utah Constitution's mandate for "the Legislature [to] divide the state into congressional . . . districts." For Plaintiffs to prevail on any of their claims would require an unprecedented reading of the Utah Constitution, which would distort beyond recognition provisions never intended to apply to the Legislature's constitutional duty to draw congressional boundaries. The Utah Constitution has committed the responsibility for the redistricting of congressional boundaries exclusively to the Legislature. The Court should honor the Constitution's framing.

Plaintiffs' claims against Legislative Defendants should be dismissed in their entirety and with prejudice for the following reasons:

I. As a threshold matter, the Court lacks subject matter jurisdiction over Plaintiffs' claims related to alleged partisan redistricting as a nonjusticiable political question because:

A. the Utah Constitution places the authority and discretion for redistricting solely with the Legislature; and

B. these claims lack any judicially discoverable or manageable standards for providing Plaintiffs' requested relief.

II. Plaintiffs fail to state any claim upon which relief may be granted against the Individual Legislative Defendants and the Legislative Redistricting Committee because those defendants cannot themselves provide the requested relief and because the Individual Legislative Defendants are protected by legislative immunity.

III. Plaintiffs fail to state any claim upon which relief may be granted against Legislative Defendants because:

A. the separation of powers doctrine precludes the Court from providing relief;

B. there is no provision in the Utah Constitution that would be violated if the Legislature passed a congressional plan that allegedly included partisan considerations or produced an effect that favored one political party over another; and

C. article I, section 2 and article VI, section 1 of the Utah Constitution do not prohibit the Legislature from passing legislation to enact or amend the Utah Code.

For these reasons, the Court should dismiss Plaintiffs' Complaint in its entirety.

FACTUAL BACKGROUND AND RULE 12(b) STANDARD

Legislative Defendants reject Plaintiffs' descriptions of the legislative process,[1] conclusions of law,[2] mischaracterizations,[3] irrelevant information, and conjecture found in the Complaint for Declaratory and Injunctive Relief ("Complaint"). However, for the purpose of Legislative Defendants' motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6), the Court should accept Plaintiffs' factual allegations as true and consider reasonable inferences drawn from those facts in the light most favorable to Plaintiffs. *Salt Lake City v. State*, 2020 UT 27, ¶ 26, 466 P.3d 158, 166; *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226, 1230. But the Court "need not accept extrinsic facts not pleaded nor . . . accept legal conclusions in contradiction of the pleaded facts." *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 7, 342 P.3d 224, 228. Additionally, the Court need not "accept legal conclusions or opinion couched as facts." *Koerber*

[1] For example, both a citizen initiative and the Legislature's bills have the same effect of enacting or modifying statutes in the Utah Code. The Legislature has not modified or repealed an initiative but rather statutes in the Utah Code. Similarly, the Legislature has chosen to exercise its exclusive authority to redistrict through legislation that enacts a statute that incorporates by reference a congressional map that assigns over 70,000 individual census blocks to individual districts. The legislation incorporating by reference a congressional map is what the Legislature passed, and the Governor signed, and the resulting statute is the proper focus of the constitutional evaluation.

[2] For example, Plaintiffs suggest that political redistricting should be met with strict scrutiny on par with race-based discrimination without identifying a single phrase in the Utah Constitution that identifies a constitutional entitlement to a desired political outcome or any justification as to why the Court should apply strict scrutiny. Similarly, Plaintiffs suggest that it is constitutionally acceptable for an entity other than the Legislature to exercise the redistricting authority granted exclusively to the Legislature by the Utah Constitution.

[3] For example, Plaintiffs dramatize the parallel processes of the Legislative Redistricting Committee and the Independent Redistricting Commission and theatricalize the Governor's signing of the congressional map.

v. Mismash, 2013 UT App 266, ¶ 3, 315 P.3d 1053, 1054 (citations and internal quotation marks omitted). Finally, when a court is presented with a challenge to the constitutionality of a statute, it "presume[s] the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality." *South Salt Lake City v. Maese*, 2019 UT 58, ¶ 8, 450 P.3d 1092, 1095. Applying these standards of review, the Court should dismiss the Complaint for the reasons stated herein.

The alleged facts that are material to the legal questions presented are as follows:

1. Every ten years, the federal government conducts a census enumeration of all persons living in the United States, Congress reapportions congressional representation for each State based on relational population changes, and states draw new congressional district boundaries to reflect changes in the state's population. (Compl., ¶¶ 50–52.)
2. The Utah Constitution states that "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." (*Id.*, ¶ 68 (citing Utah Const. art. IX, § 1).)
3. The Utah Constitution recognizes the people's lawmaking power through ballot initiatives that are not subject to gubernatorial veto. (*Id.*, ¶ 71.)
4. In the November 2018 general election, the people passed Proposition 4 to enact statutory redistricting requirements and establish a non-legislative redistricting commission. (*Id.*, ¶ 73.)
5. On March 11, 2020, the Legislature passed SB 200 Redistricting Amendments, repealing some of the statutory provisions that Proposition 4 enacted and amending others. (*Id.*, ¶ 93.)
6. On November 9, 2021, the Utah State House of Representatives voted 50-22 to pass new congressional district boundaries; on November 10, 2021, the Utah State Senate voted 21-7

to pass the new congressional district boundaries; and on November 12, 2021, Governor Cox signed the bill adopting the new congressional district boundaries. (*Id.*, ¶¶ 173, 180, 201.)

7. Proponents of the new congressional district boundaries stated an intent to ensure a mix of urban and rural areas in each congressional district. (*Id.*, ¶ 187.)

8. All four congressional districts contain a minority of registered Democratic voters. (*Id.*, ¶ 226.)

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS THAT PRESENT NONJUSTICIABLE POLITICAL QUESTIONS.

The Court lacks subject matter jurisdiction related to Plaintiffs' political redistricting claims (Counts One through Four) because those claims present nonjusticiable political questions. When a Court lacks subject matter jurisdiction, it lacks authority to hear the merits of a case. *See, e.g., Johnson v. Johnson*, 2010 UT 28, ¶ 8, 234 P.3d 1100, 1102. Accordingly, as a threshold matter, the Court should dismiss the political redistricting claims asserted in Counts One through Four as nonjusticiable political questions because (A) the Utah Constitution places the authority and discretion for redistricting solely with the Legislature, and (B) these claims lack any judicially discoverable or manageable standards for providing Plaintiffs' requested relief. Federal courts have tried for over twenty years to find manageable judicial standards to address claims of partisan gerrymandering but have been unable to do so.[4] Plaintiffs now ask this Court to engage in the same futile exercise.

[4] *See generally, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019); *Vieth v. Jubelirer*, 541 U.S. 267, 270 (2004). Although some state courts have found partisan gerrymandering to be justiciable based on those states' existing constitutions and statutes, *see, e.g., Harper v. Hall*, 868

A. The Utah Constitution places the authority and discretion for redistricting solely with the Legislature.

The Court should dismiss Plaintiffs' political redistricting claims (Counts One though Four) as nonjusticiable political questions because the Utah Constitution explicitly grants the Legislature the sole authority and discretion to redistrict: "No later than the annual general session next following the Legislature's receipt of the results of an enumeration made by the authority of the United States, the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1.

A court lacks subject matter jurisdiction when there is no justiciable controversy, *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995), and political questions are prime examples of nonjusticiable claims that a court must dismiss for lack of jurisdiction. A political question—and the political question doctrine—"prevents judicial interference in matters wholly within the control and discretion of other branches of government." *Id.*; *see also In re Childers-Gray*, 2021 UT 13, ¶ 64, 487 P.3d 96.

The political question doctrine is rooted in the separation of powers requirement. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Skokos*, 900 P.2d at 541; *see infra* Part III.A. The Utah Constitution's separation of powers provision, article V, section 1, "regulates and guides the apportionment of authority and function between the branches of government." *In re Childers-Gray*, 2021 UT 13, ¶ 64 (internal quotations and citations omitted). Similarly, "the political question doctrine . . . focus[es] on the proper roles of each branch of government and aim[s] to

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S.E.2d 499 (N.C. 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), Utah's Constitution does not permit a court to re-draw district maps for reasons set forth herein.

curtail interference of one branch in matters controlled by the others." *Id.* To determine whether an issue poses a nonjusticiable political question, courts consider several factors, including whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker,* 369 U.S. at 217.

Article IX, section 1 of the Utah Constitution vests the power to divide the state into congressional districts solely with the Legislature, and no other provision in the Utah Constitution expressly confers redistricting authority on any other branch or to the people. Contrary to article VI, section 1, in which the Utah Constitution explicitly grants legislative authority to both the Legislature and the people, article IX, section 1 explicitly grants redistricting authority solely to the Legislature. Furthermore, the Utah Constitution does not limit the Legislature's exercise of that authority.[5] Absent an express constitutional limitation on legislative power, the Court does not have jurisdiction to opine on the political decision of the political branch regarding where to draw district lines and the resulting effect on the potential success of a given political party's efforts to gain political power. Thus, the constitutional authority to redistrict—the political decision of where to draw district lines—lies exclusively with the Legislature and presents a nonjusticiable political question.

[5] In contrast to the Utah Constitution's unrestricted delegation of authority to the Legislature to divide congressional districts, other constitutional provisions expressly limit grants of authority. Examples include article VIII, section 4, which grants the Utah Supreme Court the power to "adopt rules of procedure and evidence to be used in the courts of the state," but permits the Legislature to amend those rules "upon a vote of two thirds of all members of both houses of the Legislature;" and article VII, section 10, which grants the Governor authority to nominate and appoint state and district officers, but limits this power to the "consent of the Senate."

Claims of political gerrymandering have been raised since the nation was in its infancy, and the framers of the Utah Constitution were certainly aware of it leading up to Utah's statehood in 1896. *See Rucho*, 139 S. Ct. at 2494–95 (discussing framers' understanding of political gerrymandering when drafting the United States Constitution). "Political gerrymanders are not new to the American scene. One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia . . ." *Vieth*, 541 U.S. at 274.[6] Notwithstanding the Utah framers' familiarity with the American redistricting context, the only "political equality" the framers addressed was to confer "upon women the right to vote and exercise political privileges equal with men." Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah, Day 19 (Mar. 22, 1895).[7]

Redistricting has historically been a legislative function. "For the first 160-plus years of our nation's history, all redistricting was performed by state legislatures, with little guidance on when or how to do it—or whether to do it at all" and "changing redistricting systems is a relatively new phenomenon in American democracy."[8] While this new phenomenon is now the

[6] Indeed, the concept predates Utah's statehood by more than 80 years: the namesake for the 1812 term "gerrymander," Massachusetts governor Elbridge Gerry, signed the Declaration of Independence and served as a delegate to the constitutional convention. National Archives and Records Administration, The Founding Fathers: Massachusetts, Mar. 5, 2018, https://www.archives.gov/founding-docs/founding-fathers-massachusetts#gerry.

[7] https://le.utah.gov/documents/conconv/19.htm.

[8] National Conference of State Legislatures, Redistricting Systems: A 50-State Overview, https://www.ncsl.org/research/redistricting/redistricting-systems-a-50-state-overview.aspx (last visited Apr. 12, 2022).

practice in some states, the reassignment of the redistricting power was accomplished by amending the constitutions of those states.[9]

If the framers of the Utah Constitution thought it necessary to avoid political gerrymandering in redistricting, they would certainly have expressed this intention as an exception to article IX, section 1. Instead, the framers expressly reserved the redistricting function exclusively to the Legislature. As recognized by the Utah Supreme Court:

> It is plainly apparent from the discussions in our own Constitutional Convention that they proceeded upon the assumption that the Convention had full power to determine the basis of representation in the state legislature, and that the state legislature would succeed to such power except as to such restrictions as the Constitution should specifically prescribe.

Parkinson v. Watson, 4 Utah 2d 191, 199, 291 P.2d 400, 405 (1955).

The nature of Plaintiffs' claims as a nonjusticiable political question is revealed in the term "*partisan* gerrymandering." Although Utah's constitutional framers did not seek to constitutionally guarantee a particular political outcome for redistricting, Plaintiffs now ask the Court to invent a judicial standard of redistricting that would guarantee a particular political outcome. While reasonable minds may differ on whether vesting redistricting power solely with the Legislature is the best policy, that policy is enshrined in the Utah Constitution and may not be unilaterally changed by the judicial branch, which is the least political of the three branches of government and, thus, the least suited to make policy decisions. Because the Utah Constitution vests the authority to divide the state into congressional districts solely with the Legislature,

[9] National Conference of State Legislatures, Creation of Redistricting Commissions, Dec. 10, 2021, https://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx, (last visited Apr. 12, 2022).

where the Legislature draws those divisions is a political question. Therefore, the Court lacks subject matter jurisdiction regarding Plaintiffs' Counts One through Four and must dismiss them.[10]

B. There are no judicially discoverable or manageable standards for providing Plaintiffs' requested relief.

The Court lacks subject matter jurisdiction related to Plaintiffs' political redistricting claims (Counts One through Four) as nonjusticiable political questions because there are no judicially discoverable or manageable standards for providing Plaintiffs' requested relief. Political questions arise in claims that lack "judicially discoverable and manageable standards for resolving [them]." *Baker*, 369 U.S. at 217. Unlike malapportionment of congressional districts based on population (the "one person one vote" principle) or racial gerrymandering claims, both of which the United States Supreme Court has concluded violate the United States Constitution, standards to address political gerrymandering claims are not judicially discoverable and manageable, and therefore, the Court lacks subject matter jurisdiction to consider Plaintiffs' claims.

Political gerrymandering claims are not judicially discoverable and manageable because there are unlimited ways to divide the state's tens of thousands of census blocks into districts

[10] Moreover, under the independent state legislature doctrine, which several United States Supreme Court Justices appear sympathetic to, the Elections Clause of the United States Constitution assigns the task of congressional redistricting "to the state legislatures, expressly checked and balanced by the Federal Congress." *See Rucho,* 139 S. Ct. at 2496 (discussing why federal courts have a limited role to play); *See Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting with two other Justices and J. Kavanaugh, in his concurrence, also agreeing) (dissenting from denial of stay and raising the Elections Clause argument as having merit). According to the doctrine, state courts may be limited when reviewing state legislatures' federal election regulations. *Moore*, 142 S. Ct. at 1091 (Alito, J., dissenting).

based on the federal census data upon which a redistricting map is based. Because of this reality, the Legislature is tasked with making difficult policy decisions by weighing various and frequently competing redistricting principles. These conflicting policy decisions carry political consequences, and those decisions are constitutionally assigned to, and best handled by, the political branch of government. For a court to evaluate and opine on the political outcomes of these policy decisions, the court would plunge itself into "one of the most intensely partisan aspects of American political life." *Rucho,* 139 S. Ct. at 2507.

Rather than discovering *whether* the placement of a district line carries a political outcome, the "'central problem' . . . is 'determining when political gerrymandering has gone too far,'" *Rucho,* 139 S. Ct. at 2497 (quoting *Vieth,* 541 U.S. at 296 (plurality opinion)). What method or standard should the Court divine from the dearth of express language in the Utah Constitution? The requirement that the population of congressional districts must be as nearly equal as practicable makes it impossible to draw districts that genuinely reflect partisan equality while also ensuring that the districts are geographically contiguous and compact. Voters favoring major political parties are not uniformly geographically disbursed, voters favoring smaller political parties are widely disbursed, and voters who are unaffiliated, nonpartisan, or anti-partisan are randomly scattered among them. Furthermore, the way any of those individual voters may vote, or whether they will vote at all, in a given election is subject to change and dependent on the circumstances of the given election and consequently entirely unknowable.[11]

[11] Plaintiffs' arguments assume that voters who self-identify as members of a particular political party will always vote for that political party's candidates and ignore the possibility that members of a political party who vote in one election may not vote at all in a subsequent election.

The Utah Constitution simply does not require any proportional leveling of these disparate and unknowable interests, let alone provide any discernable standards by which either the legislature or a court could weigh potential political outcomes.

The United States Supreme Court described this impossibility in the Court's plurality opinion in *Vieth*: "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Vieth,* 541 U.S. at 287. Recognizing a political gerrymandering claim would require this Court "to indulge a fiction—that partisan affiliation is permanent and invariably dictates how a voter casts every ballot." *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 483 (Wis. 2021). Moreover, Plaintiffs conspicuously allege that the Legislature drew congressional district lines based on partisan data to reach an expected political outcome while they ask the Court for relief that commits the same alleged impropriety: providing new congressional district lines also drawn based on partisan data to reach an expected political outcome, but instead *their* desired political outcome.[12]

In holding that partisan gerrymandering claims are nonjusticiable under Wisconsin's constitution, the Wisconsin Supreme Court stated that "[e]ven if a state's partisan divide could be accurately ascertained, what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law. 'Deciding among . . . different visions of fairness . . . poses basic questions that are political, not legal.'" *Id.* (citing *Rucho,* 139 S. Ct. at 2500). The

[12] Plaintiffs allege that the legislature engaged in *cracking* (i.e., politically benefiting one party by diffusing members of the other party among multiple districts), but appear to advocate, instead, for packing (i.e., politically benefiting one party by concentrating its members into a district to give that party a safe district).

Wisconsin Supreme Court found that nothing in Wisconsin's constitution "authorizes this court to recast itself as a redistricting commission in order 'to make [its] own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end.'" *Id.* (citing *Rucho,* 139 S. Ct. at 2499). Similarly, the Utah Constitution contains no authorization for Utah's courts to assume this role.

Plaintiffs appear to request some sort of proportional parliamentary system in which a given political persuasion is entitled to a number of representatives that is equal to the proportion of votes cast in support of that political persuasion. *See, e.g.*, Compl., ¶ 206 (forecasting that the newly enacted congressional map will ensure that a Republican wins each of Utah's four congressional seats for the next decade even though 100% of votes would not be cast for Republicans). However, this proportional distribution of political power has no grounding in American redistricting law or history:

> "It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." . . . Perhaps the easiest way to see the flaw in proportional party representation is to consider third party candidates. Constitutional law does not privilege the "major" parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties. If Libertarian Party candidates receive approximately five percent of the statewide vote, they will likely lose every election; no one deems this result unconstitutional.

Johnson, 967 N.W.2d at 482–484 (quoting *Rucho,* 139 S. Ct. at 2501) (additional quotations and citations omitted).

There is simply no judicially discoverable or manageable method of guessing how a given district's population may vote and no judicially discoverable or manageable standards for determining whether the imagined outcome of a given election in a given district is beyond the imagined constitutional boundary for political outcomes. Therefore, Plaintiff's political redistricting claims are nonjusticiable, and the Court must dismiss Counts One through Four for lack of subject matter jurisdiction. The Court need not engage in the constitutional contortions that would be required to invent a legal standard to provide Plaintiffs relief under the merits of these claims.

II. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST DEFENDANTS' UTAH LEGISLATIVE REDISTRICTING COMMITTEE, SENATOR SCOTT SANDALL, SPEAKER WILSON, AND PRESIDENT ADAMS.

Because this case involves a nonjusticiable political question, the Court need not entertain the merits of the claims against the Legislative Defendants. However, in addition to nonjusticiability, Plaintiffs have failed to state a claim upon which relief may be granted against Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Speaker Wilson, and President Adams (collectively, "Committee and Individual Legislative Defendants") for two reasons. First, the Committee and Individual Legislative Defendants are unable to act on the Legislature's behalf and provide the relief Plaintiffs request. Second, the Individual Legislative Defendants are immune from claims related to their actions as legislators.

A. Plaintiffs fail to state a claim because the Committee and Individual Legislative Defendants are unable to act on the Legislature's behalf to provide the relief Plaintiffs seek.

The Legislature as a whole divides the state into congressional districts; the Committee and Individual Legislative Defendants do not. Plaintiffs assume, incorrectly, that the Committee,

by recommending a map, and the Individual Legislative Defendants, by virtue of their chair status and leadership positions, act as surrogates for the Legislature. (*See* Compl., ¶¶ 41–43, 142). This simply is not the case. The Committee merely recommended the map to the Legislature. Despite their chair status and leadership positions, the Individual Legislative Defendants are members of a 104-member Legislature that acts by majority vote. The Committee and Individual Legislative Defendants are not responsible for the Legislature's actions or inactions, nor do they have the authority to compel legislative action. Even if, *arguendo*, the Court grants Plaintiffs' request for relief and compels the Legislative Defendants to redraw and pass a redistricting plan, the Committee and Individual Legislative Defendants are unable to act on the Legislature's behalf and provide the relief Plaintiffs request. Because Plaintiffs fail to state a claim upon which relief can be granted as to the Committee and Individual Legislative Defendants, the Court must dismiss these defendants from the case.

B. Plaintiffs fail to state a claim because Individual Legislative Defendants are immune from claims related to their actions as legislators.

The Court should dismiss Plaintiffs' claims against the Individual Legislative Defendants because they are immune from claims related to their actions as legislators. Like the federal government and forty-three other states, Utah has adopted the common law legislative immunity and legislative privilege doctrines into its constitution through a Speech or Debate Clause.[13] *See*

[13] Utah's Speech or Debate Clause provides that "[m]embers of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place." Utah Const. art. VI, § 8.

generally William M. Howard, *Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions*, 24 A.L.R. 6th 255 (2013).

Legislative immunity applies to legislators performing a legitimate legislative function or acting in the sphere of legislative activity. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Legislative immunity "enables legislators to be free, not only from 'the consequences of litigation's results, but also from the burden of defending themselves.'" *2BD Assocs. Ltd. P'ship v. County Comm'rs*, 896 F.Supp. 528, 531 (D. Md. 1995) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). "Thus the effect of the doctrine [of legislative immunity] is twofold; it protects legislators from civil liability, and it also functions as an evidentiary and testimonial privilege." *Id.* (citing *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 46 (4th Cir. 1988)); *Marylanders For Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992)).

Legislative immunity has two critical features. First, it "applies broadly to evidence or testimony about all 'acts that occur in the regular course of the legislative process.'" *In re Grand Jury*, 821 F.2d 946, 953 (3d Cir. 2006) (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)). Second, it "is 'absolute;' hence, it cannot be overcome by any countervailing interest no matter how strong." *Id.* (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509–10 n.16 (1975)). While there is little case law interpreting Utah's Speech or Debate Clause, Utah courts look to federal case law interpreting the federal clause for guidance.[14] *See generally Riddle v. Perry*, 2002 UT 10, ¶ 8, 40 P.3d 1128, 1131 (repeatedly quoting and citing *Tenney*).

[14] Additionally, Utah courts routinely rely on federal precedent when interpreting a state constitutional provision that is substantially similar to its federal counterpart. *See e.g.*, *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 29, 67 P.3d 436 (applying federal law to interpret the Utah Due Process Clause); *State v. Daniels*, 2002 UT 2, ¶ 42, 40 P.3d 611, 623 (applying federal

To the extent Plaintiffs make allegations against the Individual Legislative Defendants in the Complaint, they entirely relate to the Individual Legislative Defendants' performance of legitimate legislative functions—lawmaking and their constitutional duty in enacting a congressional map. Accordingly, legislative immunity is an absolute bar to Plaintiffs' claims against the Individual Legislative Defendants and those claims must be dismissed.

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM UNDER THE UTAH CONSTITUTION AGAINST LEGISLATIVE DEFENDANTS.

Because this case involves a nonjusticiable political question, the Court need not entertain the merits of Plaintiffs' claims under specific provisions of the Utah Constitution. However, in addition to nonjusticiability, the Complaint fails to state a claim upon which relief can be granted because: (A) the requested relief is barred by the separation of powers doctrine; (B) the Utah Constitution does not guarantee a beneficial political outcome for a given political affiliation and does not prohibit drawing districts in a way that may impact the political power of a political party; and (C) article I, section 2 and article VI, section 1 of the Utah Constitution do not prohibit the Legislature from passing legislation to enact or amend the Utah Code as alleged in Count Five.

law to interpret Utah's ex post facto clause); *State v. Anderson*, 910 P.2d 1229, 1238 (Utah 1996) (applying federal law to interpret article I, section 14 of the Utah Constitution).

A. Plaintiffs fail to state a claim because the relief they seek is barred by the separation of powers doctrine.

Counts One through Four of Plaintiffs' Complaint should be dismissed for failure to state a claim upon which the Court may grant relief. In addition to being grounds for dismissal as a nonjusticiable political question, the separation of powers doctrine stands alone as a basis for the Court's dismissal of Plaintiffs' claims.

Plaintiffs ask the Court to compel Legislative Defendants to perform their redistricting duties "in a manner that comports with the Utah Constitution"; set a deadline for Legislative Defendants to enact a compliant map; and failing this, "order a Court-imposed plan that complies with the Utah Constitution." (Compl., pages 78–79). Plaintiffs' requested relief would require the Court to exercise a function that is constitutionally the exclusive province of the Legislature.

Article V, section 1 of the Utah Constitution provides:

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

This constitutional provision explicitly prohibits the exercise of *any* function of one branch of government that belongs to another branch unless the constitution *expressly* provides otherwise. Or, as the Utah Supreme Court states, "[t]he latter phrase of this clause establishes that there may be exceptions to the separation-of-powers doctrine, but any exception must be found within the Utah Constitution." *State v. Drej*, 2010 UT 35, ¶ 25, 233 P.3d 476, 484. As explained above, *see supra* Part I.A, the Utah Constitution provides no express exception to the exclusive grant of redistricting authority to the Legislature set forth in article IX, section 1.

Although court review of a redistricting plan may be proper in some circumstances, it is not proper for a court to substitute its judgment in the political arena for that of the Legislature. As explained by the Utah Supreme Court in a decision relating to a previous version of Utah Constitution article IX, section 2:

> The legislature having performed its function, if we are obliged to review it, we must do so with the highest possible degree of understanding of the multifarious problems the legislative process is fraught with, including the makeup of the legislature and its variety of interests. It must be realized that there is plenty of room within the framework of the Constitution for legislation with which we might not agree, were we legislators. It is a rule of universal acceptance that the wisdom or desirability of legislation is in no wise for the courts to consider. Whether an act be ill advised or unfortunate, if such it should be, does not give rise to an appeal from the legislature to the courts. But the remedy for correction of legislation remains with the people who elect successive legislatures.

Parkinson, 4 Utah 2d at 196, 291 P.2d at 403 (internal citations omitted).[15] Because Counts One through Four of Plaintiffs' Complaint ask the Court to violate the separation of powers doctrine, these Counts must be dismissed for failure to state a claim upon which relief may be granted.

[15] *Parkinson* involved a challenge to population deviations between districts. While the deviations upheld by the court in that case would have been held unconstitutional under subsequent caselaw interpreting the federal constitution (in violation of the principle of *one person, one vote*), the separation of powers principles discussed in that case are relevant to the matter before the court in this action. In the present case, the Court is asked to read into the Utah Constitution a mandate to balance the political outcome between the two major political parties while ignoring the remaining parties, the unaffiliated voters, and the fact that not all members of a political party consistently vote for that party's candidates.

B. Plaintiffs fail to state a claim under the Utah Constitution because the constitution does not guarantee a beneficial political outcome for a given political affiliation and does not prohibit drawing districts in a way that may impact the political power of a political party.

Plaintiffs fail to state a claim upon which the Court can grant relief in this case because the Utah Constitution contains no provision that guarantees a redistricting map that benefits a given political party based on anticipated outcomes in future elections. Similarly, the Utah Constitution contains no provision that prohibits drawing districts in a way that may impact the political power of a political party. Plaintiffs complain of a violation of a constitutional right that simply does not exist and request that the Court invent legal standards that benefit one political party and disregard smaller political parties and unaffiliated voters as a remedy for relief. More specifically, (1) article I, section 17 of the Utah Constitution does not prohibit political redistricting as alleged in Count One; (2) article I, sections 2 and 24 of the Utah Constitution do not prohibit political redistricting as alleged in Count Two; (3) article I, sections 1 and 15 of the Utah Constitution do not prohibit political redistricting as alleged in Count Three; and (4) article IV, section 2 of the Utah Constitution does not prohibit political redistricting as alleged in Count Four.

(1) Count One fails to state a claim upon which relief may be granted under article I, section 17 of the Utah Constitution.

Plaintiffs fail to state a claim upon which relief may be granted under Utah's Free Elections Clause in article I, section 17. The Free Elections Clause guarantees a qualified voter the right to cast a vote, but there is nothing in the Free Elections Clause's text or precedent to suggest that it prohibits political redistricting or guarantees that each vote holds substantially

equal political power as measured by the voter's political party affiliation or lack of political party affiliation. (*See* Compl., ¶¶ 264, 267).

Utah's Free Elections Clause states: "All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17 (1896).[16] If the framers had intended for the Free Elections Clause to guarantee each voter's "voting power" based on their partisan affiliation, then they would have expressly guaranteed this theoretical concept. Nothing in the text of the Constitution suggests the Free Elections Clause meant that the second largest political party was entitled to a packed congressional district that could be considered a *safe* district in their favor, while not guaranteeing anything to smaller political parties or unaffiliated voters.

In the only decision interpreting Utah's Free Elections Clause, the Utah Supreme Court did not expand the Clause's meaning to guarantee equal voting power based on partisan affiliation. Rather, the court held that the Clause did not guarantee a person's "right to appear as a candidate upon the ticket of any political party." *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942). The Utah Supreme Court explained that voters' right to suffrage is subject to

[16] Utah framers of the Free Elections Clause at Utah's 1895 Constitutional Convention explicitly chose to remove "and equal" from the Free Elections Clause. In contrast, many state constitutions' have "free *and equal* clauses." After reading a draft of section 17: "All elections shall be free and equal, and no power . . . .", one of the delegates moved to strike "and equal" from the line. This motion was directly agreed to without further debate. *See* Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah, Day 22 (Mar. 25, 1895), https://le.utah.gov/documents/conconv/22.htm (remarks of delegate William Grant Van Horne). If the framers had intended for the Free Elections Clause to guarantee each voter's "voting power" based on their partisan affiliation, then they arguably would not have removed "and equal" from the Free Elections Clause.

the Legislature's power to prescribe means and methods for elections, voting, and selecting nominees.

> While this provision guarantees the qualified elector the free exercise of his right of suffrage, it does not guarantee any person the unqualified right to appear as a candidate upon the ticket of any political party. It cannot be construed to deny the legislature the power to provide regulations, machinery and organization for exercising the elective franchise, or inhibit it from prescribing reasonable methods and proceedings for determining and selecting the persons who may be voted for at the election.

Id. The Utah Supreme Court also explained that the Clause is not self-executing but requires the Legislature "to provide by law for the conduct of elections, and the means of voting, and the methods of selecting nominees." *Id.* The court's focus was fixed on the *exercise* of the right to cast a vote, not on voting power.

The Court should dismiss Plaintiffs' Free Elections claim, Count One in the Complaint, because they have not alleged facts that would constitute a violation of a right guaranteed under article I, section 17 of the Utah Constitution.

(2) Count Two fails to state a claim under article I, sections 2 and 24 of the Utah Constitution.

Plaintiffs fail to state a claim under article I, sections 2 and 24 of the Utah Constitution. The 2021 Congressional Plan does not violate Plaintiffs' fundamental right to vote or preclude Plaintiffs' equal opportunity to vote for their preferred congressional candidates under article I, sections 2 and 24, because political redistricting does not affect a fundamental or critical right guaranteed to the voters of Utah, and does not create a suspect classification. The Court should accordingly review the 2021 Congressional Plan under a rational basis standard, and should conclude that any classification that ensued from the 2021 Congressional Plan was reasonable

and that a reasonable relationship exists between the classification and the Legislature's legitimate objective of ensuring that congressional districts contain both urban and rural areas. (Compl., ¶ 187.)

Article I, section 2 of the Utah Constitution provides that "[a]ll political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Utah Const. art. I, § 2 (1896). Article I, section 24 provides that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24 (1896). The Court's analysis of Plaintiffs' uniform operation of laws challenge is "guided by the well-settled proposition that all statutes are presumed to be constitutional and the party challenging a statute bears the burden of proving its invalidity." *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989).

The Court applies a heightened degree of scrutiny to a law that implicates a "fundamental or crucial right" or creates a classification that is "impermissible or suspect." *Gallivan v. Walker*, 2002 UT 89, ¶ 40, 54 P.3d 1069, 1085 (internal quotations and citation omitted). But, if there is no fundamental or critical right and no impermissible or suspect classification, the Court applies a "rationally related" test, or what is essentially rational basis review. *See State v. Angilau*, 2011 UT 3, ¶ 12, 245 P.3d 745, 750.

Plaintiffs allege that the 2021 Congressional Plan "arbitrarily classifies voters based on partisan affiliation and geographic location, then targets the disfavored class of voters for negative differential treatment compared to other similarly situated Utahns," (Compl., ¶ 274) but fail to state a claim under article I, sections 2 or 24: Plaintiffs do not identify any fundamental

right that the 2021 Congressional Plan violates, or suspect classification that the 2021 Congressional Plan creates. The Court should accordingly analyze Plaintiffs' claims under rational basis review.

The 2021 Congressional Plan does not impact Utahns' right to vote freely for the candidate of one's choice and, therefore, does not implicate a fundamental right. In the 2021 Congressional Plan, voters in each district have a vote exactly equal to that of voters in the same district and in the other districts. Each voter may choose to vote with other Democratic voters or with other Republican voters. Moreover, this map does not preclude a Republican from voting for a Democrat, an independent, or another party's candidate, nor does it preclude a Democrat from voting for a Republican, an independent, or another party's candidate, and it does not preclude an unaffiliated voter from doing the same. The outcome in a future election is undetermined, and Plaintiffs have not alleged that an individual's party affiliation (ignoring unaffiliated voters) is somehow immutable and controlling for all future elections. Even if the Utah Constitution guarantees a population deviation-based one person, one vote principle that parallels the federal constitution, there is nothing in the text of article I, Sections 2 or 24, in the history of those provisions, or in any subsequent precedent to suggest there is a right to voting outcomes based on one's political affiliation.

Moreover, Plaintiffs complain that the 2021 Congressional Plan "intentionally cracks Plaintiffs" who support Democratic candidates to prevent them from achieving a ballot box victory (Compl., ¶ 275), but then asks that this court provide legal relief by intentionally packing Plaintiffs. If cracking a partisan group violates the invented constitutional right Plaintiffs seek to protect, then packing by the Court would certainly violate the same invented constitutional right.

Just as the United States Supreme Court noted that the Founders of the United States Constitution did not think proportional representation was required, the same is true for the framers of the Utah Constitution. *See Rucho*, 139 S. Ct. at 2499. Neither the text nor history contains any suggestion that "a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *See id.* at 2501. The bottom line is that "[i]f members of the major political parties are protected by the [Uniform Operation of Law provision] from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims." *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring), *abrogated by Rucho*, 139 S. Ct. at 2484. If the invented constitutional guarantee protects Plaintiffs' partisan ambitions, it must also do so with all Utah voters' partisan ambitions. "There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group." *Id.* Thus, Plaintiffs fail to allege the 2021 Congressional Plan implicates a fundamental or critical right.

Plaintiffs also fail to allege any facts suggesting that the 2021 Congressional Plan creates a suspect classification. Instead, they state a legal conclusion couched as fact. (Compl., ¶ 275.) The Court need not "accept legal conclusions or opinion couched as facts." *Koerber*, 2013 UT App 266, ¶ 3, 315 P.3d 1053, 1054 (citations and internal quotation marks omitted). Unlike race-based laws, which are inherently suspect, *see State v. Canton*, 2013 UT 44, ¶ 36, 308 P.3d 517, 525, there is no authority suggesting that classifications based on voters' party affiliations, expected alliance with a political party, or imagined voting outcome are suspect classifications.

Simply stated, the "right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength." *Davis*, 478 U.S. at 150 (O'Connor, J., concurring in the judgment).

Because Plaintiffs fail to allege facts sufficient to show infringement of a fundamental right or a suspect classification, the Court should apply rational basis review. *See Angilau*, 2011 UT 3, ¶ 21, 245 P.3d 745, 752. The Court's rational basis review involves determining "whether the classification is reasonable, whether the objectives of the legislative action are legitimate, and whether there is a reasonable relationship between the classification and the legislative purpose." *Blue Cross & Blue Shield of Utah*, 779 P.2d at 637. The Court gives broad deference to the Legislature and will sustain a classification if "facts can reasonably be conceived which would justify the distinctions or differences in state policy [expressed by the challenged legislation] as between different persons." *Id.*

Accepting Plaintiffs' factual allegations as true, and even in the light most favorable to Plaintiffs, Plaintiffs' allegations trigger only rational basis review of the Legislature's action. The Legislature voted on congressional district lines for the reasonable purpose of ensuring a balance of urban and rural areas in each congressional district. (Compl., ¶ 187). Having an alleged rational basis in hand, the Court should dismiss Plaintiffs' claims under article I, Sections 2 and 24 of the Utah Constitution.

(3) Count Three fails to state a claim under article I, sections 1 and 15 of the Utah Constitution.

The Utah Constitution's guarantees of freedom of speech and an inalienable right to freely communicate thoughts and opinions under article I, sections 1 and 15 of the Utah Constitution, respectively, simply do not relate to the redistricting process. Where the Legislature

chooses to place a congressional district boundary does not in any way restrict an individual's speech or impair an individual's ability to communicate. *See Radogno v. Ill. State Bd. Of Elections*, No. 11-CV-04884, 2011 WL 5025251 at *7 (N.D. Ill. Oct. 21, 2011); *Johnson*, 967 N.W.2d at 487. As previously noted, *see supra* Part I.A, the framers were fully aware of partisan redistricting, and had they intended to prohibit redistricting for partisan gain, they would have done so.

Nevertheless, these constitutional rights were not intended to be distorted in the manner Plaintiffs suggest. "The minutes of the 1895 Utah constitutional convention point to the fact that the framers of our constitution . . . envisioned a limited freedom of speech." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 42, 140 P.3d 1235, 1248. As clearly expressed by the Utah Supreme Court, "First Amendment jurisprudence in this case does not guarantee unlimited participation in political activity, nor does it establish a right to political success. Rather, it protects individuals from regulations that directly discourage or prohibit political expression." *Cook v. Bell*, 2014 UT 46, ¶ 57, 344 P.3d 634, 642. Clearly, a map of a district boundary is not a regulation that directly discourages or prohibits political expression. And the right to political expression does not guarantee a voter's right to political success. There is no way to grant Plaintiffs' relief under article I, sections 1 and 15 that comports with the text of those sections and relevant case law, and, therefore, the Court should dismiss Count Three of the Complaint.

(4) Count Four fails to state a claim under article IV, section 2 of the Utah Constitution.

Plaintiffs fail to state a claim under article IV, Section 2 of the Utah Constitution because the congressional map does not restrict a citizen's right to vote when that citizen is eighteen years of age or over and presents proper proof of residence. Utah Const. art. IV, § 2. As

evidenced by the plain text of the provision, the intent of the ratifiers was to address a citizen's qualifications to cast a vote. There is no pertinent Utah history or case law that expands this constitutional provision to ensure a desired political outcome. This provision is simply inapplicable to the present circumstances and, to the extent that it is based on this provision, Count Four of the Complaint should be dismissed forthwith.

C. Plaintiffs fail to state a claim under article I, section 2 and article VI, section 1 of the Utah Constitution.

Count Five of Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief may be granted because article I, section 2 and article VI, section 1 of the Utah Constitution do not prohibit the Legislature from passing legislation to enact or amend the Utah Code. To grant the relief sought under that Count, the Court would need to impose an unconstitutional restriction on the legislative power of the Legislature.

Plaintiffs argue that "[i]n enacting Proposition 4's redistricting reforms—including shifting primary responsibility for drawing electoral maps from the Legislature to an independent commission and establishing mandatory anti-gerrymandering standards—the people of Utah, including Plaintiffs, exercised their constitutional right to alter or reform their government." (Compl., pages 77–78).[17]

[17] Plaintiffs' allegations should be accepted as true for the purpose of this Rule 12 motion, and the legal question of the Legislature's plenary power to enact, amend, or repeal statutes through legislation does not depend on a factual question. As a point of information irrelevant to the legal determination of this motion against Count five, Plaintiffs' argument that the Legislature "repealed Proposition 4" (*see* Compl., ¶¶ 317–318) is incorrect based on the Utah Code. Through Proposition 4, voters enacted Title 20A, Chapter 19, Utah Independent Redistricting Commission and Standards Act. Later, through S.B. 200, 2020 General Session, the Legislature repealed and replaced Title 20A, Chapter 19 with an alternate version in Title 20A, Chapter 20, Utah Independent Redistricting Commission. Chapter 20 provides for an advisory redistricting

Article I, section 2 of the Utah Constitution provides: "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require."

While the people clearly have the right to alter or reform their government, any alteration or reformation must be accomplished in accordance with the Utah Constitution, which is an expression of the will of the people regarding the power delegated by them.[18] Article IX, section 1 of the Utah Constitution expressly grants the power to "divide the state into congressional, legislative, and other districts" to the Legislature. A change to this authority can only be accomplished through a constitutional amendment or revision, and the people have expressed their will regarding how this must be done in article XXIII of the Utah Constitution.[19]

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commission but does not include the unconstitutional provisions of Chapter 19 related to the Legislature's authority. The Legislature could have made these statutory changes by amending Chapter 19 or repealing it and replacing it with chapter 20, but either approach is well within the Legislature's plenary power to pass legislation. Simply stated, Chapter 19 is not Proposition 4, and Chapter 20 is not S.B. 200: they are statutes contained within the Utah Code. The Legislature's amendment or repeal of a statute is not an amendment or repeal of the method, be it initiative or bill, that originally enacted that statute. The method of enacting a statute does not in any way restrict the Legislature's plenary authority to later amend or repeal that statute.

[18] "[T]he people have the inherent authority to allocate governmental power in the bodies they establish by law. Acting through the state constitution, the people of Utah divided their political power, vesting it in the various branches of government. Article VI vests 'The Legislative power of the State' in two bodies: (a) 'the Legislature of the State of Utah,' and (b) 'the people of the State of Utah as provided in Subsection (2).'" *Carter v. Lehi City*, 2012 UT 2, ¶ 22, 269 P.3d 141.

[19] Article XXIII provides that the constitution may be amended by a vote of the people: after a favorable vote on a proposal of "two-thirds of all the members elected to each of the two houses;" or after revision during a convention called by the same super-majority of the Legislature. Utah Const. art. XXIII.

Article VI, section 1, provides that "the Legislative power of the State shall be vested in" both a Senate and House of Representatives and "the people of the State of Utah." Utah Const. Art. VI, § 1. "The power of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share 'equal dignity.'" *Gallivan*, 2002 UT 89, ¶ 23, 54 P.3d 1069, 1080 (citing *Utah Power & Light Co. v. Provo City*, 94 Utah 203, 235–36, 74 P.2d 1191, 1205 (1937) (Larson, J., concurring)). "On its face, article VI recognizes a single, undifferentiated 'legislative power,' vested both in the people and in the legislature. Nothing in the text or structure of article VI suggests any difference in the power vested simultaneously in the 'Legislature' and 'the people.' The initiative power of the people is thus parallel and coextensive with the power of the legislature." *Carter*, 2012 UT 2, ¶ 22, 269 P.3d 141, 148.

Because the power of the Legislature and the people to legislate is coequal, the people may amend or repeal legislation passed by the Legislature, and the Legislature may repeal or amend legislation passed by the people.[20] The only limitations placed on this coequal power are those expressly provided in the Constitution: for example, the limitation on the people's referendum power in relation to legislation "passed by a two-thirds vote of the members elected to each house of the Legislature." Utah Const. art. VI, § 1(2). Thus, subject to such express limitations, the Court should not differentiate between a legislative action taken by the Legislature, and one taken by the people. If a statute may be amended or repealed by either the

[20] This occurred, for example, with the initiative on medical marijuana, which was the subject of *Grant v. Herbert*, 2019 UT 42, 449 P.3d 141. In that case, the court held that the constitutional prohibition of a referendum when legislation passes by two-thirds of both houses of the Legislature applies even when the law sought to be challenged by referendum repealed an initiative. *Id.* ¶¶ 32–33.

Legislature or the people, it is irrelevant whether the Legislature or the people enacted the underlying legislation.

If the people intended to limit the Legislature's power to repeal or amend law created via an initiative, the limitation would have been included in our Constitution, as it has been in other states.

> Initiative and referendum states commonly provide in their constitutions that a law enacted by initiative or referendum cannot be amended or repealed by the legislature, either absolutely or for a limited period of time, unless otherwise provided. Where a statute was originally enacted by initiative, the legislature cannot adopt amendments to that statute without approval by the electorate. Such a limitation was considered necessary to protect the right of the people to enact laws directly. *In the absence of any such limitation, the legislature can immediately render such laws ineffective by amendment.*

Statutes subject to amendment—Acts enacted by initiative and referendum, 1A Sutherland Statutory Construction § 22:6 (7th ed.) (emphasis added).

Though such a limitation does not exist in Utah's Constitution, the people are not left without a remedy. If voters disagree with subsequent action by the Legislature in relation to an initiative, they can hold their elected officials accountable at the polls or they can further amend or repeal provisions of the statute by initiative.

Count Five of the Complaint must be dismissed for failure to state a claim upon which relief may be granted. While the people have the right to alter or reform their government, Utah's Constitution requires that this right be exercised by amendment or revision to the Constitution. The people of Utah, via its Constitution, delegated the redistricting power to the Legislature, and revocation of this delegation can only be accomplished by amending or revising the constitution, not by statute. Further, the power of the people to legislate via initiative or referendum is coequal

with the power of the Legislature to legislate. Thus, both can, without limitation other than those expressly provided in the Constitution or by statute authorized by the Constitution, repeal or modify the legislative action of the other.

CONCLUSION

The Court should dismiss Plaintiffs' Complaint in its entirety. In this case of first impression, Plaintiffs seek for the Court to invent new law to prohibit partisan cracking and to, paradoxically, grant them a remedy of partisan packing. First, and dispositive of Counts One through Four, the Court lacks subject matter jurisdiction over Plaintiffs' claims related to partisan redistricting because they are nonjusticiable political questions and nonjusticiable for lack of judicially discoverable or manageable standards. Second, Plaintiffs fail to state any claim upon which relief may be granted against the Individual Legislative Defendants and the Legislative Redistricting Committee because the Individual Legislative Defendants are protected by legislative immunity and neither the Individual Legislative Defendants nor the Legislative Redistricting Committee can provide any of the requested relief. Third, Plaintiffs fail to state any claim upon which relief may be granted because the Utah Constitution does not contain any provision requiring the Legislature to draw a district line based on the political affiliations or preferences of the two largest political parties to the exclusion of all other political parties and unaffiliated voters. Additionally, the constitutional provisions cited in Counts One through Four do not prohibit political redistricting, and the constitutional provisions cited in Count Five do not restrict the Legislature's plenary power to pass legislation to enact or modify the Utah Code. For the above reasons, the Court should dismiss Plaintiffs' Complaint in its entirety.

DATED this 2nd day of May, 2022.

OFFICE OF LEGISLATIVE RESERCH AND GENERAL COUNSEL

/s/ John L. Fellows
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Notice to responding party
You have a limited amount of time to respond to this motion. In most cases, you must file a written response with the court and provide a copy to the other party:

- within 14 days of this motion being filed, if the motion will be decided by a judge, or
- at least 14 days before the hearing, if the motion will be decided by a commissioner.

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If you do not respond to this motion or attend the hearing, the person who filed the motion may get what they requested.

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CERTIFICATE OF FILING

I certify that on this 2nd day of May 2022, I electronically filed the foregoing, **LEGISLATIVE DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**, with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

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