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.	**RULING AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS** Case No. 220901712 Judge Dianna M. Gibson

Before the Court is the Motion to Dismiss filed by Defendants Utah State Legislature, Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator Stuart Adams (collectively, "Defendants")[1] on May 2, 2022 ("Motion"). The Court heard oral argument on August 24, 2022. On October 14, 2022, Defendants filed a Notice of Supplemental Authority Regarding Legislative Defendants' Motion to Dismiss and Memorandum in Support. Having considered the Motion, the memoranda submitted both in support and opposition to it, and the arguments of counsel at oral argument, the Court issued a Summary Ruling on October 24, 2022. The Court now issues the legal analysis supporting that Ruling.

BACKGROUND

Defendants move to dismiss this action for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the Utah Rules of Civil Procedure. In reviewing a motion to dismiss under Rule 12(b)(6), courts accept all the facts alleged in the Complaint as true. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226. Legal conclusions or opinions couched as facts are not "facts," and therefore are not accepted as true. *Koerber v. Mismash*, 2013 UT App 266, ¶ 3, 315 P.3d 1053.

With respect to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), when a defendant mounts only a "facial attack" to the court's jurisdiction, courts presume that "all of the factual allegations concerning jurisdiction are . . . true."[2] *Salt Lake County v. State*, 2020 UT 27, ¶¶ 26-27, 466 P.3d 158. Here, Defendants have mounted a facial

[1] Lieutenant Governor Deidre Henderson is not a party to this Motion.

[2] "Motions under rule 12(b)(1) fall into two different categories: a facial or a factual attack on jurisdiction." *Salt Lake County*, 2020 UT 27, ¶26. Because a factual challenge "attacks the factual allegations underlying the assertion of jurisdiction," courts do not presume the truth of plaintiff's factual allegations. *Id.* However, in a facial challenge, "all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id.*

attack on jurisdiction. Therefore, under Rule 12(b)(1) and 12(b)(6), the Court accepts the allegations in the Complaint as true in reciting the facts of this case. In addition, the Court views those facts and all reasonable inferences drawn from them in the light most favorable to Plaintiffs as the non-moving party." *Oakwood Vill. LLC.*, 2004 UT 101, ¶ 9. The facts recited below are taken from Plaintiffs' Complaint.

In November 2018, Utah voters passed Proposition 4, titled the Utah Independent Redistricting Commission and Standards Act, which was a bipartisan citizen initiative created specifically to reform the redistricting process and establish anti-gerrymandering standards that would be binding on the Utah Legislature. (Compl. ¶¶ 2, 73, 75.) Proposition 4 was presented to Utah voters as a "government reform measure invoking the people's constitutional lawmaking authority." (*Id.* ¶ 77.) Proponents of the measure argued "[v]oters should choose their representatives, not vice versa." (*Id.* ¶ 78.) Under then-existing laws, proponents maintained, "'Utah politicians can choose their voters' because 'Legislators draw their own districts with minimal transparency, oversight or checks on inherent conflicts of interest.'" (*Id.*)

Proposition 4 created the Independent Redistricting Commission, a seven-member bipartisan-appointed commission that would take the lead in formulating various state-wide redistricting plans. (*Id.* ¶¶ 2, 80-82.) The Independent Redistricting Commission was required to conduct its activities in an independent, transparent, and impartial manner, to apply "traditional non-partisan redistricting standards" to establish neutral map-making standards and to abide by certain listed redistricting standards. (*Id.* ¶¶ 83-84, 86.) Specifically, Proposition 4 provided that final maps must "abide by the following redistricting standards to the greatest extent practicable and in the following order of priority:" (a) "achieving equal population among districts" using the most recent census; (b) "minimizing the division of municipalities and counties across

multiple districts;" (c) "creating districts that are geographically compact;" (d) "creating districts that are contiguous and that allow for the ease of transportation throughout the district;" (e) "preserving traditional neighborhoods and local communities of interest;" (f) "following natural and geographic features, boundaries, and barriers;" and (g) "maximizing boundary agreement among different types of districts." (Compl. ¶ 86.)

In addition, all redistricting plans were to be open for public comment, considered in a public hearing, and voted on by the Legislature. (*Id.* ¶¶ 85, 88.) If the Legislature voted to reject the redistricting map, "Proposition 4 required the Legislature to issue a detailed written report explaining its decision and why the Legislature's substituted map(s) better satisfied the mandatory, neutral redistricting criteria." (*Id.* ¶ 88.) Proposition 4 also authorized "Utahns to sue to block a redistricting plan that failed to conform to the initiative's structural, procedural, and substantive standards." (*Id.* ¶ 89.) "A majority of Utah citizens from a range of geographic areas and across the political spectrum voted to approve Proposition 4 and enact it into law." (*Id.* ¶ 90.)

Sixteen months later, on March 11, 2020, Plaintiffs contend that the Legislature effectively repealed the Utah Independent Redistricting Commission and Standards Act and instead passed SB 200, which established new redistricting criteria. (*Id.* ¶ 93.) SB 200 effectively "eliminated all mandatory anti-gerrymandering restrictions imposed by the people on the Legislature as well as Proposition 4's enforcement mechanisms." (*Id.* ¶ 96.) While SB 200 retained the Independent Redistricting Commission, its role is now wholly advisory; the Legislature is not required to consider any recommended redistricting maps and in fact, the Legislature may disregard any recommended maps without explanation. (*Id.* ¶ 94.) "SB200 returned redistricting to the pre-Proposition 4, unreformed status quo where the Legislature could freely devise anti-democratic maps—as if the people had never spoken." (*Id.* ¶ 97.) SB200

eliminated neutral redistricting criteria, enforcement mechanisms and all transparency and public accountability provisions. (*Id.* ¶¶ 97-98.) In April 2021, the Utah Legislature formed its twenty-member Legislative Redistricting Committee (LRC). (*Id.* ¶¶ 142-143.)

Even after SB200's reforms, many legislators represented that the Legislature would honor the people's will to prevent undue partisanship in the mapmaking process. (*Id.* ¶ 99.) For example, Senator Curt Bramble, the chief sponsor of SB200 said he was "committed to respecting the voice of the people and maintaining an independent commission." (*Id.* ¶ 100.) Then-Senate Majority Leader Evan Vickers vowed that the Legislature would "meet the will of the voters" and reinstate in SB200 "almost everything they've asked for." (*Id.*) Representative Brad Wilson indicated the Legislature would leave Proposition 4's anti-gerrymandering provisions largely intact, and Representative Steinquist represented the Legislature would "make sure that we have an open and fair process when it comes time for redistricting." (*Id.* ¶ 101.)

Despite these representations, the LRC conducted a "closed-door" mapmaking process. (*Id.* ¶¶ 142-143.) The LRC did not publish the full list of criteria that guided its redistricting decisions, but instead offered a one-page infographic for public map submissions that stated three criteria the Legislature said it would consider: "population parity among districts, contiguity, and reasonable compactness." (*Id.* ¶ 145.) The LRC "did not commit to avoid unduly favoring or disfavoring incumbents, prospective candidates, and/or political parties in its redistricting process." (*Id.* ¶ 147.) The LRC solicited some public input about Utah's communities and voters' preferences during hearings, but Plaintiffs allege "the LRC does not appear to have used that testimony to guide its redistricting process." (*Id.* ¶ 148.)

Notwithstanding SB200, the Independent Redistricting Commission met thirty-two times from April to November 2021, and fulfilled its duties as originally contemplated under

Proposition 4. (*See generally id.* ¶¶ 104-126, 132-140.) Just before the Commission's final deadline, former Republican Congressman Rob Bishop abruptly resigned from the Commission. (*Id.* ¶ 127.) He cited the proposed map, which he believed would result in one Democrat being elected to Congress, as a reason for his resignation. (*Id.* ¶ 129.) He stated that "[f]or Utah to get anything done" in Congress, the State "need[s] a united House delegation . . . having everyone working together." (*Id.*) On November 1, 2021, the Independent Redistricting Committee presented three maps to the Utah Legislature's LRC and explained in detail the non-partisan process used to prepare the maps. (*Id.* ¶¶ 139-140.)

In early November 2021, the Legislature adopted its own map – the 2021 Congressional Plan ("Plan") – over the three maps created and proposed by the Independent Redistricting Committee. (*Id.* ¶¶ 141, 149.) Despite the Legislature's ostensible goal of hearing public input on the Plan at a public hearing scheduled on Monday, November 8, 2021, the LRC released the Plan publicly on Friday, November 5, 2021 around 10:00 pm, giving the public just two weekend days to review the Plan. (*Id.* ¶¶ 156, 159-60.) The LRC received significant public response at the public hearing and through comments on the LRC's website, hundreds of emails, protests at the Capitol, and a letter to the Legislature from prominent Utah business and community leaders. (*Id.* ¶¶ 161-65, 169.)

Notwithstanding significant public opposition to the LRC's map, on November 9, 2021, the Utah State House voted to approve the 2021 Congressional Plan. (*Id.* ¶¶ 171, 173.) Five House Republicans joined all House Democrats in voting against the Plan. (*Id.*) The next day, November 10, 2021, the Senate voted 21-7 to approve the Plan. (*Id.* ¶ 180.) One Republican Senator joined all Democratic Senators to vote against the Plan. (*Id.*) On November 12, 2021, Governor Cox signed the bill into law. (*Id.* ¶ 201.) While answering questions from the public

about the Plan, Governor Cox "acknowledged there was 'certainly a partisan bend' in the Legislature's redistricting process and conceded that 'Republicans are always going to divide counties with lots of Democrats in them, and Democrats are always going to divide counties with lots of Republicans in them.'" (*Id.* ¶ 200.) Governor Cox additionally "agreed that 'it is a conflict of interest' for the Legislature to 'draw the lines within which they'll run.'" (*Id.*)

The 2021 Congressional Plan splits both Salt Lake and Summit Counties, the two counties that typically oppose Republican candidates. (*Id.* ¶ 192.) The Plan "cracks" urban voters in Salt Lake County—Utah's largest concentration of non-Republican voters—dividing them between all four congressional districts and immersing them into sprawling districts reaching all four corners of the state. (*Id.* ¶¶ 192, 207.) It also divides Summit County into two. (*Id.* ¶ 192.) The Plan, however, leaves intact urban and suburban voters in both Davis and Utah counties, because those voters tend to support Republican candidates. (*Id.*) In addition, fifteen municipalities were divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities were divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty and up to three hundred miles away. (*Id.* ¶¶ 242-251.)

Proponents of the Plan maintain that the boundaries were drawn with the intent of ensuring a mix of urban and rural interests in each district. (*Id.* ¶ 158.) In a statement explaining the decision to divide Salt Lake County between all four districts, the LRC said, "[w]e are one Utah, and believe both urban and rural interests should be represented in Washington, D.C. by the entire federal delegation." (*Id.*) Notably, rural voters and rural elected officials opposed the

Legislature's urban-rural justification. Two reported commenters stated: "[a]s a voter in a rural area I'm entirely uncomfortable with my vote being used to dilute the power of another"; and "[a]s a Republican who lives in a more rural part of the state, I have the same complaint as those living in Salt Lake. Please do not dilute our vote by splitting us up between all four districts! I'm far more interested in having everybody fairly represented than I am in electing more people from my own party." (*Id.* ¶¶ 194, 195.) This sentiment was also echoed by Governor Cox, who "stated that he supports a redistricting process that focuses on preserving 'communities of interest,' such as the Commission's neutral undertaking, which he reaffirmed is 'certainly one area where that is a good way to make maps, try to keep people similarly situated together, communities together is something that I think is positive." (*Id.* ¶ 200.)

Plaintiffs assert that the "LRC's process was designed to achieve—and did in fact achieve—an extreme partisan gerrymander." (*Id.* ¶ 144.) Plaintiffs assert the Plan was intentionally created to maximize Republican advantage in all four congressional districts, not to ensure an urban-rural mix. (*Id.* ¶ 190.) Plaintiffs contend that "amplifying representation of rural interests at the cost of urban interests" is not a legitimate redistricting consideration, and the "purported need" to have rural interests represented in all four districts was "a pretext to unduly gerrymander the 2021 Congressional Plan for partisan advantage." (*Id.* ¶¶ 188, 189.)

Based on the 2021 Congressional Plan, each district contains a minority of non-Republican voters "that will be perpetually overridden by the Republican majority of voters in each district, blocking these disfavored Utahns from electing a candidate of choice to any seat in in the congressional delegation." (*Id.* ¶ 226.) While congressional plans from previous years had contained at least one competitive congressional district, all four districts under the 2021 Plan contain a substantial majority of Republican voters. (*Id.* ¶¶ 65, 175, 226, 232.) Notably, Senator

Scott Sandall admitted that political considerations affected the Legislature's redistricting decisions. (*Id.* ¶ 151.) He said the LRC "never indicated the legislature was nonpartisan. I don't think there was ever any idea or suggestion that the legislative work wouldn't include some partisanship." (*Id.*)

Some partisanship is inherent in the redistricting process. Here, however, Plaintiffs contend that the 2021 Congressional Plan subordinates the voice of Democratic voters and entrenches the Republican party in power for the next decade. (*Id.* ¶ 205, 206.) The Plan "protects preferred Republican incumbents and draws electoral boundaries to optimize their chances of reelection." (*Id.* ¶ 197.) And it converts "the competitive 4th District into a safe Republican district to enhance Republican Representative Burgess Owens' prospects to win reelection." (*Id.* ¶ 198.)

As a result, on March 17, Plaintiffs, including two organizational plaintiffs—the League of Women Voters of Utah and Mormon Women for Ethical Government—and seven individual plaintiffs, filed suit, alleging that Defendants violated Plaintiffs' constitutional rights by repealing Proposition 4 and adopting the intentionally-gerrymandered 2021 Congressional Plan. All Defendants, except for Defendant Lieutenant Governor Deidre Henderson, moved to dismiss Plaintiffs' Complaint.[3]

ANALYSIS

Defendants filed a Motion to Dismiss the action, in its entirety, arguing the Court lacks subject matter jurisdiction under Rule 12(b)(1) of the Utah Rules of Civil Procedure. In addition, they move to dismiss each of Plaintiffs' five claims for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Utah Rules of Civil Procedure. Essentially, Defendants

[3] Because Lieutenant Governor Henderson did not join in the Motion, any claims against her are unaffected by this Court's ruling.

contend that claims of partisan gerrymandering are not justiciable. And, if they are, partisan gerrymandering does not violate the Utah Constitution. Many of the issues raised in this case are matters of first impression, including whether partisan redistricting / gerrymandering presents a purely political question.

A motion to dismiss under Rule 12(b)(1) of the Utah Rules of Civil Procedure "is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Salt Lake County v. State*, 2020 UT 27, ¶ 26, 466 P.3d 158 (quoting *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993)). A motion under Rule 12(b)(6) challenges a plaintiffs' right to relief based on the alleged facts. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8, 104 P.3d 1226 (citation omitted). At this stage of the litigation, the Court's "inquiry is concerned solely with the sufficiency of the pleadings, and not the underlying merits of the case." *Id.* ¶ 8 (cleaned up).

I. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED. This Court Has Jurisdiction to Hear Plaintiffs' Redistricting Claims. Plaintiffs' Constitutional Claims are Justiciable.

Defendants argue that this Court lacks subject matter jurisdiction because Plaintiffs' redistricting claims (Counts One through Four) present nonjusticiable political questions. (Defs.' Mot. at 5.) The Court disagrees.

Under the political question doctrine, a claim is not subject to the Court's review if it presents a nonjusticiable political question. *See Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995). "The political question doctrine, rooted in the United States Constitution's separation-of-powers premise, prevents judicial interference in matters wholly within the control and discretion of other branches of government. Preventing such intervention preserves the integrity of functions lawfully delegated to political branches of government." *Id.* (cleaned up).

Political questions are those questions which have been wholly committed to the sole discretion of a coordinate branch of government, and those questions which can be resolved only

by making "policy choices and value determinations." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). When presented with a purely political question, "the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer." *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). In deciding whether a claim presents a nonjusticiable political question, the Court must consider two questions: (1) whether it "involve[es] 'a textually demonstrable constitutional commitment of the issue to a coordinate political department[]"or (2) whether there is "a lack of judicially discoverable and manageable standards for resolving it.'" *Matter of Childers-Gray*, 2021 UT 13, ¶ 64, 478 P.3d 96 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Defendants contend that Plaintiffs' claims involve political questions for both these reasons. For the reasons discussed below, Defendants are incorrect on both points.

A. Redistricting is not exclusively within the province of the Legislature.

Defendants first assert that Article IX, Section 1 of the Utah Constitution represents a "textually demonstrable constitutional commitment" of the redistricting power to the Legislature." (Defs.' Mot. at 6.) Article IX, Section 1 states, in relevant part: "the Legislature shall divide the state into congressional, legislative, and other districts accordingly." Utah Const. art. IX, § 1. Defendants argue this provision delegates the responsibility for drawing congressional districts to the Legislature, and because no other provision in the Utah Constitution confers redistricting authority on any other branch or to the people, redistricting authority rests exclusively with the Legislature and is exempt from judicial review. (Defs.' Mot. at 7.)

The Utah Constitution does give the Legislature authority to "divide the state into congressional, legislative and other districts," but nothing in the Utah Constitution restricts that power to the Legislature or states that such power is exclusively within the province of the

Legislature. Even a cursory analysis reveals that the redistricting power is not exercised solely by the Legislature. While redistricting is primarily a legislative function, the governor and the people also exercise some degree of redistricting power. Redistricting laws and maps are submitted to the governor for veto like any other law under Article VII, Section 8 of the Utah Constitution. In addition, the Utah Constitution makes clear that "[a]ll political power is inherent in the people." Utah Const. art. I, § 2. In line with this authority, Utah's citizens have historically exercised power over redistricting through initiatives and referendums, including Proposition 4. *See also Parkinson v. Watson*, 291 P.2d 400, 403 (Utah 1955) (describing redistricting referendum proposing a constitutional amendment, which was submitted to the people in 1954 after the Legislature failed to reach a compromise regarding congressional district apportionment). And in the past, independent citizen redistricting committees have conducted redistricting. *See* 1965 Utah Laws, H.B. No. 8, Section 4, eff. May 11, 1965. At a minimum, because the executive branch and the people share in the redistricting power, both under the Utah Constitution and historically, this Court concludes that redistricting power is not solely committed to the Legislature.

Further, the constitutionality of legislative action is not beyond judicial review. Courts regularly review legislative acts for constitutionality. The United States Supreme Court in *Marbury v. Madison* famously stated that reviewing statutes to determine if they are constitutional is "the very essence of judicial duty" under our constitutional form of government. 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803). In fact, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Courts have a duty to review acts of the Legislature to determine whether they are constitutional. *Matheson v. Ferry*, 641 P.2d 674, 680 (Utah 1982) (stating courts cannot "shirk [their] duty to find an act of the Legislature

unconstitutional when it clearly appears that it conflicts with some provision of our Constitution."); *see also Skokos,* 900 P.2d at 541 ("If a claim involves the interpretation of a statute or questions the constitutionality of a particular political policy, courts are acting within their authority in scrutinizing such claims."). Courts also cannot "simply shirk" their duty by finding a claim nonjusticiable, merely because the case involves "significant political overtones." *Matter of Childers-Gray*, 2021 UT 13, ¶ 67 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230). Were it otherwise, the legislature would be the sole judge of whether its actions are constitutional, which is inconsistent with our Constitution, separation of powers, and longstanding principles of judicial review. *See, e.g.*, *Matheson*, 641 P.2d at 680; *Marbury*, 5 U.S. at 178; *see also Ritchie v. Richards,* 14 Utah 345, 47 P. 670, 675 (1896) (Batch, J., concurring) ("[t]he power to declare what the law shall be is legislative. The power to declare what is the law is judicial.").

Other constitutional provisions designate various duties to the Legislature—e.g., the compensation of state and local officers in art. VII, § 18; public education in art. X, § 2; and gun regulation in art. I, § 6—but that does not mean that the Legislature's power in those areas is beyond judicial review. For example, in the case of public education, the Utah Supreme Court has held:

> [t]he legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. . . . However, its authority is not unlimited. The legislature, for instance, cannot establish schools and programs that are not open to all the children of Utah or free from sectarian control . . . for such would be a violation of . . . the Utah Constitution.

Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 2001 UT 2, ¶ 14, 17 P.3d 1125. Even though the Utah Constitution explicitly grants authority over education to the Legislature, that authority must be exercised in a manner consistent with the Utah Constitution.

This principle equally applies to redistricting. As Defendants' counsel acknowledged during oral argument, the Legislature is bound to follow the United States and Utah Constitutions when engaging in the redistricting process. And outside the context of this litigation, Defendants have acknowledged that "[t]he redistricting process is subject to the legal parameters established by the United States and the Utah Constitutions, state and federal laws, and caselaw."[4] Given these acknowledgements, it follows that "the mere fact that responsibility for reapportionment is committed to the [Legislature] does not mean that the [Legislature's] decisions in carrying out its responsibility are fully immunized from any judicial review." *Harper*, 868 S.E.2d at 534. That proposition would be wholly inconsistent with this Court's obligation to enforce the provisions of the Utah Constitution. *See Matheson*, 641 P.2d at 680.

In addition, the Utah Supreme Court has previously reviewed the Utah Legislature's redistricting actions. In *Parkinson*, the plaintiffs challenged the Legislature's redistricting act alleging that it created districts with vastly unequal populations. *Parkinson*, 291 P.2d at 401. In its decision, the Utah Supreme Court initially expressed reluctance to interfere with the Legislature's redistricting actions given the importance that the three branches of government remain separate. *See id.* at 403. The Utah Supreme Court, however, did not dismiss the claim as a nonjusticiable political question. *Id.* at 400. Instead, it engaged in judicial review and reviewed the map for constitutionality, ultimately determining that congressional districts with unequal populations were not unconstitutional.

Notably, after previously reviewing partisan gerrymandering cases, the United States Supreme Court, in a 5 - 4 decision, recently concluded that such claims are nonjusticiable in

[4] Plaintiffs cited this quote from a report by Utah State Legislature on Utah's redistricting in 2001. Office of Legislative Research and General Counsel, 2001 Redistricting in Utah (Jan. 2022), le.utah.gov/documents/redistricting/redist.htm (last accessed May 25, 2022). The Court takes judicial notice of the report pursuant to Utah Rules of Evidence 201(b)(2).

federal courts. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506 (2019). While the United States Supreme Court has backed away from evaluating redistricting claims, it does not follow that such claims are nonjusticiable in Utah courts for several reasons. First and foremost, the *Rucho* Court specifically stated: "Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void.... Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507.

Utah courts also are not bound by the same justiciability requirements as federal courts under Article III. Several Utah cases have noted that, on matters like standing and justiciability, a lesser standard may apply. *See, e.g.*, *Laws v. Grayeyes*, 2021 UT 59, ¶ 77, 498 P.3d 410 (Pearce, J., concurring); *Gregory v. Shurtleff*, 2013 UT 18, ¶ 12, 299 P.3d 1098; *Brown v. Div. of Water Rts. of Dep't of Nat. Res.*, 2010 UT 14, ¶¶ 17-18, 228 P.3d 747; *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).

Utah courts at times decline to merely follow and apply federal interpretations of constitutional issues. *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 27, 450 P.3d 1092. They "do not presume that federal court interpretations of federal constitutional provisions control the meaning of identical provisions in the Utah Constitution." *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935. They do not merely presume that federal construction of similar language is correct, *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106. And they recognize that federal standards are sometimes "based on different constitutional language and different interpretative case law." *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 45. Utah courts have also interpreted the Utah constitution to provide more protection than its federal counterpart when federal law was an "inadequate safeguard" of state constitutional rights. *Tiedmann*, 2007 UT 49, ¶¶ 33, 42-44.

While the *Rucho* majority decision conclusively resolved the issue justiciability for federal courts, given the split in the decision and the dissent authored by Justice Kagan, the issue was clearly not that cut and dry, even for the federal courts. Justice Kagan wrote that most members of the Supreme Court agree that partisan gerrymandering is unconstitutional. And four of the nine justices agreed that partisan gerrymandering is justiciable, judicially manageable standards exist, and the dissent discussed tests that exist and have been applied by the federal courts. *Rucho v. Common Cause*, 139 S. Ct. at 2509-2525 (Kagan, J., dissenting) (stating, in reference to the majority opinion, "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks it is beyond judicial capabilities."). Federal caselaw may prove helpful in this case as the litigation proceeds, but the majority's holding in *Rucho* – that partisan gerrymandering is not justiciable – is not binding on this Court and this Court declines to follow it.

B. Judicially discoverable and manageable standards exist.

Defendants argue that the Court lacks jurisdiction because there are no judicially discoverable or manageable standards for resolving redistricting claims because redistricting is a purely political exercise, based entirely on the Legislature's consideration and weighing of competing policy interests in deciding where to draw boundary lines. (Defs.' Mot. at 10.) The Court disagrees.

Plaintiffs' Complaint challenges the constitutionality of the 2021 Congressional Plan and the Utah Legislature's action. Determining whether the 2021 Congressional Plan violates the Utah Constitution involves no "policy determinations for which judicially manageable standards are lacking." *Baker*, 369 U.S. at 226. Instead, it involves legal determinations, the standards for which are provided both in the Utah Constitution and in caselaw. Utah courts have previously

addressed the Free Elections, Uniform Operation of Laws, Freedom of Speech and Association and the Right to Vote clauses of the Utah Constitution and, for some clauses, there are well-developed standards that have been applied by Utah courts in various scenarios.[5] And Utah courts are regularly asked to address issues of first impression, to interpret constitutional provisions and statutes for the first time and to apply established constitutional principles to new legal questions and factual contexts.[6] There is no reason why this Court cannot do the same here.

In reviewing Plaintiffs' redistricting claims, the Court will simply be engaging in the well-established judicial practice of interpreting the Utah Constitution and applying the law to the facts. The Utah Supreme Court has stated that "the Utah Constitution enshrines principles, not application of those principles," and it is the court's duty to determine "what principle the constitution encapsulates and how that principle should apply." *Maese,* 2019 UT 58, ¶ 70 n. 23. In applying constitutional principles to new types of claims, the Court uses "traditional methods of constitutional analysis," which starts with analyzing the plain language of the constitution and taking into consideration "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper

[5] While the constitutional provisions Plaintiffs cite have never been applied by Utah courts for redistricting claims, they have been applied in a variety of other contexts. The following are examples, not an exhaustive list. The Utah Supreme Court has applied Article I, Section 17 of the Utah Constitution (Free Elections Clause, Plaintiffs' Count One) while analyzing the right of a political candidate to appear on a party's ticket. *Anderson v. Cook*, 102 Utah 265, 130 P.2d 278, 285 (1942). It has applied Sections 2 and 24 of Article I (Uniform Operation of Laws, Count Two) in the context of a citizen initiative. *Gallivan v. Walker,* 2002 UT 89, 54 P.3d 1069. It has applied Sections 1 and 15 of Article I in an obscenity case. *American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235. And the Utah Supreme Court has applied Article IV, Section 2 in a case in which a prison inmate challenged a residency requirement in registering to vote. *Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985).

[6] For example, in *State v. Roberts*, the Utah Supreme Court applied the Utah Constitution to determine whether a reasonable expectation of privacy exists for electronic files shared in a "peer-to-peer file sharing network." 2015 UT 24, ¶ 1, 345 P.3d 1226. *See also State v. Limb*, 581 P.2d 142, 144 (Utah 1978) (addressing automobile exception); *Dexter v. Bosko*, 2008 UT 29, ¶ 19 (unnecessary rigor provision applied to seatbelts); *State v. James*, 858 P.2d 1012, 1017 (Utah Ct. App. 1993) (due process applied to video recorded interrogations).

interpretation of the provision in question." *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921, n.6 (Utah 1993).

In addition, in addressing redistricting, Utah's court are not without judicially-discoverable or manageable standards. *Rucho* specifically recognized that "provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 139 S. Ct. at 2507. Here, the people of Utah passed Proposition 4, which codified into law the people's will to apply traditional redistricting criteria in congressional districting. *See supra* pp. 3-4. Other state courts have addressed claims involving partisan gerrymandering. In fact, seven state courts in North Carolina, Pennsylvania, Florida, Ohio, Maryland, New York, and Alaska have concluded that partisan gerrymandering claims are cognizable under their respective state constitutions.[7] Some have set forth criteria and factors that may be considered in such analyses. *See, e.g., League of Women Voters v. Commonwealth*, 645 Pa. 1, 118-21 (Pa. 2018) (discussing consideration of traditional redistricting criteria, including contiguity, compactness, and respect for political subdivisions, and establishing "neutral benchmarks" for evaluating gerrymandering claims). Federal courts have applied various tests to address partisan gerrymandering. *See, e.g., Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (discussing application of a three-part test, including consideration of intent, effects, and causation, and discussing generally other tests previously applied). Utah courts have historically relied on case law from other state and federal courts in addressing questions that arise under Utah law. *See, e.g., Am. Bush,* 2006 UT 40, ¶ 11; *Ritchie v. Richards*, 47 P. 670, 677-79 (1896).

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[7] *See Harper*, 868 S.E.2d at 558-60; *League of Women Voters v. Commonwealth*, 645 Pa. 1, 128 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371-72 (Fla. 2015); *Adams v. DeWine*, 2022 WL 129092 at *1-2 (Ohio Jan. 14, 2022); *Szeliga v. Lamone*, Nos. C-02-cv-21-001816 & C-02-CV-21-001773 at 93-94 (Anne Arundel Cnty. Cir. Ct. Mar. 25, 2022), https://redistricting.lls.edu/wp-content/uploads/MDSzeliga-20220325-order-granting-relief.pdf; *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022); *In the Matter of the 2021 Redistricting Cases*, S-18419 (Alaska May 24, 2022) (applying *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987)) (opinion forthcoming).

This Court can do the same here, taking into consideration material differences in our constitutions and state laws.

This case is in the beginning stages. The parties have not conducted discovery. No evidence has been presented and the parties have not yet presented their positions regarding appropriate tests or criteria that should be considered and applied. As this case proceeds through litigation and with specific input from both parties, this Court can determine what criteria or factors should be considered in this case, under Utah law. *See Harper*, 868 S.E.2d at 547-48 (stating specific standards for evaluating state legislative apportionment schemes should be developed in the context of actual litigation); *accord Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment.").

Utah courts, including this one, recognize the separation of powers. To be clear, this Court will not review the Legislature's legitimate weighing of policy interests. The judiciary is not a political branch of government; policy determinations are for the Legislature to decide. As the Utah Supreme Court has stated, "[i]t 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 it should be, does not give rise to an appeal from the legislature to the courts." *Parkinson*, 291 P.2d at 403. However, even in cases involving political issues, the Court is bound to review the Legislature's actions, not to weigh in on policy matters, but to determine whether there has been a constitutional violation. *Matheson*, 641 P.2d at 680.

Judicial review of legislative action to determine constitutionality does not derogate from the primacy of the state legislature's role in redistricting. However, because redistricting is not wholly within the control of the Legislature, the constitutional claims presented here are not political questions, and because judicially discoverable and manageable standards exist to review constitutional challenges and redistricting claims, the Court concludes that it has jurisdiction in this case to review the Legislature's actions to determine if they are constitutional.

Therefore, Defendants' Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is DENIED.

II. Defendants' Motion to Dismiss the Committee and Individual Defendants is DENIED.

Defendants move to dismiss Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Senator J. Stuart Adams, and Representative Brad Wilson (collectively, Committee and Individual Defendants). (Defs.' Mot. at 14.) Defendants' Motion is based on two arguments. First, they argue that the Committee and Individual Defendants are immune from suit based on claims related to their actions as legislators. Second, the Committee and Individual Defendants assert they are unable to provide Plaintiffs' requested relief, and as such, should be dismissed. (*Id.*).

Regarding immunity, the Committee and Individual Defendants are correct that Utah law grants them immunity from certain lawsuits. However, that grant of immunity does not make them immune to all claims. To the contrary, Utah law only grants legislators immunity from claims of *defamation* related to their actions as legislators. Utah has adopted the common law legislative immunity and legislative privilege doctrines through its Speech or Debate Clause,[8]

[8] Utah's Speech or Debate Clause states: "[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

which Utah courts interpret as providing legislative immunity only from *defamation* liability. *See Riddle v. Perry*, 2002 UT 10, ¶ 10, 40 P.3d 1128. In *Riddle*, the Utah Supreme Court declined to provide absolute legislative immunity in all instances. It explained that the policy consideration behind the legislative immunity doctrine is "the importance of full and candid speech by legislators, even at the possible expense of an individual's right to be free from defamation." *Id.* ¶ 8. Here, Plaintiffs are not seeking relief from defamation. Under this limited view of legislative immunity,[9] the Committee and the Legislative Defendants are not immune.

The Committee and Individual Defendants also assert that they cannot provide the relief requested and that any order from this Court directed at them "would blatantly violate the separation of powers." (Reply at 15.) The Committee's and Individual Defendants' argument on this point is less than two pages. They do not cite any authority, legal or otherwise, to support that the Committee and the Defendants cannot provide *any* relief requested or that any order from the Court, directed at them, would violate the separation of powers.[10] Such unsupported arguments are insufficient to satisfy Defendants' burden on a motion to dismiss. *See Bank of Am. v. Adamson*, 2017 UT 2, ¶ 13, 391 P.3d 196 ("A party must cite the legal authority on which its

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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.

[9] The *Riddle* Court explained the limits of the Utah's legislative immunity doctrine:

> In determining the contours of the legislative proceeding privilege, we adopt the privilege as set forth in section 590A of the Restatement (Second) of Torts: "A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he [or she] is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding."

Id. ¶ 11 (alteration in original).

[10] Notably, Utah courts have allowed lawsuits against individual legislators to proceed. *See, e.g., Matheson v. Ferry*, 657 P.2d 240, 244 (Utah 1982); *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978); *Rampton v. Barlow*, 23 Utah 2d 383, 384, 464 P.2d 378 (1970); *Romney v. Barlow*, 24 Utah 2d 226, 227, 469 P.2d 4497 (1970). This Court is not aware of any legal authority, either at the state or federal level, that prohibits all lawsuits naming legislators. If any legal precedent exists to justify the dismissal of any defendant, it is incumbent on the moving party to present that authority to the Court.

argument is based and then provide reasoned analysis of how that authority should apply in the particular case."). While Defendants certainly raise important issues that the parties and this Court will consider as this case proceeds,[11] the arguments made at this stage are simply insufficient to justify dismissing the Committee and the Individual Defendants. *See Gardiner v. Anderson*, 2018 UT App 167, ¶ 21 n.14, 436 P.3d 237 ("[I]t is not the district court's burden to research and develop arguments for a moving party.").

Regarding the Committee and Legislative Defendants' separation of powers argument, the Court has a duty to review the Legislature's acts if it appears they conflict with the Utah Constitution. *Matheson*, 657 P.2d at 244. Indeed, to hold otherwise would make the Legislature the ultimate arbiter of what is constitutional, which would in fact violate the separation of powers principle by intruding on this Court's constitutional role. *See id.* At this stage, it appears this Court can give Plaintiffs at least some of the relief requested without intruding on the Legislature's powers, which is sufficient to defeat Defendants' Motion to Dismiss.

Defendants' Motion to Dismiss the Committee and the Legislative Defendants is DENIED.

III. Defendants' Motion to Dismiss Counts One through Four is DENIED; Defendants' Motion to Dismiss Count Five is GRANTED.

Defendants' move to dismiss each of Plaintiffs' four constitutional challenges to the 2021 Congressional Plan asserting that Utah's Constitution, and specifically the Free Elections Clause, Equal Protection Clause, Free Speech and Association Clause and the Right to Vote Clause, does not expressly prohibit partisan gerrymandering. Defendants

[11] The precise relief that Plaintiffs seek and might be entitled to is not entirely clear at this stage of the litigation. Thus, any ruling the Court could make would be merely advisory and the Court declines to do so. *Salt Lake County v. State*, 2020 UT 27, ¶36, 466 P.3d 158 ("[W]e do not issue advisory opinions."). The Court recognizes, however, that the issues raised by Defendants are legitimate questions that the Court will address if and when the issues are fully ripe and briefed.

take the position that these provisions should be interpreted narrowly to protect *only* every citizen's right to cast a vote in an election. Nothing more. They argue generally that the 2021 Congressional Plan does not prohibit any citizen from voting in an election. New boundary lines do not prohibit each citizen from physically casting a vote or from freely speaking and associating with like-minded voters on political issues. Further, they argue that the Utah Constitution does not guarantee "equal voting power," a vote that is politically "equal in its influence," any political success, or a beneficial political outcome. In addition, Defendants move to dismiss Plaintiffs' fifth claim, asserting that the Utah Constitution does not prohibit the Legislature from either amending or repealing the Utah Independent Redistricting Commission and Standards Act, Title 20A, Chapter 19, of the Utah Code, which is the law that went into effect with the successful passage of Proposition 4.

Defendants' motion is made under Rule 12(b)(6) of the Utah Rules of Civil Procedure, asserting that Plaintiffs have failed to state a claim under the Utah Constitution.

> "The purpose of a rule 12(b)(6) motion is to challenge the *formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case*." *Van Leeuwen v. Bank of Am. NA*, 2016 UT App 212, ¶ 6, 387 P.3d 521 (cleaned up). Accordingly, "dismissal is justified *only* when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim." *Id.* (cleaned up).

Pioneer Homeowners Ass'n v. TaxHawk Inc., 2019 UT App 213, ¶ 19, 457 P.3d 393, *cert. denied sub nom., Pioneer Home v. TaxHawk, Inc.*, 466 P.3d 1073 (Utah 2020) (emphasis added). The Court's review of Defendant's Motion at this stage is limited to considering only "the legal viability of a plaintiff's underlying claim as presented in the pleadings." *Lewis v. U.S. Bank Tr. NA*, 2020 UT App 55, ¶ 9, 463 P.3d 694, 697 (internal quotation marks excluded).

Each of Plaintiffs' claims is based on the Utah Constitution. Constitutional interpretation starts with evaluating the plain text to determine "the meaning of the text as understood when it

was adopted." *S. Salt Lake City v. Maese,* 2019 UT 58, ¶ 18, 450 P.3d 1092 (discussing generally process of constitutional interpretation). "The goal of this analysis is to discern the intent[12] and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235. "While we first look to the text's plain meaning, we recognize that constitutional language is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." *Id.* ¶ 10. The Court's focus is on "how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." *Patterson v. State of Utah*, 2021 UT 52, ¶ 91, 405 P.3d 92.

In addition to analyzing the text, prior caselaw guides us to analyze "historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting.'" *Maese,* 2019 UT 58, ¶ 18 (quoting *Am. Bush*, 2006 UT 40, ¶ 12). The language of the text, in certain circumstances, may begin and end the analysis. However, "[w]here doubt exists about the constitution's meaning, we can and should consider all relevant materials. Often that will require a deep immersion in the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Maese,* 2019 UT 58, ¶ 23 (cleaned up) (explaining merely "asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact is not a recipe for sound constitutional interpretation.").[13] The Court may also

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[12] The Utah Supreme Court has explained that "[w]hile we have at times used language of 'intent' in discussing our constitutional interpretation analysis, our focus is on the objective original public meaning of the text, not the intent of those who wrote it. Evidence of framers' intent can inform our understanding of the text's meaning, but it is only a means to this end, not an end in itself." *Maese*, 2019 UT 58, ¶ 59 n.6.

[13] In interpreting the Utah Constitution, "we consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy. Our primary search is for intent and purpose. Consistent with this view, this court has a very long history of interpreting constitutional provisions in light

consider caselaw from sister states, with similar provisions made contemporaneously to the framing/ratification of Utah's Constitution, and federal caselaw interpreting similar provisions from the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 11.

Both parties have provided to the Court some relevant material to support their competing interpretations of the Utah Constitution, of which this Court may take judicial notice of under Rule 201 of the Utah Rules of Evidence. At this stage, the Court cannot consider factual matters outside the pleadings on a motion to dismiss without converting the motion into to one for summary judgment. Utah R. Civ. P. 12(b); *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 12, 104 P.3d 1226. Neither party has made such a request. Therefore, at this stage, the Court need only decide whether Plaintiffs have stated a claim, not whether Plaintiffs will succeed on those claims. Because each claim involves separate legal issues, the Court addresses each individually below.

a. Plaintiffs Sufficiently State a Claim under the Free Elections Clause (Count One).

Defendants assert that Plaintiffs have failed to, and cannot, state a claim under the Free Elections Clause. Defendants argue the plain language of the Free Elections Clause does not expressly prohibit partisan gerrymandering and that it guarantees only "the freedom to *cast a vote* without interference from civil or military power." (Defs.' Reply at 17 (emphasis added).) The Court disagrees.

The 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

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of their historical background and the then-contemporary understanding of what they were to accomplish. This case, like many others, proves the wisdom of the axiom that '[a] page of history is worth a volume of logic.'" *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 23, 450 P.3d 1092, 1098 (discussing and quoting *Society of Separationists v. Whitehead*, 870 P.2d 916, 920–21, and n. 6 (Utah 1993)).

Const. art. I, § 17. Defendants argue that this Court must interpret the provision as a whole, arguing that the second clause, which states that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," necessarily modifies or limits the first. (Defs.' Reply at 17.) The Court rejects this interpretation.

1. The Plain Meaning of "All *elections* shall be *free.*"

There are two express rights guaranteed by the Free Elections Clause, not just one. First and foremost, "all *elections* shall be *free*." The second, "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The clause is constructed as a compound sentence, separating two independent clauses by the conjunction "and." This sentence construction supports that these two clauses are to be given equal value. Nothing in the construction or choice of conjunction suggests to this Court that the second independent clause was intended to limit the first. Defendants also provide no authority, legal or otherwise, to support such interpretation.

What did the term "all *elections* shall be *free*" mean to the people of Utah in 1895, when the Utah Constitution was adopted? There is little historical information on Utah's Free Elections Clause. While the Clause was discussed during the Proceedings and Debates of the Convention Assembled to Adopt a Constitution for State of Utah, in Mar. 25, 1895,[14] the discussion provides no guidance as to what the clause was intended to protect or how to interpret the key words. The reported transcript of the proceedings reflects that the Free Elections Clause was passed with no debate. One modification was made to the final text. As originally proposed, the Free Elections Clause stated that "[a]ll elections shall be free and equal." A successful motion was made to remove "equal," but with no discussion. Defendants argue the removal is significant, revealing

[14] Found at le.utah.gov/documents/conconv/22.htm ("Convention Proceedings").

the drafter's intent to not guarantee "voting power." (Defs.' Mot. at 21, n.16.) Plaintiffs, on the other hand, argue that "equal" was removed because it was "superfluous," because the term "free," as defined in 1891, already contained an equality component. (Pls' Opp'n at 26.) Neither party, however, provided any authority to support their respective arguments.[15] And the debate regarding this clause is of little assistance.

There are no early Utah common law cases discussing the Free Elections Clause. There are no Utah cases from any time period defining the term "elections." Notably, neither party focused on this term nor provided a definition or any legal analysis of it.[16] The meaning of the term "elections," however, is critical to this analysis and critical to interpreting this clause.

An "election" is defined by Merriam-Webster as the "act or process of electing." *Election*, Merriam-Webster, https://www.merriam-webster.com/dictionary/elections (noting first known use of this term, with this definition, was the 13th century). To "elect" is "to select by vote for an office, position or membership." *Elect,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elect. Other dictionary sources define the term similarly: "An election is a process in which people vote to choose a person or group of people to hold an official position." *Election*, (noun), Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/election.[17]

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[15] The Court agrees with Defendants that the removal means something. But there is insufficient historical information before the Court to determine what was intended by the removal. The Court need not determine why it was removed; instead, the Court focuses on interpreting the clause as it is written.

[16] Notably, neither party provided a definition of "elections." Both parties focused primarily on and provided definitions for the word "free." Based on the Court's analysis, the definition of "elections" does not appear to have changed over time and it does not appear to be subject to widely different interpretations. This Court is not a linguistics expert and did not undertake independent scientific research, but it did resort to standard dictionary definitions to assist in interpreting the plain language of the Free Elections Clause. *See generally State v. Rasabout*, 356 P.3d 1258 (2015) (discussing generally interpretation methods under Utah law).

[17] "*Election* (noun), the act or process of choosing someone for a public office by voting." *Election*, Britannica Dictionary, https://www.britannica.com/dictionary/election. An "election" is "the process of choosing a person or a

"Election" also means the "right, power, or privilege of making a choice." *Election,* Merriam-Webster, https://www.merriam-webster.com/dictionary/elections. Similar definitions were used in the late 1800s. *See e.g., State v. Hirsch,*[18] 125 Ind. 207, 24 N.E. 1062, 1063 (1890) (discussing various definitions of "election" and stating it "is not limited in its definition and meaning to the act or process of choosing a person for a public office by a vote of the qualified electors at the time, place, and manner prescribed by law.").

The term "free" as defined in the 1891 Black's Law Dictionary means: "[u]nconstrained; having power to follow the dictates of his own will;" "[e]njoying full civic rights;" and "[n]ot despotic; assuring liberty;[19] defending individual rights against encroachment by any person or class; instituted by a free people; said of governments, institutions, etc." *Free*, Black's Law Dictionary, 1st ed. 1891. (Pls.' Opp'n at 26-29; Defs.' Reply at 16-20). "Free" was also defined as "[o]pen to all citizens alike[.]" *Free,* Anderson, Dictionary of Law, 1889.

Two notable terms justify further analysis. First, "unconstrained" means "not held back or constrained." *Unconstrained*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unconstrained (noting definition first used in the 14th century). "Constrained" means "to force by imposed stricture, restriction or limitation;" "to force or produce in an unnatural or strained manner." *Constrained*, Merriam-Webster,

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group of people for a position, especially a political position, by voting." *Election (noun)*, Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/election.

[18] In *State v. Hirsch*, 125 Ind. 207, 24 N.E. 1062, 1063 (Ind. 1890), the Indiana Supreme Court analyzed the meaning of the term "elections" to interpret a state statute prohibiting liquor sales on "election day." Notably, the Court recognized that "[u]nder our form of government we have a well-defined system of choosing or electing officers, regulated by law." *Id.*

[19] "Liberty" is defined as "the quality or state of being free; the power to do as one pleases; freedom from physical restraint; freedom from arbitrary or despotic control; the positive enjoyment or various social, political, or economic rights and privileges; the power of choice." *Liberty,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/liberty (noting the definition has been used since the 14th century).

https://www.merriam-webster.com/dictionary/constrain (noting definition used in the 14th century).

Second, "despotic" means "of, or relating to, or characteristic of a despot // a despotic government." *Despotic*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despotic#h1 (noting this term, with this definition, was first used in 1604). "Despot" in turn means "a ruler with absolute power and authority; one exercising power tyrannically; a person exercising absolute power in a brutal or oppressive way." *Despot*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/despot (noting this definition came into being with the beginning of democracy at the end of the 18th century). The United States Supreme Court in 1866 explained what it means to be despotic: "In a despotism the autocrat is unrestricted in the means he may use for the defence of his authority against the opposition of his own subjects or others; and that is what makes him a despot." *Ex parte Milligan*, 71 U.S. 2, 81, 18 L. Ed. 281 (1866).

The first clause "all elections shall be free" guarantees to Utah's citizens an election *process* that is free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained process, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process to either ensure continued control or to attain an electoral advantage. This right given to Utah citizens, necessarily imposes a limit on the legislature's authority when overseeing the election process.

The second clause specifically provides that "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. This portion of the clause prohibits a civil or military power from interfering with the free exercise of the right of suffrage. It does not, however, expressly preclude a governmental power, like the

legislature, from providing "by law 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).

Anderson v. Cook is the only Utah case discussing the Free Elections Clause. In *Anderson,* a potential candidate submitted a petition to appear on a primary election ballot, but the acting county clerk refused to certify the nomination of the candidate for the primary election. *Id.* at 280. In affirming the county clerk's decision, the *Anderson* Court concluded that the petition was not timely filed, that the political party could not designate a candidate without an effective petition, and that the primary election laws did not provide for a "write in" candidate (while noting that general election laws did). *Id.* at 281-82. The candidate argued to deny him the right to appear on the ballot would violate the Free Elections Clause. *Id.* at 285. The *Anderson* Court did not fully interpret or analyze the clause. More importantly, it did not conclude that the Free Elections Clause did not apply to the issues presented. Rather, it held:

> 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.

Anderson v. Cook, 102 Utah 265, 130 P.2d 278, 285 (1942) (emphasis added).

While the *Anderson* Court found no constitutional violation (i.e., because the candidate's petition was not filed in accordance with the law), the case does support that claims regarding the election *process* cannot be made under the Free Elections Clause. It supports that the Legislature necessarily has a role in providing "reasonable" regulation, machinery, and organization of the exercise of the right to vote. Additionally, the Legislature must "provide by law for the conduct

of elections, and the means of voting, and the methods of selecting nominees." *Anderson*, 130 P.2d at 285.

Based on the Court's analysis, and contrary to Defendants' arguments, Utah's Free Elections clause guarantees more than merely the right to vote.

2. Free Election Clauses and the English Bill of Rights

The history of free election clauses also supports that they were intended to prohibit tyrannical or despotic governmental manipulation of the election process to either ensure continued power or to attain electoral advantage. The first state free election clauses derived from a provision in the English Bill of Rights of 1689. *See Harper v. Hall*, 868 S.E.2d 499, 540 (N.C. 2022) (quoting historical sources discussing the origin of Free Elections Clauses in Virginia, Pennsylvania, and North Carolina). The original provision provided: "election of members of parliament ought to be free," and "was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain electoral advantage." *Id.* (citing Bill of Rights, 1689, 1 W. & M. Sess. 2 c. 2 (Eng.)). The key principle driving these reforms was "avoiding the manipulation of districts that diluted votes for electoral gain." *Id.* North Carolina's free election clause was enacted following passage of similar provisions in Virginia and Pennsylvania, with the intent to "end the dilution of the right of the people to select representatives to govern their affairs," and to "codify an explicit provision to establish protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* (cleaned up). While not identical to Utah's, North Carolina's free election clause states simply: "All elections shall be free."

Defendants argue there is no evidence that Utah's Free Elections Clause, specifically, was based on the English Bill of Rights. This is true. Utah does not have the same well-

developed caselaw like North Carolina, specifically tracing the origin of this specific constitutional provision directly to the English Bill of Rights. However, the Utah Supreme Court has recognized that at least one provision in the Utah Constitution arose from the English Bill of Rights of 1689. *See, e.g.*, *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996) (discussing Utah's cruel and unusual punishment clause), *abrogated by Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533; *see also State v. Houston,* 2015 UT 40, ¶¶ 166-170, 353 P.3d 55, 99-100 (Lee, J. concurring) (discussing English Bill of Rights and English origins of protection against "cruel and unusual punishment"). Based on *Bott,* the English Bill of Rights certainly had some influence on Utah's Constitution, as did other state constitutions and the United States Constitution. *Am. Bush*, 2006 UT 40, ¶ 31 (stating "the drafters of the Utah Constitution borrowed heavily from other state constitutions and the United States Constitution" and English common law.).

The history and evolution of our representative democracy in the United States was well known to the Utah Supreme Court in 1896, as it evaluated legislative action and various challenges to an election process. *See Ritchie v. Richards*, 14 Utah 345, 47 P. 670, 675 (1896) (stating elections should be "honest and fair"). In a concurring opinion, Justice Batch rejected the proposition that all legislative action is presumed constitutional and beyond judicial review. *Id.* at 675. Specifically, he rejected an interpretation of the Utah Constitution that would vest the legislature with "a power so arbitrary" that it likened it to "the parliament of Great Britain, under a monarchial form of government." *Id.*; *see also id.* at 681 (Miner, J., concurring in J. Batch's opinion).

Utah caselaw from 1891 reflects the strong sentiment at that time regarding the fundamental nature of the right to vote and the importance of protecting it from illegal acts of

election/government officials. *See Ferguson v. Allen,* 7 Utah 263, 26 P. 570, 574 (1891). The Utah Supreme Court in *Ferguson*, while analyzing allegations of election fraud, stated that the right to vote is fundamental and "[t]hat no legal voter should be deprived of that privilege by an illegal act of the election authorities is a fundamental principle of law." *Id.* at 573. The *Ferguson* court stated: "[a]ll other rights, civil or political, depend on the *free* exercise of this one, and *any material impairment* of it is, to that extent, a subversion of our political system." *Id.* at 574 (emphasis added). It further reasoned that the "rights and wishes of all people are too sacred to be cast aside and nullified by the illegal and wrongful acts of their servants, no matter under what guise or pretense such acts are sought to be justified." *Id.*

3. *Harper v. Hall* and Defendants' cited cases.

In line with the reasoning in *Ferguson*, the North Carolina Supreme Court in *Harper v. Hall* held that partisan gerrymandering is a cognizable claim under North Carolina's free elections clause, stating:

> partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. *Partisan gerrymandering prevents election outcomes from reflecting the will of the people* and such a claim is cognizable under the free elections clause.

Harper v. Hall, 868 S.E.2d 499, 542, *cert. granted sub nom. Moore v. Harper,* 142 S. Ct. 2901 (2022) (emphasis added).

Defendants cite two cases from Colorado and Idaho, suggesting that those states narrowly interpret their free elections clauses. They do not. In fact, in reviewing both cases, the Colorado

and Idaho courts apply their respective free elections clauses to address the "process" and not just merely the act of casting voting.

Defendants cite the Colorado case *Neelley v. Farr*, 158 P. 458 (Colo. 1916), stating that the Colorado Supreme Court interpreted Colorado's "free and open elections" provision to mean that "voters' right to the act of suffrage [be] free from coercion." *Id.* at 467. While that quote is part of the analysis, the *Neelley* court's decision does not support that the Court narrowly interpreted the Colorado free and open election clause to mean only that it protects against vote coercion. Notably, the case did not address redistricting. Rather, it addressed whether votes obtained from a "closed precinct," where the non-preferred candidates' party and voter information were prohibited (due to alleged industrial necessity), violated the free and open elections clause. The *Neelley* Court concluded that it did, and it excluded all votes cast, legal and illegal, from the precinct. *Id.* at 515.[20] While there are numerous quotes from the case regarding "free and open elections" that support that free and open elections means more than simply casting a vote, one quote is particularly instructive:

> There can be no free and open election in precincts where the legitimate activity of a political organization is interfered with and its members excluded either by private interests or public agencies or by the co-operation of both. So here a private, extrinsic agency, assisted by a public agency, the board of county commissioners, obtruded itself between a political organization and the electorate, and excluded one side to the controversy from the public territorial entity wherein the right of suffrage must be exercised.

Neelley v. Farr, 61 Colo. 485, 526, 158 P. 458, 472 (1916). This case supports that Colorado's free and open elections clause protects the *process*. In addition, congressional

[20] The *Neelley* court also stated: "under our form of government, if there is anything that should be held sacred, it is the ballot; and, if the aspirants for office, the election officials, and the party leaders so far forget themselves as to commit, or permit the commission of, gross frauds, so that the will of the legal electors cannot be determined, there is nothing left for the courts to do but to set aside the election in the precincts contaminated by such fraudulent conduct." *Neelley v. Farr*, 61 Colo. 485, 515, 158 P. 458, 468 (1916).

districts drawn through partisan gerrymandering to ensure one parties' election success to the exclusion of others does not meet the *Neelley* court's definition of a "free and open" election.

Defendants also cite *Adams v. Lansdon*, 110 P. 280 (Idaho 1910). *Adams* also does not deal with redistricting. Rather, the issue before the *Adams* court was whether requiring voters to vote for a first and second choice violated the portion of the Idaho's free and lawful elections clause, which stated: "No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." *Id.* at 282. In rejecting the argument, the *Adams* court interpreted the provision to prevent only "civil or military officers" from "meddl[ing] with or intimidat[ing] electors" at polls; it ruled that imposing the requirement to vote for a first and second choice was a reasonable exercise of the legislature's power. *Id.* Notably, the *Adams* courts' ruling does not generally determine what "free elections" means. It also does not hold that a congressional map that predetermines elections is a reasonable exercise of the legislature's power and that such map does not meddle or interfere with the lawful exercise of the right to vote.

Based on the plain text of the Free Elections Clause, Utah caselaw, and decisions from other state courts, Utah's Free Elections Clause guarantees more than merely the right to cast a vote. It guarantees an election *process* free from despotic and tyrannical government control and manipulation. A "free election" involves an unconstrained *process*, that does not "produce" results "in an unnatural or strained manner." And it prohibits governmental manipulation of the election process, including through redistricting, to either ensure continued control or to attain an electoral advantage. As such, this Court concludes that partisan gerrymandering is a cognizable claim under Utah's Free Elections Clause.

4. Application of Plaintiffs' "effects-based" test.

Plaintiffs assert that this Court should assess Plaintiffs' Free Elections Clause claim under an effects-based test, which evaluates whether: "(1) the Enacted Plan has the effect of substantially diminishing or diluting the power of voters based on their political views, and (2) no legitimate justification exists for the dilution." (Pls.' Opp. at 17, 29.) The Court notes that this is Defendants' Motion, but Defendants neither address nor object to Plaintiffs' proposed test. Under the circumstances, and without adequate briefing, the Court adopts Plaintiffs' test solely for the purposes of deciding the current motion.

Assuming the allegations in the Complaint to be true, the Court concludes that Plaintiffs have sufficiently pled a claim under Utah's Free Elections Clause. First, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan has the effect of substantially diminishing or diluting the power of democratic voters, based on their political views. Plaintiffs allege that the Plan achieves extreme and durable partisan advantage by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to diminish their electoral strength. (Compl. ¶ 207.) In doing so, the Plan makes it systematically harder for non-Republican voters to elect a congressional candidate. It entrenches a single party in power and will reliably ensure Republicans and Republican incumbents are elected in all of the State's congressional seats for the next decade, despite a compact and sizeable population of non-Republican voters that, in a partisan-neutral map, would comprise a majority of a district covering most of Salt Lake County. (*Id.* ¶¶ 6, 206-209, 226-231.)

Second, there is no legitimate justification to dilute Plaintiffs' vote, and the dilution cannot be explained by application of traditional redistricting principles. (*Id.* ¶¶ 187-98, 233-54.)

The only stated justification is that Defendants intended "to ensure a mix of urban and rural areas in each congressional district." (Defs.' Mot. at 5, 23, 26.) Defendants contend that explanation is nothing more than a pretext. (Compl. ¶¶ 128-130, 177-78, 180-81, 187-198.) At this stage, the Court cannot resolve any disputes of fact. Therefore, it must accept Plaintiffs' well-pled allegations as true.

Further, Plaintiffs allege that the Plan was enacted for partisan advantage, based on the nature of the boundary lines, lack of transparency in the redistricting process, and the actions and statements made by elected officials involved in approving the Plan. (*Id.* ¶¶ 3-5, 141-198, 200, 233-235, 254, 275.) Finally, seeking partisan advantage is neither a compelling nor a legitimate governmental interest, because it "in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government." *Harper*, 868 S.E.2d at 549.

Based on the facts alleged in the Complaint, and the Court's legal analysis above, the Court concludes that Plaintiffs have sufficiently stated a claim under the "effects-based" test for violation of Utah's Free Elections Clause.

This Court recognizes that there will always be incidental political considerations and partisan effects during redistricting, even when neutral and traditional redistricting criteria are applied. The United States Supreme Court recognizes that "[n]ot every limitation on the right to vote requires judicial intervention. Some administrative burdens on the franchise are unavoidable. But some so alter the nature of the franchise that they deny a citizen's 'inalienable right to full and effective participation in the political process.'" *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). "Because self-government is fundamentally predicated upon voters choosing winners and losers in the political marketplace, elections must reflect the voters' judgments and

not the state's." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J. concurring) ("In a free society the State is directed by political doctrine, not the other way around."). Key to the success of our government is "public confidence in the integrity of the electoral process," which ultimately "encourages citizen participation in the democratic process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). What is clear in a representative democracy, and under Utah's Free Elections clause, is that the way in which a government/legislature regulates, manages, provides for, and ultimately shapes the electoral process matters. As such, government/legislative action in this area should not be, and in this case is not, beyond constitutional challenge.

Plaintiffs should have the opportunity to present their case. Defendants' Motion to Dismiss Count One is DENIED.

b. **Plaintiffs Sufficiently State an Equal Protection Claim (Count Two).**

Next, Defendants maintain that Plaintiffs fail to state an equal protection claim because the Congressional Plan does not impact any fundamental right or the right to vote because each voter can freely vote for the candidate of their choice. Defendants also argue the 2021 Congressional Plan doesn't create a suspect classification. And, Defendants argue, any "perceived inequality" is the "product of the imbalance in the political makeup in the state and the corresponding political outcomes that reflect that imbalance of political opinion." (Defs.' Mot. at 22; Defs.' Rep. at 21.) The Court disagrees. Based on the well-established three-part test set forth in *Gallivan v. Walker*, 2002 UT 89, ¶ 31, 54 P.3d 1069, Plaintiffs sufficiently state a claim for violation of Utah's Equal Protection Clause.

Plaintiffs' equal protection claim is based on their contention that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their equal protection rights

under the Uniform Operation of Laws Clause of the Utah Constitution. (Compl. ¶¶ 187-198, 271-82.) The Utah Constitution states that "all free governments are founded on their authority for their equal protection and benefit." Utah Const. art. I, § 2. The Uniform Operation of Laws Clause states that "[a]ll laws of a general nature shall have uniform operation." *Id.* art. I, § 24. Equal protection is inherent in the basic concept of justice. *Malan v. Lewis,* 693 P.2d 661, 670 (Utah 1984).

In comparing the federal Equal Protection Clause and Utah's equal protection guarantees (which are embodied in the Uniform Operation of Laws Clause), the Utah Supreme Court noted that both embody similar fundamental principles, generally that "persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Gallivan,* 2002 UT 89, ¶ 31 (internal quotation marks omitted). Utah courts have noted that Utah's constitutional protections are "in some circumstances, more rigorous than the standard applied under the federal constitution." *Id.* ¶ 33.[21] In other words, Utah's protections are "at least as exacting," *id.,* but in some cases more protective that its federal counterpart. *Blue Cross & Blue Shield of Utah v. State Tax Comm'n,* 779 P.2d 634, 637 (Utah 1989). For instance, "article I, section 24 demands more than facial uniformity; the law's *operation* must be uniform." *Gallivan,* 2002 UT 89, ¶ 37. The test applied

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[21] The *Gallivan* Court reasoned:

> Even though there is a similitude in the "fundamental principles" embodied in the federal Equal Protection Clause and the Utah uniform operation of laws provision, "our construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause," *Malan,* 693 P.2d at 670; *see also Ryan v. Gold Cross Servs., Inc.,* 903 P.2d 423, 426 (Utah 1995), and "[w]e have recognized that article I, section 24 ... establishes different requirements from the federal Equal Protection Clause." *Whitmer v. City of Lindon,* 943 P.2d 226, 230 (Utah 1997).

Gallivan v. Walker, 2002 UT 89, ¶ 33.

to determine compliance with the Uniform Operation of Laws Clause remains the same in all cases; however, the level of scrutiny given to legislative enactments varies. *Blue Cross*, 779 P.2d at 637 (stating this provision operates to restrain the legislature from "classifying persons in such a manner that those who are similarly situated with respect to the purpose of a law are treated differently by the law").

Under Utah law,

> A law does not operate uniformly if persons similarly situated are not treated similarly or if persons in different circumstances are treated as if their circumstances were the same. In other words, [w]hen persons are similarly situated, it is unconstitutional to single out one person or group of persons from among the larger class on the basis of a tenuous justification that has little or no merit."

Id. ¶ 37 (cleaned up). The Uniform Operation of Laws Clause "protects against discrimination within a class and guards against disparate *effects* in the application of laws." *Id.* ¶ 38 (emphasis added). The courts have a responsibility to determine "whether a classification operates uniformly on all persons similarly situated within constitutional parameters." *Id.* Utah laws must not "operate unequally, unjustly, and unfairly upon those who come within the same class." *Blackmarr v. City Ct. of Salt Lake City,* 86 Utah 541, 38 P.2d 725, 727 (1934).

Gallivan v. Walker is not a redistricting case, however, the principles espoused in the context of apportionment are no less applicable here. Notably, the *Gallivan* Court stated: "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Gallivan*, 2002 UT 89, ¶ 72 (citing *Reynolds v. Sims,* 377 U.S. 533,

565–66, 84 S. Ct. 1362 (1964) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686 (1954))). *Gallivan* also recognized that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems just." *Id.*

Plaintiffs assert that the right to vote is fundamental, and therefore heightened scrutiny applies based on the test set forth in *Gallivan*, 2002 UT 89, ¶¶ 42-43. Defendants, on the other hand, argue that because no fundamental or critical right or suspect classifications are implicated, the "rational basis" test, set forth in *State v. Angilau,* 2011 UT 3, ¶ 12, 245 P.3d 745, applies. At this stage, the Court need not decide which test applies as a matter of law because Plaintiffs have alleged facts sufficient to satisfy both standards.

Plaintiffs sufficiently allege facts to support that heightened scrutiny should apply. Plaintiffs have alleged that the 2021 Congressional Plan affects their fundamental right to vote. (Compl. ¶¶ 2, 261-262, 276-277, 301-307.) They have alleged that their right to vote has been burdened, diluted, impaired, abridged and is effectively meaningless, solely because of their political views and past votes. (*Id.*) The *Gallivan* court recognizes the right to vote as fundamental, stating:

> [n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Id. (citing *Reynolds*, 377 U.S. at 560 (1964)).

Under the Uniform Operation of Laws analytical model set forth in *Gallivan*, at this stage, Plaintiffs must allege that (1) the challenged law creates a classification, (2) that the "classification is discriminatory" or "treats the members of the class or subclasses disparately," and that it is (3) reasonably necessary to further a legitimate legislative goal. *Id.* ¶¶ 42-43.

First, Plaintiffs allege that the 2021 Congressional Plan, like the multi-county signature requirement in *Gallivan*, operates to create classifications. (Pls.' Opp'n at 34.) Plaintiffs allege that the district boundary arbitrarily classifies voters based on partisan affiliation and geographic location. (Compl. ¶¶ 4, 207-227, 274-275.) *Gallivan* recognized that the multi-county signature requirement created two subclasses of registered voters based on where they lived, rural and urban voters. *Gallivan*, 2002 UT 89, ¶ 44. Defendants contend that party affiliation is not a "suspect classification." However, at this stage, Plaintiffs have alleged, and this Court accepts as true, that the 2021 Congressional Plan operates to classify voters by both partisan affiliation and geographic location.

Second, Plaintiffs allege that the 2021 Congressional Plan treats similarly situated voters disparately. (*Id.* ¶¶ 4, 15, 23, 29-33, 36, 130, 187-198, 271-276.) Plaintiffs allege that Utah's Republican and non-Republican voters are similarly situated for redistricting purposes because both groups are entitled to equally weighted votes. The same is true for voters living in both urban and rural settings. Plaintiffs allege that the 2021 Congressional Plan diminishes the voting strength of non-Republican and urban voters, while amplifying the strength of Republican and rural voters. (*Id.* ¶¶ 30-33, 36, 188, 265, 276.)

Third, Plaintiffs sufficiently allege that there is no "legitimate" legislative goal in seeking a partisan advantage through redistricting, which effectively pre-determines election outcomes, targets disfavored voters, dilutes their vote and shifts voting power from all the people to a subset of people. (*Id.* ¶¶ 270-82.) They also allege there is no legitimate interest in amplifying the interests of rural or suburban voters to the detriment of urban voters.[22] (*Id.* ¶ 280.) Plaintiffs

[22] The *Gallivan* Court held that the multi-county signature requirement did not further a legitimate legislative purpose because it "invidiously discriminates against urban registered voters in violation of the one person, one vote principle." *Gallivan*, 2002 UT 89, ¶ 49.

also allege that Defendants' stated justification for the placement of district boundaries, to ensure an urban/rural mix, was merely a pretext to ensure partisan advantage and dilution of non-Republican votes. (*Id.* ¶¶ 177, 187-197.) Accepting these facts and the facts in the Complaint as true, Plaintiffs have stated a claim for equal protection under the Uniform Operation of Laws Clause.

Defendants contend that no fundamental right is implicated, and that partisan affiliation is not a suspect classification. As such, they maintain the Court should apply the rational basis standard. Based on that standard, Defendants assert that "the Legislature voted on congressional district lines for the *reasonable* purpose of ensuring balance of urban and rural areas in each congressional district." (Defs.' Mot. at 26 (citing Compl. ¶ 187).). Defendants' argument goes to the merits of Plaintiffs' claim, rather than to whether they have sufficiently stated a claim. While the Complaint does reflect that proponents of the 2021 Congressional Plan represented that the district lines were "necessary" to balance urban and rural interests, it does not state that the purpose was reasonable. In addition, Defendants ignore paragraphs 188 to 198 of the Complaint, in which Plaintiffs allege that rationale was a pretext. On a motion to dismiss, this Court does not decide the merits. Rather, it assumes the well-pleaded facts in the Complaint to be true. Plaintiffs allege that Defendants' urban/rural justification is merely a pretext. For purposes of this motion, this Court assumes that fact to be true. This Court cannot, at this stage, resolve disputes of fact or make credibility determinations.

Even reviewed under the rational basis test, Plaintiffs' Complaint still states a claim. Under that standard, this Court considers: "(1) whether the classification is reasonable; (2) whether the objectives of the legislative action are legitimate, and (3) whether there is a

reasonable relationship between the classification and the legislative purpose."[23] *State v. Angilau*, 2011 UT 3, ¶ 21, 245 P.3d 745 (internal quotation marks omitted). Courts will "uphold a statute under the rational basis standard if [the statute] has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory." *Id.* ¶ 10 (internal quotation marks omitted) (second alteration in original) (emphasis added). Assuming factors one and three are established, the Complaint alleges sufficient facts to show that there is no legitimate legislative objective in either seeking partisan advantage through redistricting or in establishing districts to predetermine the outcome of elections and to ensure that incumbents continue to hold their seats.

For the reasons stated above, Plaintiffs have stated an equal protection claim under both a heightened scrutiny and rational basis standard. The Motion to Dismiss Count Two is DENIED.

c. Plaintiffs Sufficiently State a Claim for Violation of Plaintiffs' Right to Free Speech and Association (Count Three).

Defendants assert that the 2021 Congressional Plan and the congressional district boundaries established therein neither implicate nor violate Plaintiffs' Free Speech and Association rights. The Court disagrees.

Article I, Section 1 of the Utah Constitution states that "[a]ll persons have the inherent and inalienable right to . . . assemble peaceably, . . . petition for redress of grievances, [and to] communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, § 1. Article I, Section 15 states, in pertinent part, that "[n]o law shall be passed to abridge or restrain the freedom of speech." Utah Const. art. I, § 15. The Utah Supreme Court has explained that together, Sections 1 and 15 of Article I "prohibit laws which either directly

[23] The Court also notes that whether a classification is in fact "reasonable" or whether legislative objectives are "legitimate" are inherently factual determinations. At this stage, the Court cannot "find facts" nor decide if the classification is "reasonable" or if the legislative objectives are "legitimate," without a developed factual record. On a motion to dismiss, the only issue before the Court is whether Plaintiffs have alleged sufficient facts to state a claim under Utah's Uniform Operation of Laws Clause.

limit protected [free speech] rights or indirectly inhibit the exercise of those rights." *Am. Bush*, 2006 UT 40, ¶ 21 (noting drafter of Utah's Constitution borrowed heavily from other state constitutions and the United States Constitution and finds its roots in English common law). Notably, the United States Supreme Court has recognized a First Amendment interest in voting. *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)); *Burdick*, 504 U.S. at 438 (observing that "voters express their views in the voting booth.").

The role of free speech is central to our representative democracy. In *American Bush*, the Utah Supreme Court discussed the history of free speech in Utah. 2006 UT 40, ¶ 13. That court recognized that "[t]he framers of Utah's constitution saw the will of the people as the source of constitutional limitations upon our state government." *Id.* And, because "'[a]ll political power is inherent in the people,' only Utah's citizens themselves had the right to limit their own sovereign power to act through their elected officials." *Id.* ¶ 14 (citing Utah Const. art. I, § 2). "'Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.'" *Harper*, 868 S.E.2d at 545 (citing Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970)).

Plaintiffs allege that the 2021 Congressional Plan divides up the only two predominately Democratic counties in Utah. Salt Lake County is divided among the four congressional districts; Summit County is divided among two. Fifteen municipalities are divided up into thirty-two pieces, and numerous communities of interest, school districts, and racial and ethnic minority communities are divided. (*See generally* Compl. ¶¶ 205-45, 250-51, 254.) Plaintiffs allege free

speech and association rights have in fact been burdened by these new boundaries. Urban neighborhoods, school districts and communities of interests – that may share common goals and interests based on proximity – do not vote with neighbors within a five-minute walk; they now vote with other rural voters who live eighty to three hundred miles away. (*Id.* ¶¶ 242-251.) The proximity between voters discourages, burdens, or effectively impacts free speech and association. Plaintiffs allege that these predominately democratic communities were intentionally divided or "cracked" solely because of their political views and past votes. (*Id.* ¶¶ 192, 275.) The effect of the "cracking" is that their non-Republican views are subordinated, votes are diluted, voices are silenced, and Republican-advantage and control is locked in in all four congressional districts for the next decade. (*Id.* ¶¶ 36, 275, 293-94.)

Plaintiffs allege that partisan gerrymandering as reflected in the 2021 Congressional Plan violates their free speech and association protections. They allege the 2021 Congressional Plan is both discriminatory and retaliatory and based solely on their protected political views and past votes. (Compl. ¶ 3-4, 36, 205-207. 209, 283-97.) Plaintiffs allege that the 2021 Congressional Plan burdens free speech and association in multiple ways. Specifically, it "restrains and mutes Plaintiffs' ability to express their viewpoints," "abridges the ability of voters with disfavored views to effectively associate with other people holding similar viewpoints," "impairs Plaintiffs' ability to recruit volunteers, secure contributions, and energize other voters to support Plaintiffs' expressed political views and associations," "retaliates against Plaintiffs for exercising political speech that Defendants disfavor," "prevent[s] [voters] from being able to associate and elect their preferred candidates who share their political views," divides Plaintiffs "to make their voices too diluted to be heard and guarantee they are not represented in any meaningful way because of

their disfavored views," and dilutes non-Republican votes. (*See generally* Compl., Compl. ¶¶ 289-294.)

Defendants assert that the Free Speech and Association Clauses do not apply to the redistricting process. (Defs.' Mot. at 26.) Defendants contend that the placement of a congressional district boundary "does not in any way restrict an individual's speech or impair an individual's ability to communicate," citing two federal district court cases, *Radogno v. Ill. State Bd. Of Elections*, No. 11-CV-04884, 2011 WL 5025251 (N.D. Ill. Oct. 21, 2011) and *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 487, but without any legal analysis. (Defs.' Reply at 26-27.)

In *Radogno*, the federal district court rejected Plaintiffs' First Amendment claims, holding that such rights were not burdened by the redistricting plan at issue. Specifically, the *Radogno* Court reasoned:

> Plaintiffs are every bit as free under the new redistricting plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression. Plaintiffs' freedom of expression is simply not burdened by the redistricting plan. It may very well be that Plaintiffs' ability to successfully elect their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights.

Radogno, 2011 WL 5025251, at *7 (N.D. Ill. Oct. 21, 2011).[24] *Radogno*'s First Amendment analysis of partisan political gerrymandering, under federal law, makes sense and is persuasive generally. However, that rationale may not apply to every case or to every fact scenario. In addition, it is not binding on this Court.

[24] Notably, the *Radogno* court did not dismiss outright plaintiffs' equal protection claim under the Fourteenth Amendment, but instead granted plaintiffs' leave to amend to plead a "workable test" or "reliable standard" to evaluate such claim. *Radogno*, 2011 WL 5025251, at *6 (discussing generally partisan gerrymandering cases under federal law, noting that some have reached the conclusion that they are justiciable, but not solvable).

In *Johnson v. Wis. Elections Comm'n*, the Wisconsin Supreme Court noted that in *Rucho v. Common Cause*, 204 L. Ed. 2d 931, 139 S. Ct. 2484, 2499–500 (2019), "[t]he United States Supreme Court recently declared there are no legal standards by which judges may decide whether maps are politically 'fair.'" *Johnson*, 2021 WI 87, ¶ 3, 399 Wis. 2d 623, 631. The *Johnson* court agreed that "fairness" is not a judicially manageable standard and that "deciding what constitutes 'fair' partisan divide . . . would encroach on the constitutional prerogatives of the political branches." *Id.* ¶ 45. The court emphasized that it would not decide whether the maps were fair but would fulfill its judicial role of "declaring what the law is and affording the parties a remedy for its violation." Like the *Johnson* court, this Court is not asserting that it has a role in deciding "fairness." And Plaintiffs here are not arguing that the 2021 Congressional Plan is unfair. They assert that it violates the Utah Constitution, and, as previously emphasized, the Court does not hesitate to engage in constitutional review.

Defendants also assert that the Free Speech and Association clauses of the Utah Constitution do not protect the redistricting process because "the framers of our [Utah] constitution . . . envisioned a limited freedom of speech." *Am. Bush*, 2006 UT 40, ¶ 42. The *American Bush* case, however, has only minimal relevance, if any, to this specific issue. *American Bush* did not involve redistricting, allegations of gerrymandering or voting rights. Instead, the *American Bush* court characterized the right to free speech as "limited" while discussing whether obscenity—in that case, nude dancing—was protected speech. *Am. Bush*, 2006 UT 40, ¶¶ 31-58. Consequently, the holding that the Utah Constitution's free speech protections do not extend to obscenity has little, if any, relevance to the issues at bar. Notably, unlike obscenity, voting is a fundamental right, and its exercise is a form of protected speech.

Laws v. Grayeyes, 2021 UT 59, ¶ 61 (stating "the right to vote is sacrosanct"); *Doe v. Reed*, 561 U.S. at 224 (recognizing a First Amendment interest in voting).

Defendants also assert there can be no First Amendment violation because Plaintiffs have no right to political success. *See Cook v. Bell*, 2014 UT 46, ¶ 34, 344 P.3d 634 (addressing whether the Legislature's limits on the right to initiative imposed severe restrictions on free speech and association). The Court does agree that "First Amendment jurisprudence . . . does not guarantee unlimited participation in political activity, nor does it establish a right to political success." *Id.* ¶ 57. However, it does protect "individuals from regulations that directly discourage or prohibit political expression." *Id.*

This Court notes there is a distinction between incidental political impacts that flow from neutral government action and government action aimed at discouraging, burdening, or prohibiting speech and association in order to secure an electoral advantage. Where "one-party rule is entrenched [because] voters approve of the positions and candidates that the party regularly puts forward," courts cannot and should not intervene in a neutrally administered electoral system. *New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S. Ct. 791 (rejecting argument that "one-party rule" demands application of First Amendment to ensure competition or a "fair shot at party endorsement"). But when a state takes steps, under either election laws or by redistricting, to grant its preferred party a durable monopoly, this deviation from neutrality undermines the competitive mechanism that undergirds the democratic process, and it burdens a voters' right to participate in a fair election. *See Williams v. Rhodes*, 393 U.S. 23, 31-32, 89 S. Ct. 5, 10-11 (1968) (holding Ohio's ballot-access laws, which favored the long-established Republican and Democratic parties, placed an unequal burden on the right to vote

and the right to associate to form a new political party).[25] "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC,* 572 U.S. 185, 191, 134 S. Ct. 1434, 1444 (2014). As such, the government cannot and should not "restrict political participation of some in order to enhance the relative influence of others." *Id.*

In *Harper v. Hall,* the North Carolina Supreme Court recognized that there is a cognizable claim for violation of free speech and association rights based on partisan gerrymandering. *Harper v. Hall*, 868 S.E.2d 499, 546 (N.C. 2022). The North Carolina Supreme Court stated:

> When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny."

Id. (holding congressional map subject to strict scrutiny and requiring it to be "narrowly tailored to advance a compelling governmental interest"). This practice "distorts the expression of the people's will." *Id.* Under these circumstances, "[t]he diminution or dilution of voting power based of partisan affiliation . . . suffices to show a burden on that voter's speech and associational rights." *Id.* ¶ 161. This Court is persuaded that partisan gerrymandering that effectively entrenches a state's preferred party in office discriminates on the basis of viewpoint dilutes the

[25] In *Williams,* the State of Ohio asserted "that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution, providing that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . to choose a President and Vice President." *Williams*, 393 U.S. at 28–29. While noting that there "can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors," the Court stated: "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. *Id.*

non-favored party's vote, burdens / impairs the citizens' rights to exercise a meaningful vote and to associate. *See Vieth*, 541 U.S. at 314 (Kennedy, J, concurring); *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658.

Plaintiffs assert that heightened scrutiny applies to the free speech and association claims. Plaintiffs have also cited several cases in support of that assertion. *See, e.g., Reed v. Town of Gilbert*, Ariz., 135 S. Ct 2218, 2227 (2015); *Harper v. Hall*, 868 S.E.2d at 546. In their Reply, Defendants do not challenge that contention or seek to distinguish these cases with respect to this issue. Thus, in the absence of any contrary argument or authority, the Court assumes, for purposes of analyzing the motion at bar, that strict scrutiny applies to the free speech and association claims.[26] Based on the factual allegations in the Complaint, which this Court must accept as true, Plaintiffs have sufficiently alleged that the 2021 Congressional Plan violates their rights to free speech and association because it discourages and burdens political expression, is discriminatory and retaliatory based on disfavored political views and past voting history, and it dilutes Plaintiffs' voting power. (*See generally* Compl.; Compl. ¶¶ 288-294.) Plaintiffs also allege that Defendants have "cracked" and "packed" the congressional voting districts to intentionally dilute the voting power of those who have disfavored views, namely Democrats.

Plaintiffs also have sufficiently alleged that there is no compelling or legitimate government interest in drawing congressional district boundaries to give Republicans an electoral advantage, to the detriment of non-Republican voters' right to free speech and association. (*Id.* ¶ 295.) Plaintiffs also allege the 2021 Congressional Plan is not narrowly

[26] By applying strict scrutiny for purposes of this Motion, the Court is not necessarily ruling that Plaintiffs' assertion is correct. But given the briefing and accepting the factual allegations in the Complaint as true, including that the Legislature intentionally drawing the maps to punish Plaintiffs for expressing disfavored views, the Court adopts this standard solely for the purpose of determining if Plaintiffs have stated a viable claim for relief.

tailored to serve any legitimate state interest. (*Id.* ¶ 296.) Plaintiffs have sufficiently stated a claim for violation of their Free Speech and Association rights.

For the reasons stated above, Defendants' Motion to Dismiss Count Three is DENIED.

d. Plaintiffs Sufficiently State a Right to Vote Claim (Count Four).

Defendants assert Plaintiffs fail to state a claim for violation of the Right to Vote Clause. Defendants also argue, without citation to any legal authority, that the Right to Vote Clause was intended to deal solely with voter qualifications and that there is no basis in Utah law to interpret the provision to guarantee anything other than the right to physically cast a ballot. Defendants also argue that the 2021 Congressional Plan does not prevent Plaintiffs or any other qualified Utah citizens from voting, therefore there can be no constitutional violation. (Defs.' Mot. at 27-28; Defs.' Rep. at 25-26.) The Court disagrees.

The Right to Vote Clause provides that "[*e*]*very citizen* of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, *shall be entitled to vote in the election.*" Utah Const. art. IV, § 2 (emphasis added).[27] Utah law unequivocally acknowledges that the right to vote is fundamental to our democracy and our representative form of government. *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).[28] In fact, it is said to be "more precious in a free country" than any other right. *Gallivan*, 2002 UT 89, ¶ 24 (quoting *Reynolds*, 377 U.S. at 560). If the right "of having a voice in the election of those who

[27] The Court notes that neither party presented any arguments regarding the plain meaning of this clause, historical evidence regarding the drafting or adoption of this clause or discussed any particular test to be applied.

[28] "The right to vote and to actively participate in its processes is among the most precious of the privileges for which our democratic form of government was established. The history of the struggle of freedom-loving men to obtain and to maintain such rights is so well known that it is not necessary to dwell thereon. But we re-affirm the desirability and the importance, not only of permitting citizens to vote but of encouraging them to do so." *Rothfels v. Southworth*, 11 Utah 2d 169, 176, 356 P.2d 612, 617 (1960).

make the laws under which, as good citizens, we must live," is undermined, "[o]ther rights, even the most basic, are illusory. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right." *Id.*

Defendants argue that the Right to Vote Clause deals solely with voter qualifications, implying that it only applies when voter qualifications are at issue. While this clause includes qualifications required to exercise the right, the right to vote is nonetheless expressly guaranteed.

Defendants also assert that this clause guarantees only the right to physically cast a vote. Defendants cite no authority to support such a limited interpretation of this specific clause. To the contrary, when interpreting constitutional provisions, the Utah Supreme Court has stated that individual constitutional provisions

> cannot properly be regarded as something isolated and absolute but must be considered in the light of its background and the purpose it was designed to serve; and in relation to other fundamental rights of citizens set forth in the entire Constitution which are essential to the proper functioning of our democratic from of government. One of the principal merits of our system of law and justice is that it does not function by casting reason aside and clinging slavishly to a literal application of one single provision of law to the exclusion of all others. Its policy is rather to follow the path of reason in order to avoid arbitrary and unjust results and to give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions.

Shields v. Toronto, 16 Utah 2d 61, 63, 395 P.2d 829, 830 (1964) (interpreting Article VI, Section 7 of the Utah Constitution in reference to the right to vote).[29] In interpreting this provision, the Court should consider the entire Utah Constitution and its purpose, including the Free Elections Clause, the Equal Protection Clause, the Free Speech and Association Clauses and the long line

[29] Notably, the *Shields* Court recognized the historical and "continuing expansion of the right of suffrage in this country." *Shields v. Toronto*, 16 Utah 2d 61, 66 n. 12, 395 P.2d 829, 833 n. 12 (1964). While discussing the right to vote in the context of voting "freely for the candidate of one's choice," the Court stated that voting "is of the essence of a democratic society, and any restrictions on that right strike at the essence of a representative government." *Id.* Every citizen should have a "right to a vote free of arbitrary impairment by state action." *Id.*

of cases generally discussing the "right to vote." The plane language of the Right to Vote clause guarantees the right. But, read in light of the entire Utah Constitution, the right to vote clearly guarantees more than the physical right to cast a ballot.

Utah law has recognized that the right to vote must be "meaningful." *Shields*, 395 P.2d at 832-33 (explaining "[t]he foundation and structure which give [our democratic system of government] life depend upon participation of the citizenry in all aspects of its operation."). The right must not be "unnecessarily abridged" or "diluted." *Gallivan*, 2002 UT 89, ¶ 72 (stating "'[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.'" (quoting *Reynolds*, 377 U.S. at 565-66, 84 S.Ct.). And the right to vote "cannot be abridged, impaired, or taken away, even by an act of the Legislature." *Earl v. Lewis*, 28 Utah 116, 77 P. 235, 237-38 (Utah 1904). The goal of an election "is to ascertain the popular will, and not to thwart it," and "aid" in securing "a fair expression at the polls." *Id.*[30]

Here, Plaintiffs allege that the Legislature drew the 2021 Congressional Map in a way to render Plaintiffs' votes meaningless. While they still can engage in the act of voting, Plaintiffs' votes no longer have any effect. Specifically, Plaintiffs allege that the 2021 Congressional Plan "achieves this extreme partisan advantage for Republicans primarily by cracking Utah's large and concentrated population of non-Republican voters, centered in Salt Lake County, and dividing them between all four of Utah's congressional districts to eliminate the strength of their

[30] There is only one Utah case specifically addressing the Right to Vote Clause. *See Dodge v. Evans*, 716 P.2d 270, 273 (Utah 1985). In *Dodge*, a prison inmate challenged a law requiring him to vote in the county in which he resided prior to incarceration rather than in the county in which he was incarcerated. Plaintiff alleged that his right to vote under the Right to Vote Clause was in effect denied. *Id.* at 272-73. In analyzing that claim, the Utah Supreme Court stated, "Dodge made no contention that his right to vote was improperly burdened, conditioned or diluted." *Id.* at 273. The implication is that a claim under the right to vote clause may include an allegation that the right was "improperly burdened, conditioned or diluted."

voting power." (Compl. ¶ 207.) The result is that the 2021 Congressional Plan "draw[s] district lines to predetermine winners and losers." (Compl. ¶ 306.) Their disfavored vote is meaningless, diluted, impaired and infringed due to the intentional partisan gerrymandering. (*Id.* ¶ 304-06.) In addition, because the election outcomes are now predetermined for the next ten years, the true public will cannot be ascertained and is effectively distorted. (*Id.* ¶ 305-09.) Plaintiffs also allege that this impairment serves no legitimate public interest.[31] (*Id.*) Assuming these facts in the Complaint to be true, the Court concludes that Plaintiffs have properly stated a claim under the Right to Vote Clause.

Defendants' Motion to Dismiss Count Four is therefore DENIED.

IV. Plaintiffs Fail to State a Claim Under Count Five the "Unauthorized Repeal of Proposition 4."

Finally, Defendants assert that the fifth claim should be dismissed because the Legislature's amendment or repeal of Proposition 4 does not violate the Inherent Political Powers and Initiative Clauses of Utah Constitution. The Court agrees.

Plaintiffs' fifth claim alleges that when the Legislature replaced the citizen-enacted Proposition 4 with SB 200, the Legislature infringed on the people's inherent political powers and initiative rights under the Utah Constitution. (Compl. ¶¶ 315-17). The Initiative Clause of the Utah Constitution states, in relevant part: "The legal voters of the state of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: (A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute." Utah Const. art. VI, § 1(2)(a)(i)(A). The Inherent Political Powers Clause provides that "All political power is inherent

[31] The Court notes that neither party has addressed the appropriate standard to be applied in this case, i.e., strict scrutiny or rational basis, for Plaintiffs' Right to Vote claim. However, reviewing Plaintiffs' Complaint, the Court concludes that Plaintiff has sufficiently pled a claim under either standard.

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. Plaintiffs argue that the Legislature violated these clauses by passing SB 200, effectively repealing Proposition 4, which had been put in place via citizen initiative.

The Utah Supreme Court has explained that "[u]nder [Article I, Section 2], upon which all our government is built, the people have the inherent authority to allocate governmental power in the bodies they establish by law." *Carter v. Lehi City*, 2012 UT 2, ¶ 21, 269 P.3d 141. Under this authority, "the people of Utah divided their political power," vesting

> "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)." [Utah Const.] art. VI, § 1(1). 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*. This interpretation is reinforced by the history of the direct-democracy movement, by constitutional debates in states with constitutional provisions substantially similar to Utah's article VI, and by early judicial interpretations of those provisions.

Id. ¶ 22 (emphasis added). In further explaining this shared legislative power, the Utah Supreme Court has stated, "[t]he 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 v. Walker*, 2002 UT 89, ¶ 23, 54 P.3d 1069.

The Utah Constitution and Utah law unequivocally recognizes the importance of its citizens' right to initiate legislation to alter or reform their government. Utah Const. art. I, § 2; *Gallivan*, 2002 UT 89, ¶ 23; *Utahns For Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 2007 UT 97, ¶ 10. This is clear. The Constitution, however, does not restrict or limit, in any way, the Legislature's ability to amend or repeal citizen-initiated laws after they become effective.

Through their coequal power, both the Legislature and the people can enact, amend, and repeal legislation. The people can repeal legislation enacted by the Legislature through their referendum power, with some limitation. *See* Utah Const. art. VI, § (2)(a)(1)(B). The Utah Constitution, caselaw, and historical practice, however, shows that the Legislature can amend and repeal legislation enacted by citizen initiative, without limitation.

When we interpret the Utah Constitution, the starting point is the text itself. *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 19, 144 P.3d 1109 (internal quotation marks omitted). In evaluating legislative authority, the provisions in the Utah Constitution are construed as "limitations, rather than grants of power." *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955); *Shurtleff*, 2006 UT 51, ¶ 18 ("The Utah Constitution is not one of grant, but one of limitation."). Article VI of the Utah Constitution vests legislative authority in both the Legislature and the people. *See* Utah Const. art. VI, § 1(1). Notably, the text of article VI broadly confers legislative authority on the Legislature without any express limitation on the Legislature's ability to pass or repeal laws. *See id.* art. VI, § 1(a).

In contrast, the ability of the people to enact or repeal legislation, however, is specifically limited by the text of the Constitution.[32] *See id.* art. VI, § 1(b) (stating that "Legislative power" is "vested in ... the people of the State of Utah as provided in Subsection (2)"). In fact, subsection 2 of article VI explicitly restricts the people's referendum power—or the ability to repeal laws

[32] The citizens' right to legislate through the initiative process is also limited by the plain language of the Utah Constitution. *Gallivan v. Walker*, 2002 UT 89, ¶ 172, 54 P.3d 1069, 1118. Article VI, section (2)(a)(i)(A) states: "The legal voters of the State of Utah, in the numbers, *under the conditions, in the manner, and within the time provided by statute*, may initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, *as provided by statute.*" Utah Const. art. VI, § 2(a)(i)(A). Notably, it is the Legislature that establishes the statutory requirements to initiate, submit and vote on any citizen initiative. *See Sevier Power Co., LLC v. Bd. of Sevier Cty. Comm'rs*, 2008 UT 72, ¶ 10, 196 P.3d 583.

enacted by the Legislature—to laws that were passed with less than a 2/3 majority vote by the Legislature. *See id.* art. VI, § 2(a)(1)(B).

Given the absence of anything in the Utah Constitution that restricts the Legislature's ability to repeal laws enacted via initiative, there is a clear implication that the Legislature has broad authority to enact and repeal laws, including those enacted by citizen initiatives. Reading the Utah Constitution to limit the Legislature's authority to amend or repeal laws originally enacted via citizen initiative would require the Court to read something into the Constitution that is simply not there.[33] The Court declines to do so.

Moreover, Utah law also clearly indicates that the Legislature has power to amend and repeal laws that are passed via citizen initiative.[34] In explaining that the legislative powers of the Legislature and the people are coequal or "parallel," the Utah Supreme Court approvingly quoted the Oregon Supreme Court, which stated that "'[l]aws proposed and enacted by the people under the initiative . . . are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will.'" *Carter*, 2012 UT 2, ¶ 27 (quoting *Kadderly v.*

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[33] The Court further notes that Plaintiffs have not provided any facts from the historical record to suggest that such a restriction was intended. Rather, the historical practice and the caselaw indicate that such a restriction was not intended. In contrast to the Utah Constitution, the constitutions of ten other states expressly restrict their respective legislatures' authority to amend or repeal the statutes/law enacted from a successful citizen initiative. *See* Alaska (Alaska Const. art. XI, § 6); Arizona (Ariz. Const. art. IV, pt. 1, § 1(6)(B)-(C)); Arkansas (Ark. Const. art. V, § 1); California (Cal. Const. art. II, § 10); Michigan (Mich. Const. art. II, § 9; art. XII, § 2); Nebraska (Neb. Const. art. III, § 2); Nevada (Nev. Const. art. XIX, §§ 1-2); North Dakota (N.D. Const. art. III, § 8); Washington (Wash. Const. art. II, § 1); and Wyoming (Wyo. Const. art. III, § 52). Given the lack of any textual limitation, the history of the Legislature repealing citizen initiatives, and examples of other state constitutions that do contain express limits on their respective legislature's ability to make changes to citizen-initiated laws, it would clearly be improper for the Court to read such a limitation into Utah's Constitution.

[34] Utah law also specifically authorizes the Legislature to amend citizen-initiated or approved laws. Under Utah Code Ann. Section 20A-7-212(3)(b), "[t]he Legislature may amend any initiative approved by the people at any legislative session" and Subsection 20A-7-311(5)(b) provides that "[t]he Legislature may amend any laws approved by the people at any legislative session after the people approve the law." The Court agrees with Defendants that adopting Plaintiffs' argument *could* create certain practical challenges to the maintenance of the Utah Code in that the Legislature would be precluded from correcting typographical errors and making any changes, substantive or otherwise. Other than the authority provided in the above-cited statutes, there is no other process or procedure to manage changes to citizen-initiated laws.

City of Portland, 44 Or. 118, 74 P. 710, 720 (1903). Thus, the Utah Supreme Court has seemingly recognized that the Legislature may repeal initiative-enacted law.

Likewise, the Legislature's amendment or effective repeal of Proposition 4 / Title 20A, Chapter 19, Utah Independent Redistricting Commissions Standards Act is in line with historical practice. In 2018, Governor Herbert called a special session of the Utah Legislature to address citizen initiative Proposition 2, the Utah Medical Cannabis Act, the day before it was set to go into effect. *Grant v. Herbert*, 2019 UT 42, ¶ 5, 449 P.3d 122. The Legislature heavily amended the statute, changing many key aspects of the law. *Id.* In response, voters attempted to place the amended statute on the ballot through referendum but were not able to do so because the amendment had passed by a two-thirds vote in the Legislature, making it exempt from referendum. *Id.* ¶ 7. The Utah Supreme Court ultimately upheld Governor Herbert's decision to call the special legislative session which amended Proposition 2. *Id.* ¶¶ 21-24.

In view of the foregoing, including the text of the Utah Constitution, statutory language, the caselaw, and historical practice, the Legislature's exercise of its coequal legislative authority to repeal citizen initiatives does not violate the Citizen Initiative or Inherent Powers Clauses of the Utah Constitution. Therefore, even accepting the factual allegations as true, the Legislature did not act unconstitutionally by either substantially amending or effectively repealing Proposition 4. Plaintiffs' Fifth cause of action, therefore, does not state a valid claim for relief under Utah law. Accordingly, the Court GRANTS Defendants' Motion to Dismiss with respect to Count Five in the Complaint.

CONCLUSION

For the reasons stated above:

(1) The Court DENIES Defendants' Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

(2) The Court DENIES Defendants' Motion to Dismiss certain Defendants Utah Legislative Redistricting Committee, Senator Scott Sandall, Representative Brad Wilson, and Senator J. Stuart Adams.

(3) The Court DENIES Defendants' Motion to Dismiss Count One (Free Elections Clause), Count Two (Equal Protection Rights), Count Three (Free Speech and Association Rights), and Count Four (Affirmative Right to Vote) of Plaintiffs' Complaint.

(4) The Court GRANTS Defendants' Motion as to Plaintiffs' Count Five. Therefore, Count Five, "Unauthorized Repeal of Proposition 4 in Violation of Utah Constitution's Citizen Lawmaking Authority to Alter or Reform Government" is DISMISSED, with prejudice.

DATED November 22, 2022.

BY THE COURT:

Dianna M. Gibson

DIANNA M. GIBSON
DISTRICT JUDGE

STATE OF UTAH
3RD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 220901712 by the method and on the date specified.

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