No. 20220991-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

League of Women Voters of Utah, et al.,
Appellees and Cross-appellants (Plaintiffs),
v.
Utah State Legislature, et al.,
Appellants and Cross-appellees (Defendants).

Brief of Professor Charles Fried as Amicus Curiae in Support of Reversal of the District Court Decision

On Defendants' Petition (20220991-SC)
Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Dianna M. Gibson, District Court No. 220901712

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CURRENT AND FORMER PARTIES

Appellants and Cross-appellees ("Legislature" or "Defendants")

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

Represented by Victoria Ashby, Robert H. Rees, and Eric N. Weeks of the Office of Legislative Research and General Counsel; and Tyler R. Green, Taylor A.R. Meehan, Frank H. Chang, and James P. McGlone of Consovoy McCarthy PLLC

Appellees and Cross-appellants (Plaintiffs)

League of Women Voters of Utah, Mormon Women for Ethical Government, Stephanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, and Jack Markman

Represented by Troy L. Booher, J. Frederic Voros, Jr., and Caroline A. Olsen of Zimmerman Booher; David C. Reymann and Kade N. Olsen of Parr Brown Gee & Loveless; and Mark Gaber, Hayden Johnson, Aseem Mulji, and Anabelle Harless of Campaign Legal Center

Cross-appellee (Defendant)

Lt. Governor Deidre Henderson

Represented by Sarah Goldberg, David N. Wolf, and Lance Sorenson of the Utah Attorney General's Office

Parties below not parties to the appeal

Plaintiff Dale Cox (voluntarily dismissed)

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INTERESTS OF AMICUS CURIAE[1]

Professor Charles Fried is the Beneficial Professor of Law at Harvard Law School and has been teaching at the school since 1961. He was Solicitor General of the United States, 1985–89, and an Associate Justice of the Supreme Judicial Court of Massachusetts, 1995–99. His scholarly and teaching interests have been moved by the connection between normative theory and the concrete institutions of public and private law. Professor Fried is a member of the Litigation Strategy Council of the Campaign Legal Center, a nonprofit organization that advances democracy through law at the federal, state, and local levels, fighting for every American's rights to responsive government and a fair opportunity to participate in and affect the democratic process. Professor Fried's legal expertise thus bears directly on the question of whether, relying on particular state constitutional provisions, state courts may go beyond the federal limits on the justiciability of partisan gerrymandering.

INTRODUCTION

When determining that partisan gerrymandering claims were nonjusticiable under the federal Constitution, the United States Supreme Court issued a direct invitation for the protections of state constitutions to fill the void. Respondents took up that invitation in filing the instant case in the Utah courts, and our federalist system ensures that this Court

[1] Pursuant to Utah R. App. P. 25(e)(6), no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief pursuant to Utah R. App. P. 25(b)(2) and received timely notice pursuant Utah R. App. P.25(a).

can exercise its distinct responsibility under Utah's Constitution to effectuate the separate protections that its constitution provides. Utah's Constitution—a foundational source of rights and liberties for Utahns—provides "substantive protections against antidemocratic conduct that the federal Constitution does not." Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 913 (2021). The Utah Constitution provides just such protections against an anti-democatic gerrymander.

Utah's Constitution contains provisions distinct from the federal Constitution, including in particular the Free Elections and Uniform Operation of Laws Clauses. The original meaning of these constitutional protections and this Court's own precedent compels the conclusion that partisan gerrymandering claims are justiciable under Utah's Constitution.

ARGUMENT

In shutting the federal courts to partisan gerrymandering claims, the Court "[did] not condone excessive partisan gerrymandering." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Instead of "condemn[ing] complaints about districting to echo into a void," the Court recognized that state constitutions might indeed point in another direction. *Id.* That should come as no surprise for "the very premise of . . . cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977). "[L]iberties," like the rights violated by partisan gerrymandering, "cannot survive if the states betray the trust the [Supreme] Court has put in them." *Id.* Indeed, state courts' "manifest purpose is to expand constitutional protections." *Id.*

This Court can achieve that purpose by recognizing that the Utah Constitution's Free Elections and Uniform Operation of Laws Clauses preclude partisan gerrymandering. Partisan gerrymandering severely undermines Utah's sweeping constitutional guarantees that "[a]ll elections shall be free," Utah Const. art. I, § 17, and that "[a]ll laws of a general nature shall have uniform operation," Utah Const. art. I, § 24. The history of these provisions and this Court's precedents confirm that these provisions bar partisan gerrymandering.

I. State constitutions contain more extensive protections of individual rights than the federal Constitution.

a. State supreme courts have an independent duty and authority to afford the citizens of their state the full protections of their state's constitution.

"State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." Brennan, *supra*, at 491. Accordingly, "state courts, no less than federal [courts] are and ought to be the guardians of our liberties." *Id.* As the final arbiters of the meaning of their constitutions, state courts "may experiment all they want with their own constitutions, and often do in the wake of [the Supreme] Court's decisions." *Kansas v. Carr*, 577 U.S. 108, 118 (2016) (Scalia, J.). "And of course, state courts that rest their decisions wholly . . . on state law need not apply federal principles of . . . justiciability that deny litigants access to the courts." Brennan, *supra*, at 501.

This two-tiered federalist system is a defining feature of American constitutional governance. "Our system of dual sovereigns comes with dual protections." Jeffrey S. Sutton, *51 Imperfect Solutions* 2 (2018). That basic idea traces back to the nation's

founding: "[T]he state and federal founders saw federalism and divided government as the first bulwark in the rights protection and assumed the States and state courts would play a significant role, even if not an exclusive role, in that effort." Jeffrey S. Sutton, *The Enduring Salience of State Constitutional Law*, 70 Rutgers U. L. Rev. 791, 795 (2018). While some limited protections of the federal Constitution began to be applied against the states earlier, before the U.S. Supreme Court incorporated the Bill of Rights' protections against the states in the mid-twentieth century, state constitutions and state courts were the key constitutional guardians of individual rights against actors other than the federal government. *See* Jonathan Thompson, *The Washington Constitution's Prohibition of Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1249 (1996).

Nevertheless, state courts' critical rights-protecting role did not wane following the incorporation of the federal Constitution against the states; such incorporation only further underscored state constitutions' and courts' importance in our federalist system. In the latter part of the twentieth century, state courts continued to recognize that state constitutional guarantees provided "greater protection than was available under the federal Constitution" in hundreds of cases. G. Alan Tarr, *Understanding State Constitutions* 165–66 (1998). Indeed, much of state constitutions would be superfluous if state courts protected only those rights the federal Constitution already preserved. But that is not the purpose of our federal structure.

State courts can and must go further; they should consider the text and history of their own constitutions to determine whether their founding documents provide stronger

bulwarks against government encroachment than the federal Constitution. And when, as here, the U.S. Supreme Court declined to protect the rights violated by partisan gerrymandering, "the state courts [became] the *only* forum . . . for enforcing the right under their own constitutions, making it imperative to see whether, and if so, how the States fill the gaps left by the U.S. Supreme Court." Sutton, *51 Imperfect Solutions* at 2 (emphasis in original).

Utah should heed this call, just as it has in the past. This Court has repeatedly declined "invitation[s] to interpret [Utah's] constitution in lockstep with the federal [Constitution] . . . ." *South Salt Lake City v. Maese*, 2019 UT 58, ¶ 27, 450 P.3d 1092, 1099; *see also West v. Thomson Newspapers*, 872 P.2d 999, 1006 (Utah 1994) (rejecting a "lockstep approach" to interpreting the Utah Constitution that "does not allow independent interpretation of a state constitution"). In fact, this Court has recognized that by developing "independent doctrine and precedent" in state constitutional law, it "act[s] in accordance with the original purpose of the federal system." *Thomson Newspapers*, 872 P.2d at 1006. Consequently, this Court "ha[s] not hesitated to interpret the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate." *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935, 942.

b. Many states, including Utah, have recognized that their state constitutions provide greater protections than the federal Constitution.

Keeping with the foundational principles of American federalism, many state courts interpret their states' constitutions to provide stronger protections than the federal Constitution, recognizing that they have an independent duty and authority under their own

constitutions to protect the people of their state. *See, e.g.*, *State v. Guillaume*, 975 P.2d 312, 230 (Mont. 1999) ("In interpreting the Montana Constitution, this Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart."); *State v. Guzman*, 842 P.2d 660, 666 (Idaho 1992) ("It is by now beyond dispute that this Court is free to interpret our state constitution as more protective of the rights of Idaho citizens than the United States Supreme Court's interpretation of the federal constitution."); *State v. Hernandez*, 410 So. 2d 1381, 1385 (La. 1982) ("[W]e cannot and should not allow [federal constitutional] decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana.").

Often, when state courts find their state constitutions provide greater protections than the federal Constitution, those cases involve broad provisions that the courts have understood to protect rights central to individual liberties. For example, forty-six states "interpret the equal protection clause of their state constitutions to provide greater protections than that afforded by the equal protection clause of the Fourteenth Amendment of the United States Constitution." James A. Kushner, *Government Discrimination: Equal Protection Law and Litigation* § 1.7 (2022).

In interpreting their state constitutions, state courts often find greater protections for criminal defendants than the federal Constitution provides. As an illustration, after the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), nationalizing the exclusionary rule, which prevents the government from unconstitutional evidence gathering, the importance of distinct state constitutional protections became increasingly evident. In *United States v.*

Leon, 468 U.S. 897, 900 (1984), the U.S. Supreme Court established a good-faith exception to the exclusionary rule, allowing evidence gathered in violation of the Fourth Amendment to be admitted. Numerous state supreme courts then rejected that approach, interpreting their own constitutions' protections against illegal search and seizure to preclude any such exception to the exclusionary rule. *See, e.g.*, *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993); *Guzman*, 842 P.2d at 671; *Com. v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991); *State v. Oakes*, 598 A.2d 119, 120 (Vt. 1991); *State v. Crawley*, 808 P.2d 773, 776 (Wash. 1991); *State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990); *State v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987); *People v. Bigelow*, 488 N.E.2d 451, 458 (N.Y. 1985); *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323, 373 (2011) (at least twenty states have rejected the good-faith exception post-*Leon*).

In many cases, state supreme courts have interpreted their own constitutional provisions protecting personal rights as providing more expansive protections than the federal Constitution. For example, state supreme courts, in states both with and without explicit inclusion of the right to privacy in their constitutions, have found greater constitutional protections for privacy rights than the U.S. Supreme Court has found in the federal Constitution. *See, e.g.*, *State v. Brown*, 156 S.W.3d 722, 729 (Ark. 2004); *State v. Perry*, 610 So.2d 746, 758 (La. 1992); *State v. Saunders*, 381 A.2d 333, 341 (N.J. 1977).

As discussed above, this Court has repeatedly acknowledged that Utah's Constitution provides stronger individual protections than does the federal Constitution. This Court disclaimed lock-stepping with the federal Constitution in *Jensen ex rel. Jensen v. Cunningham*:

> "While some of the language of our state and federal constitutions is substantially the same, similarity of language does not indicate that this court moves in lockstep with the United States Supreme Court's [constitutional] analysis or foreclose our ability to decide in the future that our state constitutional provisions afford more rights than the federal Constitution."

2011 UT 17, ¶ 46, 250 P.3d 465 (quotation marks omitted). And this Court has affirmed that "we will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens." *State v. DeBooy*, 2000 UT 32, ¶ 12, 996 P.2d 546.

Following its own directive, this Court has interpreted the Utah Constitution apart from the federal Constitution to protect the greater rights afforded to Utahns by their Constitution. Similar to other states' constitutions detailed above, this Court found that Utah's protection against unreasonable searches and seizures provides "a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court," even though the "provisions contain identical language." *DeBooy*, 2000 UT 32, ¶ 12. This Court also ruled that "the article III constitutional restrictions and federalistic prudential considerations that have guided the evolution of federal court standing law are not necessarily relevant to the development of the standing rules that apply in Utah's state courts." *Provo City Corp. v. Willden*, 768 P.2d 455, 456 (Utah 1989) (collecting cases where this Court developed standing rules distinct from federal standing rules). And this Court has recognized that "our state constitution may well provide greater protection for the free exercise of religion in some respects than the federal constitution." *State v. Holm*, 2006 UT 31, ¶ 34, 137 P.3d 726.

More recently, in 2020, when presented with an analysis of the state constitutional standards under Utah's Due Process Clause, this Court held that "[we] are of course not bound to follow precedent on federal due process in our formulation of state due process standards. And we may thus depart from the federal formulation if and when we are presented with state constitutional analysis rooted in the original meaning of the Utah due process clause." *State v. Antonio Lujan*, 2020 UT 5, ¶ 49 n.7, 459 P.3d 992, 1003. Just like the protections of the Utah Constitution recognized in those cases, here Utah's Free Elections and Uniform Operation of Laws Clauses provide stronger protections than the federal Constitution. Consistent with its precedent affirming that the Utah Constitution need not be interpreted in lockstep with the federal Constitution, this Court must "not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens," from partisan gerrymanders. *DeBooy*, 2000 UT 32, ¶ 12.

II. Utah's Constitution precludes partisan gerrymandering.

a. Utah's Free Elections Clause, like the Free Elections Clauses of sister states, precludes partisan gerrymandering.

Article I, Section 17 of the Utah Constitution provides that "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17. Partisan gerrymandering—the act of drawing electoral districts to disproportionately favor one political party—creates elections that are decidedly not free. Partisan gerrymandering distorts and manipulates Utahns' "free exercise of the right of suffrage." *Id.* From the text alone, Utah's Free Elections Clause

precludes partisan gerrymandering. Historical evidence from the drafting of Utah's Constitution and the state's admission to the United States only underscores the Free Elections Clause's promise to protect Utahns from acts of distortion and manipulation upon their "free exercise of the right of suffrage." *Id.*

In *American Bush v. City of South Salt Lake*, this Court found that "in interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." 2006 UT 40, ¶ 12, 140 P.3d 1235. In doing so, courts must "discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect." *Id.* Therefore, this Court should interpret Utah's Free Elections Clause through the clause's text and historical accounts of the drafters' and citizens' intent and purpose at the time of drafting.[2]

Merriam-Webster includes in its definition of "free" "enjoying political independence or freedom from outside domination" as well as "not determined by anything

[2] *American Bush* is the proper standard for constitutional analysis under this Court's precedent. Petitioners distort this Court's findings in *Machan v. UNUM Life Ins. Co. of Am.* by suggesting that the language "Utah courts are reluctant to recognize an implied right," 2005 UT 37, ¶ 23, 116 P.3d 342, forbids the conclusion that the Free Elections Clause precludes partisan gerrymandering because the clause "says nothing about redistricting, politically neutral or otherwise," Pet'rs' Br. 36. This language from *Machan* is entirely unrelated to constitutional interpretation. In *Machan*, this Court found that "we have generally observed that, in the absence of *statutory* language expressly indicating a legislative intent to grant a private right of action, Utah courts are reluctant to recognize an implied right." *Machan*, 2005 UT 37, ¶ 23 (emphasis added). This Court's "reluctan[ce] to recognize an implied right" of action in that *statutory* context is irrelevant and inapplicable to its interpretation of the Utah *Constitution's* Free Elections Clause. *Id.*

beyond its own nature or being: choosing or capable of choosing for itself." Merriam Webster, *Free*, (last updated March 21, 2023), https://www.merriam-webster.com/dictionary/free. In their Motion to Dismiss, Petitioners claim that because the Utah drafters removed "and equal" from the Free Elections Clause, the drafters did not intend "to guarantee each voter's 'voting power' based on their partisan affiliation." Def's Mot. to Dismiss 21 n.16. This contention is misplaced for at least two reasons. First, the word "equal" is not necessary to conclude that the Free Elections Clause prohibits partisan gerrymandering. The word "free," alone, precludes partisan gerrymandering because drawing district lines to disproportionately favor one political party is the kind of "outside domination" alien to the word "free." Merriam Webster, *Free*, (last updated March 21, 2023), https://www.merriam-webster.com/dictionary/free. The 1891 Black's Law Dictionary similarly defines free as "[u]nconstrained . . . defending individual rights against encroachment by any person or class." *Free*, *Black's Law Dictionary* (1st ed. 1891). The act of partisan gerrymandering constrains, manipulates, and distorts the political will of the people, and, therefore, is inherently and fundamentally not free. This is especially true as to gerrymandering since it allows a majority of the legislature at a particular moment to entrench its power so that future majorities cannot control the lawmaking of a state. Any election in such a regime, where a majority is powerless, is surely not free.

Second, the historical record reflects that the drafters of Utah's Constitution were concerned with eliminating surplusage. *See Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March 1895,*

to Adopt a Constitution for the State of Utah at 229 (Salt Lake City, Star Printing Co. 1898). [hereinafter *Proceedings and Debates*]. This concern included striking the word "equal" to "improve the rhetorical construction, without changing the meaning" in another section of the Constitution. *Id.* That "equal" does not provide greater meaning to "free" in clauses such as the Free Elections Clause made it an ideal target for such elimination.

In addition to this explicit textual answer that the Free Elections Clause precludes partisan gerrymandering, the clause's historical origins demand the same conclusion. Utah's admission as a state was an iterative process. Daniel J.H. Greenwood, Christine M. Durham, & Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 649, 651 (2008) (George E. Connor & Christopher W. Hammons, eds., 2006). In seeking statehood, the first six versions of Utah's Constitution were rejected. *Id.* at 652. Then, in 1896, the federal government approved the draft prepared by the delegates to the 1895 convention (the seventh draft), which became the Utah Constitution. *Id.* at 655.

Like the earlier drafts, the accepted constitution borrowed provisions from other states' constitutions. *Id.* at 651. The drafters "relied on the principle that language imported from other states' constitutions, which Congress had already approved, would serve as a safe harbor, avoiding any potential for federal criticism." *Id.* at 655. Reflecting on this drafting process, historian Jean Bickmore White noted that "[t]he announcement that a particular proposal came from an existing constitution seemed reassuring, not a sign of lack of creativity . . . [i]n a convention dominated by lawyers, there was a clear desire to write provisions that had been accepted by Congress and had worked fairly well since

their adoption." Jean Bickmore White, *Charter for Statehood: The Story of Utah's State Constitution* 52 (1996).

This history of the drafting process led Professor John J. Flynn of the University of Utah to conclude that the Utah Constitution is a "patchwork of bits and pieces borrowed from other state constitutions by a gradual process of attempting to placate a hostile Congress." John J. Flynn, *Federalism and Viable State Government: The History of Utah's Constitution*, 1966 Utah L. Rev. 311, 324–25 (1966). Professor Flynn identified Nevada, Washington, Illinois, New York, and Pennsylvania as among the states the delegates to the 1895 constitutional convention borrowed most heavily from. *Id*. at 323–24. Thomas G. Alexander, then-professor of Western American History at Brigham Young University, Provo, confirmed that the drafters drew from other state constitutions. Thomas G. Alexander, *A Reflection of the Territorial Experience*, 64 Utah Hist. Q. 264, 264 (1996).

The records of the proceedings and debates of the 1895 constitutional convention—particularly concerning the Free Elections Clause—further demonstrate the drafters' borrowing from other states' constitutions. There was no reported debate over the Free Elections Clause in the transcript of the convention, which suggests that the clause was merely a replica of other states' free elections clauses. *Proceedings and Debates*. Indeed, Pennsylvania, Colorado, Illinois, Montana, Washington, and Wyoming—states Professors Flynn and Alexander recognized as heavily influencing the 1895 convention's delegates—all had Free Elections Clauses in their constitutions in 1895. Pa. Const. art. I, § 5; Colo. Const. art. II, § 5; Ill. Const. art. III, § 3; Mont. Const. art. I, § 5 (now reflected at art. II, § 13); Wash. Const. art. I, § 19; Wyo. Const. art. I, § 27. If this clause had been a ground-

breaking, novel concept, it would have generated the same kind of "long[] fight" other constitutional provisions created, such as the equal rights provision. Greenwood et al., *supra*, at 660–61.

The drafters' borrowing from the Pennsylvania Constitution is particularly important for discerning their intent under this Court's constitutional interpretation standard set forth in *American Bush*. Flynn, *supra*, at 324; *Am. Bush*, 2006 UT 40, ¶ 12. Article VI, Section 26 of the Utah Constitution forbids "private or special law[s] . . . where a general law can be applicable." Utah Const. art. VI, § 26. This language "was taken almost verbatim" from the Congressional Act of 1886, which was based on Article III, Section 6 of the Pennsylvania Constitution of 1874. Flynn, *supra*, at 324.

This connection between the Utah and Pennsylvania constitutions alongside the fact that both constitutions include free elections clauses is fruitful in discerning the Utah drafters' intent under the *American Bush* standard. Relying on the constitutional text and related history of the clause, the Pennsylvania Supreme Court has recognized that their Free Elections Clause precludes partisan gerrymandering. *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 814 (2018) .[3] That court ruled that "[a]n election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not free and equal" and that "[i]n such circumstances, a power, civil or military, to wit, the

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[3] The Pennsylvania Constitution is among the oldest state constitutions and served as a source for many other state constitutions. While the North Carolina Supreme Court has recently followed the federal courts in holding partisan gerrymandering claims non-justiciable, the Pennsylvania Supreme Court, interpreting a document known to be a source for Utah's Constitution, has found these claims justiciable.

General Assembly, has in fact interfere[d] to prevent the free exercise of the right of suffrage" in violation of Pennsylvania's Free Elections Clause. *Id.* (quoting Pa. Const. art. 1, § 5) (internal quotation marks omitted).

Pennsylvania's Free Elections Clause originated from the English Bill of Rights of 1689, as did analogous clauses in other early states of our nation. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 289 (2021). "As states began enacting constitutions after our Nation declared independence, the Framers of those Constitutions, still wary of executive power, adopted provisions similar to that in the 1689 English Bill of Rights." *Wolf v. Scarnati*, 660 Pa. 19, 53, 233 A.3d 679, 700 (2020). Pennsylvania's Free Elections Clause reflected the personal history of the delegates to the Pennsylvania Constitutional Convention and their desire to "establish[] a critical 'leveling' protection in an effort to establish the uniform right of the people of this Commonwealth to select their representatives in government." *League of Women Voters*, 178 A.3d at 807; *see* John L. Gedid, *History of the Pennsylvania Constitution*, *in* THE PENNSYLVANIA CONSTITUTION A TREATISE ON RIGHTS AND LIBERTIES 48 (Ken Gormley ed., 2004).

The origins of American free elections clauses in the English Bill of Rights of 1689 further confirm that these clauses prohibit partisan gerrymandering. The Free Elections Clause was included in the English Bill of Rights of 1689 following the "Glorious Revolution" to address the King's subversion of democracy through manipulating parliamentary elections. J.R. Jones, *The Revolution of 1688 in England* 148 (1972). The King performed this manipulation through the "rotten boroughs" system—the 1600s

England version of modern-day partisan gerrymandering. For years, the King regularly distorted control of parliament by altering or malapportioning districts (called "boroughs" at the time) to ensure a government loyal to and in favor of the monarch. *See* Ross, *supra*, at 256. This distortion of political districts to deliver the King's desired results became known as the "rotten boroughs" system. *Id.*; *see also Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).

The victims of the "rotten boroughs" system strongly opposed this political manipulation, and their shared opposition to this system was a motivating factor prompting the Glorious Revolution and eventual passage of the English Bill of Rights in 1689. *See Harper*, 868 S.E.2d at 541–42. The Free Elections Clause of the English Bill of Rights states that "[e]lection of Members of Parliament ought to be free." Bill of Rights, 1689, 1 W. & M., Sess. 2 c. 2 (Eng.). This provision was a "central feature of the English Bill of Rights" included to eliminate the distortion and manipulation of the political process the King's rotten boroughs system created and to ensure "an independent Parliament through free elections." Ross, *supra*, at 221–22, 289.

The memory of the rotten boroughs system was still fresh in the American Revolutionary era, during which the Founders were equally committed to ensuring a political system free of manipulation and distortion. *See, e.g.*, McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 Hastings L.J. 1509, 1537 (2018) ("The Framers were responding to the lack of representation afforded them as colonists, in conjunction with fresh memory of rotten boroughs that corrupted England's representative system."). With the Pennsylvania constitution adopted in 1776—

more than a decade before the U.S. Constitution in 1789—the delegates to the Pennsylvania constitutional convention were undoubtedly influenced by their English forebearers and British rule.

The Utah Constitution has further connections to the English Bill of Rights in addition to its ties from adopting provisions from states including Pennsylvania. In fact, Petitioners agree that Utah's Free Elections Clause has its roots in the English Bill of Rights and other states' constitutions. Pet'rs' Br. 40. And this Court has already expressly recognized that at least one provision in the Utah Constitution—Article I, Section 9—originated in the English Bill of Rights of 1689. *See Bott v. Deland*, 922 P.2d 732, 737 (Utah 1996) (finding that Utah's cruel and unusual punishment clause originated from the English Bill of Rights of 1689), *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, ¶¶ 166–70, 353 P.3d 55, (Lee, J. concurring) (discussing the English Bill of Rights and English origins of protection against "cruel and unusual punishment").

This Court also recognized in *American Bush* that "the drafters of the Utah Constitution borrowed heavily from other state constitutions[,] . . . the United States Constitution[,]" and English common law. *Am. Bush*, 2006 UT 40, ¶ 31. Professor Alexander confirmed this connection between the Utah Constitution and English common law in his conclusion that "[i]nitially, both New Mexico and Utah rejected English common law because of existing Mexican civil law and Mormon customary law . . . [but] [i]n both territories pressure from national interests, especially from federal judges, forced the

adoption of the national system of English common law which both territories incorporated into their state constitutions." Alexander, *supra*, at 279.

The Free Elections Clause was not the only way in which the Utah drafters demonstrated their commitment to expansively protecting voting rights in their constitution. Greenwood et al., *supra*, at 660–61. For example, "after the 'longest fight in the convention' and despite fears that it might endanger congressional approval," Utahns added "one of the earliest guarantees of equal rights of women" in Article IV, Section 1, which protected women's right to vote. *Id.* Further, in a rare moment of departure from other states' constitutions, the Utah drafters explicitly removed a literacy requirement for enfranchisement. *Id.* Under the *American Bush* standard, this intent of the drafters to expand and protect voting rights must inform constitutional interpretation in Utah.

The textual and historical analysis of Utah's Free Elections Clause demonstrates how and why it precludes partisan gerrymandering. The history of the drafting of Utah's Constitution reveals the drafters' commitment to protecting and expanding Utahns' voting rights as well as preventing tyrannical forces from manipulative acts like partisan gerrymandering. Under its standard in *American Bush*, this Court should conclude that the Free Election Clause precludes partisan gerrymandering. Doing so is the only way to "operationalize the state constitutional commitment to popular sovereignty and political equality" that the Free Elections Clause embodies, for "partisan gerrymandering . . . entails legislative self-dealing that at once undermines the ability of the people to share equally in the power to influence government and confers special treatment on members of one political party." Bulman-Pozen & Seifter, *supra*, at 911.

b. Utah's Uniform Operation of Laws Clause similarly extends farther than the federal Equal Protection Clause and precludes partisan gerrymandering.

Utah's Constitution provides Utah voters a second protection against partisan gerrymandering—the Uniform Operation of Laws Clause. Article I, Section 24 of the Utah Constitution states that "[a]ll laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. While this provision "embod[ies] the same general principle" as the federal Equal Protection Clause, *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984), this Court has continuously emphasized that Utah's Uniform Operation of Laws Clause "establishes different requirements than does the federal Equal Protection Clause." *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995). And under those requirements, partisan gerrymandering—as discrimination related to the fundamental right to vote—triggers a heightened scrutiny that such gerrymandering cannot survive.

Under Utah's Uniform Operation of Laws Clause, Utahns enjoy protections distinct from, and stronger than, the federal Equal Protection Clause. Like the federal Equal Protection Clause, Utah's Uniform Operation of Laws Clause stands for the proposition that "persons similarly situated should be treated similarly . . . ." *Malan*, 693 P.2d at 669. Article I, Section 2 of the Utah Constitution confirms this basic idea, affirming that "all free governments are founded on [the people's] authority for [the people's] equal protection and benefit." Utah Const. art. I, § 2. But this "similarity in the stated standards under [the Uniform Operation of Laws Clause and the federal Equal Protection Clause] does not amount to complete correspondence in application." *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988).

Instead, as this Court has stressed time and time again, its "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 Mohi*, 901 P.2d at 997 (reiterating that the Uniform Operation of Laws Clause "establishes different requirements than does the federal Equal Protection Clause"); *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 426 (Utah 1995) ("[L]anguage from federal equal protection analysis under the Fourteenth Amendment . . . is not readily transposed to the . . . test [this Court] appl[ies] under the uniform operation of laws provision of the Utah Constitution."). In fact, this Court has developed legal standards under the Uniform Operation of Laws Clause that are "at least as exacting and, in some circumstances, *more rigorous* than the standard applied under the federal constitution." *Mountain Fuel*, 752 P.2d at 889 (emphasis added); *see also Blue Cross & Blue Shield of Utah v. State Tax Comm'n*, 779 P.2d 634, 637 (Utah 1989). Those different standards "can produce different legal consequences," *Lee v. Gaufin*, 867 P.2d 572, 577 (Utah 1993), in part because Utah's Uniform Operations of Laws Clause protects against discriminatory effects in ways the federal Equal Protection Clause does not.

Unlike the federal Equal Protection Clause, Utah's Uniform Operation of Laws Clause, based on its plain terms and history, "guards against disparate effects in the application of laws," *Gallivan v. Walker*, 2002 UT 89, ¶ 38, 54 P.3d 1069. *Compare id.* (explaining that "the equal protection principle inherent in [Utah's] uniform operation of laws provision . . . guards against disparate effects in the application of laws) *with Washington v. Davis*, 426 U.S. 229, 239 (1976) (rejecting the "proposition that a law or

other official act . . . is unconstitutional [under the federal Equal Protection Clause] solely because it has a . . . disproportionate impact"). The plain terms of Article I, Section 24 of Utah's Constitution focus on the uniform *operation* of laws. Thus, "it is not enough that [a law] be uniform on its face. What is critical is that the *operation* of the law be uniform." *Lee*, 867 P.2d at 577 (emphasis in original); *see also Blackmarr v. City Ct. of Salt Lake City*, 38 P.2d 725, 727 (Utah 1934) (emphasizing that laws cannot "operate unequally, unjustly, and unfairly upon those who come within the same class"). The Uniform Operation of Laws Clause's historical antecedents confirm this conclusion. "Historically, uniform operation provisions were understood to be aimed at . . . practical *operation*." *State v. Canton*, 2013 UT 44, ¶ 34 & n.7, 308 P.3d 517 (elaborating that "uniform operations clauses originally reflected an '*opposition to favoritism and special treatment for the powerful*,' and explaining that '[a]lthough these provisions may seem to overlap somewhat with federal equal protection doctrine, closer scrutiny reveals significant differences'") (quoting Robert F. Williams, *The Law of American State Constitutions* 209–13 (2009)) (emphasis added).

Accordingly, this Court has developed a three-part test to assess whether statutes or government actions violate the Uniform Operation of Laws Clause. It asks: (1) "what classifications the statute creates," (2) "whether different classes . . . are treated disparately," and (3) "whether the legislature had any reasonable objective that warrants the disparity among any classifications." *DIRECTV v. Utah State Tax Comm'n*, 2015 UT 93, ¶ 49, 364 P.3d 1036. Step three of this inquiry "incorporates varying standards of scrutiny," with heightened scrutiny applying to cases involving "discrimination on the

basis of a fundamental right." *Id.* at ¶ 50. This well-established test allows this Court to assess partisan gerrymandering claims under the Utah Constitution. And applying that test here demonstrates partisan gerrymandering violates Utah's Constitution for it arbitrarily classifies and disparately impacts politically disfavored voters in a way that dilutes their fundamental right to vote.

Partisan gerrymandering that classifies voters by both geographic location and partisan affiliation to diminish the strength of votes for a certain party. Such classifications satisfy the first two prongs of this Court's Uniform Operation of Laws test. In *Gallivan* this Court held that a multi-county signature requirement on the ballot initiative process violated Utah's Uniform Operation of Laws Clause in part because it: (1) created "two subclasses of registered voters: those who reside in rural counties and those who reside in urban counties," *Gallivan*, 2002 UT 89, ¶ 44; and (2) treated "similarly situated registered voters disparately" by requiring prospective ballot initiatives to be signed by a specific percent of voters in twenty of Utah's twenty-nine counties, thereby "diluting the power of urban registered voters and heightening the power of rural registered voters in relation to an initiative petition." *Id.* ¶ 45. The multi-county signature requirement created these disparate effects in part by exploiting "Utah's uniquely concentrated population." *Id.*

Partisan gerrymandering fares even worse under the Uniform Operation of Laws test than the multi-county signature requirement in *Gallivan* did. First, partisan gerrymanders can classify voters on not just one, but two bases: geographic location (as in *Gallivan*) *and* partisan affiliation. *See* Compl. ¶¶ 4, 207–27, 274–76. This sorting clearly creates the "classifications" that the Court in *DirectTV* used as the first prong of its test.

Second, just as in *Gallivan*, the sorting of voters on the basis of party leads to favored factions having "a disproportionate amount of power" in the political process, *Gallivan*, 2002 UT 89, ¶ 45. *See* Compl. ¶¶ 30–33, 36, 187–98, 265, 275–76. Such gerrymanders—that "dilut[e] the power of [one group of voters] and heighten[] the power of [another group of voters]," *Gallivan*, 2002 UT 89, ¶ 45—classify and disparately affect similarly situated Utahns differently, thereby fulfilling the second prong of the Court's test.

As a discriminatory act implicating the fundamental right to vote, partisan gerrymandering triggers a heightened scrutiny in the third prong of Utah's Uniform Operations of Law test. "For decades" this Court has repeatedly reinforced that "the right to vote is a fundamental right." *Gallivan*, 2002 UT 89, ¶ 24; *see also Utah Pub. Emps. Ass'n v. State*, 610 P.2d 1272, 1273 (Utah 1980) ("[T]he catalog of fundamental interests . . . includes such things as the right[] to vote . . . ."). Indeed, in *Gallivan,* this Court reinforced that:

> "[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."

Gallivan, 2002 UT 89, ¶ 24 (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964)). The right to vote thus triggers heightened scrutiny not "just because it is important to the aggrieved party," but because it "form[s] an implicit part of the life of a free citizen in a free society." *Utah Pub. Emps. Ass'n*, 610 P.2d at 1273 (Utah 1980). The right to vote is "sacrosanct," and "Utah courts must defend it against encroachment and maintain it inviolate." *Gallivan*, 2002 UT 89, ¶ 27. Partisan gerrymandering dilutes the worth of

certain Utahns' fundamental right to vote, and this Court must use its authorities under the Utah Constitution to defend against that encroachment, just as it did in *Gallivan*.

Partisan gerrymanders plainly implicate the fundamental right to vote. In *Gallivan*, this Court recognized that a statute requiring prospective ballot initiatives to receive the signatures of a certain percent of registered voters in twenty of Utah's twenty-nine counties impacted the fundamental right to vote because "Utah's uniquely concentrated population," *id.* ¶ 45, meant the requirement "ha[d] the effect of heightening the relative weight of the signatures of registered voters in rural, less populous counties and diluting the weight of the signatures of registered voters in urban, more populous counties . . . ," *id.* ¶ 34. Partisan gerrymanders affect the fundamental right to vote for this same reason. And as such, partisan gerrymanders must survive heightened scrutiny.

To survive heightened scrutiny, one would need to demonstrate that a partisan gerrymander is "reasonably necessary to further, and in fact . . . actually and substantially further[s], a legitimate legislative purpose." *Gallivan*, 2002 UT 89, ¶ 42. But partisan gerrymandering does not actually and substantially further any legitimate legislative purposes. Privileging the votes of one set of geographically located voters over those of differently geographically located voters does not actually and substantially further a legitimate legislative purpose. *Cf. id.* ¶¶ 50, 59 n.11, 59–61. Empowering voters of one political party at the expense of voters in other parties also does not actually and substantially further a legitimate legislative purpose. *Cf. Midvale City Corp. v. Haltom*, 2003 UT 26, ¶ 16, 73 P.3d 334, 339 (recognizing claim of viewpoint discrimination where the government "suppress[es] disfavored speech or disliked speakers").

It is this Court's "province to decide the vital and determinative question of whether a classification operates uniformly on all persons similarly situated within constitutional parameters," *Gallivan*, 2002 UT 89, ¶ 38 (internal quotations omitted). Partisan gerrymanders do not operate uniformly on similarly situated Utahns; they impermissibly infringe on some Utahns' sacrosanct right to vote to heighten others' voting powers.

CONCLUSION

For the foregoing reasons, this Court must exercise its independent authority and duty in our federalist system to protect the rights enshrined in the Utah Constitution, by holding that claims of partisan gerrymandering are justiciable under the Utah Constitution's Free Elections and Uniform Operation of Laws Clauses.

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RESPECTFULLY SUBMITTED
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief contains 6,935 words, excluding any tables or attachments, in compliance with Utah R. of App. P. 25(f).
2. This brief complies with Utah R. App. P. 21(h) regarding public and non-public filings.

DATED this 19th day of May, 2023.

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CERTIFICATE OF SERVICE

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