

In the Supreme Court of the 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, Dale Cox,

Plaintiffs-Respondents,

v.

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

Defendants-Petitioners.

No. 20220991-SC

On Interlocutory Appeal
From the Third Judicial
District Court Honorable
Dianna M. Gibson No.
220901712

Brief of Amicus Curiae Common Cause
In Support of Reversal

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INTEREST OF AMICUS CURIAE¹

Amicus curiae Common Cause was founded by John Gardner in 1970 as a nonpartisan “citizens lobby” whose primary mission is to protect and defend the democratic process and make government accountable and responsive to the interests of ordinary people, and not merely to those of special interests. Common Cause is one of the nation's leading democracy organizations and currently has over 1.5 million members and supporters nationwide and local chapters in 30 states. Common Cause promotes, on a non-partisan basis, its members’ interest in open, honest, and accountable government and political representation. Common Cause has participated as a party or amicus curiae in numerous Supreme Court, lower court, and state court actions concerning the constitutionality and implementation of federal and state election laws.

INTRODUCTION

Partisan gerrymandering—the drawing of electoral maps in ways that dilute the voting strength of some voters based on party affiliation or other community characteristics—is a bipartisan practice that allows a political party to lock in election

¹ Pursuant to Utah R. App. P. 26(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. 26(b)(2) and received timely notice pursuant Utah R. App. P.26(a).

victories in perpetuity and “can also short-circuit majority rule.”² Partisan gerrymanders “are incompatible with democratic principles.”³ Independent redistricting commissions represent a neutral and effective attempt at reforming and professionalizing how voting district lines are drawn. By drawing congressional maps based on neutral, nonpartisan criteria, such commissions empower voters by honoring their constitutional right to choose their representatives in free and fairly contested elections, and under rules unencumbered by the machinations of party insiders. Utah voters chose just such an option in 2018, by passing Proposition Number 4, (“*Prop 4*”), with 512,218 votes in favor. Prop 4 created a Utah Independent Redistricting Commission (the “*UIRC*”) and tasked it with providing 12 Maps—three Congressional, three State House, three State Senate, and three State School Board. Legislators would then be required to give these maps an up or down vote to determine which would govern Utah’s voting district lines for this decade’s elections.⁴

Disregarding the voice of the citizens of Utah, a single party supermajority in the state legislature subsequently passed S.B. 200, which “remove[d] the requirement that the Legislature vote on the commission’s proposals and follow specific redistricting criteria, eliminate[d] the role of the Chief Justice of the state Supreme Court in redistricting, and [got] rid of the right of private citizen lawsuits if the Legislature approve[d] maps different

² Claire Snyder-Hall, *How Partisan Gerrymandering Kills Democracy*, 34 Del. Law. 18, 18 (2016).

³ *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015).

⁴ UIRC, *Redistricting Report* (Nov. 2021) (“Redistricting Rep.”) at 3.

than the commission.”⁵ After repealing Prop 4, “right before the decennial census that triggers the redistricting process”, the Utah Legislature assured voters that, despite rescinding the voter sponsored reforms of Prop 4 almost completely, it would both allow the UIRC to perform its vital work and earnestly consider the UIRC’s proposed district maps.⁶ “The Legislature, however, had other ideas” and chose to draw up and enact new district maps before the UIRC had even completed its work.⁷ The final congressional district lines produced by the Legislature completely disregarded the UIRC’s work and recommendations, and the enacted maps reflect extreme partisan gerrymandering. The process by which the maps were enacted “minimized any meaningful opportunity for public scrutiny and input,”⁸ and the maps themselves are designed to marginalize all voters not in the majority party.

SUMMARY OF ARGUMENT

Amicus joins in the legal arguments made by Appellee in the district court below and in their briefing before this Court.⁹ We write separately to make the Court aware of the

⁵ Princeton University, *Gerrymandering Project (Utah)*, <https://gerrymander.princeton.edu/reforms/UT> (last visited on May 5, 2023).

⁶ Complaint ¶ 3.

⁷ Appellee Brief at 13.

⁸ *Id.* at 16.

⁹ *See id.* at 17 (“The Legislature’s repeal of Prop 4 was unconstitutional. The Legislature has no power to repeal any citizen-enacted legislation. The text, structure, and history of the Constitution make clear that Legislature had no authority to repeal Prop 4.”) Thus, the Court should reverse the decision below so that the maps drawn by the UIRC, maps representative of the people’s will, may fairly guide the coming decade’s elections.

work done by the UIRC—work reflecting the engaged and active participation of Utah’s citizenry, whose recommendations and insight the Legislature disregarded. Partisan gerrymandering is a broad multifaceted problem involving innumerable factors and considerations. “There are a multitude of ways to examine the accuracy of political representation and fairness of districts, which is one of the many reasons why redistricting can become contentious and controversial.”¹⁰ But it can be done through transparency, neutrality and fairness. In the wake of the Supreme Court’s decision in *Rucho v. Common Cause*, 588 U. S. ___, 139 S. Ct. 2484 (2019), states have gradually and earnestly been confronting the problem head on;¹¹ independent redistricting commissions have proliferated across America as a solution to partisan dysfunction.¹² Although “not all redistricting commission are created equally,”¹³ citizen groups, academics, and political

¹⁰ Redistricting Rep. at 5.

¹¹ See generally Alaska Const. art. VI; Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI; Cal. Gov’t Code §§ 8251-8253.6; Colo. Const. art. V, §§ 44-44.6, 46-48.4; Idaho Const. art. III, §§ 2, 4, 5; Idaho Code Ann. §§ 72-1501-1508; Mich. Const. art. IV, §§ 1-6; *id.* at art. V, §§ 1, 2, 4; *id.* at art. VI, §§ 1, 4; Mont. Const. art. V, § 14; Mont. Code Ann. §§ 5-1-101-115; Wash. Const. art. II, § 43; Rev. Code Wash. ch. 44.05; Ark. Const. art. 8, § 1; Haw. Const. art. IV; Haw. Rev. Stat. ch. 25; N.J. Const. art. II, § II; *id.* at art. IV, § II; *id.* at art. IV, § III; Ohio Const. art. XI; *id.* at art. XIX; Pa. Const. art. II, § 17.

¹² Alex Keena, Article, *2021 Redistricting in Virginia: Evaluating the Effectiveness of Reforms*, 26 Rich. Pub. Int. L. Rev. 85, 91 (2022) (“In these ‘independent’ redistricting commissions, elected officials appoint citizens to serve and impose eligibility criteria to prevent undue political influence in the process.”)

¹³ Tierney Sneed, *A fair maps success story or ‘multi-layered stages of Dante’s Hell’? Where redistricting commissions worked – and didn’t work – this cycle*, CNN Politics (June 18, 2022), <https://www.cnn.com/2022/06/18/politics/redistricting-commission-takeaways-success/index.html> (last visited May 5, 2023).

experts have worked tirelessly to improve the means by which such commissions can best serve their democratic aims. So far, these commissions have proven to “have succeeded to a great degree in limiting the conflict of interest implicit in legislative control over redistricting” and “thus impede legislators from choosing their voters instead of facilitating the voters’ choice of their representatives.”¹⁴ Utah’s Prop 4, and the processes and recommendations produced subsequently by the UIRC represent the highest application of this work and provide a model which should rightfully govern all future state map drawing procedures. The UIRC’s work represents a success story that Utahns can honor, despite the Legislature’s disregard.

ARGUMENT

I. Independent Redistricting Commissions Represent a State-Based Solution to a Complex Problem.

A. Gerrymandering and State Responses

In the majority of states, the state legislature, as an entity, has monolithic control over the redistricting process. This means that after the decennial U.S. Census results are released, and after the federal government determines how many seats a state is given in the United States House of Representatives, state elected officials are empowered to draw the district maps by which candidates will be selected by voters in future elections.¹⁵ “In

¹⁴ *Ariz. State Legis.*, 576 U.S. at 821.

¹⁵ League of Women Voters, Report, Designing a Transparent and Ethical Redistricting Process (2021), https://www.lwv.org/sites/default/files/2021-03/Transparency_Report_FINAL.pdf.

most states, district lines are passed just like regular legislation, with a majority vote in each legislative chamber.”¹⁶ This drawing of electoral maps for the coming decade by politicians leaves the democratic process vulnerable to abuse; politicians may easily opt to benefit their own reelection chances or further the entrenched power of their party through the process of partisan gerrymandering.¹⁷

No political party is immune from this problem; rather, it can threaten democracy itself. Lawsuits have proliferated with mixed success. In federal court, the U.S. Supreme Court declined to upend a partisan scheme, finding a case non-justiciable wherein “[v]oters and other plaintiffs in North Carolina and Maryland challenged their States’ congressional districting maps as unconstitutional partisan gerrymanders” based on maps drawn to disfavor the minority party in each state.¹⁸ In Alaska, Pennsylvania, and Maryland, state

¹⁶ Professor Doug Spencer, *Guide to Drawing the Electoral Lines, Who draws the lines?* (Loyola Law School), <https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/> (last visited on May 5, 2023).

¹⁷ Lillian V. Smith, Note, *Recreating the ‘Ritual Carving’: Why Congress Should Fund Independent Redistricting Commissions and End Partisan Gerrymandering*, 80 Brook. L. Rev. 1641, 1648 (2015) (“One danger of redistricting, when conducted by elected officials, is that it allows the map-drawing party to create safe, uncompetitive districts and to allocate political power in a way that is beneficial to the party in power but that does not necessarily reflect voters’ actual preferences. Because, in most states, redistricting is the purview of the legislature, the majority party has significant influence over the process.”); D. Theodore Rave, Article, *Politicians As Fiduciaries*, 126 Harv. L. Rev. 671, 683-84 (2013) (“[G]errymanders tend to reduce competition in districted elections, helping to insulate incumbents from challenge. Indeed, incumbents routinely win by landslides in the overwhelming majority of districted elections.”)

¹⁸ *Rucho*, 139 S. Ct. at 2491; *see also Gill v. Whitford*, 138 S. Ct. 1916 (2018) (in which the Supreme Court ruled that the plaintiffs challenging a gerrymandered map plan had failed to demonstrate standing to bring the suit under Article III of the United States Constitution).

courts have interpreted state constitutional provisions to prohibit partisan gerrymandering.¹⁹ Similar litigation has moved throughout a number of states.²⁰ Justice Kagan aptly summarized the problem:

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others. A mapmaker draws district lines to “pack” and “crack” voters likely to support the disfavored party... He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. ... In short, the mapmaker has made some votes count for less, because they are likely to go for the other party. (citations omitted).²¹

¹⁹ *In re 2021 Redistricting Cases Matanuska-Susitna Borough*, Nos. 18332/18419, 2023 Alas. LEXIS 33, 107-108 (Alaska Apr. 21, 2023); *Szeliga v. Lamone*, 2022 Md. Cir. Ct. LEXIS 9, 54 (Md. Cir. Ct. Mar. 25, 2022); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 123 (2018),

²⁰ *See e.g.*, *Caster v. Merrill*, No. 2:21-CV-1536 (N.D. Ala. Nov. 16, 2021), *Suttlar v. Thurston*, No. 60CV-22–1849 (Ark. Cir. Ct. Mar. 21, 2022), *Common Cause v. Byrd*, No. 4:22-CV-109 (N.D. Fla. Mar. 11, 2022), *Graham v. Adams*, No. 22-CI-47 (Ky. Cir. Ct. Jan. 20, 2022), *Parrott v. Lamone*, No. C-02-CV-21–001773 (Md. Cir. Ct. Dec. 21, 2021), *League of Women Voters of Michigan v. Independent Citizens Redistricting Commission*, No. 164022 (Mich. Sup. Ct. Feb. 1, 2022).

²¹ *Rucho*, 139 S. Ct. at 2513-14 (Kagan, J., dissenting).

Some state legislative bodies have themselves attempted to mitigate this damage to the democratic process through various incremental strategies.²² On one end of the spectrum, certain states treat the passage of redistricting legislation differently than other law-making. For example, Connecticut and Maine both require supermajorities of two-thirds in each state house to approve a redistricting plan; and Connecticut, Florida, Maryland, Mississippi, and North Carolina set district lines by joint resolution without the potential for a gubernatorial veto.²³ Iowa, Maine, and Vermont have appointed advisory commissions which “do not take the legal power of redistricting away from the legislature, but can have a great influence on the process depending on the culture of the state.”²⁴ For example, the “purely advisory version of the UIRC” adopted by S.B. 200 here in Utah remained empowered to make recommendations, engage the public, and deploy resources from state budgets in fulfilling its mandate.²⁵ Additionally, many states have used backup commissions, which function to draw state and congressional district lines if the legislature fails to pass a satisfactory map. The specific functions of such commissions vary by state,

²² Nick Corasanti & Reid J. Epstein, *How a Cure for Gerrymandering Left U.S. Politics Ailing in New Ways*, N.Y. Times (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/us/politics/gerrymandering-redistricting.html> (“Taking the map-drawing process out of the hands of lawmakers under pressure to win elections, the thinking went, would make American democracy more fair. But as this year’s once-in-a-decade redistricting process descends into trench warfare, both Republicans and Democrats have been throwing grenades at the independent experts caught in the middle.”)

²³ Spencer, *supra* note 16.

²⁴ League of Women Voters, *supra* note 15.

²⁵ *See* Appellee Brief at 15.

with some granting the authority over final maps to statewide actors, the governor's office, or specially selected committees in the event of legislative failure.²⁶

Moving across the spectrum from these well-meaning but toothless reforms, and addressing the risk of legislative actors injecting partisanship into this vital democratic process, Arkansas, Hawaii, Missouri, New Jersey, Ohio, Pennsylvania, and Virginia have empowered political commissions to take the power of redistricting away from the legislature in favor of specially elected officials to draw the legislative maps.²⁷ Some states such as Alaska, Idaho, Montana, and Washington empower commissions with significant or complete authority to make final decisions on maps while allowing elected officials to appoint commissioners with few restrictions. Finally, and most robustly, Arizona, California, Colorado, and Michigan empower citizen commissions to make final decisions on maps with very limited participation of elected officials even in the appointment of commissioners.²⁸ The limited participation of elected officials in the drafting of maps was of course the ambition of Prop 4 in Utah.

Even within this gold standard form of district line drawing, however, the level of permissible partisanship or the actual independence of the various commission members differs by state, thus impacting the system's effectiveness. States may police potential commission members' former ties to politics, legislatures, and lobbying to varying degrees

²⁶ Barry Edwards *et al.*, Article, *Can Independent Redistricting Commissions Lead us Out of the Political Thicket?*, 9 Alb. Gov't L. Rev. 288 (2016).

²⁷ *Id.*

²⁸ Spencer, *supra* note 16.

of sufficiency.²⁹ For example, Utah Statute 20A-20-201(5) strictly bars lobbyists, candidates or holders of office, employees of political parties or political entities, and political appointees of various degrees from UIRC membership. But, in the most recent redistricting cycle, states in which advisory commissions drew congressional maps saw “most of [their] state legislatures essentially disregard[] the good work of the advisory commissions.”³⁰ “Only some of the commissions set up for the 2020 cycle were truly independent, and how they were designed affected how functional – or dysfunctional – they were.”³¹ A lack of true independence and multiple process failures in transparency, ethics, citizen engagement, and commitment to their mandate have all proven fatal to the well-intentioned designs of many state commissions.

Criteria for map-making, and democratic operations have been studied, critiqued, and guided by academics, policy experts, and citizens groups. There is a robust literature now available which identifies the necessary considerations that must guide, not only the formation of a redistricting commission, but also its operations and policy recommendations if it is to become a universally trustworthy and effective tool for democratic preservation.

1. Independent Commission Best Practices

In addition to abiding by redistricting requirements and principles imposed by state

²⁹ *Id.*

³⁰ Sneed, *supra* note 13.

³¹ *Id.*

and federal law independent voting commissions, when drawing maps, should also follow a host of best practices guidelines from the researcher community. A consensus has emerged that “putting commissions in charge of redistricting can significantly reduce many of the worst abuses associated with redistricting and improve outcomes and satisfaction across the stakeholder spectrum — but only if commissions are carefully designed and structured to promote independence and incentivize discussion and compromise.”³² “An important feature of commissions is “their capacity to negotiate ... and agree on reasonably imperfect plans (*i.e.*, good redistricting deliberation).”³³

Policy experts recommend commission rules guided by the ethical principles of transparency, accountability, and rigorous personal standards of conduct applied to commission members.³⁴ States have additionally adopted criteria around map drawing prohibiting the favoring or disfavoring of incumbent candidates or parties, prohibitions against using partisan data in line drawing, making competitiveness between partisans a priority in drawing lines, and imposing proportionality considerations in drawing districts which reflect the historical preferences of state voters.³⁵ Drawing upon the lessons from

³² Brennan Center for Justice, *Redistricting Commissions: What Works* (July 24, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/redistricting-commissions-what-works> (last visited May 5, 2023).

³³ Bruce E. Cain, Essay & Feature, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808 (2012).

³⁴ League of Women Voters, *supra* note 15.

³⁵ National Conference of State Legislatures, *Redistricting Criteria* (July 16, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-criteria> (last visited May 5, 2023).

previous state efforts, geared toward empowering redistricting commissions, academic, state, and policy stakeholders make the following recommendations for structuring independent commissions:

- An independent selection process to screen applicants for disqualifications or conflicts of interest and to make qualitative assessments about the fitness of applicants to do the job.³⁶
- Clear, prioritized criteria for map drawing.
- A commission sized to ensure geographic, political, and ethnic diversity.³⁷
- Strong transparency requirements that make commission proceedings as accessible as possible and encourage public input.³⁸
- Adequate funding to enable the commission to hire sufficient staff and experts.³⁹
- An appointment timeframe that allows new commissioners adequate time to hold public hearings, obtain feedback on initial proposed maps, make any necessary adjustments, and draw final maps.⁴⁰
- A ban on local partisan actions, elected officials, family members, and campaign staff from the commission.⁴¹
- Public notice and comment procedures and facilitations of the public’s ability to submit draft maps.

³⁶ Snyder-Hall, *supra* note 2, at 18.

³⁷ Brennan Center for Justice, *supra* note 32.

³⁸ Micah Altman, *et al.*, Op-Ed, *Principles for Transparency and Public Participation in Redistricting* (June 17, 2010), <https://www.brookings.edu/opinions/principles-for-transparency-and-public-participation-in-redistricting/> (last visited on May 5, 2023) (“Increasing transparency can empower the public to shape the representation for their communities, promote public commentary and discussion about redistricting, inform legislators and redistricting authorities which district configurations their constituents and the public support, and educate the public about the electoral process.”)

³⁹ Common Cause, California Local Redistricting Project, *Commission Considerations* (Apr. 2017), <https://www.localredistricting.org/commissions> (last visited May 5, 2023).

⁴⁰ Brennan Center for Justice, *supra* note 32.

⁴¹ Common Cause, California Local Redistricting Project, *Redistricting Commission Best Practices* (Dec. 2017), https://assets.ctfassets.net/mla2k9txthv8/5Z4PT6IXaoAcMes6EMOAuS/6991e3959f55e26d56f6dd46b4511563/Brief_-_Best_Practices_-_Final.pdf

- Electronic publication of proposed final maps prior to passage so that the public may comment.⁴²

These measures, when adhered to, can be successful. Empirical studies have found that “[i]nfusing a nonpartisan, technocratic redistricting commission with strong citizen participation and limited oversight from an elected legislature is a compelling vehicle for reform” which has generated the most successful and fair maps and map drawing processes.⁴³

Finally, new technology can also play a fundamental role in making all maps available for public notice and comment and in making all data used in commission considerations, along with the sources of such data, open to public review.⁴⁴ Although “[r]ecent advances in technology have allowed elected officials to manipulate districts with

⁴² *Id.*

⁴³ Noah Litton, Note, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 Ohio St. L.J. 839, 850 (2012) (“analysis shows that nonpartisan redistricting is best suited to control partisan gerrymandering by simultaneously increasing electoral responsiveness and reducing partisan bias”); Edwards, *supra* note 26, at 320 (“When additional data from the 1972, 1982, and 2012 elections were added in a follow-up analysis, commission drawn plans were still more likely to be competitive.”)

⁴⁴ “Prior to the advent of computer databases, election officials kept track of which voters resided in which districts using a combination of paper maps, lists of addresses, and paper records of voter registration information. Today, many election officials use computerized election management systems (EMS), geographic information systems (GIS), electronic voter registration systems, and other technology tools to help maintain voter and associated district boundary information.” See U.S. Election Assistance Commission, *Election Officials’ Guide to Redistricting* (Aug. 25, 2021), https://www.eac.gov/sites/default/files/2021-08/LEO_Guide_to_Redistricting.pdf.

unprecedented effectiveness[,]”⁴⁵ technology in the proper hands provides a vehicle for true citizen empowerment. The academic community has provided a blueprint whereby independent commissions may utilize citizen feedback in map making through use of the internet.⁴⁶ “[S]tate redistricting websites should include data repositories ... and available state data on political boundaries; open-redistricting tools incorporating relevant data and including easy-to-use mapping software and accompanying instructions/tutorials; hearing portals that include notice of hearings, live-streamed hearings, and hearing archives; posted plans—both those created by legislative/commission line drawers and maps submitted by members of the public; and portals for public input and comment.”⁴⁷ The digital age has the capacity to restore public trust in democracy through restoring public oversight and participation in every facet of our democratic process, beginning with how district lines are drawn.

In the remaining portion of this brief, amicus will demonstrate that the design and operation of the UIRC, and the work done and delivered by the UIRC in drawing its own maps —“perform[ing] its [albeit] watered-down role under S.B. 200”⁴⁸— fully embraced, adhered to, and in many ways surpassed the most rigorous standards embodied by the

⁴⁵ *Daunt v. Benson*, No. 19-2377, 2020 WL 820741, at *14 (6th Cir. Feb. 20, 2020).

⁴⁶ Rebecca Green, Article, *Redistricting Transparency*, 59 Wm. & Mary L. Rev. 1787, 1812 (2018) (“Particularly in rural states where traveling to a central location is more difficult, technology can provide a valuable bridge.”)

⁴⁷ *Id.*

⁴⁸ *See* Appellee Brief at 15.

consensus recommendations and legal requirements described above.

B. Utah’s Response: Prop 4 and the UIRC.

During the 2018 election, Prop 4 appeared as an “initiative to create an independent commission on redistricting for the state, known today as the Utah Independent Redistricting Commission.”⁴⁹ Due to the efforts of citizen volunteers and community advocacy organizations the initiative passed with 512,218 votes in favor.⁵⁰ The original statute enacted due to Prop 4, Utah Code Annotated (“U.C.A.”) 1953 Section 20A-19-101 *et seq.*, was a model of transparency and accountability in the redistricting process. As outlined in the complaint below, this legislation imposed strict non-partisan requirements on commission members along with far reaching measures encouraging responsiveness, transparency, and compromise.⁵¹ However, and most importantly, “Proposition 4 required the Legislature to consider the Commission’s proposed maps in an open public hearing and to vote to enact without material change or reject the Commission-adopted plans.”⁵² And, if the Legislature rejected the Commission’s selected 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.”⁵³ Prop 4 also forbade the Legislature from enacting a redistricting plan “or

⁴⁹ Redistricting Rep. at 7.

⁵⁰ *Id.*

⁵¹ *See* Complaint ¶¶ 80-90.

⁵² U.C.A. § 20A-19-204(2)(a), repealed by Laws 2020, c. 288, § 12, eff. Mar. 28, 2020.

⁵³ *Id.* § 20A-19-204(5)(a), repealed by Laws 2020, c. 288, § 12, eff. Mar. 28, 2020.

modification of any redistricting plan unless the plan or modification has been made available to the public by the Legislature, including by making it available on the Legislature's website, or other equivalent electronic platform, for a period of no less than 10 calendar days.”⁵⁴ Finally, it contained a citizen suit provision as a failsafe measure to block any redistricting plan that failed to conform to Prop 4’s mandates.⁵⁵

Although, the original UIRC was technically an advisory commission, the statute placed the onus on the Legislature to explain why it would choose to disregard the nonpartisan map proffered by the people’s voice, through the UIRC, in favor of maps drawn through its own less transparent and more easily manipulatable proceedings.

This changed with the passage of S.B.200. “SB200 required the Commission to craft its own standard ‘prohibiting the purposeful or undue favoring or disfavoring’ of parties, incumbents, or candidates, but [allowed] the Legislature [to] follow its own preferences, permitting the gerrymandering of Utah’s maps for partisan advantage.”⁵⁶ Amicus joins with Appellee’s briefing as to why the Legislature’s disregard of the people, and of the initial mandates of Prop 4 in passing S.B.200, was a violation of democratic principles and of citizens’ rights.⁵⁷ “SB200 eliminated all mandatory anti-gerrymandering restrictions imposed by the people on the Legislature as well as Proposition 4’s

⁵⁴ *Id.* at (4).

⁵⁵ U.C.A. § 20A-19-301(2), repealed by Laws 2020, c. 288, §12, eff. Mar. 28, 2020.

⁵⁶ Complaint ¶ 95.

⁵⁷ *See* Appellee Brief at 17-18, 20-27.

enforcement mechanisms ... as if the people had never spoken.”⁵⁸ However, this did not prevent the “new” UIRC from carrying out its mandate to the fullest extent contemplated by Prop 4 under the compromise structure still in place after passage of S.B. 200.

C. The Commission’s Work

The UIRC’s structural independence began with its appointment procedures. “The appointed commissioners are barred from being active lobbyists, elected officials, political party leaders, or executive appointees as a step to ensure there are no conflicts of interest. Additionally, the seven-member commission was appointed by both Democratic and Republican party leaders—with the chair appointed by the governor.”⁵⁹ Careful statutory prescriptions govern the appointment of each member of the commission, guaranteeing that its membership represents all branches of the Utah government and representatives of all major political constituencies.⁶⁰

As Prop 4 expressly prohibited “the purposeful or undue favoring or disfavoring of an incumbent elected official, a candidate or prospective candidate for elected office, or a political party” in drawing district lines,⁶¹ the UIRC unanimously adopted seven affirmative neutral redistricting criteria and one prohibition on favoring candidates,

⁵⁸ Complaint ¶¶ 96-97.

⁵⁹ Redistricting Rep. at 11.

⁶⁰ *See* U.C.A. § 20A-20-201(2).

⁶¹ *See* U.C.A. § 20A-20-302.

incumbents, and/or political parties in line drawing.⁶² Additionally, S.B. 200 requires that the UIRC hold “no fewer than seven public hearings throughout the state to discuss maps;” affords the public “a reasonable opportunity to submit written and oral comments to the commission and to propose redistricting maps for the commission's consideration;” prescribes rigorous standards for equitable map drawing; provides staffing and budget resources outside the reach of partisan control; and empowers the UIRC to define and adopt redistricting policies in line with the best recommendations of experts and citizens.⁶³ The UIRC not only complied with these mandates but in many ways exceeded these goals.

1. Community Outreach

The need for an independent redistricting commission to serve the citizens of Utah was never higher than after this most recent census cycle. The population of the state of Utah grew by about half a million people in the previous decade.⁶⁴ The 2020 Census showed that some cities concentrated along the Wasatch Front grew by literally hundreds of percentage points (with one city’s, Vineyard Front’s, population growing by as much as 10,000%).⁶⁵ This transformation of multiple cities and municipalities necessitated radical changes to the district maps drawn for the state of Utah. Additionally, the U.S. Census Bureau released its redistricting data to states a full six months later than the usual deadline

⁶² UIRC, UIRC Meeting–August 27, 2021, <https://uirc.utah.gov/uirc-meeting/uirc-august-27-2021/>.

⁶³ See U.C.A. § 20A-20-301, *et seq.*

⁶⁴ Redistricting Rep. at 15.

⁶⁵ *Id.*

due to pandemic complications which increased the difficulties of tabulating proper populations. “There was less time to conduct public hearings, gather comments and input from communities of interest, and most importantly less time to draw district maps.”⁶⁶ Still, the UIRC exceeded its mandate.

“Prior to any mapping, the Commission worked to ensure that the mapping itself would be transparent and open to public input. While the criteria used by the commissioners is largely explained in the statute, some specific clarifications and details of the statute were ambiguous, prompting the commission to formally adopt criteria to be used while drafting maps.”⁶⁷

The Commission adopted criteria to preserve communities of interest, contiguous boundaries, geographic boundaries, municipal and country lines, and prohibited any undue favoring of incumbents or candidates; all criteria were listed on the Commission’s website with a window for public input, and with explanations provided at public hearings throughout the state.⁶⁸

Exceeding the statutory mandate for 7 public hearings, the UIRC conducted 15 public hearings across the state.⁶⁹ Embracing transparency, the UIRC made all public

⁶⁶ *Id.* at 16.

⁶⁷ *Id.* at 19. *See* Appendix 1.

⁶⁸UIRC, Synopsis of Threshold Criteria and Redistricting Standards, <https://uirc.utah.gov/uirc-meeting/synopsis-criteria-and-standards/>.

⁶⁹ Redistricting Rep. at 21.

hearings and all team mapping sessions available online—initiatives which greatly expanded on the requirements mandated under the law.⁷⁰ Live streaming technology enabled the public to witness every modification made to district maps in real time and allowed commissioners to engage with public comments throughout the mapping process.⁷¹ The UIRC provided virtual access to all its business and “actively considered differing urban and rural needs in its communities-of-interest analyses.”⁷² This unprecedented level of public access was coupled with an equally unprecedented degree of public participation in the map making. Open houses and active dialogue sessions between the UIRC and the public were included in every hearing—citizens could and often did submit their own maps for consideration online and during public meetings.⁷³

Additionally, the Commission solicited feedback as to what the public believed constituted relevant communities of interest implicated in any redistricting design. After receiving thousands of comments defining and protecting communities of interest, from both the website and outside organizations, commission staffers worked to categorize submissions into the following categories: economic communities, educational communities, environmental communities, ethnic communities, industrial communities, language communities, local government communities, neighborhood communities, and

⁷⁰ *Id.* at 15.

⁷¹ *See* Complaint ¶ 125.

⁷² *Id.* ¶ 128.

⁷³ *Id.* ¶ 124.

religious communities.⁷⁴ Utilizing cutting edge technology, communities of interest were categorized with data turned into “viewable layers within the redistricting software, allowing the Commissioners to evaluate whether their drafted maps were considerate of collected communities.”⁷⁵ Finally, the commission used social media both to educate the public about its work via outreach programs, and to solicit feedback from the public by “sharing polls that asked followers what they thought about specific maps or where they would like to see their district boundaries.”⁷⁶

In addition to its sophisticated cyberspace initiatives the UIRC compiled a list of over 500 organizations throughout the state of Utah to solicit their engagement in the redistricting efforts. These organizations hosted UIRC emissaries at their meeting places and shared information provided by the UIRC with their members, thus ensuring that all interested parties throughout the state had the opportunity to participate in the UIRC’s work.⁷⁷ “Because each Commissioner is not familiar with every community across the state, public input was necessary to better understand each community’s needs, and through this mutually beneficial educational process citizens were able to impact the commission’s work in substantial ways.”⁷⁸ Finally, countless additional meetings were held with groups

⁷⁴ Redistricting Rep. at 23.

⁷⁵ *Id.*

⁷⁶ *Id.* at 24-25.

⁷⁷ *Id.* at 25-26.

⁷⁸ *Id.*

as diverse as local school boards, The Navajo Nation, and Mormon Women for Ethical Government. During these meetings the UIRC members and representatives could both discuss their work with the public and hear first-hand the public's concerns in preparation for and throughout map-making.

2. The Mapping Process

The map drawing process itself was yet another instance of the UIRC embracing and exceeding all mandates for transparency and citizen engagement. The commissioners were split into three mapping teams, each with a commissioner appointed by a Democrat and a Republican. Transparency guided all UIRC work as explained in the UIRC redistricting report:

During mapping sessions, all discussions and mapping were streamed live, and those people doing the actual mapping included not only staff members, but also expert volunteers associated with parts of the Geographic Information System (GIS) community. Commissioner Hillyard would often explain to members of the public that this mapping process was more difficult than it seemed, explaining that not only was the commission restricted by adopted criteria, but also noting that every change had a ripple effect. Changing the boundary of one district necessitated changing the boundary of another. The teams created detailed maps that not only fulfilled legal requirements, but also took into consideration the many public comments received by the commissioners.⁷⁹

By using three different teams, each of which often chose and utilized different methodologies and worked independently, the UIRC maximized the potential for a fair and balanced compromise map emerging. Congressional maps, of course, always involve a tradeoff of considerations pertaining to rural and urban interests, neighborhood concerns,

⁷⁹ *Id.* at 29; *see also* Appendix 2.

and differing community interests. But six of the seven commissioners, of differing political affiliations, successfully agreed to the final map submitted to the Legislature.⁸⁰ This unprecedented achievement should inspire public confidence in the UIRC process, not least because the public had easy real time access to and input over every facet of the UIRC's duties. Given the partisan climate, the extreme population changes in Utah, and the inherent difficulties in fairly fulfilling any mandate involving something as charged as voting districts, the UIRC's process and the maps it produced stand as a clear success story of how citizen initiatives can transcend partisan ambition to improve and sustain the quality of our democracy and achieve the goal of free and fair elections.

Unfortunately, the Utah Legislature chose to ignore the voice of the people and the labors of the UIRC, first when it repealed Prop 4, and then again when it devised and enacted a gerrymandered congressional map even "before the UIRC presented its impartial proposal."⁸¹ The UIRC maps nonetheless remain as a reflection of citizen will and of a fair and open process essential to democratic principles.

CONCLUSION

State action to address partisan gerrymandering ensures that citizen complaints about this threat to democracy do not "echo into a void."⁸² Rather than succumbing to

⁸⁰ *Id.* at 30 ("On February 25, 2021 commissioner Rob Bishop, appointed by Speaker Wilson, resigned his position as commissioner citing a frustration with the makeup of the commission and disagreements with other commissioners' congressional mapping philosophies.")

⁸¹ *See* Appellee Brief at 15.

⁸² *Rucho*, 139 S. Ct. at 2490.

despair or partisanship, the citizens of Utah embraced the tradition of active engagement in American politics by states and their citizens and passed Prop 4, thereby bringing an end to partisan gerrymandering in the State of Utah. The Legislature has circumvented the people's will, and in disregarding the work of the UIRC, failed to protect our democracy from manipulation. But the work and results of the UIRC demonstrate that another way is possible. "Better redistricting politics is not a judgment imposed by the politically pure upon the less pure; it is a 'reasonably imperfect' outcome that a broad cross-section of citizens and groups can live with for a decade."⁸³ The Legislature's maps reflect partisan manipulation of voting districts, which will distort voting results for a decade. The UIRC's maps demonstrate what is required for neutrally drawn and fair district lines, and, even more important, what can be achieved by a process that ensures fairness, openness, and freedom from partisan abuse.⁸⁴

⁸³ Cain, *supra* note 33, at 1843.

⁸⁴ *Developments in the Law: Voting and Democracy*, 119 Harv. L. Rev. 1165, 1176 (2006) ("State [courts have] . . . the potential to provide a significant layer of defense against misuse of redistricting power and thus deserve[] greater consideration as a complement . . . to independent commissions.")

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CERTIFICATE OF COMPLIANCE

This brief (1) does not exceed 7,000 words in compliance with the requirements of Utah R. App. P. 24(a)(11) and 25(f); (2) was prepared in proportionally spaced typeface using Microsoft Word in 13-point Times New Roman font in compliance with the requirements of Utah R. App. P. 27(a); and (3) contains no non-public information in compliance with Utah R. App. P. 21(h).

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APPENDIX 1

UIRC MAPPING CRITERIA

ADOPTED MAPPING CRITERIA:

Population Deviation: The population of each district must fall within adopted deviations, matching those deviations discussed by the Legislative Redistricting Committee.

Contiguous: No part of a district can be entirely separated from the remainder of the district.

Reasonably Compact: To the extent practicable, districts will be reasonably compact.

Communities of Interest: To the extent practicable, districts will preserve communities of interest.

Geographic Boundaries: To the extent practicable, districts will follow natural, geographic, or man-made boundaries.

Cores of Prior Districts: To the extent practicable, districts will preserve the cores of prior districts.

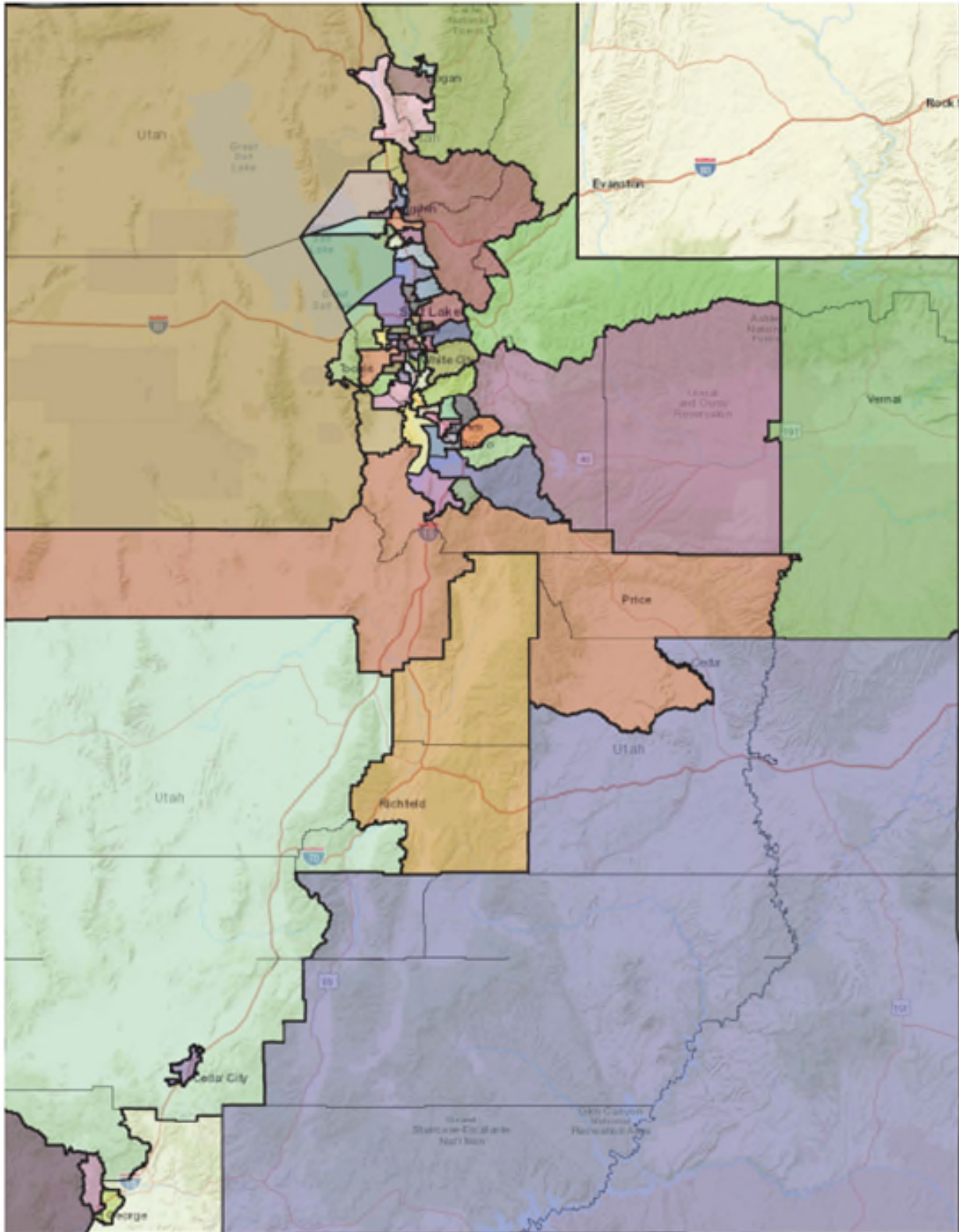
Municipalities and Counties: To the extent practicable, districts will follow and preserve the boundaries of municipalities and counties.

Boundary Agreement: To the extent practicable, districts will seek boundary agreement between map types.

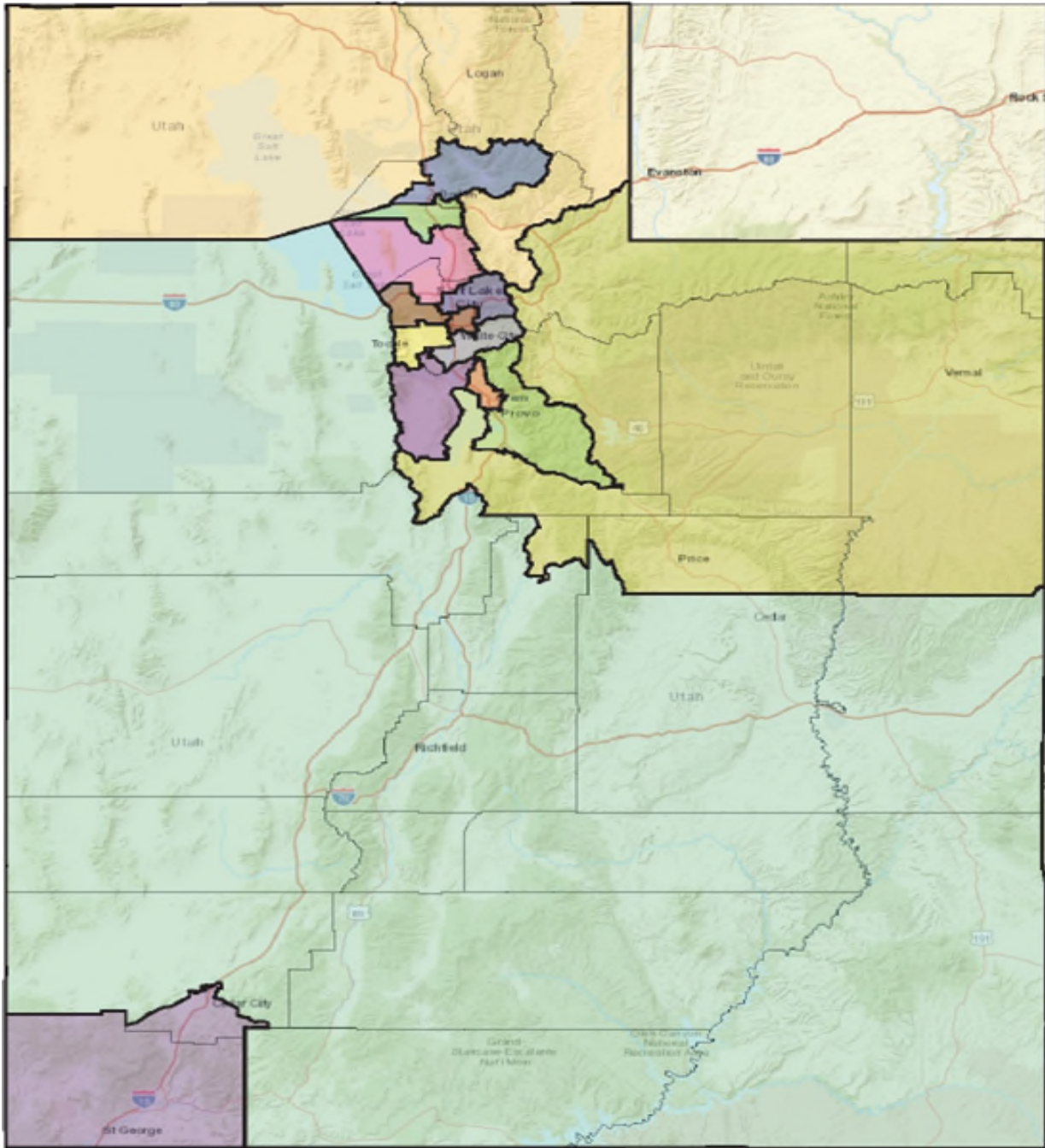
Purposeful or Undue Favoring: The Commission will, to the extent practicable, prohibit the purposeful or undue favoring or disfavoring of an incumbent elected official, a candidate or prospective candidate for elected office, or a political party. In so doing, the Commission will consider direct or indirect evidence of intent and, where practicable, quantitative measures. The Commission will not use residential addresses of incumbents, candidates, or prospective candidates in creating its proposed maps

APPENDIX 2

HOUSE MAP



SCHOOL BOARD MAP



CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2023 a true, correct, and complete copy of the foregoing **Brief of Amicus Curiae in Support of Respondents** was filed with the Utah Supreme Court and served via electronic mail as follows:

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