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INTEREST OF THE AMICUS CURIAE

Jenny Wilson presently serves as Mayor of Salt Lake County. She submits this brief in support of respondents, however, in her individual capacity and not on behalf of Salt Lake County or its County Council. Mayor Wilson¹ has served as Mayor of Salt Lake County since January of 2019. Prior to holding that office, she served two non-consecutive terms on the Salt Lake County Council, the first beginning in 2005. She was a primary candidate for Mayor of Salt Lake City in 2006 and in 2016 served as Utah’s national committeewoman for the Democratic Party. Mayor Wilson was also the Democratic nominee for the United States Senate in 2018.

As a result of her long experience in politics in Salt Lake County, Mayor Wilson is uniquely cognizant of the operations of the County, the needs of its citizens, its interaction with the federal government – including Utah’s congressional representatives – and the distinct needs of its communities as defined by the municipal boundaries within Salt Lake County. In this respect, she is acutely aware of the impact of the 2021 Congressional Plan at issue in this litigation, the effect of such plan on the citizens of Salt Lake County, and the need for adequate representation. Accordingly, Mayor Wilson’s interest is in providing commentary and context to demonstrate the implications of the 2021 Congressional Plan on her constituents and to advocate that her constituents’ rights should be afforded the opportunity for protection through the above-captioned litigation.

¹ While reference is made to Mayor Wilson using the honorific appropriate for a person in her elected position, this should not be construed as an indication that she purports to offer support to Respondents on behalf of Salt Lake County.

NOTICE, CONSENT, AUTHORSHIP, AND FUNDING

Pursuant to Utah R. App. P 25(b), amicus curiae Mayor Wilson has given timely notice to the parties of this amicus brief, and they have consented the filing of this amicus brief. None of the parties' counsel authored this brief in whole or in part or contributed money to fund the preparation or submission of this brief. And no other person except amicus curiae or their counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

The right to vote and to have that vote count is the DNA of our democratic government. In the words of the United States Supreme Court, and emphasized by Plaintiffs-Respondents ("Respondents") in their Complaint in this matter,

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms of cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Reynolds v. Sims, 377 U.S. 533, 562 (1964). Mayor Wilson endeavors to protect this fundamental right so that she and her fellow residents of Salt Lake County are given the ability to actively participate in elections and obtain the representation to which they are entitled consistent with their unified communities of interest. Mayor Wilson does so in her personal capacity and as an individual impacted by the gerrymandering Respondents' action seeks to address.

Mayor Wilson does not now advocate on the ultimate conclusion in this action as to the constitutionality of the Legislature's conduct. Rather, she advances Respondents' request that the Court affirm the district court's order allowing Respondents' claims to proceed. These claims implicate fundamental and justiciable constitutional rights jeopardized by the Legislature's fracturing of Salt Lake County. Throughout history, our government and the British before us recognized the importance of drawing representative districts congruous with municipal boundaries to support the interests of county communities, render government accessible, and create faith and trust in the system. Like all others, the residents of Salt Lake County rely upon the cohesiveness between political subdivisions and the communities of interest that they represent. And like all others, the residents of Salt Lake County feel the detrimental impact of the Legislature's disregard of these principles.

The interests of Salt Lake County residents must be afforded the opportunity for protection through litigation on the constitutionality of the Legislature's 2021 Congressional Plan at issue in this litigation. The Plan deviates from the traditional focus on keeping counties together and puts at risk the right to participate in free and fair elections, the right to equal protection, the right to freedom of speech and association, and the right to vote protection, all of which are guaranteed by the Utah Constitution.

Mayor Wilson respectfully supports Respondents' request that this Court affirm the underlying order denying dismissal of Counts I through IV of its Complaint and allow this matter to proceed to final adjudication and provide relief for the 2024 election.

ARGUMENT

I. The Congressional Plan at Issue Disregards County and Municipal Boundaries Depriving Communities of Cohesive Representation.

The 2021 Congressional Plan at issue in this litigation created four congressional districts with roughly equal populations of 817,904 residents based on the population of Utah as determined by the 2020 United States Census of 3,271,616.² Of this total population, 1,186,257 people live in Salt Lake County.³ [R.20]. Based on these figures, fulfilling the goal of creating districts with roughly equal populations, Salt Lake County would necessarily need to cover two congressional districts to maintain equal populations. This was not, however, what the Legislature decided to do. Rather than split the county among two districts, or even three – as Mayor Wilson advocated⁴ – the Legislature divided Salt Lake County among all four congressional districts. [R.7]. In doing so, the Legislature threatened Salt Lake County residents’ rights to adequate representation consistent with their county and municipal boundaries.

² See “Utah,” U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/UT,saltlakecountyutah,saltlakecitycityutah/PST045222> (last viewed May 17, 2023).

³ See *id.*

⁴ Mayor Wilson attended a meeting of the Utah Independent Redistricting Commission on October 21, 2021, at which time she advocated for Salt Lake County being split between two and no more than three districts. See, e.g., Commission Meeting Minutes, available at <https://www.utah.gov/pmn/files/792361.pdf> (last viewed May 13, 2023); see also Recording of October 21, 2021 Commission Meeting, available at https://www.youtube.com/watch?v=ldE9Q_f11UI&t=1102s (last viewed May 13, 2023).

A. Salt Lake County residents share commonalities beyond political party.

As alleged by Respondents, Salt Lake County contains Utah's largest concentration of non-Republican voters. [R.6-8.]. It is also unified by the nature of its population and the issues facing its predominantly urban community.

With its population and business centers consolidated largely in Salt Lake County and the Wasatch Front, Utah has grown to the seventh most urbanized state in the United States. [R.20.] The Salt Lake County population is predominantly urban and consists of, in significant part, people who identify as racial and/or ethnic minorities. [R.20-21.] As alleged in Respondents' Complaint, Salt Lake County is the center of Utah's racially and ethnically diverse populations. The percentage of Salt Lake County residents who identify as racial and/or ethnic minorities increased from 26% in 2010 to 32.4% in 2020. [R.21.] This amounts to over 350,000 people. And multiple municipalities within Salt Lake County are now considered "majority-minority" such as West Valley City, with minority groups making up over 51.4% of the population. [R.21.]

These factors and features of Salt Lake County that differentiate it from other Utah counties mean that its residents share community, political, and economic resources; they have interests that necessarily differ from the equally important interests of Utah residents living in more rural counties. For example, Salt Lake County residents generally rely on the same infrastructure with the understanding that it will be governed, on a local basis, by politicians elected to serve the needs of the community living in a more urban environment that is located within the political boundaries of Salt Lake County.

In this respect, the citizens of Salt Lake County have the ability to elect officials representative of their interests on a variety of levels according to the natural community needs as defined by local political boundaries. A Salt Lake City resident is represented by their local Mayor and City Council who have an obligation to work for the best interests of its citizens. The same can be said of Draper, West Valley City, and Millcreek, among the various other political subdivisions of Salt Lake County. These same citizens are also represented by Salt Lake County, the larger political subdivision of which they are members. At this level they are represented by Mayor Wilson and the Salt Lake County Council, which is reflective of the political dispersion within the larger County as demonstrated by the Salt Lake County Council district lines.

Salt Lake County utilizes an independent redistricting commission to define its council districts according to certain defined criteria. *See, e.g.*, Salt Lake County Code of Ord., §§2.71.010 & 2.71.050. This includes, among other things, where possible, the alignment of County districts with the jurisdictional boundaries of municipalities and townships and expressly prohibits political gerrymandering for political advantage. *Id.* at §§ 2.71.050(B)(3) & (B)(5). These criteria are consistent with the larger mandate that while the Council districts “shall have substantially equal populations” they should also, “to the extent practical, remain consistent with the original geographical configuration and representation” to all for “continuity and ease of contact between residents and district Council members.” *Id.* at 2.04. Each of the nine members of the County Council, as well as the Mayor, are bound to serve their population irrespective of party affiliation in providing infrastructure and resources.

Within Salt Lake County and the cities and unincorporated areas lying therein, the residents *might* share political views, but they assuredly do share common infrastructure and needs. This would include such things as sewers, power grids, schools, parks, street maintenance, and the like. The infrastructure and resources associated with the administration of local government, on the city or county level, inherently necessitate advocacy for federal resources and assistance. This may include the application for and administration of funds for transportation, schools, roads, housing, environmental resources, and others. It would include the potential need to seek federal assistance in the event of a natural or man-caused disaster that may afflict residents of Salt Lake County or the municipalities that comprise the county.

The interests of Salt Lake County residents are in many ways aligned with the local political subdivisions in which they reside. That is, it is presumed that residents of Millcreek will share common interests and needs; residents of Riverton will share common interests and needs. These needs are addressed by local representatives elected by the members of the community. And the residents of Salt Lake County, likewise, share common resources, problems, and solutions, for which the County represents the whole.

Under the congressional districts approved by the Legislature and challenged in this matter, the Legislature threatens the ability of Salt Lake County residents to seek uniform federal representation and assistance aligned with their community needs and the community's political ethos. Both urban and rural voters voiced this concern over the potential for divided interests during the redistricting process. [R.52-53, 774-75.] Yet that

is what the current congressional district structure requires of Utah’s congressional representatives; it requires congressional representatives to advocate not for a consistent group, but for a wide array of potentially disparate or inapposite interests. They could be required to opine and advocate for the air quality interests of the urban Wasatch Front and the oil and gas interests of Vernal. Fracturing Salt Lake County diminishes the import of political subdivisions calculated to assure representation and threatens substantial conflict between the dissimilar interests of each representative’s rural and urban constituents.

B. The 2021 Congressional Plan fractures Salt Lake County and deprives residents of representation.

The 2021 Congressional plan at issue in this litigation divided Salt Lake County among each of the four (4) congressional districts. The district lines – as alleged in Respondents’ Complaint – bisect Salt Lake City’s Main Street and Temple Square, and then cut sharply to the east and south, fragmenting residential areas. [R.7, 58.] Perhaps most acutely, all four district boundaries meet near the heart of Millcreek, dividing a population of approximately 63,000⁵ into each of the four separate congressional districts. [R.68-69.] Other urban political subdivisions within Salt Lake County are similarly divided including Murray (population approximately 50,000), Midvale (population 36,000), and West Valley City (population 140,000).

⁵ See U.S. Census Bureau, “Millcreek City, Utah”, <https://www.census.gov/quickfacts/millcreekcityutah> (last viewed May 17, 2023).

The paring of these political subdivisions means that neighbors, who share common roads, sewer systems, schools, parks, and other infrastructure are represented by separate congressional districts. In this respect, a resident of Millcreek is represented by a single City Mayor, a single County Mayor, but four separate congressional representatives. That is, one Millcreek resident may be within walking distance of four neighbors, each of whom resides in a separate congressional district. Residents of Millcreek in need of assistance can, again, appeal to a single City Mayor, a single County Mayor, but in the event of the need for federal assistance in the event of a natural disaster or otherwise, would need to appeal to four separate congressional representatives. [R.68.]

Individuals living in Salt Lake County may send their children to the same school, use the same bus routes, travel on the same highways, make use of the same parks, but be directed to separate representatives for federal representation. The community interest that is represented by city and county boundaries and officials dissipates and is non-existent at the federal level. Moreover, each of these four elected representatives are respectively aligned with both residents of Millcreek as well as with substantial rural districts with equally important but substantially disparate needs than the urban residents of Salt Lake County.

In this respect, a resident of Salt Lake County has different interests in crime prevention and transportation than a resident of Millard County. A resident of Salt Lake County has different interests in school funding and how it is allocated than a resident of Washington County. Nevertheless, the cracking and packing of Salt Lake County assures

that not even an overwhelming consensus of its population can elect an official that would be consistent with its views.

As noted above, each congressional district in the Plan subject to this litigation purports to represent approximately 817,000 residents of the State of Utah. When equally divided by the four districts, the population of Salt Lake County renders each district comprised of approximately 36% residents of Salt Lake County and 64% residents of other counties, including rural counties at the far ends of the state. [R.55-77.] This means that even if every Salt Lake County resident voted consistently with each other, they would still not be a majority of any congressional district. The votes of Salt Lake County residents are diluted by voters who live sometimes hundreds of miles away in rural areas with concerns that are equally important, but fundamentally different. And those elected to congress have an obligation not only to urban Salt Lake County residents and their concerns, but also to substantial numbers of rural voters who may not be as concerned, for example, about funding light rail systems along the Wasatch front.

This is not to say every resident of Salt Lake County has the same political alignment or that they would always vote consistently, but the day-to-day concerns remain the same. Nevertheless, even in the collective, they are deprived of the opportunity to vote for a federal representative to advocate for their interests.

As noted in Respondents' Complaint as well as above, Salt Lake County comprises 35% of the population of the State of Utah. Nevertheless, the 2021 Congressional Plan effectively dilutes the political voice of this population and eliminates the possibility and/or probability that this significant portion of the population can have

its interests adequately represented. A redistricting plan that gives voice to the residents of Salt Lake County is both necessary and required by traditional redistricting criteria that provide for the protection of rights recognized by the Utah Constitution.

II. Unnecessary Fracturing of Counties Implicates Actionable Constitutional Rights.

While the process of drawing districts has varied since this country’s inception, one criterion has stood the test of time – keeping counties and municipalities together. That is, even where disagreement is rife among courts and scholars as to what “traditional districting” principles means, preserving county and city boundaries emerges as an outlier for its nearly universal acceptance. And this acceptance is not surprising when examining the history of this country.

A. Counties hold historical prominence as voting centers.

The “modern American county” can be traced back to at least 1066 and the English shire – “an administrative unit that William the Conqueror retained after the Norman Conquest of 1066.” Benjamin Plener Cover & David Niven, *Geographic Gerrymandering*, 16 Harv. L. & Pol’y Rev. 159, 180 (2021) (citing Tanis J. Salant, *Overview of County Governments*, in *How American Governments Work: A Handbook of City, County, Regional, State, and Federal Operations* 117 (Roger L. Kemp ed., 2002)). These English “counties” enjoyed a “dual identity as both a top-down administrative arm of the state and a bottom-up mechanism of local control.” *Id.* And, eventually, counties became the unit of representation in English Parliament. *Id.* (citing

Robert Luce, *Legislative Principles: The History And Theory Of Lawmaking By Representative Government* 331 (1930)). And with colonization, the county-based representative government found its footing in North America. Cover & David Niven, *supra*, at 180.

Not surprisingly, then, James Madison noted in *Federalist 56* that, “[i]t is [a] sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents.” John A. Curiel Steelman & Tyler Steelman, *Redistricting Out Representation: Democratic Harms in Splitting Zip Codes*. *Election Law Journal*. 2018;17 (4): 332 (quoting Hamilton, Alexander, James Madison, and John Jay. 1788. *The Federalist Papers*. Mineola, NY: Dover Publications: 275). Embodying this principle, “[i]n nearly every state, governments represented the people through apportionment of representatives to counties or townships.” Curiel & Steelman, *supra*, at 332 (citing Kromkowski, Charles A. 2002. *Recreating the American Republic: Rules of Apportionment, Constitutional Change, and American Political Development, 1700-1870*. Cambridge, UK: Cambridge University Press).

Indeed, counties existed precisely to function as a political unit with a representative designated to advance the interests of its constituents. Curiel & Steelman, *supra*, at 332. And by delineating localized representation through county borders, the founders ensured “deliberate government by the people.” *Id.* at 333. Per Madison, again, “The natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as public functions demands.” *Id.* (quoting Hamilton, Alexander, James Madison, and John Jay. 1788. *The Federalist*

Papers. Mineola, NY: Dover Publications: 62). And it is from these roots and this focus on representative government that counties – and the protection of county and municipal boundaries – garnered favored status in the discussion of traditional districting principles. *Id.*

B. County cohesion has been considered a “traditional districting” criterion in case law and statutes.

With respect to congressional districting, counties likewise functioned as the foundation for the first districts. Cover & Niven, *supra*, at 181 (citing Engstrom, Erik J., *Partisan Gerrymandering and the Construction of American Democracy*, University of Michigan Press, 2013, p. 89). “For congressional districting, county preservation was not a requirement of positive law, but a traditional practice.” Cover & Niven, *supra*, at 181 (citing Micah Altman, *Districting Principles and Democratic Representation* 1, 163, n. 112 (1998) (Ph.D. dissertation, California Institute of Technology) 21 (1998)). And while the protection of the county boundary subordinated to the population equality requirement during the reapportionment revolution, it nevertheless remained a guiding traditional districting principle justifying at times deviations from the equal population mandate. Cover & Niven, *supra*, at 184-186.⁶ To be sure, “after the Court established the

⁶ Consistent with the standards applied by Salt Lake County discussed *supra*, prior to the reapportionment revolution, Utah’s Constitution originally stated, “When more than one county shall constitute a senatorial district, such counties shall be contiguous, and no county shall be divided in the formation of such districts unless such county contains sufficient population within itself to form two or more districts, nor shall a part of any county be united with any other county in forming any district. . . . In any future apportionment made by the Legislature, each county shall be entitled to at least one representative.” *Petuskey v. Clyde*, 234 F. Supp. 960, 967 (D. Utah 1964) (quoting Utah

equal population mandate, states did not abandon their historical commitment to county preservation in state and congressional districting. Instead, states tried to preserve the role of counties to the extent possible while achieving substantially equal population.” *Id.* at 186. In turn, the United States Supreme Court recognized in *Gaffney v. Cummings*, 412 U.S. 735, 748-49 (1973) (cleaned up) that

Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. An unrealistic overemphasis on raw population figures, a mere nose count, in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

In other words, while the Court was loathe to veer too far off the equal population path, it “consistently recognized the preservation of local units as one of the few state interests justifying some departure from population equality for state and local districts.” Cover & Niven, *supra*, at 181 (citing *Abate v. Mundt*, 403 U.S. 182, 183 (1971) and *Mahan v. Howell*, 410 U.S. 315, 333 (1973)).

Accordingly, in *Shaw v. Reno*, 509 U.S. 630 (1993), the Court found that the

Const. art. IX, s. 4 (1896)); *see also Petuskey v. Clyde*, 234 F. Supp. 960, 969 (D. Utah 1964) (Ritter, J., concurring) (“Article IX of the Utah Constitution is unconstitutional insofar as each county is given a representative regardless of population”); *Id.* at 965 (“[T]o the extent that the provisions of Article IX of the Utah Constitution compel an apportionment of representation in the Utah Legislature that is violative of the Constitution of the United States, such provisions of the Utah Constitution are themselves unconstitutional and should not be regarded as mandatory upon the legislature of Utah when such provisions are considered either singly or in combination.”).

plaintiffs had sufficiently stated a claim upon which relief could be granted under the equal protection clause where districts were so irregularly drawn that they could only be rationally viewed as racially motivated rather than guided by traditional districting principles. In so finding, the Court observed that “of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided.” *Id.* at 636. The Supreme Court has long recognized that traditional districting criteria include “respect for political subdivisions,” *i.e.*, county boundaries. *Id.* at 647; *see also Davis v. Mann*, 377 U.S. 678, 686 (1964) (“And, because of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed only of combinations of counties and cities and not by pieces of them.”).

The desire to keep counties together also shows up in state statutes. As observed in 2021, 39 states had an explicit requirement to follow county boundaries when drawing state legislative districts and 27 states required following county boundaries in drawing congressional districts. Yunsieg P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of “Traditional” Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 Wisc. Law Rev. 1:184. Despite all of the disagreement, there has been since the founding of this country – and even before – longstanding consensus that counties should not be needlessly divided. And, as discussed below, these concerns are appropriately addressed through litigation – such as this – to assure and protect voters’ constitutional rights.

III. When Counties Are Fractured Unnecessarily, Voters – and Their Representatives – Are Harmed.

Justice White observed in *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973),

The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.

To be sure, the political implications of district lines might be readily evident might from looking at a map, but the degree to which the unnecessary fracturing of counties alienates voters goes deeper than is immediately apparent.

“The election process begins and ends at the county level.” Cover & Niven, *supra*, at 188 (citation omitted). This geographic unit “comprised of people with an array of geographic and economic commonalities” and “natural communities of interest.” *Id.* And it is the county that administers “local, state, and national” elections. *Id.* As discussed above with respect to Salt Lake County, “voters in the same neighborhood are likely to belong to the same social communities and share political interests; voters in the same area are better able to communicate and coordinate with one another; politicians can better maintain connections with voters in the same area” Daryl R. DeFord, Nicholas Eubank, and Jonathan Rodden, *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering*, *Political Analysis*, 1, 5 (2021). Thus, dividing up counties unnecessarily has detrimental effects for not only voters but also the people on the ticket. As scholar Donald E. Stokes noted, “interview studies ... show how much more salient to his voters is the congressman whose district comprises a ‘natural’

community ... than the congressman who district is a fraction of a great metropolitan complex.” Cover & Niven, *supra*, at 188 (2021) (quoting Donald E. Stokes, *Parties and the Nationalization of Electoral Forces in the American Party Systems*, in *The American Party Systems: Stages of Political Development* 197 (William Nisbet Chambers & Walter Dean Burnham, eds., 1967).

A. Fracturing counties hurts voter recall of their representative.

When the county line and district line are incongruous, voters “have a harder time identifying their member of Congress.” Cover & Niven, *supra*, at 189 (citing Richard G. Niemi et al., *The Effects of Congruity Between Community and District on Salience of U.S. House Candidates*, 11 *Legis. Stud. Q.* 187, 193 (1986)). As one study shows, even “while accounting for the influence of various measures of member prominence and voter interest, ... respondents in congruent districts were 8% more likely to recall the name of their incumbent member of Congress and 13% more likely to recall the name of the challenger candidate.” Cover & Niven, *supra*, at 189 (citing Niemi et al., *supra*, at 193). The consequences of impaired recall are significant when it comes to voting:

In their study on redistricting’s effect on election outcomes, Hood and McKee found that candidate awareness was a primary driver of voter decisions such that respondents who could not recall a candidate were quite unlikely to vote for that candidate. Meanwhile, as Winburn and Wagner warn, incongruency is associated with lower awareness of House candidates but not lower voter participation. Which is to say, residents of incongruent districts are left to cast their ballots with less access to information about whom they are voting for or against.

Cover & Niven, *supra*, at 189-90 (citing M.V. Hood III & Seth C. McKee, *Stranger Danger: Redistricting, Incumbent Recognition, and Vote Choice*, 91 *Soc. Sci. Q.* 344,

347 (2016) and Jonathan Winburn & Michael W. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout and Voting Behavior*, 63 Pol. Rsch. Q. 373, 376 (2010)); *see also* Curiel & Steelman, *supra*, at 341-42 (finding that where zip codes were divided among congressional districts, such splits reduced representative recognition and that these reductions were even greater when the representative and voter were members of different political parties or races).⁷

B. Fracturing counties hurts voter-representative relations.

When voters can't recall their representative's name, it becomes difficult to hold that representative responsible when those voters do not feel adequately represented. There is no relationship between the voter and the representative, and again this works to the detriment of both. "Members thrive where some sense of community already exists." Cover & Niven, *supra*, at 193 (quoting Richard F. Fenno, Jr., *Home Style: House Members In Their Districts* 250 (1978)). "But – importantly – where districts lack coherence, members are hard pressed to cobble together commonalities and connections that are not already there." Cover & Niven, *supra*, at 193.

⁷ And the confusion doesn't end with the voters. Consider the case of Ohio's 12th district, which includes "the entirety of three counties and bits of four others" – including Franklin County. "The Franklin County Board of Elections revealed that from 2012 through the 2018 primary election, 2,000 county voters had been assigned to the wrong congressional districts in county election files. For six years, the county gave those voters the wrong ballot and counted those votes for the wrong candidates." Benjamin Plener Cover & David Niven, *Geographic Gerrymandering*, 16 Harv. L. & Pol'y Rev. 159, 189 (2021) (citation omitted) (citing Jeremy Pelzer, *More Than 2,000 Franklin County Voters Were Assigned to Wrong Congressional District, Election Officials Say*, Cleveland.com (June 29, 2018), https://www.cleveland.com/open/index.ssf/2018/06/2000-frankling_county_voters_we.html).

And, thus, in districts where the district line is not congruous with the county line, voters are less likely to have “positive evaluations of their member of Congress’s constituent service.” *Id.* (citing Daniel C. Bowen, *Boundaries, Redistricting Criteria, and Representation in the U.S. House of Representatives*, 42 Am. Pol. Rsch. 856, 858 (2014)). Voters are also less likely to contact their representatives in incongruous districts. Cover & Niven, *supra*, at 193 (citing Curiel & Steelman, *supra*, at 340-42).

Consistent with this finding, incongruent districts “are likely to foster more ideological distance between constituents and their members of congress.” Cover & Niven, *supra*, at 193 (citing Curiel & Steelman, *supra*, at 340-42). This makes practical sense because where districts split counties, they also split communities of interest leaving a representative to try and “make sense of disparate interests.” Cover & Niven, *supra*, at 194.⁸

C. When districts are drawn to unnecessarily fracture counties, voters have constitutional remedies.

As former Representative Ralph Regula observed, “[o]ne of the key elements of a congressional district is that people have to know where to go when they need help.” Cover & Niven, *supra*, at 193 (quoting Jim Siegel, *His Car Can Handle Miles of Redrawn District, Say Stivers*, Columbus Dispatch (Sept. 21, 2011, 12:01 AM), <http://www.dispatch.com/article/20110921/news/309219702>). When voters cannot recall

⁸ One study even suggests that “‘packed’ and ‘cracked’ voters might receive fewer fiscal transfers”. Daryl R. DeFord, Nicholas Eubank, and Jonathan Rodden, *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering*, *Political Analysis*, 1, 5 (2021) (citing Stashko, A. 2020. *Crossing the District Line: Border Mismatch and Targeted Redistribution*. Working Paper, University of Utah).

their representative and otherwise feel no relationship with their representative, their voting power suffers. When “clusters of voters [are] carved out of their natural communities and pooled with other voters in an effort to dilute their political influence[,]” it not only “may undermine the political effectiveness of these voters, but it may also deprive them of the benefits associated with belonging to a coherent constituency.” Daryl R. DeFord, Nicholas Eubank, and Jonathan Rodden, *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering*, *Political Analysis*, 1, 5 (2021). This is a harm that keeping counties from unnecessary and unnatural fractures seeks to prevent.

In the words of Alexander Hamilton, “[t]here can be no truer principle than this – that every individual of the community at large has an equal right to the protection of the government.” *Evenwel v. Abbott*, 578 U.S. 54 65, (2016) (quoting 1 Records of the Federal Convention of 1787, p. 473 (M. Farrand ed. 1911)). By drawing district lines that fracture counties more than mathematically necessary, the legislature denies voters equal protection of the government and dilutes the right to vote. Accordingly, amicus respectfully submits that Utah Supreme Court should affirm the district court’s denial of Defendants-Appellants’ motion to dismiss on Plaintiffs-Respondents’ Counts I through IV of the Complaint to preserve the mechanisms that protects the public when the Legislature dilutes their vote by fracturing counties.

D. Focusing on county cohesion avoids the justiciability concerns raised in *Rucho*.

Of course, in addition to the reapportionment revolution and district population equality, growing populations and large city centers will necessarily require more county division today than contemplated by Madison's philosophical concern for the importance of accessible government. But counties should not be split more than necessary, and these splits should be minimal, particularly at the congressional level because of the relatively large size of the districts. As posited by Benjamin Plener Cover & David Niven in *Geographic Gerrymandering*, 16 Harv. L. & Pol'y Rev. 159, 181 (2021), whether a county has been needlessly split is calculable.

A state's ideal district population is the state's total population divided by the number of districts in the state's congressional map. We then define a county's population ratio as the county's [] population divided by the state's ideal district population. A county's population ratio tells us how many county splits a mapmaker must impose to satisfy the equal population mandate. If a county's ratio is less than one, no split is required; if the ratio is between one and two; one split is required. More generally, the number of splits a county requires is the county's population ratio rounded down to the nearest integer

Cover & Niven, *supra*, at 196. Using Salt Lake County, Utah, as an example, as noted above, the 2020 population of Utah was 3,271,616. *See* United States Census Bureau, Utah: 2020 Census, <https://www.census.gov/library/stories/state-by-state/utah-population-change-between-census-decade.html> (last visited 13 May 2023). With 4 congressional districts, the ideal district population for Utah is 817,904 (3,271,616/4). The 2020 population of Salt Lake County was 1,185,238. *Id.* Thus Salt Lake County's population ratio – or the number of splits required – is 1 (1,185,238/817,094 = 1.45).

Under this theory, Salt Lake County should be split only once and anything in excess of that makes it a needlessly fractured county. Cover & Niven, *supra*, at 196.

In this same vein, Yunsieg P. Kim and Jowei Chen in *Gerrymandered by Definition: The Distortion of “Traditional” Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 Wisc. Law Rev. 1, also push for an objective approach, by defining traditional districting criteria based on normative principles. In particular, they define “traditional” districting criteria to include only those criteria which are “permitted by twenty-six or more states and prohibited by twelve or fewer” namely, “equal population, compactness, contiguity, and preserving city and county boundaries.” *Id.* at 104.

The value of mathematical or empirical principles is that they do not require the Court to consider partisan gerrymandering, a claim eschewed Justice Roberts in *Rucho v. Common Cause*, 139 S.Ct. 2484, 2500 (2019) as federally non-justiciable. As Justice Roberts laments,

The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in [redistricting] Fairness may mean a greater number of competitive districts. ... But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. ... On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by ... cracking and packing, to ensure each party its “appropriate” share of “safe” seats. ... Such an approach, however, comes at the expense of competitive districts. ... Or perhaps fairness should be measured by adherence to “traditional” districting criteria, such as ... keeping communities of interest together, and protecting incumbents. ... But protecting incumbents, for example, enshrines a particular partisan distribution. ... Deciding among just these different visions of fairness ... poses basic questions that are political, not

legal. There are no legal standards discernible in the Constitution for making such judgments

But these mathematical and empirical approaches which protect the county boundaries do not require Justice Roberts “or any other judge to impose as law their personal opinions regarding traditional criteria.” Kim & Chen, *supra*, at 119. That is, by framing the alleged harm in geographic terms “(e.g., disproportionate county splits)” ... “many of the justiciability problems” are avoided. Cover & Niven, *supra*, at 212.

Geographic representation cannot be rejected as a subjective norm inconsistent with the theoretical underpinnings and traditional practices of the American electoral system. Geographic representation reflects the traditional practices and the representational theory underlying the American electoral system. The predominance of geographic districting, both historically and today, indicates its significance. The States themselves demonstrate the value they accord to geographic representation by adopting districting criteria designed to promote it.

Id. at 213. In other words, consideration of county boundaries and geographic gerrymandering (irrespective of whether it is also partisan gerrymandering) presents a justiciable controversy as to whether unnecessary splits violate voters’ equal protection rights, free speech and association rights, and the affirmative right to vote.⁹

⁹ This is not to say that partisan gerrymandering does not also present a justiciable controversy in its contravention of one-person, one-vote. “Assume, for example, that a state has 50 voters, 30 of whom vote for Party A and 20 for Party B. Further assume that each district elects one representative and consists of ten voters. Under proportional representation, this state would elect three representatives from Party A and two from Party B. However, assume that each district is drawn to include six voters who support Party A and four who support Party B. Then, because Party A’s candidates would win in every district by two votes, this state would elect five, not three, candidates from Party A. ... [This] violates one-person, one-vote, because the redistricting eliminates 20 voters’ influence on government by guaranteeing that their votes will be wasted” Yunsieg P. Kim and Jowei Chen in *Gerrymandered by Definition: The Distortion of “Traditional” Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 Wisc. Law

And ultimately, it is the protection of these rights that requires a court to consider the cohesiveness of counties in congressional maps. As discussed above, the rights that suggest a traditional deference to boundaries are the rights of which residents of Salt Lake County have been deprived due to the cracking and packing worked by the 2021 Congressional Plan at issue in this matter. That is, the same reasons underlying the focus on counties underlying this this country's founding necessitate the cohesive treatment of county boundaries today - because, as set forth below, without it, voters – and votes – are lost in deprivation of constitutional rights.

CONCLUSION

For the reasons set forth herein, Mayor Wilson respectfully supports Plaintiffs-Respondents' request that this Court affirm the underlying order denying dismissal of Counts I through IV of its Complaint and allow this matter to proceed to final adjudication and provide relief for the 2024 election.

DATED this 19th day of May, 2023.

PARSONS BEHLE & LATIMER.

By: /s/ Nathan D. Thomas

Nathan D. Thomas

Elizabeth M. Butler

Attorneys for Amicus Curiae Jennifer Wilson

Rev. 1, 132-33. This abrogation of constitutional rights is a harm courts – both federal and state - exist to address.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of May, I caused a true and correct copy of the foregoing to be served via electronic mail on the following:

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