

**UTAH INDEPENDENT REDISTRICTING COMMISSION**  
Proposed Threshold Criteria and Redistricting Standards

Draft: July 27, 2021

*The following proposal is intended to help guide the work of the Utah Independent Redistricting Commission (“UIRC” or the “Commission”) as it seeks to fulfill its statutory duties. The following proposal discusses how the UIRC will evaluate maps in light of the threshold criteria and redistricting standards. The Commission is committed to following a criteria-driven approach. The proposed criteria and requirements below are intended to aid that effort.*

*Comments on the proposed threshold criteria and redistricting standards are due by August 20, 2021 at 5:00 PM MTN. The Commission will review all comments, make any adjustments necessary, and release a final version no later than September 1, 2021.*

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## **Threshold Criteria, Utah Code § 20A-20-302(4)**

### **PROPOSED CRITERION 1.**

#### **Legislative Redistricting Principles**

The Commission will submit maps that comply with the Redistricting Principles as adopted by the Legislative Redistricting Committee. These Redistricting Principles have been incorporated into proposed criteria (2), (3), and (4).

#### Discussion:

Section 302(4) states that the Commission “shall ensure” that each map and district meet certain criteria. These criteria largely mirror the [“Redistricting Principles”](#) adopted by the Legislative Redistricting Committee (hereinafter, the “Legislative Committee”). The Commission is committed to ensuring that its recommended maps are viable both in the eyes of the courts and the Legislature. Therefore, the Commission intends to treat the “Redistricting Principles” adopted by the Legislative Committee as the floor for all maps proposed for consideration.

### **PROPOSED CRITERION 2.**

#### **Population Deviation**

The Commission will only submit maps that are drawn using the official population enumeration of the most recent decennial census. Each district will be drawn using the total population figure of the most recent decennial census. The Commission will make a good faith effort to achieve numerical equality across districts. For congressional districts, the total population deviation shall not exceed  $\pm 0.1\%$ ; and for State House, State Senate, and State School Board, the total population deviation shall not exceed  $\pm 5.0\%$ . The term “total population deviation” is defined in Utah Code § 20A-20-302(b).

#### Discussion:

One notable difference between the “Redistricting Principles” adopted by the Legislative Committee and Section 302(4) is that the Legislative Committee has adopted a smaller total population deviation than that required of the Commission under Section 302(4). In any event, the U.S. Supreme Court has rejected an exact standard for permissible population variation.<sup>1</sup> The Court has interpreted the Equal Protection Clause as requiring that the vote of any citizen be “approximately equal in weight to that of any other citizen in the state.”<sup>2</sup> Therefore, the

<sup>1</sup> See *Karcher v. Daggett*, 462 U.S. 725, 725–26 (1983) (“There are no de minimis population variations, which could practicably be avoided, that may be considered as meeting the standard of Art. I, § 2, without justification.”).

<sup>2</sup> *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

Commission is proposing that its maps, to the extent possible, achieve approximate equality. In no instance, however, will the population deviation of a proposed Commission map exceed that required by the State Legislature.

**PROPOSED CRITERION 3**

**Federal & State Law**

The Commission will not use race as a predominant factor in drawing district lines and any map submitted shall comply with the United States Constitution, all applicable federal laws, including Section 2 of the Voting Rights Act. In evaluating the requirements of this Subsection, the Commission shall rely on the current precedent of the United States Supreme Court, the 10th Circuit Court of Appeals, and, where applicable, the Utah Supreme Court.

Discussion:

The Commission is committed to abiding by the United States Constitution, all applicable federal laws, and Section 2 of the Voting Rights Act. While these general standards do not cater to an exact definition, the Commission will review each map submitted to the State Legislature to verify that it is in compliance with federal and state law.

**PROPOSED CRITERION 4**

**Single Member Districts & Contiguity**

The Commission will only recommend maps in which each district in each map is a single member district. A single member district is defined as an electoral district represented by a single officeholder, rather than two or more officeholders. Furthermore, each district will be contiguous, meaning that no part of a district can be entirely separated from the remainder of the district.

Discussion:

The Commission is required to propose maps with single-member districts. A single member district is defined as “an electoral district represented by a single officeholder, rather than two or more.”<sup>3</sup> Federal law also requires single-member districts.<sup>4</sup>

Districts are also required to be contiguous. This means that all parts of a district must be connected at some point with the rest of the district.<sup>5</sup> Contiguity is often considered in evaluating whether a district was unlawfully gerrymandered.<sup>6</sup>

<sup>3</sup> *Single Member District*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/single-member%20district> (last visited June 24, 2021).

<sup>4</sup> See 2 U.S.C. § 2c; see also *Branch v. Smith*, 538 U.S. 254, 270 (2003).

**PROPOSED CRITERION 5**

**Reasonably Compact**

The Commission shall, to the extent practicable, submit maps with districts that are reasonably compact. Compactness means that districts shall avoid odd shapes or contortions that cannot be explained by other legitimate redistricting criteria.

Discussion:

Each district in each map type must be “reasonably compact.” Unfortunately, there is no universally agreed upon measure of compactness and, unlike contiguity, compactness is not a binary concept. Still, courts regularly consider compactness in examining whether a district has been gerrymandered.<sup>7</sup> Currently, there is no federal standard for measuring compactness. Even where state law prescribes compactness standards, courts have difficulty enforcing them since there is no established threshold at which a district is no longer considered compact.<sup>8</sup> Currently, thirty-seven states have a compactness requirement for their state legislative or congressional districts, but the requirements range from general language calling for reasonable compactness, to specific technical measures of compactness.<sup>9</sup>

Generally speaking, compactness refers to the quality of being closely packed together.<sup>10</sup> The Supreme Court has held that a district that “reaches out to grab small and apparently isolated minority communities’ is not reasonably compact.”<sup>11</sup> Some courts have even relied upon the imprecise adage “you know it when you see it,” when evaluating compactness of electoral districts.<sup>12</sup>

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<sup>5</sup> *Redistricting Criteria*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> (last visited June 24, 2021).

<sup>6</sup> See *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

<sup>7</sup> *Id.*

<sup>8</sup> The Arizona Constitution requires that districts be “geographically compact and contiguous to the extent practicable.” ARIZ. CONST. art. 4 pt. 2 § 1(13)(c). The Arizona Independent Redistricting Commission used a minimum compactness score known as the Polsby-Popper score in order to comply with the constitutional compactness requirement. The California Constitution requires geographical compactness “to the extent practicable . . . such that nearby areas of population are not bypassed for [a] more distant population.” CAL. CONST. art. XXI § 2(5). The Colorado Constitution requires that every district be “as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible.” COLO. CONST. art. V §§ 46-48.3. The Michigan Constitution requires that every district be “reasonably compact.” MICH. CONST. art. IV § 6(13)(g). To comply with this requirement, Michigan code governing its redistricting commission states that “[c]ompactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area . . . inside the circle but not inside the district.” Mich. Comp. Laws Ann. § 4.261(j).

<sup>9</sup> Michael McDonald, *The Predominance Test: A Judicially Manageable Compactness Standard for Redistricting*, 129 Yale L.J. Forum, 18, 22 (2019).

<sup>10</sup> *Compact*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/compact> (last visited June 24, 2021).

<sup>11</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 402 (2006) (citing *Bush v. Vera*, 517 U.S. 952 (1996)).

<sup>12</sup> Aaron Kaufman, Gary King, and Mayya Komisarich, *How to Measure Legislative District Compactness If You Only Know it When You See It*, Am. J. of Pol. Sci. (forthcoming).

Still, significant effort has been made to develop precise measures of compactness. In fact, political scientists and legal experts have created almost 100 different technical measures of compactness.<sup>13</sup> These measures tend to focus on the **boundaries** of a district, **dispersion** from a central point, and the geographic distribution of the **population**. The utility of any measure may depend on the type and shape of the district. Boundary-based estimates focus on the perimeter of a district, the area of the district compared to the perimeter, or the area of the district compared to the area of a circle with a perimeter equal to the perimeter of the district.<sup>14</sup> A district with smooth boundaries will be more compact, while a district with jagged or bumpy boundaries will be less compact.<sup>15</sup>

Dispersion-based estimates focus on the dispersion of the area of a district from a central point. Dispersion measurements compare a district's height to its width, the district's total area to the area of the smallest shape that can be drawn around it, and/or the distance between a central point and the farthest perimeter.<sup>16</sup> Districts with thin elongated tendrils sticking out from the center will be less compact, while districts with fewer, shorter pieces sticking out from the center will be more compact.<sup>17</sup>

Finally, population-based measures consider the population of the district relative to its density. These measures tend to compare a district's geographic shape to its population "center of gravity."<sup>18</sup> Districts with a geographic center close to its population center are usually more compact, while districts with a population center far from its geographic center are less compact.<sup>19</sup>

Given the difficulty in estimating compactness, the Commission believes it is important to capture, if possible, both qualitative and quantitative measures of compactness. The Commission specifically requests comment on possible measures of compactness that might be most relevant to Utah.

### **Redistricting Standards, Utah Code § 20A-20-302(5)**

In addition the Threshold Criteria, Utah Code § 20A-20-302(5) also requires that the Commission consider six (6) standards in evaluating maps. These standards include:

1. preserving communities of interest;
2. following natural, geographic, or man-made features, boundaries, or barriers;
3. preserving cores of prior districts;
4. minimizing the division of municipalities and counties across multiple districts;
5. achieving boundary agreement among different types of districts; and
6. prohibiting the purposeful or undue favoring or disfavoring of:

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<sup>13</sup> *Id.* at 1.

<sup>14</sup> Justin Leavitt, Erika Wood, *A Citizen's Guide to Redistricting*, Brennan Center for Justice 51 (2010).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 52.

<sup>19</sup> *Id.*

- a. an incumbent elected official;
- b. a candidate or prospective candidate for elected office; or
- c. a political party.

**PROPOSED STANDARD 1.**

**Communities of Interest**

The Commission shall, to the extent practicable, preserve communities of interest. A “community of interest” is defined as a group of people in a contiguous geographic area that share common policy interests, whether cultural, religious, social, economic, or others that do not necessarily coincide with the boundaries of a political subdivision. A community of interest cannot be based on a relationship with a political party, incumbent, or political candidate.

Discussion:

Utah Code § 20A-20-302 requires that the Commission, to the extent practicable, preserve communities of interest. This requirement is common among independent redistricting commissions.<sup>20</sup> The idea behind a community of interest is that grouping certain communities together facilitates fair and effective representation.

There is no generally agreed upon way to define “community of interest.” According to the National Conference of State Legislatures (NCSL), a community of interest is a “[g]eographical area[,], such as neighborhoods of a city or regions of a state, where the residents have common political interests that do not necessarily coincide with the boundaries of a political subdivision, such as a city or county.”<sup>21</sup> The Colorado Constitution refers to communities of interest as including “ethnic, cultural, economic, trade area, geographic, and demographic factors.”<sup>22</sup> Kansas defines communities of interest as “[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation.”<sup>23</sup> California defines a community of interest as “[a]contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation.”<sup>24</sup> The California Constitution goes on to give examples of shared “social and economic interests,” including ethnicity, language, historical characteristics, religion, culture, trade area, living standards, transportation facilities, work opportunities, and economic interests.<sup>25</sup> Finally, Michigan defines communities of interest as

<sup>20</sup> See, e.g., COLO. CONST. art. V, § 47(3).

<sup>21</sup> *Redistricting Criteria*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> (last visited June 24, 2021).

<sup>22</sup> COLO. CONST. art. V, § 47(3).

<sup>23</sup> KANSAS LEGISLATIVE RESEARCH DEPARTMENT, GUIDELINES AND CRITERIA FOR 2012 KANSAS CONGRESSIONAL AND LEGISLATIVE REDISTRICTING (adopted Jan. 9, 2012).

<sup>24</sup> CAL. CONST. art. XXI, § 2(4).

<sup>25</sup> CAL. CONST. art. XXI, § 2(4); COLO. CONST. art. V, § 47(3); MICH. CONST. art. IV, § 6(13).

including, “but not limited to, populations that share cultural or historical characteristics or economic interest.”<sup>26</sup>

Recently, the Utah Legislature identified and honored the Asian American and Pacific Islander communities, highlighting the importance of these communities to the state of Utah, condemning attacks perpetrated specifically against those communities, and encouraging education and empathy.<sup>27</sup> The Utah Legislature recognized that the “state of Utah is home to the fifth-largest Native Hawaiian and Other Pacific Islander population in the nation, with nearly 38,000 individuals” and that Salt Lake City and West Valley City “have the largest and second-largest population of Tongans of any city in the United States.”<sup>28</sup> These are examples of potential communities of interest in Utah to be preserved.

Upon reviewing the various definitions used by other commissions and guidance from other sources, there are a few things worth noting. First, a community of interest **should not** be based on a relationship with political parties, incumbents, or certain political candidates.<sup>29</sup> Otherwise, the concept could just become a vehicle for partisan influence. Second, there must be some geographic contiguity to the community of interest because the concept needs to be able to translate into producing maps. And third, to avoid legal issues, line drawers should not rely on race alone in defining a community of interest.<sup>30</sup>

The purpose of adopting a definition of “community of interest” is not to create a clear legal standard; rather, as operationalized by other commissions, the definition is designed to encourage residents to define their community as they see it. It might be unrealistic to expect a member of the public to draw seventy-five state house seats, twenty-nine state senate seats, fifteen state school board seats, and four congressional districts. But it is more realistic to ask people to define the community in which they live and with which they identify.

Other state commissions have utilized various means to seek input from the public, including personal testimonies and written descriptions. The California Citizens Redistricting Commission holds regular meetings to gather public input on communities of interest and maintains a website—[Draw My CA Community](#)—that allows California residents to draw their communities of interest and submit them to the Commission for consideration. Michigan is undertaking a Communities of Interest Engagement Program to encourage its residents to learn about the redistricting process, attend public hearings, submit personal testimony, and submit proposed maps to Michigan’s Independent Citizen Redistricting Commission.<sup>31</sup> The Washington State Redistricting Commission holds regular public meetings and their website incorporates a tool to encourage residents to describe their community in any language or media form and submit the information for consideration.<sup>32</sup>

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<sup>26</sup> MICH. CONST. art. IV, § 6(13).

<sup>27</sup> S.C.R. 101, 64th Leg. Sess., Spec. Sess. (Ut. 2021).

<sup>28</sup> *Id.*

<sup>29</sup> *See, e.g.*, CAL. CONST. art. XXI, § 2(4).

<sup>30</sup> *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests.”).

<sup>31</sup> *Voters Not Politicians*, 2021 COMMUNITIES OF INTEREST ENGAGEMENT PROGRAM <https://votersnotpoliticians.com/coi/> (last visited June 29, 2021).

<sup>32</sup> DRAW YOUR WA <https://www.redistricting.wa.gov/> (last visited June 29, 2021).

This is a new exercise of the State of Utah, and therefore, the Commission is proposing to adopt a fairly broad definition of “community of interest” with the idea that a broad definition will encourage Utahns to think creatively about how they see their communities. The Commission proposes this definition on the understanding that, in the near future, it will begin actively asking the public to define their communities of interest. That input will then be considered in the creation of maps.

Like other states, the Commission does not intend to adopt a definition of community of interest that is based, even in part, on a relationship with political parties, incumbents, or certain political candidates. The Commission is also requiring that a community of interest have some geographic contiguous footprint.

The Commission also seeks public comment concerning potential empirical measurements that could be utilized in connection with this standard. The Commission recognizes that there are several quantitative methods that have been developed and utilized to objectively measure how various redistricting principles or criteria have been “honored” in a particular map. Such methods often involve a software component, the creation of ensemble plans, and accompanying expert analysis of the data. These methods, many of which are addressed in detail herein, include such measures/tests as the Dispersion-based Estimates; Efficiency Gap; Lopsided-averages Test; Mean-Median Difference; Partisan Bias; and, Excess Seats Test. Effectively utilizing any of these tests requires resources. For example, a single partisan bias analysis, including the creation of ensemble plans, would likely cost between \$100,000 to \$150,000. And a racial polarization analysis, which might be used for the state House districts in Salt Lake City, would cost between \$50,000 and \$100,000.

The expert, data and software costs associated with these quantitative methods can be substantial, often accounting for a significant portion of a commission’s overall budget. It should therefore come as no surprise that when Arizona’s redistricting commission was created in 2000, over \$10,000,000 was spent for that commission’s work. For the current redistricting cycle, Michigan’s commission has a budget of over \$13 million and Colorado’s commission has a budget of \$2 million, with both commissions tasked with creating only three (3) maps. Even New Mexico’s advisory commission has a budget of \$1.5 million, 50% greater than the UIRC budget. In other words, the UIRC has been tasked by law to consider and analyze numerous criteria in developing twelve (12) maps but has extremely limited resources to utilize the available quantitative measures to fulfill this mandate.

**PROPOSED STANDARD 2.**

**Geographic Boundaries**

The Commission shall, to the extent practicable, follow natural, geographic, or man-made features, boundaries, or barriers when drawing district boundaries. A “geographic boundary” means natural barriers, such as mountain ranges, significant rivers or large lakes, and other bodies of water. A “man-made” feature refers to prominent aspects of the built or human-designed environment, including streets and freeways. The Commission intends to qualitatively evaluate this standard.

Discussion:

As required by Utah Code § 20A-20-302, the Commission, to the extent practicable, will follow “natural, geographic, or man-made features, boundaries, or barriers” when drawing district boundaries where possible. Conforming districts to natural or man-made geographic features creates easily cognizable districts for the voting public and can facilitate an electoral candidate’s ability to get around their district.<sup>33</sup> This requirement is fairly common<sup>34</sup> and may be especially relevant in Utah, a state with significant natural features (e.g., the Wasatch Mountain Range) and at the intersection of two major interstate highways, I-15 and I-80. Given the difficulty of measurement of this standard, the Commission intends to qualitatively evaluate to what extent a proposed map fits with geographic boundaries.

**PROPOSED STANDARD 3.**

**Cores of Prior Districts**

The Commission shall, to the extent practicable, preserve cores of prior districts. In doing so, the Commission will consider district lines as previously drawn. If possible, the Commission will utilize empirical methods of measuring congruence in prior and proposed district boundaries.

Discussion:

According to the National Conference of State Legislatures, preserving the core of a prior district “refers to maintaining districts as previously drawn.”<sup>35</sup> This standard promotes continuity in representation which could lower the cost of participation in the political system. Over time,

<sup>33</sup> Leavitt, *supra* note 16, at 55.

<sup>34</sup> For example, Arizona requires that, “to the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts.” ARIZ. CONST. art. IV, Pt. 2 § 1(14)(E). Alaska requires that “geographic features shall be used in describing boundaries wherever possible.” ALASKA CONST. art. VI, § 6.6. Hawaii requires that, “[w]here possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and, when practicable shall coincide with census tract boundaries.” HAW. CONST. art. IV, § 6(5).

residents will become familiar with the boundaries of a district and representatives will increasingly understand the area. When an issue pops-up, a resident will know who to speak with and who else might be concerned and the representative can more easily evaluate how a proposal will affect the entire district. Moreover, preserving the cores of prior districts may curtail unnecessary changes and maximize efficiency in electoral redistricting.<sup>36</sup> This standard has also been recognized by the Supreme Court as a legitimate redistricting objective,<sup>37</sup> and several states explicitly consider this issue when drawing lines.<sup>38</sup>

Utah’s rapid population growth might make applying this standard difficult. People may move in and out of an area rather quickly, making it less useful as a tool for encouraging political participation. Furthermore, it might be more difficult to achieve population equality if district lines must resemble the prior district. A focus on ensuring new lines reflect old lines also assumes that the previous district is a desirable starting point, which may not be the case. Furthermore, preserving cores of districts cannot be used as a pretext for impermissible protection of incumbents of political parties or undue favoring of incumbents or political parties.

The Commission recognizes the benefits that may come with continuity and will evaluate this standard by comparing prior districts with proposed districts. The Commission is especially interested in obtaining public comment on the best way to operationalize these criteria, including, if possible, empirical measurements. The Commission has considered defining the “core” of a district as the population center of the district but is concerned about the potential overlap with other redistricting standards (e.g., community of interest).

Given the severe resource limitations of the Commission, there are quantitative measures and tests that could address this and the other standards and criteria but that are economically unfeasible for the Commission to employ.

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<sup>35</sup> *Redistricting Criteria*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> (last visited June 24, 2021).

<sup>36</sup> *Id.*

<sup>37</sup> See *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (“Any number of consistently applied legislative policies might justify some variance, including, for instance, . . . preserving the cores of prior districts . . . As long as the criteria are nondiscriminatory, . . . these are all legitimate objectives that on a proper showing could justify minor population deviations.”).

<sup>38</sup> For example, New York requires that its redistricting commission “consider maintenance of cores of existing districts.” N.Y. CONST., art III, § 4(c)(5). Kansas requires that “if possible, preserving the core of the existing districts should be undertaken when considering the ‘community of interests’ in establishing districts.” KANSAS LEGISLATIVE RESEARCH DEPARTMENT, GUIDELINES AND CRITERIA FOR 2012 KANSAS CONGRESSIONAL AND LEGISLATIVE REDISTRICTING (adopted Jan. 9, 2012). Kentucky’s Redistricting Subcommittee states that “[e]fforts will be made to preserve cores of existing districts where such efforts are consistent with and do not violate the other criteria.” INTERIM JOINT COMMITTEE ON STATE GOVERNMENT’S REDISTRICTING SUBCOMMITTEE, CRITERIA/STANDARDS FOR CONGRESSIONAL REDISTRICTING (adopted July 11, 1991).

**PROPOSED STANDARD 4.**

**Municipalities and Counties**

The Commission will, to the extent practicable, submit maps which minimize the division of municipalities and counties across multiple districts. The term “municipality” is defined in [Utah Code § 10-1-104\(5\)](#). The Commission will, to the extent practicable, rely on quantitative measurements of division.

Discussion:

Like a community of interest or a prior district boundary, creating districts that reflect municipal and county boundaries promotes predictability in representation. It may also facilitate fair and effective representation by grouping certain communities together that are affected similarly by various policy choices. Division among city and county boundaries also “provides an important reference point for courts undertaking the predominance analysis,” an analysis used in racial gerrymandering cases.<sup>39</sup>

The Commission seeks comment specifically on how to measure “division” of municipalities and counties. A simple but arguably naïve measurement may be the sheer number of municipalities and counties that are split between two or more districts.<sup>40</sup> An obvious weakness of such a measurement is that it does not take into account the size of the division; all divisions would be treated the same. There are nearly three hundred (300) incorporated municipalities in Utah, ranging in population from 20-30 people to approximately 200,000, so a more robust measurement would be useful. The Commission recognizes the potential conflict between respecting counties and towns and seeks comment as to whether counties and towns should be viewed as equally important or if there should be some sort of hierarchy applied. The Commission also seeks comment on whether it is better to split one municipality among many districts or more than one among a few districts.

It is also difficult, and in some cases impossible, to include only whole jurisdictions within districts while also abiding by federal or state-mandated population constraints.<sup>41</sup> In these situations, a court will look to another standard- such as compactness, geographic boundaries, precinct boundaries, or communities of interest- to help determine whether or not neutral criteria were subordinated in the mapmaking process.<sup>42</sup> Thus, consistent with the statute, the Commission intends to reduce, not eliminate, such splits.

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<sup>39</sup> See *Bethune-Hill v. Virginia State Bd. Of Elections*, 141 F. Supp. 3d 505, 538 (E.D. Va. 2015).

<sup>40</sup> NAT’L CONF. OF STATE LEGISLATURES, REDISTRICTING LAW 77 (2020).

<sup>41</sup> See generally *Bush v. Vera*, 517 U.S. 952, 977-78 (1996); *Mahan v. Howell*, 410 U.S. 315, 328 (1973); *Miller*, 515 U.S. at 916-917; *Bethune-Hill*, 141 F. Supp. at 537-38.

<sup>42</sup> See *Bethune-Hill*, 141 F. Supp. at 538.

**PROPOSED STANDARD 5.**

**Boundary Agreement**

The Commission will, to the extent practicable, seek boundary agreement among the map types submitted. Specifically, the Commission will consider the alignment among the boundaries of the districts for the Utah House of Representatives, the Utah State Senate, the Utah State School Board, and the United States Congress.

Discussion:

Boundary agreement facilitates election administration by avoiding the need for voting precincts with multiple distinct ballot options. It might also encourage political participation by making it easier for residents to learn and remember who their representatives are.

Some states specifically require “nesting,” wherein district boundaries of one type must be contained within the district boundaries of a different type of district with a greater population.<sup>43</sup> So, a certain number of state house seats would be contained within a state senate seat; and a certain number of state senate seats would be contained within a congressional seat. The Commission does not face a strict nesting requirement, which would be impossible in any event given the current districts are not multiples of each other. Nevertheless, the Commission intends to operationalize this standard where possible.

The Commission is seeking public comment on methods of measuring boundary agreement. The Commission is open to both qualitative and quantitative measures. The Commission is especially interested in measures that might target the potential downsides of not achieving boundary agreement directly (e.g., split precincts, voter confusion). The Commission also will seek clarification from the state of Utah concerning any plans to redraw the precincts.

**PROPOSED STANDARD 6.**

**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.

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<sup>43</sup> *Where are the lines drawn?*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/redistricting-101/where-are-the-lines-drawn/> (last visited July 14, 2021).

## Discussion:

While the Commission *may* adopt a standard that prohibits it from using (a) partisan political data, (b) political party affiliation information, (c) voting records, (d) partisan election results, or (e) residential addresses of incumbents, candidates, or prospective candidates in its adoption of maps,<sup>44</sup> the Commission *shall*, to the extent practicable, ensure that its recommended maps do not purposefully or unduly favor or disfavor (i) an incumbent elected official; (ii) a candidate or prospective candidate for elected office; or (iii) a political party.<sup>45</sup>

This standard is essentially an anti-gerrymandering provision, i.e., prohibiting the intentional drawing of a map to advantage one group or party of another.<sup>46</sup> There is no generally agreed upon way to measure whether a district or map is gerrymandered but the methods available range from qualitative measures, e.g., direct intent, strange shapes, etc., to quantitative measures, e.g., courts have considered whether districts are “cracked” or “packed” for instance.<sup>47</sup> At the federal level, the Supreme Court has decided not to adopt a standard for measuring unlawful partisan gerrymandering because it views the entire exercise as a political question that is beyond the competence of the courts.<sup>48</sup>

State courts have been more willing to adopt and apply standards to prohibit excessive partisan gerrymandering. For instance, in 2010, Florida residents voted to amend their state constitution to state that no “apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”<sup>49</sup> In 2012, the Florida Supreme Court waded into the thicket, relying on the Legislature’s compliance with its own redistricting principles, the shapes of districts, and other objective indicators of intent to spot undue favoring of a political party.<sup>50</sup> The Florida Court noted that, “where the shape of a district in relation to the demographics is so highly irregular and without justification that it cannot be rationally understood as anything other than an effort to favor or disfavor a political party, improper intent may be inferred.”<sup>51</sup> The Florida Court also identified objective indicators of intent to include, *inter alia*, such factors “as the maneuvering of district lines in order to avoid pitting incumbents against one another in new districts or the drawing of a new district so as to retain a large percentage of the incumbent’s former district.”<sup>52</sup> In 2015, the Florida Supreme Court ultimately

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<sup>44</sup> See Utah Code § 20A-20-302(6).

<sup>45</sup> *Id.* at (5).

<sup>46</sup> *The Redistricting Glossary*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/redistricting/the-redistricting-lexicon-glossary.aspx> (last visited July 19, 2021).

<sup>47</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492, 204 L. Ed. 2d 931 (2019) (“A “cracked” district is one in which a party’s supporters are divided among multiple districts, so that they fall short of a majority in each; a “packed” district is one in which a party’s supporters are highly concentrated, so they win that district by a large margin, “wasting” many votes that would improve their chances in others.”).

<sup>48</sup> *Id.* at 2500 (“There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is “fair” in this context would be an “unmoored determination” of the sort characteristic of a political question beyond the competence of the federal courts.”).

<sup>49</sup> See FLA. CONST. art. III, §§20(a), 21(a) (“No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or incumbent.”); see also <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/43605-2.pdf>

<sup>50</sup> *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 618 (Fla. 2012).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 619.

applied this provision to strike down a districting plan adopted by the Florida State Legislature.<sup>53</sup> The Florida Court relied on “direct and circumstantial evidence” to determine that that the Florida Legislature drew its map with the improper intent to favor a political party or incumbent.<sup>54</sup>

Generally speaking, Florida has relied on qualitative measures to spot undue partisan influence. Qualitative measures, such as evidence of direct intent, might be especially useful in determining whether a map purposefully or unduly favors an incumbent elected official, candidate, or prospective candidate.<sup>55</sup> The Commission has proposed a capacious definition of intent in order to capture all relevant evidence.

The Commission is also interested in applying quantitative methods to measure whether a map unduly favors an incumbent elected official, a candidate or prospective candidate for elected office, or a political party. These measures often look to the effect of a proposed map, and other states use the measures when determining whether a map impermissibly favors a political party.<sup>56</sup> The Commission is especially interested in obtaining comment on the following methods.

### **(1) Lopsided Wins**

In a closely-divided state, inequality of opportunity would be evident in the form of excessively large wins for one party, a sign that its voters have been packed into a few districts.<sup>57</sup> This can be tested using the lopsided wins test. For example, in the 2016 election, winning Democrats in Pennsylvania on average took 75 percent of the vote, compared with 64 percent for the Republicans.<sup>58</sup> Under the Lopsided test, such disparity points towards a sign that the districts were “lopsided” and favored the Republican party, whereas a map with no undue partisanship would have symmetry between both parties.<sup>59</sup>

### **(2) Mean-Median Difference (Consistent Advantage)**

The mean-median test, a “common analysis long used by statisticians in many academic fields to measure skew,” is a measurement for undue partisanship.<sup>60</sup> In some states, a pattern of artificially engineered advantage (i.e. undue favoritism for a political party) feature a median district with a substantially different vote from the statewide average (also known as mean)

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<sup>53</sup> League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015)

<sup>54</sup> *Id.* at 399.

<sup>55</sup> See Utah Code § 20A-20-302(5)(f)(i)-(ii).

<sup>56</sup> See OHIO CONST. art. XI, § 6.

<sup>57</sup> See generally Sam Wang & Brian Remlinger, THE AMERICAN PROSPECT (Sep. 25, 2017), <http://prospect.org/power/slaying-partisan-gerrymander/> (“Partisan symmetry is the idea that parties should be treated equally and should have roughly the same opportunity to translate votes into seats.”)

<sup>58</sup> Jonathan Lai, *Why Pa. Sends Too Many Republicans to Washington - and Why That Could Change*, THE PHILADELPHIA INQUIRER (Aug. 14, 2017), <http://www.inquirer.com/philly/news/pennsylvania-gerrymandering-districts-supreme-court-20170814.html>.

<sup>59</sup> Wang, *supra* note 50.

<sup>60</sup> Laura Royden & Michael Li, *Extreme Maps*, BRENNAN CENTER FOR JUSTICE, <https://www.politico.com/f/?id=0000015c-11a2-d46a-a3ff-9da240e10002>.

vote.<sup>61</sup> The median district is considered to be the “middle district on a list that is sorted in order of increasing party vote share.”<sup>62</sup> If a map treated the two major parties equally, with no favoritism, the difference between the mean and median would be close to zero percent.<sup>63</sup> Thus, the goal of the Commission should be to reach a mean-median difference as close as possible to zero percent.

### (3) Efficiency Gap

The efficiency gap is a measure of the net fraction of “wasted” votes that parties receive across districts in a given map, divided by the total votes.<sup>64</sup> Political scientists have defined wasted votes as those cast in a losing election or those cast for winners in excess of the minimum 50 percent (plus one vote) required to win.<sup>65</sup> For any given map of districts, both parties will receive wasted votes; the net difference is used to calculate the efficiency gap. In maps that are biased to favor one party, the more victimized party’s votes are wasted through both packing and cracking.<sup>66</sup> In a case looking at gerrymandering claims in Wisconsin, the Supreme Court acknowledged the efficiency gap as a recognized measure for “the effect that a gerrymander has on the political fortunes of political parties.”<sup>67</sup>

### (4) Excess Seats Test

The Commission also seeks comment on the use of the excess seats curve, which requires the use of simulations to determine the likelihood of a particular partisan outcome. In short, another way to detect possible undue favoritism of a political party is to examine how much the makeup of a state's Congressional delegation deviates from national results, given the state's party divide.<sup>68</sup> Whereas other measurements look more at whether the pattern of voting in certain districts could have arisen by chance, the excess seats test evaluates whether a certain party gained an advantage in terms of seats, and calculates the cumulative size of that effect.<sup>69</sup>

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<sup>61</sup> See Samuel S.-H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, Election L. J., [https://web.math.princeton.edu/~sswang/wang16\\_ElectionLawJournal\\_gerrymandering-MD-WI\\_.pdf](https://web.math.princeton.edu/~sswang/wang16_ElectionLawJournal_gerrymandering-MD-WI_.pdf) (“In a partisan gerrymander, district outcomes are distributed to favor the redistricter’s party, even though the average vote may not favor that party”).

<sup>62</sup> Sam Wang, *Opinion: Let Math Save Our Democracy*, THE NEW YORK TIMES (Dec. 5, 2015), <https://www.nytimes.com/2015/12/06/opinion/sunday/let-math-save-our-democracy.html>.

<sup>63</sup> Laura Royden & Michael Li, *Extreme Maps*, BRENNAN CENTER FOR JUSTICE, <https://www.politico.com/f/?id=0000015c-11a2-d46a-a3ff-9da240e10002> (“By comparison, states that have not been gerrymandered should have roughly even mean and median district vote shares”).

<sup>64</sup> Eric Petry, *How the Efficiency Gap Works*, BRENNAN CENTER FOR JUSTICE, [https://www.brennancenter.org/sites/default/files/legal-work/How\\_the\\_Efficiency\\_Gap\\_Standard\\_Works.pdf](https://www.brennancenter.org/sites/default/files/legal-work/How_the_Efficiency_Gap_Standard_Works.pdf).

<sup>65</sup> See *Id.*

<sup>66</sup> Darla Cameron, *Here’s How the Supreme Court Could Decide Whether Your Vote Will Count*, THE WASHINGTON POST (Oct. 4, 2017), <https://www.washingtonpost.com/graphics/2017/politics/courts-law/gerrymander/>.

<sup>67</sup> *Gill v. Whitford*, 138 S.Ct 1916, 1933 (2018).

<sup>68</sup> See Wang, *supra* note 54 (“Calculate whether the outcome of an election after redistricting was d[i]sproportional relative to a simulated seats/votes curve and whether that outcome favors the redistricting party”).

<sup>69</sup> See *Id.*

## **(5) Partisan Symmetry**

The Commission seeks comment on the use of partisan symmetry as a standard for assessing partisan gerrymandering. Partisan symmetry is the notion that the share of votes received by a party should translate into a specific number of legislative seats, regardless of which party received that vote share. For example, suppose State X has 10 congressional seats and in the last election Party A won 60 percent of the votes and 80 percent of the total seats (8 seats). Partisan symmetry would be met if it were shown that Party B would have also won 8 seats if it had won 60 percent of the votes cast. However, if it were shown that Party B would have fewer seats after winning the same share of votes cast, this would suggest a “violation” of the partisan symmetry principle in favor of Party A. It should be noted that partisan symmetry is not itself a measure but a standard for defining partisan gerrymandering, and various metrics have been utilized (such as the efficiency gap) as a means of determining whether a map satisfies the partisan symmetry principle.

Again, given the severe resource limitations of the Commission, there are quantitative methods and tests that could address this and the other standards and criteria but that are economically unfeasible for the Commission to employ. The Commission asks that those submitting comments on such methods be mindful of this economic reality.