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*ex rel.* Clare E. Connors, Attorney General

SCPW-21-\_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I *ex rel.* Clare E.  
Connors, Attorney General,

Petitioner,

v.

STATE OF HAWAI'I 2021  
REAPPORTIONMENT COMMISSION,

Respondent.

ORIGINAL PROCEEDING

**PETITION FOR WRIT OF MANDAMUS OR EXTRAORDINARY WRIT DIRECTED  
TO THE STATE OF HAWAI'I 2021 REAPPORTIONMENT COMMISSION**

**MEMORANDUM IN SUPPORT**

**DECLARATIONS OF MARK MUGIISHI, SCOTT T. NAGO,  
& NICHOLAS M. MCLEAN**

**EXHIBITS**

**CERTIFICATE OF SERVICE**

**PETITION FOR WRIT OF MANDAMUS OR EXTRAORDINARY WRIT DIRECTED  
TO THE STATE OF HAWAI‘I 2021 REAPPORTIONMENT COMMISSION**

Petitioner THE STATE OF HAWAI‘I *ex rel.* Clare E. Connors, Attorney General of the State of Hawai‘i (“**Petitioner**”), through undersigned counsel, respectfully petitions this Honorable Court for issuance of a writ of mandamus or, in the alternative, an extraordinary writ directing THE STATE OF HAWAI‘I 2021 REAPPORTIONMENT COMMISSION (“**Respondent**” or the “**Commission**”) to: (1) issue public notice of the Commission’s proposed legislative and congressional reapportionment plans by no later than **January 8, 2022**; and (2) file the Commission’s final legislative and congressional reapportionment plans with the Chief Election Officer by no later than **February 27, 2022**. The order requested herein would have the effect of adjusting these two deadlines by 170 days, or slightly less than six months.<sup>1</sup>

This relief is necessary because factors entirely beyond the Commission’s control—specifically, the Federal Government’s unprecedented and unforeseeable delay in transmitting census data to the States this year—have made the original deadlines impossible to meet, if those deadlines are read literally and strictly applied. Those original deadlines are set forth in the Hawai‘i Constitution, Haw. Const. art. IV, § 2,<sup>2</sup> and in statute, HRS § 25-2.<sup>3</sup> Because this Court will not read provisions of constitutional or statutory text in a manner that would require an absurd, unjust, impossible, or unreasonable result, *see OHA v. Hous. & Cmty. Dev. Corp. of Hawai‘i*, 121 Hawai‘i 324, 335, 219 P.3d 1111, 1122 (2009); *In re Pioneer Mill Co.*, 53 Haw. 496, 500, 497 P.2d 549, 552 (1972)—and because “a court may not require an agency to render performance that is impossible,” *Am. Hosp. Ass’n v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2017)—an adjustment to the deadlines outlined in article IV, § 2 and HRS § 25-2 is necessary and warranted under the extraordinary and highly unusual circumstances existing this year.

In recent months, the supreme courts of two sister states—California and Oregon—have granted extraordinary writs that have similarly adjusted constitutional deadlines on the grounds that literal compliance with those deadlines is now impossible. *See Legislature v. Padilla*, 469 P.3d 405, 408, 411 (Cal. 2020) (issuing a preemptory writ of mandate to provide for “a one-time

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<sup>1</sup> As explained below, under the present constitutional and statutory framework, the Commission’s Public Notice Deadline would be July 22, 2021 and the Filing Deadline would be September 10, 2021. This Petition requests that these two deadlines be moved back by 170 days.

<sup>2</sup> *See* McLean Decl. Ex. 1.

<sup>3</sup> *See* McLean Decl. Ex. 2, as amended by Act 14, SLH 2021, SB 1350 (McLean Decl. Ex. 3).

adjustment” of the relevant constitutional and statutory deadlines “given the extraordinary circumstances we confront here,” to ensure “the orderly functioning of our electoral system”);<sup>4</sup> *State ex rel Koteck v. Fagan*, 484 P.3d 1058, 1064 (Or. 2021) (“In light of the impossibility of compliance with the constitutionally prescribed dates that is presented by the delay in delivery of the federal census data, we conclude that a writ of mandamus should issue directing the Secretary to fulfill her constitutional responsibilities in compliance with [adjusted] deadlines . . .”).<sup>5</sup> Petitioner respectfully requests that this Court do the same. The issuance of this relief will ensure that the redistricting process can proceed in an orderly, fair, and transparent manner. The adjustment to the constitutional and statutory deadlines proposed herein would still provide for substantial compliance by the Commission with the relevant constitutional and statutory provisions, to the extent possible under the circumstances.

This Petition is made pursuant to HRS §§ 602-5(a)(3), 602-5(a)(5), 602-5(a)(6), and Rules 21(b) and 21(e) of the Hawai‘i Rules of Appellate Procedure (“**HRAP**”). This Court has original jurisdiction to provide the relief sought in this Petition. This Petition is supported by the attached memorandum in support, and by the attached declarations of Mark Mugiishi (“**Mugiishi Decl.**”), Scott T. Nago (“**Nago Decl.**”), and Nicholas M. McLean (“**McLean Decl.**”), and accompanying exhibits. As reflected in the attached Declaration of Commission Chair Mark Mugiishi, this Petition is being brought at the request of and with the support of the Commission.<sup>6</sup>

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<sup>4</sup> McLean Decl. Ex. 4.

<sup>5</sup> McLean Decl. Ex. 5. A similar petition is also pending before the Michigan Supreme Court. See Clara Hendrickson, *Redistricting commission asks Michigan Supreme Court for deadline extension*, Detroit Free Press (Apr. 21, 2021), <https://www.freep.com/story/news/politics/2021/04/21/redistricting-commission-michigan-supreme-court-deadline/7317331002/> (last visited May 21, 2021) (attached as McLean Decl. Ex. 6). It has been reported that officials in Maine are planning to file a petition with their state supreme court as well. See Zach Montellaro & Ally Mutnick, *Census data snafu upends 2022 elections*, Politico (Mar. 1, 2021), <https://www.politico.com/news/2021/03/01/census-data-elections-471882> (last visited May 21, 2021) (attached as McLean Decl. Ex. 7).

<sup>6</sup> Petitioner and Respondent agree that a response by Respondent to the instant Petition is not necessary under the circumstances. Cf. *Fagan*, 484 P.3d at 1065 (“In this case, . . . time is of the essence, and the parties agree that the filings already before us fully and adequately set out their positions; no additional briefing is needed. Accordingly, we treat the matter as fully submitted and ready for decision.”).

In filing this Petition, Petitioner is also cognizant of Hawai‘i Senate Resolution No. 220, which requested the Attorney General “to begin legal proceedings to . . . petition the Hawaii Supreme Court seeking relief to prevent action against the Reapportionment Commission for the Reapportionment Commission’s failure to meet statutory or constitutional deadlines relating to the 2021 reapportionment plans resulting from the United States Census Bureau’s delay in delivering high quality data to the states and public[.]” Senate Resolution No. 220, [https://www.capitol.hawaii.gov/session2021/bills/SR220\\_SD1\\_.pdf](https://www.capitol.hawaii.gov/session2021/bills/SR220_SD1_.pdf) (last visited May 21, 2021) (attached as McLean Decl. Ex. 8).

Because time is of the essence, Petitioner respectfully requests that the Court expedite its consideration of this Petition and, if possible, issue the writ prior to the occurrence of the current July 22, 2021 public notice deadline.

DATED: Honolulu, Hawai‘i, May 21, 2021.

*/s/ Nicholas M. McLean*

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*rel.* Clare E. Connors, Attorney General



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## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

At the start of every decade, the United States Census Bureau counts the total number of persons in each state. The following year, the Hawai‘i Reapportionment Commission uses the data collected in the decennial census to reapportion the members of both houses of the State Legislature and the members of the U.S. House of Representatives allocated to Hawai‘i among districts that are as of nearly equal population as is practicable. Doing so safeguards the fundamental franchise of voting by adhering to the “one person, one vote” principle. *See Reynolds v. Sims*, 377 U.S. 533, 561-64 (1964).

But this year—due to unprecedented delays stemming from the COVID-19 pandemic—the Census Bureau is delaying the date on which it will deliver the 2020 redistricting data to the States by six months, from March 31, 2021 until September 30, 2021. Although the Census Bureau was “acutely aware of the difficulties that this delayed delivery of the redistricting data will cause some states”—some of which, like Hawai‘i, “have statutory or even state constitutional deadlines and processes that they will have to address due to this delay”—the delay was, according to the Census Bureau, necessary under the circumstances to ensure “accurate, high quality, and fit-for-use data in the least total amount of time to all states.”<sup>7</sup>

Hawai‘i is one of the states affected by this unprecedented delay: The State of Hawai‘i 2021 Reapportionment Commission (“**Respondent**” or the “**Commission**”) is subject to constitutional and statutory deadlines, but these deadlines assume that the redistricting data would be provided *before* the five-month reapportionment process begins. Accordingly, the Commission is currently facing a July 22, 2021 deadline to issue public notice of the draft reapportionment plans, and a September 10, 2021 deadline to file its final reapportionment plans.

It is impossible for the Commission to meet these deadlines because the Commission cannot begin the reapportionment process without the necessary data from the Census Bureau.

This puts the Commission in an impossible position. Article IV, Section 2 of the Hawai‘i Constitution and HRS § 25-2 purport to obligate the Commission to meet its July and September

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<sup>7</sup> James Whitehorne, *Timeline for Releasing Redistricting Data* (February 12, 2021), <https://www.census.gov/newsroom/blogs/random-samplings/2021/02/timeline-redistricting-data.html> (last visited May 21, 2021) (attached as Exhibit 2 to the Declaration of Scott T. Nago (“**Nago Decl.**”)).

2021 deadlines, but the Commission will not have the necessary data to create its reapportionment plan until after the Census Bureau releases the necessary census data. This Court's intervention is the only way to resolve this unique and challenging state of affairs. There is no mechanism for any other entity to step in should the Commission fail to meet these deadlines. Although the Commission intends to fulfill its constitutional and statutory duties as expeditiously as it possibly can upon receipt of the redistricting data, the present deadlines are simply untenable.

The Commission thus seeks a one-time extension from this Court so that the Commission can ensure the legal validity of its actions. Only this Court has the power to issue this relief before the deadlines lapse. Petitioner therefore respectfully requests that the Court grant the Petition and issue a writ authorizing and directing a one-time adjustment of the public notice and filing deadlines.

## **II. STATEMENT OF FACTS**

### **A. The Commission Is Subject to Constitutional and Statutory Reapportionment Deadlines**

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Beginning in 1980, and every ten years thereafter, the U.S. Secretary of Commerce ("**Secretary**") is required to take a decennial census of the population as of the first day of April of that year ("**Decennial Census Date**"). 13 U.S.C. § 141(a).<sup>8</sup> The tabulation of "the whole number of persons in each State" is required for the apportionment of seats in the U.S. House of Representatives in Congress among the states and is to be completed within nine months after the Decennial Census Date. *See* U.S. Const. amend XIV, § 2; *see also* 13 U.S.C. § 141(b). The tabulation of populations of each state and tabulations of population for areas identified in any plan approved by the Secretary (collectively, "**Census Data**") is to be completed and transmitted to the respective states within one year of the Decennial Census Date. 13 U.S.C. § 141(c). Included in the Census Data delivered to the states is redistricting data ("**Redistricting Data**"), which consists of "counts of population by race, ethnicity (Hispanic or Latino origin), voting age, housing occupancy status, and group quarters population, all at the census block level," and is "information that states need to redraw or 'redistrict' their legislative boundaries." *See* Census Bureau Statement on Redistricting Data Timeline; Nago Decl. Ex. 3, attached hereto.

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<sup>8</sup> *See* McLean Decl. Ex. 9.

The year after the federal decennial census is a reapportionment year for Hawai‘i. *See* Haw. Const. art. IV, § 1 (“The year 1973, the year 1981, and every tenth year thereafter shall be reapportionment years.”). In reapportionment years, the Commission is tasked with three main duties: (1) legislative reapportionment; (2) congressional reapportionment; and (3) designating twelve of twenty-five State Senate district seats which will have two-year terms in the election immediately following reapportionment (collectively, “**Reapportionment**”). *See* Haw. Const. art. IV, §§ 2, 4-6, & 8-9. Legislative reapportionment is the process of allocating the total number of State Representatives and Senators among the basic island units<sup>9</sup> using the total number of permanent residents and computed by the method of equal proportions, and upon that allocation, apportioning the members among the districts therein and redrawing district lines in that manner that the average number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable (“**Legislative Reapportionment**”). *See* Haw. Const. art. IV, §§ 4-6. Congressional reapportionment is the process of apportioning the members of the U.S. House of Representatives allocated to Hawai‘i among single member districts so that the average number of persons in the total population in each district is as nearly equal as possible and redrawing congressional district lines (“**Congressional Reapportionment**”). *See* Haw. Const. art. IV, § 9; HRS § 25-2.

Article IV, Section 2 of the Hawai‘i Constitution sets forth deadlines regarding the formation of the Commission and the submission of Legislative Reapportionment and Congressional Reapportionment plans. Article IV, Section 2 provides in relevant part:

**Section 2.** A reapportionment commission shall be constituted on or before May 1 of each reapportionment year and whenever reapportionment is required by court order. The president of the senate and the speaker of the house of representatives shall each select two members. Members of each house belonging to the party or parties different from that of the president or the speaker shall designate one of their number for each house and the two so designated shall each select two members of the commission. The eight members so selected, promptly after selection, shall be certified by the selecting authorities to the chief election officer and within thirty days thereafter, shall select, by a vote of six members, and promptly certify to the chief election officer the ninth member who shall serve as chairperson of the commission.

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<sup>9</sup> The basic island units are: (1) the island of Hawai‘i, (2) the islands of Maui, Lāna‘i, Moloka‘i, and Kaho‘olawe, (3) the island of O‘ahu and all other islands not specifically enumerated, and (4) the islands of Kaua‘i and Ni‘ihau. *See* Haw. Const. art. IV, § 4.

...

Not more than one hundred fifty days from the date on which the members are certified, the commission shall file with the chief election officer a reapportionment plan for the state legislature and a reapportionment plan for the United States congressional districts which shall become law after publication as provided by law.

HRS § 25-2(a), recently amended by Act 14, Session Laws of Hawai‘i 2021, sets forth additional requirements and deadlines for Legislative Reapportionment):

Legislative reapportionment. The commission shall reapportion the members of each house of the legislature on the basis, method, and criteria prescribed by the Constitution of the United States and article IV of the Hawaii State Constitution. For purposes of legislative reapportionment, a “permanent resident” means a person having the person’s domiciliary in the State. In determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year. The commission shall conduct public hearings and consult with the apportionment advisory council of each basic island unit. *No more than one hundred days from the date on which all members are certified, the commission shall cause to be given in each basic island unit, public notice[] of a legislative reapportionment plan prepared and proposed by the commission.* At least one public hearing on the proposed reapportionment plan shall be held in each basic island unit after initial public notice of the plan. At least twenty days’ notice shall be given of the public hearing. The notice shall include a statement of the substance of the proposed reapportionment plan, and of the date, time, and place where interested persons may be heard thereon. The notice shall be given at least once in a basic island unit where the hearing will be held. All interested persons shall be afforded an opportunity to submit data, views, or arguments, orally or in writing, for consideration by the commission. *After the last of the public hearings, but in no event later than one hundred fifty days from the date on which all members of the commission are certified, the commission shall determine whether the plan is in need of correction or modification, make the correction or modification, if any, and file with the chief election officer, a final legislative reapportionment plan.* Within fourteen days after the filing of the final reapportionment plan, the chief election officer shall cause public notice [] to be given of the final legislative reapportionment plan which, upon public notice, shall become effective as of the date of filing and govern the election of members of the next five succeeding legislatures.



(Emphases added).<sup>10</sup>

HRS § 25-2(b) sets forth additional requirements and deadlines for Congressional Reapportionment and provides in relevant part:

The commission shall first determine the total number of members to which the State is entitled and shall then apportion those members among single member districts so that the average number of persons in the total population counted in the last preceding United States census per member in each district shall be as nearly equal as practicable. . . . *Not more than one hundred days from the date on which the members are certified, the commission shall cause public notice to be given of a congressional reapportionment plan prepared and proposed by the commission.* The commission shall conduct public hearings on the proposed plan in the manner prescribed under subsection (a). At least one public hearing shall be held in each basic island unit after initial public notice of the plan. *After the last of the public hearings, but in no event later than one hundred fifty days from the date on which all members of the commission are certified, the commission shall determine whether or not the plan is in need of correction or modification, make the correction or modification, if any, and file with the chief election officer, a final congressional reapportionment plan.* Within fourteen days after filing of the final reapportionment plan, the chief election officer shall cause public notice to be given of the final congressional reapportionment plan which, upon public notice, shall become effective as of the date of filing and govern the election of members of the United States House of Representatives allocated to this State for the next five succeeding congresses.

(Emphases added).

The result of these provisions is that there are two key deadlines for the Commission. First, the Commission must issue public notice of the proposed Reapportionment plans within 100 days after the date on which its members are certified (the “**Public Notice Deadline**”). HRS § 25-2. Second, the Commission must file the final Reapportionment plans with the Chief Election Officer within 150 days after the date on which its members are certified (the “**Filing Deadline**”). *See* Haw. Const. art. IV, § 2; HRS § 25-2. Following the Public Notice Deadline but prior to the Filing Deadline, the Commission must also conduct public meetings on the proposed plans in each of the four basic island units after twenty days’ public notice. HRS § 25-2. Only after all of the public meetings have been conducted may the Commission then adopt the final plans. *Id.*

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<sup>10</sup> A copy of Act 14 is attached as McLean Decl. Ex. 3.

This year, consistent with prior practice, the nine-member Commission was constituted on April 13, 2021. *See* Nago Decl. ¶ 14 Accordingly, under the present constitutional and statutory framework, the Commission’s Public Notice Deadline would be July 22, 2021 and the Filing Deadline would be September 10, 2021.

B. The Delivery of the 2020 Redistricting Data Has Been Delayed

“[I]n ordinary circumstances,” the State “would receive federal census data by March 31, 2021[.]” *State ex rel Kotek v. Fagan*, 484 P.3d 1059, 1060 (Or. 2021). This would give the Commission sufficient time to do its work and meet its deadlines, as it has in prior years. But “[t]his year . . . is different.” *Id.* “Because of the COVID-19 pandemic, the Census Bureau has announced that it will not provide 2020 census data to the states until between August 15 and August 31, 2021.” *Id.* On February 12, 2021, the Census Bureau announced that, due to COVID-19-related delays, the delivery of the 2020 Redistricting Data will be delayed from March 31, 2021 to September 30, 2021. *See* Census Bureau Statement on Redistricting Data Timeline, attached as Nago Decl. Ex. 3.

On April 1, 2021, the Census Bureau notified intended recipients of the 2020 Redistricting Data that, in an effort to “provide data for states that need redistricting data earlier[.]” it would be “provid[ing] states with [its] legacy format summary files in mid-to-late August [2021], currently scheduling for the third week of August.” *See* April 1, 2021 Letter to Recipients, attached as Nago Decl. Ex. 5. The Census Bureau stated that the “legacy format files will have identical data to the files that [it] will deliver in September,” but it acknowledged that the “drawback to using the legacy format summary files is that they will require additional handling and software to make the data easily accessible.” *See id.*

By letter dated April 21, 2021, the Census Bureau further notified Amy Cohen, Executive Director of the National Association of State Election Directors, that in light of its “understand[ing] that states need to plan for the receipt of this data as every day is important for the compressed timelines they will face,” it was “committing to publishing the legacy format summary files to our FTP site for the states and the public no later than August 16, 2021.” *See* Ltr. to Amy Cohen (Apr. 21, 2021), attached as Nago Decl. Ex. 7.

On April 26, 2021, the Census Bureau released its 2020 apportionment results, which divided the 435 seats in the U.S. House of Representatives among the fifty states. *See* 2020 Census Apportionment Results, attached as Nago Decl. Ex. 8. The State of Hawai‘i was

allocated two members of the U.S. House of Representatives. *See id.* The Census Bureau also released the 2020 census resident population and overseas population for the states, but has not yet released any Redistricting Data. *See* Nago Decl. ¶ 26.

### **III. STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT**

The sole issue presented here is whether issuance of a writ of mandamus or other extraordinary writ is warranted under the unique circumstances of this case. As explained below, it is impossible for the Commission to meet the Public Notice and Filing Deadlines due to the federal government's delayed delivery of the 2020 Census Data. This unprecedented and unforeseeable circumstance warrants this Court's issuance of an order adjusting the time period within which the Commission must complete its reapportionment duties. Absent relief, the validity of actions taken by the Commission after the current Public Notice and Filing Deadlines may well be subject to legal challenge—and the result could call the integrity of the reapportionment process and the 2022 election into question. At a time when protecting and maintaining public trust in elections is paramount, the extraordinary relief sought herein is warranted.

Petitioner thus seeks the issuance of a writ of mandamus or an extraordinary writ directing the Commission to: (1) issue public notice of the Commission's proposed legislative and congressional reapportionment plans by no later than ***January 8, 2022***; and (2) file the Commission's final legislative and congressional reapportionment plans with the Chief Election Officer by no later than ***February 27, 2022***. This one-time adjustment is based on the anticipated delivery date of the 2020 Redistricting Data and preserves the Commission's 100-day period to issue public notice of its draft reapportionment plans and 150-day period to file its final reapportionment plans. This adjustment would only extend the time within which the Commission has to perform its duties; it would not relieve the Commission of any of its substantive duties.

#### IV. LEGAL STANDARD

##### A. The Standard for Issuance of Writs of Mandamus and Extraordinary Writs

HRS § 602-5(a)(3) grants this Court “original jurisdiction in all questions ... arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices.” The writ of mandamus is an extraordinary remedy that may issue if the petitioner demonstrates a clear and indisputable right to relief and a lack of alternative means to redress adequately the alleged wrong or obtain the requested action. *See Kema v. Gaddis*, 91 Hawai‘i 200, 204, 982 P.2d 334, 338 (1999); HRAP Rule 21(b). HRS § 602-5(a)(5) empowers this Court “[t]o make or issue any order or writ necessary or appropriate in aid of its jurisdiction, and in such case, any justice may issue a writ or an order to show cause returnable before the supreme court[.]” Additionally, HRS § 602-5(a)(6) provides that the Court may “make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.”

Rule 21(e) of the Hawai‘i Rules of Appellate Procedure authorizes the filing of a petition for an extraordinary writ. An extraordinary writ will not issue when alternative relief is available and is not a substitute for an appeal. *City and County of Honolulu v. State*, 143 Hawai‘i 455, 463, 431 P.3d 1228, 1236 (2018). Relief may, however, be warranted “in ‘rare and exceptional situations’ in which ‘the special and exigent circumstances of the particular case’ compel this court to act.” *Id.* Moreover, courts have recognized that mandamus or other extraordinary-writ relief may be appropriate “when necessary to the orderly functioning of [the] electoral system.” *Legislature v. Padilla*, 469 P.3d at 408; *see also Vandermost v. Bowen*, 269 P.3d 446, 461 (Cal. 2012) (“In past cases, this court has repeatedly exercised authority to entertain and decide petitions for original writs of mandate related to the referendum, initiative, and redistricting process in circumstances in which an expeditious ruling was necessary to the orderly functioning of the electoral system.”).

B. General Principles of Constitutional Interpretation and the Well-Established Rule Against “Absurd” and “Unreasonable” Interpretation

This Court is “the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai‘i Constitution[.]” *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i 249, 267 n.33, 408 P.3d 1, 19 n.33 (2017) (quoting *State v. Arceo*, 84 Hawai‘i 1, 28, 928 P.2d 843, 870 (1996)). “Issues of constitutional interpretation present questions of law that are reviewed de novo.” *Kaheawa Wind Power, LLC v. Cty. of Maui*, 146 Hawai‘i 76, 87, 456 P.3d 149, 160 (2020) (quoting *Blair v. Harris*, 98 Hawai‘i 176, 178, 45 P.3d 798, 800 (2002)). This Court “observes the following basic principles” when interpreting the State Constitution:

Because constitutions derive their power and authority from the people who draft and adopt them, we have long recognized that the Hawai‘i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent. This intent is to be found in the instrument itself.

The general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written. In this regard, the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them. Moreover, a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.

*Kaheawa*, 146 Hawai‘i at 87, 456 P.3d at 160 (quotations and alteration omitted). “[T]his court interprets a constitutional provision in harmony with other constitutional provisions and ‘in the light of the circumstances under which it was adopted.’” *City & Cty. of Honolulu*, 143 Hawai‘i at 469 n.21, 431 P.3d at 1242 n.21 (quotation omitted).

Although “Constitutional intent is to be found in the language of the constitutional provision itself,” *Sierra Club v. D.R. Horton-Schuler Homes, LLC*, 136 Hawai‘i 505, 516, 364 P.3d 213, 224 (2015), this Court is “always reluctant to decide that the constitutional draftsmen intended to accomplish what appears to be an absurd result.” *In re Pioneer Mill Co.*, 53 Haw. 496, 500, 497 P.2d 549, 552. Accordingly, “[u]ncertainty as to the meaning of a statute may arise from the fact that giving a literal interpretation to the words would lead to such unreasonable, unjust, impracticable, or absurd consequences that they could not have been intended by the legislature.” *State v. Sylva*, 61 Haw. 385, 388, 605 P.2d 496, 498 (1980). And

“[e]ven where a statute appears unambiguous, the court may deviate from a literal application of the language in order to avoid absurdity and give effect to the legislature’s intended purpose.” *State v. McKnight*, 131 Hawai‘i 379, 389, 319 P.3d 298, 308 (2013); *see also Iddings v. Mee-Lee*, 82 Hawai‘i 1, 15, 919 P.2d 263, 277 (1996) (explaining that “it is well settled that this court may depart from a plain reading of a statute where a literal interpretation would lead to absurd and/or unjust results”); *OHA v. Hous. & Cmty. Dev. Corp. of Hawai‘i*, 121 Hawai‘i 324, 335, 219 P.3d 1111, 1122 (2009) (applying absurdity doctrine in context of constitutional interpretation; rejecting reading of constitutional provision as “absurd,” and thus impermissible and “contrary to this court’s rules of constitutional interpretation”); *State v. Smythe*, 72 Haw. 217, 220, 811 P.2d 1100, 1102 (1991) (explaining that an “over-literal reading of the words” of the law must be rejected when it “would accomplish an absurd result, obviously unintended by the legislature”). Moreover, “[n]o provision of the law should be interpreted in a way which requires an impossible task.” *Brady v. City & Cty. of Denver*, 508 P.2d 1254, 1256 (Colo. 1973).

## **V. STATEMENT OF REASONS FOR ISSUING THE WRIT**

For the reasons set forth below, the Court should issue a writ of mandamus directed to the Commission pursuant to HRAP Rule 21(b) or, in the alternative, should issue an extraordinary writ pursuant to HRAP Rule 21(e).

### **A. The Commission Cannot Begin the Reapportionment Process Without the 2020 Census Data**

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The Commission is statutorily required to use the 2020 Census Data provided by the Census Bureau in the Reapportionment process. For purposes of Legislative Reapportionment, Act 14, § 5(a) provides that “[i]n determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the *total population of the State counted by the United States Census Bureau for the respective reapportionment year.*” (Emphasis added). Pursuant to 13 U.S.C. § 141(a) and (c), the Census Bureau was required to take a federal decennial census of population as of April 1, 2020 and transmit the Census Data to the states by March 31, 2021. Inasmuch as 2021 is a reapportionment year for Hawai‘i, *see* Haw. Const. art. IV, § 1, the Commission is required to use the 2020 Census Data in determining the total number of permanent residents for purposes of apportionment among the four basic island units for purposes of Legislative Reapportionment. Moreover, because the apportionment among the

basic island units is the first of two steps in Legislative Reapportionment, the Commission cannot move past step one without the 2020 Census Data. *See Solomon v. Abercrombie*, 126 Hawai‘i 283, 292, 270 P.3d 1013, 1022 (2012) (“Article IV, sections 4 and 6 provide a two-step process for apportionment of the state legislature: apportionment *among* the four counties, followed by apportionment *within* the four counties.”) (emphasis in original); Nago Decl. ¶ 26.

For purposes of Congressional Reapportionment, HRS § 25-2(b) states that the “commission shall first determine the total number of members to which the State is entitled and shall then apportion those members among single member districts so that the average number of persons in the *total population counted in the last preceding United States census* per member in each district shall be as nearly equal as practicable.” (Emphasis added). The last U.S. Census was taken as of April 1, 2020. *See* 13 U.S.C. § 141(a). The Commission is therefore required to use the 2020 Census Data in Congressional Reapportionment and similarly cannot begin the Congressional Reapportionment process without first receiving it. *See* Nago Decl. ¶¶ 26-27.

B. It Is Impossible for the Commission to Meet the Public Notice and Filing Deadlines due to Delayed Delivery of the 2020 Redistricting Data

Because the Commission cannot begin the reapportionment process without the 2020 Census Data, it is impossible for the Commission to meet the July 22, 2021 Public Notice Deadline and September 10, 2021 Filing Deadline. Both deadlines will occur before the September 30, 2021 delivery of the 2020 Redistricting Data. And even if the Commission were to try to use the legacy format summary files (“**Legacy Files**”)—currently slated for delivery on or about August 16, 2021—it would still be plainly impossible for the Commission to meet the deadlines. The Public Notice Deadline will already have passed and the September 10, 2021 Filing Deadline would be a mere *25 days* from the date of the anticipated receipt of the Legacy Files. Although the Commission’s vendor has indicated that it has the software and capability to convert the Legacy Files into a format the Commission can use for Reapportionment, that work is anticipated to take about two weeks from receipt. *See* Nago Decl. ¶ 21. This means that the Commission would not be able to begin using that data until roughly late August or early September—or later if additional delays are incurred. *See* Nago Decl. ¶ 27. That would only leave roughly two weeks for the Commission to: (1) review the data, (2) prepare the initial reapportionment plans, (3) issue twenty days’ public notice, (4) convene a public meeting in each basic island unit, and (5) adopt the final plans before the September 10, 2021 Filing Deadline.

*See* Haw. Const. art. IV, § 2; HRS § 25-2. That timeframe would be categorically impossible to meet under the circumstances. Indeed, the twenty days’ public-notice period mandated by HRS § 25-2 *alone* would exceed the time available. Thus—even assuming the Census Bureau is able to deliver the legacy format files by August 16, 2021 (as currently indicated), and even assuming the Commission’s vendor is able to format the data within two weeks (as currently projected)—it would *still* be impossible for the Commission to meet the Public Notice and Filing Deadlines.

C. A One-Time Adjustment of the Deadlines Is Necessary to Protect the Integrity of the Reapportionment Process

Reapportionment is more than just the apportioning of elected representatives among districts as nearly of equal population as is practicable. In a representative form of government, reapportionment ensures that voters can exercise their right to vote in a free and unimpaired fashion. *See Reynolds*, 377 U.S. at 562-65. As explained by the Supreme Court in *Reynolds*:

[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

*Id.* at 565. To ensure that voters have a meaningful and effective voice, states must adopt “a reasonably conceived plan for periodic readjustment of legislative representation.” *Id.* at 583. This is necessary because, as the Supreme Court explained, “representation schemes once fair and equitable become archaic and outdated.” *Id.* at 567. Although decennial reapportionment is not itself a constitutional prerequisite, it has been determined to meet “the minimal requirements for maintaining a reasonably current scheme of legislative representation.” *Id.* at 583-84.

To provide Hawai‘i’s voters a meaningful, appropriate, and effective voice in their elected representatives in the upcoming 2022 election, the Commission must use the updated 2020 Census Data. The alternative—proceeding with the 2022 election using the existing reapportionment scheme, based on the 2010 Census—might well be open to serious legal challenge. *See id.* at 584 (stating that if reapportionment were accomplished less frequently than every ten years, the result “would assuredly be constitutionally suspect”). Moreover, this Court



has observed that “the equal protection clause of the United States Constitution requires that electoral representation be apportioned on a *population basis*”—and, accordingly, “a state must make an honest and good faith effort to construct districts as nearly of equal population as is practicable.” *Citizens for Equitable & Responsible Gov’t v. Cty. of Hawai‘i*, 108 Hawai‘i 318, 325, 120 P.3d 217, 224 (2005) (emphasis added; quotation omitted; cleaned up).

Nor would using the 2010 Census data make sense under the circumstances because, even accounting for the requested adjustment, there is still enough time for the Commission to complete the Reapportionment process before candidate filing opens on March 1, 2022.<sup>11</sup> On the other hand, challenges to the validity of the Commission’s reapportionment plans—including attempts to invalidate the plans based on an asserted failure to strictly adhere to constitutional and statutory deadlines—might risk making the Commission’s work impossible within the limited pre-election timeframe. *See* Nago Decl. ¶¶ 26-29.

A one-time adjustment of the deadlines would preclude such challenges, while leaving undisturbed the Commission’s substantive constitutional and statutory duties and providing for substantial compliance with the overall constitutional and statutory framework. *Cf. Thirty Voters of Kauai Cty. v. Doi*, 61 Haw. 179, 184, 599 P.2d 286, 290 (1979) (looking to whether “there has been substantial compliance” in context of challenge to election process).<sup>12</sup> As the California Supreme Court has explained,

[T]he Census Bureau’s adjusted timeline for release of the census data will make it impossible for the Commission to meet the statutory July 1 deadline for release of the first preliminary statewide redistricting maps. The Legislature, Secretary of State, and Commission all contend that, given the extraordinary and unforeseen circumstances that have rendered compliance with the deadline impossible, the proper remedy is for this court to extend the deadline and thereby preserve the intended operation of the statutory framework. We agree, and we do so here.

*Padilla*, 469 P.3d at 409; *see also id.* at 412 (“As always, our goal in fashioning such a remedy is to disturb the original language of the provision as little as possible.”). As an *amicus* brief filed in support of the petition for relief in the *Padilla* case explained, the relief sought offers “a common-sense solution” that “provides the least invasive means of addressing what is—

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<sup>11</sup> *See* Act 14, Session Laws of Hawai‘i 2021.

<sup>12</sup> *Cf. State v. Villeza*, 85 Hawai‘i 258, 265, 942 P.2d 522, 529 (1997) (suggesting that “[w]e determine substantial compliance with a statute by determining whether the statute has been followed sufficiently such that the intent for which it was adopted is carried out”).

hopefully—a once-in-a-lifetime disruption.” Br. of *Amici Curiae* California Common Cause, the League of Women Voters of California, & Former Governor Arnold Schwarzenegger, *Legislature v. Padilla*, No. S262530 (June 15, 2020), at 10 (attached as McLean Decl. Ex. 10); *see also id.* at 3 (“The requested relief—which amounts to a modest extension of deadlines directly in line with the Census delay—is necessary, within the Court’s power, and the only option that does not carry significant risks of undermining the redistricting process.”).

In addition, because the final reapportionment plans will serve as the basis for candidate filing in the 2022 election, *see* Nago Decl. ¶ 30, an adjustment would also protect against challenges to the qualifications of candidates or the legitimacy of the results of the election on the basis that the Commission was unable to adhere to the deadlines. Protecting against such challenges before they can impact the election is consistent with this Court’s preference for resolving challenges prior to the election. *Cf. City and County of Honolulu*, 143 Hawai‘i at 464, 431 P.3d at 1237 (“[O]ur precedents make clear that pre-election challenges are favored whenever feasible.”). This Court’s explanation regarding why pre-election challenges are favored similarly counsels in favor of stepping in now:

Resolving legal challenges to a ballot’s validity before an election generally conserves public resources and discourages gamesmanship by preventing litigants from ‘gambling on the outcome of the election contest then challenging it when dissatisfied with the results.’

But more importantly, settling such challenges before the votes are tallied protects the integrity of our most sacred democratic institutions. The right of the citizenry to shape the way in which it is governed through free and fair elections is ‘the foundation of our representative society.’ . . . No matter how justified a court may be in setting aside the results of a popular election, such an action may be perceived as a subversion of the directly expressed will of the people. Invalidating an electoral result thus threatens public confidence in both the efficacy of voting and the independence of our justice system, and this risk of irreparable harm is to be avoided if practicable.

*Id.* (citations and brackets omitted). Here, a one-time adjustment of the deadlines is necessary to protect the integrity of the reapportionment process—and, by extension, the 2022 election.

Crucially, there is nothing in the text of the State Constitution or the history of these provisions that “indicates that the” framers “intended the specified deadlines to serve a purpose other than to provide a means to” appropriate and timely reapportionment. *Fagan*, 484 P.3d at

1062. The clear goal was not the “exact date[s]” as ends in themselves, but rather their role “as part of a larger framework calculated to result in the adoption of a timely final plan.” *Id.* As the Oregon Supreme Court explained:

[T]he voters’ paramount interests seem to have been to direct the Legislative Assembly to enact a reapportionment plan based on census data in advance of the next general election cycle and to provide an alternative means by which a plan would still be made if the Legislative Assembly fails to act. As we see it, the fact that the voters also adopted deadlines to give effect to those interests does not deprive us of authority to order that the Legislative Assembly and the Secretary fulfill the primary duties that the voters imposed. If it were possible for the State of Oregon to comply with all the requirements of Article IV, section 6, we of course would require that it do so. But here, where it is not possible for the state to create a reapportionment plan based on federal census data and still comply with the constitutionally prescribed deadlines, and where it is possible for the state to fulfill its paramount duties in compliance with modified deadlines, we conclude that we have authority to direct it to do so.

*Fagan*, 484 P.3d at 1063; *see also Padilla*, 469 P.3d at 412 (“The state law provisions setting forth the deadlines for the Commission to release draft maps and approve final maps were designed to ensure that the Commission can take the necessary steps to prepare for a public redistricting process with some degree of certainty about when those steps will occur. The Commission’s forecasted delay runs the risk of rendering these provisions hollow.”). Likewise, as the California Supreme Court explained, “[w]e consider it clear from the constitutional framework that, confronted with extraordinary pandemic-related federal delay, the enactors of [the relevant constitutional provision] would have preferred shifting the date for approval of the Commission’s final maps to the available alternatives.” *Id.*

Similar reasoning applies here. The deadlines stated in Article IV, Section 2 and HRS § 25-2 are a means to an end. The goal of these provisions is ensuring an effective, transparent, timely, and fair reapportionment and redistricting process. Under the circumstances, granting the Commission relief from strict compliance with the literal terms of these deadlines would vindicate the important goals of the redistricting and reapportionment process—not undermine them. As this Court has explained, “[t]he right of the citizenry to shape the way in which it is governed through free and fair elections is the foundation of our representative society.” *City &*

*Cty. of Honolulu*, 143 Hawai‘i at 464, 431 P.3d at 1237 (quotation omitted).<sup>13</sup> This right cannot be effectively secured and maintained if the Commission is not permitted to employ updated census data.

Privileging strict adherence to the specific (and unattainable) deadlines set forth in Article IV and HRS § 25-2 over the fundamental goals of fair and effective reapportionment and redistricting—in other words, ensuring representative government based on the updated and relevant data—would ill-serve the State and its people. *Cf. Costa v. Superior Ct.*, 128 P.3d 675, 689 (Cal. 2006) (rejecting challenge to initiative process because, *inter alia*, “an unreasonably literal or inflexible application of constitutional or statutory requirements that fails to take into account the purpose underlying the particular requirement at issue would be inconsistent with the fundamental nature of the people’s constitutionally enshrined initiative power”).

Under the unique and unprecedented circumstances at play here, the relief sought in the Petition is warranted and appropriate.

D. The Issuance of the Writ of Mandamus or an Extraordinary Writ Represents the Only Effective Means of Relief Available

The Filing Deadline is set forth in the State Constitution and in statute. *See* Haw. Const. art. IV, § 2; HRS § 25-2. There are only two ways by which the Constitution can be amended: through a constitutional convention or through legislative enactment, both of which would have to be ratified by the electorate at a general election. *See* Haw. Const. art. XVII, §§ 2-3. Because the next general election is not until November 8, 2022, *see* Nago Decl. ¶ 30, it is not possible to amend the Constitution before the September 10, 2021 Filing Deadline. Nor would it be an appropriate use of the constitutional amendment process to effectuate a one-time change to the deadlines.

Moreover, even if the Legislature were to extend the statutory Public Notice Deadline and the statutory restatement of the Filing Deadline, the constitutional Filing Deadline would still remain in place. *See generally* Haw. Const. art. III, § 1. The Legislature lacks the power to extend the statutory Public Notice Deadline and statutory Filing Deadline beyond the

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<sup>13</sup> *See generally* 2 Craig Kugiaski, Legis. Reference Bureau, *Hawaii Constitutional Convention Studies, Article III: Reapportionment in Hawaii* 8 (1978) (“Within the context of the reapportionment function, the constitutional requisites contained in this chapter should be viewed as guideposts rather than obstacles on the path toward more representative democracy.”).

constitutional Filing Deadline. To address this situation, the Hawai‘i State Senate adopted Senate Resolution No. 220 (“**SR220**”) on March 31, 2021. SR220 provides, in relevant part, as follows:

WHEREAS, a fundamental tenet of elections in the United States is the fair apportionment of representation across a given population, and the United States and Hawaii governments each have legislative bodies with legislators elected to represent individual districts that have an approximate equal number of citizens; and

...

WHEREAS, . . . provided that the Chairperson of the Reapportionment Commission is selected on May 31, the latest date that proposed reapportionment plans may be presented to the public is September 8, and the latest date on which a public hearing may be held is September 28; and

WHEREAS, article IV, section 2 of the Hawaii State Constitution requires the Reapportionment Commission to submit to the Chief Election Officer final reapportionment plans no later than one hundred fifty days after the Commission is convened; and

WHEREAS, accordingly, provided that the Chairperson of the Reapportionment Commission is selected on May 31, the latest date that the final reapportionment plans may be submitted to satisfy the Constitution is October 28; and

...

WHEREAS, due to the coronavirus disease 2019 (COVID-19) pandemic, the United States Census Bureau has announced that it expects to deliver to the states and the public the quality data necessary for states to prepare reapportionment plans later than previous years, potentially as late as September 30, 2021; and

WHEREAS, due to the COVID-19 pandemic and the announcement from the United States Census Bureau, it appears unlikely that the 2021 Reapportionment Commission will be able to meet the Commission's statutorily and constitutionally mandated deadlines; and

WHEREAS, the Reapportionment Commission's inability to meet these statutory and constitutional deadlines makes the eventual reapportionment plans subject to legal challenge, which could detrimentally delay the State's elections process; now, therefore,

BE IT RESOLVED by the Senate of the Thirty-first Legislature of the State of Hawaii, Regular Session of 2021, that *the Attorney General is requested to begin legal proceedings to, when appropriate, petition the Hawaii Supreme Court seeking relief to prevent action against the Reapportionment Commission for the Reapportionment Commission's failure to meet statutory or constitutional deadlines relating to the 2021 reapportionment plans resulting from the United States Census Bureau's delay in delivering high quality data to the states and public[.]*

SR220, S.D. 1, [https://www.capitol.hawaii.gov/session2021/bills/SR220\\_SD1\\_.pdf](https://www.capitol.hawaii.gov/session2021/bills/SR220_SD1_.pdf) (last visited May 21, 2021) (emphasis added);<sup>14</sup> *see also* Stand. Com. Rep. No. 1464, [https://www.capitol.hawaii.gov/session2021/CommReports/SR220\\_SD1\\_SSCR1464\\_.htm](https://www.capitol.hawaii.gov/session2021/CommReports/SR220_SD1_SSCR1464_.htm) (last visited May 21, 2021) (“This measure requests the Attorney General to petition the Hawaii Supreme Court seeking relief to prevent action against the Reapportionment Commission stemming from this unavoidable delay.”).<sup>15</sup>

On May 17, 2021, the Commission also requested that the Attorney General petition this Court for relief from the Public Notice and Filing Deadlines. *See* Mugiishi Decl. ¶ 3 attached hereto.

Having concurred that no other means of obtaining relief are available, Petitioner filed the instant Petition. As discussed above, other jurisdictions have also petitioned for and obtained extraordinary relief in the form of an adjustment to constitutional and statutory deadlines which are impossible to meet due to the delayed delivery of the 2020 Census Data. *See Padilla*, 469 P.3d 405 (issuing a peremptory writ of mandate authorizing a minimum four-month extension of state constitutional and statutory reapportionment deadlines, with the provision for an additional extension based on the actual date of delivery of the census data); *Fagan*, 484 P.3d 1058 (issuing a peremptory writ of mandamus establishing revised state constitutional reapportionment deadlines). Given the impossibility of compliance with the deadlines and potential irreparable harm should the Court decline to intervene, Petitioner respectfully submits that an extraordinary writ should be issued to implement a one-time adjustment of the deadlines.

This Petition, it should be emphasized, requests narrow and targeted relief in response to an extraordinary situation—a situation that would have been impossible to predict and that is unlikely to be repeated. As the California Supreme Court explained when it granted a petition requesting similar relief, these “adjustments to the relevant deadlines are limited to this redistricting cycle and these extraordinary circumstances.” *Padilla*, 469 P.3d at 413; *see also id.* (“It is these circumstances that necessitate the remedy we authorize today: a public health crisis that has compelled declarations of emergency by both the President and the Governor, and that has compelled the federal government to pause the decennial census and seek congressional authorization for an extension of its own deadline.”). And, as the California Supreme Court

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<sup>14</sup> A copy of this resolution appears as McLean Decl. Ex. 8.

<sup>15</sup> A copy of this committee report appears as McLean Decl. Ex. 11.

made clear, “the remedy . . . is a narrow one: a one-time adjustment to the deadlines, to enable the relevant constitutional and statutory redistricting provisions otherwise to operate as written and intended.” So too here.

## **VI. CONCLUSION**

Accordingly, Petitioner respectfully urges this Court to grant the Petition and issue a writ directing the Commission to (1) issue public notice of the Commission’s proposed legislative and congressional reapportionment plans by no later than ***January 8, 2022*** and (2) file the Commission’s final legislative and congressional reapportionment plans with the Chief Election Officer by no later than ***February 27, 2022***.

DATED: Honolulu, Hawai‘i, May 21, 2021.

*/s/ Nicholas M. McLean*

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KIMBERLY T. GUIDRY  
NICHOLAS M. MCLEAN

Attorneys for Petitioner STATE OF HAWAI‘I  
*ex rel.* Clare E. Connors, Attorney General

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I *ex rel.* Clare E.  
Connors, Attorney General,

Petitioner,

v.

STATE OF HAWAI‘I 2021  
REAPPORTIONMENT COMMISSION,

Respondent.

ORIGINAL PROCEEDING

DECLARATION OF MARK MUGIISHI

DECLARATION OF MARK MUGIISHI

I, MARK MUGIISHI, under penalty of law, do hereby declare as follows:

1. I am a resident of the City and County of Honolulu, State of Hawaii, and am the Chairperson of the State of Hawai‘i 2021 Reapportionment Commission (“Commission”).
2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.
3. On May 17, 2021, the Commission voted to request that the Attorney General for the State of Hawai‘i petition the Hawaii Supreme Court for relief from the constitutional and statutory deadlines that cannot be met due to the U.S. Census Bureau’s delayed delivery of the 2020 redistricting data in the form of a writ directing the Commission to: (a) issue public notice of the Commission’s proposed reapportionment plans by no later than January 8, 2022; and (b) file the final reapportionment plans with the Chief Election Officer by no later than February 27, 2022.
4. That same day, the Commission also voted to authorize me to submit this



declaration and any other supporting documentation on behalf of the Commission which reflects the Commission's concurrence with and support of the petition for relief.

5. I have read the foregoing petition and can confirm that the Commission concurs with the representations and arguments made therein and with the specific relief requested. To that end, the Commission does not believe that a response to the petition is necessary. It is the Commission's intent to proceed with the reapportionment process as expeditiously as possible upon receipt of the 2020 redistricting data.

I, MARK MUGIISHI, declare under penalty of perjury that the foregoing is true and correct.

DATED: San Francisco, California, USA, May 21, 2021.

  
MARK MUGIISHI

SCPW-21-\_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I *ex rel.* Clare E.  
Connors, Attorney General,

Petitioner,

v.

STATE OF HAWAI‘I 2021  
REAPPORTIONMENT COMMISSION,

Respondent.

ORIGINAL PROCEEDING

**DECLARATION OF  
NICHOLAS M. MCLEAN;  
EXHIBITS “1”-“11”**

**DECLARATION OF NICHOLAS M. MCLEAN**

I, NICHOLAS M. MCLEAN, hereby declare, under penalty of law, that the following is true and correct:

1. I am a Deputy Solicitor General in the Department of the Attorney General of the State of Hawai‘i and am one of the attorneys representing Petitioner in the above-captioned matter.
2. Attached as Exhibit “1” is a true and correct copy of Article IV, Section 2 of the Constitution of the State of Hawai‘i.
3. Attached as Exhibit “2” is a true and correct copy of Haw. Rev. Stat. § 25-2 (as it existed prior to the passage of Act 14). This provision was amended by Act 14, Session Laws of Hawai‘i 2021, which was signed by the Governor on May 17, 2021.
4. A true and correct copy of Act 14, SLH 2021, SB 1350, is attached as Exhibit “3.”

5. Attached as Exhibit “4” is a true and correct copy of the California Supreme Court’s decision in *Legislature v. Padilla*, 469 P.3d 405 (Cal. 2020).

6. Attached as Exhibit “5” is a true and correct copy of the Oregon Supreme Court’s decision in *State ex rel Kotek v. Fagan*, 484 P.3d 1058 (Or. 2021).

7. Attached as Exhibit “6” is a true and correct copy of a news article entitled Clara Hendrickson, *Redistricting commission asks Michigan Supreme Court for deadline extension*, Detroit Free Press (Apr. 21, 2021), *available at* <https://www.freep.com/story/news/politics/2021/04/21/redistricting-commission-michigan-supreme-court-deadline/7317331002> (last visited May 21, 2021).

8. Attached as Exhibit “7” is a true and correct copy of a news article entitled Zach Montellaro & Ally Mutnick, *Census data snafu upends 2022 elections*, Politico (Mar. 1, 2021), *available at* <https://www.politico.com/news/2021/03/01/census-data-elections-471882> (last visited May 21, 2021).

9. Attached as Exhibit “8” is a true and correct copy of Senate Resolution No. 220 S.D.1, which was adopted on March 31, 2021. *See* [https://www.capitol.hawaii.gov/session2021/bills/SR220\\_SD1\\_.pdf](https://www.capitol.hawaii.gov/session2021/bills/SR220_SD1_.pdf) (last visited May 21, 2021).

10. Attached as Exhibit “9” is a true and correct copy of 13 U.S.C. § 141.

11. Attached as Exhibit “10” is a true and correct copy of the Brief of *Amici Curiae* California Common Cause, the League of Women Voters of California, & Former Governor Arnold Schwarzenegger, *Legislature v. Padilla*, No. S262530 (June 15, 2020).

12. Attached as Exhibit “11” is a true and correct copy of Stand. Com. Rep. No. 1464, *available at*

[https://www.capitol.hawaii.gov/session2021/CommReports/SR220\\_SD1\\_SSCR1464\\_.htm](https://www.capitol.hawaii.gov/session2021/CommReports/SR220_SD1_SSCR1464_.htm) (last visited May 21, 2021).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai‘i, May 21, 2021.

/s/ Nicholas M. McLean

**NICHOLAS M. MCLEAN**



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

West's Hawai'i Revised Statutes Annotated  
The Constitution of the State of Hawaii (Refs & Annos)  
Article IV. Reapportionment  
Reapportionment Commission

Const. Art. 4, § 2

Section 2

Currentness

A reapportionment commission shall be constituted on or before May 1 of each reapportionment year and whenever reapportionment is required by court order. The commission shall consist of nine members. The president of the senate and the speaker of the house of representatives shall each select two members. Members of each house belonging to the party or parties different from that of the president or the speaker shall designate one of their number for each house and the two so designated shall each select two members of the commission. The eight members so selected, promptly after selection, shall be certified by the selecting authorities to the chief election officer and within thirty days thereafter, shall select, by a vote of six members, and promptly certify to the chief election officer the ninth member who shall serve as chairperson of the commission.

Each of the four officials designated above as selecting authorities for the eight members of the commission, at the time of the commission selections, shall also select one person from each basic island unit to serve on an apportionment advisory council for that island unit. The councils shall remain in existence during the life of the commission and each shall serve in an advisory capacity to the commission for matters affecting its island unit.

A vacancy in the commission or a council shall be filled by the initial selecting authority within fifteen days after the vacancy occurs. Commission and council positions and vacancies not filled within the times specified shall be filled promptly thereafter by the supreme court.

The commission shall act by majority vote of its membership and shall establish its own procedures, except as may be provided by law.

Not more than one hundred fifty days from the date on which its members are certified, the commission shall file with the chief election officer a reapportionment plan for the state legislature and a reapportionment plan for the United States congressional districts which shall become law after publication as provided by law. Members of the commission shall hold office until each reapportionment plan becomes effective or until such time as may be provided by law.

No member of the reapportionment commission or an apportionment advisory council shall be eligible to become a candidate for election to either house of the legislature or to the United States House of Representatives in either of the first two elections under any such reapportionment plan.

Commission and apportionment advisory council members shall be compensated and reimbursed for their necessary expenses as provided by law.

# MCLEAN EXHIBIT "1"

The chief election officer shall be secretary of the commission without vote and, under the direction of the commission, shall furnish all necessary technical services. The legislature shall appropriate funds to enable the commission to carry out its duties.

**Credits**

1978 Const. Con., ratified Nov. 7, 1978; [H.B. 2322 \(1992\)](#), ratified Nov. 3, 1992.

Const. Art. 4, § 2, HI CONST Art. 4, § 2

Current through Act 13 of the 2021 Regular Session, pending text revision by the revisor of statutes. Some statute sections may be more current; see credits for details.



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

West's Hawai'i Revised Statutes Annotated

Division 1. Government

Title 3. Legislature

Chapter 25. [Reapportionment]

HRS § 25-2

§ 25-2. Duties

Currentness

(a) Legislative reapportionment. The commission shall reapportion the members of each house of the legislature on the basis, method, and criteria prescribed by the Constitution of the United States and article IV of the Hawaii Constitution. Pursuant thereto, the commission shall conduct public hearings and consult with the apportionment advisory council of each basic island unit. Not more than one hundred days from the date on which all members are certified, the commission shall cause to be given in each basic island unit, public notice of a legislative reapportionment plan prepared and proposed by the commission. At least one public hearing on the proposed reapportionment plan shall be held in each basic island unit after initial public notice of the plan. At least twenty days' notice shall be given of the public hearing. The notice shall include a statement of the substance of the proposed reapportionment plan, and of the date, time, and place where interested persons may be heard thereon. The notice shall be given at least once in the basic island unit where the hearing will be held. All interested persons shall be afforded an opportunity to submit data, views, or arguments, orally or in writing, for consideration by the commission. After the last of the public hearings, but in no event later than one hundred fifty days from the date on which all members of the commission are certified, the commission shall determine whether or not the plan is in need of correction or modification, make the correction or modification, if any, and file with the chief election officer, a final legislative reapportionment plan. Within fourteen days after the filing of the final reapportionment plan, the chief election officer shall cause public notice to be given of the final legislative reapportionment plan which, upon public notice, shall become effective as of the date of filing and govern the election of members of the next five succeeding legislatures.

(b) Congressional reapportionment. At times that may be required by the Constitution and that may be required by law of the United States, the commission shall redraw congressional district lines for the districts from which the members of the United States House of Representatives allocated to this State shall be elected. The commission shall first determine the total number of members to which the State is entitled and shall then apportion those members among single member districts so that the average number of persons in the total population counted in the last preceding United States census per member in each district shall be as nearly equal as practicable. In effecting the reapportionment and districting, the commission shall be guided by the following criteria:

- (1) No district shall be drawn so as to unduly favor a person or political party;
- (2) Except in the case of districts encompassing more than one island, districts shall be contiguous;
- (3) Insofar as practicable, districts shall be compact;

**MCLEAN EXHIBIT "2"**

- (4) Where 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;
- (5) Where practicable, state legislative districts shall be wholly included within congressional districts; and
- (6) Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Not more than one hundred days from the date on which all members are certified, the commission shall cause public notice to be given of a congressional reapportionment plan prepared and proposed by the commission. The commission shall conduct public hearings on the proposed plan in the manner prescribed under subsection (a). At least one public hearing shall be held in each basic island unit after initial public notice of the plan. After the last of the public hearings, but in no event later than one hundred fifty days from the date on which all members of the commission are certified, the commission shall determine whether or not the plan is in need of correction or modification, make the correction or modification, if any, and file with the chief election officer, a final congressional reapportionment plan. Within fourteen days after filing of the final reapportionment plan, the chief election officer shall cause public notice to be given of the final congressional reapportionment plan which, upon public notice, shall become effective as of the date of filing and govern the election of members of the United States House of Representatives allocated to this State for the next five succeeding congresses.

#### **Credits**

Laws 1969, ch. 79, § 2; Laws 1979, ch. 51, § 3; [Laws 1992, ch. 320, § 3](#); [Laws 1998, ch. 2, § 8](#).

#### [Notes of Decisions \(39\)](#)

H R S § 25-2, HI ST § 25-2

Current through Act 13 of the 2021 Regular Session, pending text revision by the revisor of statutes. Some statute sections may be more current; see credits for details.





EXECUTIVE CHAMBERS  
HONOLULU

DAVID Y. IGE  
GOVERNOR

May 17, 2021

The Honorable Ronald D. Kouchi,  
President  
and Members of the Senate  
Thirty First State Legislature  
State Capitol, Room 409  
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki,  
Speaker and Members of the  
House of Representatives  
Thirty First State Legislature  
State Capitol, Room 431  
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

This is to inform you that on May 17, 2021, the following bill was signed into law:

SB1350 SD1 HD2 CD1

RELATING TO STATE GOVERNMENT.  
**ACT 014 (21)**

Sincerely,

DAVID Y. IGE  
Governor, State of Hawai'i

**MCLEAN EXHIBIT "3"**

THE SENATE  
THIRTY-FIRST LEGISLATURE, 2021  
STATE OF HAWAII

**ACT 014**

**S.B. NO.** 1350  
S.D. 1  
H.D. 2  
C.D. 1

# A BILL FOR AN ACT

RELATING TO STATE GOVERNMENT.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

## PART I

SECTION 1. Act 2, Session Laws of Hawaii 2020, is amended  
by amending section 2 to read as follows:

"SECTION 2. (a) Notwithstanding any law to the contrary  
and notwithstanding the legislature not disapproving the  
commission on salaries' recommendation for salary increases by  
adoption of a concurrent resolution in 2019, beginning on  
July 1, 2020, and continuing through ~~[June 30, 2021,]~~  
December 31, 2022, the annual salaries of the governor,  
lieutenant governor, justices and judges of all state courts,  
administrative director of the State or an equivalent position,  
and department heads or executive officers and the deputies or  
assistants to the department heads or executive officers of the  
departments of:

- (1) Accounting and general services;
- (2) Agriculture;
- (3) The attorney general;
- (4) Budget and finance;



1 (5) Business, economic development, and tourism;  
2 (6) Commerce and consumer affairs;  
3 (7) Defense;  
4 (8) Hawaiian home lands;  
5 (9) Health;  
6 (10) Human resources development;  
7 (11) Human services;  
8 (12) Labor and industrial relations;  
9 (13) Land and natural resources;  
10 (14) Public safety;  
11 (15) Taxation; and  
12 (16) Transportation,  
13 shall remain at the salary rate as of June 30, 2020; provided  
14 that on [~~July 1, 2021,~~] January 1, 2023, the salaries of these  
15 positions shall be adjusted pursuant to the salary  
16 recommendations of the commission on salaries to the level they  
17 would have been on July 1, [~~2021,~~] 2022, without the delay under  
18 this Act; provided further that the salary recommendations of  
19 the commission on salaries for these positions effective July 1,  
20 [~~2022,~~] 2023, and [~~each year thereafter through~~] July 1, 2024,



1 shall become effective on that date in accordance with the  
2 recommendations.

3 (b) Notwithstanding any law to the contrary and  
4 notwithstanding the legislature not disapproving the commission  
5 on salaries' recommendation for salary increases by adoption of  
6 a concurrent resolution in 2019, beginning on January 1, 2021,  
7 and continuing through [~~June 30, 2021,~~] December 31, 2022, the  
8 annual salaries of members of the legislature shall remain at  
9 the salary rate as of June 30, 2020; provided that on [~~July 1,~~  
10 ~~2021,~~] January 1, 2023, the salaries of the legislators shall be  
11 adjusted pursuant to the salary recommendations of the  
12 commission on salaries to the level they would have been on  
13 January 1, [~~2021,~~] 2023, without the delay under this Act;  
14 provided further that the salary recommendations of the  
15 commission on salaries for legislators effective [~~January 1,~~  
16 ~~2022, and each year thereafter through~~] January 1, 2024, shall  
17 become effective on that date in accordance with the  
18 recommendations.

19 (c) This section shall not be enforced to the extent that  
20 it is preempted by federal law."

21 PART II



1 SECTION 2. The purpose of this part is to:

- 2 (1) Permit public notice in a short form for proposed,  
3 revised, and final reapportionment plans, subject to  
4 specific requirements;  
5 (2) Temporarily amend the start date for the availability  
6 of nomination papers for the 2022 primary election;  
7 (3) Define "permanent resident" for reapportionment  
8 purposes; and  
9 (4) Authorize and appropriate funds to the reapportionment  
10 commission.

11 SECTION 3. Section 1-28.5, Hawaii Revised Statutes, is  
12 amended to read as follows:

13 "§1-28.5 Publication of notice. (a) Notwithstanding any  
14 other statute, law, charter provision, ordinance, or rule to the  
15 contrary, whenever a government agency is required to give  
16 public notice or to publish notice, the notice shall be given  
17 only as follows:

18 (1) For statewide publication:

- 19 (A) In a daily or weekly publication of statewide  
20 circulation; or



1 (B) By publication in separate daily or weekly  
2 publications whose combined circulation is  
3 statewide; and

4 (2) For county-wide publication, by publication in a daily  
5 or weekly publication in the affected county.

6 Additional supplemental notice may also be given through  
7 Hawaii FYI, the State's interactive computer system.

8 (b) For purposes of this section, the comptroller pursuant  
9 to chapter 103D shall determine a publication for all government  
10 agencies to enable the public to go to one source of publication  
11 for published public notice on each island.

12 (c) Whenever a public notice is published in a newspaper  
13 or other publication described in subsection (a), proof of the  
14 publication shall be the affidavit of the printer, publisher,  
15 principal clerk, or business manager of the newspaper or other  
16 publication or of the designated agent of the group that  
17 published the notice.

18 (d) This section shall not apply to notices required by  
19 chapters 103D, 103F, 127A, and 523A.

20 (e) For purposes of publishing a proposed, revised, or  
21 final reapportionment plan pursuant to section 25-2, public



1 notice shall be permitted in a short form; provided that each  
2 short form public notice shall include the following  
3 information:

4 (1) Whether the reapportionment plan has been either  
5 proposed, revised, or adopted;

6 (2) The online location to view the reapportionment plan;

7 (3) A list of the location of each public office where the  
8 hard copies of the reapportionment plan and maps are  
9 available; and

10 (4) The public hearing dates.

11 ~~[(e)]~~ (f) For purposes of this section, "government  
12 agency" means each department, board, commission, or officer of  
13 the State or any of its political subdivisions."

14 SECTION 4. Section 12-2.5, Hawaii Revised Statutes, is  
15 amended to read as follows:

16 "**§12-2.5 Nomination papers; when available.** Nomination  
17 papers shall be made available from the first working day of  
18 ~~[February]~~ March in every even-numbered year; provided that in  
19 the case of a special primary or special election, nomination  
20 papers shall be made available at least ten days ~~[prior to]~~  
21 before the close of filing."



1 SECTION 5. Section 25-2, Hawaii Revised Statutes, is  
2 amended by amending subsection (a) to read as follows:

3 "(a) Legislative reapportionment. The commission shall  
4 reapportion the members of each house of the legislature on the  
5 basis, method, and criteria prescribed by the Constitution of  
6 the United States and article IV of the Hawaii State  
7 Constitution. [~~Pursuant thereto, the~~] For purposes of  
8 legislative reapportionment, a "permanent resident" means a  
9 person having the person's domiciliary in the State. In  
10 determining the total number of permanent residents for purposes  
11 of apportionment among the four basic island units, the  
12 commission shall only extract non-permanent residents from the  
13 total population of the State counted by the United States  
14 Census Bureau for the respective reapportionment year. The  
15 commission shall conduct public hearings and consult with the  
16 apportionment advisory council of each basic island unit. [~~Not~~]  
17 No more than one hundred days from the date on which all members  
18 are certified, the commission shall cause to be given in each  
19 basic island unit, public notice subject to section 1-28.5 of a  
20 legislative reapportionment plan prepared and proposed by the  
21 commission. At least one public hearing on the proposed





1 reapportionment plan shall be held in each basic island unit  
2 after initial public notice of the plan. At least twenty days'  
3 notice shall be given of the public hearing. The notice shall  
4 include a statement of the substance of the proposed  
5 reapportionment plan, and of the date, time, and place where  
6 interested persons may be heard thereon. The notice shall be  
7 given at least once in the basic island unit where the hearing  
8 will be held. All interested persons shall be afforded an  
9 opportunity to submit data, views, or arguments, orally or in  
10 writing, for consideration by the commission. After the last of  
11 the public hearings, but in no event later than one hundred  
12 fifty days from the date on which all members of the commission  
13 are certified, the commission shall determine whether [~~or not~~]  
14 the plan is in need of correction or modification, make the  
15 correction or modification, if any, and file with the chief  
16 election officer, a final legislative reapportionment plan.  
17 Within fourteen days after the filing of the final  
18 reapportionment plan, the chief election officer shall cause  
19 public notice subject to section 1-28.5 to be given of the final  
20 legislative reapportionment plan which, upon public notice,



1 shall become effective as of the date of filing and govern the  
2 election of members of the next five succeeding legislatures."

3 SECTION 6. There is appropriated out of the general  
4 revenues of the State of Hawaii the sum of \$287,200 or so much  
5 thereof as may be necessary for fiscal year 2021-2022 for the  
6 reapportionment commission to support its expenses.

7 The sum appropriated shall be expended by the office of  
8 elections for the purposes of this Act.

9 PART III

10 SECTION 7. If any provision of this Act, or the  
11 application thereof to any person or circumstance, is held  
12 invalid, the invalidity does not affect other provisions or  
13 applications of the Act that can be given effect without the  
14 invalid provision or application, and to this end the provisions  
15 of this Act are severable.

16 SECTION 8. Statutory material to be repealed is bracketed  
17 and stricken. New statutory material is underscored.

18 SECTION 9. This Act shall take effect on upon its  
19 approval; provided that:

20 (1) Part I of this Act shall take effect on June 29, 2021;



- 1           (2) Section 4 of this Act shall be repealed on November 9,  
2                   2022; provided further that section 12-2.5, Hawaii  
3                   Revised Statutes, shall be reenacted in the form in  
4                   which it read on the day before the effective date of  
5                   this Act; and  
6           (3) Section 6 of this Act shall take effect on July 1,  
7                   2021.

APPROVED this    17    day of    MAY    , 2021

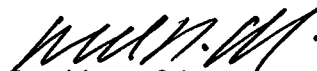



GOVERNOR OF THE STATE OF HAWAII

**THE SENATE OF THE STATE OF HAWAI‘I**

Date: April 27, 2021  
Honolulu, Hawaii 96813

We hereby certify that the foregoing Bill this day passed Final Reading in the Senate  
of the Thirty-First Legislature of the State of Hawai‘i, Regular Session of 2021.

  
President of the Senate

  
Clerk of the Senate

SB No. 1350, SD 1, HD 2, CD 1

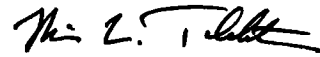
THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Date: April 27, 2021  
Honolulu, Hawaii

We hereby certify that the above-referenced Bill on this day passed Final Reading in the House of Representatives of the Thirty-First Legislature of the State of Hawaii, Regular Session of 2021.

A handwritten signature in black ink, appearing to read "Saiki".

Scott K. Saiki  
Speaker  
House of Representatives

A handwritten signature in black ink, appearing to read "Brian L. Takeshita".

Brian L. Takeshita  
Chief Clerk  
House of Representatives

9 Cal.5th 867  
Supreme Court of California.

LEGISLATURE of the State of California, Petitioner,

v.

Alex PADILLA, as Secretary of State, etc., Respondent.

S262530

|

July 17, 2020

**Synopsis**

**Background:** Legislature filed an emergency petition for a peremptory writ of mandate seeking relief from redistricting deadlines set by California law, in light of United States Census Bureau's announcement that release of census data would be delayed due to COVID-19 pandemic.

**Holdings:** The Supreme Court, [Kruger](#), J., held that:

[1] Court would extend by four months statutory deadline for displaying preliminary redistricting maps, and

[2] Court would extend by four months the California Constitution's deadline for approving and certifying final redistricting maps.

Petition granted; writ issued.

**Procedural Posture(s):** Petition for Writ of Mandate; Original Jurisdiction.

West Headnotes (3)

[1] **Mandamus** 🔑 Organization and location of local governments or authorities

Supreme Court would grant Legislature's request for writ of mandate to extend by four months statutory deadline for displaying preliminary redistricting maps in light of delay in release of census data caused by COVID-19; deadline was chosen to ensure that the public had the opportunity to provide input on the proposed maps, Census Bureau did not anticipate delivering federal census data until after deadline, and enactors clearly would have preferred deadline be adjusted rather than the public comment process be effectively eliminated because of extraordinary circumstances that made compliance with the statutory deadline impossible. [Cal. Const. art. 6, § 10](#); [Cal. Gov't Code § 8253\(a\)\(7\)](#).

1 Cases that cite this headnote

[2] **Constitutional Law** 🔑 Rewriting to save from unconstitutionality

Court may reform statutory deadlines to effectuate the enactors' clearly articulated policy judgments when it is feasible to do so and when the enacting body clearly would have preferred reformation to invalidation.

**MCLEAN EXHIBIT "4"**

**[3] Mandamus** 🔑 Organization and location of local governments or authorities

Supreme Court would grant Legislature's request for writ of mandate to extend by four months the California Constitution's deadline for approving and certifying final redistricting maps, in light of delay in release of census data caused by COVID-19 and corresponding delay in displaying preliminary redistricting maps for public comment. [Cal. Const. art. 21, § 2](#); [13 U.S.C.A. § 141\(c\)](#).

**Witkin Library Reference:** [7 Witkin, Summary of Cal. Law \(11th ed. 2017\) Constitutional Law, § 332](#) [Redistricting by Independent Committee.]

**Attorneys and Law Firms**

\*\*\*3 Olson Remcho, [Robin B. Johansen](#), Sacramento, and [Thomas A. Willis](#) for Petitioner.

[Xavier Becerra](#), Attorney General, [Thomas S. Patterson](#), Assistant Attorney General, Anthony R. Hakl and [P. Patty Li](#), Deputy Attorneys General, for Respondent Alex Padilla.

[Marian M. Johnston](#), Sacramento, for Respondent Citizens Redistricting Commission.

Nielsen Merksamer Parrinello Gross & Leoni and [Marguerite Mary Leoni](#), Sacramento, for Charles Munger, Jr., as Amicus Curiae.

**Opinion**

Opinion of the Court by [Kruger](#), J.

**\*\*406 \*871** Every 10 years, following the federal census, new maps must be drawn establishing the boundaries of the state's congressional, Assembly, Senate, and Board of Equalization districts. California law assigns the task of redistricting to the Citizens Redistricting Commission, which draws new maps based on the federal census data. The law also specifies a series of fixed deadlines for the Commission to solicit public input on its work and finalize updated maps for the next round of elections. As a result of the current COVID-19 pandemic, however, the federal Census Bureau has announced that census data collection and processing will be delayed. Under the Census Bureau's modified timeline, the data required to draw new district maps will not be released to the states in time for the Commission to meet the redistricting deadlines set forth in California law.

In view of the anticipated delay and to ensure that the Commission will be able to perform its redistricting function in time for the 2022 elections, the Legislature has filed an emergency petition for a peremptory writ of mandate seeking relief from the deadlines set by California law. The Secretary of State and the Commission have joined in the Legislature's request. We issued an order notifying the parties of our intent to issue a peremptory writ of mandate in the first instance. (See [Palma v. U.S. Industrial Fasteners, Inc.](#) (1984) 36 Cal.3d 171, 203 Cal.Rptr. 626, 681 P.2d 893.) We now grant the petition and issue the writ.

**I.**

At the start of each decade, the federal government conducts a national census. Beginning on April 1 of the census year, the United States Census Bureau collects population and demographic data for the \*\*\*4 entire country. ([13 U.S.C. § 141\(a\)](#).) Within one year of this date, the Census Bureau must deliver these census data to each state for purposes of drawing new districts for the United States Congress, state legislatures, and other bodies of government. (*Id.*, [§ 141\(c\)](#).) At that point, each state begins its redistricting **\*872** process. The goal of redistricting is to craft new district maps that reflect current population

numbers, to ensure compliance with the constitutional one-person, one-vote rule. (See, e.g., *Evenwel v. Abbott* (2016) — U.S. —, — [136 S.Ct. 1120, 1123–1124], 194 L.Ed.2d 291; Cal. Const., art. XXI, § 2, subd. (d)(1).)

In California, the redistricting process begins with the Legislature preparing a dataset that combines the federal census data with voter registration data and historical statewide election results. (Gov. Code, § 8253, subd. (b).) The Legislature then provides this dataset to the Citizens Redistricting Commission, an independent panel of 14 Californians of different party affiliations that is tasked with drawing new maps for the state's congressional, Assembly, Senate, and Board of Equalization districts. (Cal. Const., art. XXI, § 2.) The Commission was first created with the passage of Proposition 11 in 2008, which transferred the power to draw Assembly, Senate, and Board of Equalization districts from the Legislature to the newly formed Commission; two years later, voters passed Proposition 20, which expanded the Commission's responsibilities to include congressional redistricting. Under the California Constitution, as amended by these two initiatives, the Commission must conduct an open and transparent redistricting process that allows public comment on draft maps produced by the Commission. (Cal. Const., art. XXI, § 2, subd. (b); Gov. Code, § 8253.) To carry out these duties, the Commission typically begins its work even before the census data are delivered to the state. As the chair of the \*\*407 previous redistricting commission explains in a declaration submitted to this court, this preliminary work includes arranging public hearings, soliciting public participation, and hiring staff and consultants.

State law sets forth deadlines by which the Commission must release draft maps for public comment and later, approve and certify final maps to the Secretary of State. The Government Code provides that the Commission must release at least one set of draft maps for public comment by July 1 of the year following the census year. (Gov. Code, § 8253, subd. (a)(7) [“Public comment shall be taken for at least 14 days from the date of public display of the first preliminary statewide maps of the congressional, State Senatorial, Assembly, and State Board of Equalization districts, which shall be publicly displayed no later than July 1 in each year ending in the number one.”].) The California Constitution provides that the Commission must then approve and certify final maps to the Secretary of State by August 15 of the year following the census year. (Cal. Const., art. XXI, § 2, subd. (g) [“By August 15 in 2011, and in each year ending in the number one thereafter, the commission shall approve four final maps that separately set forth the district boundary lines for the congressional, Senatorial, Assembly, and State Board of Equalization districts. Upon approval, the commission shall certify the four final maps to the Secretary of State.”].)

\*873 The maps are subject to referendum under the ordinary procedures for placing an enactment on the ballot for a popular vote under the Constitution. (Cal. Const., art. XXI, § 2, subd. (i); *id.*, art. II, § 9.) If the Commission does not approve a final map by the requisite votes, or if voters disapprove a map in a referendum election, the Constitution provides that the Secretary \*\*\*5 of State “shall immediately petition the California Supreme Court for an order directing the appointment of special masters” to adjust district boundaries using the census data. At that point, the court becomes responsible for approving and certifying the special masters’ map to the Secretary of State. (*Id.*, art. XXI, § 2, subd. (j); see also *id.*, § 3, subd. (b)(1).)

This year, the usual order of redistricting operations has been upended by the COVID-19 pandemic, a public health crisis caused by a newly discovered coronavirus that has spread rapidly around the globe, on a scale not seen in a century. In response to the crisis, the Governor of California declared a state of emergency on March 4, and the President of the United States proclaimed a national emergency under federal law on March 13.<sup>1</sup> As infection rates rose across California and the United States, governments issued stay-at-home orders drastically curtailing daily activities in an attempt to limit the spread of the virus.

On April 13, the United States Secretary of Commerce announced that the Census Bureau had halted its field operations due to the pandemic. The agency adopted a phased approach to resuming the collection of census data in the weeks and months that followed. As a result, the Census Bureau predicted that its delivery of census data to the states would be delayed by up to four months. Because the current March 31, 2021, deadline for releasing federal census data to the states is set by federal statute, the Census Bureau has asked the United States Congress to authorize 120 additional days — i.e., until July 31, 2021 — to deliver the data. To date, the United States House of Representatives has passed one bill authorizing this four-month extension; additional bills containing similar authorizations have been introduced in both houses. (H.R. No. 6800, 116th Cong., 2d Sess., Div. G, tit. II, § 70201, pp. 771–772 (2020) bill passed in House May 15, 2020; H.R. No. 7034, 116th Cong., 2d Sess., § 2, p. 3 (2020) as introduced May 27, 2020; Sen. \*\*408 No. 4048, 116th Cong., 2d Sess. (2020) as introduced June 23, 2020.)



**\*874** On June 4, the Legislature filed an emergency petition in this court seeking a peremptory writ of mandate that would effectively grant the Commission equivalent four-month extensions to release draft maps for public comment and to approve and certify final maps. Specifically, the Legislature seeks a writ extending the date by which the Commission must release draft maps for public comment from July 1, 2021, to November 1, 2021, and requiring the Secretary of State to accept the final Commission redistricting maps by December 15, 2021. The Legislature has no power to change these deadlines by statute: The deadline for the release of the draft maps is set forth in a state statute that the Legislature is prohibited from amending either this year or next, and the deadline for the approval of final maps is specified in the California Constitution. ([Gov. Code, § 8251, subd. \(c\)\(5\)](#) [the Legislature cannot amend any statute governing the Commission's work in years that end in 9, 0, or 1]; [Cal. Const., art. XXI, § 2, \\*\\*\\*6](#) subd. (g).) According to the Legislature, it has filed this emergency petition because, without the requested relief, the Legislature's only alternative will be to ask voters to enact a constitutional amendment that alters the Commission's deadlines for purposes of the 2020 redistricting cycle. The Legislature reports that the last day that it can pass a bill placing a constitutional amendment on the November ballot is July 26, 2020.

In response to the Legislature's petition, we sought preliminary oppositions from the Commission and the Secretary of State. Both filed preliminary responses supporting the Legislature's request.<sup>2</sup> Shortly thereafter, we issued a *Palma* notice advising the parties that we might issue a peremptory writ of mandate in the first instance extending the time limits for the Commission to release draft and final maps and inviting the Commission and the Secretary of State to file any formal oppositions by June 29. (*Palma v. U.S. Industrial Fasteners, Inc.*, *supra*, 36 Cal.3d 171, 203 Cal.Rptr. 626, 681 P.2d 893; see *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 82 Cal.Rptr.2d 85, 970 P.2d 872.) Both the Commission and the Secretary of State again filed statements supporting the Legislature's request.

In its request, the Legislature invokes our authority to issue an extraordinary writ under [article VI, section 10 of the California Constitution](#), which grants this court original jurisdiction in proceedings for extraordinary mandamus relief. We have previously exercised this jurisdiction to consider and grant appropriate relief when necessary to the orderly functioning of our electoral system, and it is undisputed that we have the same authority here. **\*875** (*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 451–453, 137 Cal.Rptr.3d 1, 269 P.3d 446.) For the reasons explained below, we grant the Legislature's petition and issue a peremptory writ of mandate adjusting the relevant deadlines in accordance with the forecasted delay in the Census Bureau's release of the federal census data necessary to draw the new district maps.<sup>3</sup>

## II.

The first deadline faced by the Commission is the July 1, 2021, deadline for displaying the first preliminary statewide maps for public comment. ([Gov. Code, § 8253, subd. \(a\)\(7\)](#).) Because of the COVID-19 pandemic, the Census Bureau has announced that it anticipates moving its scheduled deadline for releasing the federal census data needed to draw the maps to July 31, 2021 — nearly a month after the Commission's statutory deadline for publishing the draft maps. Indeed, as a practical matter, the delay is even more substantial than it might at first seem. The Legislature reports that the Commission cannot begin the process of creating the maps until the Legislature has first built the **\*\*409** redistricting database for the Commission to use. (*Id.*, [§ 8253, subd. \(b\)](#).) In a declaration submitted with the Legislature's petition, the director of the database explains that it takes approximately one month to create this database after the state receives the census data. This means that if the census data are not delivered **\*\*\*7** until July 31, 2021, then the earliest the Commission could begin drawing maps would be August 31, 2021 — fully two months after the statutory deadline for the Commission to publicly release the first round of draft maps.

In other words, the Census Bureau's adjusted timeline for release of the census data will make it impossible for the Commission to meet the statutory July 1 deadline for release of the first preliminary statewide redistricting maps. The Legislature, Secretary of State, and Commission all contend that, given the extraordinary and unforeseen circumstances that have rendered compliance with the deadline impossible, the proper remedy is for this court to extend the deadline and thereby preserve the intended operation of the statutory framework. We agree, and we do so here.

We comprehensively discussed our power to grant the kind of relief the Legislature seeks in *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 47 Cal.Rptr.2d 108, 905 P.2d 1248 (*Kopp*). In that case, we addressed a challenge to the constitutionality of a suite of voter-enacted statutes that governed the financing of state and local political campaigns. (*Id.* at p. 614, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) After holding certain statutes were unconstitutional as written, we \*876 considered whether, instead of invalidating the statutes, we could reform the statutes to preserve them. (*Id.* at p. 615, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) We explained that “[u]nder established decisions of this court and the United States Supreme Court, a reviewing court may, in appropriate circumstances, and consistently with the separation of powers doctrine, reform a statute to conform it to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable. The guiding principle is consistency with the Legislature’s (or, as here, the electorate’s) intent.” (*Ibid.*) “[A] court may reform a statute to satisfy constitutional requirements if it can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute.” (*Ibid.*)

In *Kopp*, we concluded that the statutes in question could not be reformed consistent with the intent of the voters in enacting the statutes. (*Id.* at p. 671, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) But in the years since, we have applied *Kopp* to reform statutes where it was feasible to do so in a manner that would effectuate the clearly articulated policy judgments of the enactors. (See, e.g., *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 208–209, 204 Cal.Rptr.3d 770, 375 P.3d 887 [reforming statute to remedy a constitutional flaw by providing property owners the right to a jury trial in precondemnation proceedings].)

In *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 135 Cal.Rptr.3d 683, 267 P.3d 580 (*Matosantos*), we applied *Kopp* to a situation in which a statute could not be implemented as written because circumstances had made it impossible for the statute to be carried out in accordance with the deadlines written into it. In *Matosantos*, we had partially stayed the implementation of two statutes pending our review of a challenge to their validity. (*Id.* at p. 274, 135 Cal.Rptr.3d 683, 267 P.3d 580.) After upholding the validity of one of the two statutes, we recognized that several “critical deadlines” in the statute had passed and could no longer be met. (*Ibid.*) “This impossibility,” we said, “ought not to prevent the Legislature’s valid enactment from taking effect.” (*Ibid.*) In situations like these, we explained, the \*\*\*8 standard from *Kopp* applies for deciding whether a statutory deadline can be reformed: “Reformation is proper when it is feasible to do so in a manner that carries out those policy choices clearly expressed in the original legislation, and when the legislative body would have preferred reform to ineffectuality.” (*Matosantos*, at p. 274, 135 Cal.Rptr.3d 683, 267 P.3d 580; see *id.* at p. 275, 135 Cal.Rptr.3d 683, 267 P.3d 580.) “By exercising \*\*410 the power of reform ... we may as closely as possible effectuate the Legislature’s intent and allow its valid enactment to have its intended effect.” (*Id.* at p. 274, 135 Cal.Rptr.3d 683, 267 P.3d 580.) In other words, the court has the inherent authority to reform a statute in situations where *impossibility* would have the same effect as invalidity, preventing the statute from being carried out in accordance with its literal terms, but only if the court can do so \*877 consistent with the enactors’ intent. In *Matosantos*, we extended several statutory deadlines by the duration of the court’s stay to “retain the relative spacing of events originally intended by the Legislature and simplify compliance for all affected parties.” (*Id.* at p. 275, 135 Cal.Rptr.3d 683, 267 P.3d 580.) This included deadlines that had passed during the stay as well as future deadlines that needed to be adjusted to maintain the sequence of events spelled out in the statute. (*Ibid.*; see also *Briggs v. Brown* (2017) 3 Cal.5th 808, 861–862, 221 Cal.Rptr.3d 465, 400 P.3d 29 [exercising the court’s “inherent power of reformation to revise the effective date of stayed legislation in order to avoid problems of compliance with statutory deadlines” affected by the stay].)

The situation we confront here is similar. Because the release of the federal census data will be delayed by four months under the Census Bureau’s plan, it will be impossible for the Commission to meet the July 1, 2021, deadline for displaying the first round of draft maps for public comment. (Gov. Code, § 8253, subd. (a)(7).) What we must ask, then, is whether this deadline can be reformed in a manner that closely approximates the framework designed by its enactors, and whether the enactors would have preferred the reform to the effective nullification of the statutory language. (*Matosantos*, *supra*, 53 Cal.4th at p. 275, 135 Cal.Rptr.3d 683, 267 P.3d 580.) The answer to both questions is yes.

The basic purpose of the deadline set out in [Government Code section 8253](#) is to ensure the timely display of draft redistricting maps to the public so that Californians can voice their views about the proposed district boundaries. The statute was first enacted as part of Proposition 11 — the 2008 ballot initiative that created the Commission, outlined a selection process for its members, and assigned it the responsibility of drawing the boundaries for the State Assembly, Senate, and Board of Equalization districts. (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) analysis of Prop. 11 by Legis. Analyst, pp. 70–71; *id.*, text of Prop. 11, pp. 137–140.) As relevant here, Proposition 11 amended article XXI of the Constitution to specify that the Commission shall “conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines.” ([Cal. Const., art. XXI, § 2](#), subd. (b)(1).) This process is described in [Government Code section 8253](#), which guarantees public access to the redistricting process by requiring open meetings, public notice for each meeting, and procedures for public input on the proposed maps. ([Gov. Code, § 8253, subd. \(a\)](#).) Additionally, the statute directs the Legislature to establish procedures to provide the public with access to redistricting data and mapping software to facilitate participation in the process. (*Id.*, subd. (b).) The framework reflects a policy judgment \*\*\*9 that the public should have the opportunity to be involved throughout the redistricting process. (*Vandermost v. Bowen, supra*, 53 Cal.4th at p. 445, 137 Cal.Rptr.3d 1, 269 P.3d 446 [Cal. Const. and statutes “establish a public redistricting process”].) And public comment is typically robust: In the 2010 redistricting cycle, the Commission \*878 held 34 public hearings in 32 cities, reviewed more than 2,000 written submissions, and received input from more than 20,000 entities and individuals.

Of course, for the public to provide feedback on proposed district boundaries, the Commission must first make its work available for public review. As initially passed by the voters in 2008, subdivision (a)(7) of [Government Code section 8253](#) stated, in relevant part: “The commission shall display the maps for public comment in a manner designed to achieve the widest public access reasonably possible. Public comment shall be taken for at least 14 days from the date of public display of any map.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), *supra*, text of Prop. 11, p. 140.) In 2012, the Legislature \*\*411 amended this language to read, as relevant here: “Public comment shall be taken for at least 14 days from the date of public display of the *first preliminary* statewide maps of the congressional, State Senatorial, Assembly, and State Board of Equalization districts, which shall be publicly displayed *no later than July 1 in each year ending in the number one*. The commission shall not display any other map for public comment during the 14-day period. ... Public comment shall be taken for at least seven days from the date of public display of any subsequent preliminary statewide maps and for at least three days from the date of public display of any final statewide maps.” ([Gov. Code, § 8253, subd. \(a\)\(7\)](#), as amended by Stats. 2012, ch. 271, § 4, italics added.) As an Assembly bill analysis explained, the requirement “guarantee[d] that the public will have the ability and time to review the maps and respond to the Commission” at least six weeks before the August 15 deadline for the final maps set by the California Constitution. (Assem. Com. on Elections & Redistricting, Analysis of Sen. Bill No. 1096 (2011–2012 Reg. Sess.) July 3, 2012, p. 5.) The amendments also limited the 14-day public display requirement to the first set of draft maps released by the Commission, as opposed to all of the draft maps. (*Id.* at pp. 1–2.) The deadline ensured the public would be given adequate time to comment on at least one set of draft maps (and the Commission would have time to respond) before the August 15 deadline.

[1] In short, the July 1 deadline for displaying preliminary maps was chosen to ensure that the public has the opportunity to provide input on the proposed maps before the Commission certifies them as final. But if the Census Bureau does not deliver the federal data until July 31, 2021, as it anticipates, it will be impossible for the Commission to comply with the July 1 deadline. The remedy the Legislature seeks is both temporary and limited in nature: a one-time adjustment of the statutory deadline, for purposes of this redistricting cycle, in accordance with the adjustment to the schedule for releasing the federal census data. By granting this limited remedy, we effectuate the policy judgment underlying the provision and preserve the public’s right to provide input on electoral district maps before those maps are finalized. We consider \*879 it clear that the enactors would have preferred this deadline be adjusted — and the opportunity for public comment on the preliminary maps preserved — to effectively eliminating the public comment process because of extraordinary circumstances that make compliance with the statutory deadline impossible.

\*\*\*10 This brings us to the second relevant deadline faced by the Commission: the August 15, 2021, deadline for approving and certifying final redistricting maps to the Secretary of State. ([Cal. Const., art. XXI, § 2](#), subd. (g).) If a delay in the federal data makes the July 1 deadline for the draft maps impossible to meet, it stands to reason that the deadline for the final maps,

which the Constitution sets at just six weeks later, will be impossible to meet as well. If the census data are sent to the states on July 31, 2021, and the Legislature takes one month to prepare the dataset to be used for redistricting, the Commission cannot begin its work until September 2021 at the earliest — well after the constitutionally prescribed August 15, 2021, deadline. Allowing a period for public comment, as the statutory scheme envisions, will result in even greater delay.

[2] As we explained above, this court's precedent establishes that a court may reform statutory deadlines to effectuate the enactors' clearly articulated policy judgments when it is feasible to do so and when the enacting body clearly would have preferred reformation to invalidation. (*Kopp, supra*, 11 Cal.4th at p. 615, 47 Cal.Rptr.2d 108, 905 P.2d 1248; *Matosantos, supra*, 53 Cal.4th at pp. 274–275, 135 Cal.Rptr.3d 683, 267 P.3d 580.) Although the August 15 deadline is set by a constitutional amendment passed by the voters, rather than by statute, we see no reason why the same principles would not permit a one-time adjustment of the deadline given the extraordinary circumstances we confront here.

The August 15 deadline was enacted against the backdrop of the federal deadline that requires the Census Bureau to transmit census data to the states by March 31 of the **\*\*412** year following the census. (13 U.S.C. § 141(c).) We presume that the voters who approved the initiatives establishing the Commission and the deadline for the approval of the final redistricting maps were aware of this federal deadline, and that the choice of the August 15 date reflects their judgment about the amount of time that is ordinarily appropriate for an effective redistricting process after the necessary federal census data are released. (See *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11, 210 Cal.Rptr. 631, 694 P.2d 744; Voter Information Guide, Gen. Elec. (Nov. 4, 2008), *supra*, text of Prop. 11, p. 138 [setting the deadline for the Commission's final maps as Sept. 15 of the year following the census]; Voter Information Guide, Gen. Elec. (Nov. 2, 2010) analysis of Prop. 20 by Legis. Analyst, pp. 18–19; *id.*, text of Prop. 20, p. 96 [changing the deadline for the approval of final maps from Sept. 15 to Aug. 15].)

**\*880** [3] We consider it clear from the constitutional framework that, confronted with extraordinary pandemic-related federal delay, the enactors of [article XXI, section 2](#), would have preferred shifting the date for approval of the Commission's final maps to the available alternatives. It is true that the Constitution provides for certain scenarios in which the Commission is unable to approve a final map. In that event, the Secretary of State must petition this court for an order appointing special masters to adjust district boundaries instead. (Cal. Const., art. XXI, § 2, subd. (j).) But by its terms, the Constitution reserves this backstop for situations in which the Commission fails to approve a final map because it cannot muster “the requisite votes” (or voters disapprove of a final map by referendum). (*Ibid.*) It is not designed to address the situation here, where the Commission will be unable to complete its work by the prescribed deadline because of extraordinary events outside of its control. There are, moreover, strong reasons to **\*\*\*11** believe voters would not have preferred deploying this backstop — and thereby transferring primary responsibility for redistricting from the Commission to this court — to employing the usual redistricting procedures on an adjusted timeline. The voters enacted Propositions 11 and 20 to transfer the responsibility of drawing new district maps from the Legislature to an independent panel of citizens. (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), *supra*, analysis of Prop. 11 by Legis. Analyst, pp. 70–71; see *Wilson v. Eu* (1991) 54 Cal.3d 471, 473, 286 Cal.Rptr. 280, 816 P.2d 1306.) In so doing, the voters tasked this court with redistricting only as a matter of last resort. (Cal. Const., art. XXI, § 2, subd. (j).) For this court to undertake to draw maps in the first instance would both displace the role voters envisioned for the Commission and preclude opportunities for the public to participate in the process as the voters intended. (See Cal. Const., art. XXI, § 2, subd. (b)(1) [instructing the Commission to “conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines ...”].) Adjusting the August 15 deadline, by contrast, gives effect to the voters’ intent that the Commission play the lead role in drawing new district maps, with input from the public received in a timely manner.

As always, our goal in fashioning such a remedy is to disturb the original language of the provision as little as possible. (*Kopp, supra*, 11 Cal.4th at p. 661, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) The Legislature proposes that, for purposes of the 2020 redistricting process, we adjust the deadlines to account for the anticipated federal delay — here, four months. The Commission and the Secretary of State concur. We agree this adjustment is appropriate. The state law provisions setting forth the deadlines for the Commission to release draft maps and approve final maps were designed to ensure that the Commission can take the necessary steps to prepare for a public redistricting process with some degree of certainty about when those steps will occur. The Commission's forecasted delay runs the risk of rendering these provisions hollow. As **\*881** the Legislature and the Secretary of

State explain, without clear deadlines, the Commission will be ill equipped to plan and coordinate the public process of drawing new maps. A four-month adjustment of these deadlines addresses this issue while leaving sufficient time for the maps to be finalized in advance of the 2022 **\*\*413** primaries.<sup>4</sup> For these reasons, we agree that a four-month adjustment of the deadlines for the release of the draft maps and the approval of the final maps is appropriate.

We recognize, however, that the dynamic nature of the global pandemic may lead the federal government to further postpone its delivery of the census data. In the event of further federal delay, we conclude the relevant state deadlines should be shifted accordingly, for the reasons outlined here. Thus, while we today grant a minimum four-month adjustment to the relevant deadlines, we also order that the deadlines be further extended by the length of any additional delay in release of the federal census data beyond four months. In the event that an additional extension of time risks interference with the timeline for conducting elections, appropriate parties may seek further relief in this court. Conversely, should the federal government release the census data sooner than July 31, 2021, the Commission should **\*\*\*12** make every effort to expedite its process and release the preliminary and final maps in advance of the deadlines set forth in this order.

Finally, we again emphasize that these adjustments to the relevant deadlines are limited to this redistricting cycle and these extraordinary circumstances. It is these circumstances that necessitate the remedy we authorize today: a public health crisis that has compelled declarations of emergency by both the President and the Governor, and that has compelled the federal government to pause the decennial census and seek congressional authorization for an extension of its own deadline. And the remedy we authorize is a narrow one: a one-time adjustment to the deadlines, to enable the relevant constitutional and statutory redistricting provisions otherwise to operate as written and intended.

### III.

We grant the Legislature's petition and issue a peremptory writ of mandate as follows:

- (i) The Commission is directed to release the first preliminary statewide maps for the congressional, State Senatorial, Assembly, and State Board of Equalization districts for public display and comment no later than November 1, 2021, notwithstanding [Government Code section 8253, subdivision \(a\)\(7\)](#).

- \*882** (ii) The Commission is directed to approve and certify the final statewide maps to the Secretary of State by no later than December 15, 2021. If the maps are approved and certified by this date, the Secretary of State shall consider the maps approved and certified consistent with the requirements of [article XXI, section 2, subdivision \(g\) of the California Constitution](#).

If the federal government transmits the census data to the state later than July 31, 2021, the number of days of additional delay shall be considered to be the “additional federal delay.” In the event additional federal delay occurs, the Commission is directed to release the first preliminary statewide maps by no later than the date following November 1, 2021, that extends the November 1 deadline by the additional federal delay, and to approve and certify the final maps by no later than the date following December 15, 2021, that extends the December 15 deadline by the additional federal delay.

In the event the federal government transmits the census data to the state before July 31, 2021, the Commission should make every effort to expedite its process and release the preliminary and final maps in advance of the deadlines set forth above.

This decision shall be final upon the filing of this opinion. ([Cal. Rules of Court, rule 8.490\(b\)\(2\)\(A\)](#); [Ng v. Superior Court](#) (1992) 4 Cal.4th 29, 34, fn. 1, 13 Cal.Rptr.2d 856, 840 P.2d 961.)

We Concur:



[CANTIL-SAKAUYE](#), C. J.

[CHIN](#), J.

[CORRIGAN](#), J.

[LIU](#), J.

[CUÉLLAR](#), J.

[GROBAN](#), J.

#### All Citations

9 Cal.5th 867, 469 P.3d 405, 266 Cal.Rptr.3d 2, 20 Cal. Daily Op. Serv. 7142, 2020 Daily Journal D.A.R. 7433

#### Footnotes

- 1 Office of Governor Gavin Newsom, Proclamation of a State of Emergency (Mar. 4, 2020) <<https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>> (as of July 17, 2020); The White House, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020) <<https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>> (as of July 17, 2020). All Internet citations in this opinion are archived by year, docket number, and case name at <<https://www.courts.ca.gov/38324.htm>>.
- 2 Pursuant to state statute, the Commission is created by August 15 of each census year. ([Gov. Code, § 8252, subd. \(g\)](#); see also [Cal. Const., art. XXI, § 2](#), subd. (a) [constitutional requirement that the Commission be created by December 31 of each census year].) Because the 2020 Commission had not been formed at the time our orders were filed, the 2010 Commission filed responses.
- 3 The Legislature's request for judicial notice, which was filed in connection with its emergency petition for a writ of mandate, is granted.
- 4 We note that legislation is currently pending to move the March 2022 primary elections to June 2022 in light of the pandemic. (Sen. Bill [No. 970 \(2019–2020 Reg. Sess.\)](#) § 1, p. 2, as introduced Feb. 11, 2020.)

367 Or. 803  
Supreme Court of Oregon,  
En Banc.

STATE EX REL Representative Tina KOTEK and Senator Peter Courtney,  
on behalf of the Oregon Legislative Assembly, Plaintiffs-Relators,  
v.  
Shemia FAGAN, Oregon Secretary of State, Defendant.

So68364  
|  
April 9, 2021

### Synopsis

**Background:** State legislative leaders petitioned for writ of mandamus to require Secretary of State to comply with modified deadlines for decennial reapportionment of state legislative districts, based on allegations that federal government's delayed release of decennial census data made it impossible for Legislative Assembly and Secretary to fulfill their constitutional responsibilities without adjustment of state Constitution's deadlines.

**Holdings:** The Supreme Court, [Walters](#), C.J., held that:

[1] Supreme Court had constitutional authority to issue the requested mandamus relief, and

[2] Supreme Court would exercise its discretion to grant mandamus relief requiring Secretary to comply with Court-modified deadlines.

Petition allowed; peremptory writ to issue.

**Procedural Posture(s):** Petition for Writ of Mandamus.

West Headnotes (3)

[1] **Courts** 🔑 Public officers, boards, and municipalities, acts and proceedings of

Supreme Court, under its constitutional grant of original jurisdiction to issue writs of mandamus, had authority to issue writ of mandamus requiring Secretary of State to comply with Court-modified deadlines for decennial reapportionment of state legislative districts, where federal government's delayed release of decennial census data made it impossible for Legislative Assembly and Secretary to fulfill their constitutional responsibilities without adjustment of state Constitution's deadlines; constitutional deadlines, which gave effect to voters' paramount interests in directing enactment of reapportionment plan based on census data in advance of next general election cycle, did not deprive Court of authority to order fulfillment of Assembly's and Secretary's duties. [Or. Const. art. 4, § 6\(1, 3\)](#); [Or. Const. art. 7, § 2 \(amended\)](#).

[2] **Constitutional Law** 🔑 Power and duty to redistrict and reapportion

# MCLEAN EXHIBIT "5"

The Equal Protection Clause of the United States Constitution imposes a duty on the states to reapportion state legislative districts by population. [U.S. Const. Amend. 14](#).

**[3] Mandamus** 🔑 [Organization and location of local governments or authorities](#)

Supreme Court would exercise its authority to issue writ of mandamus requiring Secretary of State to comply with Court-modified deadlines for decennial reapportionment of state legislative districts, where federal government's delayed release of decennial census data made it impossible for Legislative Assembly and Secretary to fulfill their constitutional responsibilities without adjustment of state Constitution's deadlines; Secretary conceded that census data was best evidence of population, and Secretary's proposed two-step process, with initial enactment of reapportionment plan using non-census data, would interfere with electors' constitutional right to object to a plan prepared by Assembly. [Or. Const. art. 4, § 6\(1\), \(2\)\(a, c\), \(3\)\(b, d\)](#); [Or. Const. art. 7, § 2 \(amended\)](#); [13 U.S.C.A. § 141\(a, c\)](#).

**\*\*1059** Original proceeding in mandamus, filed March 10, 2021; considered and under advisement March 30, 2021.

**Attorneys and Law Firms**

[Anna M. Joyce](#), Markowitz Herbold PC, Portland, filed the petition for writ of mandamus and reply in support of petition for plaintiffs-relators. Also on the petition were [Harry B. Wilson](#) and [Stephen F. Deatherage](#).

[P.K. Runkles-Pearson](#), Assistant Attorney General, Salem, filed the memorandum in opposition and reply for defendant. Also on the memorandum were [Ellen F. Rosenblum](#), Attorney General, and [Benjamin Gutman](#), Solicitor General.

**Opinion**

[WALTERS](#), C.J.

**\*805** The relators in this mandamus proceeding are Representative Tina Kotek, Speaker of the Oregon House of Representatives, and Senator Peter Courtney, President of the Oregon State Senate. Appearing on behalf of the Oregon Legislative Assembly, they inform us that the federal government will not meet its statutory deadline to produce federal decennial census data and, therefore, that neither the Legislative Assembly nor the Secretary of State (Secretary) will be able to meet the deadlines for decennial reapportionment of state legislative districts set out in [Article IV, section 6, of the Oregon Constitution](#).<sup>1</sup>

Relators ask that we exercise our authority under Article VII (Amended), section 2, of the Oregon Constitution<sup>2</sup> and issue a writ of mandamus requiring the Secretary to fulfill her constitutionally specified duties and to do so on dates ordered by the court. Relators served their petition for writ of mandamus on the Secretary, and she has appeared in opposition.

As we will explain, [Article IV, section 6](#), requires the Legislative Assembly or the Secretary to reapportion legislative districts every 10 years on the basis of federal decennial census data, and includes deadlines to ensure that a final reapportionment plan is adopted in time for the next general election cycle. In this case, because the federal government's delayed release of the 2020 census data makes it impossible for the Legislative Assembly and the Secretary to fulfill their constitutional responsibilities without an adjustment of those deadlines, and because the deadlines can be modified without significantly affecting the duties of the Legislative Assembly **\*\*1060** or the Secretary, or the rights of electors, and without interfering with the general election cycle, we will exercise our authority to compel compliance with [Article IV, section 6](#), according to a revised schedule set out in Appendix 2 to this opinion. We will issue **\*806** a peremptory writ directing the Secretary to abide by that schedule.



The reapportionment process is set out in [Article IV, section 6, of the Oregon Constitution](#). In summary, that section directs the Oregon Legislative Assembly to reapportion state legislative districts in the year next following the federal decennial census. [Or. Const., Art IV, § 6\(1\)](#).<sup>3</sup> If the Legislative Assembly fails to enact a reapportionment plan, then [Article IV, section 6](#), requires the Secretary to make a plan. [Id. § 6\(3\)](#). In either instance, electors are permitted to challenge the plan, and this court is granted original jurisdiction and directed to review any such challenges. *See id. §§ 6(2), 6(3)(b)-(e)*.

[Article IV, section 6](#), also sets out deadlines for each of those actions. Relevant here, the Legislative Assembly is to enact a reapportionment plan by July 1 of the year following the federal decennial census. *Id. §§ 6(1), 6(3)*. If the Legislative Assembly fails to enact a plan by July 1, then the Secretary is required to make a reapportionment plan by August 15. *Id. § 6(3)(a)*. In ordinary circumstances, those deadlines would give the Legislative Assembly three months after receipt of the federal census data to enact a plan and, if it failed to do so, then the deadlines would give the Secretary an additional 45 days to make her plan. That is because, by federal law, the United States Secretary of Commerce must conduct the decennial census in 1980 and every ten years thereafter and provide results to the states before April 1 of the following year. [13 USC § 141\(a\), \(c\)](#). Thus, in ordinary circumstances, the State of Oregon would receive federal census data by March 31, 2021, allowing three months for the Legislative Assembly to enact a plan by its deadline of **\*807** July 1, or, failing that, for the Secretary to make a plan by her deadline of August 15.

This year, however, is different. Because of the COVID-19 pandemic, the Census Bureau has announced that it will not provide 2020 census data to the states until between August 15 and August 31, 2021.<sup>4</sup> Consequently, assuming that the federal census data is released at the earliest anticipated date—August 15—it will come after the constitutional due dates for the plans either enacted or made by the Legislative Assembly or the Secretary.

Citing that impossibility, relators ask this court to issue a writ of mandamus. They ask us to extend the deadlines for the Legislative Assembly to enact a reapportionment plan, and to enjoin the Secretary from making a plan until after the Legislative Assembly has had an opportunity to do so.

The Secretary recognizes the difficulty identified by relators, but she objects to relators' proposed solution. She contends that this court does not have authority to issue a writ of mandamus and argues that, even if it does, no extension of the [Article IV, section 6](#), deadlines is warranted. The Secretary concedes that federal census data “may be the most accurate and well-accepted evidence of population,” but she maintains that that data is not necessary to prepare a plan. She asserts that the Population Research Center, housed at Portland State University, could provide data sufficiently reliable to adopt an initial plan and that any subsequent changes **\*\*1061** required in light of federal census data could be handled during any ensuing judicial review of an objection to the plan filed in this court.

[1] The first question for us, then, is whether we have authority to provide relief in mandamus. As noted, [Article VII \(Amended\), section 2](#), of the Oregon Constitution gives this court original jurisdiction to issue writs of mandamus. [ORS 34.110](#) defines a writ of mandamus:

**\*808** “A writ of mandamus may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station[.]”

Accordingly, we have authority to issue a writ to compel the performance of an act that the law requires the Legislative Assembly or the Secretary to perform, given their respective duties regarding reapportionment. In this case, relators assert that we have authority to order the Legislative Assembly and the Secretary to wait to perform their reapportionment duties until after the federal census data is received, and to order revised deadlines to enable them to accomplish those duties. The Secretary responds that we do not have that authority. In her view, we would not be ordering her to do what the law requires, but, instead, would be commanding what the law prohibits. We agree with the parties that whether this court can order an extension of the deadlines in [Article IV, section 6](#), depends on the nature of the reapportionment duties of the Legislative Assembly and the Secretary. To

inform our understanding of that issue, we begin by looking both to the federal constitutional requirements for reapportionment, and to the genesis of [Article IV, section 6](#).

[2] The Equal Protection Clause of the United States Constitution imposes a duty on the states to reapportion state legislative districts by population. See *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) (Equal Protection Clause “requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis”).<sup>5</sup> Although reapportionment every \*809 10 years is not constitutionally mandated, any longer interval “would assuredly be constitutionally suspect.” *Id.* at 583-84, 84 S. Ct. 1362.

The original Oregon Constitution also contemplated regular reapportionment of state legislative districts by population. Article IV, section 5, provided for a state census every 10 years starting in 1865, and [Article IV, section 6](#), required the Legislative Assembly to conduct a reapportionment in the year after every census, state or federal. See *Or. Const., Art IV, §§ 5, 6* (1857). However, despite the duty to do so, the Legislative Assembly made no changes to legislative district boundaries for a period of more than four decades, between 1911 and 1952. See Official Voters’ Pamphlet, General Election, Nov. 4, 1952, 81 (explanatory statement noting \*\*1062 that last reapportionment had been in 1911).<sup>6</sup>

In 1952, the voters amended [Article IV, section 6](#), to require reapportionment after only the federal, as opposed to the state, census and to require the Secretary to make a \*810 reapportionment plan if the Legislative Assembly failed to do so.<sup>7</sup> Given the history just discussed, the voters’ purpose in amending the provision at issue before us seems to have been two-fold: (1) to ensure that reapportionment occur in conjunction with each federal census and reflect the data provided by that census; and (2) to permit the Legislative Assembly to enact a reapportionment plan, but to provide an alternative if it did not.

Thus, [Article IV, section 6](#), imposes a duty on the Legislative Assembly to enact a reapportionment plan based on federal census data in advance of the next general election cycle, and it imposes a similar duty on the Secretary if the Legislative Assembly fails to act. We are authorized to issue a writ of mandamus to order the fulfillment of those constitutional duties, and, as we will explain, we do not see the deadlines prescribed by that section as prohibiting us from exercising that authority.

As indicated, the voters’ intent was to require that reapportionment occur every 10 years based on census data and in time for the upcoming election cycle. Notably, neither the text of [Article IV, section 6](#), nor the history of the amendments to that section, indicates that the voters intended the specified deadlines to serve a purpose other than to provide a means to those ends. We have been presented with no reason why the voters who adopted the 1952 amendments would have been concerned with the exact date by which the Legislative Assembly or Secretary are required to enact or make a plan, except as part of a larger framework calculated to result in the adoption of a timely final plan. Nor is there any indication that the voters would have intended to require the Legislative Assembly to adhere to the July 1 deadline for legislative action in the unforeseen event that \*811 federal census data—the impetus for drawing new district lines in the first place—was not available by that date.

Instead, the voters’ paramount interests seem to have been to direct the Legislative Assembly to enact a reapportionment plan based on census data in advance of the next general election cycle and to provide an alternative means by which a plan would still be made if the Legislative Assembly fails to act. As we see it, the fact that the voters also adopted deadlines to give effect to those interests does not deprive us of authority to order that the Legislative Assembly and the Secretary fulfill the primary duties that the voters imposed. If it were possible for the State of Oregon to comply with all the requirements of [Article IV, section 6](#), we of course would require that it do so. But here, where it is not possible for the state to create a reapportionment plan based on federal census data and still comply with the constitutionally prescribed deadlines, and where it is possible for the state to fulfill its paramount \*\*1063 duties in compliance with modified deadlines, we conclude that we have authority to direct it to do so. Relators ask us to use our mandamus authority to require the Secretary to act in accordance with the duties imposed by Article IV, section 6—to make a reapportionment plan based on data from the federal census, and to wait to do so until the Legislative Assembly has first had an opportunity to enact a plan. We conclude that we have authority to make such orders, and we now turn to the question of whether we should do so.

[3] The Secretary argues that we need not act because the Legislative Assembly can use available non-census data that is sufficiently accurate to enable it to enact an initial reapportionment plan by the July 1 deadline, which could then be revised during the judicial review process. We see substantial flaws in the Secretary's argument.

For one, the Secretary concedes that census data is the best evidence of population, and she does not dispute the central role that [Article IV, section 6](#), accords to federal census data in plan preparation. If it is possible to wait for that data and meet other constitutional requirements, then requiring the enactment or making of a plan without that **\*812** data seems to fly in the face of the provisions of [Article IV, section 6](#).<sup>8</sup>

A second flaw in the Secretary's argument is that requiring a two-step process—the enactment or making of a plan using non-census data, with later revisions to align with census data—would interfere with the electors' constitutional right to object to a plan prepared by the Legislative Assembly. [Article IV, section 6](#), gives electors 30 days after a reapportionment plan is enacted or made to file objections to the plan. *See Or. Const., Art IV, §§ 6(2)(a), 6(3)(b)* (last date for objection by electors is August 1 or September 15, depending on which entity enacted or made plan).<sup>9</sup> The Secretary does not dispute that the constitutional revision process contemplates that electors will have time to evaluate the plan in light of census data and make individually targeted objections. *See Or. Const., Art IV, §§ 6(2)(c), 6(3)(d)* (both providing that, if plan enacted or made “does not comply with subsection (1) [of [Article IV, section 6](#)] \*\*\* and all law applicable thereto,” this court must specify “with particularity wherein the reapportionment fails to comply”). Thus, as the Secretary also recognizes, if a plan were enacted or made without federal census data, electors would be required to file “placeholder” objections for later revision once the census data becomes available. Beyond that, this court would be required to engage in a wide-ranging and potentially unconstrained review of a challenged plan in an effort to identify problems, all with little or no input or assistance from interested parties.<sup>10</sup> Such a result is not **\*813** consistent with the constitutional expectation that electors should have adequate time to make objections and to have those objections heard.

Finally, the Secretary's argument assumes that, after a reapportionment plan is enacted or made without the benefit of federal census data, this court will conduct a review process, during which federal census data can be considered. However, no such review process will occur if electors do not file objections to such a plan. We reject the Secretary's argument **\*\*1064** that we should not act because there is no need to act.

Our final challenge is to determine whether we can craft deadlines that will enable the Legislative Assembly and the Secretary to fulfill their constitutional duties without significantly affecting the rights of voters or interfering with the 2022 general election cycle.<sup>11</sup> The Secretary has represented that candidates for state legislative office must declare their candidacy by March 8, 2022. *See ORS 249.037(1)* (declaration of candidacy must be filed at least 70 days before nominating election). For potential candidates to be able to do so, they must have some reasonable certainty that they have resided in that legislative district for the required period of time. *See Or. Const., Art IV, § 8(1)(a) (B)* (general requirement is one year before election date); *id.* [§ 8\(1\)\(b\)](#) (for general election in year following reapportionment, candidate must have resided in district since January 1). Accordingly, a reapportionment plan must become final before March 8, or it would derail the primary election scheduled to be held on May 17, 2022. In addition, any revised deadlines must still allow sufficient time for participation and review by those with a role in the process, including electors and, assuming one or more objections are filed, review by this court.

**\*814** Attached as Appendix 2 to this opinion are a revised set of deadlines and a revised set of effective dates that will meet those objectives. The deadlines set out in Appendix 2 provide participants with substantially the same amount of time as they would have had under the deadlines set out in [Article IV, section 6](#), and a plan will be final no later than February 8, 2022.<sup>12</sup> The Legislative Assembly and the Secretary will have less time to work with the census data than would be true in an ordinary year, but the Secretary has assured us that both will have the use of non-census population data that should enable their work to begin well before the census data is delivered.

In light of the impossibility of compliance with the constitutionally prescribed dates that is presented by the delay in delivery of the federal census data, we conclude that a writ of mandamus should issue directing the Secretary to fulfill her constitutional responsibilities in compliance with the deadlines set out in Appendix 2 to this opinion.

Certain other changes are also necessary. First, the census delays leave no doubt that the Legislative Assembly cannot enact a reapportionment plan during its regular session. See [Or. Const., Art IV, § 6\(3\)](#) (Legislative Assembly must enact plan during regular sessions and no later than July 1). This year's regular session must end by June 28, 2021, and the census data will not be received by that date. See [Or. Const., Art IV, § 10\(1\)\(a\)](#) (regular session of legislature cannot last longer than 160 days; current regular session began on January 19). To give the Legislative Assembly its constitutionally guaranteed opportunity to enact a reapportionment plan, relators ask this court to authorize the Legislative Assembly to enact such a plan during an emergency session, rather than a regular session. We agree that **\*815** that is appropriate, and we will include that provision in the writ that is to issue.

Second, relators have asked us to revise the deadline in [Article IV, section 8\(1\)\(b\)](#). That section provides that, for the general election after a reapportionment, legislative **\*\*1065** candidates must become a resident of the districts they seek to represent by the assumed effective date of the reapportionment: January 1, 2022. Given the potential delay in the effective date of the reapportionment, we modify that deadline so that the residency period runs from the date that the reapportionment becomes effective under the revised deadlines set out in Appendix 2 of this opinion. <sup>13</sup>

Ordinarily, at this stage of a mandamus proceeding, we would allow the petition and issue an alternative writ of mandamus. Doing so would trigger further pleading, briefing, and oral argument before this court. See [ORAP 11.15](#) (describing process). In this case, however, time is of the essence, and the parties agree that the filings already before us fully and adequately set out their positions; no additional briefing is needed. Accordingly, we treat the matter as fully submitted and ready for decision.

For the reasons discussed above, relators' petition for a writ of mandamus is allowed. A peremptory writ of mandamus shall issue establishing revised deadlines for performance of the paramount duties described in [Article IV, section 6](#); permitting the Legislative Assembly to enact a reapportionment plan during an emergency session; providing a revised residency timeline under [Article IV, section 8\(1\)\(b\)](#); and directing the Secretary to perform her duties under [Article IV, section 6](#), pursuant to the revised deadlines set out in Appendix 2.

**\*816** The petition for a writ of mandamus is allowed. Peremptory writ to issue. Notwithstanding [ORAP 9.25\(1\)](#), the State Court Administrator shall issue the peremptory writ and appellate judgment on Monday, April 19, 2021, unless a petition for reconsideration is electronically filed by 11:59:59 p.m. on Friday, April 16. Notwithstanding [ORAP 9.25\(2\)](#), if a petition for reconsideration is filed, a response to the petition may be electronically filed by 11:59:59 p.m. on Wednesday, April 21. A timely petition for reconsideration shall stay issuance of the appellate judgment until the court acts on the petition.

#### **\*817** APPENDIX 1—TEXT OF ARTICLE IV, SECTION 6

“(1) At the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population. A senatorial district shall consist of two representative districts. Any Senator whose term continues through the next odd-numbered year regular legislative session after the operative date of the reapportionment shall be specifically assigned to a senatorial district. The ratio of Senators and Representatives, respectively, to population shall be determined by dividing the total population of the state by the number of Senators and by the number of Representatives. A reapportionment by the Legislative Assembly becomes operative as described in subsection (6) of this section.

“(2) This subsection governs judicial review and correction of a reapportionment enacted by the Legislative Assembly.

“(a) Original jurisdiction is vested in the Supreme Court, upon the petition of any elector of the state filed with the Supreme Court on or before August 1 of the year in which the Legislative Assembly enacts a reapportionment, to review any reapportionment so enacted.

“(b) If the Supreme Court determines that the reapportionment thus reviewed complies with subsection (1) of this section and all law applicable thereto, it shall dismiss the petition by written opinion on or before September 1 of the same year and the reapportionment becomes operative as described in subsection (6) of this section.

**\*\*1066** “(c) If the Supreme Court determines that the reapportionment does not comply with subsection (1) of this section and all law applicable thereto, the reapportionment shall be void. In its written opinion, the Supreme Court shall specify with particularity wherein the reapportionment fails to comply. The opinion shall further direct the Secretary of State to draft a reapportionment of the Senators and Representatives in accordance with the provisions of subsection (1) of this section and all law applicable thereto. The Supreme Court shall file its order with the Secretary of State on or before September 15. The Secretary of State shall conduct a hearing on the reapportionment at which **\*818** the public may submit evidence, views and argument. The Secretary of State shall cause a transcription of the hearing to be prepared which, with the evidence, shall become part of the record. The Secretary of State shall file the corrected reapportionment with the Supreme Court on or before November 1 of the same year.

“(d) On or before November 15, the Supreme Court shall review the corrected reapportionment to assure its compliance with subsection (1) of this section and all law applicable thereto and may further correct the reapportionment if the court considers correction to be necessary.

“(e) The corrected reapportionment becomes operative as described in subsection (6) of this section.

“(3) This subsection governs enactment, judicial review and correction of a reapportionment if the Legislative Assembly fails to enact any reapportionment by July 1 of the year of the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government.

“(a) The Secretary of State shall make a reapportionment of the Senators and Representatives in accordance with the provisions of subsection (1) of this section and all law applicable thereto. The Secretary of State shall conduct a hearing on the reapportionment at which the public may submit evidence, views and argument. The Secretary of State shall cause a transcription of the hearing to be prepared which, with the evidence, shall become part of the record. The reapportionment so made shall be filed with the Supreme Court by August 15 of the same year. The reapportionment becomes operative as described in subsection (6) of this section.

“(b) Original jurisdiction is vested in the Supreme Court upon the petition of any elector of the state filed with the Supreme Court on or before September 15 of the same year to review any reapportionment and the record made by the Secretary of State.

“(c) If the Supreme Court determines that the reapportionment thus reviewed complies with subsection (1) of this section and all law applicable thereto, it shall dismiss the petition by written opinion on or before October 15 of the same year and the reapportionment becomes operative as described in subsection (6) of this section.

**\*819** “(d) If the Supreme Court determines that the reapportionment does not comply with subsection (1) of this section and all law applicable thereto, the reapportionment shall be void. The Supreme Court shall return the reapportionment by November 1 to the Secretary of State accompanied by a written opinion specifying with particularity wherein the reapportionment fails to comply. The opinion shall further direct the Secretary of State to correct the reapportionment in those particulars, and in no others, and file the corrected reapportionment with the Supreme Court on or before December 1 of the same year.

“(e) On or before December 15, the Supreme Court shall review the corrected reapportionment to assure its compliance with subsection (1) of this section and all law applicable thereto and may further correct the reapportionment if the court considers correction to be necessary.

“(f) The reapportionment becomes operative as described in subsection (6) of this section.

“(4) Any reapportionment that becomes operative as provided in this section is a law **\*\*1067** of the state except for purposes of initiative and referendum.

“(5) Notwithstanding section 18, Article II of this Constitution, after the convening of the next odd-numbered year regular legislative session following the reapportionment, a Senator whose term continues through that legislative session is subject to recall by the electors of the district to which the Senator is assigned and not by the electors of the district existing before the latest reapportionment. The number of signatures required on the recall petition is 15 percent of the total votes cast for all candidates for Governor at the most recent election at which a candidate for Governor was elected to a full term in the two representative districts comprising the senatorial district to which the Senator was assigned.

“(6)(a) Except as provided in paragraph (b) of this subsection, a reapportionment made under this section becomes operative on the second Monday in January of the next odd-numbered year after the applicable deadline for making a final reapportionment under this section.

“(b) For purposes of electing Senators and Representatives to the next term of office that commences after the applicable deadline for making a final reapportionment **\*820** under this section, a reapportionment made under this section becomes operative on January 1 of the calendar year next following the applicable deadline for making a final reapportionment under this section.”

## **\*821** APPENDIX 2

The Oregon Supreme Court directs that the following revised deadlines be used in the State of Oregon reapportionment process for 2021:

### REAPPORTIONMENT PLAN BY LEGISLATIVE ASSEMBLY

1. If the Legislative Assembly enacts a plan, the following revised deadlines apply:
  - a. The Legislative Assembly will enact a plan on or before Monday, September 27, 2021, and may do so in an emergency session rather than its regular session.
  - b. Objections by electors are due by Monday, October 25, 2021.
    - i. Responses by the Legislative Assembly, Secretary of State, or others, as well as amicus briefs (discouraged) are due by Monday, November 8, 2021.
    - ii. Any reply briefs, though discouraged, are due by Monday, November 15, 2021.
  - c. If the Supreme Court determines that the initial plan complies with applicable law:
    - i. A Supreme Court opinion approving the plan will be filed by Monday, November 22, 2021; and
    - ii. The reapportionment plan will become effective January 1, 2022, for purposes of [Or. Const., Art IV, § 6\(6\)\(b\)](#), only.



- d. If the Supreme Court determines that the initial plan requires corrections, a Supreme Court opinion to that effect will be filed by Monday, December 6, 2021, and the plan will be sent to the Secretary of State for changes.
- i. The revisions by the Secretary of State are due by Monday, January 17, 2022.
- ii. The Supreme Court will approve the revisions or make any necessary additional corrections by Monday, January 31, 2022.
- \*822** iii. The reapportionment plan will become effective Tuesday, February 1, 2022, for purposes of [Or. Const., Art IV, § 6\(6\)\(b\)](#), only, and that will serve as the date for state legislators to establish residency under [Or. Const., Art IV, § 8\(1\)\(b\)](#).

#### REAPPORTIONMENT PLAN BY SECRETARY OF STATE

- 2. If the Legislative Assembly does not enact a plan by September 27, 2021, the following revised deadlines apply:
  - a. If the Legislative Assembly fails to enact a plan by September 27, 2021, **\*\*1068** the Secretary of State's plan is due by Monday, October 18, 2021.
  - b. Objections by electors are due by Monday, November 15, 2021.
    - i. Responses by the Legislative Assembly, Secretary of State, or others, as well as amicus briefs (discouraged) are due by Monday, November 29, 2021.
    - ii. Any reply briefs, though discouraged, are due by Monday, December 6, 2021.
  - c. If the Supreme Court determines that the initial plan complies with applicable law:
    - i. A Supreme Court opinion approving the plan will be filed by Monday, December 13, 2021.
    - ii. The reapportionment plan will become effective January 1, 2022, for purposes of [Or. Const., Art IV, § 6\(6\)\(b\)](#), only.
  - d. If the Supreme Court determines that the initial plan requires corrections, a Supreme Court opinion to that effect will be filed by Monday, December 27, 2021, and the plan will be returned to the Secretary of State for changes.
    - i. The revisions by the Secretary of State are due by Monday, January 24, 2022.
    - ii. The Supreme Court will approve the revisions or make any necessary additional corrections by Monday, February 7, 2022.
    - \*823** iii. The reapportionment plan will become effective Tuesday, February 8, 2022, for purposes of [Or. Const., Art IV, § 6\(6\)\(b\)](#), only, and that will serve as the date for state legislators to establish residency under [Or. Const., Art IV, § 8\(1\)\(b\)](#).<sup>14</sup>

#### All Citations

367 Or. 803, 484 P.3d 1058

#### Footnotes

- 1 The full text of [Article IV, section 6](#), is set out in Appendix 1 to this opinion.  
The deadlines for reapportioning the state into federal congressional districts differ and are governed by statute. *See* [ORS 188.125](#) (setting out different deadlines and other procedural requirements).
- 2 Article VII (Amended), section 2, provides in part that “the supreme court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings.”
- 3 [Article IV, section 6\(1\)](#), specifies that reapportionment shall occur in “the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government.” It is not disputed that that phrase refers to the “[e]numeration” of inhabitants by the federal government that is mandated every ten years by Article I, section 2, of the United States Constitution. The federal government conducts that “enumeration” every ten years pursuant to the Census Act, [13 USC § 1 et seq.](#) The parties understand [Article IV, section 6\(1\)](#), to require reapportionment in the year next following the federal census conducted under that Act (here, in 2021 following the 2020 federal census), and, for purposes of this case, we accept that understanding.
- 4 *See* “U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File” (Mar 15, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html> (accessed Apr. 7, 2021) (data will be released “by mid-to-late August 2021”).
- 5 In *Reynolds*, the United States Supreme Court expressed the compelling nature of that command:  
 “To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of ‘government of the people, by the people, [and] for the people.’ The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.  
 “\* \* \* \* \*

“We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”

[377 U.S. at 567-68](#), [84 S.Ct. 1362](#) (alteration in original; footnotes omitted).

- 6 The explanatory statement for the 1952 amendment to [Article IV, section 6](#), which established the framework used today for reapportionment, provided, in part:

“At the present time and because the Legislature has failed to make any reapportionment for over 40 years, some Counties or Districts have more legislative representation than they are entitled to under the present Constitution. Others have less representation. This amendment would bring about an immediate reapportionment on the population basis now provided by the Constitution and would assure that such a reapportionment would hereafter be made every ten years.”

Voters’ Pamphlet at 81. Indeed, the ballot title caption for the proposed measure was “Constitutional Legislative Senator and Representative Apportionment Enforcement Amendment.” *Id.*

- 7 Although [Article IV, section 6](#), was revised in 1986 (House Joint Resolution (HJR) 6 (1985), adopted Nov. 4, 1986), and the text has undergone minor additional modifications since, the current version retains all the salient features first adopted in 1952. The 1986 revision expressly was not intended to change the overall scheme established in 1952; rather,



it merely extended the deadlines and made certain other changes not relevant to the question before us. *See* Official Voters' Pamphlet, General Election, Nov. 4, 1986, 8 (explanatory statement). Accordingly, we focus on the voters' purpose in 1952.

In 1972, the voters deleted [Article IV, section 5](#), providing for a state census. HJR 16 (1971), adopted May 23, 1972.

- 8 In so noting, we do not suggest that the Legislative Assembly or the Secretary must rely only on census data in all instances. *See Hartung v. Bradbury*, 332 Or. 570, 599 n. 26, 33 P.3d 972 (2001) (permitting Secretary to use non-census data to correct plan when census data regarding particular census block was indisputably in error and reliable, unbiased sources were available). It may be useful for the Legislative Assembly or the Secretary to prepare draft reapportionment plans using non-census data from the Population Research Center before enacting or making a plan. Given the short time frames involved, we do not wish to discourage or prohibit that use.
- 9 Not only might the objections have to be made without access to the census data, but persons responding to the objection might have to do so without reference to the data, either. *See* [ORAP 11.35\(6\)\(a\)](#) (briefs in opposition are due 10 business days after date objections are due).
- 10 *See* [Or. Const., Art IV, §§ 6\(2\)\(b\), 6\(3\)\(c\)](#) (Supreme Court's jurisdiction is to determine whether challenged plan “complies with subsection (1) of this section and all law applicable thereto”); *id.* [§§ 6\(2\)\(c\), 6\(3\)\(d\)](#) (if plan does not comply, Supreme Court must issue opinion that specifies “with particularity wherein the reapportionment fails to comply”).
- 11 In an effort to identify possible alternative deadlines that would achieve the requirements of [Article IV, section 6](#), we previously submitted a draft set of deadlines to the parties. We have considered the parties' responses, as well as the federal government's recently revised announcement that census data will be available earlier than previously expected. As discussed below, the dates set out in Appendix 2 of this opinion reflect those considerations.
- 12 [Article IV, section 6\(6\)](#), provides two different effective dates. The only effective date affected by this decision is set out in [section 6\(6\)\(b\)](#), which applies “[f]or purposes of electing Senators and Representatives to the next term of office that commences after the applicable deadline for making a final reapportionment under this section.” The other effective date provision, set out in [section 6\(6\)\(a\)](#), applies in all other instances, and for those purposes, the reapportionment plan is not effective until January of 2023. *See* [Or. Const., Art IV, § 6\(6\)\(a\)](#) (plan is “operative on the second Monday in January of the next odd-numbered year after the applicable deadline for making a final reapportionment under this section”).
- 13 Relators have identified a number of additional statutory deadlines that they suggest needed to be changed. None of those deadlines runs from the effective date of the reapportionment; almost all the deadlines are the first date that some action is permitted, and almost all those first dates precede the currently prescribed January 1 effective date for a reapportionment. The reason why persons should be prohibited from taking action earlier is neither obvious nor explained by relators. Moreover, doing so would in most cases narrow the available window of time for taking such actions. Accordingly, we decline the invitation to make those additional changes.
- 14 Unless otherwise expressly noted or necessarily changed by implication, all other formal requisites of the reapportionment process remain unchanged.

# Detroit Free Press

## POLITICS

# Redistricting commission asks Michigan Supreme Court for deadline extension

**Clara Hendrickson** Detroit Free Press

Published 9:43 a.m. ET Apr. 21, 2021 | Updated 4:13 p.m. ET Apr. 21, 2021

Michigan's redistricting commission and Secretary of State Jocelyn Benson asked the state Supreme Court to extend the deadline for adopting new congressional and legislative districts in a petition for relief filed Tuesday.

Under the state constitution, the Michigan Independent Citizens Redistricting Commission must propose congressional and legislative maps by Sept. 17 and adopt the final maps by Nov. 1. Because of COVID-19-related delays, the Census Bureau says it will deliver the data needed to undertake redistricting to the states by Sept. 30, six months past the deadline in federal law.

The months-long, unprecedented delay in the census data creates a conflict with meeting Michigan's constitutional deadlines for redistricting.

The commission's petition for relief proposes a new timeline to accommodate the delay in which the commission would propose redistricting plans by Dec. 11 and adopt final plans following 45 days of public comment by Jan. 25, 2022.

The petition notes that if the data arrives earlier, the commission "will make every effort to expedite the process."

"Our state constitution guarantees the people of Michigan 45 days to review and provide comment on the maps created by the independent commission, and this time must be granted them despite the delay by the U.S. Census Bureau," Benson said in a statement.

"We launched this historic commission in a manner that was citizen led and transparent and voters across the state and across the political spectrum expect it to continue to operate this way."

## MCLEAN EXHIBIT "6"

**More:** Gerrymandering split up communities in the past. New redistricting process aims to keep them together.

**More:** Your questions about Michigan's new redistricting process answered

In 2018, Michigan voters backed a constitutional amendment to establish the new citizen-led redistricting process, taking the power away from the Legislature. The commission is made up of Democrats, Republicans and independents.

Benson said the timeline would give the Bureau of Elections enough time to update the state's voter registration database. After each redistricting cycle following the completion of the census every ten years, the state has to assign every registered voter to their new congressional, state Senate and state House districts so that they are given the correct ballot.

The process of converting maps into ballots is one that usually takes about six months, according to Michigan Director of Elections Jonathan Brater. But this year the bureau will have less time to undertake that process due to the census delay.

The proposed timeline would not change the filing deadline. Candidates filing nominating petitions for the August 2022 primary would still have to file by April 19, 2022.

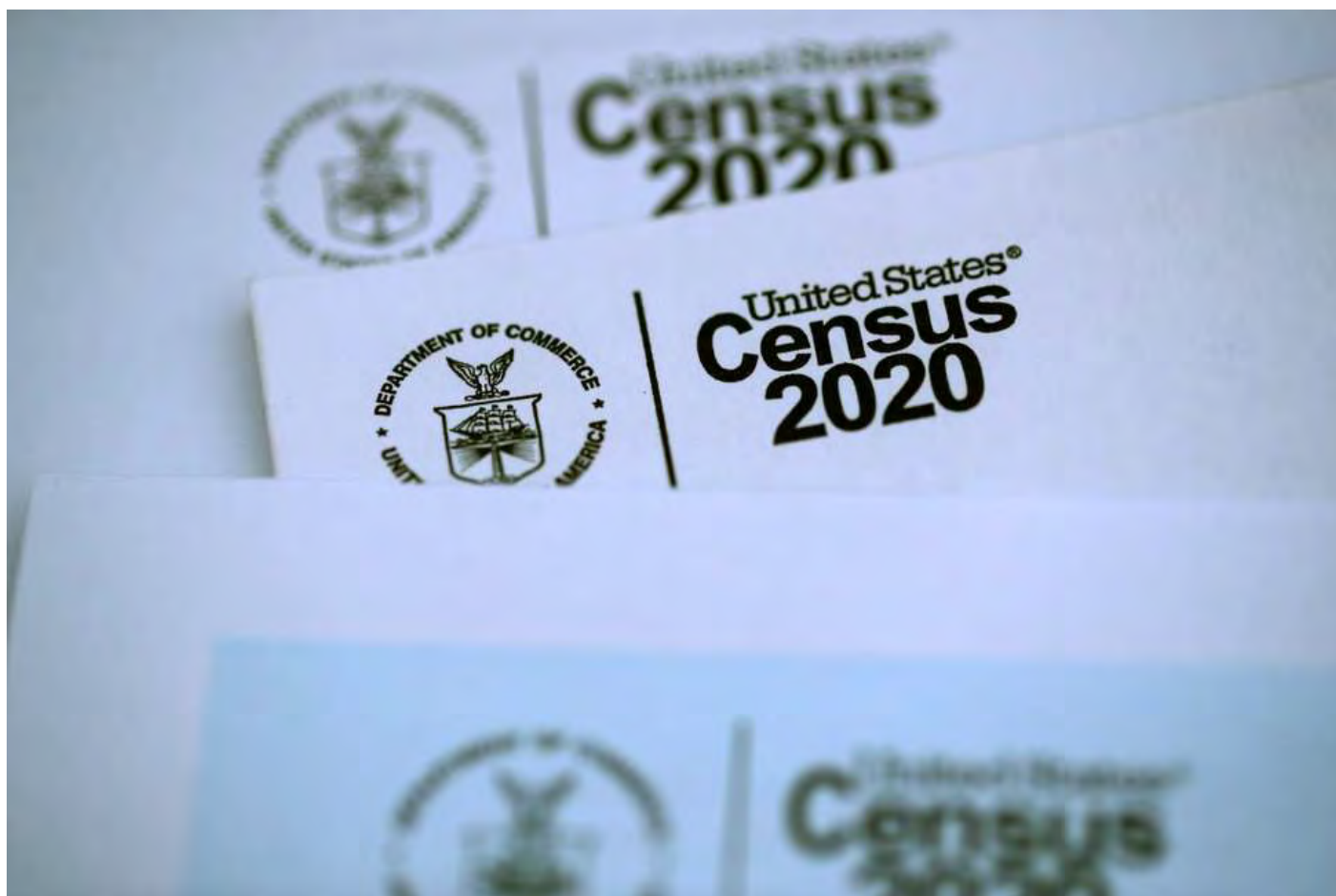
*Clara Hendrickson fact-checks Michigan issues and politics as a corps member with Report for America, an initiative of The GroundTruth Project. Make a tax-deductible contribution to support her work at [bit.ly/freepRFA](https://bit.ly/freepRFA). Contact her at [chendrickson@freepress.com](mailto:chendrickson@freepress.com) or 313-296-5743 for comments or to suggest a fact-check. Follow her on Twitter @clarajanehen .*



## ELECTIONS

## Census data snafu upends 2022 elections

A six-month delay in releasing redistricting data to is set to delay primaries and blow deadlines for new maps in some states.



The Census Bureau has announced that redistricting data, which are used to draw equal-population political boundaries for state legislatures and the House of Representatives, would be released by Sept. 30 this year — well past the usual delivery date of March 31. | Justin Sullivan/Getty Images

By **ZACH MONTELLARO** and **ALLY MUTNICK**

03/01/2021 04:30 AM EST



## MCLEAN EXHIBIT "7"

A six-month delay holding up the data that states use to draw their legislative

districts is mangling plans for the 2022 elections, as states discuss postponing primaries and navigating legal deadlines for redistricting that some are now almost certain to miss.

The Census Bureau announced in mid-February that redistricting data — the granular, block-level population counts that are used to draw equal-population political boundaries for state legislatures and the House of Representatives — would be released by Sept. 30 this year, well past the usual delivery date of March 31.

AD

Many states are typically done with redistricting by then, not just starting it, and the delay puts states with early primaries and redistricting deadlines in a difficult position. At least nine states have constitutional or statutory deadlines to redraw their maps, according to the National Conference of State Legislatures, that won't mesh with such a profound delay in the data delivery. Election officials in some states, such as North Carolina, have recommended moving back early primary dates to make more time for drawing new districts. And both political parties will have to grapple with how to recruit candidates to run for districts that may not exist until just before election season begins.

“Basically we’re sort of panicking, and we’re not really sure what we’re going to do,” said Jessika Shipley, the staff director of the Colorado's state redistricting commission. “We don’t have the option of just waiting and doing this for the 2024 cycle.”

The time crunch will hit every state, but it's particularly acute in states like Colorado with hard deadlines. Colorado's state constitution requires new congressional maps to be drawn by Sept. 1. The commission is not fully formed yet, but Shipley said her staff is considering its options, including proposing legislation or turning to the state judiciary for a delay. "The other option is, I guess, to wait and get sued because we don't meet our deadlines, and see what court weighs in at that point," she said.

In a late February call with reporters, the National Republican Redistricting Trust, the GOP's hub for data and legal efforts on redistricting, expressed concern that the delay could spur a cascade of litigation and force courts to take a significantly bigger role in the redistricting process.

"I am concerned that it's going to increase the volume of litigation," said Jason Torchinsky, an attorney with the NRRT who gamed out potential scenarios stemming from the census delays, including a proliferation of court-drawn interim maps. "So we could wind up with a series of court-drawn maps around the country for 2022, only to have legislatures reconvene to draw new maps for 2024."

AD

Even the broadest redistricting data from the Census Bureau — apportionment data, the topline population counts that determine how many House seats each state gets — won't be released until the second half of April. These numbers, which were originally slated for release in December 2020, are most crucial to states that are on the cusp of losing or gaining a seat — and to the members of

Congress in those states, who could suddenly find themselves standing without a chair when the music stops. The latest estimates show New York and Alabama battling for the last slot.

A few states have already taken action to give themselves more leeway, and they could serve as potential blueprints for their peers. California's constitution requires that maps be drawn by Aug. 15, but the state legislature had already [sought and received a four-month extension](#) from the state Supreme Court — and it may require another. Other legislatures are also considering asking the judiciary for relief.

“We’re working with the attorney general’s office to see what options we may have,” said Maine state Senate President Troy Jackson, whose state has a June deadline for the legislature to draw maps. “We might have to go to the Maine Supreme Court to see if we could get an extension. The original delay was concerning, really concerning. But this one is obviously a real problem.”

“I think the court’s going to be sympathetic, if that’s the route we end up going, because they won’t be able to draw any maps without having any knowledge, either,” he continued. “Our constitution never took into account what we’re dealing with here.”

Another tactic adopted by Ohio last week was to [file a suit in federal court](#) that would compel the Census Bureau to release redistricting data on March 31 as legally required, arguing that the Bureau has unilaterally changed the deadlines codified in law and was harming the state. Ohio has a constitutional deadline to finalize its new maps in September.

Voters in New Jersey, which holds legislative elections in odd-numbered years, approved a state constitutional amendment in 2020 that pushes legislative redistricting back due to the delay, so the 2021 elections will be held on the old maps.

The six-month delay will have a downstream effect that will likely hold up candidate filing deadlines and primaries around the country. Illinois, Texas and North Carolina, which are likely to have March primaries and late 2021



candidate-filing deadlines, are in the biggest squeeze. And with Illinois on track to lose a seat, North Carolina gaining one and Texas slated to gain as many as three, all maps will change significantly, too.

AD

“Keep in mind the logistics of this: This is not just the deadlines for drawing the maps,” Torchinsky said. “You also have to work backwards from the date of the election to allow time for both qualifying, through whatever the state processes are, plus allowing normal time for election administration like ballot printing.”

In North Carolina, Karen Brinson Bell, the executive director of the state board of elections, told a State House committee last week that her staff is recommending that the state’s primaries be pushed to May 3. Any change in the state’s election calendar would have to be approved by the state legislature.

And in Pennsylvania, legislative leaders have already [floated the need to delay](#) the state’s 2022 primaries, which are currently scheduled for mid-May.

“It is possible that the six-month delay could cause the final legislative plans to be completed well into the second quarter of 2022,” Brent McClintock, the executive director of the Pennsylvania Legislative Data Processing Center, a nonpartisan agency that assists the state legislature, said at a hearing last week.

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## Weekly Score

Your guide to the year-round campaign cycle



## YOUR EMAIL

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Uncertain schedules for primaries and filing deadlines put candidates in a particularly uncomfortable situation. They will go months without actually knowing the lines of the districts they want to run in — a headache lawmakers in Pennsylvania know well.

In 2018, the state Supreme Court invalidated Pennsylvania's congressional map, calling it an illegal partisan gerrymander. It didn't impose a new map until February 2018, about three months before the primaries.

AD

“When I ran my first time, we didn't really know where the districts were. We ended up running several different races,” said second-term Rep. Chrissy Houlahan (D-Pa.). “We ended up doing petitions in two different districts. We ended up not knowing where to campaign. It's really hard.”

In general, that dynamic could benefit incumbents in 2022, given that sitting lawmakers typically have sizable campaign accounts and a built-out staff. Challengers, meanwhile, may be reluctant to launch campaigns knowing that districts might change in ways that make them unwinnable or draw their communities into a different seat.

communities into a different seat.

The compressed timeline will also make it harder for objectors to challenge new maps, either in court or by marshaling public opinion.

The National Democratic Redistricting Committee, led by former Attorney General Eric Holder, has been working for years to get voters more invested in blocking partisan gerrymanders so they can publicly pressure lawmakers into creating what they call "fair districts."

In Florida, some Democrats are working to ensure a short redistricting timeline doesn't interfere with their state-mandated process of gathering public input on the new maps proposed by lawmakers in Tallahassee.

"Making sure that the public engagement piece is there to react to what the legislature proposes to do is just as important," said Florida state Rep. Ben Diamond, who is helping with Democratic redistricting efforts in the state.

**FILED UNDER:** ELECTIONS, CENSUS, 2020 CENSUS, U.S. CENSUS BUREAU, CHRIS HOULAHAN, 2022 ELECTIONS

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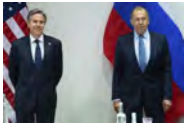
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## SENATE RESOLUTION

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REQUESTING THE ATTORNEY GENERAL TO PETITION THE HAWAII SUPREME COURT SEEKING RELIEF TO PREVENT ACTION AGAINST THE REAPPORTIONMENT COMMISSION FOR THE COMMISSION'S FAILURE TO MEET STATUTORY OR CONSTITUTIONAL DEADLINES RELATING TO THE 2021 REAPPORTIONMENT PLANS.

1 WHEREAS, a fundamental tenet of elections in the United  
2 States is the fair apportionment of representation across a  
3 given population, and the United States and Hawai'i governments  
4 each have legislative bodies with legislators elected to  
5 represent individual districts that have an approximate equal  
6 number of citizens; and

7  
8 WHEREAS, article IV, section 2, of the Hawaii State  
9 Constitution calls for, and explains the procedures for, the  
10 convening of the Reapportionment Commission, which is tasked  
11 with creating a reapportionment plan for the Legislature and a  
12 reapportionment plan for United States congressional districts;  
13 and

14  
15 WHEREAS, the Hawaii State Constitution requires that the  
16 first eight members of the Commission be selected by May 1 of a  
17 reapportionment year, and the Chairperson of the Commission be  
18 selected no later than thirty days after the eighth member of  
19 the Commission is selected; and

20  
21 WHEREAS, accordingly, the latest date for the final member  
22 and chairperson of the Reapportionment Commission to be selected  
23 is May 31; and

24  
25 WHEREAS, section 25-2, Hawaii Revised Statutes, requires  
26 the Reapportionment Commission to:

- 27  
28 (1) Submit a draft of its respective reapportionment plans  
29 no later than one hundred days after it convenes; and  
30



1 (2) Hold at least one public hearing on the proposed  
2 reapportionment plans in each basic island unit after  
3 a minimum of twenty days following public notice of  
4 the plan; and  
5

6 WHEREAS, accordingly, provided that the Chairperson of the  
7 Reapportionment Commission is selected on May 31, the latest  
8 date that proposed reapportionment plans may be presented to the  
9 public is September 8, and the latest date on which a public  
10 hearing may be held is September 28; and  
11

12 WHEREAS, article IV, section 2, of the Hawaii State  
13 Constitution requires the Reapportionment Commission to submit  
14 to the Chief Election Officer final reapportionment plans no  
15 later than one hundred fifty days after the Commission is  
16 convened; and  
17

18 WHEREAS, accordingly, provided that the Chairperson of the  
19 Reapportionment Commission is selected on May 31, the latest  
20 date that the final reapportionment plans may be submitted to  
21 satisfy the Constitution is October 28; and  
22

23 WHEREAS, article IV, section 1, of the Hawaii State  
24 Constitution designates as reapportionment years "the year 1981  
25 . . . and every tenth year thereafter", making 2021 a  
26 reapportionment year; and  
27

28 WHEREAS, due to each state's ever-changing populations, the  
29 United States Census is conducted every ten years by the United  
30 States Census Bureau for the purpose of gathering an accurate  
31 count of persons living in the United States, and this count is  
32 used in the reapportionment process to ensure fair and equal  
33 representation in legislative bodies; and  
34

35 WHEREAS, for the 2011 reapportionment, Hawai'i received data  
36 from the United States Census Bureau on February 22, 2011; and  
37

38 WHEREAS, to date, Hawai'i has not received the data from the  
39 United States Census Bureau necessary to prepare the 2021  
40 reapportionment plans; and  
41



1 WHEREAS, due to the coronavirus disease 2019 (COVID-19)  
2 pandemic, the United States Census Bureau has announced that it  
3 expects to deliver to the states and the public the quality data  
4 necessary for states to prepare reapportionment plans later than  
5 previous years, potentially as late as September 30, 2021; and  
6

7 WHEREAS, due to the COVID-19 pandemic and the announcement  
8 from the United States Census Bureau, it appears unlikely that  
9 the 2021 Reapportionment Commission will be able to meet the  
10 Commission's statutorily and constitutionally mandated  
11 deadlines; and  
12

13 WHEREAS, the Reapportionment Commission's inability to meet  
14 these statutory and constitutional deadlines makes the eventual  
15 reapportionment plans subject to legal challenge, which could  
16 detrimentally delay the State's elections process; now,  
17 therefore,  
18

19 BE IT RESOLVED by the Senate of the Thirty-first  
20 Legislature of the State of Hawaii, Regular Session of 2021,  
21 that the Attorney General is requested to begin legal  
22 proceedings to, when appropriate, petition the Hawaii Supreme  
23 Court seeking relief to prevent action against the  
24 Reapportionment Commission for the Reapportionment Commission's  
25 failure to meet statutory or constitutional deadlines relating  
26 to the 2021 reapportionment plans resulting from the United  
27 States Census Bureau's delay in delivering high quality data to  
28 the states and public; and  
29

30 BE IT FURTHER RESOLVED that certified copies of this  
31 Resolution be transmitted to the Director of the United States  
32 Census Bureau, Governor, Chief Justice of the Hawaii Supreme  
33 Court, Attorney General, and Chief Elections Officer.





KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated  
Title 13. Census (Refs & Annos)  
Chapter 5. Censuses (Refs & Annos)  
Subchapter II. Population, Housing, and Unemployment (Refs & Annos)

13 U.S.C.A. § 141

§ 141. Population and other census information

Currentness

<For [Executive Order No. 13986](#), “Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census”, see [Executive Order No. 13986](#), January 20, 2021, 86 F.R. 7015.>

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the “decennial census date”, in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve

**MCLEAN EXHIBIT "9"**



in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the “mid-decade census date”.

(e)(1) If--

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census--

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, “census of population” means a census of population, housing, and matters relating to population and housing.

#### CREDIT(S)

(Aug. 31, 1954, c. 1158, 68 Stat. 1019; [Pub.L. 85-207](#), § 9, Aug. 28, 1957, 71 Stat. 483; [Pub.L. 94-171](#), §§ 1, 2(a), Dec. 23, 1975, 89 Stat. 1023, 1024; [Pub.L. 94-521](#), § 7(a), Oct. 17, 1976, 90 Stat. 2461.)

#### EXECUTIVE ORDERS

**EXECUTIVE ORDER NO. 13880**

<July 11, 2019, 84 F.R. 33821>

**Collecting Information About Citizenship Status in Connection With the Decennial Census**

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

**Section 1. Purpose.** In *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), the Supreme Court held that the Department of Commerce (Department) may, as a general matter, lawfully include a question inquiring about citizenship status on the decennial census and, more specifically, declined to hold that the Secretary of Commerce's decision to include such a question on the 2020 decennial census was “substantively invalid.” That ruling was not surprising, given that every decennial census from 1820 to 2000 (with the single exception of 1840) asked at least some respondents about their citizenship status or place of birth. In addition, the Census Bureau has inquired since 2005 about citizenship on the American Community Survey\_a separate questionnaire sent annually to about 2.5 percent of households.

The Court determined, however, that the explanation the Department had provided for including such a question on the census was, in the circumstances of that case, insufficient to support the Department's decision. I disagree with the Court's ruling, because I believe that the Department's decision was fully supported by the rationale presented on the record before the Supreme Court.

The Court's ruling, however, has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire. After examining every possible alternative, the Attorney General and the Secretary of Commerce have informed me that the logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the question on the 2020 decennial census.

Nevertheless, we shall ensure that accurate citizenship data is compiled in connection with the census by other means. To achieve that goal, I have determined that it is imperative that all executive departments and agencies (agencies) provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective. When the Secretary of Commerce decided to include the citizenship question on the census, he determined that such a question, in combination with administrative records, would provide the most accurate and complete data. At that time, the Census Bureau had determined based on experience that administrative records to which it had access would enable it to determine citizenship status for approximately 90 percent of the population. At that point, the benefits of using administrative records were limited because the Department had not yet been able to access several additional important sets of records with critical information on citizenship. Under the Secretary of Commerce's decision memorandum directing the Census Bureau “to further enhance its administrative record data sets” and “to obtain as many additional Federal and state administrative records as possible,” the Department has sought access to several such sets of records maintained by other agencies, but it remains in negotiations to secure access. The executive action I am taking today will ensure that the Department will have access to all available records in time for use in conjunction with the census.

Therefore, to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the Department, I am hereby ordering all agencies to share information requested by the Department to the maximum extent permissible under law.

Access to the additional data identified in section 3 of this order will ensure that administrative records provide more accurate and complete citizenship data than was previously available.

I am also ordering the establishment of an interagency working group to improve access to administrative records, with a goal of making available to the Department administrative records showing citizenship data for 100 percent of the population. And I am ordering the Secretary of Commerce to consider mechanisms for ensuring that the Department's existing data-gathering efforts expand the collection of citizenship data in the future.

Finally, I am directing the Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship.

Ensuring that the Department has available the best data on citizenship that administrative records can provide, consistent with law, is important for multiple reasons, including the following.

First, data on the number of citizens and aliens in the country is needed to help us understand the effects of immigration on our country and to inform policymakers considering basic decisions about immigration policy. The Census Bureau has long maintained that citizenship data is one of the statistics that is “essential for agencies and policy makers setting and evaluating immigration policies and laws.”

Today, an accurate understanding of the number of citizens and the number of aliens in the country is central to any effort to reevaluate immigration policy. The United States has not fundamentally restructured its immigration system since 1965. I have explained many times that our outdated immigration laws no longer meet contemporary needs. My Administration is committed to modernizing immigration laws and policies, but the effort to undertake any fundamental reevaluation of immigration policy is hampered when we do not have the most complete data about the number of citizens and non-citizens in the country. If we are to undertake a genuine overhaul of our immigration laws and evaluate policies for encouraging the assimilation of immigrants, one of the basic informational building blocks we should know is how many non-citizens there are in the country.

Second, the lack of complete data on numbers of citizens and aliens hinders the Federal Government's ability to implement specific programs and to evaluate policy proposals for changes in those programs. For example, the lack of such data limits our ability to evaluate policies concerning certain public benefits programs. It remains the immigration policy of the United States, as embodied in statutes passed by the Congress, that “aliens within the Nation's borders should not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations” and that “the availability of public benefits should not constitute an incentive for immigration to the United States” (8 U.S.C. 1601(2)). The Congress has identified compelling Government interests in restricting public benefits “in order to assure that aliens be self-reliant in accordance with national immigration policy” and “to remove the incentive for illegal immigration provided by the availability of public benefits” (8 U.S.C. 1601(5), (6)).

Accordingly, aliens are restricted from eligibility for many public benefits. With limited exceptions, aliens are ineligible to receive supplemental security income or food stamps (8 U.S.C. 1612(a)). Aliens who are “qualified aliens”—that is, lawful permanent residents, persons granted asylum, and certain other legal immigrants—are, with limited exceptions, ineligible to receive benefits through Temporary Assistance for Needy Families, Medicaid, and State Children's Health Insurance Program for 5 years after entry into the United States (8 U.S.C. 1613(a)). Aliens who are not “qualified aliens,” such as those unlawfully present, are generally ineligible for Federal benefits and for State and local benefits (8 U.S.C. 1611(a), 1621(a)).

The lack of accurate information about the total citizen population makes it difficult to plan for annual expenditures on certain benefits programs. And the lack of accurate and complete data concerning the alien population makes it extremely difficult to evaluate the potential effects of proposals to alter the eligibility rules for public benefits.

Third, data identifying citizens will help the Federal Government generate a more reliable count of the unauthorized alien population in the country. Data tabulating both the overall population and the citizen population could be combined with records of aliens lawfully present in the country to generate an estimate of the aggregate number of aliens unlawfully present in each

State. Currently, the Department of Homeland Security generates an annual estimate of the number of illegal aliens residing in the United States, but its usefulness is limited by the deficiencies of the citizenship data collected through the American Community Survey alone, which includes substantial margins of error because it is distributed to such a small percentage of the population.

Academic researchers have also been unable to develop useful and reliable numbers of our illegal alien population using currently available data. A 2018 study by researchers at Yale University estimated that the illegal alien population totaled between 16.2 million and 29.5 million. Its modeling put the likely number at about double the conventional estimate. The fact is that we simply do not know how many citizens, non-citizens, and illegal aliens are living in the United States.

Accurate and complete data on the illegal alien population would be useful for the Federal Government in evaluating many policy proposals. When Members of Congress propose various forms of protected status for classes of unauthorized immigrants, for example, the full implications of such proposals can be properly evaluated only with accurate information about the overall number of unauthorized aliens potentially at issue. Similarly, such information is needed to inform debate about legislative proposals to enhance enforcement of immigration laws and effectuate duly issued removal orders.

The Federal Government's need for a more accurate count of illegal aliens in the country is only made more acute by the recent massive influx of illegal immigrants at our southern border. In Proclamation 9822 of November 9, 2018 (Addressing Mass Migration Through the Southern Border of the United States), I explained that our immigration and asylum system remains in crisis as a consequence of the mass migration of aliens across our southern border. As a result of our broken asylum laws, hundreds of thousands of aliens who entered the country illegally have been released into the interior of the United States pending the outcome of their removal proceedings. But because of the massive backlog of cases, hearing dates are sometimes set years in the future and the adjudication process often takes years to complete. Aliens not in custody routinely fail to appear in court and, even if they do appear, fail to comply with removal orders. There are more than 1 million illegal aliens who have been issued final removal orders from immigration judges and yet remain at-large in the United States.

Efforts to find solutions that address the immense number of unauthorized aliens living in our country should start with accurate information that allows us to understand the true scope of the problem.

Fourth, it may be open to States to design State and local legislative districts based on the population of voter-eligible citizens. In [Evenwel v. Abbott, 136 S. Ct. 1120 \(2016\)](#), the Supreme Court left open the question whether “States may draw districts to equalize voter-eligible population rather than total population.” Some States, such as Texas, have argued that “jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline\_including total population and voter-eligible population\_so long as the choice is rational and not invidiously discriminatory”. Some courts, based on Supreme Court precedent, have agreed that State districting plans may exclude individuals who are ineligible to vote. Whether that approach is permissible will be resolved when a State actually proposes a districting plan based on the voter-eligible population. But because eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population.

The Department has said that if the officers or public bodies having initial responsibility for the legislative districting in each State indicate a need for tabulations of citizenship data, the Census Bureau will make a design change to make such information available. I understand that some State officials are interested in such data for districting purposes. This order will assist the Department in securing the most accurate and complete citizenship data so that it can respond to such requests from the States.

To be clear, generating accurate data concerning the total number of citizens, non-citizens, and illegal aliens in the country has nothing to do with enforcing immigration laws against particular individuals. It is important, instead, for making broad policy determinations. Information obtained by the Department in connection with the census through requests for administrative records under [13 U.S.C. 6](#) shall be used solely to produce statistics and is subject to confidentiality protections under Title 13 of the United States Code. Information subject to confidentiality protections under Title 13 may not, and shall not, be used to bring

immigration enforcement actions against particular individuals. Under my Administration, the data confidentiality protections in Title 13 shall be fully respected.

**Sec. 2. Policy.** It is the policy of the United States to develop complete and accurate data on the number of citizens, non-citizens, and illegal aliens in the country. Such data is necessary to understand the effects of immigration on the country, and to inform policymakers in setting and evaluating immigration policies and laws, including evaluating proposals to address the current crisis in illegal immigration.

**Sec. 3. Assistance to the Department of Commerce and Maximizing Citizenship Data. (a)** All agencies shall promptly provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens, non-citizens, and illegal aliens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective. In particular, the following agencies shall examine relevant legal authorities and, to the maximum extent consistent with law, provide access to the following records:

(i) Department of Homeland Security, United States Citizenship and Immigration Services\_National-level file of Lawful Permanent Residents, Naturalizations;

(ii) Department of Homeland Security, Immigration and Customs Enforcement--F1 & M1 Nonimmigrant Visas;

(iii) Department of Homeland Security--National-level file of Customs and Border Arrival/Departure transaction data;

(iv) Department of Homeland Security and Department of State, Worldwide Refugee and Asylum Processing System--Refugee and Asylum visas;

(v) Department of State--National-level passport application data;

(vi) Social Security Administration--Master Beneficiary Records; and

(vii) Department of Health and Human Services--CMS Medicaid and CHIP Information System.

(b) The Secretary of Commerce shall instruct the Director of the Census Bureau to establish an interagency working group to coordinate efforts, consistent with law, to maximize the availability of administrative records in connection with the census, with the goal of obtaining administrative records that can help establish citizenship status for 100 percent of the population. The Director of the Census Bureau shall chair the working group, and the head of each agency shall designate a representative to the working group upon request from the working group chair.

(c) To ensure that the Federal Government continues to collect the most accurate information available concerning citizenship going forward, the Secretary of Commerce shall consider initiating any administrative process necessary to include a citizenship question on the 2030 decennial census and to consider any regulatory changes necessary to ensure that citizenship data is collected in any other surveys and data-gathering efforts conducted by the Census Bureau, including the American Community Survey. The Secretary of Commerce shall also consider expanding the distribution of the American Community Survey, which currently reaches approximately 2.5 percent of households, to secure better citizenship data.

(d) The Department shall strengthen its efforts, consistent with law, to gain access to relevant State administrative records.

**Sec. 4. General Provisions. (a)** Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or



(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

**MEMORANDA OF PRESIDENT**

**PRESIDENTIAL MEMORANDUM**

<July 21, 2020, [85 FR 44679](#)>

**Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census**

**Memorandum for the Secretary of Commerce**

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

**Section 1. Background.** In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted ([U.S. Const. art. I, sec. 2, cl. 3](#)). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the “whole number of persons in each State,” which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress ([2 U.S.C. 2a\(a\)](#)). The Congress has provided that it is “the President’s personal transmittal of the report to Congress” that “settles the apportionment” of Representatives among the States, and the President’s discretion to settle the apportionment is more than “ceremonial or ministerial” and is essential “to the integrity of the process” ([Franklin v. Massachusetts, 505 U.S. 788, 799, and 800 \(1992\)](#)).

The Constitution does not specifically define which persons must be included in the apportionment base. Although the Constitution requires the “persons in each State, excluding Indians not taxed,” to be enumerated in the census, that requirement has never been understood to include in the apportionment base every individual physically present within a State’s boundaries at the time of the census. Instead, the term “persons in each State” has been interpreted to mean that only the “inhabitants” of each State should be included. Determining which persons should be considered “inhabitants” for the purpose of apportionment requires the exercise of judgment. For example, aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are “persons” who have been excluded from the apportionment base in past censuses. Conversely, the Constitution also has never been understood to exclude every person who is not physically “in” a State at the time of the census. For example, overseas Federal personnel have, at various times, been included in and excluded from the populations of the States in which they maintained their homes of record. The discretion delegated to the executive branch to determine who qualifies as an “inhabitant” includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status.

In [Executive Order 13880](#) of July 11, 2019 (Collecting Information About Citizenship Status in Connection With the Decennial Census), I instructed executive departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country. As the Attorney General and I explained at the time that order was signed, data on illegal aliens could be relevant for the purpose of conducting the apportionment, and we intended to examine that issue.

**Sec. 2. Policy.** For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended ([8 U.S.C. 1101 et seq.](#)), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

**Sec. 3. Excluding Illegal Aliens from the Apportionment Base.** In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in Final 2020 Census Residence Criteria and Residence Situations, 83 FR 5525 (Feb. 8, 2018).

**Sec. 4. General Provisions.** (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
  - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

[Notes of Decisions \(62\)](#)

13 U.S.C.A. § 141, 13 USCA § 141

Current through PL 117-12 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. See credits for details.

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June 15, 2020

Honorable Chief Justice Tani Cantil-Sakauye  
and Honorable Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102

Re: ***Legislature of the State of California v. Padilla***  
California Supreme Court Case No. S262530  
Amici Curiae Letter in Support of Emergency Petition for Writ of Mandate

Dear Honorable Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g), we write in support of the Emergency Petition for Writ of Mandate in this case on behalf of the following amici curiae: California Common Cause, the League of Women Voters of California, and Former Governor Arnold Schwarzenegger.<sup>1</sup>

### **Interests of Amici**

Amici are grassroots organizations and a former Governor of California committed to the core values of democracy, each with extensive experience reforming and overseeing redistricting efforts in California and across the country. Amici are well-positioned to assist the Court in understanding the impact of unprecedented census delays on California's redistricting process.

California Common Cause is a nonpartisan organization dedicated to ensuring open, accountable, and effective government in California. Common Cause works to

<sup>1</sup> No counsel for a party wrote this letter in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this letter. No person other than the amici curiae, their members, or their counsel made a monetary contribution to fund the preparation or submission of this letter.

**MCLEAN EXHIBIT "10"**

Document received by the CA Supreme Court.

strengthen public participation in the political process and to ensure that process serves the public interest. To that end, Common Cause has pursued redistricting reform for several decades. Common Cause led efforts to reform California's state redistricting process by establishing an alternative to Legislature-drawn state district lines. As one of Proposition 11's drafters and original proponents, Common Cause sought to create the Citizens Redistricting Commission, and to give it the responsibility of drawing state districts that would follow new, prioritized mapping criteria and rules for transparency and public engagement. Common Cause also endorsed and devoted resources to the passage of Proposition 20, which expanded the Commission's responsibilities in drawing congressional district lines and added language about communities of interest, timing of map adoption, and referendum rules. Common Cause led coalition efforts of California groups in the 2010 and 2020 cycles to monitor, provide guidance to, and educate the public about the Commission's recruitment, selection, mapping, and public engagement.

The League of Women Voters of California is a registered 501(c)(4) nonprofit, nonpartisan, political organization based in Sacramento, California, which encourages informed and active participation in the democratic process, and influences public policy through education and advocacy. The League served as a key member of the coalition that worked to develop the framework for Proposition 11. The League was integrally involved in drafting and finalizing the language of the initiative and was a signatory to the ballot arguments supporting the initiative. The League also provided input on Proposition 11's implementing regulations, including application and selection processes. The League and its education arm also regularly conduct education and outreach to encourage members of the public to learn about the Commission and apply for positions, and they provide recommendations to the Commission about how to conduct its own public outreach.

Arnold Schwarzenegger served as the Governor of California from 2003 to 2011. In 2008 and 2010, he successfully advocated for Proposition 11 and Proposition 20, two ballot initiatives that established nonpartisan redistricting commissions for California. These reforms ended decades of partisan gerrymanders to the benefit of California's political system. Following his term of office, the former Governor has continued to support efforts to fight partisan gerrymandering nationwide and is a leading national redistricting reform advocate.

**Why the Court Should Grant the Emergency Writ**

**I. The Court should take immediate action to ensure the Commission has sufficient time to complete its work.**

The Court should grant the Legislature’s Petition for Writ of Mandate to ensure that the California Redistricting Commission (the “Commission”) will carry out its constitutional role. The People of California amended the California Constitution to create a nonpartisan redistricting process with the Commission at its center. Article XXI, section 1 of the California Constitution provides that “[i]n the year following the year in which the national census is taken,” the Commission “shall adjust the boundary lines of the congressional, State Senatorial, Assembly, and Board of Equalization districts.” In contrast to gerrymandering efforts that have damaged the underpinnings of democracy in many states, the Commission stands as a prototype for fair redistricting.

But COVID-19 has jeopardized the Commission’s work by delaying the national census. Because state and federal law require the Commission to use census data for redistricting, delays in the national census mean that the Commission will be unable to meet its constitutional and statutory deadlines. This Court can and should take swift action by granting the Legislature’s Petition. The requested relief—which amounts to a modest extension of deadlines directly in line with the Census delay—is necessary, within the Court’s power, and the only option that does not carry significant risks of undermining the redistricting process.

**A. Due to the COVID-19 pandemic, the decennial census will not be completed on schedule.**

Under 13 U.S.C. § 141, the U.S. Census Bureau counts the population as of April 1 of the year of the decennial census. (13 U.S.C. § 141(a).) Nine months later, the Census Bureau must report the census data to the President of the United States. (*Id.* § 141(b).) Three months after that, by March 31 in the year following the census, the Census Bureau must transmit redistricting data to the states. (*Id.*, § 141(c).)

COVID-19’s disruptive effect has left the Census Bureau unable to meet these statutory deadlines. On March 18, 2020, the Census Bureau announced that it would suspend field operations for collecting data for the 2020 Census, due to the COVID-19 pandemic. (See *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (March 18, 2020) U.S. Census Bureau <<https://www.census.gov/newsroom/press-releases/2020/operational-update.html>> [as of June 15, 2020].) Though field operations were originally suspended for only two weeks, the evolving circumstances of the pandemic extended operational closures. The Census Bureau only recently began a phased reopening of its field operations, and many have yet to reopen. (See generally

*COVID-19* (March 15, 2020) U.S. Census Bureau <<https://2020census.gov/en/news-events/press-kits/covid-19.html>> [as of June 15, 2020].) The Census Bureau’s call centers faced similar setbacks when social distancing guidelines and shelter-in-place restrictions upended operations. (See *U.S. Census Bureau Statement on 2020 Census Call Centers* (April 2, 2020) U.S. Census Bureau <<https://2020census.gov/en/news-events/press-releases/2020-census-call-centers.html>> [as of June 15, 2020].)

Due to these impediments, on April 13, 2020, the Census Bureau announced that “[i]n order to ensure the completeness and accuracy of the 2020 Census, the Census Bureau is seeking statutory relief from Congress of 120 additional calendar days to deliver final apportionment counts.” (*U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to Covid-19* (April 13, 2020) U.S. Census Bureau <<https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html>> [as of June 15, 2020].) This requested extension would change the Census Bureau’s internal deadline for transmitting redistricting data to the states from March 31, 2021 to July 31, 2021. (See *ibid.*) As of today, the House of Representatives has passed one bill and introduced another that approve the extension. (See HEROES Act, 116 H.R. No. 6800, 116th Cong., Div. G, tit. II, § 70201 (May 15, 2020); 116 H.R. No. 7034, 116th Cong., at <<https://www.congress.gov/bill/116th-congress/house-bill/7034/all-info>> [as of June 15, 2020].)

Even without the enactment of legislation, the Census Bureau has already extended its schedule of operations. (See *2020 Operational Adjustments Due to Covid-19*, U.S. Census Bureau <<https://2020census.gov/en/news-events/operational-adjustments-covid-19.html>> [as of June 15, 2020].) The Census Bureau currently plans to allow self-responses to census questionnaires through October 31, 2020, three months after the original deadline. (See *ibid.*) Stay-at-home orders and social distancing measures have also prevented door-knocking by census workers, efforts that were initially slated to begin in mid-May. (See *ibid.*) And the counts for many groups of people, such as for the homeless, still have no set schedule. (See *ibid.*) There is no question that the Census Bureau will miss its statutory deadlines for transmitting redistricting data to the states.

**B. The COVID-related delays in obtaining census information will prevent the Commission from meeting constitutional and statutory deadlines.**

The Commission’s deadlines rely on the congressionally-mandated timeline for transmitting census redistricting data to the states. In 1975, Congress added the requirement that the Census Bureau transmit tabulations of the population to the states

“within one year” of the April 1st census date. (13 U.S.C. § 141(c) (1975); H.R. No. 1753, 94th Cong., Pub. L. 94-171, 89 Stat. 1023 (Dec. 23, 1975).) Because the Census Bureau has consistently adhered to this schedule for the last five decades, multiple states, including California, have treated this transmittal deadline as definitive in crafting constitutional and statutory deadlines for redistricting. (See Tim Storey, Exec. Dir. of the National Conference of State Legislatures, letter to Steven Dillingham, Dir. of the U.S. Census Bureau, May 26, 2020 <<https://www.ncsl.org/documents/statefed/Census-Bureau-letter-May26-FINAL.pdf>> [as of June 15, 2020] [“Many states developed their redistricting schedules knowing that the April 1 P.L. 94-171 data delivery deadline was set by federal law.”]; *2020 Census Data & Redistricting*, California Common Cause <<https://www.commoncause.org/wp-content/uploads/2020/05/Redistricting-Deadlines-map-and-list.pdf>> [as of June 15, 2020] [summarizing state deadlines].)

As detailed in the Legislature’s Petition, when the Census Bureau delivers data on schedule, the Commission’s normal deadlines provide sufficient time to perform the redistricting process. This year, however, the Census Bureau’s anticipated four-month delay of the transmittal data—from March 31 to July 31—will make it impossible for the Commission to complete its work on time. The statutory deadline for the Commission to display preliminary maps, July 1, 2021, falls *before* the Census Bureau will transmit the data needed to draw the maps, making it impossible to meet the preliminary map deadline.

Moreover, as the Legislature explains in its Petition, the Commission’s August 15th deadline to approve final maps falls *before* the date the Commission will receive the state’s census datasets from the Statewide Database, which projects delivering the datasets to the Commission approximately thirty days after receipt of 2020 census data from the Census Bureau. These datasets are critical to ensuring that district lines comply with the federal Voting Rights Act of 1965. The Commission thus cannot commence mapping without these datasets which, under the current projected timeline, will be available by August 31, 2021—two weeks after the constitutional deadline for adoption of final maps. Even if the Commission were to streamline its process and work harder to act quickly, it would be impossible to draw, let alone adopt, maps by the August 15th deadline.

**C. This Court has both equitable and legal authority to modify the Commission’s deadlines.**

This Court clearly has the authority to grant the Legislature’s requested relief. The Court routinely exercises its authority to address threats to the orderly functioning of the electoral system, without waiting for the system to be irreparably disrupted before it takes action. The Court has “original jurisdiction in proceedings for extraordinary relief

in the nature of mandamus, certiorari, and prohibition.” (Cal. Const., art. VI, § 10.) On a petition for writ of mandate, the Court has jurisdiction where the “issues presented are of great public importance and must be resolved promptly.” (*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 453.) This Court has “exercised authority to entertain and decide petitions for original writs of mandate related to the . . . redistricting process in circumstances in which an expeditious ruling was necessary to the orderly functioning of the electoral system.” (*Id.* at p. 452; see also, e.g., *Wilson v. Eu* (1991) 54 Cal.3d 471, 473 (“*Wilson I*”) [judicial drawing of redistricted map when Legislature and Governor were unable to reach agreement on redistricting plan]; *Legislature v. Reinecke* (1972) 6 Cal.3d 595, 603-604 (1972) [evaluating and selecting interim state and congressional district maps for 1972 elections in the same circumstances]; *Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 692 [exercising power to select interim maps during a pending referendum].)

This Court has broad equitable powers, based in state and federal authority, to ensure the timely adoption of lawful maps. (See *Vandermost, supra*, 53 Cal.4th at pp. 450-451, 460, 483.) In *Wilson I*, for example, the Court held that because the Legislature and the Governor (who, at the time, were responsible for the redistricting process) were at an “impasse,” the Court was obligated to appoint special masters to draft appropriate district maps that complied with “equal protection guarantees” and the “right to equal participation.” (*Wilson I, supra*, 54 Cal.3d at p. 473; see also *Deukmejian, supra*, 30 Cal.3d at p. 665 [selecting maps by invoking the Court’s equitable powers under federal law as well as the equal protection and redistricting provisions of the California Constitution].) Much like in *Wilson I*, this case presents circumstances where the entity responsible for redistricting—the Commission—is unable to complete the redistricting process, at least under current deadlines. Thus, this Court should exercise its equitable powers to extend those deadlines so that the Commission may draw lawful and appropriate maps. This relief is less extreme than appointing special masters to perform the redistricting, and it would support, rather than undermine, the redistricting process the People of California chose.

In addition to the Court’s equitable powers, the Court must read the Commission’s deadlines in the broader context of the constitutional scheme requiring the **Commission** to perform the redistricting process. A statutory or constitutional provision’s “language must be construed in the context of the statute as a whole and the . . . overall . . . scheme.” (*Prof’l Eng’rs in Cal. Gov’t v. Kempton* (2007) 40 Cal.4th 1016, 1037.) Article XXI, section 1 of the California Constitution states that “[i]n the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the **Citizens Redistricting Commission . . . shall . . . adjust the boundary lines**” of the state and federal districts. Meanwhile, the Commission’s July 1st deadline for displaying its first preliminary map is part of



regulations meant to govern “[t]he activities” of the Commission. (Gov. Code, § 8253(a)(7).) Similarly, the August 15th deadline for approving final maps in the California Constitution is part of the “standards and process” for the Commission’s work. (Cal. Const., art. XXI, §§ 1, 2(g).) The voters and the Legislature could not have intended for these deadlines to take the redistricting process out of the Commission’s hands—the practical result here unless deadlines are extended.

**D. The Court should act now.**

To ensure that the Commission can act as soon as it obtains data from the Census Bureau, the Commission needs a viable schedule as soon as possible. The new Commission will be formed on August 15, 2020. (Gov. Code, § 8252(g).) Once that date passes, the Commission must begin hiring staff and advisors (Gov. Code, § 8253(a)(5)) and calendaring a series of public hearings and meetings to obtain public input (*id.*, § 8253(a)(7)). The broad range and significant scale of this work takes time. The 2011 Commission “held more than 70 business meetings and 34 public hearings in 32 cities throughout the state” and considered “more than 2,000 written submissions.” (*Vandermost, supra*, 53 Cal.4th at p. 445.) This hearing process will also likely be complicated by COVID-19, given ongoing stay-at-home and social distancing measures. The Commission will be unable to effectively plan around these logistical challenges if it does not even know whether the Commission will be allowed the time needed to complete its work, or when relevant benchmarks must be met. (Cf. *Wilson v. Eu* (1991) 54 Cal.3d 546, 548 (“*Wilson II*”) [providing early relief because elections are “a complex and ‘sequential’ process” and that “[e]arly delays in one function can impact all other functions”].)

If the Court does not provide scheduling relief for the Commission, the Legislature has indicated that it would consider placing an initiative on the November 2020 ballot to amend the constitutional and statutory deadlines. But the prospect of a future ballot initiative is not an adequate substitute for immediate judicial relief. As the Legislature explains in its Petition, the ballot process itself would impose a significant procedural and financial burden. (Perez Decl. in Support of Petition, ¶¶ 2-3 & Ex. A.) There is no guarantee that the Legislature will succeed in placing an initiative on the November 2020 ballot, given the limited window for legislative action and the multiple emergencies California and the nation currently face. Moreover, there is no existing funding or campaign for educating voters about a last-minute ballot measure, both of which would be critical to obtaining voter approval. Groups and individuals such as amici, who were instrumental in the passage of Propositions 11 and 20, have not had an opportunity to build a campaign, raise campaign funds, or assemble a coalition to help support such a measure. Even if a constitutional amendment were placed on the ballot, the voters may reject it—at which point, only another Petition could provide relief.

Finally, granting the narrow judicial relief now will help the Court avoid embroiling itself more deeply in the “political thicket” of drawing electoral maps in the future. (*Deukmejian, supra*, 30 Cal.3d at p. 693 [conc. & dis. opn. of Mosk, J.] (internal quotations omitted).) This Court has held that redistricting “is primarily a legislative task, undertaken by this court only when circumstances permit no alternative.” (*Id.* at p. 665 [maj. opn.].) Should the impossible deadlines the Commission faces make it unable to draw appropriate maps, the Court will need to step in to ensure lawful maps. (*Id.* at p. 660; Cal. Const., art. XXI, § 2(j).) By granting the Petition, the Court will minimize the risk that it will need to take a direct role in drawing electoral maps in the future.

## **II. The Legislature’s requested extensions will protect the Commission’s transparency and inclusiveness.**

Proposition 11 compelled heightened inclusiveness and transparency in the redistricting process. In addition to requiring a Commission free of legislative influence, it required the Commission to “draw districts based on strict, nonpartisan rules designed to ensure fair representation,” guaranteeing that debates occur “in the open with public meetings” and declaring that “every aspect of this [redistricting] process will be open to scrutiny by the public and the press. (See Prop. 11, Findings and Purpose, as approved by voters, Gen. Elec. (Nov. 4, 2008).) Proposition 11 amended the Constitution to mandate “an open and transparent process enabling full public consideration of and comment on the drawing of district lines.” (Cal. Const, art. XXI § 2(b).) To implement this charge, the Government Code requires the Commission to hold hearings both before and after the Commission draws its maps, and to display the maps “in a manner designed to achieve the widest public access reasonably possible.” (Gov. Code, § 8253(a)(7).)

Petitioner’s requested extensions are necessary to afford meaningful public participation in the State’s redistricting process. From the inception of the Commission in the 2011 cycle, community members have been highly involved in the redistricting process. The prior Commission received oral comments from more than 2,700 speakers at hearings. It collected written submissions, including proposed maps based on the 2010 census data, from more than 2,000 organizations and more than 20,000 individuals. (Rafael J. Sonenshien, League of Women Voters, *When the People Draw the Lines: An Examination of the California Citizens Re districting Commission* (June 12, 2013) at pp. 40-41, <<https://cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf>>.)

A significant part of that public engagement can occur only in the three-and-a-half months *after* the Statewide Database provides the reconstructed census data to the Commission. Individuals and organizations representing communities, working in coalitions, often hire their own demographers to analyze the census data, retain voting



experts and voting rights attorneys to analyze the Commission’s maps and assess Voting Rights Act compliance, and submit their own unity and district maps that inform the Commission’s line drawing. This critical dialog between the Commission and the public does not materialize overnight; it develops as a product of sustained outreach and education over the course of the mapping process. A shortened schedule will exclude impacted community members by reducing their opportunities to provide input, eroding the perceived legitimacy of the redistricting process.

### **III. The Legislature’s requested extensions are a nonpartisan response to unanticipated scheduling issues.**

The Legislature’s extension request is not an effort by any political group to obtain a perceived electoral advantage. Both Democrat and Republican-led state legislatures across the country are now grappling with how to maintain orderly and fair redistricting processes despite COVID-19-related disruptions. Two states—Virginia and New Jersey—are scheduled to hold 2021 primary elections before they are to receive the now-delayed census data. (*2020 Census Data & Redistricting*, California Common Cause <<https://www.commoncause.org/wp-content/uploads/2020/05/Redistricting-Deadlines-map-and-list.pdf>> [as of June 15, 2020].) The census delays also imperil the redistricting timelines in seventeen other states, including California. (See *ibid.*) Although California’s redistricting procedures are unique, the Legislature’s desire to protect a fundamental step in the electoral process is not.

The Legislature’s requested extensions are consistent with the Commission’s nonpartisan status. Supporters of Proposition 11 sought to insulate the Commission’s map-drawing functions from political manipulation. (Ballot Pamp., Gen. Elec (Nov. 4, 2008), argument in favor of Prop. 11, *Redistricting. Initiative Constitutional Amendment and Statute*. <<http://vigarchive.sos.ca.gov/2008/general/argu-rebut/argu-rebutt11.htm>> [“There is a serious conflict of interest when legislators are allowed to draw their own district boundaries.”].) By setting constitutionally-mandated dates for crucial steps of the redistricting procedure (Cal. Const, art. XXI, § 2(g)), Proposition 11 provided a further firewall against partisan interference. Here, however, the Legislature’s request for a one-time modification of that procedure does not raise any such concerns. The Legislature seeks to maintain the status quo, by ensuring that the redistricting process can be completed before the 2022 primaries. The request is narrowly tailored and proportional to the census delays motivating it, and does not disturb any unrelated deadlines or procedures. By petitioning the Court, the Legislature involves an outside authority to confirm that it is not seeking relief contrary to the Commission’s nonpartisan goals. Amici are particularly sensitive to any efforts to undercut the Commission’s independence, but they find no such danger here.

Ultimately, the Legislature's requested relief provides the least invasive means of addressing what is—hopefully—a once-in-a-lifetime disruption. The Commission's scheduling procedures are sound, but even our society's best procedures have been upended by the COVID-19 pandemic. The Court should take limited action in this specific instance to address those disruptions. If, instead, the Legislature must pursue a constitutional amendment to address COVID-19-related delays, the procedural changes may inject unnecessary complexity into the process and may expose redistricting schedules to further changes in the future. The Legislature's Petition proposes a common-sense solution that avoids those risks.

Respectfully submitted,

**KEKER, VAN NEST & PETERS LLP**



R. ADAM LAURIDSEN (SBN 243780)  
CONNIE P. SUNG (SBN 304242)  
JASON S. GEORGE (SBN 307707)

*Attorneys for Amici Curiae California Common  
Cause; League of Women Voters of California;  
Former Governor Arnold Schwarzenegger*

Document received by the CA Supreme Court.

## **DECLARATION OF ELECTRONIC SERVICE**

Case Name: *Legislature v. Alex Padilla*

Action No. S262530

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker, Van Nest & Peters LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On June 15, 2020, I electronically served the attached **Amici Curiae Letter in Support of Emergency Petition for Writ of Mandate** by transmitting a true copy via this Court's TrueFiling system, addressed as follow:

<p>Robin Johansen Olson Remcho, LLP 1901 Harrison Street, Suite 1550 Oakland, CA 94612 Email: <a href="mailto:rjohansen@olsonremcho.com">rjohansen@olsonremcho.com</a></p> <p>Attorney for Legislature of the State of California</p>	<p>Marian M. Johnston Attorney at Law</p> <p>Email: <a href="mailto:marianmjohnston@comcast.net">marianmjohnston@comcast.net</a></p> <p>Attorney for 2010 California Citizens Redistricting Commission</p>
<p>XAVIER BECERRA Attorney General of California THOMAS S. PATTERSON Senior Assistant Attorney General ANTHONY R. HAKL Supervising Deputy Attorney General *P. PATTY LI Deputy Attorney General 455 Golden Gate Avenue, #11000 San Francisco, CA 94102-7004 Email: <a href="mailto:Patty.Li@doj.ca.gov">Patty.Li@doj.ca.gov</a></p> <p>Attorneys for Secretary of State Alex Padilla</p>	

Document received by the CA Supreme Court.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct, and that this declaration was executed on June 15, 2020, at San Francisco, California.



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ROSEANN CIRELLI

Document received by the CA Supreme Court.

STAND. COM. REP. NO. 1464

Honolulu, Hawaii

RE: S.R. No. 220  
S.D. 1

Honorable Ronald D. Kouchi  
President of the Senate  
Thirty-First State Legislature  
Regular Session of 2021  
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred S.R.  
No. 220 entitled:

"SENATE RESOLUTION REQUESTING THE ATTORNEY GENERAL TO  
PETITION THE HAWAII SUPREME COURT SEEKING RELIEF TO PREVENT  
ACTION AGAINST THE REAPPORTIONMENT COMMISSION FOR THE  
COMMISSION'S FAILURE TO MEET STATUTORY OR CONSTITUTIONAL  
DEADLINES RELATING TO THE 2021 REAPPORTIONMENT PLANS,"

begs leave to report as follows:

The purpose and intent of this measure is to request the  
Attorney General to petition the Hawaii Supreme Court seeking  
relief to prevent action against the Reapportionment Commission  
for the Commission's failure to meet statutory or constitutional  
deadlines relating to the 2021 reapportionment plans.

Your Committee received testimony in support of this measure  
from the Office of Elections and one individual. Your Committee  
received testimony in opposition to this measure from one  
individual. Your Committee received comments on this measure from  
Common Cause Hawaii.

Your Committee finds that article IV, section 2, of the  
Hawaii State Constitution requires and provides procedures and a  
timetable for the convening of the Reapportionment Commission to  
be tasked with creating a reapportionment plan for the Legislature  
and the United States congressional districts within the State.  
Your Committee further finds that the Reapportionment Commission

## MCLEAN EXHIBIT "11"

relies on data from the United States Census Bureau for accurate counts of the United States population on which to base reapportionment plans. Your Committee additionally finds that, because of the coronavirus disease 2019 pandemic, the United States Census Bureau has already indicated that redistricting data will not be available until after the constitutional deadline for the Reapportionment Commission to submit a final plan has passed. This measure requests the Attorney General to petition the Hawaii Supreme Court seeking relief to prevent action against the Reapportionment Commission stemming from this unavoidable delay.

Your Committee has amended this measure by:

(1) Removing members of the state Senate and state House of Representatives from the listed recipients of certified copies; and

(2) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee concurs with the intent and purpose of S.R. No. 220, as amended herein, and recommends its adoption in the form attached hereto as S.R. No. 220, S.D. 1.

Respectfully submitted on  
behalf of the members of the  
Committee on Judiciary,

---

KARL RHOADS, Chair

SCPW-21-\_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I *ex rel.* Clare E.  
Connors, Attorney General,

Petitioner,

v.

STATE OF HAWAI‘I 2021  
REAPPORTIONMENT COMMISSION,

Respondent.

ORIGINAL PROCEEDING

**DECLARATION OF  
SCOTT T. NAGO;  
EXHIBITS “1” - “8”**

**DECLARATION OF SCOTT T. NAGO**

I, SCOTT T. NAGO, pursuant to Rule 52 of the Hawai‘i Rules of Appellate Procedure, declare:

1. I am a resident of the City & County of Honolulu and am the Chief Election Officer of the State of Hawai‘i.
2. As the Chief Election Officer, I also serve as the secretary of the Reapportionment Commission (the “Commission”). In that capacity, and under the direction of the Commission, I furnish all necessary technical services to the Commission.
3. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.
4. On February 12, 2021, my office received two emails from the U.S. Census Bureau.

5. Both emails informed us of the announcement of a new release schedule for redistricting data. According to these emails, this was expected to be delayed and to occur on September 30, 2021.

6. The first email included a link for a press release statement, while the second email additionally included a link to a blog.

7. Attached hereto as Exhibit “1” is a true and correct copy of the first email.

8. Attached hereto as Exhibit “2” is a true and correct copy of the second email.

9. Attached hereto as Exhibit “3” is a true and correct copy of the document that the statement link was associated with.

10. Attached hereto as Exhibit “4” is a true and correct copy of the document that the blog link was associated with.

11. On April 1, 2021, my office received an email from the U.S. Census Bureau indicating that in an effort to “provide data for states that need redistricting data earlier[,]” it would be “provid[ing] states with [its] legacy format summary files in mid-to-late August [2021], currently scheduling for the third week of August.”

12. Attached hereto as Exhibit “5” is a true and correct copy of the email.

13. Attached hereto as Exhibit “6” is a true and correct copy of the attachment to the above-referenced email.

14. The Reapportionment Commission became fully constituted on April 13, 2021, with the selection by the then-eight commission members of Mark M. Mugiishi, M.D., as the Chair.

15. As such, the statutory deadline of “[n]o more than one hundred days from the date on which all members are certified, the commission shall cause to be given in each basic



island unit, public notice subject to section 1-28.5 of a legislative reapportionment plan prepared and proposed by the commission,” and “[n]ot more than one hundred days from the date on which all members are certified, the commission shall cause public notice to be given of a congressional reapportionment plan prepared and proposed by the commission” would be set at July 22, 2021. *See* Haw. Rev. Stat. § 25-2.

16. Likewise, the constitutional deadline that “[n]ot more than one hundred fifty days from the date on which its members are certified, the commission shall file with the chief election officer a reapportionment plan for the state legislature and a reapportionment plan for the United States congressional districts which shall become law after publication as provided by law” would be set at September 10, 2021.

17. As the Chief Election Officer, I am a member of the National Association of State Election Directors (“NASED”).

18. In that capacity, I was forwarded a letter that NASED received from the U.S. Census Bureau, dated April 21, 2021.

19. Attached hereto as Exhibit “7” is a true and correct copy of the letter, dated April 21, 2021, from the U.S. Census Bureau to NASED Executive Director Amy Cohen.

20. The letter indicated that the U.S. Census Bureau was “committing to publishing the legacy format summary files to our FTP site for the states and the public no later than August 16, 2021.”

21. I understand our vendors to have the ability to convert the legacy files into a format which the Reapportionment Commission can use for reapportionment and that this would take approximately two weeks from receipt.

22. Our office learned on April 26, 2021 that the apportionment results used for apportioning the members of the U.S. House of Representatives were posted on the U.S. Census Bureau's website that day at <https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html>.

23. Subsequently, the U.S. House of Representatives sent a letter to Governor David Y. Ige dated May 3, 2021. The letter enclosed a Certificate of Entitlement, which indicated that the State of Hawai'i was entitled to two representatives in the U.S. House of Representatives.

24. This correspondence was forwarded to my office.

25. Attached hereto as Exhibit "8" is a true and correct copy of the letter, dated May 3, 2021, and the Certificate of Entitlement on file in my office.

26. The Commission cannot begin the reapportionment process without the redistricting data as it is necessary for purposes of ensuring that the districts that are drawn are as nearly equal in population. As of the date of this declaration, we have not received any redistricting data from the 2020 census.

27. Under the present circumstances, we plan to attempt to use the legacy format summary files. As indicated above, these are currently projected to be delivered on or before August 16, 2021. The legacy format summary files, as previously mentioned, would need to be reformatted by our vendor before the Commission can use the data. Because this reformatting will take approximately two weeks, the Commission would not be able to begin using the data until approximately the end of August or the beginning of September (and perhaps later if additional, currently unanticipated, delays are encountered). Due to the statutory requirements of Haw. Rev. Stat. § 25-2 regarding twenty days' public notice and the holding of a public meeting in each basic island unit, it would be impossible for the Commission to meet the July

22, 2021 and September 10, 2021 deadlines even if we were able to successfully use the legacy formatted data.

28. To the extent issues are faced that require us to wait for the originally scheduled delivery of the data that is to occur no later than September 30, 2021, it would continue to be impossible for the Reapportionment Commission to satisfy the statutory requirements in Haw. Rev. Stat. § 25-2 that “[n]o more than one hundred days from the date on which all members are certified, the commission shall cause to be given in each basic island unit, public notice subject to section 1-28.5 of a legislative reapportionment plan prepared and proposed by the commission,” and “[n]ot more than one hundred days from the date on which all members are certified, the commission shall cause public notice to be given of a congressional reapportionment plan prepared and proposed by the commission,” as the one hundredth day is July 22, 2021.

29. Likewise, absent not following the statutory requirements of Haw. Rev. Stat. § 25-2 regarding giving public notice of the plan to the public within one hundred days of certification of the members of the Reapportionment Commission and the statutory requirement to hold a public hearing in each basic island unit preceded by twenty days' notice, before the Reapportionment Commission can decide if it wishes to correct or modify its plans, it does not appear possible to comply with the constitutional requirement in Article IV, Section 2 of the State Constitution that “[n]ot more than one hundred fifty days from the date on which its members are certified, the commission shall file with the chief election officer a reapportionment plan for the state legislature and a reapportionment plan for the United States congressional districts which shall become law after publication as provided by law,” as the one hundred fiftieth day is September 10, 2021.

30. The upcoming Primary Election is scheduled for August 13, 2022 and the General Election is scheduled for November 8, 2022. *See* Haw. Rev. Stat. § 25-2 & Haw. Const. Article II, Section 8. This is preceded by the statutory opening of candidate filing this upcoming year on March 1, 2022 and its ending on June 7, 2022. *See* Haw. Rev. Stat. §§ 12-2.5 (Act 14, SLH 2021) & 12-6.

31. The actual publication of the reapportionment plans, on whatever date is established by the Supreme Court of the State of Hawai‘i, is not the end but the beginning of what needs to be done in regard to the candidate filing process and other matters related to the planning and implementation of our elections. For example, the final reapportionment plans will serve as the basis for candidate filing.

32. In addition, we will need to take the plans and correspondingly update the statewide voter registration system to correctly assign everyone to their precincts, which we refer to as the “precincting” process. These precincts have their own boundaries that have to take into account the boundaries of the districts established by the redistricting process.

33. This will take approximately one month and may have an impact on the opening of candidate filing and other matters that rely on precincting such as the printing of ballots and the programming and testing of the voting system.

34. The above-referenced precincting process allows the statewide voter registration system to determine if a signatory to a nomination paper lives in the applicable district and is eligible to sign the nomination paper. Without that, to the extent a signatory lives close to a district boundary, additional time may be necessary to resolve whether they are qualified to sign for the prospective candidate.

35. Additionally, precincting impacts the finalization of the ballot types that will be used (*i.e.*, ballot types are associated with districts and precincts).

36. We next need to begin the process of ordering ballots, programming and testing the voting system to read those ballots, and printing and mailing those ballots to our military and overseas voters who are entitled to their ballots by the 45th day prior to the Primary Election (*i.e.* ballots need to be transmitted by June 29, 2022). 52 U.S.C. § 20302 & Haw. Rev. Stat. § 15D-9.

I, SCOTT T. NAGO, declare under penalty of law that the foregoing is true and correct.

DATED: Pearl City, Hawai‘i, May 20, 2021.

  
SCOTT T. NAGO

**From:** [DIR Redistricting Data Office \(CENSUS/DIR\)](#)  
**To:** [DIR Redistricting Data Office \(CENSUS/DIR\)](#)  
**Subject:** [EXTERNAL] 2020 Census Redistricting Program: Schedule Announcement  
**Date:** Friday, February 12, 2021 8:10:37 AM

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Good Afternoon,

As official recipients of the P.L. 94-171 Redistricting Data and geographic support files, our office is reaching out to let you know about today's announcement of the new release schedule for the official redistricting data, expected to be by September 30, 2021. Please see the blog link below for additional information.

Statement: <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>

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Redistricting & Voting Rights Data Office/ADDC/HQ  
U.S. Census Bureau  
O: 301-763-4039 | M: 202-263-9144  
[census.gov](https://www.census.gov) | [@uscensusbureau](https://twitter.com/uscensusbureau) | [2020census.gov](https://2020census.gov)

**NAGO EXHIBIT "1"**

**From:** [DIR Redistricting Data Office \(CENSUS/DIR\)](#)  
**To:** [DIR Redistricting Data Office \(CENSUS/DIR\)](#)  
**Subject:** [EXTERNAL] Revised: 2020 Census Redistricting Program: Schedule Announcement  
**Date:** Friday, February 12, 2021 8:31:06 AM

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Good Afternoon,

Apologies as the previous message included the press statement and omitted the blog.

As official recipients of the P.L. 94-171 Redistricting Data and geographic support files, our office is reaching out to let you know about today's announcement of the new release schedule for the official redistricting data, expected to be by September 30, 2021. Please see the blog link below for additional information.

Statement: <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>

Blog: <https://www.census.gov/newsroom/blogs/random-samplings/2021/02/timeline-redistricting-data.html>

Please do not hesitate to contact us with additional questions.

Best Regards

James

\*\*\*\*\*

Redistricting & Voting Rights Data Office/ADDC/HQ  
U.S. Census Bureau  
O: 301-763-4039 | M: 202-263-9144  
[census.gov](https://www.census.gov) | [@uscensusbureau](mailto:@uscensusbureau) | [2020census.gov](https://2020census.gov)

**NAGO EXHIBIT "2"**

# Census Bureau Statement on Redistricting Data Timeline

*US Census Bureau*

2-3 minutes

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**FEB. 12, 2021** — The U.S. Census Bureau announced today that it will deliver the Public Law 94-171 redistricting data to all states by Sept. 30, 2021. COVID-19-related delays and prioritizing the delivery of the apportionment results delayed the Census Bureau’s original plan to deliver the redistricting data to the states by March 31, 2021.

Different from previous censuses, the Census Bureau will deliver the data for all states at once, instead of on a flow basis. This change has been made because of COVID-19-related shifts in data collection and in the data processing schedule and it enables the Census Bureau to deliver complete and accurate redistricting data in a more timely fashion overall for the states.

The redistricting data includes counts of population by race, ethnicity (Hispanic or Latino origin), voting age, housing occupancy status, and group quarters population, all at the census block level. This is the information that states need to redraw or “redistrict” their legislative boundaries.

In preparation for the delivery of redistricting data products, the Census Bureau has been in close coordination with each states’ official



nonpartisan liaisons to understand the impacts of the delayed delivery on individual states. Since 2019, states have had access to prototype geographic support products and data tabulations from the 2018 Census Test to help them begin to design their redistricting systems. This is one tool states can use to help minimize the impact of schedule delays. In addition, the Census Bureau today completed the release of all states' 2020 Census geographic products needed for redistricting. This will enable states to redistrict promptly upon receipt of their 2020 Census tabulation data.

###

# Timeline for Releasing Redistricting Data

*US Census Bureau*

6-8 minutes

If this were a typical decade, we would be on the verge of delivering the first round of redistricting data from the 2020 Census. Our original plan was to deliver the data in state groupings starting Feb. 18, 2021 and finishing by March 31, 2021.



However, COVID-19 delayed census operations significantly. Consistent with previous census, we are focusing first on our constitutional obligation to deliver the state population counts for [apportionment](#) to the President. As we [announced](#) last week, the deadline for this work is April 30, 2021. This focus on meeting our constitutional obligation has delayed some of the processing activities necessary to generate the redistricting counts. We expect to deliver the redistricting data to the states and the public by Sept. 30, 2021.

Now that we have finalized the [schedule](#) for completing the apportionment counts (by April 30), we have been able to finalize a schedule for the redistricting data.

## **Delivering by September 30**

This data delivery will be a single national delivery, rather than our originally-planned staggered delivery of redistricting data.

This national delivery allows us to:

- Ensure we are delivering the high-quality fit-for-use data products the states need for redistricting.
- Complete delivery to all states several weeks earlier than the last states would have otherwise received it.

- Better manage the production process.

We are acutely aware of the difficulties that this delayed delivery of the redistricting data will cause some states. Some states have statutory or even state constitutional deadlines and processes that they will have to address due to this delay.

The decision to have a single national delivery ensures that the Census Bureau can provide accurate, high quality, and fit-for-use data in the least total amount of time to all states.

Following our thorough and complete process provides the best assurance to the states that these data meet the quality standards they expect and require to underpin their important decisions.

### **Support for the States**

In the meantime, I am happy to say, we have delivered the [2020 Census Redistricting Data Geographic Support Products](#) to all 50 states, the District of Columbia, and Puerto Rico. As of this morning, Feb. 12, 2021, we published the final sets of geographic data to census.gov for the public as well.

State and local governments use these products in their redistricting efforts. The products contain newly created 2020 Census blocks and updated block groups, census tracts, voting districts, and current boundaries for legal governments and school districts referenced to Jan. 1, 2020.

The law (Public Law 94-171) that governs our work on producing redistricting data directs us to allow the states the opportunity to identify the small area geography and tabulations they need to do their redistricting work.

Over the past few years, we worked through non-partisan liaisons in each state to identify these geographic areas by:

- Providing customized open source software for exchanging geographic data.
- Allowing states to suggest updates to multiple types of geography.
- Creating prototype census blocks to help them visualize how the 2020 Census blocks would appear if the geography for their state was left unchanged.
- Providing an additional review period of several months in which they could finalize their geographic updates.

Using the information that each state provided, we have now delivered geographic

information in formats that will help them plug in the actual 2020 Census data and do their work of redrawing district boundaries. And as we announced today, we will provide those quality data to the states by Sept. 30, 2021.

## **Related blogs**

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[Random Samplings Blog | April 20, 2021 | By Jason Devine, Assistant Division Chief for Census Programs, Population Division; Roberto Ramirez, Assistant Division Chief for Special Population Statistics, Population Division; Jonathan Spader, Assistant Division Chief for Housing Characteristics, Social, Economic and Housing Statistics Division; Ryan King, Mathematical Statistician, Decennial Statistical Studies Division](#)

### [2020 Census Data Review](#)

[For the 2020 Census, we are conducting one of the most comprehensive reviews in recent census history.](#)

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[Random Samplings Blog | April 20, 2021 | By Jason Devine, Assistant Division Chief for Census Programs, Population Division; Roberto Ramirez, Assistant Division Chief for Special Population Statistics, Population Division; Jonathan Spader, Assistant Division Chief for Housing Characteristics, Social, Economic and Housing Statistics Division; Ryan King, Mathematical Statistician, Decennial Statistical Studies Division](#)

### [Revisión de los datos del Censo del 2020](#)

[En este blog hablamos sobre cómo estamos realizando una de las revisiones de datos más completas en la historia reciente del censo, para el Censo del 2020.](#)

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**From:** [DIR Redistricting Data Office \(CENSUS/DIR\)](#)  
**To:** [DIR Redistricting Data Office \(CENSUS/DIR\)](#)  
**Cc:** [CRVRDO FTE List](#)  
**Subject:** [EXTERNAL] Fw: Update regarding delivery of the 2020 Census P.L. 94-171 Redistricting Data in August and September; discontinuation of the September embargo  
**Date:** Thursday, April 1, 2021 9:08:56 AM  
**Attachments:** [Census Redistricting Data Official Recipients Letter\\_04\\_01\\_2021.pdf](#)

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Dear Official Recipients of the 2020 Census P.L. 94-171 Redistricting Data,

The Census Bureau announced on February 12, through a [blog](#) and a [press release](#), a revised timeline for producing and delivering high-quality redistricting data products to the states. Establishing a date against which states could rely on to receive their redistricting data required the Census Bureau to identify exactly which activities need to be completed and in what sequence, as well as setting the time and resources needed for each of these steps. Based on this review, we determined it will take until September 30, 2021, for us to complete and deliver the full set of planned redistricting data products.

We also recognize that delivery in September may cause hardship for states with earlier deadlines. Accordingly, we continued to evaluate our planned data processing, looking for ways to provide data for states that need redistricting data earlier. Through this reevaluation, we announced on [March 15, 2021](#), that we will provide the states with our legacy format summary files in mid-to-late August, currently scheduling for the third week of August. While we had intended to provide the legacy format summary files with the final 2020 Census redistricting data, we determined that many states will be able to use these legacy files in August without waiting for the September delivery. The legacy format files will have identical data to the files that we will deliver in September. They will have been fully reviewed and subject to the same exacting quality assurance processes. The only drawback to using the legacy format summary files is that they will require additional handling and software to make the data easily accessible. We expect that many states will elect to use the August delivery because they have used similar products in the past.

Legacy Format Summary Files:

- Published to the web in mid-to-late August.
- Available to the states and the public.
- Identical data to the materials and tools provided in the September delivery.
- Fully reviewed and subject to the same exacting quality assurance processes.

In September, we will provide states the remainder of the planned data products/tools. DVDs and flash drives will be provided to official state recipients, those required by law. The states and the public will also receive access to the data through our data.census.gov Data Explorer platform.

- The DVDs and flash drives contain an integrated software browsing tool that allows intuitive browsing of the data. They also contain a simple custom extraction menu that allows for the extraction of large datasets from the device. Those extractions can then be imported easily into a Geographic Information System or database.
- The Data Explorer web tool at data.census.gov is our online data browsing tool for both the official recipients and the public. Users of the Data Explorer platform can access many different census datasets, including the redistricting data. The Data Explorer has custom

**NAGO EXHIBIT "5"**

filters that allow the user to filter on those geographic and characteristic data for which they are interested. For example, a state could filter the data and easily identify the number of voting-age residents by race or ethnicity in each and every block within a census tract, county, or even for the entire state. They can then view, map, and download these datasets once they have set the filters with their choices.

This dual release of data, in August and September, has made for one additional alteration to our data release plan. Our original plan had all three of these methods available simultaneously in late September. As part of that plan, we built in an ability for you, as an official recipient, to access our data.census.gov platform a day before the public through a data embargo. Now, with the release of the summary file data a month in advance, this provision no longer makes sense and so has been removed.

To assist states with the August delivery, we recently posted a [legacy format summary file of the prototype redistricting data tabulations](#) released from the 2018 End-to-End Census Test in Providence County, RI. These files are in the format that states can expect when they receive the 2020 redistricting data. We also posted the 2020 technical documentation that will accompany the 2020 redistricting data. We are also continuing to identify support documentation and tools that may assist some data users in the use of these files. They will be added to the website as they are developed. I encourage you, your staff, or your legislative support team to review the prototype in preparation for the August publication of the 2020 Census P.L. 94-171 Legacy Format Summary Files.

Sincerely,  
James Whitehorne

\*\*\*\*\*

**James Whitehorne, Chief**

Redistricting & Voting Rights Data Office/ADDC/HQ

U.S. Census Bureau

O: 301-763-4039 | M: 202-263-9144

[census.gov](https://www.census.gov) | [@uscensusbureau](mailto:@uscensusbureau) | [2020census.gov](https://2020census.gov)

04/01/2021

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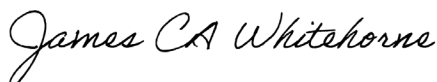
**NAGO EXHIBIT "6"**

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Sincerely,

A handwritten signature in black ink that reads "James CA Whitehorne". The signature is written in a cursive, flowing style.

James Whitehorne

Chief, Census Redistricting & Voting Rights Data Office





UNITED STATES DEPARTMENT OF COMMERCE  
U.S. Census Bureau  
Office of the Director  
Washington, DC 20233-0001

04/21/2021

Amy Cohen  
Executive Director, National Association of State Election Directors  
1200 G Street NW, Suite 800  
Washington, DC 20005  
acohen@nased.org

Dear Executive Director Cohen,

Thank you for your email of April 14, 2021, passing along some questions and concerns of your members. We are aware of the difficulties that your members face with the late delivery of redistricting data. The willingness of the National Association of State Election Directors, alongside the National Association of Secretaries of State, to engage with us has helped us understand these concerns more acutely, and we appreciate the time your members have shared expressing those concerns.

While the Census Bureau has announced that it would provide redistricting data by September 30, 2021, we have been continually evaluating our schedule and processes to identify actions we can take that would reduce the burden of a late delivery of the redistricting data. One such solution we identified on March 15, 2021, is to provide the legacy format summary files in August, earlier than the planned September official release by DVD/flash drive to state officials and through our primary dissemination platform at [data.census.gov](https://data.census.gov) for the public.

We understand that states need to plan for the receipt of this data as every day is important for the compressed timelines they will face. As such, the Census Bureau is committing to publishing the legacy format summary files to our FTP site for the states and the public no later than August 16, 2021.

The question of the possibility of these files being available earlier has been raised during our engagements with NASS and NASED. The Census Bureau's working schedule is a dynamic one, with time built in for the Census Bureau to identify and correct issues we find during data processing. Being a dynamic schedule, dates and timing are liable to shift as different activities take place. If we have an indication that our schedule could change, we will inform the public. We have confidence, however, that we will be able to meet the August 16, 2021, and September 30, 2021, dates.

I hope the firm acknowledgment of the August 16, 2021, date provides you and your members with the certainty needed for their planning.

Sincerely,

James Whitehorne  
Chief, Census Redistricting and Voting Rights Data Office

**NAGO EXHIBIT "7"**

CHERYL L. JOHNSON  
CLERK

H-154 THE CAPITOL

GLORIA J. LETT  
DEPUTY CLERK

ROBERT F. REEVES  
DEPUTY CLERK

Office of the Clerk  
U.S. House of Representatives  
Washington, DC 20515-6601

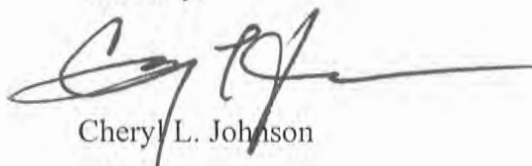
May 3, 2021

The Honorable David Y. Ige  
Governor, State of Hawaii  
Executive Chambers  
State Capitol  
Honolulu, HI 96813

Dear Governor Ige:

Pursuant to the provisions of Section 2a (b) of Title 2 of the United States Code, I am hereby transmitting to you a certificate stating the number of Representatives to which your State is entitled in the United States House of Representatives in the 118<sup>th</sup> Congress and in each subsequent Congress until a new reapportionment takes effect.

Sincerely,



Cheryl L. Johnson

**NAGO EXHIBIT "8"**

# Certificate of Entitlement

## HOUSE OF REPRESENTATIVES

OFFICE OF THE CLERK

WASHINGTON, D.C.

I, Cheryl L. Johnson, Clerk of the House of Representatives of the United States, Hereby Certify, Pursuant to the Provisions of Title 2, United States Code, Section 2a (b), That the State of

### HAWAII

Shall be Entitled, in the One Hundred Eighteenth Congress and in Each Congress Thereafter Until a Subsequent Reapportionment Shall Take Effect Under Applicable Statute, to

### TWO REPRESENTATIVES

in the House of Representatives of the Congress of the United States.



*In Witness Whereof I Hereto Affix  
My Name and the Seal of the House of  
Representatives of the United States of  
America this Third Day of May, Anno  
Domini 2021, in the City of Washing-  
ton, District of Columbia*

  
CLERK OF THE HOUSE OF REPRESENTATIVES  
OF THE UNITED STATES

SCPW-21-\_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I *ex rel.* Clare E.  
Connors, Attorney General,

Petitioner,

v.

STATE OF HAWAI‘I 2021  
REAPPORTIONMENT COMMISSION,

Respondent.

ORIGINAL PROCEEDING

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the following via electronic service (JEFS) or conventionally (U.S. Mail) as indicated on the date noted below:

Patricia T. Ohara, Esq.  
Lori N. Tanigawa, Esq.  
Department of the Attorney General  
425 Queen Street  
Honolulu, Hawai‘i 96813  
Tel: (808) 586-0618  
E-mail: [patricia.t.ohara@hawaii.gov](mailto:patricia.t.ohara@hawaii.gov)  
[lori.n.tanigawa@hawaii.gov](mailto:lori.n.tanigawa@hawaii.gov)

DATED: Honolulu, Hawai‘i, May 21, 2021.

*/s/ Nicholas M. McLean*

KIMBERLY T. GUIDRY  
NICHOLAS M. MCLEAN

Attorneys for Petitioner STATE OF HAWAI‘I  
*ex rel.* Clare E. Connors, Attorney General