STATE OF MAINE

SUPREME JUDICIAL COURT

DOCKET NO. ___-_____

In re 2021 Apportionment of Maine House of Representatives, Maine Senate, U.S. House of Representatives, and County Commissioners

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PETITION TO EXTEND CONSTITUTIONAL DEADLINES FOR APPORTIONMENT BY PRESIDENT OF THE SENATE TROY D. JACKSON, SENATE MINORITY LEADER JEFFREY L. TIMBERLAKE, SPEAKER OF THE HOUSE RYAN M. FECTEAU, AND HOUSE MINORITY LEADER KATHLEEN R. J. DILLINGHAM, WITH INCORPORATED MEMORANDUM OF LAW

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PETITION FOR WRIT OR ORDER

For the reasons set forth in the incorporated memorandum of law, President of the Senate Troy D. Jackson, Senate Minority Leader Jeffrey L. Timberlake, Speaker of the House Ryan M. Fecteau, and House Minority Leader Kathleen R. J. Dillingham, respectfully petition this Supreme Judicial Court for issuance of a writ or order pursuant to one or more of 14 M.R.S. § 5301, 4 M.R.S. § 7, or its apportionment authority under Me. Const. art. IV, pt. 1, § 3; pt. 2, § 2; art. IX, §§ 24(2) & 25(2), issued no later than August 10, 2021, that extends the 2021 deadlines set forth in the Maine Constitution for apportionment of legislative, congressional, and county commissioner districts to the deadlines proposed in Part III of the enclosed memorandum of law, or to any such alternative extended deadlines that this Court may determine to be consistent with the interests of justice.

MEMORANDUM OF LAW IN SUPPORT OF PETITION

Introduction

In 2011, Maine voters ratified a constitutional amendment that ended Maine's practice of waiting two years after the release of federal decennial census data to redraw legislative and congressional districts,

requiring instead that reapportionment occur as soon as the census data is released. In drafting the amendment, the framers incorporated specific calendar deadlines for various steps in the apportionment process, relying on a federal law that requires the Census Bureau to provide states with apportionment data no later than April 1 of the year following the census. *See* 13 U.S.C.A. § 141(c) (Westlaw). As amended, the Maine Constitution now expressly requires the Apportionment Commission to submit proposed plans to the Legislature by June 1, 2021, the Legislature to enact the legislative and congressional plans, or alternative plans of its own, by June 11, and, if no plans are enacted, this Court to "make the apportionment" within 60 days after that, or August 10, 2021.

As with much else in American life, the COVID-19 pandemic upended the 2020 federal decennial census. As a result, the Census Bureau has announced that the census data required for redistricting will be released as late as August 16, 2021. While the estimated delay would appear to leave Maine with enough time as a practical matter to redistrict before the 2022 election—the overarching purpose of the 2011 amendment—it has made compliance with the Constitution's specific

calendar deadlines impossible. The Apportionment Commission will not have a plan by June 1. The Legislature will not have enacted a plan by June 11. And, without census data, this Court will have no way to "make the apportionment" by August 10 (60 days after June 11).

Skipping apportionment altogether for this decade is not an option. Decennial reapportionment is a bedrock principle of the Maine Constitution and, in any event, a failure to reapportion for 10 more years would likely violate the U.S. Constitution's "one person, one vote" principle. Nor is using alternative data a viable option, since, even assuming reliable, current, and useable data could be found, the Maine Constitution expressly references federal census data and legislative history confirms that enabling the use of such data was a key concern of the framers. Given these constitutional imperatives, the only option that will preserve the framers' intent is to extend the constitutional deadlines until after receipt of the census data.

This Court can order such relief. Although Maine has abolished the great writs, this Court retains original jurisdiction over proceedings seeking relief in the nature of mandamus and prohibition. 14 M.R.S.A. § 5301 (Westlaw through 2020 1st Reg. Sess.). This Court, sitting as

the Law Court, has affirmed grants of mandamus relief by this Court in appropriate circumstances. *See Dep't of Corr. v. Superior Ct.*, 622 A.2d 1131, 1135 (Me. 1993). Oregon's Supreme Court recently relied on a similar grant of original jurisdiction to extend Oregon's similarly impossible constitutional deadlines. *See State ex rel Kotek v. Fagan*, 484 P.3d 1058, 1065 (Or. 2021). This Court also has original jurisdiction based on its power, set forth in 4 M.R.S. § 7, to issue writs not within the exclusive jurisdiction of the Superior Court that are "necessary for the furtherance of justice or the execution of the laws." 4 M.R.S.A. § 7 (Westlaw through 2020 1st Reg. Sess.). And finally, the Court has jurisdiction over this question by virtue of the fact it is the body ultimately required to "make the apportionment" if the Legislature fails to act. Implicit in the Maine Constitution's conferral of that authority is the power to determine the conditions under which the Court may properly carry out that duty in light of the extraordinary circumstances at issue.

Petitioners therefore respectfully request that this Court issue a writ or other order that extends the constitutional deadlines as proposed in Part III below. Although Petitioners seek such a writ or

order as soon as possible, they respectfully ask that, in any event, the Court rule before the expiration of the final constitutional apportionment deadline, August 10, 2021.

Background

Constitutional Framework for Apportionment

The Maine Constitution requires that the Legislature convening in 2021 (and every ten years thereafter) "shall cause the State to be divided into districts" for the 151 seats in the Maine House of Representatives and the currently 35 seats in the Maine Senate. Me. Const. art. IV, pt. 1, § 2 (House) & pt. 2, § 2 (Senate). The "mean population figure" for each district must be determined by dividing the number of seats into "the number of inhabitants of the State exclusive of foreigners not naturalized according to the latest Federal Decennial Census or a State Census previously ordered by the Legislature to coincide with the Federal Decennial Census." *Id.* Districts must be drawn "as nearly as practicable" to produce "equally populated districts." *Id.*

Since 1975, the Maine Constitution has required an Apportionment Commission to come up with an initial proposal for

redistricting. Me. Const. art. IV, pt. 3, § 1-A; Const. Res. 1975, ch. 1, *approved in* 1975.[1] The Commission, appointed at the start of the first legislative session after the federal decennial census, must be made up of legislators from the two largest political parties and members of the public. Me. Const. art. IV, pt. 3, § 1-A. The Constitution provides that the Commission shall produce apportionment plans to the Clerk of the House of Representatives and the Secretary of the Senate "no later than June 1st of the year in which apportionment is required." Me. Const. art. IV, pt. 1, § 3 (House) & pt. 2, § 2 (Senate). Then, "by June 11th of the year in which apportionment is required," the Legislature "shall" enact either "the submitted plan of the commission or a plan of its own" by a 2/3rds vote. *Id.*

If the Legislature fails to act, the Maine Constitution provides that this Court shall act instead:

> In the event that the Legislature shall fail to make an apportionment by June 11th, the Supreme Judicial Court shall, within 60 days following the period in which the Legislature is required to act, but fails to do so, make the apportionment.

[1] This Constitutional Resolution and many of the other documents cited herein relating to the Maine Constitution are available at https://legislature.maine.gov/legis/lawlib/lldl/constitutionalamendments/index.html.

Id. In making the apportionment, the Court shall take into consideration plans and briefs filed with the Court by the public "during the first 30 days of the period in which the court is required to apportion." *Id.* These same provisions give this Court "original jurisdiction to hear any challenge to an apportionment law enacted by the Legislature, as registered by any citizen or group thereof," further providing that if a challenge is sustained, this Court "shall make the apportionment." *Id.*

Apportionment of Maine's two congressional districts works similarly. The Commission is required to "review the existing congressional districts." Me. Const. art. IX, § 24(1). "If the districts do not conform to Supreme Judicial Court guidelines, the commission shall reapportion the State into congressional districts." *Id.* The deadlines for congressional reapportionment are the same as for legislative reapportionment: June 1st for the Commission to submit its plan, and June 11th for the Legislature to enact the plan or a plan of its own. *Id.*

If the Legislature fails to act, this Court must make the apportionment "within 60 days following the period in which the Legislature is required to act but fails to do so." Me. Const. art. IX,

§ 24(2). Notably, the Maine Constitution expressly recognizes the importance of the federal census data to this process, providing that the Apportionment Commission should start its work "when the Secretary of State has received notification of the number of congressional seats to which the State is entitled *and the Federal Decennial Census population count is final*." Me. Const. art. IX, § 24(1) (emphasis added).

The Maine Constitution also requires apportionment of county commissioner districts. The constitutionally prescribed process largely follows the process for apportionment of legislative districts, except that the Commission's apportionment plan, though it must be presented to the Clerk of the House of Representatives on June 1 with the congressional and legislative plans, need not be submitted to the Legislature until January 15 of the following year. Me. Const. art. IX, § 25(1)(C). At that point the Legislature has 30 days to enact the plan or a plan of its own before this Court is required to make the apportionment, again within 60 calendar days following the period in which the Legislature is required to act but fails to do so. Me. Const. art. IX, § 25(2).

For a number of years, the Maine Constitution and Maine statutes had required apportionment to occur in the fourth year of each decade (1983, 1993, etc.). *See* Const. Res. 1975, ch. 1, *approved in* 1975. (providing for reapportionment in 1983 and every 10 years thereafter). But in 2011, in the midst of federal litigation over whether the two-year delay between the release of the decennial federal census and the reapportionment of Maine's congressional districts violated article I, § 2 of the U.S. Constitution, *see Desena v. Maine*, 793 F. Supp. 2d 456 (D. Me. 2011), the Maine Legislature approved (and voters later ratified) a constitutional amendment to move up apportionment deadlines for both congressional and legislative districts to years ending in "1."[2] Const. Res. 2011, ch. 1.

Because apportionment would now be occurring in the same year as the release of federal census data, the framers of the 2011 amendment recognized that the existing reapportionment deadlines in the Maine Constitution would become unworkable. Those deadlines

[2] Prior to 2011, apportionment of congressional and county commissioner districts had been governed by statute. The 2011 amendment embedded those procedures in the Constitution. Const. Res. 2011, ch. 1, *passed in* 2011.

had required the Commission to submit a plan by early April of the redistricting year, and the Legislature to act on that plan no later than 10 days after that.[3] Me. Const. art. IV, pt. 1, §§ 2–3 (amended 2011).

As the Office of Policy and Legal Analysis explained at the time, "[t]he US Census Bureau releases its population figures mid-March 2011. That would leave only 20 days to do the work [under the April deadline]." OPLA Memorandum to State and Local Government Committee re: *LD 494, Resolution*, *Proposing an Amendment to the Constitution of Maine to Change the Schedule for Redistricting* at 1 (Mar. 10, 2011) (hereinafter "OPLA Memo"), attached as Exhibit A. The 2011 amendment therefore moved the deadlines to June 1 for the Apportionment Commission to submit its plans for legislative, congressional, and county commissioner redistricting, and June 11 for the Legislature to act upon the first two plans (with the county

[3] More specifically, the Constitution then required submission of the plan within 120 days of the convening of the relevant legislature, which occurs on the "day next preceding the first Wednesday in December following the general election," and the Legislature to act on that plan the earlier of 30 days after it was submitted or 130 days after the convening of the Legislature. Me. Const. art. IV, pt. 1, §§ 2–3 (amended 2011); *id.* art. IV, pt. 3, § 1.

commissioner plan subject to a longer timetable). Const. Res. 2011, ch. 1.

In the floor debate on the 2011 amendment, the amendment's sponsor, Representative Keschl, explained that the purpose of the amendment was to require the use of federal census data to reapportion Maine's legislative districts as soon as it was available:

> I submitted LD 494 after talking to one of my constituents . . . who expressed concern that the State of Maine currently waits almost three years after a national census to redistrict our State, Senate and House districts. While this might not [sic] have been necessary in the past which [sic] much of the redistricting was done by hand calculations, now with technology advancements the time it takes to perform this task is greatly reduced. Almost all other states redistrict before the first election after the national census and this bill seeks to do the same, starting after the 2020 Census. This would allow Maine to redraw the current districts with the most recent census data to ensure that districts are fair and reflect the actual population so that every person is represented proportionately and has the same voting power. That is, one person one vote.

Legis. Rec. H-920 (1st Reg. Sess. 2011).

2021 Delay in Federal Census Data

The Secretary of the U.S. Department of Commerce is charged with conducting the federal decennial census required by article 1, § 2,

of the U.S. Constitution. 13 U.S.C.A. § 141(a) (Westlaw). In 1975, Congress enacted a law, now codified at 13 U.S.C. § 141(c), requiring the Commerce Secretary to collaborate with state officials to produce, as part of the decennial census, population data broken down into small-area geographic units designed to enable states to construct properly apportioned legislative districts.[4] *See* Pub. L. No. 94-171, 89 Stat. 1023. This law replaced a system in which the Census Bureau, at the time it released census results, produced population data by "enumeration district," which was considerably less useful to states for redistricting purposes. *See* H.R. Rep. No. 94-456, at 3 (1975). The fine-grained apportionment data produced to states under 13 U.S.C. § 141(c) is known as "P.L. 94-171 redistricting data."

Section 141 requires the Commerce Secretary to publish census data within specific periods following the April 1 census date. *See* 13 U.S.C.A. § 141(a) (Westlaw). First, the Secretary is required to produce

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[4] More specifically, the population data is broken down into various overlapping geographic units, the smallest of which is a "census block," which is a statistical area bounded by visible or invisible features such as roads or political boundaries and which can be as small as a city block. *See* Rossiter, Katy, "What are census blocks?" U.S. Census Bureau website (July 11, 2011), at https://www.census.gov/newsroom/blogs/random-samplings/2011/07/what-are-census-blocks.html.

a "tabulation of total population by States," used to allocate the number of congressional seats to each State, within nine months of the April 1 census date, or January 1, 2021, for the most recent census. *Id.* § 141(b). Second, the Secretary is required to deliver the fine-grained P.L. 94-171 data to states "as expeditiously as possible," but in any event within one year after the April 1 census date, or April 1, 2021, for the most recent census. *Id.* § 141(c).

Due to the COVID-19 pandemic, the Commerce Secretary has missed both deadlines. The Census Bureau did not release the statewide population totals, due January 1, until April 26, 2021. *See* Press Release, "2020 Census Apportionment Results Delivered to the President," U.S. Census Bureau (Apr. 26, 2021).[5] And the Census Bureau still has not produced the crucial P.L. 94-171 data. In an April 21, 2021 letter to the National Association of State Election Directors, the head of the Census Bureau's Census Redistricting and Voting Rights Data Office described the Bureau as having "confidence" that it will provide the P.L. 94-171 to states in a legacy format no later than

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[5] Available at https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html.

August 16, 2021. *See* Exhibit B. The Census Bureau continues to stand by this deadline on its website. *See* U.S. Census Bureau, "Important Dates," at https://2020census.gov/en/important-dates.html (last visited May 24, 2021). Petitioners expect that the legacy-format data promised by August 16th will be useable for reapportionment.

Effect on Maine's Reapportionment Process

The federal government's delay in delivering the P.L. 94-171 census data will make it impossible for Maine to reapportion its legislative and congressional districts in the timeframe required by the Maine Constitution. By August 16th almost all the deadlines in the Maine Constitution relating to apportionment will have already expired. The Apportionment Commission will have had no way of submitting reapportionment plans to the Legislature by June 1, 2021. The Legislature will have had no way of approving legislative and congressional plans by June 11, 2021. And this Court will have had no way of "mak[ing] the apportionment" by August 10, 2021—60 days after the June 11 deadline.

Practical Time Constraints on Apportionment

The Court could substantially delay the June and August deadlines without compromising the State's ability to hold elections

with redrawn districts in 2022. The 2022 election cycle formally begins on January 1, 2022, which is the date candidates may start collecting nomination signatures from residents of the districts for which they are running. 21-A M.R.S.A. §§ 335(6), 354(6) (Westlaw through 2020 1st Reg. Sess.); *see also* Affidavit of Deputy Secretary of State Julie Flynn, dated May 24, 2021 ("Flynn Aff."), ¶¶ 17–21. The Secretary of State's Elections Division estimates that, if it expedites implementation of the districts and assuming its outside vendor timely implements the necessary computer code, it should be able to have the districts in place six weeks after receiving the apportionment plans. Flynn Aff. ¶¶ 6–16. Thus, to avoid truncating next year's election process, the Legislature or the Court would need to adopt an apportionment plan no later than November 15, 2021.

Argument

I. This Court Has Original Jurisdiction Over this Matter

Three separate statutory and constitutional provisions grant the Court original jurisdiction to hear and decide this petition.

First, the Court has jurisdiction to determine this action under 14 M.R.S. § 5301. That statute provides that the Supreme Judicial Court

and the Superior Court "shall have and exercise concurrent original jurisdiction in proceedings in habeas corpus, prohibition, error, mandamus, quo warranto and certiorari." 14 M.R.S. § 5301 (Westlaw through 2020 1st Reg. Sess.). While Rule 81(c) of the Maine Rules of Civil Procedure, together with the repeal of various statutes in Title 14 in 1967, abolished those writs as "separate procedural devices," those changes did not "alter the substantive law pertaining to the writs or make any change in the kinds of relief available in situations where they have been appropriate." M.R. Civ. P. 81 advisory committee's notes to 1967 amend., Dec. 31, 1967. Thus, while the Legislature repealed the various statutes setting forth procedures for obtaining writs of mandamus, prohibition, etc., it left § 5301 intact, amended to reflect that the Supreme Judicial Court's jurisdiction was now over "proceedings" to obtain these forms of relief rather than "writs." P.L. 1967, ch. 441, § 6.

Second, the Court has jurisdiction to determine this action under 4 M.R.S. § 7. That statute gives the Court jurisdiction to, among other things, "issue all writs and processes, not within the exclusive jurisdiction of the Superior Court, necessary for the furtherance of

justice or the execution of the laws." 4 M.R.S.A. § 7 (Westlaw through 2020 1st Reg. Sess.). This little-used provision has been in effect in something close to its current form since at least 1841. *See* R.S. ch. 96, § 5 (1841).[6] Though Petitioners have located virtually no caselaw interpreting the relevant portion of the statute, it appears to grant this Court a power to directly issue injunctive relief—in the form of a writ—when "necessary" for the "furtherance of justice" or the "execution of the laws." The Legislature's decision not to excise this provision when it abolished various specific writs in 1967 indicates an intent to allow the Court to retain this residual power even after the abolition of the traditional writs.

As reflected by the absence of caselaw on this provision, it will be a rare and exceptional situation in which the issuance of a writ by this Court will be "necessary" for the furtherance of justice or the execution of laws. In nearly all circumstances, the more customary forms of relief available through the lower courts, as prescribed by statute and court

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[6] The 1841 version of the statute read "They [the members of the SJC] shall have power to issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other processes and writs, to courts of inferior jurisdiction, to corporations and individuals, which may be necessary for the furtherance of justice, and the due execution of the law." R.S. ch. 96, § 5 (1841).

rules, should suffice to protect the interests of justice and the execution of the laws. However, the situation now presented to this Court, in which the constitutionally mandated timeline for apportionment has become impossible due to events beyond control of any branch of State government, meets the exacting requirements for issuance of a writ under § 7.

Finally, the Constitution itself impliedly confers jurisdiction upon the Supreme Judicial Court to consider this petition. Specifically, the Constitution imposes an obligation upon this Court to "make the apportionment" within 60 days following the period in which the Legislature is required to act, but fails to do so. Me. Const. art. IV, pt. 1, § 3 & pt. 2, § 2; art. IX, § 24(2) & § 25(2). That provision necessarily confers jurisdiction on the Court to decide the threshold question of whether the constitutional preconditions for it to commence apportionment have come to pass. Indeed, prior apportionment decisions of this Court start with precisely such findings. *See In re Apportionment of House of Representatives*, 315 A.2d 211, 213 (Me. 1974) (taking notice that "the Maine Legislature failed to make an apportionment of the House of Representatives by . . . the end of the

period in which the Legislature was required by the Constitution of Maine to make such apportionment"); *In re Apportionment of Senate*, 287 A.2d 421, 421 (Me. 1972).

It is certainly true that, as of today's date, the June 1 and June 11 deadlines that would transfer apportionment authority to this Court have not expired. But, due to the federal government's delay of the census data, it is now certain that those deadlines will expire without proposal or enactment of the constitutionally required apportionment plans.

Given the certainty that the Commission will miss its June 1 deadline and that the Legislature will miss its June 11 deadline, there is a "concrete, certain, and immediate legal problem" that is ripe for resolution now. *Waterville Indus., Inc. v. Fin. Auth. of Maine*, 2000 ME 138, ¶ 22, 758 A.2d 986, *as amended on recons. in part* (Sept. 27, 2000) (quoting *Wagner v. Secretary of State*, 663 A.2d 564, 567 (Me.1995)). There is no reason the Court cannot determine now the circumstances under which it will acquire the responsibility to "make the apportionment." Alternatively, if the Court were concerned about its

jurisdiction prior to June 11, it could hold this matter in abeyance until that deadline has passed.[7]

On all three of the above bases, the Court has jurisdiction to consider the enclosed petition and grant the requested relief.[8]

II. The Court Should Extend the Constitutional Deadlines for Apportionment

A. Of the Available Options, Extension of the Deadlines Is Least Disruptive to the Constitutional Order

The delay of the federal census data has created an unprecedented constitutional quandary for the Apportionment Commission, the Maine Legislature, and even this Court, in which full compliance with the

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[7] The Court should hear this matter *en banc*, and not through a single Justice. Unlike most original actions filed with the Supreme Judicial Court, which are assigned to a single Justice, *see, e.g.*, *Dep't of Corr. v. Superior Ct.*, 622 A.2d 1131, 1134 (Me. 1993) (appeal of mandamus action heard by a single Justice under 4 M.R.S. § 7 and 14 M.R.S. § 5103), this Court customarily sits *en banc* when it considers original actions relating to apportionment. *See, e.g.*, *In re 1983 Legislative Apportionment of House, Senate, & Cong. Districts*, 469 A.2d 819, 822 (Me. 1983) (noting that the Court heard argument "sitting *en banc*"); *In re 2003 Legislative Apportionment of House of Representatives*, 2003 ME 81, ¶ 7, 827 A.2d 810. It should adopt the same practice in this similar action. Moreover, because this action presents virtually a pure question of law, there is no need for factual development in a trial-like proceeding. By hearing the matter *en banc*, the Court can provide definitive relief in a timely manner.

[8] Given the exceptional nature of this action, Petitioners submit that the Maine Rules of Civil Procedure do not "specifically prescribe[]" a procedure by which this matter is to be presented and resolved. The Court may thus "proceed in any lawful manner to inconsistent with the Constitution of the State of Maine, these rules, or any applicable statutes." M.R. Civ. P. 81(f).

Maine Constitution's requirements is not just difficult, but impossible. The Maine Constitution requires reapportionment to occur in 2021. *See* Me. Const. art. IV, pt. 1, § 2 (providing that the Legislature "which convenes in 2021 and every 10th year thereafter[] *shall* cause the State to be divided into [House] districts . . . ." (emphasis added)); *see also id.* art. IV, pt. 2, § 2 (Senate); art. IX, § 24(1) (U.S. House) & § 25(1) (county commissioner). It requires apportionment to be done with federal census data. Me. Const. art. IV, pt. 1, § 2; art. IX § 24(1). And, for legislative and congressional districts, it requires that the Legislature complete its process by June 11 or, failing that, that this Court complete the process by August 10. Me. Const. art. IV, pt. 1, § 3 & pt. 2, § 2; art. IX, § 24(1)–(2). With the census data delayed, one of these requirements will be violated. The only question is which one.

In answering that question, the Court should seek, to the greatest extent possible, to preserve the overall purposes of the Maine Constitution's apportionment provisions, mindful also of federal constitutional proscriptions against malapportioned districts under the Apportionment Clause and the principle of "one person, one vote" enshrined in the Fourteenth Amendment. Those considerations point

toward an extension of the apportionment deadlines as the alternative that is least damaging to the overall constitutional framework.

The worst possible option would be to skip reapportionment altogether. The Maine Constitution's requirement of decennial apportionment is at the heart of its apportionment requirements. Virtually all of the other apportionment provisions in the Maine Constitution are aimed at facilitating this overarching goal of assuring that, at regular intervals, election districts are redrawn to ensure, as nearly as possible, that all Maine citizens have equal voting power. A holding that Maine must keep its electoral districts the same until 2031 because it cannot reapportion by specific calendar deadlines in the apportionment year would thus do the greatest possible violence to the overall constitutional framework of any option.

Such a ruling would also potentially violate the U.S. Constitution. Article I, § 2, of the U.S. Constitution (as amended by § 2 of the 14th Amendment) forbids malapportioned congressional districts. *See Desena*, 793 F. Supp. 2d at 459. Moreover, the 14th Amendment has long been held to forbid malapportioned legislative districts. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). A three-judge panel ruled in 2011

that Maine's prior scheme of waiting a mere two years after the release of census data to reapportion its congressional districts resulted in an as-applied violation of the Apportionments Clause. *Desena*, 793 F. Supp. 2d at 459, 461. A ten-year delay would seem likely to be highly problematic under the reasoning of that decision. Similarly, the Supreme Court has declared that anything less than decennial reapportionment of legislative districts "would assuredly be constitutionally suspect." *Reynolds*, 377 U.S. at 584; *see also Farnum v. Burns*, 548 F. Supp. 769, 774 (D.R.I. 1982) (three-judge panel) (holding that state was required to reapportionment legislative districts following release of 1980 census data even though 10 years had not passed since previous apportionment).

This caselaw suggests that any reading of the Maine Constitution as permitting malapportioned districts to persist for a decade if apportionment cannot be completed by a particular date in August would violate the U.S. constitution. The Maine Constitution should be interpreted to avoid such a result. *Cf. State v. Legassie*, 2017 ME 202, ¶ 13, 171 A.3d 589 (noting that, if possible, a statute should be construed to preserve its constitutionality).

Requiring reapportionment without the federal census data would also deviate significantly from the overall purposes of the Constitution's apportionment framework. The Maine Constitution requires, absent a state census ordered by the Legislature (which was not ordered for 2020), apportionment to be based on federal census data. Most directly, article IV, pt. 1, § 2, and pt. 2, § 2, provide that the mean population figure for each House and Senate district must be determined based on "the latest[9] Federal Decennial Census or a State Census previously ordered by the Legislature to coincide with the Federal Decennial Census." While the detailed P.L. 94-171 data is not strictly necessary to calculate the mean population figure, it would not make sense for the framers to have directed the Commission to use the federal census data to determine a target population for each district if they expected the Commission to rely on some other data set to construct the districts. The numbers would not add up.

[9] There can be no doubt that the "latest" Federal Decennial Census is the 2020 census. Although the census data takes time to be gathered, compiled, and released, the census itself, by law, occurs as of a specific day: April 1st of the census year. 13 U.S.C.A. § 141(a) (Westlaw). Since April 1, 2020 has passed, the 2020 census is now the "latest" census, regardless of whether the data compiled from that census has been released. In any event, any reading allowing the use of 2010 census data would likely violate the U.S. Constitution for the reasons just described.

The constitutional provision on congressional apportionment further confirms that the framers assumed and expected that federal census data would be used for apportionment. Section 24 of Article IX provides that the Apportionment Commission should start its work on congressional reapportionment when "the Federal Decennial Census population count is final." If the Apportionment Commission was intended to use some other data set for congressional apportionment, there would be no reason for the Constitution specify the release of federal census data as the start date for the Commission's work.

Any doubt that the Constitution requires use of the P.L. 94-171 redistricting data is dispelled by the legislative history of the 2011 amendment. That history makes clear that the 10-year apportionment schedule was moved from years ending in "3" to "1" for the express purpose of aligning apportionment with the release of the federal census data. Legis. Rec. H-920 (1st Reg. Sess. 2011) (testimony of sponsor). Even more telling, the history makes clear that the deadlines for Commission and legislative action were pushed back from April to June for the purpose of ensuring that the Commission would have adequate time to consider the P.L. 94-171 census data, which, by

federal statute, must be released by April 1 of the year following the census. Exhibit A at 1 (OPLA Memo); 13 U.S.C.A. § 141(c) (Westlaw). If the intent of the framers was solely to require the use of the total statewide population count, there would have been no need to adjust the April deadline, since statewide population totals must be released by January 1st of the year following the census. 13 U.S.C.A. § 141(b) (Westlaw).

In stark contrast to skipping apportionment altogether, or attempting to apportion without the necessary population data, extending the June 1, June 11, and August 10 deadlines should not interfere at all with the objectives of the Constitution's apportionment provisions. As the Deputy Secretary of State indicates in her affidavit, the constitutional deadlines contain some leeway. If the Secretary of State's Office receives an apportionment plan by November 15, 2021, it expects to have sufficient time to implement the districts by the start of the next election cycle on January 1, 2022. Flynn Aff. ¶ 16. Assuming the data is delivered by August 16th, which the Census Bureau says it has "confidence" will occur, *see* Ex. B, the usual timeframes for action on the data can be adjusted in a manner that is manageable for the

Commission, the Legislature, and the Court, without affecting next year's election.

In short, in the absence of any way to fully comply with the Constitution's apportionment requirements, extension of the Constitution's apportionment deadlines is the least bad option. Specifically, it is the option least likely to interfere the Constitution's overarching objective of accurately apportioned electoral districts.

B. The Justices Have Previously Authorized Deviation from Constitutional Requirements in Exigent Circumstances

Because this situation is literally unprecedented, there is little caselaw to look to for guidance. However, the disputed election of 1879 provides an example of the Justices of this Court endorsing a departure from the strict requirements of the Constitution in order to protect the larger constitutional order. In the aftermath of that election, the Governor and the (now-defunct) Council, upon inspection of the election returns, refused to recognize the victories of numerous house and senate candidates and instead issued summonses to other individuals to take the winning candidates' seats. *Opinion of the Justices*, 70 Me. 570, 570–78 (1880). The Governor then administered the oath of office to the

improperly summonsed individuals, while refusing to administer the oath to the duly elected individuals. *Id.* 579–80. The result was a constitutional crisis, in which both parties claimed to have captured a majority of seats in the Legislature. Making matters worse, the Governor's term then expired, leaving the position vacant until the fractured Legislature could choose a successor.[10] *Id.* at 590–91.

The crisis was resolved by an Opinion of the Justices. Among the issues presented to the Justices was whether the legislators whom the Governor improperly refused to swear could engage in legislative duties after being sworn by someone other than the Governor, even though Article IX, § 1 of the Constitution expressly required the Governor to administer the oath. *Id.* at 591–92. The question was momentous, because there was no longer a Governor, nor any prospect of electing a Governor without a quorum of properly sworn and properly elected legislators. If only the Governor could properly swear in legislators, and only sworn legislators could select a Governor, two branches of government would effectively cease to function.

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[10] At the time, the Maine Constitution charged the Legislature with choosing the Governor if no candidate received a majority of the vote in the general election. Me. Const. art. V, pt. 1, § 3 (amended 1880).

The Justices provided a decisive response, recognizing that, in such a situation, fundamental constitutional imperatives must prevail over strict adherence to procedural requirements:

> Is anarchy to triumph? Can the government be destroyed or its action paralyzed because there is no governor and council, before whom the prescribed oath is to be taken? We think not. The prescribed oath, from the necessity of the case, may be taken before a magistrate authorized to administer oaths. The members must be sworn before they can act. It is by their action that a governor and council, thereafter, is to be settled and the government continued.
>
> It cannot be presumed that the framers of the constitution had in contemplation that the oath had better not be administered at all, than administered by any other officer than the one designated therein. This is one of the most reliable tests by which to distinguish a directory from a mandatory provision.

Id. at 592.

The same analysis should apply here. Where it is impossible to give effect to all applicable constitutional directives, the "necessity of the case" requires the Court to consider which constitutional provisions the framers would have expected to prevail. *Id.* In the case of oaths it was clear that the framers would have preferred the wrong official to administer the oath than no oath to be administered at all, or, even

worse, the Legislature ceasing to function for want of sworn legislators. Similarly, in this case, given a choice between skipping reapportionment altogether, performing apportionment without the necessary census data, or performing apportionment on a slightly later and more compressed timetable than the Constitution contemplates, it seems clear that the framers would have expected the final option to prevail.

The Opinion's distinction between mandatory and directory provisions is also applicable here. The Law Court has recognized, in the context of agency procedural deadlines, that "in the absence of a clear manifestation in a statute to the contrary, statutory language such as 'shall' is directory, not mandatory, and does not wrest from the agency jurisdiction to act if the deadline is not met." *Doe v. Bd. of Osteopathic Licensure*, 2020 ME 134, ¶ 11, 242 A.3d 182; *accord Davric Maine Corp. v. Maine Harness Racing Comm'n*, 1999 ME 99, ¶ 13, 732 A.2d 289.

Under a comparable analysis, the ultimate deadline imposed by the Constitution for reapportionment—60 days from when the Legislature fails to act—is directory. The Maine Constitution imposes no consequences for exceeding the deadline, and it is not plausible that

the framers would have intended an apportionment plan issued 61 days after the Legislature failed to act to be ineffective, resulting in malapportioned districts for the following 10 years. *See Boynton v. Adams*, 331 A.2d 370, 372 (Me. 1975) ("In construing a statute as being mandatory or directory the purposes of the statute as well as the language must be considered"). Moreover, there is nothing special about August 10th; as noted above, the Secretary of State's Office expects to be able to implement an apportionment plan by January 1st even if receives the plan as late as November 15th. *See Ex parte St. Hilaire*, 101 Me. 522, 64 A. 882, 883 (1906) ("When there is no substantial reason why an act may not as well be done after as at or before the time prescribed, such a statute is directory").

Of course, merely extending the 60-day deadline would not address a key aspect of the framers' intent: their view that the Commission and the Legislature should have primary responsibility for reapportionment. While the June 11 deadline in particular ordinarily has a mandatory aspect—its expiration results in automatic transfer of the matter to the Supreme Judicial Court—that mandatory aspect is based on the framers' assumptions that (a) the Legislature will have

had a fair opportunity to act, and (b) the Court will have some ability to act upon transfer of the matter. But, in the extraordinary circumstances here, neither assumption is accurate. The Court would assume authority over apportionment on June 12 without the Legislature having had a chance to agree on a plan, and would itself have to hold the matter in abeyance for months to await release of the census data. In these unique circumstances, the Court should treat the entire sequence of apportionment deadlines—not just the last one—as directory, and thus extend them all in order to maintain the framers' intent that the elected Legislature should have primary responsibility for apportionment, with the Court acting as a backstop where the Legislature cannot reach agreement.

C. Other State Supreme Courts Have Extended Their Apportionment Deadlines

Maine is not the only state in this predicament. Several other states have apportionment deadlines written into their constitutions that have become impracticable due to the census delay.[11] Petitions

[11] *See* Nat'l Conference of State Legislatures, "2020 Census Delays and the Impact on Redistricting," at https://www.ncsl.org/research/redistricting/2020-census-delays-and-the-impact-on-redistricting-637261879.aspx (last visited May 24, 2021).

similar to this one have been granted by the Supreme Courts of California and Oregon, and a petition is currently pending with the Supreme Court of Michigan. Undersigned is aware of no court decisions rejecting petitions to extend constitutional deadlines to address the Census Bureau's delay.

The Oregon decision is perhaps most directly on point. In that case, the Speaker of the House and Senate President sought a peremptory writ of mandamus directing Oregon's Secretary of State to comply with a set of deadlines for reapportionment that diverged from those set forth in the Oregon Constitution. *State ex rel. Kotek*, 484 P.3d at 1059. As here, the delay of the federal census data made compliance with the Oregon Constitution's deadlines—July 1 for the Legislature to act and August 15 for the Secretary of State to make the apportionment if the Legislature failed to act—impossible. *Id.* at 1060. However, Oregon's Secretary of State opposed issuance of a writ, arguing that the court lacked authority to issue such a writ and that she could construct an apportionment plan using private data (though conceding that federal census data "may be the most accurate and well-accepted evidence of population"). *Id.*

The court rejected the Secretary's arguments and issued the writ. It first recognized its authority to issue the writ, pointing to a provision in the Oregon Constitution that gave the Oregon Supreme Court discretion to "take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings." *Id.* at 1061 & 1059 n.2 (quoting Or. Const. art. VII, § 2). It then considered the legislative history of the Oregon Constitution's apportionment provisions, concluding that "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." *Id.* at 1062. In light of this history, the Court concluded that it had authority to issue a writ setting alternate deadlines that would comply with the overarching constitutional objectives. *Id.* at 1063. The Court then rejected the Secretary's proposal that non-census data be used to make the apportionment, reasoning that the census data was both the "best evidence of population" and that the Oregon Constitution accords a "central role" to federal census data in plan preparation. *Id.*

The case for this Court to issue a writ extending Maine's constitutional deadlines is even stronger. The Oregon Supreme Court needed to derive the requirement that federal census data be considered in apportionment from legislative history. The Maine Constitution, in contrast, repeatedly references the federal decennial census in the text of its apportionment provisions, even establishing the finalization of the federal census population count as the trigger for the Apportionment Commission to start its work on congressional redistricting. Me. Const. art. IX, § 24(1). What is more, unless this Court believes it could construct properly apportioned districts without the P.L. 94-171 redistricting data, there appears to be no party potentially responsible for apportionment, similar to the Oregon Secretary of State, who is contending that apportionment without census data is viable as practical matter. Rather, as evidenced by the parties to this petition, the legislative leaders of both major parties are in agreement that the deadlines should be extended to provide the Legislature with the opportunity to consider the federal census results and attempt to agree on a plan.

In extending California's constitutional deadlines, the California Supreme Court conducted a similar analysis. After recognizing its original jurisdiction to issue "extraordinary mandamus relief" under the California Constitution, the court considered "whether [the constitutional apportionment] 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." *Legislature v. Padilla*, 469 P.3d 405, 408, 410 (Cal. 2020). The court concluded that extending the deadlines was the best option to "effectuate the policy judgment underlying the provision." *Id.* at 411.

Notably, in extending the deadlines, the California Supreme Court considered and expressly rejected the option of simply allowing apportionment to go to the courts—the California Constitution's "backstop" option if California's apportionment commission fails to approve a plan. *Id.* at 412. In rejecting that option, the court observed that it was designed for situations in which the Apportionment Commission fails to muster the requisite votes (or voters disapprove the final map), and not for situations in which the commission "will be

unable to complete its work by the prescribed deadline because of extraordinary events outside of its control." *Id*. This same reasoning applies to Maine's Constitution, in which this Court's role in apportionment is similarly intended as a "backstop" for when the Legislature is unable to agree on apportionment, as opposed to the current situation, in which the Legislature temporarily has no practical way of even considering the issue.

III. Relief Requested

As detailed in the Statement of Facts above, the practical deadline to have an appointment plan in place is no later than November 15, 2021, so that the Secretary of State's Office will have time to implement the apportionment plan by the start of the 2022 election cycle.

In light of this deadline, Petitioners respectfully propose that the constitutional deadlines be extended as follows:

Deadline for Apportionment Commission to submit plans to the Legislature for Legislative, Congressional, and County Commissioner Districts: Within 45 days of receipt of the legacy-format P.L. 94-171 data.

Deadline for the Legislature to Adopt the Commission's Plans or Plans of Its Own for Legislative and Congressional Districts: Within 10 days of the earlier of (a) the Commission's submission to the Legislature of congressional and legislative redistricting plans or (b) expiration of the above deadline for the Commission to submit the plans.

Deadline for the Court to Make the Apportionment If the Legislature Fails to Act: Within 35 days of any failure by the Legislature to enact an apportionment plan by the above deadline.[12]

The above deadlines are calculated to ensure that all relevant parties have sufficient time to consider apportionment and that, assuming receipt of the P.L. 94-171 data by August 16, 2021, apportionment will be complete by the Secretary of State's November 15, 2021 deadline.

[12] Petitioners express no view on whether the 30-day period for the Court to receive briefing and proposed plans from the public should be shortened or remain intact.

Conclusion

The Court should issue an order or a writ extending the constitutional deadlines for apportionment as proposed above.

Respectfully submitted,

May 24, 2021

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OFFICE OF POLICY AND LEGAL ANALYSIS

Date: March 10, 2011

To: State and Local Government Committee

From: Anna Broome, Legislative Analyst

LD 494 RESOLUTION, Proposing an Amendment to the Constitution of Maine to Change the Schedule for Redistricting

SUMMARY:

This resolution proposes to amend the Constitution of Maine to change the years of redistricting the Legislature after 2013 from 2023 and every 10th year thereafter to 2021 and every 10th year thereafter.

TESTIMONY

Proponents:

- Maine redistricts 3 years after the census; new districts in place 4 years out of date.
- Undermines the one person, one vote principle; concern about litigation.
- Elections in years ending in '2' would be based on data 10 years more recent.
- Most of the rest of the country redistricts either 1 or 2 years after the census.
- This is a good time to do this – no sense of political or budgetary situation in 2021.
- Maine's redistricting process is.better than in many other states – less partisan.
- If the constitutional resolution is successful, there would be a companion bill next year to add counties and congressional districts to the reapportionment commission.
- Could include the congressional districts in the constitutional process.

ADDITIONAL INFORMATION:

Maine Constitution Article IV, Part Third, Section 1-A establishes the personnel on the Apportionment Commission. Includes: 3 members from each party in the House; 2 members from each part in the Senate; chair of each of the two largest political parties; 3 members of the public – one chosen from each side and one chosen by the two public members. (Attached)

Statutory sections in 21-A MRSA §1206 and 30-A §65 (county commissioner districts)(attached)

Attached NCSL appendix with redistricting dates (not all states have specific dates).

Dates are changed for each stage of the reapportionment commission in the constitutional resolution for the following reasons:

- Currently, the apportionment plan of the commission must be presented 120 days after the Legislature convenes. This would be early April 2011. The US Census Bureau releases its population figures mid-March 2011. That would leave only 20 days to do the work.
- In the bill, the plan must be presented by June 1st. That allows 10 days for the Legislature to act by June 11th, just prior to adjournment. Current law requires the Legislature to act within 130 days (still 10 days).
- If the Legislature fails to act, the Supreme Judicial Court makes the apportionment.

FISCAL IMPACT:

Not yet available from OFPR. Will likely be referendum costs.

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 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 CA Whitehorne

James Whitehorne
Chief, Census Redistricting and Voting Rights Data Office