STATE OF MICHIGAN
IN THE SUPREME COURT

In re INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR STATE LEGISLATIVE AND CONGRESSIONAL DISTRICT'S DUTY TO REDRAW DISTRICTS BY NOVEMBER 1, 2021.
_____/

Supreme Court No. 162891

REPLY BRIEF OF ATTORNEY GENERAL TEAM SUPPORTING MICHIGAN SUPREME COURT JURISDICTION

ORAL ARGUMENT REQUESTED

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INTRODUCTION

According to the Attorney General Team Opposing Jurisdiction, when the People adopted the Redistricting Amendments, they left an important question unanswered—what happens if the federal government fails to timely provide the decennial census data? (Br Opp Juris, p 1.) Article 4, § 6 does not specifically address that very question. And with good reason: The People could not have anticipated the Census Bureau *not* providing the data in time, since it historically has done so like clockwork. Indeed, the People could not have fathomed a COVID-19 pandemic with its wide-reaching and disruptive tentacles.

But while the People may have left that specific question unanswered, they did not leave it unanswerable. They were forward-thinking enough to provide a remedy for any situation that might thwart the process of compiling the maps—in article 4, § 6(19) they gave this Court original jurisdiction to direct the Commission and the Secretary in their duties. Section 6 does not simply ask the Commission to adopt a redistricting plan by November 1, which the Team Opposing Jurisdiction focuses intently on. No, § 6 imposes a host of duties, including following specific criteria, holding public meetings, and supporting plans with census data. A laser focus on a single provision in § 6 to the exclusion of the context, and indeed the driving purpose, of that section betrays the common understanding of the People. And even if § 6(19) did not support jurisdiction, this Court retains original jurisdiction over writs of mandamus.

Although the Brief Opposing Jurisdiction points out that constitutional requirements are often treated as mandatory, there can be no rule *prohibiting*

treating them as directory. Such a rule would either limit the People's ability to exercise their reserved legislative power, or to limit this Court's power to construe the Constitution correctly. Neither of these is tenable. And so the question whether the timing provision here is directory or mandatory is one this Court can answer.

The remaining question is whether this Court should exercise its jurisdiction here. The Brief Opposing Jurisdiction says no—despite acknowledging that the Commission is in an "unenviable" position and is unable to meet the "looming deadline" through no fault of its own—and concludes that this situation does not present the "extreme circumstances" necessary to justify a deviation from the constitutionally established deadline. (Br Opp Juris, p 1.) But that conclusion stems from a conceptual error—that the decennial data is "*its* [the Commission's] preferred means to meet the November 1 deadline." (Br, p 1.) The decennial census data is not the Commission's preferred means—*it is the People's*. And *that* is what creates the dilemma (the impossibility of complying with *all* requirements of Article 4, § 6) and necessitates this Court's intervention. Having Petitioners "do their best" to meet the November deadline is a pseudo-solution that simply invites litigation. Likewise, it is easy to say that Petitioners can meet the deadline using untabulated data (Br Opp Juris, p 39; Senate Amicus, pp 8–9) if you are not the one doing the work, but it flies in the face of the earnest assessment of those who actually *do* the work (Br in Support of Pet, pp 13–17; Pets' Am Ex A to Supp Br, Brace Aff). This Court's direction is needed. An extension is needed. This Court has done it before when extreme circumstances warranted it. It should do so again.

ARGUMENT

I. This Court has original jurisdiction over the Petition.

Article 4, § 6(19) grants this Court the authority to direct the Secretary of State and the Commission to perform their respective duties. That is what the Petitioners ultimately seek—for this Court to direct them to carry out a set of duties in the context of a conflict. As an alternative, this Court has jurisdiction to consider the Petition as a prerogative writ of mandamus.

A. This Court has jurisdiction pursuant to Article 4, § 6(19).

Again, article 4, § 6(19) provides, "The supreme court, in the exercise of original jurisdiction, *shall direct the secretary of state or the commission to perform their respective duties* . . . ." Const 1963, art 4, § 6(19) (emphasis added). The Brief Opposing Jurisdiction asserts that "this Court's original jurisdiction under this text is limited to ordering the Secretary or the Commission to carry out or fulfill their respective constitutionally required tasks and actions." (Br Opp Juris, p 21.) This team agrees.

The main disagreement centers on what the Petitioners are truly seeking. The Team Opposing Jurisdiction asserts that the Petition only seeks "an order that preemptively allows them to not comply with the duties outlined in the Constitution." (Br Opp Juris, p 22.) That views the Petition with one eye shut. It might well be correct if the facts were different—if the Commission and the Secretary sought some escape hatch from meeting their obligations because of their own doing. But that is not true here. The Petitioners are faced with a choice to

meet a deadline, or else compress the time for public input, *id.*, § 6(9), (10), cast aside the requirement to use census data "necessary to accurately describe the plan and verify the population of each district," *id.* § 6(9), and risk adopting a plan that fails to meet the substantive redistricting criteria, see *id.* § 6(13). These substantive duties are the true engines of the Redistricting Amendments, and the Petition asks that this Court direct the Petitioners to abide by those paramount duties.

The Team Opposing Jurisdiction parses and splices the language of the Petition, offering an unduly legalistic reading of it as requesting not a directive from this Court "to perform" their duties, but only seeking assistance from this Court "in the performance of" their duties. (Br Opp Juris, pp 22–23.) But this does not account for the fact that certain of Petitioners' duties are irreconcilable due to circumstances outside their control. The essence of the matter here is that the Commission and the Secretary have myriad duties regarding redistricting—temporal duties and substantive duties—but that during this cycle, those duties conflict. Thus, without the possibility of complying both with those substantive duties and the deadlines, the Petition properly asks this Court to direct the Commission and the Secretary to comply with the paramount duties set out in the Constitution.

For these reasons and those offered in the Brief Supporting Jurisdiction, this Court has jurisdiction over the Petition.

B. As an alternative, this Court has jurisdiction pursuant to Article 6, § 4.

If this Court lacks jurisdiction over the Petition under to article 4, § 6(19), this Court may properly exercise jurisdiction pursuant to article 6, § 4.

1. This Court's jurisdiction over prerogative writs in this context remains intact.

The Team Opposing Jurisdiction discusses the historical lineage of actions in this Court concerning redistricting jurisdiction. The proffered premise is that prior to the 1963 Constitution, a mandamus action under article 6, § 4 *was* the "traditional vehicle for challenging redistricting and apportionment schemes," *LeRoux v Secretary of State*, 465 Mich 594, 606 (2002), and then once the 1963 Constitution was ratified, the common vehicle was article 4, § 6. (Br Opp Juris, pp 6–9.) To begin, it makes sense that litigants would rely on the more specific provision under article 4, § 6, and that is the primary basis (under the current Constitution) for original jurisdiction that the AG Team Supporting Jurisdiction advances. But even where article 4, § 6 has been the preferred jurisdictional provision since the 1963 Constitution was ratified, that does not imply that the propriety of original jurisdiction over a mandamus action under article 6, § 4 evaporates.

In support of its argument, the Team Opposing Jurisdiction places weight on the following italicized clause of the Redistricting Amendments:

> *Except to the extent limited or abrogated by article IV, section 6*, or article V, section 2, the supreme court shall have . . . power to issue, hear and determine prerogative and remedial writs . . . . [Const 1963, art 6, § 4 (2018).]

The brief contends that this italicized language necessitates a *contraction* of this Court's jurisdiction under article 6, § 4, as the clause would otherwise be surplusage. (Br Opp Juris, p 11.) But this language does not bear the weight assigned to it.

As an initial matter, this clause does not limit or abrogate *anything*, in and of itself. Instead, it simply directs the reader to article 4, § 6, and *if*—or, "to the extent"—that provision limits a part of this Court's jurisdiction, then it does not exist within article 6, § 4. It simply makes clear that article 6, § 4 is *subject to* any limitations set out in article 4, § 6.

The argument seems to be that, with the inclusion of that clause in article 6, § 4, the People intended to only shrink this Court's jurisdiction flowing from that provision. (Br Opp Juris, p 11 ("Regardless of exactly how the words 'limited or abrogated' restrict this Court's authority, in no way can they be read as enlarging this Court's jurisdiction. Nor should they be understood to merely reaffirm this Court's historic or existing authority in redistricting matters . . . .").) But this leaves out what the People *actually enacted* with the Redistricting Amendments—both a contraction of jurisdiction and an expansion of it under § 6(19), compared to the as-ratified version.

For the contraction of jurisdiction, this Court is now relieved of the role of deciding among competing redistricting plans, a considerable part of its jurisdiction under the 1963 Constitution. Compare Const 1963, art 4, § 6, ¶ 7 (as ratified) (*requiring* this Court to adopt a redistricting plan where the original commission

could not garner a majority vote) with Const 1963, art 4, § 6(19) (2018) ("In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.") and Const 1963, art 4, § 6(14)(c) (2018) (creating a new tiebreaker provision—one that involves only the Commission).

This is a substantial change. Removing the judicial branch (as well as the Legislature and the executive branch) from the creation and adoption of redistricting plans is a sea change in Michigan. See *In re Apportionment of State Legislature–1992*, 439 Mich 715, 719 (1992) (discussing this Court's efforts in 1972 when it "apportioned the state"). Indeed, in 1982, this Court took on the "responsibility to provide for the continuity of government by assuring that the people will be provided the opportunity to elect a lawfully apportioned Legislature in the 1982 election." *In re Apportionment of State Legislature–1982*, 413 Mich 96, 116 (1982). That is no small task. But today, under the Redistricting Amendments, this Court is *prohibited* from exercising its jurisdiction to engage in the consequential matter of drawing districts itself. Const 1963, art 4, § 6(19) (2018) (this Court now *cannot* exercise jurisdiction to choose a redistricting plan, under *any* grant of jurisdiction).

This limitation substantially reduces this Court's original jurisdiction regarding redistricting matters as compared to the provisions governing the original commission. The clause added to article 6, § 4 simply recognizes and accounts for this modification of the balance of authority in matters of redistricting. The article

6, § 4 clause need not be given more work to do than this—recognizing a severe contraction of this Court's jurisdiction and authority in the ultimate promulgation of a redistricting plan.[1] As a result, the "Except to the extent limited or abrogated" clause of article 6, § 4 does not provide any sound reason to further contract this Court's jurisdiction.

2. Though unusual, the Petition properly seeks the equitable writ of mandamus.

Certainly, it is unusual that the Commission and the Secretary seek anticipatory redress via a writ of mandamus to direct their duties, but it is also unusual that the census data upon which the Commission needs to rely is delayed by the federal government. Under these facts, the Petition properly invokes this Court's article 6, § 4 jurisdiction should article 4, § 6(19) not provide it.

The Team Opposing Jurisdiction makes the analogy that the Petition is a square peg and mandamus is a round hole. (Br Opp Juris, p 17.) But this analogy is inapt, as it misapprehends the nature of the writ of mandamus, which is flexible and responsive to the circumstances. "Issuance of a writ of mandamus is governed by equitable principles." *Bd of Ed of Oakland Sch v Superintendent of Pub*

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[1] Although that lane of jurisdiction is narrower, the Redistricting Amendments also *expanded* this Court's jurisdiction when they omitted restrictions that existed in the 1963 Constitution as ratified. As discussed more fully in Brief Supporting Jurisdiction, pp 8–9, this Court's jurisdiction pertinent to the original commission was limited in two specific ways—requiring an elector to file the application and permitting an action within a temporal window. Const 1963, art 4, § 6 (as ratified). Those limitations do not appear in the current grant of jurisdiction under article 4, § 6(19).

Instruction, 401 Mich 37, 44 (1977), citing *Franchise Realty Interstate Corp v City of Detroit*, 368 Mich 276, 279 (1962). And "equity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life." *Tkachik v Mandeville*, 487 Mich 38, 45–46 (2010) (cleaned up). The rigid rules of law give way to the "flexible jurisdiction of courts of equity" which "allows 'complete justice' to be done in a case by 'adapting its judgments to the special circumstances of the case.' " *Id.* at 46, quoting 27A Am Jur 2d, Equity, § 2, at 520–521 (brackets omitted).

With this background in mind, a few points merit emphasis.

First, specific to the writ of mandamus, this Court has deemed it "fundamental" that mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one." *Fawcett v Dept of Labor & Indus*, 282 Mich 489, 494 (1937), quoting *People ex rel La Grange Twp v State Treasurer*, 24 Mich 468, 477 (1872). If article 4, § 6(19) does not permit jurisdiction, then article 6, § 4 is the proper basis here as no other specific remedy is available.

Second, although the general rule is that the target of a mandamus action must be a purely ministerial act, *Toan v McGinn*, 271 Mich 28, 34 (1935), this Court has made clear that "mandamus will lie to compel the exercise of discretion," but will not be issued "to compel its exercise in a particular manner." *Teasel v Dept of Mental Health*, 419 Mich 390, 410 (1984). The gist of the Petition is that it seeks this Court's direction regarding which duties to carry out when it cannot carry out all of them; the Petition does not ask this Court *how* to effectuate any of those

duties. The Brief Opposing Jurisdiction myopically looks at the November 1 date, obscuring the rest of the picture and the other duties at play.

Third, this singular focus taints the brief's discussion of the typical required showing for a writ of mandamus—that the party to perform has a clear, ministerial duty. See *In re MCI Telecom Complaint*, 460 Mich 396, 443 (1999).[2] As discussed ad nauseum, there are several clear legal duties required of the Commission and the Secretary, not just whether the Commission must adopt a plan by November 1. The Petition effectively asks the Court to direct the Commission and the Secretary to perform those duties, even at the expense of the directory constitutional deadline.

Finally, the typical mandamus element requiring that a petitioner has the clear right to the performance of a duty, *In re MCI Telecom Complaint*, 460 Mich at 443, should give way to equitable principles underlying mandamus actions. Again, writs of mandamus are guided by principles of equity, including the flexibility to do "complete justice" in light of "the special circumstances of the case." *Tkachik*, 487 Mich at 45–46. Should article 4, § 6(19) not provide jurisdiction here, it is imperative that this Court consider the Petition under its broad authority to hear remedial and prerogative writs so that complete justice can be done.

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[2] Regarding the fact that Petitioners are also those seeking to be bound by this Court, this Team relies on the arguments and authorities in its initial brief. (See Argument I.C.2.)

II. Neither *Dettenthaler* nor any other authority prevents this Court from correctly construing the directory constitutional timing requirement at issue here and giving effect to the People's will.

The Brief Opposing Jurisdiction correctly concedes that the Legislature possesses the power to enact timing requirements that are directory rather than mandatory. (Br Opp Juris, p 24.) This raises the question—where did the Legislature get this power? The answer, of course, is the only place the Legislature got any of its power: a delegation of the legislative authority that inheres in the People. And in delegating legislative authority to the Legislature through the Constitution, the People reserved a portion of that authority for themselves—in the powers of initiative and referendum. If the Legislature can choose to enact directory timing requirements, it follows of necessity that the People, when exercising their reserved legislative power, can make the same choice.

In support of the proposition that this Court lacks the authority to give effect to the People's decision to enact a directory timing requirement, the Brief Opposing Jurisdiction relies heavily on *People v Dettenthaler*, 118 Mich 595 (1898). *Dettenthaler* did not involve a constitutional timing requirement—it involved the Constitution's requirement that "The style of the laws shall be 'The People of the State of Michigan enact.' " Const 1850, art 4, § 48.[3] The Legislature passed a bill that did not include the enacting clause, and the Governor signed it. 118 Mich at 597–599. When Frank Dettenthaler violated the law (by selling margarine that looked like butter), he argued that the law was invalid due to the failure to comply

[3] The equivalent provision is in article 4, § 23 of the 1963 Constitution.

with the enacting-clause requirement. *Id.* at 597–598. This Court agreed, held the law invalid, and struck down the conviction. *Id.* at 603.

In reaching its decision, this Court, as the Brief Opposing Jurisdiction points out, included language that supports a general presumption that constitutional requirements be treated as mandatory rather than directory. *Id.* at 600–603. It did not, however, lay down an absolute rule that this Court lacks the power to treat a constitutional requirement as directory.

Relevant here, *Dettenthaler* quoted with approval Justice Cooley on Constitutional Limitations, who observed that "[i]f directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end[.]" 118 Mich at 600–601, quoting Cooley on Constitutional Limitations, 5th Ed., p 93.

It does not appear that this Court or the Court of Appeals has ever cited *Dettenthaler* for the proposition that a constitutional requirement must be deemed mandatory, or even for the milder proposition that "a strong presumption" exists that a constitutional requirement is mandatory. Thus, any contention that

Dettenthaler laid down an important rule of constitutional construction is dubious at best.[4]

Further, it bears noting that there is a fundamental difference between the constitutional provision at issue here and the provisions at issue in *Dettenthaler* and similar cases that discuss the procedures the Legislature must follow in passing laws (see, e.g., *Rode v Phelps*, 80 Mich 598 (1890); *People ex rel Kent Cty Sup'rs v Loomis*, 135 Mich 556 (1904)). In those cases, the People had restricted the power of the Legislature to pass legislation *at all* by imposing certain requirements on the passage of legislation. And there would be no constitutional problem with holding the purported law void if those requirements were not met. In *Dettenthaler*, for example, there was no difficulty created when this Court told the Legislature, in effect, "Because the bill you passed banning the sale of margarine that looks like butter did not have an enacting clause, Michigan has no law banning the sale of margarine that looks like butter." But the same does not apply to a redistricting plan. The Legislature *may* ban the sale of certain margarine, but the Commission *must* enact a redistricting plan. The Court *cannot* tell the Commission, "Because

[4] It has been cited for the proposition that a law is not valid if the enacting clause is omitted. E.g., *Olds v Comm'r of State Land Office*, 134 Mich 442, 446 (1901). And it has been cited, though not in a majority opinion, for the uncontroversial proposition that "[t]he Governor has no power to make laws." *Taxpayers of Michigan Against Casinos v Michigan*, 478 Mich 99, 114 (2007) (Weaver, J., dissenting); *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 356 (2004) (Weaver, J., concurring in part and dissenting in part).

you adopted a plan after November 1, Michigan has no redistricting plan." Michigan must have a redistricting plan, and it must come from the Commission.

Given the completely different character of the requirement at issue in *Dettenthaler*, it is apparent that key language in that opinion simply does not apply here. The Brief Opposing Jurisdiction quotes *Dettenthaler*, in turn quoting Cooley, to say, "If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised *in that time and mode only*. . . ." (Br Opp Juris, p 25, quoting *Dettenthaler*, 118 Mich at 600–601, quoting Cooley on Constitutional Limitations.) But the People manifestly did not intend that the Commission must adopt a plan by November 1 or never adopt one at all.

The most *Dettenthaler* says regarding this subject is not that this Court can never deem a constitutional requirement directory—but only that courts should indulge a presumption that such requirements are mandatory. If such a presumption is truly appropriate, then it is hard to think of a constitutional provision that more clearly overcomes it than that at issue here.[5] For one thing, the People explicitly contemplated and accepted the possibility that a plan would not necessarily become law 90 days after being adopted, as the Redistricting Amendments require. This is evident from the People's choice of remedy for a non-

[5] This Court need not decide whether such a presumption applies. This Court can grant the relief Petitioners seek by holding that, assuming there is such a presumption, it has been overcome under these circumstances.

compliant plan. Rather than imposing any other remedy that would strictly enforce the timeline set forth in § 6 (for example, by tasking this Court, the Legislature, or some other person or body with imposing a plan), the People chose to empower this Court to *remand* a non-compliant plan to the Commission for further action. This choice reflects an unmistakable preference in the minds of the People that the redistricting process be done *right* rather than done on time, if it cannot be both.

In other words, the People did not intend that the redistricting process should fail altogether if a deadline is missed, nor did they intend that another body pick up the task if the Commission is late, nor did they intend that the Commission do a shoddy job by using inadequate data.

And if this Court reads *Dettenthaler* to entirely forbid this Court from construing a constitutional timing requirement as directory rather than mandatory, then *Dettenthaler* was wrongly decided and this Court should overrule it on that point. As discussed in the Opening Brief Supporting Jurisdiction, it cannot be the case that the People lack the power to enact directory timing requirements, because the Legislature has that power, and the only power the Legislature has is delegated from the People. And it cannot be the case that this Court lacks the power to construe the Constitution correctly—that is axiomatic. Thus, any rule that this Court could never recognize the People's exercise of their power to enact directory requirements cannot be correct. If *Dettenthaler* imposed such a rule, it should be overruled, and if it suggested that there is such a rule, this Court should take this opportunity to clarify the point.

Although the Brief Opposing Jurisdiction relies heavily on *Dettenthaler* to support its argument that constitutional provisions are mandatory, not directory, (Br Opp Juris at 24–26), the Team acknowledges that *Ferency v Secretary of State*, did not "address *any* of [that] authority." (*Id.* at 34.) That is telling. Indeed, as even the Brief Opposing Jurisdiction acknowledges, this Court in *Ferency* began instead with the "unique circumstances" that "justified" it "taking the extraordinary action of disregarding the constitutionally imposed 60-day requirement." (*Id.*)

Critically, this Court easily could have—but did not—limit its holding to its facts. It did the opposite. It said that it "only the *most extreme circumstances, such as* the last-minute active judicial intervention in the instant case, can justify this deviation." In other words, it expressly left open the door for other such "extreme circumstances," while cautioning that the Court would not extend constitutional deadlines lightly. 409 Mich 569, 602 (1980). Neither Petitioners nor the AG Team Supporting Jurisdiction make the request here lightly. As discussed further in Argument III below, the pandemic was unforeseen by any measure, devastating not only to lives and health but also timings and structures—circumstances that are at least as extreme as those in *Ferency*.

III. *Ferency* presents sound analysis and is on point, and this situation presents equally "extreme circumstances" that justify this Court adjusting § 6's deadlines.

The AG Team Opposing Jurisdiction attempts to debunk *Ferency*, characterizing this Court's analysis as "relatively cursory" and "perfunctory." (Br Opp Juris at 35). The AG Team Supporting Jurisdiction disagrees. This Court's

analysis was neither superfluous nor indifferent, nor is its care and depth of analysis marked by word count. It is reflected in the principles embodied in the analysis. The analysis in *Ferency* maps what this Court faces with the Petition.

To reiterate—in *Ferency*, (1) the timing requirement did not relate to the sufficiency or validity of the underlying petitions at issue; (2) it was put in place to facilitate the important process at issue; (3) it was designed to give election officials ample time to do their important work; (4) the ultimate goal was not to be prevented where the there was no fault on the part of the official; and (5) the circumstances were "extreme." 409 Mich at 601–602. Based on those significant kernels, this Court was sound in holding that a constitutional timing may be directory—even when framed in mandatory terms.

Notably, the same criteria are met here: (1) the deadlines do not relate to the accuracy or fairness of the district maps themselves; (2) the time limit was put into place to ensure that the important process kept on schedule because of the impending election cycle (which will not be affected by the requested time extension); (3) based on the expected timing of the decennial census data (as historically provided), the timing was designed to give Petitioners ample time to complete work that ought not be rushed; (4) Petitioners have done and continue to do all in their power to meet the deadlines; (5) and the circumstances are at least as extreme as in *Ferency*.

The Team Opposing Jurisdiction next tries to distinguish *Ferency*, arguing that this situation "does not present the 'unique' and 'most extreme circumstances'

that would warrant such an extraordinary departure from the express constitutional deadline of Article 4, § 6." (Br Opp Juris, p 36.) But its attempts are unconvincing.

The Team Opposing Jurisdiction first argues that the Petitioners *could* use the legacy data and that no one is preventing them from doing so. (Br Opp Juris, pp 38–39.) Yes, they could, but this is only half of the equation. The Commission has already acknowledged that it can begin its work with the legacy data but that it cannot reconcile it and finish its work in time to meet the constitutional deadlines; the Secretary has also stated that she will have difficulty updating the QVF in time. (Br in Support of Pet, pp 13–17.) Central to the inquiry, and contrary to the opposing approach (Br Opp Juris, p 30, fn 13), article 4, § 6 impliedly mandates the use of the decennial data. (Br Supporting Juris, p 26.) Thus, Petitioners cannot fulfill their paramount constitutional duty to render maps that are accurate.[6]

The Brief Opposing Jurisdiction next attempts to distinguish the right to propose laws and constitutional amendments through the initiative process from the constitutional amendment that results from that process—here, the Redistricting Amendments. (Br, p 30). Of course they are different things. But the

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[6] The Brief Opposing Jurisdiction also posits that under Article 12, § 1, the Legislature *could* possibly propose an amendment to the Constitution that would alter the November 1, 2021 deadline and that would take effect before that deadline, but concedes that this is "highly unlikely." (Br Opp Juris, p 39, fn 14.) This Team agrees, given both the hurdles of Article 12, § 1 (2/3 of each house, and a majority of electors) and the lack of any indication that the Legislature is interested—including from amicus Senate.

Brief Opposing Jurisdiction misses the central point. Both the initiative process and a constitutional amendment that result from that process represent the People's clear and direct voice in governance—its exercise of power the People reserved for themselves. See *Bingo Coal for Charity—Not Politics v Bd of State Canvassers*, 215 Mich App 405, 407 (1996), quoting Const 1963, art 2, § 9 ("The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum."); *Kuhn v Dep't of Treasury*, 384 Mich 378, 385 (1971) ("[C]onstitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed.").

Third, the Team Opposing Jurisdiction argues that *Ferency* is inapplicable because there the inability to comply with the 60-day certification deadline was due to court intervention, while here there is no "foul play." (Br Opp Juris, p 34.) While court intervention was indeed a factor in *Ferency,* that is not what drove the holding. What drove *Ferency* was an impossible dilemma in meeting the constitutional deadline because of external circumstances, not through any fault of the entity that could not meet the deadline. If that scenario sounds familiar, it should: it is precisely the scenario confronting Petitioners. Although the causes of the dilemmas may be different—court intervention as compared with a pandemic and delayed data—the same "manifest unfairness" present in *Ferency* is present here. Significantly, in both cases, the unfairness in ultimately to the People, who

tasked the Commission, and the Commission alone, with this important and consequential work.

Fourth, the Brief Opposing Jurisdiction argues that the constitutional deadline at issue here "o*stensibly* relates to the sufficiency or validity of the redistricting plans" (Br Opp Juris, pp 40–41 (emphasis added)), because it was designed to allow time for challenges to the sufficiency. As the Opposing Team's chosen language suggests, that analysis is attenuated. Section 6's deadline was meant not for a specific purpose but more generally to move the entire process along and prevent unnecessary delays. And the overall schedule does not affect the *substance* of claims about the sufficiency of the maps the Commission draws. Finally, the fact that things must be accomplished even after November 1 (public hearings, for example) is no different than the ballot printing and distribution that had to be done after the deadline in *Ferency*.

Relatedly, in their fifth argument, the Team Opposing Jurisdiction asserts that this situation differs from *Ferency* because it could impact individuals other than those who facilitate the electoral process, such as candidates who are under deadlines for collecting signatures. (Br Opp Juris, pp 42–43.) Even if true, that was true in *Ferency* as well. If the "election machinery" had failed, overseas voters, for example, might not have gotten their ballots timely, a situation that can affect the fundamental right to vote. *Obama for Am v Husted*, 697 F3d 423, 434 (CA 6, 2012) ("To account for inconsistencies and delays in foreign mail systems, UOCAVA, as amended by the MOVE Act, requires states to provide absentee ballots to absent

military and overseas voters at least 45 days prior to an election. 42 U.S.C. § 1973ff–1(a)(8). These special accommodations are tailored to address the problems that arise from being overseas."). Moreover, there is a solution to any problems related to candidate deadlines: it is within the Legislature's power to extend those deadlines. What cannot be solved absent this Court's assistance is the constitutional timing strictures. And without that assistance, there are worse problems down the road, not only for candidates but for the Commission and the People as well: either maps will be drawn without the most accurate data, or the Commission could be engulfed in litigation a few months down the road, interrupting the Commission's important work despite coming to this Court for direction in advance.

Finally, the Team Opposing Jurisdiction asserts that the out-of-jurisdiction cases, *Padilla* and *Kotek,* are inapplicable here because they involved impossibility of compliance, while in this case it is possible to comply. (Br Opp Juris at p 30, fn 15.) But again, that conclusion is based on the faulty premise that Petitioners can meet *all* the mandates of Article 4, § 6—both substantive and timing—simply by working faster and harder. But the Petitioners have asserted that they cannot. (Br Supporting Pet, pp 13–17; Ex A to Pets' Supp Br, Brace Aff.) These entities are entitled to deference, especially since Petitioners *want* to comply with the constitutional mandates and have been diligent in trying to do so. *Padilla* and *Kotek* are applicable and persuasive.

CONCLUSION AND RELIEF REQUESTED

For these reasons and those set forth in this Team's earlier brief, the Attorney General Team Supporting Jurisdiction respectfully requests that this Court hold that it has jurisdiction to decide this issue, that the constitutional timing requirements of Article 4, § 6 are directory, not mandatory, and that these unique circumstances justify the granting of Petitioners' request for an adjustment of time.

Respectfully submitted,

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