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

Expedited consideration requested under MCR 7.311(E). Relief requested as soon as is practicable but no later than August 1, 2021.

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PETITIONERS MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION AND SECRETARY OF STATE JOCELYN BENSON'S RESPONSE TO DEPARTMENT OF ATTORNEY GENERAL'S BRIEF IN OPPOSITION TO PETITION

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the petition properly invokes this Court's original jurisdiction under Const 1963, art 6, § 4 or Const 1963, art 4, § 6(19)?

   Petitioners' answer: Yes

   Attorney General Team Supporting Michigan Supreme Court's Jurisdiction's answer: Yes

   Attorney General Team Opposing Michigan Supreme Court's Jurisdiction's answer: No

2. Whether this Court has the authority to deem a constitutional timing requirement as directory instead of mandatory?

   Petitioners' answer: Yes.

   Attorney General Team Supporting Michigan Supreme Court's Jurisdiction's answer: Yes

   Attorney General Team Opposing Michigan Supreme Court's Jurisdiction's answer: No

3. Whether the unprecedented delay in the transmission of federal decennial census data justifies a deviation from the constitutional timeline?

   Petitioners' answer: Yes

   Attorney General Team Supporting Michigan Supreme Court's Jurisdiction's answer: Yes

   Attorney General Team Opposing Michigan Supreme Court's Jurisdiction's answer: No

INTRODUCTION

Pursuant to this Court's request in its May 20, 2021 order, the Department of Attorney General filed briefs arguing both sides of the questions posed in that order. The Department of Attorney General's brief in opposition to the position taken by Petitioners provided a vigorous argument, but ultimately its arguments fail to demonstrate that this Court lacks jurisdiction, that the Court lacks authority to interpret constitutional requirements as directory, or that the unprecedented circumstances do not justify a deviation from the timelines provided in the constitution.

First, Petitioners have properly invoked this Court's jurisdiction under article 4, § 6(19) of the Constitution. They have plainly requested this Court to direct them to perform their duty by answering the embedded legal question of what their duty is in the extraordinary circumstances presented. Such a request directly invokes the specific jurisdiction granted this Court by article 4, § 6(19). The brief in opposition fails to demonstrate that this Court lacks jurisdiction where the constitution expressly provides that jurisdiction. Further, even if this Court did not have jurisdiction under article 4, § 6(19), it would still the jurisdiction under article 6, § 4—just as it had in prior cases touching on redistricting.

Second, the opposing brief fails to show that this Court lacks the authority to interpret a constitutional timing requirement to be directory. As argued in Petitioners' earlier brief, this Court has such authority, and has used it before. The opposing brief's argument instead relies on non-binding cases from other states and stretches other cases from this Court to suggest broader rulings than those cases

actually held. But none of the cases discussed by the opposing brief diminish the authority of the cases relied upon Petitioners or offer a persuasive reason for this Court to overrule its holding in *Ferency v Secretary of State*, 409 Mich 569 (1980).

Lastly, there is more than sufficient reason to justify a deviation in timing. The census data needed for accurate and fair redistricting will not be available in time for Petitioners to perform their duties by the timelines identified in the text of the amendment. This occurrence was not only unforeseen, it was unforeseeable—brought about by historic events unprecedented in living memory. The text of the constitution also provides no express guidance on what to do if the data is late. These unique and narrow circumstances—which are unlikely to reoccur or lead to regular involvement of this Court in the activities of the Independent Citizens Redistricting Commission—call for the kind of extraordinary relief requested by Petitioners. The brief in opposition simply fails to adequately answer why relief is not necessary, or reasonably explain what Petitioners could do without such relief.

ARGUMENT

On May 20, 2021, this Court entered an order requesting supplemental briefing from Petitioners, the Department of Attorney General, and any interested parties on three issues. The Commission and the Secretary of State timely submit the instant brief in response to the Department of Attorney General's brief opposing this Court's exercise of jurisdiction consistent with the Court's order.

I. Petitioners have properly invoked this Court's original jurisdiction under article 4, § 6(19) or, alternatively, under article 6, § 4.

A. Article 4, § 6(19) vests this Court with original jurisdiction to direct Petitioners in the performance of their duties.

As Petitioners argued in their principal and supplemental briefs, this Court has original jurisdiction to hear and resolve the petition under article 4, § 6(19) of the Constitution.

The Department of Attorney General's brief in opposition argues that article 4, § 6(19) does not confer jurisdiction because Petitioners are requesting that the Court direct them to perform a duty that is not constitutionally provided for—the adopting of redistricting plans *after* November 1, 2021. The brief argues that "rather than seeking an order requiring them to *fulfill* their duties, [Petitioners] are asking for the opposite—an order that preemptively allows them to not comply with the duties outlined in the Constitution." (Attorney General Opposition Brf, p 22.) And further, "[Petitioners] are asking this Court to actually change the constitutional text to alter those duties, at least for this census cycle." *Id.* But these arguments are unpersuasive.

The opposing Attorney General's argument is based on a misunderstanding of the phrase "[the] Supreme Court . . . shall *direct* the secretary of state or the commission *to perform their respective duties*." Const 1963, art 4, § 6(19) (emphasis added). But, Petitioners are, in fact, requesting that this Court "direct" them to "perform their respective duties" pursuant to article 4, § 6(19). Specially, the Commission is requesting direction in the performance of its duty to "[n]ot later

than November 1 . . . adopt a redistricting plan . . . for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts." Const 1963, art 4, § 6(7). Embedded within Petitioners' request for direction is a legal question—is the November 1 time limitation in article 4, § 6(7) for adopting plans mandatory or may it be interpreted as directory under the present extreme circumstances?

This Court has recognized in the context of mandamus actions—to which this case is akin—that the Court can resolve "threshold" legal questions the resolution of which informs the duty sought to be compelled. See, e.g., *Michigan United Conservation Clubs v Sec'y of State,* 463 Mich 1009 (2001); *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 585-586 (2018); *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 286-287 (2008), aff'd in result only 482 Mich 960 (2008). See also *Hertel v Racing Comm'r Dep't of Agriculture*, 68 Mich App 191, 198 (1976); *Deneweth v State Treasurer*, 32 Mich App 439, 442 (1971). In these cases, jurisdiction was not defeated because there was a legal question that required resolution before the court could direct the public officer in the performance of his or her duty.

Further, Petitioners' requested relief is consistent with article 4, § 6(19). If the Court interprets the constitutional time limitation to be directory under the present circumstances, Petitioners have requested that the Court direct the Commission to perform its duties under an alternative timeline. If the Court determines that the November 1 deadline is mandatory, presumably the Court will

direct Petitioners to perform their duties and adopt plans by November 1. Either way, this Court will have determined what duty Petitioners have and directed Petitioners' performance of that duty accordingly.

Under the opposing Attorney General's theory, neither the Commission nor the Secretary could ever pose a question to this Court regarding the performance of their duties under article 4, § 6 and this Court would be prohibited from interpreting this particular constitutional provision until after the deadlines in question have passed.[1] But nothing in article 4, § 6(19) indicates that the people intended this provision to be so limited in the context of something so important as redistricting. To be sure, Petitioners do not anticipate that they will have a need to invoke this Court's jurisdiction outside of the rarest of occasions, such as the unprecedented circumstances presented here. Without more express limitations in the plain language of article 4, § 6(19), it would be unreasonable to conclude that the people—in conferring original jurisdiction on this Court to direct Petitioners to perform their duties—intended to preclude Petitioners from seeking such direction of their own accord.

B. The Court need not address jurisdiction under article 6, § 4 of the Constitution where the Court plainly has jurisdiction under article 4, § 6(19).

The Attorney General's brief in opposition dedicates 13 pages to explaining why this Court does not have jurisdiction under article 6, § 4 of the Constitution.

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[1] Notably, this Court has interpreted constitutional language in other redistricting cases. See, e.g., *In re Apportionment of State Legislature – 1982*, 413 Mich 96, 112-116 (1982); *In re Apportionment of State Legislature – 1972*, 387 Mich 442, 451 (1972).

(Attorney General opposition brief, pp 4-17.) But because the Court plainly has jurisdiction under article 4, § 6(19), it need not decide whether it also has jurisdiction under article 6. Nevertheless, should the Court reach this issue, it should conclude that article 6, § 4 provides an alternative or additional basis for jurisdiction.

The opposing Attorney General's brief acknowledges that, before the 1963 Constitution, redistricting or apportionment cases were brought as mandamus actions under this Court's power to hear and issue various writs, including mandamus. See *LeRoux v Secretary of State*, 465 Mich 594, 606 (2002), citing *In re Apportionment of the State Legislature – 1992*, 439 Mich 715, 717 (1992). See also Const 1908, art 7, § 4 ("The supreme court shall have a general superintending control over all inferior courts; and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procendo and other original and remedial writs, and to hear and determine the same.") But in the 1963 Constitution, the people adopted specific jurisdictional provisions with respect to apportionment. As ratified, article 4, § 6 provided:

> Disagreement of commission; submission of plans to supreme court.
>
> If a majority of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in this section.

And:

> Jurisdiction of supreme court on elector's application.

> Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution. [Const 1963, art 4, § 6.]

Thus, article 4, as ratified, provided an avenue for the former Commission on Legislative Apportionment or its members to petition this Court for direct review and approval of a proposed plan. And it conferred original jurisdiction on this Court to hear applications by electors. After the new Constitution became effective, apportionment cases came to this Court under article 4, § 6 even after this Court held that all of the apportionment provisions, article 4, §§ 2-6, were unconstitutional in *In re Apportionment of State Legislature – 1982*, 413 Mich 96, 116 (1982). *In re Apportionment of State Legislature – 1992*, 439 Mich 715, 724 n 28 (1992).

Proposal 18-2 made various changes to these provisions and enacted and amended others. In particular, the amendments make very clear that the power to draw maps and approve redistricting plans lies solely with the newly constituted Commission, and no other body, including this Court, can perform these functions. See Const 1963, article 4, §§ 6(19), (22); article 5, § 2; article 6, §§ 1, 4. Thus, the amendments removed any avenue for the newly created Commission or its members to seek review and approval of proposed plans by this Court or any possibility that this Court, itself, could draw plans, but retained and amended the section conferring original jurisdiction on this Court in article 4, § 6(19):

> The supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties, may review a challenge to any plan adopted by the commission, and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law. 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.

The proposal also amended article 6, § 4 to provide, in relevant part, that "[*e*]*xcept to the extent limited or abrogated by article IV, section 6, or article V, section 2*, the supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs . . . ." Const 1963, art 6, § 4. (Emphasis added).

The opposing Attorney General's brief seizes on the amendment to article 6, § 4—the "to the extent limited or abrogated by article 4, § 6" language—and argues that this language deprives this Court of authority to exercise original jurisdiction in a redistricting case under article 6. But the better understanding of this language is that it simply prohibits this Court from doing under article 6, § 4 what it cannot do under article 4, § 6 or article 5, § 2. And what the Court cannot do under these provisions is promulgate and adopt redistricting plans or order or direct anybody other than the Commission to do so. Under this reading, the Court can exercise original jurisdiction under article 6, § 4 over a mandamus or other action involving redistricting but it cannot grant any relief that involves directing a body other than the Commission to promulgate and adopt plans. For instance, article 4, § 6(6) provides that the Commission "shall have legal standing to prosecute an action regarding the adequacy of resources provided for the operation of the

commission." The Commission could invoke this Court's original jurisdiction under article 6, § 4 by filing a complaint for mandamus to direct the proper officials, presumably the Legislature, to provide adequate funding. See Const 1963, art 4, § 6(5) ("the legislature shall appropriate funds sufficient to compensate the commissioners and to enable the commission to carry out its functions, operations and activities").

That said, article 4, § 6(19) is the more specific provision with respect to jurisdiction and provides a more apt vehicle for a petition or complaint seeking to "direct the secretary of state or the commission to perform their respective duties," or seeking to "challenge [ ] any plan adopted by the commission[.]" See, e.g., *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-640 (1978) (specific constitutional provision controls over a general provision).

Here, as argued above, article 4, § 6(19) provides the specific jurisdictional basis for Petitioners' action because they are seeking direction in the performance of their duties. However, should the Court agree with the opposing Attorney General's argument that Petitioners' claims and requested relief do not fall within the "direct the performance of their duties" language, this Court would still have jurisdiction over the petition under article 6, § 4.

Petitioners acknowledge that their current action does not fit neatly within the elements of a traditional mandamus action. See, e.g., *Baraga Co v State Tax Comm*, 466 Mich 264, 268 (2002) (setting forth factors necessary for granting mandamus relief). But its indisputable that the people of Michigan have a clear

legal right to have the Commission draw maps and adopt plans based on current census data and that comply with the criteria set forth in the Constitution. And it is just as plain that the Commission has a clear legal duty to perform these functions. What is not clear is whether the Commission has a duty to adopt plans by November 1 when it cannot do so. This Court can resolve that legal question and, whatever the answer, direct Petitioners to perform their mandatory duties. Petitioners have no other legal remedy under the circumstances. The alternative is that Petitioners wait and see if they are sued for failing to meet the November 1 time limitation, and only then learn from this Court whether the Commission had a mandatory duty to adopt plans by the deadline. And if that, in fact, is the case the next question would be whether any adopted plans would be invalid due to their untimely adoption. To wait would place the Commission in an untenable situation that this Court can alleviate by exercising jurisdiction now, which it has the authority to do under article 6, § 4.

"Mandamus proceedings, even though filed and considered on the law side, are governed by equitable principles." *Franchise Realty Interstate Corp v City of Detroit*, 368 Mich 276, 279 (1962). And the principles that have governed issuance of mandamus relief are equity, justice, discretion, and estoppel. *Davis v Ziem,* 383 Mich 717, 721 (1970). Under the unprecedented circumstances presented here, and the fundamental importance that attaches to the Commission's work, Petitioners maintain that this Court has the authority and discretion to hear Petitioners' petition and grant relief under article 6, § 4.

II. This Court has authority to deem a constitutional timing requirement as directory instead of mandatory and has done so before.

The opposing brief by the Attorney General discusses at some length this Court's decision in *People v Dettenthaler*, 118 Mich 595 (1898), but *Dettenthaler* does not preclude the relief sought by Petitioners. First, this Court in *Ferency v Secretary of State*, 409 Mich 569, 602 (1980) did not consider *Dettenthaler* to preclude determining a constitutional time limitation to be directory. If *Dettenthaler* were an absolute bar to this Court interpreting a constitutional provision to be directory rather than mandatory, then this Court would have addressed it. In fact, *Ferency* does not even include a citation to *Dettenthaler*.

Dettenthaler itself stopped short of making any absolute rule about whether the Court had the authority to interpret constitutional terms to be directory. Instead, the Court discussed the authorities *for and against* treating constitutional terms as directory and simply concluded, "The trend of the weight of authority is, in our opinion, against the relator's contention." *Dettenthaler*, 118 Mich at 602. The Court in *Dettenthaler* made a principled choice between competing lines of thought, but does not appear to have believed that it lacked the authority to reach an opposite conclusion. To the contrary, the Court clearly recognized that such a conclusion was within its authority, but that the Court simply did not agree: "There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that

the judicial decisions, as they now stand, do not sanction the application." *Dettenthaler*, 118 Mich at 601.

The circumstances presented in *Dettenthaler* are also pertinent. In that case, the Legislature had failed to include an enacting clause in a statute and the Court was called upon to decide whether the statute was valid without it, or whether such a clause might be inserted prior to the Governor's signature. *Dettenthaler*, 118 Mich at 598, 602-603. There was no question that the Legislature *could* have included such a clause in the statute, but—having neglected to do so—the argument essentially focused on whether such clauses were actually required at all or whether they could be added outside of the legislative process. As a result, the question presented went to the validity of a legislative enactment and did not involve the issues of impossibility presented either in *Ferency* or in the case at hand. So, *Dettenthaler* does not impose an absolute rule, and instead reflects an effort to balance the weight of authority against the circumstances presented.

The opposition brief attempts to bolster its argument about the application of *Dettenthaler* by citing to cases from other states where the courts found constitutional terms to be mandatory rather than directory. But decisions of sister states are not binding on this Court and offer only persuasive authority. See *Continental Cablevision of Michigan, Inc, v Roseville*, 430 Mich 727, 741 n16 (1980). Moreover, if decisions from other states are considered, even the opposing brief recognizes that there are also decisions from sister states holding that constitutional requirements may be interpreted as directory rather than advisory.

See e.g. *State ex inf Dalton v Dearing,* 364 Mo 475, 483-484 (1954). And, if decisions from other states are to be considered, then this Court should give as much, if not greater, weight to those cases in which a sister state confronted the very same problem presented here—the effect of late census data on constitutional redistricting processes—and reached the conclusion urged by Petitioners. See e.g. *State ex rel Kotek v Fagan*, 484 P3d 1058; 367 Ore 803, 810-811 (2021); *Legislature of the State of California v Padilla*, 469 P3d 405, 412-413; 9 Cal 5th 867, 880 (Cal 2020). Because *State ex rel Kotek* and *Legislature of the State of California* address essentially the very same problem presented here, they should be more persuasive than other cases applying general rules to different facts.

The opposing brief cites to *Michigan State Highway Commission v Vanderkloot*, 392 Mich 159 (1974), and argues that it supports interpreting constitutional provisions as mandatory unless it is clear that the provision was intended to be directory only. But that case offers little support to the opposing argument here. The pertinent question addressed by the Court in that case was whether the legislature had a "mandatory duty" to provide for protection of air, water, and natural resources—and the Court's analysis rested heavily on the plain language of the provision, which expressly provided that these matters were, "hereby declared to be of *paramount public concern* in the interest of the health, safety, and general welfare of the people." *State Highway Commission*, 392 Mich at 180, quoting article 4, § 52 (emphasis in original). By contrast, there is no such language in article 4, § 6 reflecting any intent by the people that the time

limitations at issue here are of similar "paramount public concern," let alone that they were intended to be accorded greater importance than constitutional requirements that the Commission's plans include sufficient census data to accurately describe districts and verify their populations. See Const 1963, art 4, § 6(9), (14)(b).

But also, the Court's opinion in *Michigan State Highway Commission* did not rely solely on plain language, and instead also considered the circumstances surrounding the adoption of the constitutional provision and the purpose to be accomplished. *Michigan State Highway Commission,* 392 Mich at 179-181. The circumstances surrounding the adoption of this amendment and the purpose of the Commission demonstrate an emphasis on having accurate districts drawn by an independent commission composed of citizens. The November 1 deadline was neither integral to the adoption of the amendment nor the purpose of the provision.

That the time limitation is directory rather than mandatory is further demonstrated by the lack of any penalty or contingency in the amendment itself as to what should happen if the time deadline is not met for any reason. While every effort should be made to comply with the time limitation, there is no basis upon which to conclude that any late plan would be invalid. The Constitution expressly prohibits any body other than the Commission from promulgating and adopting a redistricting plan. Const 1963, art 4, § 6(19), (22); article 5, § 2; article 6, § 4. To conclude that a late plan must be invalid would mean that there could be *no*

redistricting plan until the next census. That is obviously not what the people intended through their adoption of this amendment.

Importantly, nothing in either *Dettenthaler* or *Michigan State Highway Commission* purports to hold that the Court lacked the authority to interpret a constitutional term as being directory. Instead, it is more accurate to say that the Court simply concluded that—based on the information presented to it in those cases—the Court should not do so. But reaching that conclusion does not mean that the Court lacks the power to reach a different conclusion in a different case involving a different constitutional provision and based on different facts.

This Court certainly has the power to interpret the Constitution. *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co,* 471 Mich 608, 614 (2004). So, the only way this Court could be prevented from interpreting that a constitutional term is directory would be to the conclude that the people lacked the power to adopt a constitutional amendment that includes directory provisions. But no such limitation on the power of the electors to amend the constitution is found in article 12, § 2 of the Constitution.

This Court clearly has the authority to interpret constitutional requirements as directory rather than mandatory. And, again, this Court has previously done so in *Ferency*, 409 Mich at 602. So, the question is simply whether this Court should do so in this case. The opposing brief expresses concern about this Court "rewriting" the November 1 deadline, but that is not what Petitioners have requested. Rather, Petitioners seek only a limited ruling that the November 1

deadline, in the unique and extreme circumstances presented here—an unprecedented delay by the Census Bureau in issuing necessary data, which was caused at least in part by a global pandemic on a scale unseen in over a century—is not mandatory. This rare situation is unlikely to re-occur, and the narrow relief requested supports the Court's use of its power to interpret the Constitution in a manner that protects and preserves the will of the people to have fair legislative districts drawn by an independent commission. Petitioners' request no more "rewrites" the Constitution than the opposing brief would rewrite it to neglect the requirement that each proposed plan "include such census data as is necessary to accurately describe the plan and verify the population of each district," under article 4, § 6(9) and (14)(b).

Unforeseeable and historic circumstances have given rise to an unusual situation wherein the Commission cannot obey the deadlines without slighting its obligations to include the best census data in its plans—data that it will not have in time to meet the November 1 deadline. The possibility of this unique situation re-occuring again is either negligible or non-existent. This Court has the authority to conclude that, in these narrow circumstances, the time limitation is directory. And for the reasons explained further below, this Court is clearly justified in doing so.

III. The unprecedented delay in the transmission of federal decennial census data justifies deviation from the constitutional time limitation.

Contrary to the arguments in the Attorney General's opposing brief, the facts at hand overwhelmingly justify deviating from the constitutional time limitation. The opposition brief notes that the Constitution does not expressly require the

Commission to use the tabulated PL 94-171 data, and that the Commission has essentially conceded that it could draw maps using the untabulated legacy format data, thus requiring no extension of the timeline.

While it is true the Constitution does not expressly require the use of the PL 94-171 data, the Constitution entrusts the redistricting process entirely to the Commission, meaning it has sole discretion to determine what data it will use to perform its functions. Const 1963, art 4, § 6(19), (22); Const 1963, art 5, § 2, article 6, § 4.

Due to the nationwide impact of the census delay, for the first time in history the Census Bureau is releasing two sets of data: untabulated legacy format data and the traditional, tabulated PL 94-171 data. It is also the first time the census data needed for redistricting has been delayed in delivery. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶5.)

The PL 94-171 data is the dataset historically used for redistricting because it provides information on "where people live" and their characteristics (e.g., race, voting age population, etc.) at the smallest geographic unit – being the census block level. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶4(B).) There are also several important distinctions that one needs to recognize to understand the Census Bureau's tallying process to arrive at the PL 94-171 data. First, and foremost, is recognizing the fact that the basic census questionnaire has two questions that are important, with connections to a third question. The two basic questions are: 1) Are you Hispanic (and if so, what kind of Hispanic - Cuban, Mexican, etc.) and 2) What

is your race (with the answers of white, black, Native American, Asian, Pacific Islander and Other (and since 2000 any combination of the races). The third connection is to the respondents' age, the importance for PL 94-171 purposes is whether they are under or over 18 years of age, i.e., voting age). All three of these parts are then cross-referenced to each other to get 83 unique answers (and when the Census Bureau expanded to allow multiple race combinations the columns expanded to 288 data items.). All this information then needs to be tied to a piece of geography (e.g., a home address) so that the tallies can be generated for every census block in the nation. This tabulation process occurs in the year between the census count and the release of PL 94-171 data. 13 USC 141(a), (c).

The untabulated legacy format data is a database format with linkages to multiple files that need to be interpreted and combined in software to generate tables for the data. The Census Bureau has traditionally generated those tables (as described in the preceding paragraph) when it produced the PL 94-171 files for the states and the public, but because the table generation process takes additional time, the Census Bureau determined it could release just the legacy formatted data initially to the states on August 16. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶7.) This is 36-days in advance of the release of the tabulated PL 94-171 data on September 30. Redistricting software vendors and many states have generated programs to read in the processed legacy data into their own programs for the redistricting process. However, this places both the risk and responsibility on

individual states that choose to utilize legacy format data and undertake the processing of that data into a usable format.

The Commission has determined it will use the legacy format data to initially populate the redistricting software's database so initial assessments of the population and racial makeup of all areas in the state can begin. In other words, the Commission will use the legacy format data to commence drawing maps, rather than wait for the tabulated PL 94-171 data. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶8.) But to mitigate the risk in using the legacy data, when the PL 94-171 data is released on September 30, a second database of the PL 94-171 information will be generated that will be used as a comparison point to check every data item in every census block in the state to verify the information is the same between the two databases. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶10.) Reconciling the legacy format data with the PL 94-171 materials and tools is critical to verifying data integrity and requires conducting extensive analysis of the data to determine whether there might be any problems with the data and check for any unusual or unknown patterns that might turn up in the census information. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶12.)

The Commission is committed to this reconciliation process as necessary to verify data integrity for use in adoption of proposed plans and, ultimately, final redistricting plans for congressional and state legislative districts both to meet the public's high expectations and protect the adopted maps against legal challenges as to their sufficiency and accuracy based on the utilization of untabulated legacy

format data. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶10.) The Commission cannot accept the risk of relying solely on legacy format data to propose and adopt plans.

But because release of the PL 94-171 has been delayed until September 30, and reconciliation of the two datasets could only take place after that release, the Commission cannot propose and publish plans by September 17 in order to comply with the 45-day public comment period and adopt final plans by the November 1 deadline. Const 1963, art 4, § 6(7), (9). It is impossible to comply with these requirements and still allow for reconciliation with the PL 94-171 data. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶13.) That is why relief is necessary from the constitutional time limitation.

Even utilizing only the legacy format data, it is highly unlikely, if not impossible, that the Commission can meet the current constitutional deadline of November 1. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶14.) Assuming the legacy format data is released August 16, it will take 7 to 10 days to prepare the legacy data for use. Assuming the data is ready by August 26 (10 days later), the Commission will have a mere 22-days to draft proposed maps for congressional, state house and state senate districts using only untabulated legacy format data, integrate public comment and feedback, react to statistical analyses including racial bloc voting and Voting Rights Act compliance, ensure conformity with ranked criteria, and, by majority vote, adopt those proposed plans for publication by September 17. (See Pets' Supp Brf, Amd Ex A, Brace Affidavit, ¶11.)

This would be challenging enough for a multi-member body to accomplish in the full timeframe of nearly 6 months – the census delays have effectively reduced the time available under the current deadlines to 22-days. But the combination of utilizing legacy format data for its preliminary work and relief granted by this Court, would increase the time available to the Commission to complete its work to a total of 3-months, 15 days or 107 days from August 26 to December 11, 2021 to draw congressional, state house and state senate districts with access to PL 94-171 data. The Commission asserts that this is sufficient time to fulfill its constitutionally mandated redistricting duties. While this does not restore the full timeframe of a normal redistricting cycle, it is a significant increase when compared to 22-days and full reliance on untabulated legacy format data, and the unknown risks associated with using that data.

The significant challenges imposed on Petitioners by this unprecedented census delay are shown in the following table:

ACTIONS	NORMAL CYCLE	CURRENT CYCLE
Bureau releases apportionment data[2]	By Dec. 31, 2020	Received April 26, 2021
Bureau releases P.L. 94-171 redistricting data[3]	By April 1, 2021	Expected Sept. 30, 2021
Pre-mapping initial public hearings[4]	April 2021—May 2021	May—July 2021[5]
Bureau releases untabulated legacy data	Not applicable	Expected Aug. 16, 2021

[2] Bureau forwards apportionment data to President (13 USC 141(b)).
[3] 13 USC 141(c).
[4] Const 1963, art 4, § 6(8).
[5] The delay was not due to the census but the ongoing pandemic and related logistical challenges of scheduling the first round of public hearings.

Legacy data prepared for use	Not applicable	7-10 days from receipt: Aug. 23- 26, 2021	
Commission drafts plans[6]	June—Sept. 2021 **(4-months)**	With relief: Aug. 26—Dec. 11, 2021 **(3 months, 15 days-or 107 days)**	Without relief: Aug. 26—Sept. 17, 2021 **(22-days)**
Legacy data reconciliation	Not applicable	7-10 days from receipt of P.L. 94-171 data— Oct. 7-10, 2021	
Commission continues drafting plans	June—Sept. 2021 **(4-months)**	With relief: Oct. 10–Dec. 11, 2021 **(2 months, 1 day-or 62 days)**	Without relief: Oct. 10, 2021 is **past the Sept. 17 deadline** to publish proposed plans
Deadline to propose & publish plans[7]	Sept. 17, 2021 **(5-months, 17days- or 170 days after receipt of P.L. 94-171 data)**	With relief: Dec. 11, 2021 **(72 days after receiving P.L. 94-171 data)**	Without relief: Sept. 17, 2021 **(22 days after processing legacy data)**
Second round of public hearings (45-day public comment period)[8]	Sept. 17—Oct. 31, 2021	With relief: Dec. 11, 2021—Jan. 24, 2022	Without relief: Sept.17—Oct. 31, 2021
Deadline to adopt final plans[9]	Nov. 1, 2021	With relief: Jan. 25, 2022	Without relief: Nov. 1, 2021
Deadline to publish adopted plans & supporting materials[10]	Dec. 1, 2021	With relief: Feb. 24, 2022	Without relief: Dec. 1, 2021

[6] Const 1963, art 4, § 6(8).
[7] Const 1963, art 4, § 6(14)(b).
[8] Const 1963, art 4, § 6(9).
[9] Const 1963, art 4, § 6(7), 14(b).
[10] Const 1963, art 4, § 6(15).

Adopted plans become law[11]	Jan. 30, 2022	With relief: Apr. 25, 2022	Without relief: Jan. 30, 2022
Bureau of Elections updates QVF	Nov. 1, 2021 to April 2022 **(5 months)**	With relief: Jan. 25, 2022 to April, 2022 **(3 months)**	Without relief: Nov. 1, 2021 to April 2022 **(5 months)**
Filing deadline for nominating petitions for August primary	April 19, 2022	April 19, 2022 (unless extended by the Legislature; see HB 4642, 4643)	
August Primary	August 2, 2022		
General Election	November 8, 2022		

This is the inaugural Commission to engage in the redistricting process. This independent Commission, whose 13 members come from all walks of life, must build consensus to accomplish its goals. This is also very sophisticated work, and the Commission has retained experienced subject matter experts to serve as consultants. This human element is key especially for evaluating ranked criteria and the technology is devised to assist the Commission but does not supplant it. Recognizing that there are well-intentioned interests on both sides, this is a high stakes process with statewide impact. That is why it is crucial that the Commission have sufficient time to ensure that it is adopting fair, constitutionally compliant plans—but 22 days is not enough. The facts here fully justify a one-time deviation from the constitutional time limitation.

The Attorney General's opposing brief argues that permitting the Commission to adopt plans later than November 1 could negatively impact

[11] Const 1963, art 4, § 6(17).

candidates for congress and the state legislature, who need to know the districts in which they are eligible to run and how many signatures they need to collect, both of which could change based on redistricting. (Attorney General's opposing brief, p 42.) But the impact to candidates should be minimal.

If relief is granted here, the Commission will propose plans by December 11, 2020, and adopt final plans by January 25, 2022. In these situations, candidates generally are able to use the adopted plans, perhaps even the proposed plans, to determine or at least conditionally determine the relevant districts. These maps will be published and widely available. Moreover, candidates for state house and state senate seats do not even need to file nominating petitions. Instead, they can pay a $100 filing fee and file an affidavit of identity to access the primary ballot. MCL 168.163, MCL 168.558. While the affidavit of identity must identify the office and district sought, these items, like nominating petitions, do not need to be filed until April 19, 2022, MCL 168.551, which will be several months after the adoption of final plans. Congressional candidates do not have a filing fee option, but again, candidates typically use the maps as soon as they are available to confirm their districts, and they will have the final maps for several months before nominating petitions are due on April 19, 2022. Additionally, congressional candidates do not need to live in their districts, which means the maps do not limit their own ability to run.

If there is some unforeseen additional delay in adopting plans, or the plans are not final because they are being challenged, there is the possibility of a remedy.

Unlike the Commission's constitutional time limitation for adopting plans because the filing deadline is set by statute, the Legislature could relieve candidates by extending the deadline through legislation. Indeed, such legislation has already been introduced. See House Bills 4642 and 4643, introduced on April 15, 2021.[12] In addition, this Court has previously extended the deadline to file nominating petitions and filing fees in the context of directing the adoption of a redistricting plan. See *In the Matter of Apportionment of Michigan Legislature*, 387 Mich at 458. Thus, in the unlikely event that candidates are unduly burdened by the later adoption of plans, the Legislature or this Court could provide a remedy.

In sum, this proactive legal action by Petitioners demonstrates both the Commission's and Secretary's commitment to fulfilling their respective duties and reassure the public that the issues created by the U.S. Census Bureau's untimely release of data are being strategically addressed. Grant of the relief requested will ensure the will of voters to have an independent commission comprised of randomly selected residents draw fair maps using specific criteria in an impartial and transparent process is preserved.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in Petitioners Michigan Independent Citizens Redistricting Commission and Secretary of State Jocelyn Benson's principal brief filed April 14, 2021 and supplemental brief filed June 2, 2021,

[12] The bills are available at Michigan Legislature - House Bill 4642 (2021) (HB 4642) and Michigan Legislature - House Bill 4643 (2021) (HB 4643) (accessed April 20, 2021).

Petitioners respectfully request that this Court grant their petition and enter an order **directing** that:

(1) The Commission shall propose preliminary plans for state senate districts, state house of representative districts, and congressional districts, within 72 days of receipt of the redistricting data from the U.S. Census Bureau on September 30, 2021, making preliminary plans due on or before December 11, 2021, notwithstanding the requirements of article 4, § 6(7), 14(b) of the Constitution;

(2) The Commission shall adopt final redistricting plans for state senate districts, state house of representative districts, and congressional districts by the 45th day following the Commission's issuance of proposed plans on December 11, 2021, making adoption of final plans due on or before January 25, 2022, notwithstanding the requirements of article 4, § 6(7), 14(b) of the Constitution;

(3) If the U.S. Census Bureau transmits the census data to the State of Michigan later than September 30, 2021, (a) the 72 days within which the Commission must propose preliminary plans for state senate districts, state house of representative districts, and congressional districts, will commence on the new date the state receives the data, and (b) the 45 days within which the Commission must adopt a final plan, will commence running from the date the Commission issued the proposed plans under subsection (3)(a), notwithstanding the requirements of article 4, § 6(7), 14(b) of the Constitution;

(4) If the U.S. Census Bureau transmits the PL 94-171 census data to the State of Michigan earlier than September 30, 2021, the Commission will make every effort to expedite the process and adopt a final plan by a corresponding number of days in advance of the January 25, 2022, deadline set forth in paragraph (2) above; and

Petitioners ask that this Court grant any further or additional relief as this Court deems just and proper.

Respectfully submitted,

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Dated: June 9, 2021