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 SUPPLEMENTAL BRIEF

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

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

   Petitioners' answer: Yes.

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

   Petitioners' answer: Yes

INTRODUCTION

Redistricting "goes to the heart of the political process" in a constitutional democracy. *In re Apportionment of State Legislature – 1982*, *In re Apportionment of State Legislature–1982*, 413 Mich 96, 136 (1982). This is because "[a] constitutional democracy cannot exist . . . without a legislature that represents the people, freely and popularly elected in accordance with a process upon which they have agreed." *Id.* But the people's agreed-upon process is in jeopardy.

As detailed in Petitioners' principal brief, the U.S. Census Bureau's delay in the release of needed census data will render the Commission unable to comply with its duty to approve new redistricting plans for congressional and state legislative districts by November 1, 2021. This conflict places the Commission in an untenable situation and exposes that body and any later adopted plans to challenge as violative of the Constitution.

To remedy this extraordinary circumstance, Petitioners seek an order from this Court directing the Commission to perform its redistricting duties under an alternative timeline. Granting this relief would protect the Commission's ability to draw fair and lawful plans pursuant to the orderly and transparent process chosen by the People of Michigan.

In relation to that request for relief, this Court requested additional briefing relating to its jurisdiction to entertain this matter; its authority to relieve Petitioners of a constitutional deadline; and whether the circumstances justify such extraordinary relief.

As set forth below, this Court has the authority to grant Petitioners relief. First, Petitioners have properly invoked this Court's original jurisdiction under the plain language of article 4, § 6(19). Second, this Court has the authority to relieve Petitioners of the constitutional time limitation where Petitioners' inability to comply is not of their own doing and where enforcing the deadline will prejudice the public interest. And third, the circumstances presented by the unprecedented delay in receiving the census data and the importance of drawing fair maps justifies granting extraordinary 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 consistent with the Court's order.

I. Petitioners have properly invoked this Court's original jurisdiction under Const 1963, art 4, § 6(19) or, alternatively, under Const 1963, art 6, § 4.

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

"The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Wayne Co v Hathcock,* 471 Mich 445, 468 (2004). "The first rule a court should follow in ascertaining the meaning of words in a constitution is to give effect to the plain meaning of such words as understood by the people who adopted

it." *Bond v Ann Arbor School District,* 383 Mich 693, 699 (1970). "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *People v Nutt,* 469 Mich 565, 573-574 (2004) (citation omitted). See also *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 60-61 (2018).

This Court has exercised original jurisdiction in apportionment matters on numerous occasions.[1] In enacting Proposal 18-2, the people recognized that the assistance of this Court may still be required with respect to redistricting matters. Accordingly, the people again conferred "original jurisdiction" on this Court—and only 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. . . . [Emphasis added.]

This language is similar to the original 1963 provision, see Const 1963, art 4, § 6, with at least one notable difference; the section used to be proceeded with the phrase "Upon application of any elector filed not later than 60 days after final

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[1] See *In re Apportionment of Mich State Legislature - 1964*, 372 Mich 418 (1964); *In re Apportionment of Mich State Legislature – 1972*, 387 Mich 442 (1972); *In re Apportionment of Mich State Legislature – 1982*, 413 Mich 96 (1982); *In re Apportionment of Mich State Legislature – 1992*, 439 Mich 251 (1992).

publication of the plan."[2] But that phrase was excised by the 2018 amendments. As a result, to the extent there was a limitation as to who could seek relief under this section—an "elector"—or an express timing limitation as to when the Court's jurisdiction could be invoked—"60 days after final publication of the plan"—the people removed these limitations.

Accordingly, nothing in the plain language of § 6(19), as amended, precludes Petitioners—the Commission and the Secretary of State—from seeking to invoke this Court's original jurisdiction. Further, Petitioners' request is timely as there is no condition precedent that must occur under § 6(19) before Petitioners can seek "direct[ion]" in the "perform[ance] of their respective duties." Moreover, the exercise of this Court's jurisdiction is mandatory. Section 6(19) states that the Court "*shall* direct" Petitioners to perform their duties, as opposed to the Court's "may review" a challenge to a plan. (Emphasis added). The directive given by the people to this Court in the context of this case is a mandatory one. See, e.g., *Co Rd Ass'n of Mich v Governor,* 260 Mich App 299, 306 (2004), aff'd in part 474 Mich 11 (2005) (when interpreting a provision of the Michigan Constitution, "[i]t is well-established that the use of the word 'shall' rather than 'may' indicates a mandatory, rather than

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[2] As enacted, article 4, § 6 provided:

> 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.

discretionary, action"). Thus, the Court must exercise jurisdiction, although it retains discretion as to the relief granted.

Based on the plain language of article 4, § 6(19), Petitioners have properly invoked this Court's jurisdiction with respect to Petitioners' request for direction in the performance of their duties.

Alternatively, Petitioners have properly invoked this Court's original jurisdiction under article 6, § 4. This Court has entertained reapportionment actions as complaints for mandamus in other cases. See *Houghton Co Bd of Supervisors v Secretary of State,* 92 Mich 638 (1892), *Giddings v Secretary of State,* 93 Mich 1 (1892), *Williams v Secretary of State,* 145 Mich 447 (1906), *Stevens v Secretary of State,* 181 Mich 199 (1914), and *Stenson v Secretary of State,* 308 Mich 48 (1944). And in *In re Apportionment of State Legislature – 1992*, this Court treated the "complaint for initiation of original proceedings" as "one for the exercise of this Court's general superintending control." 439 Mich 1203 (1991). And so, even if this Court had not been granted jurisdiction through article 4, § 6(19), it could still exercise jurisdiction to issue a remedial writ in the nature of mandamus as it has previously done in other apportionment and redistricting cases.

Thus, under either article 4 or article 6, this Court has jurisdiction to hear and resolve this matter. Any other conclusion would be inconsistent with this Court's "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 re Apportionment of State Legislature – 1982*, 413 Mich at 116.

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

In *Ferency v Secretary of State*, 409 Mich 569, 602 (1980)—cited both in Petitioners' principal brief and in this Court's May 21, 2021 Order—this Court determined that the deadline for certification of the sufficiency and validity of signatures on a petition for a proposed constitutional amendment was "directory," and that the deadline's passing during the pendency of expedited litigation would not prevent the proposed amendment from appearing on the ballot. *Id.* So, the Court has previously interpreted a constitutional deadline as directory instead of mandatory in order to give effect to the substantive constitutional provisions at issue.

Generally, the question of whether a provision is mandatory or directory arises in the context of statutes. In *Attorney General ex rel Miller v Miller*, this Court described the difference between mandatory or directory statutes in the following manner:

> "Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition." 59 C.J. p 1074, § 631. [266 Mich 127, 133 (1934).]

More recently, in *In re Forfeiture of Bail Bond (People v Gaston)*, this Court reviewed the effect of a statutory time limitation and explained the proper analysis for considering the issue, which depends on whether the time limitation is directory

or mandatory. 496 Mich 320 (2014). There, the Court noted that the general rule is that "if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory." *Gaston*, 496 Mich at 327 (citation omitted). But the Court further explained that the general rule may not apply under certain circumstances.

First, the precise statutory language must be considered. The term "shall" denotes a "mandatory" term, while the term "may" is considered permissive and directory. *Id*. at 328. Second, an exception to the general rule is that "whenever the act to be done under a statute is to be done by a public officer, and concerns the public interest or the rights of third persons, which require performance of the act, then it becomes the duty of the officer to do it." *Id*. at 328, citing *Agent of State Prison v Lathrop*, 1 Mich 438, 444 (1850). In other words, where time limitations are "designed to protect the public interest, as well as the rights of third persons, it must be construed as a mandatory provision." *Gaston,* 496 Mich at 329. But the Court noted with approval that "time provisions are often found to be directory where a mandatory construction *might do great injury to persons not at fault,* as in a case where slight delay on the part of a public officer might *prejudice private rights or the public interest.*" *Id.,* citing 3 Sutherland Statutory Construction (7th ed), § 57:19, pp 72-74 (emphasis in original). The Court further explained that the exception may inversely apply, in that "time provisions should be construed as directory if a mandatory construction might prejudice someone's rights or the public interest." *Gaston,* 496 Mich at 333 n 5. Applying these principles, the Court in

Gaston held that the exception to the general rule applied and that the bail bond statute in question must be construed as mandatory because the failure to follow the statute created a risk of injury to public and private rights. *Id*. at 330-335.

Petitioners recognize that long ago this Court expressed doubt in applying "'the rules which distinguish directory and mandatory statutes to the provisions of a constitution,'" and declined to do so in that case concerning Michigan's constitutional provision requiring an enacting clause in legislation. *People v Dettenthaler*, 118 Mich 595, 599-602 (1898), quoting Cooley, Constitutional Limitations (5th Ed, p 93). But *Dettenthaler* is distinguishable in that the Court was not addressing a time limitation. More importantly, this Court has since applied the mandatory/directory analysis to a constitutional provision, having done so in *Ferency*.

In *Ferency*, this Court noted that the deadline at issue did not affect the validity of the petitions, but was instead intended to facilitate the electoral process by giving election officials sufficient time to print ballots in time for election day. *Ferency*, 409 Mich at 601. This Court held that the constitutional deadline, "should not be used to prevent a proposal from appearing on the ballot when its proponents have done everything the Constitution requires of them." *Ferency,* 409 Mich at 601-602. The Court, however, cautioned that constitutional requirements ought not to be "circumvented as a matter of course," but instead only in the "most extreme circumstances." *Ferency*, 409 Mich at 602. But significantly, this Court further

observed that its decision was consistent with prior decisions protecting the rights of the people:

> Finally, our decision is consistent with a long line of cases in which the Michigan courts have actively protected and enhanced the initiative and referendum power. In effect, we simply repeat today what we have said before: "[Constitutional] provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed" and their exercise should be facilitated rather than restricted.

Ferency, 409 Mich at 602, quoting *Kuhn v Dep't of Treasury*, 384 Mich 378, 385 (1971).

Both *Ferency* and the "rules" discussed in *Gaston* support this Court's authority to deem the Commission's time limitation in Const 1963, art 4, § 6(7) as directory. Indeed, the situation at hand presents a similar "extreme circumstance" that warrants the exercise of the same authority used by this Court in *Ferency*. Just as in *Ferency*, there has been no delinquency in the litigants coming before this Court—instead, they have acted promptly as soon as it became clear that the deadline could not be met. The Commission has similarly done "everything that the constitution requires" of it but will be unable to meet the November 1 deadline only because necessary information will not be provided by a federal agency in time to satisfy the deadline for completion. The deadline—just as in *Ferency*—has no effect on the validity of the Commission's work. Lastly, the Commission—as a body created through popular amendment to the state constitution—is itself an exercise of the people's direct legislative voice, and so the constitutional requirements should be construed liberally in order to facilitate its objectives. See *Ferency*, 409 Mich at 385.

And under *Gaston*, even if the language of article 4, § 6(7) is technically mandatory because it includes the word "shall",[3] it may nevertheless be interpreted as directory where a mandatory construction will injure persons not at fault—the Petitioners—and where such a construction will prejudice the public interest. *Gaston*, 496 Mich at 329. Again, it is not Petitioners fault that the Commission will be unable to meet the November 1 deadline due to the delayed release in census data by the federal government. Further, the redistricting process is of fundamental importance to the people of Michigan. See *In re Apportionment of State Legislature – 1982*, 413 Mich at 136. Construing the deadline as directory will preserve and give effect to the will of the voters in adopting Proposal 18-2, creating the Commission and setting forth its responsibility to redistrict with a focus on public engagement and input throughout an open and transparent process.

This outcome would also be consistent with the results of other states with similar redistricting bodies. See *State ex rel Kotek v Fagan*, 484 P3d 1058; 367 Ore 803 (2021); *Legislature of the State of California v Padilla*, 469 P3d 405 (Cal 2020). For example, the Oregon Supreme Court concluded that its constitutional deadlines would frustrate the core purpose of Oregon's reapportionment system:

> Instead, the voters' paramount interests seem to have been to direct the Legislative Assembly to enact a reapportionment plan based on census data in advance of the next general election cycle and to provide an alternative means by which a plan would still be made if the

[3]Article 4, § 6(7) states, in part: "Not later than November 1 in the year immediately following the federal decennial census, the commission *shall* adopt a redistricting plan under this section for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts." (Emphasis added.)

> Legislative Assembly fails to act. As we see it, the fact that the voters also adopted deadlines to give effect to those interests does not deprive us of authority to order that the Legislative Assembly and the Secretary fulfill the primary duties that the voters imposed. [*Fagan*, 367 Ore at 811.]

The same is true here. The primary directive of the People of Michigan in enacting Proposal 18-2 is that the Commission draw fair maps based on the most recent census data—not adhere to a deadline that will undermine this duty.

Case law supports this Court's authority to deem the constitutional deadline directory under the unprecedented circumstances presented to the Court. In doing so, the Court is not re-writing the Constitution, it is simply interpreting the Constitution. And where the November 1 deadline is directory rather than mandatory, and cannot be met under the present circumstances, Petitioners have proposed a deadline that they can meet. This Court can and should authorize Petitioners to proceed under the proposed schedule and confirm that the Commission's inability to meet the constitutional deadline will not render the subsequent maps unlawful on that basis.

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

As Petitioners thoroughly explained in their principal brief, the Commission will not be able to meet its constitutional timeline for adopting new redistricting plans for congressional and state legislative districts due to the delay in receipt of the PL 94-171 redistricting data from the U.S. Census Bureau.

Little has changed since Petitioners filed their principal brief. The tabulated PL 94-171 data is still set to be released on September 30, 2021, which is too late for

the Commission to draft proposed plans and publish them for the requisite 45 days of public comment, before being required to adopt plans by November 1, 2021. See Const 1963, art 4, § 6(7), (14). And while the Commission intends to use the non-tabulated, legacy format data in order to start drawing maps, the Commission still will not be able to meet the constitutional timeline, as explained by the Commission's Line Drawing and Redistricting Technical Services Consultant Kimball W. Brace. (Ex A, Brace Affidavit.)

The release of legacy format data will not have a meaningful impact on the Commission's ability to perform its duties under the current constitutionally imposed deadline. *Id.*, ¶ 9. Assuming the legacy format data is released by August 16, 2021, as currently announced, the additional time gained by the Commission remains insufficient to meet the November 1 deadline and needs to be weighed against any risk of utilizing non-tabulated data. *Id.* While the underlying data is identical, to eliminate any risk, the non-tabulated legacy format data would need to be reconciled with the tabulated PL 94-171 redistricting data set for release by September 30. *Id.*, ¶ 10. This reconciliation process is expected to take between 7 to 10 days, making the data available for use by the Commission between August 23 and August 26, 2021. *Id.* Based on the current November 1 deadline, use of legacy format data would likely provide the Commission approximately 22 days to conduct its work prior to the September 17, 2021 publication deadline that begins the 45-day public comment period. *Id.*, ¶ 11. This is still insufficient time for the 13-member Commission to analyze underlying data, receive the results of racial bloc

voting analyses, perform its work in mapping district lines for congressional and state legislative districts, continue to receive and integrate public comment during the mapping process and, by majority vote, agree on proposed plans for publication in less than one month in order to meet the 45-day publication requirements, and hold the second round of constitutionally required public hearings in advance of a final vote to adopt district plans. *Id.*

The Commission's consultant, Mr. Brace, an expert in the field of redistricting, observed that release of census data needed for redistricting has never been delayed in modern times, and that this delay has caused severe problems for many states by reducing the timeline for redistricting to occur, which is a complex and data-driven process. *Id.*, ¶ 5. Mr. Brace agrees that the legacy format data must be processed and tabulated before it may be used, and that to mitigate risk of error based on use of the legacy data, it should be reconciled with the tabulated PL 94-171 data. *Id.*, ¶¶ 7-8. It will also require extensive analysis and comparison of the data to determine whether there may be any unusual or unknown patterns that may turn up in the data. *Id.*, ¶ 12. Further, it is Mr. Brace's opinion that it will be "impossible" for Mr. Brace and the Commission to perform the necessary tasks associated with analyzing and reconciling the census data and to draw maps for public comment by September 17 and approval by the Commission by November 1, 2021, where the tabulated data will not be released until September 30. *Id.*, ¶ 13. Mr. Brace further opined that if he and the Commission were forced to use only the legacy data to draw maps, it is "highly unlikely if not impossible that the State of

Michigan and the Commission will be able to accomplish" its complex work in the anticipated 22-day timeframe. *Id.*, ¶ 14. In addition, Mr. Brace further observed that questions may arise as to confidence in that data and the validity of the resulting maps drawn with unreconciled legacy format data. *Id.*

In its amicus brief, the Michigan Senate argues that no relief is warranted because the Constitution does not require use of the tabulated PL 94-171 data and that the Commission can simply use the legacy data instead. (Senate Amicus, pp 8-9.) The Senate also posits that it "has no doubt that the Commission can make" the September 17, 2021 deadline to publish proposed plans "work." *Id.*, p 9.

It is true that article 4, § 6 does not expressly refer to the tabulated PL 94-171 data. But it is reasonable to infer that the people, in adopting Proposal 18-2, intended or understood that the Commission would use census data in a reliable and accepted format to perform its duties. The states, including Michigan, have used the PL 94-171 data since its availability. And in any event, as explained above, while the legacy format data may be used to commence map-drawing, the data ultimately needs to be reconciled with the PL 94-171 data to mitigate the risk of error and promote confidence in the maps as drawn. (Ex A, Brace Affidavit, ¶¶ 8, 10, 12, 14.) Despite the Senate's confidence in the Commission's abilities, the Commission cannot reconcile the legacy format data with the tabulated PL 94-171 data in time to meet the constitutional timeline when the tabulated data will not be available until September 30, 2021. *Id.*, ¶ 13.

The U.S. Census Bureau's unprecedented delay in releasing census data has placed the Commission in an impossible situation that justifies deviation from the constitutional timeline. By granting relief, this Court will preserve the constitutional mandate of the Commission to adhere to the decennial redistricting schedule in the U.S. Constitution and under Michigan law. It will also preserve and give effect to the will of the voters in adopting Proposal 18-2, creating the Commission as an independent entity and setting forth its responsibility to redistrict with a focus on public engagement and input throughout an open and transparent process.

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, 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.

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