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 Case No. 162891

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BRIEF OF *AMICUS CURIAE* THE MICHIGAN SENATE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over a matter that lacks any actual controversy or adverse parties—even though the Attorney General's Office has filed briefs on both sides of the matter.

Petitioners answer: Yes.

Amicus Michigan Senate answers: No.

2. 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.

Amicus Michigan Senate answers: No.

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

Petitioners answer: Yes.

Amicus Michigan Senate answers: No.

4. Whether the delay in the transmission of federal decennial census data justifies a deviation from the constitutional timeline when (1) the Census Bureau has now announced it can make legacy data available by August 16, 2021, and (2) the State of Ohio has represented to a federal court that delivery on such a date will make it possible for Ohio to complete its redistricting process, with deadlines that are closer than the Michigan Redistricting Commission's November 1, 2021 deadline.

Petitioners answer: Yes.

Amicus Michigan Senate answers: No.

STATEMENT OF INTEREST[1]

Amicus the Michigan Senate comprises one-half of the lawmaking body for the State of Michigan. Const 1963, art 4, § 1. Like the members of this Court, each Michigan Senator takes an oath of office, solemnly swearing and affirming to "support . . . the constitution of this state." Const 1963, art 11, § 1. Accordingly, the Michigan Senate has an intense interest in any judicial proceeding that implicates the faithful application of the Michigan Constitution.

This action is one such proceeding. Petitioners, Michigan Independent Citizens Redistricting Commission for State Legislative and Congressional Districts, and Jocelyn Benson, in her official capacity as Michigan Secretary of State, filed their Petition requesting that this Court rewrite the Michigan Constitution's requirement that the Commission adopt a redistricting plan by November 1, 2021. The Senate has empathy for the Commission's position. After all, the Legislature is often called upon to act with great haste to satisfy constitutional, statutory, and practical deadlines. At the same time, the Senate has great confidence that the Commission can timely complete its work given the Census Bureau's planned release of non-tabulated data by August 16, 2021, and given the State of Ohio's recent representations to a federal court that *it* can complete redistricting by October 30, 2021. It is unnecessary to alter constitutional requirements, particularly given the Court's lack of original or general jurisdiction here.

[1] This brief was not authored by counsel for a party to this case in whole or in part, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief.

CONSTITUTIONAL PROVISIONS INVOLVED

Article 4, § 6(7) of Michigan's Constitution states, in relevant part, that "Not later than November 1 in the year immediately following the federal decennial census, the commission shall adopt a redistricting plan."

Article 4, § 6(19) of Michigan's Constitution states, in relevant part, that this Court, "in the exercise of original jurisdiction, shall direct the secretary of state or the [redistricting] commission to perform their respective duties."

Article 6, § 4 of Michigan's Constitution states, in relevant part, that this Court has "power to issue, hear and determine prerogative and remedial writs" and has "appellate jurisdiction as provided by rules" of this Court.

INTRODUCTION

This Court has asked the Michigan Attorney General to brief both sides of this case to ensure there is opposing advocacy. But the need for opposing advocates highlights the fundamental deficiency in this proceeding: the lack of a controversy or opposing *parties*. As the Senate explained in its initial amicus brief, adverse parties are the most fundamental, minimum requirement for a court's jurisdiction. And while the Michigan Constitution makes rare exceptions to this requirement—such as when the Governor or Legislature asks this Court for an advisory opinion, Const 1963, art 3, § 8—this case involves no such exception. Neither Petitioners nor the Attorney General Team Supporting Jurisdiction squarely address this fatal flaw. As a result, the Court lacks jurisdiction, as four Justices explained in *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241 (2019).

There are additional reasons not to proceed. First, the Court lacks jurisdiction under either Article 6, § 4 or Article 4, § 6(19), particularly given that Petitioners do not ask the Court to "direct" the performance of their duties but to *change* them. Second, this Court lacks the authority to deem a constitutional timing requirement that uses the word "shall" as a merely directory requirement. And finally, there is no basis justifying a deviation from the constitutional timeline where Petitioners will have adequate census data to proceed. Indeed, the Census Bureau recently announced that non-tabulated census data will now be available by August 16, 2021, and the State of Ohio has agreed that makes redistricting possible before November 1, 2021. The Court should dismiss the Petition.

STATEMENT OF FACTS

I. Michigan's Independent Redistricting Commission

In 2018, Michigan voters adopted Proposal 18-2 on the November 6, 2018 general election ballot, creating the Independent Citizens Redistricting Commission. Pet. ¶¶ 11–12; Const 1963, art 4, § 6. The Constitution charges the Commission with redrawing Michigan's state senate, state house, and congressional districts following each decennial U.S. Census. Const 1963, art 4, § 6(1), (13).

As the Petition explains, "no federal rule or statute requires states to use decennial census data in redistricting, so long as the redistricting complies with the U.S. Constitution and the federal Voting Rights Act." Pet. ¶ 25 (citing *Burns v Richardson*, 384 US 73, 91, 92–97 (1966)). But such data is necessary for the Commission to do its job. For example, census apportionment data is indispensable to determine how many seats Michigan has in the U.S. House of Representatives. Fortunately, the U.S. Census Bureau already announced apportionment data on April 26, 2021—ahead of schedule, see Pet. ¶ 65—and confirmed that Michigan will have 13 seats beginning in the 2022 election cycle, one less than the current Michigan congressional delegation.[2] In addition, as the Petition explains, while "the Michigan Constitution does *not* expressly require that decennial census data be used to redistrict," Pet. ¶ 26 (emphasis added), census data is a helpful tool, used to verify the population of each district and to accurately describe a redistricting plan, *e.g.*, Const 1963, art 4, § 6(9), (14)(b).

[2] Spangler, *Michigan to lose another seat in Congress as population moves West and South*, The Detroit Free Press (Apr. 26, 2021), available at https://bit.ly/33FL6WS.

II. The U.S. Census Bureau delay and its implications

Regrettably, the U.S. Census Bureau has announced a delay in promulgating the final, formatted data from the decennial census. Pet. ¶ 29. As just noted, the Bureau has already issued apportionment data, slightly ahead of the projected "delay" deadline. And the Bureau forecasted the release of its non-tabulated or "legacy" census data by mid-to-late August 2021, Pet. ¶ 38, with the final, tabulated data—known as the PL 94-171 redistricting data files—released by the end of September 2021, Pet. ¶¶ 30, 37. As the Petition explains, the only difference between the non-tabulated and the tabulated data "is in the format the census data is presented." Pet. ¶ 37. The actual data "is identical" and "subject to the same exacting quality assurance processes." *Id.*

That is why the Commission can use the non-tabulated data "to begin its work" promptly upon receipt. Pet. ¶ 38. The only wrinkle is that, after receiving the tabulated Pl 94-171 redistricting data, the Commission will have to reconcile the two data sets, a process Petitioners expect "to take between 7-to-10 days." Pet. ¶ 40. But there is nothing in Michigan's Constitution that requires the Commission to use a "tabulated" data set to accomplish its work, nor does the Michigan Constitution require the Commission to publish "tabulated" census data when promulgating a proposed plan. Const 1963, art 4, § 6(7). All the Michigan Constitution requires is that the Commission include with its public promulgation of proposed redistricting plans "such census data as is necessary to accurately describe the plan and verify the population of each district." *Id.* And the Petition does not suggest that non-tabulated census data cannot be used for that purpose.

III. Proceedings

Based on the Commission's acknowledged ability to use the non-tabulated census data available beginning in August, the Senate has full confidence in the Commission's ability to timely develop proposed redistricting plans and to publish those plans to the public using the non-tabulated census data. Yet the Commission and the Secretary of State ask this Court to rewrite the Constitution instead. The proceeding is a curious one, because (1) the Petition lacks an opposing party, (2) Petitioners seek to invoke this Court mandamus and redistricting jurisdiction to compel Petitioners to violate redistricting commands, (3) the constitutional provision that Petitioners ask the Court to change is written in mandatory terms, and (4) by all accounts, Petitioners can move forward and do their jobs with non-tabulated data that will be available by August 16, 2021.

On May 20, 2021, the Court directed the Clerk to schedule oral argument on the Petition for June 21, 2021, and it directed Petitioners to address three questions involving this Court's jurisdiction and the Court's authority to rewrite the pertinent constitutional provision. 5/20/21 Order. Simultaneously, the Court respectfully requested that the Attorney General "submit separate briefs arguing both sides of the question." *Id.*

Unfortunately, neither Petitioners nor the Attorney General Team Supporting Jurisdiction squarely addressed the problem that this proceeding lacks adverse parties. The proceeding consists entirely of the Commission and the Secretary of State pursuing relief from themselves. Such a procedural posture means that the Court lacks jurisdiction and need not answer the other questions presented.

ARGUMENT

The Michigan Senate shares the Commission and Secretary's concern about the U.S. Census Bureau's delay in promulgating data. But given the Bureau's new commitment to issue non-tabulated data by August 16, 2021, and the fact that nothing requires the Commission to use tabulated data to complete its work, the Senate has a far greater concern about remaining faithful to the language of the Michigan Constitution—especially its limits on this Court's jurisdiction. Given that the Senate has great confidence in the Commission's ability to finish its work in a timely fashion, it opposes this Court's exercise of original jurisdiction—particularly in the absence of any party adversity—to rewrite constitutional deadlines.

I. This case lacks the necessary adversity for the Court to issue an opinion, just like in the adopt-and-amend litigation.

The Michigan Constitution vests this Court with "the judicial power of the state." Const 1963, art 6, § 1. This Court has "described that power as 'the right to determine *actual controversies* arising between *adverse litigants*, duly instituted in courts of proper jurisdiction." *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 243 (2019) (Clement, J, concurring) (emphasis added) (quoting *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), itself quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 616; 179 NW 350 (1920)). So, even when a party seeks a declaratory judgment, the case must present "adverse interests" that form an actual controversy. *Assoc Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 126; 693 NW2d 374 (2005), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 n20; 792 NW2d 686 (2010).

Absent adversity, a lawsuit like this one is nothing more than "a friendly scrimmage brought to obtain a binding result that both sides desire." *League of Women Voters v Secretary of State*, 506 Mich 905; 948 NW2d 70, 70 (2020) (Viviano, J, concurring). Except whereas a "scrimmage" has two opposing sides—as did the *League of Women Voters* case—this proceeding lacks any. It consists merely of two Petitioners who both agree on what they would like the Court to do. That is constitutionally problematic.

So what are petitioners actually requesting? An advisory opinion, which "is an opinion issued by a court on a matter that does not involve *a justiciable case or controversy between adverse parties*." *United States v Wall*, 79 MJ 456, 461 (CAAF, 2020) (emphasis added). Accord, *e.g.*, Black's Law Dictionary, p 54 (6th ed, 1990) (an "advisory opinion" indicates "how the court would rule on a matter *should adversary litigation develop*") (emphasis added). And whereas the Michigan Constitution vests this Court with jurisdiction to consider advisory-opinion requests from the Governor or the Legislature if certain prerequisites are met, Const 1963, art 3, § 8, there is no similar constitutional provision authorizing this Court to exercise jurisdiction over advisory-opinion requests from the Commission or the Secretary of State. Accordingly, the Court "must instead wait for an 'actual controversy where the stakes of the parties are committed and the issues developed *in adversary proceedings*.'" *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 241 (Clement, J, concurring) (cleaned up) (quotation omitted).

Start with first principles. The U.S. Supreme Court has long recognized that it lacks authority to adjudicate a case when both sides of the "dispute" want the same result. *E.g.*, *Moore v Charlotte-Mecklenburg Bd of Ed*, 402 US 47, 47–48 (1971) (dismissing case involving a plaintiff and defendant who agreed a law was valid and should be upheld). The U.S. Supreme Court has done the same even as to agreed-upon *issues*, despite the existence of adversity on other claims in the case. For example, in *Webster v Reproductive Health Servs*, 492 US 490 (1989), the Court dismissed one of multiple claims because the appellees abandoned their argument as to that claim, *id.* at 512–13. And in *Williams v Zbaraz*, the Court reached several issues in the case but vacated a lower-court judgment in part for lack of jurisdiction based on the lack of party adversity as to that issue. 448 US 358, 367 (1980).

The reason for all this is because courts cannot fulfill the judicial role absent party adversity:

> [A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court. [*Lord v Vezie*, 49 US (8 How) 251, 255 (1850).]

Any other practice turns courts into "self-directed boards of legal inquiry and research." *Carducci v Regan*, 714 F2d 171, 177 (CA DC, 1983) (Scalia, J).

This Court's jurisdiction is no different, being "limited to determining rights of persons or of property, *which are actually controverted* in the particular case before it." *Anway*, 211 Mich at 615 (emphasis added) (cleaned up). A "controversy must be real and not *pro forma*," even when a *pro forma* case presents "real

questions." *Id.* at 612 (cleaned up). Otherwise, "the most complicated and difficult questions of law . . . might be settled by the court upon such *pro forma* proceedings, when no real controversy or adverse interests exist." *Id.* (cleaned up). Indeed, the "actual controversy" requirement that MCR 2.605(A)(1) imposes on declaratory-judgment actions "subsume[s] the limitations on litigants' access to the courts imposed by this Court's standing doctrine." *Id.*

Here, the Commission and Secretary are not adverse; they are in lockstep and seek the same relief. Pet., Conclusion and Relief Requested. Accordingly, what they seek is an advisory opinion, though one not requested by the Governor or the Legislature. And the roadmap for deciding how to respond to that request is this Court's recent decision involving 2018 PA 368 & 369, the so-called "adopt and amend" legislation.

In 2018, Michigan citizens submitted to the Board of State Canvassers sufficient signatures to place two proposals known as the "Improved Workforce Opportunity Wage Act" and the "Earned Sick Time Act" before the Legislature and, if the Legislature declined to adopt the proposals, on the general-election ballot. The Legislature ultimately adopted the proposals and, within the same legislative session, amended them. In February 2019, both the Michigan Senate and House adopted resolutions asking this Court to issue an advisory opinion under Const 1963, art 3, § 8, opining on the legislation's constitutionality.

Though the Attorney General's Office briefed both sides of the case, four Justices declined to issue an advisory opinion. Justice Clement, writing for herself and Chief Justice McCormack, "believe[d] that this Court lacks jurisdiction under

Const 1963, art 3, § 8 to issue an advisory opinion after the effective date of the legislation being scrutinized," notwithstanding "the importance of the legal issues presented." *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 936 NW2d at 241 (Clement, J., concurring). Instead, these Justices believed the Court should "wait for an actual controversy where the stakes of the parties are committed and the issues developed *in adversary proceedings*." *Id.* (emphasis added, quotation omitted).

Justice Clement and Chief Justice McCormack began with the fundamental proposition that this Court exercises only "the judicial power of the state," *id.* at 243 (quoting Const 1963, art 6, § 1), a power described as "the right to determine *actual controversies* between *adverse litigants*, duly instituted in courts of proper jurisdictions," *id.* (quoting *Richmond*, 486 Mich at 34, and *Anway*, 211 Mich at 616). Any other proceeding, they explained, "is beyond the judicial power," *id.* at 244, unless the proceeding involves a properly requested advisory opinion under Const 1963, art 3, § 8, *id.* (citing *Devillers v Auto club Ins Ass'n*, 473 Mich 562, 588 n57; 702 NW2d 539 (2005)). Concluding that the Michigan Constitution does not authorize this Court to issue advisory opinions after an enactment's effective date as a matter of text or historical practice, Justice Clement and Chief Justice McCormack held that this Court "lack[ed] jurisdiction" to proceed. *Id.* at 258.

Justice Cavanagh, joined by Justice Bernstein, concurred. *Id.* at 259 (Cavanagh, J, concurring). These Justices found "Justice Clement's view of this Court's jurisdiction compelling." *Id.* at 260. And they wrote separately to further explain that "this Court rarely exercises its discretion to issue an advisory opinion"

because "advisory opinions are a departure from this Court's traditional role." *Id.* at 259. "Absent are parties who have an actual stake in the outcome and a record fully developed in our lower courts." *Id.* at 259–60 (quoting *In re 2002 PA 48 (House of Representatives' Request for an Advisory Op)*, 467 Mich 1203, 1203; 652 NW2d 667 (2002)). What's more, Justices Cavanagh and Bernstein observed, "Michigan's citizens follow the law. And they will, undoubtedly, continue to follow the existing laws unless those laws are held to be unconstitutional by order of this Court *in an actual case or controversy*." *Id.* at 260 (emphasis added).

This Court's decision to decline issuing an adopt-and-amend advisory opinion is dispositive in this proceeding, which also lacks a case or controversy among adverse parties. The only difference between the cases is that, unlike the Legislature, the Commission and the Secretary of State have no constitutional provision for requesting an advisory opinion that excuses this Court's ordinary jurisdictional requirements.

Unless the Court is prepared to walk away from its previous holdings regarding the limited scope of its jurisdiction and the well-reasoned opinions of the four-Justice majority in *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, the result in that case must be applied here too: the Court should respectfully decline the Commission and Secretary's request to issue an advisory opinion about the validity of the constitutionally imposed deadline set forth in Const 1963, art 4, § 6(7). Instead, the Court should rely on the Commission and Secretary to follow existing law, particularly where Petitioners do not address this dispositive jurisdictional defect.

II. This Court lacks original jurisdiction to decide the Petition.

The Court lacks jurisdiction to decide the petition for a second reason: it has no original jurisdiction under Const 1963, art 6, § 4 or Const 1963, art 4, § 6(19).

1. Article 6, § 4 grants this Court "the power to issue, hear and determine prerogative and remedial writs." Const 1963, art 6, § 4. The Michigan Court of Appeals and circuits courts possess this same power. *Citizens Protecting Michigan's Const v Secretary of State*, 324 Mich App 561, 583; 922 NW2d 404 (2018) (Court of Appeals); Const 1963, art 6, § 11 (circuit courts). The Commission and the Secretary claim that their petition falls under Article 6, § 4 because their request is like a complaint for mandamus. They are wrong, for multiple reasons.

a. First, this Court will not consider complaints for mandamus if a lower court has jurisdiction. MCR 3.301(A). And as just explained, a plaintiff may seek a writ of mandamus from a circuit court or the Court of Appeals. Petitioners have not done so here, so they are prohibited from seeking such relief in this Court. Although the Senate made this point expressly in its first-filed amicus brief in this case, 5/14/21 Senate Br, p 11, neither the Commission and Secretary nor the Attorney General Team Supporting Jurisdiction address it. So the point is conceded.

b. Second, a writ of mandamus can only issue "if the plaintiffs have a clear legal right to performance of the specific duty sought to be compelled and that the defendant has a clear duty to perform such act." *In re MCI Telecommunications Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999) (cleaned up). In other words, the plaintiffs must be asking a court to compel the defendant to engage in a "ministerial act," "one in which the law prescribes and defines the duty to be

performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale County Sr Servs, Inc v Hillsdale County*, 494 Mich 46, 58 n11; 832 NW2d 728 (2013) (cleaned up). But the Petition is the exact opposite of a writ of mandamus. The process of creating a redistricting plan is anything but ministerial. And the Commission and Secretary are asking the Court to *change* their existing legal duty—to enact a plan no later than November 1 in the year following the decennial census—and to *replace* it with a different legal duty—to enact a plan several months later. Even more fundamentally, Petitioners are not seeking to compel the performance of a clear legal duty *by someone else*. The Petition is about Petitioners' own conduct.

In response to this roadblock, neither the Commission and the Secretary nor the Attorney General Team Supporting Jurisdiction cite a single case where a court granted a writ requested by a party against itself. The Commission and Secretary rely on a string of cases where this Court "has entertained reapportionment actions as complaints for mandamus." Comm'n Supp Br, p 5. But each one of those cases involved adverse parties, not aligned parties seeking to mandamus themselves. See *Houghton Co Bd of Supervisors v Secretary of State*, 92 Mich 638; 52 NW 951 (1892); *Giddings v Secretary of State*, 93 Mich 1; 52 NW 944 (1892); *Williams v Secretary of State*, 145 Mich 447; 108 NW 749 (1906), *Stevens v Secretary of State*, 181 Mich 199; 148 NW 97 (1914), and *Stenson v Secretary of State*, 308 Mich 48; 13 NW2d 202 (1944). The Commission and Secretary also cite *In re Apportionment of State Legislature – 1992*, 439 Mich 1203 (1991). Comm'n Supp Br, p 5. But that action, too, involved a plaintiff (Cecelia Neff) and a defendant (the Secretary of State).

The Attorney General Team Supporting Jurisdiction tries a different path, arguing that *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422; 4 NW 274 (1880), stands for the proposition that this Court "has the discretion to determine who may properly seek mandamus." AG Supporting Br, p 17. But the Court's comment in *Ayres* was made in response to the question whether a private complainant could seek mandamus against a public entity: the Board of State Auditors. 42 Mich at 429–30. Nowhere did the Court suggest that its discretion included the power to dispense with mandamus prerequisites entirely.

In sum, the Petition lacks a plaintiff seeking to compel action by a separate defendant, lacks a request for performance of a ministerial function, and asks this Court to compel a *different* duty than the one the Michigan Constitution requires. It would be extraordinary for this Court to exercise Article 6, § 4 jurisdiction in such circumstances.

2. The Petition's reliance on Article 4, § 6(19) fares no better. That provision vests this Court with limited original jurisdiction to "direct the secretary of state or the commission to perform their respective duties," among other things. Const 1963, art 4, § 6(19). But the Petition is *not* asking the Court to direct the parties to perform their duty under Article 4, § 6; it instead asks the Court to *change* that duty and create a new one.

Again, the Commission and the Secretary respond by citing numerous cases—without analysis—for the proposition that this Court "has exercised original jurisdiction in apportionment matters on numerous occasions." Comm'n Supp Br, p 3, n1. But all those cases are inapposite, as each one involved the selection or

direction of an actual redistricting plan—a subject well within this Court's power under the prior constitutional provisions addressing redistricting that have now been repealed. See *In re Apportionment of Mich State Legislature – 1964*, 372 Mich 418; 126 NW2d 731 (1964); *In re Apportionment of Mich State Legislature – 1972*, 387 Mich 442; 197 NW2d 249 (1972); *In re Apportionment of Mich State Legislature – 1982*, 413 Mich 96; 321 NW2d 565 (1982); *In re Apportionment of Mich State Legislature – 1992*, 439 Mich 251; 483 NW2d 52 (1992); Former Const 1963, art 4, § 6 (vesting jurisdiction in this Court to "determine which plan complies most accurately with constitutional requirements and . . . direct that it be adopted by the commission and published as provided in this section"). Accord Attorney General Team Opposing Jurisdiction Br, pp 8–14 (discussing cases and new limits on this Court's jurisdiction).

So what does it mean to "direct the secretary of state or the commission to perform their respective duties"? Const 1963, art 4, § 6(19). As the Attorney General Team Opposing Jurisdiction explains, the provision's plain meaning limits this Court's original jurisdiction "to carry out or fulfill their respective constitutionally required tasks and actions." Attorney General Team Opposing Jurisdiction Br, p 21 (citing *Webster's New World College Dictionary* (3d ed)). So "if the Commission or Secretary fail to perform a required duty, *another party* could bring an action in this Court seeking an order that commands the Commission or Secretary to perform that particular duty." *Id.* (emphasis added). "But that is the *only* relief available under this provision—an order requiring the Secretary or the Commission to perform a specific, constitutionally required task." *Id.* (emphasis added).

The problem, as the Senate has already explained, is that the Commission and Secretary ask this Court for an order to ignore their existing duties and to judicially amend the constitutional text to change those duties. 5/14/21 Senate Br, pp 12–13. What the Commission and Secretary urge this Court to do is act as a roving advisory "super" Commission that alters the Commission's constitutional obligations when, in the Court's view, changes are warranted.

The Commission and the Secretary do not meaningfully engage this problem. They say that nothing in Article 4, § 6(19) "precludes" the Commission and the Secretary "from seeking to invoke this Court's original jurisdiction." Comm'n Supp Br, p 4. But § 6(19) is a grant of very limited jurisdiction. The question isn't whether the provision *precludes* jurisdiction in some circumstances, but whether it *vests* this Court with jurisdiction in the circumstances presented. And for the limited relief which the Petition requests, the provision does not vest jurisdiction.

The Attorney General Team Supporting Jurisdiction characterizes the situation as one where the Commission and Secretary must choose which of two opposing duties to follow. Attorney General Team Supporting Jurisdiction Br, p 7; accord *id.* at 1. But that's a false choice at this early stage of the redistricting process. As discussed in Part IV, below, the Senate has every reason to believe the Commission can and will do its job properly and on time. Accordingly, the Court lacks original jurisdiction.

III. Article 4, § 6(7)'s plain language ("shall") is mandatory, not directory.

In some circumstances, Michigan courts may construe a statute that "provides that certain acts or things shall be done within a particular time or in a particular manner" as a directory rather than mandatory command. *Attorney General ex rel Miller v Miller*, 266 Mich 127, 133–134; 253 NW 241 (1934) (cleaned up). But the rule is different when it comes to constitutional commands. "[C]ourts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution." *People v Dettenthaler*, 118 Mich 595, 600; 77 NW 450 (1898) (quotation omitted). Unlike a statute, the Michigan Constitution "fix[es] those unvarying rules by which all departments of the government must at all times shaper their conduct." *Id.* (quotation omitted). Recharacterizing constitutional commands as "prescribing mere rules of order in an unessential matter" would "lower[ ] the proper dignity" of the Constitution." *Id.* (quotation omitted). Accordingly, this Court in *Dettenthaler* disapproved of non-Michigan cases construing constitutional provisions as merely directory and relied on those cases holding that constitutional language should be "literally followed." *Id.* at 599–602 (numerous citations omitted).

As the Senate's initial amicus submission highlighted, this Court took a slightly different tack in *Ferency v Secretary of State*, 409 Mich 599, 598–602; 297 NW2d 544 (1980). But in *Ferency*, the Court did *not* excuse Michigan officials from a constitutional deadline because there was a mere possibility the officials could not finish their work by a constitutionally imposed deadline. The Board of Canvassers in that case timely *completed* its work; the problem was that a Michigan circuit

court prevented the Board from finishing the job. *Id.* at 600–01. The Court acted not to relieve a duty but out of "a tradition of jealously guarding against legislative and administrative encroachment on the people's right to propose laws and constitutional amendments through the petition process." *Id.* at 601 (citing *Wolverine Golf Club v Secretary of State*, 384 Mich 461; 185 NW2d 392 (1971)). So, the *Ferency* case was about judicial interference, not executive competency.

What's more, Article 4, § 6(7) must be considered mandatory in any event. First, when dictating the date by which the Commission must promulgate redistricting plans, §6(7) uses the term "shall," which denotes a "mandatory" term, rather than "may" which is considered permissive and directory. *In re Forfeiture of Bail Bond (People v Gaston)*, 496 Mich 320, 328; 852 NW2d 747 (2014) (construing bond statute as mandatory rather than directory). Second, rewriting Article 4, § 6(7) would harm those who allege that the Commission has violated other duties and need time to challenge an adopted redistricting plan sufficiently in advance of candidates collecting signatures and clerks printing ballots. As this Court has explained, "whenever the act to be done . . . concerns the public interest or the rights of third persons, which require the performance of the act, then it becomes the *duty* of the officer to do it." *Id.* at 328 (emphasis added, citation omitted).

In other words, when a provision like § 6(7) "was designed to protect the public interest, as well as the rights of third persons, it must be construed as a mandatory provision." *Id.* at 329 (citations omitted). To put it another way: "Some limitations of time within which a public officer is to act must be construed as mandatory. Such a construction is necessary where failure to obey the time

limitation embodies a risk of unknown injury to public or private rights." *Id.* at 335 (cleaned up). And that is the precise situation here.

The Commission and the Secretary urge this Court to do precisely that which *Gaston* prohibits. Comm'n Supp Br, pp 9–10. And they justify that request by pointing to non-Michigan cases that have recently extended their own redistricting deadlines. *Id.* at 10. But in both *State ex rel Kotek v Fagan*, 367 Or 803; __ P3d __ (2021), and *Legislature of the State of California v Padilla*, 9 Cal 5th 867; 469 P3d 405 (Cal, 2020), state law dictated the promulgation of redistricting maps before *any* census data was available, and neither case discussed Michigan's limits on the judiciary's mandamus authority. See 5/14/2021 Senate Amicus Br, pp 14–15.

The Attorney General Team Supporting Jurisdiction posits that the Court must construe Article 4, § 6(7) as directory because construing the provision as mandatory "would mean one of two things: either (a) that the People lack the power to do what the Legislature may, i.e., to enact directory timing requirements, or (b) that when the People do exercise their power to enact directory timing requirements, this Court will reuse to give effect to the People's will." Attorney General Team Supporting Jurisdiction Br, pp 18–19. That is a false dichotomy. This Court should hold that it lacks the power to declare Article 4, § 6(7) directory because the People *chose* to make the provision mandatory by using mandatory language, and they did so for a valid reason—to protect the ability of citizens to challenge proposed redistricting plans that violate Michigan or federal law. The Court should defer to the People's wisdom in this approach, not rewrite it.

IV. As the State of Ohio recently told a federal court, receiving non-tabulated federal decennial census data by August 16, 2021, is sufficient to promulgate a redistricting plan by November 1, 2021.

In its initial amicus brief, the Michigan Senate—relying on the Petition's own allegations—explained how the Commission can proceed with the redistricting process using non-tabulated data rather than the final, formatted data. 5/14/21 Senate Br, pp 4, 8–9, 14. Nothing in the Commission and Secretary's Supplemental Brief and accompanying affidavit changes things. The key is that nothing in the Michigan Constitution requires the Commission to use or publish "tabulated" census data when promulgating a proposed plan. See Const 1963, art 4, § 6(7).

A federal court recently reached the same conclusion regarding the State of Ohio's similar constitutional redistricting requirements. *Ohio v. Raimondo*, __ F. Supp. 3d. __; 2021 WL 1118049 (SD Ohio, 2021). Like Michigan, Ohio recently amended its redistricting process. *Id.* at *3. For state legislative districts, the Ohio Redistricting Commission must reach agreement no later than September 1, 2021, and before doing so, the Commission must conduct a minimum of three public hearings across the state. *Id.* For congressional districts, the Ohio General Assembly must agree on a map no later than September 30, 2021. *Id.* If it is unable to do so, then the Ohio Redistricting Commission must adopt a plan no later than October 30, 2021. *Id.* Both the Ohio Redistricting Commission and the Ohio General Assembly must determine population using data from "the federal decennial census." *Id.* at *4 (citing Ohio Const, art 11, § 3(A), and Art 19, § 2(A)(2)). Only if that data "is unavailable" may the Commission and General Assembly determine population on another basis the Assembly selects. *Id.*

After the federal Census Bureau announced that it would be unable to comply with its March 31, 2021 deadline, Ohio sued the Bureau, seeking injunctive relief or a mandamus. But the federal court concluded it lacked jurisdiction. To begin, said the court, Ohio was seeking "an advisory opinion that cannot redress their claimed injury." *Id.* at *5. More important, the court concluded that Ohio "lacks standing because it has not established injury in fact." *Id.* at *6. That is because "the State does not actually need the Census Bureau's data to redistrict." *Id.* "The absence of census data thus does not stop the state from implementing its constitutional scheme or otherwise impinge on its sovereign interests in effectuating its law." *Id.* at *7. (Although the Ohio Redistricting Commission had one alternative that is not available to the Michigan Redistricting Commission—using an alternative source of data—nothing in Michigan's Constitution requires the use of tabulated data.)

Ohio pleaded with the court that census data was "preferred," and that "alternative data sources" were "a second-best option." *Id.* But the State did "not allege that census data [was] superior to any available alternatives; nor [did] it contend that the use of census data will result in better districts or enable it to better comply with federal law." *Id.* Likewise here, where the Michigan Redistricting Commission and the Secretary of State concede that the non-tabulated data "is identical" and "subject to the same exacting quality assurance processes" as the tabulated data. Pet. ¶ 37. And because the data is identical, it is impossible for anyone to claim that use of tabulated data "will result in better districts or enable it to better comply with federal law." *Raimondo*, 2021 WL 118049, at *7.

The same is true of the Michigan Redistricting Commission with one additional postscript. On appeal, the Sixth Circuit reversed the district court's dismissal in *Raimondo* because the "Census Bureau represents that it can deliver Ohio's data in a 'legacy format' by August 16, 2021—well before the September 30, 2021 projection that the agency previously identified." *Ohio v Raimondo*, __ Fed Appx __; 2021 WL 1996452, at *1 (CA 6, 2021). "Although Ohio would prefer to get its data sooner," the Sixth Circuit acknowledged, "*Ohio agrees that an August 16 delivery would allow it to complete its redistricting process*." *Id.* If Ohio can obtain legacy-format census data by August 16, 2021, then so can the Michigan Redistricting Commission. And if Ohio can complete its redistricting process between August 16 and September 1, 2021 (for state legislative districts) and between August 16 and September 30, 2021, or October 30, 2021 (for congressional districts), then so can the Michigan Redistricting Commission. That is why Mr. Adelson, the Commission's experienced Voting Rights Attorney, explained that if the tabulated data is available by September 30, 2021, "so long as you are equipped with the necessary expertise, we're *good to go*." https://bit.ly/3x9cglH (1:08:30–1:09-36).

To be sure, moving forward with non-tabulated census data will require a speedy process. Once the Commission has that data on August 16, 2021, the Commission will have to publish its proposed redistricting plans no later than September 17, 2021, Pet. ¶ 19. But August 16, 2021, is already two weeks earlier than the late-August, worst-case scenario the Commission anticipated. Pet. ¶ 38. Given the Commission's fidelity to its constitutional obligations, the Senate has great confidence that the Commission can make this timeline work.

CONCLUSION AND REQUESTED RELIEF

This Court lacks original jurisdiction under Const 1963, art 6, § 4 or Const 1963, art 4, § 6(19); the time limit that Article 4, § 6(7) imposes is mandatory; and the Census Bureau's recent announcement that it will transmit un-tabulated Census data by August 16, 2021, means that there is no need to rewrite the Michigan Constitution. But the Court need not decide any of these issues because it lacks jurisdiction to give an advisory opinion to the Commission and the Secretary of State in a proceeding that lacks a case or controversy and has no adverse parties. This Court reached that same conclusion in the adopt-and-amend litigation, *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241 (2019). It would be difficult to understand why a different result is warranted here.

Accordingly, *Amicus* the Michigan Senate respectfully requests that the Court deny the Petition.

Respectfully submitted,

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