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

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AMICUS CURIAE BRIEF OF COUNT MI VOTE, d/b/a VOTERS NOT POLITICIANS IN SUPPORT OF PETITION FOR RELIEF

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Amicus Curiae Count MI Vote, d/b/a Voters Not Politicians contends the answer is "Yes."

II. WHETHER THIS COURT HAS THE AUTHORITY TO DEEM A CONSTITUTIONAL TIMING REQUIREMENT AS DIRECTORY INSTEAD OF MANDATORY.

Amicus Curiae Count MI Vote, d/b/a Voters Not Politicians contends the answer is "Yes."

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Amicus Curiae Count MI Vote, d/b/a Voters Not Politicians contends the answer is "Yes."

THE INTEREST OF THE AMICUS CURIAE

Count MI Vote d/b/a Voters Not Politicians ("VNP") is a 501(c)(4) organization dedicated to engaging Michigan citizens in effective actions to strengthen our democracy. Its purpose is succinctly summarized in its mission statement as follows: "Voters Not Politicians is a nonpartisan advocacy organization that works to strengthen democracy by engaging people across Michigan in effective citizen action." VNP was the sponsor of the voter-initiated ballot proposal for amendment of the Michigan Constitution to create the new Independent Citizens Redistricting Commission approved by the voters as Proposal 18-2 in the general election of 2018. That Commission is now charged with responsibility for fairly drawing the boundaries of Michigan's state legislative and congressional election districts, and to thereby remedy the abuses associated with the practice of partisan gerrymandering.

As the sponsor of Proposal 18-2, VNP resisted and prevailed against vigorous efforts to prevent its submission to the voters in the Court of Appeals and before this Court. *Citizens Protecting Michigan's Constitution, et al. v Secretary of State and Board of State Canvassers,* 324 Mich App 561; 922 NW2d 404 (2018), *aff'd* 503 Mich 42; 921 NW2d 247 (2018). VNP has also participated as an intervening defendant assisting the successful defense of the newly created Independent Citizens Restricting Commission in subsequent federal court litigation brought by the Michigan Republican Party and associated individuals seeking to prevent the implementation and use of the new Commission based upon alleged violations of the First Amendment and the Equal Protection Clause of the U.S. Constitution. *See*, *Daunt, et al. v Jocelyn Benson* and *Michigan Republican Party, et al. v Jocelyn Benson,* 956 F3d 396 (CA 6, 2020) (Affirming denial of preliminary injunctive relief); and *Daunt, et al. v Jocelyn Benson*

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VNP remains a strong proponent of the people's right to engage in the initiative and referendum process and it has continued its work to promote the adoption of fair, inclusive and accessible voting systems and policies to ensure that the vote of every Michigan voter will be received and counted fairly. As the sponsor of Proposal 18-2 and defender of the new Independent Citizens Redistricting Commission, VNP has a uniquely strong interest in ensuring that the expressed will of the People who voted overwhelmingly to approve Proposal 18-2 will not be frustrated by the presently-threatened delay in the completion of the federal decennial census data required for drawing of the new election district maps. In furtherance of that interest, VNP respectfully submits this Amicus Curiae Brief in Support of Petition for Relief with the hope that it will assist the Court in properly deciding the issues set forth in its Order of May 20, 2021. VNP will not burden the Court with a full repetition of the arguments which have already been well presented by the Petitioners and the Attorney General's team writing in support of the Petition but will offer some additional observations and perspectives informed by its unique experience and interests.[1]

[1] This Amicus Curiae Brief was written in its entirety by the undersigned counsel for Amicus Curiae Count MI Vote d/b/a Voters Not Politicians. The full cost for the preparation and submission of this Amicus Curiae Brief has been paid by Amicus Curiae Count MI Vote d/b/a Voters Not Politicians.

STATEMENT OF FACTS

The pertinent facts are straightforward and have been ably summarized in the pending Petition for Relief and supporting briefs.

INTRODUCTION

By their approval of Proposal 18-2 in the general election of 2018, Michigan's voters expressed their overwhelming approval of a concept previously approved by their vote in favor of the 1963 Constitution – that Michigan's legislative election districts should be drawn by an independent Commission specially appointed for that purpose. Regrettably, the Commission on Legislative Apportionment established by the 1963 Constitution could not be used for fulfillment of its intended purpose following this Court's decision in *In re Apportionment of State Legislature*, 413 Mich 96; 321 NW2d 565 (1982), which held that use of the weighted land area/population formulae prescribed by the originally approved Const 1963, art 4, § 6 violated the Equal Protection Clause of the U.S. Constitution, and that the invalid provisions were not severable.

Proposal 18-2 was built upon the same concept but extended the scope of the proposed Independent Citizen's Redistricting Commission's responsibility to also include redistricting of Michigan's congressional districts and included improvements in the form of new provisions carefully designed to remedy the abuses associated with partisan gerrymandering by ensuring that the redistricting process could no longer be dominated or controlled by any single political party.

The new Independent Citizens Redistricting Commission has been properly convened in accordance with the new constitutional provisions and has embarked upon the fulfillment of its responsibilities in a timely fashion but as the pending Petition for Relief has shown, it now faces a daunting obstacle that could not have been anticipated – the unprecedented lengthy delay in the release of the federal decennial census data required for a proper drawing of the election district maps – an obstacle that will make it impossible for the Commission to properly perform its constitutionally-prescribed duties within the constitutionally-prescribed timeline. The expressed will of the voters must be respected and accommodated, and thus, "something has to give," as is often said when a similar conundrum is encountered.

The Commission and the Secretary of State have made timely application to this Court for its direction as to how the Commission may properly fulfill its constitutional duty in compliance with the expectations of the voters who approved its creation and prescribed its duties, and have proposed a timeline which would allow a reasonable accommodation of the constitutional obligations now drawn into conflict by the unforeseen delay in the release of the required census data caused by the present hundred-year pandemic. The Michigan Senate has presented an Amicus Curiae Brief expressing empathy for the Commission's predicament while contending that the pending Petition for Relief should be denied based upon arguments that the Court lacks jurisdiction and authority to consider this matter or to grant the relief requested and its unhelpful conclusory suggestions that the delayed release of the final census data is not really a problem because the Commission can complete its important and complicated task using preliminary census data within the very short time that it might have to do so.

On May 20, 2021, this Court issued its Order calling for expedited briefing and argument and requesting supplemental briefing of the three issues specified therein; 1) Whether

the Petition for Relief properly invokes the Court's original jurisdiction under Const 1963, art 6, § 4 or Const 1963, art 4, § 6(19); 2) Whether the Court has the authority to deem a constitutional timing requirement as discretionary instead of mandatory; and 3) If the Court has that authority, whether the admittedly unprecedented delay in the transmission of federal decennial census data justifies a deviation from the constitutional timeline. This Amicus Curiae Brief in Support of Petition for Relief has been submitted by VNP with the hope that its unique perspective will assist the Court in finding the correct answers to these questions.

For all of the reasons discussed *infra*, and the additional reasons discussed by the Commission, the Secretary of State, and the Attorney General in their briefs filed in support of the petition, VNP respectfully suggests that this matter falls within the clear scope of the Court's original jurisdiction conferred under Const 1963, art 4, § 6(19), and can also be considered a proper invocation of the Court's jurisdiction under Const 1963, art 6, § 4, as a request for issuance of a prerogative or remedial writ; that the Court ***does*** have the authority to deem the constitutional timing requirement at issue as directory instead of mandatory in accordance with its past practice and persuasive authority; and that the unprecedented and unforeseen delay in the transmission of the federal decennial census data ***does*** justify a deviation from the constitutional timeline in this highly unusual case where the Commission's ability to properly perform its duties within the time allowed has been severely compromised by that delay.

VNP recognizes that the relief requested is extraordinary, but the situation is also truly extraordinary, and thus, VNP joins the Petitioners in respectfully suggesting that this Court can and should grant the requested relief to ensure the proper completion of the Commission's important task in accordance with the clearly expressed will of the People.

LEGAL ARGUMENTS

I. THE PENDING PETITION FOR RELIEF HAS PROPERLY INVOKED THIS COURT'S ORIGINAL JURISDICTION UNDER CONST 1963, ART 4, § 6(19) AND CONST 1963, ART 6, § 4.

The Senate's Amicus Curiae Brief has suggested that the Petition for Relief filed by the Commission and Secretary of State Benson must be denied because it does not fall within the scope of the Court's original jurisdiction, and this has perhaps served as the impetus for the Court's request for briefing of the jurisdictional issue made in its Order of May 20, 2021. VNP agrees with the position of the Commission and the Secretary of State that their Petition for Relief falls squarely within the scope of the Court's original jurisdiction conferred under the recently adopted language of Const 1963, art 4, § 6(19), and can also be considered a proper invocation of the Court's jurisdiction under Const 1963, art 6, § 4, as a request for issuance of a prerogative or remedial writ.

A. THE PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION

The Court's inquiry presents questions regarding the proper interpretation of these constitutional provisions, and thus it is appropriate to briefly review the applicable rules of constitutional construction which must be applied in finding the proper answers. It has become well settled that the primary objective in interpreting a constitutional provision is to faithfully determine and give effect to the text's original meaning to the ratifiers, the people, at the time of ratification. *UAW v Green,* 498 Mich 282, 286-287; 870 NW2d 867 (2015); *National Pride at Work, Inc. v Governor,* 481 Mich 56, 67-68; 748 NW2d 524 (2008); *Studier v Michigan Public School Employees' Retirement Board,* 472 Mich 642, 652; 698 NW2d 350 (2005). This

principle was aptly summarized in *Traverse City School District v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971) as follows, quoting Justice Cooley's time-honored summary:

> "The primary rule is the rule of "common understanding" described by Justice Cooley:
>
> > "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great* mass *of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.' (Cooley's Const Lim 81)."
>
> 384 Mich at 405 (Emphasis in Opinion)

Our appellate courts typically discern the common understanding of constitutional text by applying each term's plain meaning at the time of ratification, but if the constitution employs technical or legal terms of art, those terms are construed in their technical, legal sense. *Studier, supra,* 472 Mich at 652. The decisions have emphasized that there is no necessity for construction of unambiguous constitutional language but when interpretation is required, the courts may consider extrinsic evidence, including the circumstances surrounding the adoption of the constitutional provision in question and the purpose sought to be accomplished, to determine the meaning that would have been commonly understood by the voters who adopted it. *People v Nash,* 418 Mich 196, 209; 341 NW2d 439 (1983) (Opinion by Brickley, J.); *Traverse City School District, supra,* 384 Mich at 405; *National Pride at Work, Inc. v Governor,* 274 Mich App 147, 157; 732 NW2d 139 (2007), *aff'd* 481 Mich 56; 748 NW2d 524 (2008).

To determine the meaning of constitutional language which would have been commonly understood by the People at the time of ratification, the courts may also consider the Address to the People, which explained in everyday language what each provision of the proposed Constitution was intended to accomplish, and to a lesser degree, the convention debates, are also relevant in determining the People's intent. *UAW v Green, supra,* 498 Mich at 287-288; *Lapeer County Clerk v Lapeer Circuit Court,* 469 Mich 146, 156; 665 NW2d 452 (2003); *People v Nash, supra,* 418 Mich at 209. It is also appropriate to consult dictionary definitions. *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273, 295; 761 NW2d 210 (2008), *affirmed as to result,* 482 Mich 960 (2008). The decisions have also recognized that judicial interpretations of prior constitutional provisions and the meaning of specific terms intended by the drafters are also relevant to interpretation of constitutional language. *Boards of County Road Commissioners v Board of State Canvassers,* 391 Mich 666; 218 NW2d 144 (1974).

And consistent with its obligation to faithfully determine and give effect to the text's original meaning to the ratifiers, the Court has also held that constitutional provisions adopted for a remedial[2] purpose should be liberally construed to effectuate that purpose. *Ferency v Secretary of State*, 409 Mich 569, 593, 603; 297 NW2d 544 (1980) ("Under a system of government based on grants of power from the people, constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed."); *Hutchinson v Whitmore,* 90 Mich 255, 263; 51 NW 451 (1890) ("Constitutional and statutory

[2] The definitions of "remedial" in *Black's Law Dictionary* (Fifth Ed., 1979) include: "Affording a remedy; giving means of obtaining redress; of the nature of a remedy; intended to remedy wrongs or abuses, abate faults or supply defects."

provisions exempting property from execution are remedial, and are to be construed liberally and beneficially for the debtor."

B. THIS COURT HAS ORIGINAL JURISDICTION TO CONSIDER AND ADJUDICATE THE PENDING PETITION FOR RELIEF PURSUANT TO CONST 1963, ART 4, § 6(19).

As originally approved, Const 1963, art 4, § 6 conferred authority upon this Court, in the exercise of its original jurisdiction, to "direct the secretary of state or the commission to perform their duties," and included a directive that the Court ***shall*** do so "[u]pon the application of any elector filed not later than 60 days after final publication of the plan." As amended by the adoption of Proposal 18-2, Const 1963, art 4, § 6 now contains the same grant of original jurisdiction and imposes a functionally identical obligation to "direct the secretary of state or the commission to perform their respective duties" but no longer includes the prior requirements that a petition invoking the Court's original jurisdiction to do so be made by an elector and that such applications be made "not later than 60 days after final publication of the plan."

Thus, the question to be addressed and decided in this matter is whether the Court's jurisdictional authority and obligation to "direct the secretary of state or the commission to perform their respective duties" includes jurisdiction and authority to provide timely direction to the Commission and the Secretary as to how those duties can or should be carried out in a case where interpretation of the constitutional duty is required or their ability to fulfill an important constitutional responsibility has been thwarted by an unavoidable and unforeseen problem. Or must the Court's exercise of that jurisdiction and authority be limited to issuance of an unhelpful declaration that the constitutional directive in question must be carried out in strict compliance with the constitutional language when it is apparent that it will be impossible to do so?

VNP respectfully suggests that the first interpretation is the correct one, and that it should therefore be adopted and applied in this case. It should go without saying that this Court's obligation to "direct the secretary of state or the commission to perform their respective duties" must necessarily be deemed to include the authority to provide needed direction as to how those duties may be performed in a case such as this, where a failure of a constitutional function has been threatened by an unforeseen problem. Accordingly, VNP also respectfully suggests that it is well within the scope of the Court's original jurisdiction and authority conferred under Const 1963, art 4, § 6(19) to consider the Petition for Relief at issue and to grant the urgently needed relief requested therein.

Invocation of the Court's original jurisdiction under Const 1963, art 4, § 6(19) is consistent with the intent of the voters expressed by their approval of Proposal 18-2 and does no violence to the new constitutional plan for redistricting. This may be seen for a number of reasons which will also reveal the flaws in the arguments made in opposition. First, the most reasonable and commonly understood meaning of the term "direct" as used in the language establishing the Court's authority to "direct the secretary of state or the commission to perform their respective duties" necessarily includes the ability to provide timely direction to the Commission and the Secretary as to how those duties can or should be carried out in a case where interpretation of the constitutional duty is required or their ability to fulfill an important constitutional responsibility in strict compliance with the constitutional language has been thwarted by an unavoidable and unforeseen problem.

In a case such as this, where it clearly appears that it will be impossible for the Commission and the Secretary to properly perform their prescribed duties in strict compliance with the constitutional timeline through no fault of their own due to an unforeseen difficulty

that they could not have prevented, it would make little sense to find that this Court can do nothing more than order the impossible performance. It seems very unlikely that Michigan's voters could have intended such an unreasonably restrictive meaning of "direct" when they approved Proposal 18-2 or when they approved the substantially identical language of the original redistricting provision.

The Attorney General's team writing in opposition to the Petition for Relief has cherry-picked a definition of "direct" – "to order or command with authority" – to support its suggestion that the term should be given a narrow meaning limited to ordering performance in strict compliance with the constitutional timeline. But it is important to note, in this regard, that the dictionary definitions of "direct" include several that do not support that narrow interpretation. The definitions of "direct" appearing in the *Random House College Dictionary* (Revised Ed. 1975) include: "to guide by advice"; "to regulate the course of; control"; to administer; manage; supervise;" and "to give authoritative instructions to; command; order or ordain." The definitions of the term in *Black's Law Dictionary* (Fifth Ed. 1979) are similarly expansive – "To point to; guide; order; command; instruct. To advise; suggest; request."

This being the case, it is reasonable to conclude that the voters intended a more expansive meaning of "direct" that would allow this Court to consider requests for relief designed to facilitate the fulfillment of the Commission's constitutional duties and to grant that relief when persuaded that it is necessary to do so for the accomplishment of that purpose. It is not reasonable to suppose that the voters would have intended a grudgingly narrow meaning of "direct" that would require the denial of such relief without consideration of the probable consequences. Indeed, it would be especially unreasonable to conclude that the voters could have intended such a narrow interpretation in light of the intended purpose of the redistricting

provisions. As originally approved, Const 1963, art 4, § 6 called for the establishment of a Legislative Apportionment Commission to perform the periodic redistricting in place of the Legislature. The well-publicized purpose of Proposal 18-2 calling for the creation of the Independent Citizens Redistricting Commission was similar but more specifically focused on eliminating the abuses caused by partisan gerrymandering of Michigan's congressional and legislative election districts. Its focus on the elimination of those abuses was clearly remedial, and this also reinforces the conclusion that the voters approving the amendment did not intend a narrow interpretation of "direct" which could be used to defeat rather that facilitate the accomplishment of its intended purpose.

Second, a broader understanding of this Court's authority under Const 1963, art 4, § 6(19) to include the ability to provide direction and binding instruction necessary for fulfillment of the Commission's duties is also consistent with the Court's long-recognized authority to "grant relief as the case may require." MCR 7.316(A)(7)

Third, the Court's authority under Const 1963, art 4, § 6(19) to "direct the secretary of state or the commission to perform their respective duties" is not restricted by the limitations generally imposed upon its authority to issue a traditional writ of mandamus under Const 1963, art 6, § 4.[3] Although the Court clearly possesses the authority under Const 1963, art 4, § 6(19) to compel the performance of a clear legal duty when asked to do so by an adverse party having

[3] Following the adoption of Proposal 18-2, the Court's power to issue, hear and determine prerogative and remedial writs under Const 1963, art 6, § 4 has been limited to the extent that its authority to do so has been "limited or abrogated by Article IV, section 6..." But although the Court's prior authority to choose between competing redistricting plans or impose its own plan has been abrogated by the new language of Const 1963, art 4, § 6(19), its previously-existing authority to issue, hear and determine prerogative and remedial writs "[directing] the secretary of state or the commission to perform their respective duties" has not been limited or abrogated by the adoption of Proposal 18-2.

a clear legal right to the performance of that duty, its authority to "direct" the Commission and the Secretary under that provision is broader, as previously discussed. If the voters had intended for the Court's authority to "direct the secretary of state or the commission to perform their respective duties" under Const 1963, art 4, § 6(19) to be no more expansive that its authority to grant a writ of mandamus under Const 1963, art 6, § 4, it would not have been necessary to address that authority in Const 1963, art 4, § 6(19) at all. The additional specific discussion of the Court's authority to "direct" the Commission and the Secretary in Const 1963, art 4, § 6(19) clearly suggests the contemplation of a broader remedial authority.

The language of Const 1963, art 4, § 6(19) contains no requirement of participation by an adverse party, as the originally enacted provision did by virtue of its requirement that the Court "direct the secretary of state or the commission to perform their respective duties" upon the application of an elector. Nor, given the absence of a requirement of an adversarial proceeding, is there any necessity for the Commission or the Secretary to demonstrate the existence of a "case or controversy." But to the extent that an actual controversy might be required to support the Court's exercise of jurisdiction in this matter, such a controversy may now be found to have been supplied by the Senate's Amicus Curiae Brief requesting denial of the Petition and the Court's Order of May 20, 2021, requesting briefing of both sides of the issues identified therein and inviting further submissions by Amicus Curiae.

C. THIS COURT HAS ORIGINAL JURISDICTION TO CONSIDER AND ADJUDICATE THE PENDING PETITION FOR RELIEF PURSUANT TO CONST 1963, ART 6, § 4.

Although it should not be necessary for the Court to venture beyond consideration of its original jurisdiction and authority conferred under Const 1963, art 4, § 6(19), a sufficient basis

for the Court's exercise of original jurisdiction in this matter can also be found in its broad authority to issue prerogative and remedial writs under Const 1963, art 6, § 4.

MCR 7.303(B) provides that the Supreme Court may exercise discretionary review in several types of matters. MCR 7.303(B)(6) confers broad authority for the Court to "exercise other jurisdiction as provided by the constitution or by law." In addition to general superintending control over all courts, Const 1963, art 6, § 4 confers upon this Court the power "to issue, hear and determine prerogative and remedial writs" and appellate jurisdiction as provided by rules of the supreme court":

> "Except 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; and appellate jurisdiction as provided by rules of the supreme court."

The specification of the Court's constitutional authority to "issue, hear and determine prerogative and remedial writs" conferred under Const 1963, art 6, § 4 was a stylistic revision of the Court's broad authority to issue a variety of enumerated common law writs (writs of error, habeas corpus, mandamus, quo warranto and procedendo) "***and other original and remedial writs***" and to "hear and determine the same" previously conferred under the Constitutions of 1908 and 1850, Const 1908, art 7, § 4 and Const 1850, art 6, § 3. (Emphasis Added)[4] Consistent with the language of the prior Constitutions, the Revised Judicature Act, MCL 600.217, specifies that this Court has jurisdiction and power to issue, hear, and determine

[4] The Address to the People regarding this provision explained that "[i]t substitutes the general term "prerogative and remedial writs" for the list of historic writs contained in the present document." During the discussion of this provision at the constitutional convention, delegates Tubbs and Cudlip explained that the new language of the proposed Article 6, § 4 eliminating the specific references to the common law writs listed in the prior constitutions was intended only as a stylistic simplification of the language. Constitutional Convention Record, pp. 1269-1270)

writs of error, habeas corpus, mandamus, quo warranto, procedendo, and "***other original and remedial writs.***"[5]

VNP agrees with the Petitioners and the Attorney General's team writing in support of their Petition for Relief that the Petition can also be considered a request for issuance of a remedial writ in the nature of mandamus, and thus, the broad authority conferred upon this Court under Const 1963, art 6, § 4 can be properly considered an alternative basis for the Court to exercise original jurisdiction and grant the relief requested in this matter.

There have been many species of writ, and the listings of the most commonly employed common law writs included in MCL 600.217 and the prior constitutional provisions were not intended to be exhaustive, as evidenced by their specific inclusion of reference to "***other original and remedial writs.***" The primary definition of "writ" in *Black's Law Dictionary* (Fifth Ed. 1979) is similarly expansive – "An order issued from a court requiring the performance of a specified act, or giving authority to have it done." The relief now requested of this Court is clearly remedial, being requested and hopefully granted for the laudable purpose of allowing the Commission to properly perform its constitutional duty in spite of the delayed release of census date which will otherwise thwart its ability to do so, and an Order from this Court granting that relief would certainly qualify as a "writ" under the aforementioned definition.

II. THIS COURT HAS THE AUTHORITY TO DEEM A CONSTITUTIONAL TIMING REQUIREMENT AS DIRECTORY INSTEAD OF MANDATORY.

The discussion of this important substantive question is properly initiated with a reminder of the most basic principle underlying the design and functioning of our state

[5] MCL 600.212 provides that this Court "has all the powers and jurisdiction conferred upon it by the constitution and laws of this state."

government. That essential principle is embodied in two separate, but related concepts set forth in the very first section of our Constitution – that "[a]ll political power is inherent in the people" and that "[g]overnment is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. Thus, power reserved by the People must be respected and preserved. Government in all of its forms has been created and maintained to serve the interests of the People, not the government or any of its branches, or of any political party, person, or interest group.

It is important for the Court to keep these guiding principles firmly in mind as it decides the questions set forth in its Order of May 20, 2021 because the voter-initiated constitutional amendment creating the Independent Citizens Redistricting Commission adopted by the overwhelming vote in favor of Proposal 18-2 was a remedial change designed and intended to provide a fair drawing of congressional and state legislative election districts while eliminating the political abuses long associated with partisan gerrymandering. The People have clearly expressed their desire for this change by their vote in favor of Proposal 18-2, and their expectation that their choice will be implemented, and the change properly accomplished, must be honored. They should not be told that this cannot be done because of a perceived requirement to strictly apply constitutional time limitations precisely as written without regard to the probable consequences or the overall purpose of the constitutional scheme.

The Court has asked whether it has the authority to deem a constitutional timing requirement as directory rather than mandatory. VNP agrees that the answer is "Yes" and respectfully suggests that the most authoritative support for that answer is the fact that this Court has previously recognized and exercised that authority in *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980) to extend the constitutional deadline for certification of a voter-initiated petition for amendment of the Constitution.

As explained in its Opinion, the key to the Court's willingness to grant that admittedly extraordinary relief in *Ferency* was the fact that the petitioner had done all that it could have been expected to do – all that the Constitution required – but the Board of State Canvassers was prevented from performing its constitutional duty to certify the proposal for the ballot within the time allowed because it was restrained from doing so by an order of the Ingham County Circuit Court. *Id.* at 598-600. Under those circumstances, which threatened to defeat a proper exercise of the People's reserved right to propose amendment of the Constitution by voter initiative, the Court felt that "[i]t would be manifestly unfair to hold that because the deadline has passed this Court can afford no relief." *Id.* 601.

The Court's decision to extend the constitutional deadline in *Ferency* was also influenced by the nature of the constitutional requirement at issue, as evidenced by its discussion of the fact that the 60-day timeframe did not relate to the sufficiency or validity of the petitions, but was instead designed to facilitate the electoral process by giving the Secretary of State and county clerks enough time to print and distribute ballots and ready the machinery for election day:

> "**In addition, our holding is based on the nature of the constitutional requirement in issue. The 60-day requirement does not relate to the sufficiency or validity of the petitions themselves. We read the time limit as essentially designed to facilitate the electoral process** by giving the Secretary of State and county clerks enough time to print and distribute ballots and ready the machinery for election day. *See, e. g.*, *Wolverine Golf Club v. Secretary of State,* 384 Mich. 461, 185 N.W.2d 392 (1971). It should not be used to prevent a proposal from appearing on the ballot when its proponents have done everything the constitution requires of them.
>
> "This is not to say that the 60-day requirement may be circumvented as a matter of course. We do not suspend constitutional directory limits lightly. Only the most extreme circumstances, such as the last-minute active judicial intervention in the instant case, can justify this deviation." 409 Mich at 601-602 (Emphasis added).

Viewed in the light most favorable to those opposed to the Petition for Relief, the only significant difference between *Ferency* and the request made in this case is that the delay at issue here has been caused by the present hundred-year pandemic instead of a judicial decree. But that is a distinction without a difference. *Ferency* clearly demonstrates that it is within the Court's power to extend constitutional deadlines where there is a compelling reason to do so. The Court's decision in *Ferency* and its prior decision in *Kuhn v Dep't of Treasury*, 384 Mich 378; 183 NW2d 796 (1971) stress the necessity to act promptly to preserve rights. That has been done here, and the need and justification for the requested extension are truly extraordinary. The Commission and the Secretary have acted promptly, before the expiration of the constitutional deadlines, to seek this Court's direction as to how the Commission should perform its prescribed duties when the unforeseen delay will make it impossible to properly complete the performance of those duties within the constitutional timeline.

And as in *Ferency,* the constitutional timeframe should not be considered a matter of controlling importance. Adherence to that timeframe is not an essential element of the constitutional scheme to require a fair drawing of election district maps without the partisan gerrymandering that has hindered that objective in the past; it is merely a matter of moving the process along to a timely completion. This being the case, it is unlikely that any of Michigan's voters could have considered the proposed timeline an essential or even particularly significant part of the amendment when casting their votes in favor.[6]

[6] It should be noted, in this regard, that the constitutionally-required 100-word summary of the proposal included a list of the significant provisions but made no mention of the time limitations now at issue. *See*, *Daunt, et al. v Jocelyn Benson* and *Michigan Republican Party, et al. v Jocelyn Benson,* 956 F3d 396, 401-402 (CA 6, 2020).

The Court's Order of May 20, 2021 has also referred attention to its prior decision in *Attorney General ex rel. Miller v Miller*, 266 Mich 127; 253 NW 241 (1934), which provided useful guidance regarding the proper interpretation of statutes governing the conduct of elections to determine whether their requirements should be deemed directory or mandatory. In addressing that question, the Court focused upon whether noncompliance has been declared to be fatal, and drew a distinction between conduct that is "of the essence of the thing required" or a mere matter of form:

> "**Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result.** * * * Before election it is mandatory if direct proceedings for its enforcement are brought, but after election it should be held directory, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or the ascertainment of the result, or unless the provisions affect an essential element of the election, or it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission will render it void." 20 C. J. pp. 181, 182, § 223.
>
> "**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, par. 631. 266 Mich at 133 (Emphasis added)

Although the principles discussed in *Miller* pertained to construction of statutes, they are consistent with the *Ferency* Court's evaluation of the nature of the constitutional timeline at issue, and thus, those same principles may be profitably applied to the question of whether the constitutional time limitations here should be considered mandatory or merely directory. VNP respectfully suggests that the November 1st deadline for completion of the election district

maps should be considered directory for a number of reasons, consistent with the principles discussed in *Ferency* and *Miller.* The new constitutional language does not state that a failure to meet the deadline is fatal or that the deadline cannot be extended when there is sufficient cause to do so. Like the deadline at issue in *Ferency,* adherence to the November 1st deadline is a matter of administrative importance designed to facilitate the timely completion of the Commission's work. That requirement is not "of the essence" of the new constitutional redistricting plan which, as previously discussed, is the creation of fairly drawn election maps, and the constitutional timeline provides no guidance as to how the Commission's important work can be concluded, as it still must be, when an unanticipated problem has made compliance with the constitutional timeline impossible.

As the Petitioners have noted, their request for relief also finds strong persuasive support in the Oregon Supreme Court's recent decision in *State ex rel Kotek v Fagan,* 367 Or 803; 484 P3d 1058 (2021) and the California Supreme Court's decision in *Legislature v Padilla*, 266 Cal Rptr 3d 2; 469 P 3d 405 (2020), both of which addressed the same problem now presented here – the need to extend the applicable deadlines for redistricting in those states caused by the delayed release of the required census data. In *Kotek,* which involved deadlines for completion of redistricting under Oregon's Constitution, the court addressed the issue of necessity now facing this Court:

> "As indicated, the voters' intent was to require that reapportionment occur every 10 years based on census data and in time for the upcoming election cycle. Notably, neither the text of Article IV, section 6, nor the history of the amendments to that section, indicates that the voters intended the specified deadlines to serve a purpose other than to provide a means to those ends. We have been presented with no reason why the voters who adopted the 1952 amendments would have been concerned with the exact date by which the Legislative Assembly or Secretary are required to enact or make a plan, except as part of a larger framework calculated to result in the adoption of a timely final

> plan. Nor is there any indication that the voters would have intended to require the Legislative Assembly to adhere to the July 1 deadline for legislative action in the unforeseen event that federal census data—the impetus for drawing new district lines in the first place—was not available by that date.
>
> "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 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. If it were possible for the State of Oregon to comply with all the requirements of Article IV, section 6, we of course would require that it do so. But here, where it is not possible for the state to create a reapportionment plan based on federal census data and still comply with the constitutionally prescribed deadlines, and where it is possible for the state to fulfill its paramount duties in compliance with modified deadlines, we conclude that we have authority to direct it to do so. Relators ask us to use our mandamus authority to require the Secretary to act in accordance with the duties imposed by Article IV, section 6—to make a reapportionment plan based on data from the federal census, and to wait to do so until the Legislative Assembly has first had an opportunity to enact a plan. We conclude that we have authority to make such orders, and we now turn to the question of whether we should do so. 367 Or at 801-811

Although these decisions from Oregon and California are not binding as authority here, they are persuasive and provide useful guidance for the Court in this case.

For all of these reasons, VNP respectfully suggests that this Court should look favorably upon the pending Petition for Relief and hold that the Court ***does*** have the authority to deem the constitutional timing requirement at issue to be directory rather than mandatory. The Petitioners are not proposing a "rewriting" of the constitutional language, as the opponents have suggested. They are instead requesting a one-time extension of the deadlines that will allow the Commission to properly complete its task. The Court's authority to grant that relief is supported by its prior decision in *Ferency* and the other consistent authorities previously discussed and is also consistent with its broad authority under MCR 7.316(A)(7) to "grant relief as the case may require."

III. THE UNPRECEDENTED DELAY IN THE TRANSMISSION OF FEDERAL DECENNIAL CENSUS DATA JUSTIFIES A DEVIATION FROM THE CONSTITUTIONAL DEADLINE.

VNP agrees with the Petitioners that the unprecedented delay in the transmission of the federal decennial census data justifies a deviation from the constitutional timeline for completion of the Commission's work, and therefore joins them in suggesting that the requested extension should be granted.

The reasons justifying the requested extension have been thoroughly discussed by the Petitioners and the Attorney General's team writing in support of their Petition for Relief and need not be repeated here. For VNP's part, it will suffice to make three observations. First, as should be apparent to everyone having even a minimal understanding of the redistricting process and the newly-adopted constitutional requirements, the Commission's task of drawing the new congressional and state legislative election district maps for the coming decade would be an extremely delicate, complicated, and time-consuming task under the very best of circumstances, requiring, as it does, a nearly equal distribution of population among the districts, compliance with the federal Voters Rights Act, and compliance with the various criteria set forth in the new Const 1963, art 4, § 6.

Second, it is in everyone's best interest to ensure that this process is completed properly, which in turn, requires that the Commission be allowed sufficient time to do so. It is not a process that should be rushed. The Senate and the Attorney General's team writing in opposition have suggested that delivery of the final census data before its currently anticipated release on September 30, 2021 is unnecessary because the Commission's task can be completed using the non-tabulated legacy format data now expected to be released on August 16, 2021. But the Petition for Relief has shown that the legacy format data cannot be used for redistricting

until it has been processed and tabulated – a process which will not be completed until sometime between August 23rd and 26th, allowing a period of only 22 days or so for the Commission to complete its drawing of the proposed maps before the September 17, 2021 publication deadline.

The Petitioners have shown that it will be impossible for the Commission to properly complete its preparation of the election district maps within that extremely tight time-frame, which should come as no surprise when the enormity of the Commission's task is considered. The Petitioners have supported their position on this point with a detailed Affidavit provided by their expert redistricting consultant Kimball W. Brace, whose allegations have not been refuted.

Finally, the process of redistricting is a political process, so it may be expected that there may well be politically-motivated legal challenges to the election district maps once adopted.[7] The potential for legal challenges which may serve to further unsettle our democratic process will be enhanced if errors are made because the Commission has not been allowed the time required to properly complete its task. This reality has also influenced the Petitioners' decision to request an extension of the constitutional timeline rather that wait to be sued after the fact. If the Commission is to be faulted later for missing a deadline or making a miscalculation or

[7] The Court will undoubtedly recall the unsuccessful efforts made in 2018 to keep Proposal 18-2 off the ballot by parties who wished to deny the voters an opportunity to approve or reject it at the polls. *Citizens Protecting Michigan's Constitution, et al. v Secretary of State and Board of State Canvassers,* 324 Mich App 561; 922 NW2d 404 (2018), *aff'd* 503 Mich 42; 921 NW2d 247 (2018). In 2019, after the approval of Proposal 18-2, unsuccessful challenges to the newly created Independent Citizens Restricting Commission were made in federal court litigation brought by the Michigan Republican Party and associated individuals seeking to prevent the implementation and use of the new Commission based upon alleged violations of the First Amendment and the Equal Protection Clause of the U.S. Constitution. *See*, *Daunt, et al. v Jocelyn Benson* and *Michigan Republican Party, et al. v Jocelyn Benson,* 956 F3d 396 (CA 6, 2020) (Affirming denial of preliminary injunctive relief); and *Daunt, et al. v Jocelyn Benson* ___ F3d ___; (Sixth Circuit Docket No. 20-1734, *rel'd* 5-27-2021) (Affirming subsequent final Order of Dismissal).

other mistake made because it did not have sufficient time to do its job properly, it should be able to say in its defense that it made a timely request to this Court for the additional time it needed.

RELIEF REQUESTED

Wherefore, Amicus Curiae Voters Not Politicians respectfully suggests that this Honorable Court should grant the Petitioners' request for extension of the constitutional timelines for completion of the Independent Citizens Redistricting Commission's work as requested in their pending Petition for Relief.

Respectfully submitted,

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