

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. \_\_\_\_\_

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

\_\_\_\_\_/

**PETITIONERS MICHIGAN INDEPENDENT CITIZENS REDISTRICTING  
COMMISSION AND SECRETARY OF STATE JOCELYN BENSON'S BRIEF  
IN SUPPORT OF PETITION FOR DIRECTORY RELIEF**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

This is an original action brought by Petitioners Michigan Independent Citizens Redistricting Commission and Secretary of State Jocelyn Benson. This Court has jurisdiction over this original action under article 6, § 4 and article 4, §6(19) of the Michigan Constitution, as amended. Section 4 of article 6 provides that this Court has “the power to issue, hear and determine prerogative and remedial writs[.]” Const 1963, art 6, § 4. Subsection 6(19) of article 4 expressly provides that this Court, “in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties[.]” Const 1963, art 4, § 6(19). Further, the Michigan Court Rules further provide that this Court may “exercise other jurisdiction as provided by the Constitution or by law.” MCR 7.303(B)(6).

## STATEMENT OF QUESTION PRESENTED

1. The Constitution requires the Commission to adopt redistricting plans for congressional and state legislative districts by November 1, 2021. But the Commission cannot meet this deadline because of the federal government's delayed release of the necessary census data. Under these extraordinary circumstances, should this Court exercise original jurisdiction, resolve the conflict, and direct the Commission to adopt plans within 72 days of the Commission's receipt of the redistricting data from the U.S. Census Bureau?

Petitioners' answer:        Yes.



## CONSTITUTIONAL PROVISIONS INVOLVED

### Const 1963, art 6, § 4 provides:

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 supreme court shall not have the power to remove a judge.

### Const 1963, art 4, § 6 provides, in relevant part:

(1) An independent citizens redistricting commission for state legislative and congressional districts (hereinafter, the "commission") is hereby established as a permanent commission in the legislative branch. The commission shall consist of 13 commissioners. The commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts. . . .

(2) Commissioners shall be selected through the following process:

(a) The secretary of state shall do all of the following: . . . .

(d) By July 1 of the year of the federal decennial census, from all of the applications submitted, the secretary of state shall:

(i) Eliminate incomplete applications and applications of applicants who do not meet the qualifications in parts (1)(a) through (1)(d) of this section based solely on the information contained in the applications;

(ii) Randomly select 60 applicants from each pool of affiliating applicants and 80 applicants from the pool of non-affiliating applicants. 50% of each pool shall be populated from the qualifying applicants to such pool who returned an application mailed pursuant to part 2(a) or 2(b) of this section, provided, that if fewer than 30 qualifying applicants affiliated with a major party or fewer than 40 qualifying non-affiliating applicants have applied to serve on the commission in response to the random mailing, the balance of the pool shall be populated from the balance of qualifying applicants to that pool. The random selection process used by the secretary of state to fill the selection pools shall use accepted statistical weighting methods to ensure that the pools, as closely as possible, mirror the geographic and demographic makeup of the state; and

(iii) Submit the randomly-selected applications to the majority leader and the minority leader of the senate, and the speaker of the house of representatives and the minority leader of the house of representatives.

(e) By August 1 of the year of the federal decennial census, the majority leader of the senate, the minority leader of the senate, the speaker of the house of representatives, and the minority leader of the house of representatives may each strike five applicants from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders.

(f) By September 1 of the year of the federal decennial census, the secretary of state shall randomly draw the names of four commissioners from each of the two pools of remaining applicants affiliating with a major party, and five commissioners from the pool of remaining non-affiliating applicants. . . .

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(4) The secretary of state shall be secretary of the commission without vote, and in that capacity shall furnish, under the direction of the commission, all technical services that the commission deems necessary. The commission shall elect its own chairperson. The commission has the sole power to make its own rules of procedure. The commission shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

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(7) The secretary of state shall issue a call convening the commission by October 15 in the year of the federal decennial census. Not later than November 1 in the year immediately following the federal decennial census, the commission shall adopt a redistricting plan under this section for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts.

(8) Before commissioners draft any plan, the commission shall hold at least ten public hearings throughout the state for the purpose of informing the public about the redistricting process and the purpose and responsibilities of the commission and soliciting information from the public about potential plans. The commission shall receive for consideration written submissions of proposed redistricting plans and any supporting materials, including underlying data, from any member of the public. These written submissions are public records.

(9) After developing at least one proposed redistricting plan for each type of district, the commission shall publish the proposed redistricting plans and any data and supporting materials used to develop the plans. Each commissioner may only propose one redistricting plan for each type of district. The commission shall hold at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans. Each of the proposed plans shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and a map and legal description that include the political subdivisions, such as counties, cities, and townships; man-made features, such as streets, roads, highways, and railroads; and natural features, such as waterways, which form the boundaries of the districts.

(10) Each commissioner shall perform his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process. The commission shall conduct all of its business at open meetings. Nine commissioners, including at least one commissioner from each selection pool shall constitute a quorum, and all meetings shall require a quorum. The commission shall provide advance public notice of its meetings and hearings. The commission shall conduct its hearings in a manner that invites wide public participation throughout the state. The commission shall use technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings.

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(12) Except as provided in part (14) of this section, a final decision of the commission requires the concurrence of a majority of the commissioners. A decision on the dismissal or retention of paid staff or consultants requires the vote of at least one commissioner affiliating with each of the major parties and one non-affiliating commissioner. All decisions of the commission shall be recorded, and the record of its decisions shall be readily available to any member of the public without charge.

(13) The commission shall abide by the following criteria in proposing and adopting each plan, in order of priority:

(a) Districts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws.

(b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.

(c) Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

(d) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

(e) Districts shall not favor or disfavor an incumbent elected official or a candidate.

(f) Districts shall reflect consideration of county, city, and township boundaries.

(g) Districts shall be reasonably compact.

(14) The commission shall follow the following procedure in adopting a plan:

(a) Before voting to adopt a plan, the commission shall ensure that the plan is tested, using appropriate technology, for compliance with the criteria described above.

(b) Before voting to adopt a plan, the commission shall provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans. Each plan that will be voted on shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and shall include the map and legal description required in part (9) of this section.

(c) A final decision of the commission to adopt a redistricting plan requires a majority vote of the commission, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party. If no plan satisfies this requirement for a type of district, the commission shall use the following procedure to adopt a plan for that type of district:

(i) Each commissioner may submit one proposed plan for each type of district to the full commission for consideration.

(ii) Each commissioner shall rank the plans submitted according to preference. Each plan shall be assigned a point value inverse to its ranking among the number of choices, giving the lowest ranked plan one point and the highest ranked plan a point value equal to the number of plans submitted.

(iii) The commission shall adopt the plan receiving the highest total points, that is also ranked among the top half of plans by at least two commissioners not affiliated with the party of the commissioner submitting the plan, or in the case of a plan submitted by non-affiliated commissioners, is ranked among the top half of plans by at least two commissioners affiliated with a major party. If plans are tied for the highest point total, the secretary of state shall randomly select the final plan from those plans. If no plan meets the requirements of this subparagraph, the secretary of state shall randomly select the final plan from among all submitted plans pursuant to part (14)(c)(i).

(15) Within 30 days after adopting a plan, the commission shall publish the plan and the material reports, reference materials, and data used in drawing it, including any programming information used to produce and test the plan. The published materials shall be such that an independent person is able to replicate the conclusion without any modification of any of the published materials.

(16) For each adopted plan, the commission shall issue a report that explains the basis on which the commission made its decisions in achieving compliance with plan requirements and shall include the map and legal description required in part (9) of this section. A commissioner who votes against a redistricting plan may submit a dissenting report which shall be issued with the commission's report.

(17) An adopted redistricting plan shall become law 60 days after its publication. The secretary of state shall keep a public record of all proceedings of the commission and shall publish and distribute each plan and required documentation.

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(19) The supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties, may review a challenge to any plan adopted by the commission, and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this

constitution, the constitution of the United States or superseding federal law. In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.

(20) This section is self-executing. If a final court decision holds any part or parts of this section to be in conflict with the United States constitution or federal law, the section shall be implemented to the maximum extent that the United States constitution and federal law permit. Any provision held invalid is severable from the remaining portions of this section.

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(22) Notwithstanding any other provision of this constitution, or any prior judicial decision, as of the effective date of the constitutional amendment adding this provision, which amends article IV, sections 1 through 6, article V, sections 1, 2 and 4, and article VI, sections 1 and 4, including this provision, for purposes of interpreting this constitutional amendment the people declare that the powers granted to the commission are legislative functions not subject to the control or approval of the legislature, and are exclusively reserved to the commission. The commission, and all of its responsibilities, operations, functions, contractors, consultants and employees are not subject to change, transfer, reorganization, or reassignment, and shall not be altered or abrogated in any manner whatsoever, by the legislature. No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in this section.

## INTRODUCTION

Every ten years following the decennial United States Census, Michigan adjusts its state legislative and congressional district boundaries based on the population changes reflected in the census. This process is fundamental to democracy in Michigan.

In November 2018, the people amended the state Constitution to create the Michigan Independent Citizens Redistricting Commission and shift redistricting duties from the Legislature to the Commission. The 2020 census presents the Commission with its first opportunity to perform its new constitutional duties—and its first constitutional dilemma.

With respect to timing, the Constitution mandates that the Commission adopt a redistricting plan by November 1, 2021. But before the Commission can adopt a plan, each plan must be made available for public comment for 45 days. This means that the Commission must have proposed plans available to the public by September 17, 2021. But to draw plans, the Commission must have the 2020 census data from the federal government.

Ordinarily this data would have been available to the Commission in March of this year. However, due to the pandemic, the U.S. Census Bureau will not be releasing data to the states until September 30, 2021. This is after the date by which the Commission is required to publish proposed plans. The Commission cannot propose plans that satisfy federal and state law until it receives the 2020 census data. Because receipt of the data will be delayed, the Commission will not be able to comply with the constitutionally imposed timeline.

Given this conflict, the Commission and Secretary of State Jocelyn Benson seek direction from this Court. Being out of compliance with the Constitution places the Commission in an untenable situation. The Commission is seeking to honor its duties under Michigan's Constitution given the delays in the release of the census information. A decision from this Court here would protect the Commission's ability to draw fair and lawful plans pursuant to the orderly and transparent process chosen by the People of Michigan.

To remedy this extraordinary circumstance, Petitioners seek an order from this Court directing the Commission in the performance of their duties. Specifically, the Commission should be directed to propose plans within 72 days of receiving the census data—whatever date that should occur—and to approve plans within 45 days thereafter. If the data is received earlier, the Commission will use its best efforts to propose plans earlier as well. If the census data is received as scheduled on September 30, 2020, the proposed plans would be due no later than December 11, 2021, and plans would be approved on or before January 25, 2022. This relief is necessary to preserve public trust and to ensure that the 2022 elections for U.S. House of Representatives and the state legislature are held in districts that satisfy the law.



## STATEMENT OF FACTS

### A. Overview of the redistricting process in Michigan

#### 1. Redistricting in Michigan before Proposal 2

Before addressing the legal arguments, it is helpful to have a general understanding of Michigan’s redistricting history.<sup>1</sup> In 1963, through the new Constitution, the people of Michigan enacted a process for apportionment, now frequently referred to as redistricting. See Const 1963, art 4, §§ 2-6 (as enacted).<sup>2</sup> The Constitution created the Commission on Legislative Apportionment and charged that Commission with establishing House and Senate districts in conformity with certain standards prescribed by the Constitution. *Id.* If the commission failed to approve a plan, the proposed plans were to be submitted to this Court for its review and approval of the plan that best met the constitutional criteria. *Id.*

The commission consisted of “eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment.” *Id.* Each political party, however, was required to choose members from four prescribed geographic areas. *Id.*

Shortly after the enactment of these constitutional provisions, the U.S. Supreme Court in *Reynolds v Sims* declared apportionment criteria similar to

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<sup>1</sup> For a fuller discussion of the history of redistricting in Michigan, see also *Citizens Protecting Michigan’s Constitution v Secretary of State*, 503 Mich 42, 83-89 (2018).

<sup>2</sup> “Redistrict” means “to organize into new districts, especially legislative ones; reapportion.” *Black’s Law Dictionary* (8<sup>th</sup> ed).

Michigan's unconstitutional. 377 US 533 (1964). This Court ordered the commission to establish a plan consistent with *Reynolds*, which the commission failed to do, and the Court thereafter ordered the commission to adopt the one plan that was based on appropriate standards. *In re Apportionment of State Legislature-1964*, 373 Mich 250 (1964).

In 1972, the commission again failed to agree on a plan, and this Court again ordered the commission to approve the plan that best met the constitutional criteria. *In re Apportionment of State Legislature-1972*, 387 Mich 442 (1972). Likewise, in 1982 the commission again failed to agree upon a plan, and the competing plans were submitted to this Court. *In re Apportionment of State Legislature-1982*, 413 Mich 96 (1982). But this time the Court ordered the commission to address whether it continued to have authority to act given the constitutional invalidity of certain apportionment criteria. *Id.* at 112-113. This Court ultimately held that the valid rules were “inextricably interdependent and therefore [ ] not severable” from the invalid rules, and that “the function of the commission, which depends on those rules, and indeed the commission itself, [were] not severable from the invalidated rules.” *Id.* at 116. The Court thus ordered the former director of elections for Michigan to draw a plan consistent with standards articulated by the Court, which the Court would review and approve after a public hearing. *Id.* at 142.

Due to the invalidity of the constitutional apportionment provisions, the next three redistricting plans—1991<sup>3</sup>, 2001, and 2011—were drawn by the Legislature. In 2017, a lawsuit was filed in federal court challenging the 2011 plan, see MCL 3.51a, 4.2001a, and 4.2002a, as an unconstitutional partisan gerrymander. See *League of Women Voters v Benson*, 373 F Supp 3d 867 (ED Mich, 2019).

## 2. Redistricting in Michigan after Proposal 2

Also in 2017, Voters Not Politicians, a ballot proposal committee, filed an initiative petition to amend the Michigan Constitution signed by more than 425,000 voters. See *Citizens Protecting Michigan's Constitution v Secretary of State, et al*, 324 Mich App 561 (2018). The proposal principally sought to amend the apportionment provisions in article 4, § 6 discussed above. The Court of Appeals rejected a challenge to the placement of the proposal on the November 2018 general election ballot, *id.* at 433-434, and this Court affirmed. See *Citizens Protecting Michigan's Constitution*, 503 Mich at 55.

Identified as Proposal 18-2 on the November 6, 2018 general election ballot, the proposal passed overwhelmingly.<sup>4</sup> The amendments became effective December 22, 2018. See Const 1963, art 12, § 2.

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<sup>3</sup> This Court ended up approving a plan for the 1991 cycle as well. See *In re Apportionment of State Legislature—1992*, 439 Mich 251 (1992) and *In re Apportionment of State Legislature—1992*, 439 Mich 715 (1992). See also *Dunnell v Austin*, 344 F Supp 220 (ED Mich, 1972) and *Good v Austin*, 800 F Supp 552 (ED Mich, 1992) (reviewing congressional redistricting plans).

<sup>4</sup> 2018 Michigan Election Results, available at [https://mielections.us/election/results/2018GEN\\_CENR.html](https://mielections.us/election/results/2018GEN_CENR.html), (accessed April 20, 2021).

### 3. The Independent Citizens Redistricting Commission

The amendments re-establish a commission—the Independent Citizens Redistricting Commission—charged with redrawing Michigan’s state senate, state house, and congressional districts according to specific criteria. Const 1963, art 4, § 6(1), (13). And the Constitution makes clear that “no body, except the . . . commission . . . [shall] promulgate and adopt a redistricting plan or plans for this state.” Const 1963, art 4, § 6(19).

The amendments prescribe eligibility criteria and a complex selection process for membership on the Commission, which includes those who affiliate with the Democratic Party, the Republican Party, and persons not affiliated with either major party. *Id.*, § 6(1)-(2).<sup>5</sup> The commissioners for this redistricting cycle were initially selected by a random draw on August 17, 2020.<sup>6</sup>

The Commission is granted authority to provide for its own rules and processes, and the Legislature must appropriate money to compensate the commissioners and to enable the Commission to perform its functions. *Id.*, § 6(4)-(5). The Secretary of State acts as a non-voting secretary to the Commission, and “in that capacity shall furnish, under the direction of the commission, all technical services that the commission deems necessary.” *Id.*, § 6(4). Each commissioner is

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<sup>5</sup> In 2019, two lawsuits were filed challenging the eligibility criteria and makeup of the Commission. These challenges have been rejected to date. See consolidated decision in *Daunt, et al v Benson*, 2020 WL 8184334 (July 6, 2020, WD Mich), appeal pending, *Daunt, et al v Benson*, Sixth Circuit Case No. 20-1734.

<sup>6</sup> See *History made with selection of 13 commissioners to redraw election districts statewide*, 8/17/20, available at [https://www.michigan.gov/sos/0,4670,7-127-1640\\_9150-536996--,00.html](https://www.michigan.gov/sos/0,4670,7-127-1640_9150-536996--,00.html). One commissioner was randomly selected on October 21, 2020, to fill a vacancy. Const 1963, art 4, § 6(3).