

charged with “perform[ing] his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process.” *Id.*, § 6(10). And the Commission must conduct its business at open meetings and “conduct its hearings in a manner that invites wide public participation throughout the state.” *Id.*

Under the Constitution, Secretary Benson was required to convene the Commission by October 15, 2020, which she did. Const 1963, art 4, § 6(7). The first meeting was held September 17, 2020. Thereafter, the Commission is required “to hold at least ten public hearings throughout the state for the purpose of informing the public about the redistricting process . . . and soliciting information from the public about potential plans,” before the Commission may draft plans. *Id.*, § 6(8). At this time, the Commission has scheduled 16 public hearings to be held across the state between May 11 and July 1, 2021 to meet this requirement.<sup>7</sup>

**4. The Commission must draft and approve redistricting plans.**

After developing at least one plan for each type of district, the Commission must publish the plans, provide the supporting materials, and “hold at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans.” *Id.*, § 6(9). At this time, the Commission has scheduled eight public hearings.<sup>8</sup>

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<sup>7</sup> See Independent Citizens Redistricting Commission, meeting schedule, available at [MICRC - ICRC Meeting Schedule \(michigan.gov\)](https://michigan.gov/micrc) (accessed April 20, 2021.)

<sup>8</sup> *Id.*

Before voting to adopt a plan, the Commission must “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.” *Id.*, § 6(14)(b). And “[n]ot 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.” *Id.*, § 6(7). Thus, under the Constitution the Commission is to publish proposed plan(s), with supporting data, no later than September 17, 2021 and adopt a final plan by November 1, 2021 for this cycle.

After adopting a final plan, the Commission must “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.” *Id.* § 6(15). The Commission must also issue a report for each adopted plan “explain[ing] 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.” *Id.* § 6(16).

An adopted plan “become[s] law 60 days after its publication.” *Id.*, § 6(17). Under subsection § 6(19), this Court “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 state or federal Constitution or superseding federal law. *Id.*, § 6(19).

**B. The federal government is delaying release of the 2020 census data.**

**1. Use of census data in reapportionment and redistricting**

The U.S. Secretary of Commerce oversees the U.S. Census Bureau and the decennial census activities. 15 USC 1511(5), 13 USC 2. The decennial census data, specifically the population count, is important because it determines the number of representatives representing each state in Congress for the following decade. The more detailed dataset known as redistricting counts, or the Census PL 94-171 data, is critical for redistricting because it provides geographic and spatial detail on where people live and their key demographic characteristics.

The U.S. Constitution requires that districts are redrawn every decade to ensure equal populations between districts. See U.S. Const, Art I, § 2, US Const, Am 14, *Wesberry v Sanders*, 376 US 1, 7–8 (1964). The total number of seats in the U.S. House of Representatives is fixed by law at 435, and the seats are apportioned to the states in proportion to their populations.<sup>9</sup> Similarly, the total number of seats in the Michigan House of Representatives is fixed by law at 110, see Const 1963, art 4, § 3, the Michigan Senate is fixed by law at 38, see Const 1963, art 4, § 2, and both the House and Senate are apportioned on the basis of population. See *Reynolds v Sims*, 377 US 533, 562-564 (1964).

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<sup>9</sup> “Reapportionment” means “realignment of a legislative district’s boundaries to reflect changes in population.” *Black’s Law Dictionary* (8<sup>th</sup> ed)

Overlaying these requirements is the Voting Rights Act of 1965, 52 USC 10301 *et seq.*, “which, among other things, prohibits state election practices or procedures that result in ‘a denial of abridgement of the right of any citizen of the United States to vote on account of race or color . . . .’” *LeRoux v Secretary of State*, 465 Mich 594, 597-598 (2002) (citations omitted).

Although the use of census data is the general practice of the states, 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 Right Act. *Burns v Richardson*, 384 US 73, 91 (1966) (“[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.”); e.g., *Burns*, 384 U.S. at 92–97 (State may draw districts based on voter-registration data).

While the Michigan Constitution does not expressly require that decennial census data be used to redistrict but that appears to be the intent of the amendment. Numerous provisions in article 4, § 6 refer to the decennial census as the starting point of the redistricting process. See Const 1963, art 4, § 6(2)(a)(i), (c)–(f), (5), and (7). And subsections 6(9) and (14)(b) both require that plans be distributed to the public with “such census data as is necessary to accurately describe the plan and verify the population of each district.” Const 1963, art 4, § 6(9), (14)(b).

## 2. Federal statutory deadlines

The following provisions are codified in the Census Act, 13 USC 1 *et seq.*, which governs U.S. Census Bureau activities:

- Decennial census of population shall occur on April 1. 13 USC 141(a).<sup>10</sup>
- Tabulation of total population required for apportionment of representatives “shall be completed within 9 months after the census date and reported by the Secretary [of the U.S. Census Bureau] to the President of the United States.” 13 USC 141(b).
- States shall have the opportunity to identify the small area geography for which they need data to conduct legislative redistricting and deliver this data (PL 94-171 data) no later than one year from census day. 13 USC 141(c).

Based on these statutes, under federal law, the relevant dates for the 2020 census cycle are: census date of April 1, 2020, apportionment data due to the President by December 31, 2020, and redistricting data released to the states by April 1, 2021.

## 3. Anticipated dates for release of data

Representatives from the U.S. Census Bureau have announced a 4-month delay for apportionment data<sup>11</sup> and a 6-month delay<sup>12</sup> for the redistricting data<sup>13</sup> critical to the Commission’s work. The U.S. Census Bureau has cited the COVID-19

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<sup>10</sup> “Census of population” is defined in 13 USC 141(g) as census of population, housing and matters related to population and housing.

<sup>11</sup> See *Census Bureau Statement on Apportionment Counts*, Release Number CB21-RTQ.06, 1/28/21, available at [Census Bureau Statement on Apportionment Counts](#).

<sup>12</sup> See *Census Bureau Statement on Redistricting Data Timeline*, Release Number CB21-CN.14, 2/12/21, available at [Census Bureau Statement on Redistricting Data Timeline](#).

<sup>13</sup> The redistricting data includes counts of population by race, ethnicity (Hispanic or Latino origin), voting age, housing occupancy status, and group quarters population at the smallest geographic level, which is a census block.

pandemic, wildfires in the western states, and the active hurricane season, among others, as causes of the delay in their 2020 census operations. See *Ohio v Raimondo*, 2021 WL 1118049 at \*1-2 (March 24, 2021, SD Ohio). A chart demonstrating the progression of the delays in census data follows:

Action/Sent to	Deadline Under Title 13 “Statutory Plan”	Deadline under the Executive Summary <sup>14</sup> “Original Plan”	Updated Deadlines per 2020 Census Update <sup>15</sup> “COVID Plan”	Updated Deadlines per Press Releases <sup>16</sup> “Current Plan”
President (population counts for apportionment)	by December 31, 2020	by December 31, 2020	by April 30, 2021	by April 30, 2021
States (redistricting counts for redistricting)	by April 1, 2021	by March 31, 2021	by July 30, 2021	by September 30, 2021

Another notable change in the 2020 census cycle is a shift from the release of redistricting data, PL 94-171, on a rolling basis to delivery of the redistricting data for all states at once.<sup>17</sup> As noted above, the Bureau announced that it will now

<sup>14</sup> See *2020 Census Operational Plan, Executive Summary, Prepared by the Decennial Census Management Division, U.S. Census Bureau Version 1.0, December 2015*. The document notes Final Version 1.0 was adopted November 6, 2015.

<sup>15</sup> On January 27, 2021, Kathleen Styles, an official at the U.S. Census Bureau, announced during a 2020 Census Update Meeting hosted by the National Conference of State Legislatures that the bureau intended to deliver redistricting data to the states by July 31, 2020.

<sup>16</sup> On January 27, 2021, Styles announced the bureau intended to deliver its final apportionment report. On February 12, 2021, the census bureau announced that it would delay transmission of redistricting data to the states.

<sup>17</sup> The data is provided at the census block level, which is the smallest geographic unit used by the U.S. Census Bureau.

deliver the redistricting data to all states by September 30, 2021. In contrast, the 2010 census data was received by the Michigan Legislature on March 22, 2011.

**C. The delayed release of data will negatively impact Michigan’s redistricting process.**

**1. The Commission will not be able to meet its constitutional deadlines.**

The delay in receipt of the PL 94-171 redistricting data from the U.S. Census Bureau will have a direct, negative impact on the timing of the critical work of the Commission. The delayed receipt, now anticipated to be delivered to the states on September 30, will place the Commission in conflict with several provisions in article 4, § 6 of the Michigan Constitution.

Subsection 6(7) expressly states that the Commission must adopt redistricting plans “[n]ot later than November 1 in the year immediately following the federal decennial census.” Const 1963, art 4, § 6(7). While this date appears to grant the Commission one month to perform its map drawing duties with the delayed 2020 census data, other related constitutional deadlines make it clear that the Commission cannot meet the November 1 deadline if it receives census data on September 30.

For example, subsection 6(14) requires that, prior to a vote to adopt any plan, the Commission is required to provide public notice of each plan that will be voted on and provide a minimum of 45 days for public comment on the proposed plan(s). Const 1963, art 4, § 6(14). This would require the proposed plan(s) be published, with supporting data, and available for public comment on or before Friday,

September 17, 2021 (45 days before November 1).<sup>18</sup> This creates an inherent conflict between the latest possible date for publication/public comment period to begin, which is on or before September 17, and anticipated receipt of census data by September 30. Additionally, subsection 6(9) requires the Commission to publish proposed redistricting plans and hold at least 5 public hearings to solicit public comment on those plans *before* a vote on or before November 1. Const 1963, art 4, § 6(9).

Thus, the Commission will not be able to meet its constitutional timeline based on a census data release date of September 30, 2021. However, the Commission believes it may be able to perform significant work using data in a “legacy” format from the U.S. Census Bureau. Legacy format data is a non-tabulated version of census data that must be processed before use. The data in the legacy format files is identical to the PL 94-171 redistricting data files expected to be delivered by September 30 and subject to the same exacting quality assurance processes. The sole difference is in the format the census data is presented.

Recently, the State of Ohio filed suit against the federal government to compel release of the census data by the statutory deadline of March 31, 2021 in *Ohio v Raimondo*, 2021 WL 1118049 (March 24, 2021, SD Ohio). Although the case was dismissed for lack of jurisdiction, in responding to Ohio’s motion for a preliminary injunction the U.S. Census Bureau stated that “legacy format summary

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<sup>18</sup> Again, subsection 6(14)(b) requires, in part, that the census data “necessary to accurately describe the plan and verify the population of each district” is published in advance of the 45-day public comment window. Const 1963, art 4, § 6(14)(b).



redistricting data files” could be provided to all states by mid-to-late August 2021. (Ex A, U.S Census Bureau’s Resp to Plfs’ Mot for Prelim Injunct, Case No. 21-cv-00064-TMR, 3/12/21, ECF No. 11, p 8 and Whitehorne Decl. ¶ 12.) This legacy format data must be processed before use, and the Census Bureau noted that any state using legacy data files would have to accept responsibility for how they process these files; whether correctly or incorrectly. The tabulated, “user-friendly” PL 94-171 redistricting data is still on track for release by September 30. *Id.*

The potential release of legacy format data will not have a meaningful impact on the Commission’s ability to perform its duties under the current constitutionally imposed deadline. While the Ohio litigation was dismissed, the Census Bureau still intends to release the non-tabulated legacy format data, and the Commission here has formally expressed its intention to utilize such data to begin its work as soon as practicable.<sup>19</sup> Assuming the legacy format data is released in mid- to late-August, the additional time gained by the Commission remains insufficient to meet the November 1 deadline and needs to be weighed against any risk of utilizing non-tabulated data. While the underlying data is identical, to eliminate any risk, the non-tabulated legacy format data would be reconciled with the tabulated PL 94-171 redistricting data set for release by September 30. This reconciliation process is expected to take between 7 to 10 days. Based on the current November 1 deadline, use of legacy format data would likely provide the Commission between 2 and 4

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<sup>19</sup> See Resolution 2021.04.11, adopted April 15, 2021, available at [MICRC Res 2021 04 11 Add Language to Request for Relief from MI Supreme Court 722291 7.pdf \(michigan.gov\)](#).

weeks to conduct its work prior to the September 17, 2021, publication deadline that begins the 45-day public comment period. This is still insufficient time for the Commission to perform its work in mapping district lines for congressional and state legislative districts, meet the 45-day publication requirements, and hold the second round of constitutionally required public hearings in advance of a final vote to adopt district plans.

**2. The Secretary of State will face difficulty in updating the qualified voter file before the August 2022 primary election.**

The delay in receipt of the redistricting data and resulting delay of the redistricting work of the Commission also has a direct, negative impact on the critical work of the Secretary's Bureau of Elections, which begins after the redistricting plans are adopted. Const 1963, art 4, § 6(17).

The Bureau of Elections maintains Michigan's qualified voter file (QVF), which is an electronic list of all registered voters in the state—almost 8 million people. MCL 168.509o. For each voter, the QVF contains the list of all districts in which a voter lives, i.e., federal and state house and senate districts, etc, which is used to determine what ballot a voter receives. MCL 168.509q. The QVF also includes a “street index” of addresses for all registered voters in the state. MCL 168.509p(d). After the new maps are adopted by the Commission and become effective, the Bureau must update the QVF.

The update generally takes place in two stages. In stage one, the new district lines will be added to the QVF. In stage two, the “street index” will be reviewed to identify where districts have changed, and an update to registrations will be made

where voters' districts have changed. To accomplish these updates, the Bureau anticipates that it will be able to electronically move large groups of voters at one time. However, manual, address-by-address changes will still be required for thousands and thousands of voters where district boundaries limit the use of large or global moves. After stages one and two are accomplished, voting precincts must be reviewed and modified as necessary. See MCL 168.654a, 168.661. And after that, local clerks are charged with reviewing changes in their jurisdictions. In sum, this is an extensive and time-intensive process.

With respect to the last redistricting cycle in 2010-2011, the update to the QVF took approximately six months. The Commission's constitutional deadline of November 1 to adopt plans would ordinarily accommodate the Bureau of Elections' multi-month process of updating the QVF. The updates to the QVF must be completed in time to accommodate candidates seeking to run in the August 2, 2022 primary election.

The deadline to collect signatures and file nominating petitions for accessing the primary ballot is on or before April 19, 2022 (the 15th Tuesday before the primary).<sup>20</sup> This includes nominating petitions for congressional representatives, MCL 168.133 and state senators and representatives, MCL 168.163. Certainly, it would be helpful for candidates collecting signatures and intending to file nominating petitions to run for an office to know the final contours of the district in

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<sup>20</sup> Other deadlines include June 3, 2022, for sending primary ballots to the printer, and June 18, 2022, for making absent voter ballots available to military and overseas voters.

which they seek to run. But more significantly, the Bureau of Elections and the local clerks need to have the QVF updated in order to canvass nominating petitions. As a result, the QVF updates must be completed by the April 19 filing deadline.

The delay in receiving the redistricting data and the likely resulting delay in the Commission's adoption of final plans will make it very difficult for the Bureau of Elections to perform its QVF update in time for the April 19, 2022, filing deadline. The Bureau of Elections is currently exploring ways to accomplish the updates more efficiently, but it is unknown at this time whether any significant time-savings may be had. In addition, because the filing deadline is set by statute, the Legislature could relieve the Bureau of Elections to some extent by extending the deadline through legislation, which has been introduced. See House Bills 4642 and 4643, introduced on April 15, 2021.<sup>21</sup> But Petitioners cannot confirm to this Court whether such efforts will be successful.<sup>22</sup>

**3. Petitioners will be ready to proceed as quickly as possible once the final census data is received from the U.S. Census Bureau.**

The Secretary and the Commission have complied with their constitutional duties to date and will be prepared to proceed as quickly as possible once the data is received. Through the efforts of Secretary Benson in fulfilling her constitutional duties, the Commission was seated, and commissioners took the oath of office on

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<sup>21</sup> The bills are available at [Michigan Legislature - House Bill 4642 \(2021\)](#) (HB 4642) and [Michigan Legislature - House Bill 4643 \(2021\)](#) (HB 4643) (accessed April 20, 2021).

<sup>22</sup> This Court has previously extended the deadline to file nominating petitions and filing fees in the context of directing the adoption of a redistricting plan. See *In the Matter of Apportionment of Michigan Legislature*, 387 Mich at 458.

September 17, 2020—almost a full month ahead of the October 15 deadline. Const 1963, art 4, § 6(2)(a)–(f). Since that time, the Commission has met regularly and made good faith efforts to meet its constitutional responsibilities through its activities, which include: hiring staff, adopting Rules of Procedure as well as policy documents, engaging in the procurement process to secure necessary consultants, scheduling the first round of constitutionally mandated public hearings, identifying the locations for the second round of public hearings, and bolstering the public engagement requirements. See Const 1963, art 4, § 6(4), (7)-(8). The Commission has done this—all while demonstrating sensitivity to budget constraints and conducting strategic planning to meet the deadline to adopt final plans.

The Commission intends to fulfill its constitutional duties and has formally stated its intent to engage in preliminary line drawing utilizing the legacy format data to be prepared to receive and reconcile the tabulated PL 94-171 census data and move forward swiftly. However, the Commission cannot meet the current deadline of November 1 and the mandated 45-day public comment window deadline to begin on or before September 17, because the tabulated PL 94-171 census data will not be released until September 30.

## ARGUMENT

- I. **In order to resolve the conflict in law created by the U.S. Census Bureau, this Court should direct the Commission to adopt redistricting plans for congressional and state legislative districts within 72 days of the Commission’s receipt of the tabulated redistricting data from the U.S. Census Bureau.**

Petitioners request that this Court exercise original jurisdiction and direct the Commission to adopt redistricting plans for congressional and state legislative

districts within 72 days of the Commission’s receipt of the tabulated redistricting data from the U.S. Census Bureau. Doing so will ensure that fair maps are drawn and will protect the adopted plans from challenges based on the Commission’s inability to adhere to the constitutional timeline.

**A. The people conferred jurisdiction on this Court to direct Petitioners in the performance of their duties.**

“Although apportionment is primarily a legislative task, this Court’s involvement in the process is of long standing.” *In re Apportionment of State Legislature – 1992*, 439 Mich 715, 716 (1992).<sup>23</sup> In enacting Proposal 18-2, the people recognized that the assistance of this Court may still be required with respect redistricting matters. Accordingly, the people conferred “original jurisdiction” on the Court to “direct the secretary of state or the commission to perform their respective duties,” to “review a challenge to any plan adopted by the commission,” and to “remand a plan to the commission for further action if the plan fails to comply with the requirements” of applicable law. Const 1963, art 4, § 6(19). The people thereby preserved this Court’s important role in the review of reapportionment and redistricting matters. See *Citizens Protecting Michigan’s Constitution*, 503 Mich at 90-91, 98-99 (recognizing “jurisdictional grant under the proposal” to the Court).

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<sup>23</sup> This Court’s jurisdiction in reapportionment matters has been invoked in numerous instances. See *In re Apportionment of Mich State Legislature - 1964*, 372 Mich 418 (1964); *In re Apportionment of Mich State Legislature – 1972*, 387 Mich 442 (1972); *In re Apportionment of Mich State Legislature – 1982*, 413 Mich 96 (1982); *In re Apportionment of Mich State Legislature – 1992*, 439 Mich 251 (1992).

Further, this Court has observed that its authority to issue prerogative and remedial writs under article 6, § 4 of the Constitution “has been the traditional vehicle” for reviewing apportionment and redistricting matters. *LeRoux*, 465 Mich at 606-607, citing *In re Apportionment of the State Legislature – 1992*, 439 Mich 715, 717 (1992); *Stenson v Secretary of State*, 308 Mich 48, 51 (1944).

**B. Direction from this Court is necessary under the unusual circumstances created by the delay in receiving data.**

Article 4, § 6 vests sole authority in the Commission to promulgate and adopt redistricting plans for state senate districts, state house of representative districts, and congressional districts. This exclusive delegation of power to the Commission is clearly stated in article 4, § 6 (1), (19), and (22) of the Constitution. No other entity in Michigan holds this power or responsibility.

But if the census data is not received until September 30, the Commission cannot publish proposed plans and receive public comment on September 17. This represents the latest date the publication and public comment period can begin given the November 1 constitutional deadline for adoption of maps. Even the use of legacy format data will not have a meaningful impact on the Commission’s ability to perform its duties under the current constitutionally imposed deadline. Unless this Court provides relief with respect to the November 1, 2021 deadline, the Commission cannot timely perform its constitutional function to redistrict the state in advance of the 2022 elections.

Because the Commission’s deadlines are constitutional, the Commission cannot set new deadlines or seek relief from the Legislature. Nor is it possible, even

if it were prudent, to amend the Constitution since an amendment could only be voted upon at the next November general election, which is November 8, 2022. Const 1963, art 12, § 2; MCL 168.2(j). And while the Commission could simply set internal deadlines and work to adopt plans on the same schedule proposed here, Petitioners have significant concerns with this approach.

By failing to publish proposed plans by September 17, 2021, and failing to adopt plans by November 1, 2021, the Commission will have acted contrary to the Constitution, albeit for reasons beyond the Commission's control. This places the Commission at risk of being sued either to compel its compliance with the deadlines, or to attack the validity of any approved plans as untimely. Such lawsuits would plainly disrupt the Commission's work. Given the importance of the redistricting process to democracy in Michigan, waiting and hoping that the Commission is not sued seems an imprudent choice. Rather, the Commission and the Secretary invoke this Court's jurisdiction as provided by the Constitution to ensure that they are carrying out their constitutional duties under article 4 as envisioned by the People for the redistricting of Michigan's congressional and state legislative seats.

The will of the voters in amending the Constitution was to have an independent citizen-led commission draw district lines in a transparent process that engages the public throughout. And that interest in transparency is better served by the Commission coming before this Court, in a public filing, to explain the circumstances, support its proposed timeline, and request direction from this Court.



Other persons with a stake in this process could seek to participate and be heard by intervening or submitting amicus curiae briefs. Upon this public record, the Court could render an informed decision available to all voters in Michigan and resolve for all purposes the date by which the Commission must adopt state and congressional district plans. This decision, whatever it may be, will provide certainty, at least with respect to timing. And the Commission, other stakeholders, and the public could then proceed with and participate in the redistricting process.

Other states have taken this approach. For example, the California Legislature filed a petition in that state's Supreme Court seeking relief from the deadlines set by California law due to the U.S. Census Bureau's delay in releasing data. See *Legislature of the State of California v Padilla*, 469 P3d 405 (Cal 2020). That court granted relief, extending both statutory and constitutional deadlines for adopting redistricting plans by four months. *Id.* at 412–413. In doing so, the court emphasized that “these adjustments to the relevant deadlines are limited to this redistricting cycle and these extraordinary circumstances. It is these circumstances that necessitate the remedy we authorize today: a public health crisis that has compelled declarations of emergency by both the President and the Governor, and that has compelled the federal government to pause the decennial census and seek congressional authorization for an extension of its own deadline.” *Id.* at 413. The court observed that the remedy it authorized was “a narrow one: a one-time adjustment to the deadlines, to enable the relevant constitutional and statutory redistricting provisions otherwise to operate as written and intended.” *Id.*

Similarly, on April 9, 2021, the Oregon Supreme Court granted the Oregon Legislative Assembly’s petition extending the constitutional deadlines for submitting new legislative and congressional district maps due to delayed census results. See *State ex rel Kotek v Fagan*, 367 Or 803 (2021). Noting the “voters’ paramount interests” appear to be in the enactment of a redistricting plan every 10 years based on census data in advance of the next election cycle and that “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.” *Id.* at 811. That court further noted that the delayed release of census data “makes it impossible for the Legislative Assembly and the Secretary to fulfill their constitutional responsibilities without an adjustment of those deadlines, and because the deadlines can be modified without significantly affecting the duties of the Legislative Assembly or the Secretary, or the rights of electors, and without interfering with the general election cycle, we will exercise our authority to compel compliance with Article IV, section 6, according to a revised schedule set out in Appendix 2 to this opinion.” *Id.* at 805.

Petitioners here seek a similar limited, one-time adjustment to Michigan’s deadlines so that the Commission may perform its duties as close as possible to what the People intended.

In a different context, this Court found it appropriate to take “extraordinary action” and permit a ballot proposal to be placed on the ballot after a constitutional deadline had expired. See *Ferency v Secretary of State*, 409 Mich 569, 598-602 (1980) (distinguishing *Kuhn v Dep’t of Treasury*, 384 Mich 378 (1971)). The *Ferency* Court recognized that the case before it presented “unique circumstances” and that the parties at issue had not delayed and had attempted to perform their duties but were prohibited from doing so by an errant court order. *Id.* at 599–601. The Court acknowledged the importance of the people’s right of initiative and determined “[i]t would be manifestly unfair to hold that because the deadline has passed this Court can afford no relief.” *Id.* at 601. The Court also observed that the filing deadline did not relate to the substantive sufficiency or validity of the petition, but rather was intended “to facilitate the electoral process” by giving clerks sufficient time to print ballots. *Id.* As a consequence, the deadline “should not be used to prevent a proposal from appearing on the ballot when its proponents have done everything the constitution requires of them.” *Id.* at 601–602.

In so concluding, the *Ferency* Court noted that its decision did not mean that the deadline could be disregarded:

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 the deviation. [*Id.* at 602.]

Here, as in *Ferency*, the Petitioners have and are complying with all constitutional requirements to the extent they can do so, and it is only the actions of a third party—the U.S. Census Bureau—that will prevent them from meeting the

constitutional deadline. Further, like the people’s right to petition at issue in *Ferency*, the redistricting process is of fundamental importance to the people of Michigan. As this Court has recognized, redistricting “goes to the heart of the political process” in a constitutional democracy. *In re Apportionment of State Legislature – 1982*, 413 Mich at136. “A constitutional democracy cannot exist . . . without a legislature that represents the people, freely and popularly elected in accordance with a process upon which they have agreed.” *Id.* And, as in *Ferency*, where the deadline to adopt redistricting plans is not a matter of substance but is directory, this Court should recognize the “extreme circumstances” presented here and direct the Petitioners, specifically the Commission, to adopt plans by a later date. See, e.g., *In the Matter of Apportionment of Michigan Legislature*, 387 Mich at 458 (court exercised its authority to extend statutory deadline to file nominating petitions and filing fees).

If this Court does not provide relief, the Commission will be unable to timely update the existing congressional and state legislative district plans. This also opens the possibility for an argument that the current maps should be used. But using the “old” maps would be contrary to the law and the will of the people.

New district maps based on updated census data will reflect the population shifts over the past decade and allow for current maps to be redrawn to reflect updated data and comport with federal and state law. Reapportionment by the federal government will inform the Commission of the number of congressional districts that will need to be drawn. Michigan’s delegation has been reduced by one

seat in the U.S. House of Representatives in each of the last four census cycles due to a loss of population. It is expected that Michigan will lose at least one seat this cycle due to continued population loss, which will be confirmed by April 30, 2021.

The census data, once received by the state, is merged with individual voter registration data and historical election results, both of which are collected from the state and county registrars of voters. This final dataset will enable the Commission to gauge demographic changes and meet the criteria set forth in the Constitution being, in part, to: (1) ensure each district meets the equal population mandates under the Equal Protection Clause, (2) analyze data on race and ethnicity to comply with the Voting Rights Act, and (3) weigh demographic and socioeconomic characteristics to determine the possible presence of communities of interest. Const 1963, art 4, § 6(13).

The existing maps will not reflect any lost congressional House seat or the population shifts over the last decade. And regardless, using the current maps would be contrary to the will of the people. The Constitution was amended to establish the Commission and place the redistricting process with the people. It is a reform specifically recognized by the U.S. Supreme Court in *Rucho v Common Cause*, 139 S Ct 2484, 2507 (2019).

In sum, the old maps cannot be used because circumstances have changed, most notably the loss of a congressional seat. The outdated maps no longer accurately reflect *the people themselves* given the population changes of and within

Michigan.<sup>24</sup> More importantly, they fail to reflect the process that the People chose to redistrict as expressed in their Constitution. This is the paramount governing law in Michigan.

Therefore, it is imperative that this Court exercise jurisdiction and direct Petitioners in the performance of their duties. During its review of the 1982 apportionment, this Court recognized that it retained the “responsibility to provide for the continuity of government by assuring that the people will be provided the opportunity to elect a lawfully apportioned Legislature.” *In re Apportionment of State Legislature – 1982*, 413 Mich at 116. The preservation of the constitutional mandate of the Commission to adhere to the decennial redistricting schedule in the U.S. Constitution and under Michigan law is an issue of great importance to the public. It also preserves and gives effect to the will of the voters in adopting Proposal 18-2, creating the Commission and setting forth its responsibility to redistrict with a focus on public engagement and input throughout an open and transparent process.

**C. The Court should direct the Commission to adopt redistricting plans for congressional and state legislative districts within 72 days of the Commission’s receipt of the 2020 census data.**

The Commission, the Secretary of State, and the Bureau of Elections engaged in significant discussion to determine a workable timeline for proposing and adopting plans based on receiving census data by September 30, 2021. On March

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<sup>24</sup> And while the decision was ultimately vacated based on the lack of justiciability, the current maps were held unconstitutional. *League of Women Voters v Benson*, 373 F Supp 3d 867 (ED Mich, 2019), vacated by *Chatfield v League of Women Voters*, 140 S Ct 429 (2019).

25, 2021, the Commission, at a public meeting, voted to petition this Court for an extension of the current redistricting process deadlines for 72 days after receipt of the data. (Ex B, March 25, 2021, Commission Minutes & Materials.) This would result in the following timetable, assuming tabulated PL 94-171 data is received on September 30, 2021:

Actions	Original Timeline	Proposed Timeline
Commission holds initial public hearings and initial drafting of plans commences (art 4, § 6(8))	May 2021— September 2021	May 2021— September 2021
U.S. Census Bureau sends redistricting data to states (13 USC 141(c))	April 1, 2021	September 30, 2021
Commission deadline to propose plans (art 4, § 6(14)(b))	September 17, 2021	<b>December 11, 2021 (72 days after receiving data)</b>
Commission deadline to adopt final plan after 45 days of public comment (art 4, § 6(7), 14(b))	November 1, 2021	<b>January 25, 2022</b>
Commission publishes adopted plan and materials within 30 days (art 4, § 6(15))	December 1, 2021	February 24, 2022
Adopted plans become law 60 days after publication (art 4, § 6(17))	January 30, 2022	April 25, 2022
Bureau of Elections updates qualified voter file	November 1, 2021 to April, 2022 (5 months)	January 25, 2022 to April, 2022 (3 months)
Filing deadline for nominating petitions for August primary	April 19, 2022	April 19, 2022 (unless extended by

		the Legislature; see HB 4642, 4643)
August primary	August 2, 2022	August 2, 2022
November general election	November 8, 2022	November 8, 2022

Under the original timetable, the Commission would have had approximately 5½ months to draft proposed plans before it was required to adopt plans on November 1. As proposed, the Commission would have at least 72 days after receiving the data to draft a proposed plan for release to the public and would be required to adopt a plan on or before January 25, 2022. While this is a significantly shortened period, the Commission has carefully considered the matter and believes it can perform its constitutional function within this time period. In proposing this 72-day period it is important to Petitioners that the 45-day public comment period required under article 4, § 6(14)(b) be maintained. This is because public participation is a central component of the Commission’s mandate.

Petitioners have proposed the above timetable based on the receipt of data by September 30, 2021. Although it is unlikely that the U.S. Census Bureau will delay issuing data beyond September 30, 2021, it is a possibility. The California Supreme Court noted as much in its decision, where in fact the proposed release date at that time was July 30, 2020. *Legislature of the State of California*, 469 P3d at 413. Accordingly, Petitioners would request that the 72-day period apply to any subsequent release date.



In an even more unlikely scenario, should the PL 94-171 redistricting data be released *before* September 30, 2021, the Commission, and to the extent required, the Secretary, have agreed to make every effort to expedite the process and release the preliminary and final plans a corresponding number of days in advance of the 72-day time period. (Ex C, April 15, 2021, Commission Minutes & Materials.)

### **CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth above, Petitioners Michigan Independent Citizens Redistricting Commission and Secretary of State Jocelyn Benson respectfully request that this Court grant their petition and enter an order **directing** that:

- (1) The Commission shall propose preliminary plans for state senate districts, state house of representative districts, and congressional districts, within 72 days of receipt of the redistricting data from the U.S. Census Bureau on September 30, 2021, making preliminary plans due on or before December 11, 2021, notwithstanding the requirements of article 4, § 6(7), 14(b) of the Constitution;
- (2) The Commission shall adopt final redistricting plans for state senate districts, state house of representative districts, and congressional districts by the 45<sup>th</sup> day following the Commission's issuance of proposed plans on December 11, 2021, making adoption of final plans due on or before January 25, 2022, notwithstanding the requirements of article 4, § 6(7), 14(b) of the Constitution;
- (3) If the U.S. Census Bureau transmits the census data to the State of Michigan later than September 30, 2021, (a) the 72 days within which the Commission must propose preliminary plans for state senate districts, state house of representative districts, and congressional districts, will commence on the new date the state receives the data, and (b) the 45 days within which the Commission must adopt a final plan, will commence running from the date the Commission issued the proposed plans under subsection (3)(a), notwithstanding the requirements of article 4, § 6(7), 14(b) of the Constitution;
- (4) If the U.S. Census Bureau transmits the PL 94-171 census data to the State of Michigan earlier than September 30, 2021, the Commission will make every effort to expedite the process and adopt a final plan by a

corresponding number of days in advance of the January 25, 2022, deadline set forth in paragraph (2) above; and

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

Respectfully submitted,

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