STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

In re INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR STATE LEGISLATIVE AND CONGRESSIONAL DISTRICT'S DUTY TO REDRAW DISTRICTS BY NOVEMBER 1, 2021.
_____/

S. Ct. No. 162891

LEAGUE OF WOMEN VOTERS OF MICHIGAN'S *AMICUS CURIAE* BRIEF IN SUPPORT OF THE INDEPENDENT CITIZENS REDISTRICTING COMMISSION

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For

Theodore Sachs
1928 – 2001

Union Lawyer Extraordinaire,
Mentor, Friend, and the Lawyer
Who Brought One-Person, One-
Vote to Michigan

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction under Mich Const 1963 Art 4, § 6(19) and Art 6, § 4.

STATEMENT OF QUESTIONS INVOLVED

As set forth in this Court's May 20, 2021 Order, the questions involved are:

1. Does the Court have original jurisdiction?

Amicus Curiae League of Women Voters of Michigan answers: Yes.

2. Does the Court have the authority to deem a constitutional timing requirement as directory instead of mandatory?

Amicus Curiae League of Women Voters of Michigan answers: Yes.

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

Amicus Curiae League of Women Votes of Michigan answers: Yes.

INTERESTS OF *AMICUS CURIAE*

The League is a nonpartisan community-based statewide organization formed in April, 2019 after Michigan voters granted women suffrage in November, 1918. The League is affiliated with the League of Women Voters of the United States, which was founded in 1920. The League is dedicated to encouraging its members and the people of Michigan to exercise their right to vote as protected by the federal Constitution, Michigan Constitution, and federal and state law. The mission of the League is to promote political responsibility through informed and active participation in government and to act on selected governmental issues. The League impacts public policies, promotes citizen education, and makes democracy work by, among other things, removing unnecessary barriers to full participation in the electoral process. The League has developed a particular interest in reform of the Michigan redistricting process. In 2011-12, local Leagues studied how redistricting was conducted in Michigan and other states, and began to advocate for reform in Michigan. The League has been advocating for and educating communities about the advantages of an independent citizens commission to develop fair maps since then. The League was the lead plaintiff in *League of Women Voters of Michigan v Benson,* 373 F Supp 3d 867 (ED Mich 2019) (3-judge court), *vacated on juris. grounds*, 589 US ___; 140 S Ct 429 (2019), which found that 34 districts in the 2011 Congressional and legislative districting plans were partisan gerrymanders. The League supported the adoption of 2018 Proposal 2 which created the Independent Citizens Redistricting Commission, has encouraged Michigan voters to apply to serve the Commission, and has observed the Commission working. The League supports the Commission through town halls educating voters about the Commission and communities of interest, and by supporting its public hearings. The League will continue to support the Commission as it endeavors to develop fair maps.

INTRODUCTION

> "It is emphatically the province and duty of the judicial department to say what the law is. . . If two laws conflict with each other, the courts must decide on the operation of each."
>
> - *Marbury v Madison,* 5 US 137, 177 (1803)

Properly understood this case presents a conflict between 2 constitutional duties – the exclusive, non-delegable duty of the Independent Citizens Redistricting Commission ("ICRC") to adopt redistricting plans and the ICRC's duty to do so by November 1, 2021. That conflict was created because the census data necessary to perform the first duty will not be available in time to fulfill the second duty.

The ICRC is Michigan's 4th attempt to create a septum of redistricting which produces fair, non-gerrymandered plans. Michigan's democracy needs this system to work but the supporters of the broken status quo are doing all they can to sabotage it. *See, e g, Daunt v Benson*, 956 F3d 396 (CA6, 2020). The relief requested in the Petition will aid the ICRC in this vital work.

As Chief Justice Marshall held two centuries ago, it is "emphatically the duty" of this Court to resolve this conflict and only this Court can do so. The Court has the jurisdiction and authority under Mich Const 1963 Article 4, § 6(19) and Article 6, §§ 1 and 4, the resolution of the conflict offered by the Petition is legal and reasonable, and the Court should order that resolution.[1]

STATEMENT OF FACTS

A. THE FAILURE OF REDISTRICTING IN MICHIGAN, 1963-2018

The importance of the ICRC's work is illustrated by the last 55 years of failed redistricting in Michigan. The ICRC must succeed and the relief sought by the Petition is necessary to that

[1] Counsel for *Amicus Curiae* is the sole author of this entire brief which was funded entirely by *Amicus Curiae*. Neither undersigned counsel nor any other party or *Amicus Curiae* made a monetary contribution to fund the preparation or submission of this brief.

success.

As Justice Brandeis observed, a "State may, if its citizens choose, serve as a laboratory,"[2] giving rise to the concept of states as "laboratories of democracy." Michigan's "laboratory of democracy" has experimented with various non-judicial means of redistricting under its current Constitution since its 1963 adoption.[3] All have failed, yielding partisan deadlock and gerrymanders and often necessitating this Court and the federal courts to order plans. The Independent Citizens Redistricting Commission is intended to be the antidote to that failure by producing fair plans in a transparent process.

Under the original 1963 Constitution an 8-member Commission on Legislative Apportionment ("CLA") appointed by the Republican and Democratic parties and equally divided between them was tasked with legislative redistricting.[4] In the 1960's, 1970's, and 1980's the CLA deadlocked requiring this Court to decide upon 6 legislative plans for the State Senate and State House during those 3 decades.[5]

After the CLA was rendered inoperative by this Court in 1982 on nonseverability grounds,[6] the legislative redistricting process shifted to the Legislature and Governor. They deadlocked in

[2] *New State Ice Co v Liebmann*, 285 US 262, 311; 52 S Ct 371; 76 L Ed 747 (1932) (Brandeis, J., dissenting).

[3] For a short history of the malapportionment of Michigan prior to the one-person, one-vote revolution of the 1960's, *see* Sachs, *Scholle v Hare – The Beginnings of One Person – One Vote*, 33 Wayne L Rev 1605 (1987).

[4] Mich Const 1963 Art 4, §6 (as adopted).

[5] *In re Apportionment of State Legislature – 1964*, 373 Mich 250; 128 NW2d 722 (1964); *In re Apportionment of State Legislature*, 376 Mich 410; 137 NW2d 495 (1965); *In re Apportionment of State Legislature – 1965-1966*, 377 Mich 396; 140 NW2d 436 (1966), *app dism'd sub nom Badgley v Hare*, 385 US 119 (1966); *In re Apportionment of State Legislature – 1972*, 387 Mich 442; 197 NW2d 249 (1972); *In re Apportionment of State Legislature – 1982*, 413 Mich 96; 321 NW2d 565 (1982) (*per curiam*), *appeal dismissed*, 459 US 900 (1982); *see also Anderson v Oakland County Clerk*, 419 Mich 142; 350 NW2d 232 (1984).

[6] *In re Apportionment of State Legislature – 1982*, *supra.*

1991 again requiring court-ordered plans for the State Senate and State House.[7] In 2001 and 2011, the Legislature and Governor produced 4 legislative plans – 2 State House and 2 State Senate – all of which were partisan gerrymanders[8] and led to more litigation as well.[9]

While this failure, turmoil, and litigation engulfed the creation of legislative plans from the 1960's through the 2010's, the federal courts were similarly reluctantly drawn into the Congressional redistricting process. From the 1970's through the 1990's the Legislature and Governor deadlocked on Congressional plans leading to federal court-ordered plans.[10] The 2001 and 2011 Congressional plans were enacted by the Legislature and Governor but were partisan gerrymanders,[11] and produced other litigation as well.[12]

Overall, in the last 6 decades Michigan has needed 3 redistricting plans – Congressional, State Senate, and State House – each decade for a total of 18 plans. The result during that period? Eleven (11) judicially ordered plans and 7 gerrymandered plans produced by the Legislature and Governor. During those 6 decades the CLA, the Legislature, and the Governor produced *no plans* which weren't partisan gerrymanders.

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[7] *In re Apportionment of State Legislature – 1992*, 439 Mich 251; 483 NW2d 52 (1992) and 439 Mich 715; 486 NW2d 639 (1992).

[8] *See Benson*, *supra* (finding 34 legislative and Congressional districts in the 2011 plans were partisan gerrymanders); Center for Michigan, *Re-Drawing Michigan* at 12-13 (2011) (describing Republican gerrymandering of the 2001 legislative plans).

[9] *See NAACP v Snyder*, 879 F Supp 2d 662 (ED MI 2012) (3-judge court) (dismissing VRA claims against State House plan); *O'Lear v Miller*, 222 F Supp 2d 862 (ED MI 2002) (3-judge court), *aff'd*, 537 US 997; 123 S Ct 512; 154 L Ed 2d 391 (2002) (dismissing partisan gerrymandering claim against both legislative plans).

[10] *Dunnell v Austin*, 344 F Supp 210 (ED MI 1972); *Agerstrand v Austin*, No 81-40256 (ED MI unpublished opinion 1982) (3-judge court); *Good v Austin*, 800 F Supp 557 (ED & WD MI 1992) (3-judge court). There was a legislatively adopted congressional plan in effect from 1964 until 1972, but it was tainted by allegations of partisan gerrymandering. *See Dunnell, supra*, 344 F Supp at 217.

[11] *See* note 8, *supra*.

[12] *See LeRoux v Secretary of State*, 465 Mich 594; 640 NW2d 849 (2002) (denying review of 2001 congressional plan).

It was against this history of a failed apportionment commission controlled by the Democratic and Republican Parties, failure by the Legislature and Governor to enact plans, partisan gerrymandering by the Legislature and Governor in 1964, 2001, and 2011, and 55 years of serial judicial intervention required to draw plans that the voters of Michigan in 2018 created a new Independent Citizens Redistricting Commission. Learning from the failures of the past the new ICRC excludes the Legislature and Governor from redistricting, is not controlled by the political parties or their agents, and has new safeguards against partisan gerrymandering.

Democracy in Michigan is dependent on this latest attempt to solve the challenge of redistricting.

B. THE LEGAL CONFLICT CREATED BY THE UNPRECEDENTED DELAY IN THE AVAILABILITY OF FEDERAL DECENNIAL CENSUS DATA

The ICRC has the clear, exclusive, and nondelegable constitutional duty to adopt redistricting plans by November 1, 2021:

> (1) The commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house of representatives districts, and congressional districts.
>
> . . .
>
> (7) 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.
>
> . . .
>
> (19) *. . . 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.*

Mich Court 1963 art 4, § 6(1), (7), and (19) (emphasis added).

Normally, all of the provisions of Article 4, § 6 would work together harmoniously to produce the desired results. However the delayed release of the census date until late September,

2021 has created a conflict between ICRC's duty to adopt a redistricting plan and its duty to do so by November 1, 2021. The Petition seeks relief in the nature of mandamus – an order directing the ICRC how to perform its constitutional duties in light of the conflict between its constitutional duties. *See* Petition, Request for Relief.

ARGUMENT

THE COURT HAS THE JURISDICTION AND AUTHORITY TO RESOLVE THE CONSTITUTIONAL CONFLICT, THE REQUESTED RELIEF IS REASONABLE AND JUSTIFIED, AND THE COURT SHOULD GRANT THE RELIEF SOUGHT

I. THE RULES OF CONSTITUTIONAL ANALYSIS.

This Court has established several rules governing state constitutional analysis.

The text is the touchstone and in examining the text, the paramount rule of constitutional interpretation "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *People v Tanner*, 496 Mich 199, 223; 853 NW2d 653 (2014). When applying this principle of constitutional interpretation, "the people are understood to have accepted the words" used in a constitutional provision "in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.'" *Id* at 224 (citation omitted). As often cited, Justice Cooley described this rule:

> 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.

Federated Publications, Inc v Michigan State University Board of Trustees, 460 Mich 75, 85; 594 NW2d 491 (1999) (quoting 1 Cooley, Constitutional Limitations, at 81 (6th ed)) (emphasis original).

As part of this textual analysis and of particular importance in this matter every constitutional provision "must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Clerk v Lapeer Circuit Court*,

469 Mich 146, 156; 665 NW2d 452 (2003), unless there are conflict between provisions which must be resolved, *see, e g, Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631; 272 NW2d 495 (1978).

In addition to the text, the history of a constitutional provision, the circumstances of its adoption, and its purpose all may be used to ascertain the common understanding of the voters who adopted it. *See, e g, Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 60, 62, 75-83, 100-03 & nn 26, 33, 73, 76, 78, 86, 98, 101, 177, 187, 192; 921 NW2d 247 (2018) (consulting treatises, records of the 1907-08 and 1961-62 Constitutional Conventions, constitutional amendments, and history books).

Finally, in 1982 this Court unanimously held that in the legislative districting context:

> It is this Court's duty under Const 1963, art 6, § 1, providing for the exercise of the judicial power, *to determine what are the requirements of this constitution and to define the meaning of those requirements in specific applications*.

In re Apportionment – 1982, supra, 413 Mich at 114 (emphasis added).

II. ARTICLE 4, § 6(19) CREATED A MANDAMUS REMEDY TO ENFORCE THE COMMISSION'S DUTIES AND RESOLVE CONFLICTS BETWEEN THOSE DUTIES, MANDAMUS ACTIONS OVER WHICH THIS COURT HAS ORIGINAL JURISDICTION UNDER ARTICLES 4, § 6(19) AND 6, § 4.

This Court has long exercised original jurisdiction in redistricting matters, enforcing rights and resolving legal conflicts through mandamus. It has original jurisdiction here under Articles 4, § 6(19) and 6, § 4 to use the mandamus remedy created by Article 4, § 6(19) to resolve the conflict between the ICRC's constitutional duties.

A. *Article 4, § 6(19) Is Substantively Identical To Article 4, § 6, ¶8 Of The 1963 Constitution As Ratified And Should Be Interpreted The Same Way.*

The enforcement provision of Article 4, § 6(19) vests original jurisdiction in this Court to enforce the commission's duties in actions which sound in mandamus:

> 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.

Mich Const 1963 art 4, § 6(19) (emphasis added).

As the Court determined in *Citizens Protecting Michigan's Constitution, supra*, the ICRC is "materially similar" to the reapportionment commission created by the 1963 Constitution. 503 Mich at 55. Indeed, the enforcement provision regarding the ICRC are, save for eliminating a time limit on suing and on who can sue, identical to the 1963 enforcement provision:

> Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall reman such plan to the commission for further action if it fails to comply with the requirements of this constitution.

Mich Const 1963 art 4, § 6, ¶8 (as adopted). This Court's analysis in *Citizens Protecting Michigan's Constitution, supra*, found that under ¶8 this Court "would maintain the same general powers it wielded under the 1963 Constitution as ratified." *Id* at 99. With the textual changes those powers are *not* limited to post-enactment nor are they limited to litigation brought by an elector.

The drafters of the 2018 constitutional amendment are presumed to be aware of the history and interpretation of the provision they took from the 1963 Constitution, and to have intended the same for their work. *See, e g, Hall v Ira Township*, 348 Mich 402, 407; 83 NW2d 443 (1957). Therefore to ascertain the scope of this Court's power unless Article 4, § 6(19) it is necessary to examine the history and interpretation of its 1963 doppelganger as well as scope of the mandamus

remedy generally. That examination reveals that Article 4, § 6(19) vests this Court with original jurisdiction to provide relief in mandamus in redistricting cases where there are conflicts between laws and constitutions, including between provisions of the state constitution, exactly the situation presented by the Petition.

B. *Historically, This Court Exercised Original Jurisdiction To Resolve Legal Conflicts In Redistricting Matters Through Mandamus.*

In order to determine the meaning of Article 4, § 6, ¶8 of the 1963 Constitution it is necessary to begin with this Court's role in redistricting prior to the 1961-62 Constitutional Convention.

Since at least the Constitution of 1850 this Court has had the original jurisdiction to issue prerogative and remedial writs, including mandamus, quo warranto, procedendo, error, habeas corpus and others. *See* Mich Const 1850 art 6, § 3; Mich Const 1908 art 7, § 4; Mich Const 1963, art 6, § 4; 1961-62 Constitutional Convention Record at 3385 (address to the People regarding Article 6, § 4).

Unlike the United States Supreme Court, this Court has never held that legislative districting was non-justiciable. *Compare Colegrove v Green*, 328 US 549; 66 S Ct 1198; 90 LEd 1432 (1946) (districting non-justiciable under federal constitution). Instead this Court decided several original actions under the 1850 and 1908 Constitutions seeking mandamus relief in legislative districting. *See, e g, Scholle v Hare*, 360 Mich 1; 104 NW2d 63 (1960), *vacated*, 369 US 429 (1962), *on remand*, 367 Mich 176; 116 NW2d 350 (1962), *cert denied sub nom Beadle v Scholle*, 377 US 990 (1964); *Stenson v Secretary of State*, 308 Mich 48; 13 NW2d 202 (1949); *Stevens v Secretary of State*, 181 Mich 199; 148 NW 97 (1914); *Williams v Secretary of State*, 145 Mich 447; 108 NW 749 (1906); *Giddings v Blacker*, 93 Mich 1; 52 NW 944 (1892); *Board of Supervisors v Blacker*, 92 Mich 638; 52 NW 951 (1892).

In all of these cases, this Court resolved legal conflicts between the state constitution and districting plans adopted by the Legislature, or in the case of *Scholle* between a state constitutional amendment and the federal constitution. Prior to *Scholle*, based on separation of powers concerns this Court never ordered the Legislature to redistrict itself as a remedy in these mandamus proceedings instead employing more limited remedies. *See, e g, Williams, supra*; *Giddings, supra*; 1961-62 Constitutional Convention Record at 2014 (remarks of Delegate Hannah) ("When legislatures fail to reapportion there are no means to force action since the judiciary, under the separation of powers doctrine, has traditionally refused to mandamus legislatures.").[13]

Thus the state of the law as the 1961-62 Constitutional Convention began was that this Court had long exercised original jurisdiction in mandamus to resolve legislative redistricting conflicts between statutes and the state constitution and conflicts between state and federal constitutions, but it had refrained prior to *Scholle* from using mandamus against the Legislature to order redistricting.

C. *The 1961-62 Constitutional Convention Built Upon And Expanded This Court's Original Jurisdiction To Issue Writs of Mandamus To Resolve Legal Conflicts In Redistricting.*

The 1963 Constitution made a significant change in redistricting, moving it from the legislative and executive branches to a new bipartisan Commission on Legislative Apportionment ("CLA"). *See* Mich Const 1963 art 4, § 6 (as adopted). In 1963 the bipartisan commission was considered as innovative as the new ICRC was in 2018.

This change was intended to have several beneficial effects including expanding this Court's authority over redistricting because separation of powers concerns did not preclude it from

[13] This Court went further in its remedy in *Scholle* than it had previously in an order issued after Delegate Hannah spoke. This Court gave the Legislature a deadline to redistrict the State Senate, failing which the Court would act. *See* 367 Mich at 192.

directing the CLA in the performance of its duties. *See* 1961-62 Constitutional Convention Record at 2015 (remarks of Delegate Hannah, the Chair of the Committee on Legislative Organization) ("Failure of the commission to act or not to act in accordance with the principles established in the constitution can be remedied by action of the supreme court.").

Building on this Court's exercise of original jurisdiction in mandamus actions under the 1850 and 1908 Constitution cited *supra*, the Convention's judicial remedies proposal granted this Court original jurisdiction to exercise broad mandamus-type authority over the CLA in the performance of its duties:

> Upon the application of any qualified elector, the Supreme Court, in the exercise of original and final jurisdiction, shall direct the Secretary of State or the apportionment commission to perform their duties, or may review any final districting plan adopted by the apportionment commission and shall make orders to amend such plan if it fails to comply with the requirements of this Constitution: provided, that no such application shall be filed more than 60 days after the final publication.

Id at 2014. After further debate and amendment the final version was adopted by the Convention and the voters who ratified the 1963 Constitution, which took effect January 1, 1964:

> **Jurisdiction of supreme court on elector's application.**
>
> Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution.

Mich Const 1963, art 4, § 6, ¶8 (as adopted).[14]

The delegates to the Convention who drafted Article 4, § 6, ¶8 were aware of this Court's

[14] Because the CLA had 8 members divided between the political parties, this Court also became the tiebreaking mechanism under former Article 4, § 6, ¶7. We do not further address the Court's tiebreaking role because it's not relevant to the issues presented by the Petition.

historical use of mandamus in redistricting matters to resolve legal disputes. *See, e g,* 1961-62 Constitutional Convention Record at 2014 (remarks of Delegate Hannah). Far from repudiating or narrowing that use one of the reasons the delegates created a commission was so this Court could *expand* its authority to use mandamus without separation of powers concerns to compel the CLA to perform the Court duties in ways it could not compel the Legislature.[15]

Thus when the authors of the 2018 Proposal 2 copied former Article 4, § 6, ¶8 and when the voters adopted it, this Court's original jurisdiction over extensive mandamus remedies as to the CLA, including the resolution of legal conflicts, was revived in Article 4, § 6(19) as to the new ICRC.

D. *One Of The Purposes Of Mandamus Is To Resolve Legal Conflicts Between Statutes, Between Statutes And Constitutions, Between Constitutions, And Within Constitutions*

In addition to the Court's original jurisdiction to provide broad remedies in mandamus regarding the ICRC created by Article 4, § 6(19), case law establishes that one of the principal long-established purposes of mandamus is to resolve legal conflicts between statutes, between statutes and constitutions, between constitutions, and within constitutions.

Actions in mandamus based on this Court's original jurisdiction over writs under Article 6, § 4 or its predecessors have been used for over a century to resolve legal conflicts between redistricting laws and the state or federal constitution. *See, e g, LeRoux, supra* (mandamus action resolves claimed conflict between redistricting law and the state constitution and state law);

[15] In the brief time Article 4, § 6, ¶8 was in effect, 1964-1982, it was only used once – to invoke this Court's jurisdiction to review an adopted plan. *See, In re Apportionment, supra*, 376 Mich 410. This Court construed its authority broadly, allowing discovery and setting a deadline for the CLA to conclude its work on remand. *Id* at 438-40. This Court ultimately dismissed the challenge. *In re Apportionment, supra*, 377 Mich at 474. Between 1964 and 1982 there are no reported instances where Paragraph 8 was used to direct the CLA to perform its duties or to resolve conflicts between its duties.

Scholle, supra (mandamus action resolves claimed conflict between federal and state constitutions); *Stenson, supra*, (mandamus action resolves claimed conflict between redistricting law and state constitution); *Stevens, supra* (same); *Williams, supra* (same); *Giddings, supra* (same); *Blacker, supra* (same).

Actions in mandamus have also been used to resolve conflicts between provisions in the state constitution, as here. *See, e g, Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980) (*per curiam*) (mandamus action resolves conflict between a constitutional time limit designed to facilitate the election process and the constitutional right to ballot access for a proposal); *see also, e g, Legislature of State of California v Padilla*, 469 P3d 405, 408; 9 Cal 5th 867 (2020) (California Supreme Court adjusts redistricting deadlines under its jurisdiction and authority to issue relief in mandamus); *State ex rel Kotek v Fagan*, 484 P3d 1058; 367 Ore 803, 807-08 (2021) (same).

Thus, in addition to the broad original jurisdiction to employ mandamus granted by Article 4, § 6(19), this Court has exercised original jurisdiction under Article 6, § 4 to employ mandamus to resolve legal conflicts in redistricting, elections, and other matters.

E. *Summary: Article 4, § 6(19) Creates A Mandamus Remedy To Enforce The ICRC's Duties And Resolve Conflicts Between Those Duties, Mandamus Actions Over Which This Court Has Original Jurisdiction Under Article 4, § 6(19) And Article 6, § 4.*

For all these reasons, this Court has original jurisdiction under Article 4, § 6(19) and Article 6, § 4 over this Petition which essentially seeks a mandamus remedy to resolve a conflict between the ICRC's constitutional duties.

III. THE COURT HAS THE AUTHORITY TO PROVIDE THE REQUESTED RELIEF

There is no doubt that the Court has the authority to provide the requested relief. In addition to the broad authority which accompanies this Court's original jurisdiction, *supra*, there are

additional bases for its authority here.

First, this Court has exercised broad remedial authority in the area of redistricting. In June 1962 in an original action for mandamus in *Scholle*, this Court declared the existing 1908 state constitutional redistricting criteria and state senate districts unconstitutional and ordered extensive remedial relief:

> (1) That present sections 2 and 4 of article 5 of the Constitution of Michigan (1908). . . do as charged by plaintiff offend and therefore do fall before the equality clause of the Fourteenth Amendment. . . .
>
> (2) That no legislation exists in Michigan. . . under or by which candidates for the office of State senator may validly be elected for the biennial term commencing January 1, 1963.
>
> (3) That the primary election of candidates for the office of State senator, scheduled now in the hitherto constituted 34 senatorial districts of Michigan, for conduct on August 7, 1962, be and the same is restrained and enjoined by force of this Court's writ of mandamus. . . .
>
> (4) For the purpose of ensuring validity of all legislation. . . the presently constituted senate shall ensure from this date and until December 31, 1962, but not thereafter, function as a *de facto* body. . . .
>
> (5) That the governor and legislature be advised. . . that legislation is urgently required under and in pursuance of original sections 2 and 4 of said article 5, by which 32 senatorial districts of Michigan are arranged according to the number of inhabitants of the State as shown by the most recent United States census of Michigan. . . .
>
> (6) In event valid legislation. . . is not enacted with necessary immediate effect on or before August 20, 1962, the defendant secretary will apply forthwith to this Court for such instructions and orders as will enable him to call and conduct a State-wide primary election of candidates for the office of State senator on September 11, 1962, and as will enable him to call and conduct a State-wide election on November 6, 1962, of the necessary number of State senators. . . .
>
> (7) That jurisdiction of this cause be and is retained indefinitely, pending further order or orders, until the transition from invalid

> sections 2 and 4 of said article 5, to original sections 2 and 4 of said article 5, is fully accomplished and complete disposition of the involved subject matter is adequately provided.

367 Mich at 190-93.

Subsequently, in 1982 this Court *unanimously* held that in the districting context:

> 1. It is this Court's duty under Const 1963, art 6, § 1, providing for the exercise of the judicial power, *to determine what are the requirements of this constitution and to define the meaning of those requirements in specific applications.*
> . . .
>
> 7. It is this Court's responsibility to provided for the continuity of government by assuring that the people will be provide the opportunity to elect a lawfully apportioned Legislature in the 1982 election.

In re Apportionment – 1982, supra, 413 Mich at 114, 116 (emphasis added). This Court thus has the authority to "define the meaning" of the ICRC's duties and the November 1 deadline in the "specific application" presented by the Petition - late released census data.

While the Court could draw from this deep reservoir of redistricting authority from 1962 and 1982 to resolve the question presented by the Petition it can also draw on alternative sources of authority. Outside the redistricting context this Court has several times exercised its authority to resolve conflicts between state constitutional provisions, and it has resolved them in a variety of ways.

When this Court has to resolve conflicts between state constitutional amendments adopted at the same election it must use Article 12, § 2, ¶4 of the State Constitution. When it has to resolve conflicts between provisions enacted at different times, it has decided to resolve the conflict in favor of the later adopted provision. *See, e g, Kunzig v Liquor Control Commission*, 327 Mich 474, 480-81; 42 NW2d 247 (1950); *Romano v Auditor General*, 323 Mich 533, 539; 35 NW2d 701 (1949). When there is a conflict between general and specific provisions, the general provision

yields. *See, e g, Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-70; 272 NW2d 495 (1978).

When this Court has a conflict it can resolve based on whether provisions are mandatory or directory, it has recognized its *authority* to do so but in the only reported case declined to exercise that authority. *See People v Dettenthaler*, 118 Mich 595; 77 NW 450 (1898).

However, *Dettenthaler* is not only distinguishable from the current situation but has been undermined by a subsequent decision of this Court and does not prevent the Court from providing relief here.

Dettenthaler involved a substantive requirement for legislation – an enacting clause – which was allegedly missing from the law at issue and there was a factual dispute over whether the clause had been added. Concluding that the clause had not been added, the question was whether that clause was directory or mandatory, with the Court finding it mandatory. At issue here is a far more mundane requirement, simply an early deadline to adopt redistricting plans. *Dettenthaler* does not prevent this from treating the deadline as directory based on *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980) (*per curiam*). *Ferency* recognized that a constitutional deadline to be certified for the ballot was directory and could be temporarily suspended. *Id* at 602. In addition, it established the principle that an election-related deadline can be temporarily suspended if it prevents the exercise of a substantive constitutional right by a party which had done all it can to exercise that right. *Id* at 601-02.

The principles of *Ferency* apply here. The November 1 deadline is obviously election-related. It is intended to allow time for the necessary follow-up after plans are adopted so the next set of congressional and legislative elections can be held on time. The ICRC has been diligently carrying out its constitutional duty to adopt plans. But as in *Ferency*, through no fault of its own

due to events beyond its control, the ICRC will miss the November 1 deadline. *Ferency*, provides this Court with the authority to grant the relief requested in the Petition to temporarily suspend the November 1 deadline by deeming the deadline directory *in this instance and under these facts*.

IV. THE REQUESTED RELIEF IS REASONABLE, JUSTIFIED, AND SHOULD BE GRANTED.

The Petition seeks a modest extension of 86 days to adopt plans from November 1, 2021 until January 25, 2022. This is a reasonable request by any standard, will leave plenty of time for post-adoption events, including litigation, and should be granted.

First, by comparison the former Article 4, § 6 allowed the CLA 180 days to adopt plans after the release of census data. *See* Const 1963 art 4, § 6 ¶5 (as adopted). Were that provision in place, the ICRC would have until late March, 2022 to adopt plans, 2 months more then it seeks.

Second, January 25, 2022 is well before some plans have been adopted in the past without any delay in the subsequent elections. *See, e g, In re Apportionment – 1982, supra*, 413 Mich at 212 (Court adopted plans May 21st, August primaries held on schedule); *In re Apportionment – 1972*, 387 Mich at 458 (Court adopted plans May 4th, August primaries held on schedule); *In re Apportionment – 1964*, 373 Mich at 254 (Court adopted plans on June 22, 1964, August primaries held on time).

Next, other state Supreme Courts have concluded that an extension of deadlines is warranted by the circumstances here. *See Padilla, supra*; *Kotek, supra*.

Finally, the argument of the Michigan Senate in opposition to the Petition that the ICRC use only the non-tabulated legacy format census data to draw final plans without a deadline extension (Opening Brief at 4) betrays a fundamental misunderstanding of that data. The Census Bureau has warned that states use that data at their own risk:

> [G]iven the difficulty of using the data in this format, any state using

> legacy format summary redistricting data files would have to accept responsibility for how they process these files; whether correctly or incorrectly.

U.S. Census Bureau, *Statement on Release of Legacy Format Summary Redistricting Data File* (March 15, 2021). The use of *only* the legacy format data risks the ICRC violating the one-person, one-vote standard as well as all of the population-based criteria of Article 4, § 6 including compliance with the Voting Rights Act.

The ICRC is proceeding appropriately – using the legacy format data if possible to begin working on plans with final proposed plans to be based on the tabulated census data released in late September. *See* Petition ¶¶37-41; Petitioners' Supplemental Brief at 13-14.

The requested relief is reasonable, justified, and should be granted.

CONCLUSION AND RELIEF SOUGHT

For all these reasons, *Amicus Curiae* League of Women Voters of Michigan requests that the Court treat the Petition as a request for relief in the nature of mandamus and grant the requested relief.

Respectfully submitted,

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Dated: June 9, 2021

Proof of Service

The undersigned certifies that on June 9, 2021, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes