STATE OF MICHIGAN
IN THE SUPREME COURT

THE DETROIT NEWS, INC.,
DETROIT FREE PRESS, INC.
THE CENTER FOR MICHIGAN, INC. / BRIDGE MAGAZINE,
MICHIGAN PRESS ASSOCIATION,
LISA McGRAW,

Plaintiffs,

v.

INDEPENDENT CITIZENS REDISTRICTING COMMISSION,

Defendant.

Supreme Court No.

JURISDICTION:
Const 1963, art 4, §19

BRIEF IN SUPPORT OF EMERGENCY VERIFIED COMPLAINT

RELIEF REQUESTED BY DECEMBER 17, 2021

ORAL ARGUMENT REQUESTED

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BRIEF IN SUPPORT OF
EMERGENCY VERIFIED COMPLAINT

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JURISDICTION

The Court has original jurisdiction to direct the Independent Citizens Redistricting Commission to perform its duties. Const 1963, art 4, §6(19); MCR 7.306(B). Plaintiffs allege that the Commission has not performed its duties. The Court therefore has original jurisdiction to adjudicate this dispute.

QUESTIONS PRESENTED

The Constitution requires the Commission to hold all of its meetings in public and to publish proposed redistricting plans and any data and supporting material that it used to develop them. Const 1963, art 4, §6(9). The Commission has, however, held a closed meeting to review memoranda in aid of developing its proposed redistricting plans and has refused to release those memoranda and other supporting materials under claims of attorney-client privilege and work product protection.

Withheld Materials

I. Has the Commission violated Article 4, Section 6(9), of the Constitution by failing to publish the withheld materials to the public?

II. If so, should the Court issue writ of mandamus directing the Commission to publish the withheld materials?

III. Should the Court also issue a declaratory judgment that the Commission is required to publish all supporting materials it uses to develop proposed redistricting plans after developing at least one redistricting plan for each type of district?

Nonpublic Meeting

IV. Has the Commission violated Article 4, Section 6(10) of the Constitution by conducting business at a closed, nonpublic meeting?

V. If so, should the Court issue a writ of mandamus directing the Commission to publish the video recording of the closed meeting?

VI. Should the Court also issue a declaratory judgment that the Commission is required to hold all future meetings at which it conducts business in open, public meetings?

Under Rule 7.306(C)(2), Plaintiffs submit this brief in support of their Emergency Verified Complaint for an order directing the Independent Citizens Redistricting Commission (the "**Commission**") to perform its duties and for a writ of mandamus.

INTRODUCTION

In November 2018, dissatisfied with the secretive redistricting process that prevailed in Michigan for decades, voters amended Article 4, Section 6 of the Constitution (the "**Redistricting Amendment**"). This amendment transferred all power from the Legislature to a new redistricting commission to draw new state legislative districts and new congressional districts after each decennial census. Const 1963, art 4, §§6(1), 6(22). The touchstone of the Redistricting Amendment is transparency. The new commission is not only constituted of members of the public, but it must also conduct its business in public, with notice to the public, and give the public opportunities to aid and comment on its work. Const 1963, art 4, §§6(8)–6(12), 6(14)(b), 6(15)–6(17). Yet, on advice of counsel, the Commission has adopted rules that purport to let the commissioners meet in secret and has withheld several memoranda upon which they relied. Plaintiffs have been unable to persuade the commissioners to hold all meetings in public and to release the memoranda. Within only three weeks left in the period for public comment on the proposed redistricting plans—with intervening holidays—Plaintiffs, for themselves and the public, seek a writ of mandamus directing the Commission to comply with its constitutional duties.

STATEMENT OF FACTS

On October 27, the Commission voted to hold a nonpublic meeting to discuss two documents from one of its attorneys.[1] One document was a memorandum on the Voting Rights Act.[2] The other memorandum concerned the history of discrimination in Michigan

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[1] Commission Meeting Tr. 9–11 (Oct. 27, 2021), Exhibit 1.

[2] *Id.* at 9.

and its influence on voting.[3] After the vote, the Commission held a nonpublic meeting for about 75 minutes.[4] During the nonpublic meeting, the Commission discussed the two memoranda and how the contents of those memoranda would inform redistricting plans. Later that day, The Center for Michigan/Bridge Michigan and the Michigan Press Association asked the Commission's communications director for copies of the memoranda discussed during the nonpublic meeting.[5] He denied the request.[6]

Throughout the rest of November, Plaintiffs diligently sought access to the withheld memoranda from the Commission. Compl. Exh. 3, Press Letter at 2–3.

Efforts by The Center for Michigan / Bridge Michigan and the Michigan Press Association

On November 5, The Center for Michigan/Bridge Michigan and the Michigan Press Association asked the Commission's executive director and Commissioners Rothhorn and Szetela for copies of the memoranda. *Id.* at 2. The Commission's general counsel responded on November 12, stating that the Commission interpreted their request as a FOIA request and that the Commission would respond by December 2. *Id.* On December 1, the general counsel denied the request, citing the attorney-client privilege.[7]

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[3] *Id.*

[4] *Id.* at 11–12.

[5] Compl. Exh. 3, Letter from Julie Stafford, President of the Michigan Press Association, John Bebow, President of The Center for Michigan, Peter Bhatia, Editor of the *Detroit Free Press*, and Gary Miles, Editor and Publisher of *The Detroit News* and President of the Michigan Associated Press Media Editors, to Julianne V. Pastula, General Counsel to the Commission (Nov. 30, 2021) ("PRESS LETTER")

[6] *Id.*

[7] Compl. Exh. 9, Letter from Julianne V. Pastula, General Counsel to the Commission, to John Bebow, President for The Center for Michigan, and Lisa McGraw, Manager of the Michigan Press Association (Dec. 2, 2021). Although the text of the email bears the date December 2, the email metadata reflects that the email was sent on December 1.

***Efforts by* The Detroit News**

Also on November 5, *The Detroit News* sent a letter to Commission Chair Szetela asking her to (1) disclose the documents discussed during the nonpublic meeting and (2) conduct all of its meetings in public. *The Detroit News* has received no response to that letter. On November 16, it followed up, submitting a "FOIA request" per the Commission's Rule of Procedure 13.1.B. The Commission responded on November 19 extending its time to respond by 10 business days—*i.e.*, until December 9—"to determine whether the [Commission] possesses existing, nonexempt records responsive to the request."[8] Seeing as general counsel participated in the public meeting at which the memoranda were identified as supporting a nonpublic session, and also participated in the nonpublic session during which they were discussed, she plainly knew they existed, knew that she intended to assert the privilege, and knew this extension was unwarranted under the Commission's Rules of Procedure.

***Efforts by the* Detroit Free Press**

The *Detroit Free Press* also requested copies of the memoranda discussed at the nonpublic meeting on October 29. The Commission denied its request on November 23.[9]

The Commission has steadfastly maintained that it can withhold the memoranda under the attorney-client privilege. On November 24, members and representatives of the Plaintiffs met with the Commission's general counsel and legal counsel to request the release of the withheld documents. The Commission's counsel advised that the Commission would discuss that request at its December 2 meeting. Plaintiffs reaffirmed

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Plaintiffs do not wish to leave the Court with the misimpression that the general counsel waited to send the email until after the Commission's vote on December 2.

[8] Compl. Exh. 10, Email from Julianne V. Pastula, General Counsel to the Commission, to Craig Mauger, *The Detroit News* (Nov. 19, 2021).

[9] Compl. Exh. 6, Letter from Julianne V. Pastula, General Counsel to the Commission, to Clara Hendrickson, *Detroit Free Press* (Nov. 23, 2021).

their request for transparency in a November 30 letter to the Commission. On December 2, the Commission denied the request based on attorney-client privilege.

Opinion of the Attorney General

On October 28, 2021, Senator Ed McBroom (R–38) and Senator Jeff Irwin (D–18), submitted a bipartisan request to the Attorney General for an opinion on whether the Commission violated the Redistricting Amendment by entering a closed session on October 27, 2021. Senators McBroom and Irwin specifically referenced the two memoranda of October 14 and October 26.[10]

On November 22, 2021, the Attorney General issued Opinion No. 7317. She opined that, presuming the Commission met in closed session to discuss memoranda giving commissioner certain legal parameters and historical context that should be considered in developing, drafting, and adopting the redistricting plans, then the memoranda should be published under Article 4, Section 6(9), of the Constitution, and the discussion of such documents should be held at an open meeting. OAG, 2021, No. 7317 (Nov. 22, 2021).

The Attorney General's opinion, like Plaintiffs' efforts, failed to persuade the Commission to reverse course, publish the withheld documents, and commit to refrain from conducting further redistricting business at a closed session.

Harm to Plaintiffs and the Public

On November 12, the Commission published its proposed redistricting plan. This means that Plaintiffs and the public lost ***15 days*** (October 28–November 12) to review the withheld materials and comment before publication of the proposed plans during the six meetings the Commission held during that period. They lost ***20 additional days*** (November 13–December 2) because of the unwarranted "extensions" that the Commission claimed under FOIA.

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[10] Compl. Exh. 4, Letter from Senator Ed McBroom and Senator Jeff Irwin to the Attorney General (Oct. 28, 2021).

With the proposed redistricting plan published on November 12, the constitutionally mandated public comment period is set to elapse on December 27. On November 30, in anticipation of the Commission's next meeting on December 2, the corporate Plaintiffs sent a letter to the general counsel urging release of the withheld materials.[11] The same day, the Commission's attorneys sent a letter to the commissioners urging them not to release them.[12] On December 2, the Commission voted 7–5 against releasing the withheld materials and 8–4 against release the audio recording of the closed meeting.[13]

Within three business days, Plaintiffs came to this Court seeking a writ of mandamus to force the Commission to disclose the withheld materials. As of the filing of the Emergency Complaint, Plaintiffs and the public have been deprived of the opportunity to assess all of the information related to the Commission's business for a total of ***39 days*** (October 28–December 6) and deprived of ***24 days*** of the 45-day public comment period to review the materials and submit comments about them to the Commission.

STANDARDS OF REVIEW

"The purpose of a declaratory judgment is to enable the parties to obtain an adjudication of their rights before actual injuries or losses have occurred." *Detroit Base Coalition for Human Rights of Handicapped v Department of Social Servs*, 431 Mich 172, 191; NW2d 335 (1988). "The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to people." *Id.* A plaintiff seeking a declaratory judgment must show that

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[11] Compl. Exh. 3, Press Letter.

[12] Compl. Exh. 13, Letter from Julianne V. Pastula, General Counsel to the Commission, Katherine L. McKnight, Litigation Counsel to the Commission, David H. Fink, Local Counsel to the Commission, and Bruce L. Adelson, Voting Rights Act Counsel to the Commission, to the Commission (Nov. 30, 2021).

[13] Video of Commission Meeting 4:10:21–4:16:44 (Dec. 2, 2021), https://bit.ly/3EuGxPV.

(*i*) "a case of actual controversy" between the parties and (*ii*) the actual controversy is within the court's jurisdiction. MCR 2.605(A)(1); *League of Women Voters of Michigan v Secy of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters*, 506 Mich at 586. A case of actual controversy is within the Court's jurisdiction when "the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." MCR 2.605(A)(1); See *Allstate Ins Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993) (recognizing that if—among other things—"a court would not otherwise have subject matter jurisdiction over the issue before it," then the court would lack the authority to "declare the rights and obligations of the parties before it").

"The primary purpose of the writ of mandamus is to enforce duties created by law where the law has established no specific remedy and where, in justice and good government, there should be one." *Taxpayers for Mich Const Govt* v *Dept of Tech, Mgt & Budget*, —Mich—; —NW2d— (2021) (Docket No. 160660); slip op at 27 (citation omitted). To obtain the writ, a plaintiff must show that that (1) the plaintiff has a clear legal right to the performance of the specific duty to be enforced, (2) the defendant has a clear legal duty to perform the act; (3) the act is ministerial; and (4) no other adequate legal or equitable remedy exists that might achieve the same result. *Id.*

ARGUMENT

I. The Commission's withholding of supporting materials it used to develop redistricting plans is violating the Michigan Constitution and the Court should enter a declaratory judgment and writ of mandamus to cure the violation.

A. Plaintiffs have a clear legal right of access to the supporting materials that the Commission used to develop proposed redistricting plans.

A "clear, legal right is one clearly founded in, or granted by, law; [it is] a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty

of the legal question to be decide." *Nykoriak v Napoleon*, 334 Mich App 370, 374; 964 NW2d 895 (2020) (citation omitted).

The Constitution protects the public's right to participate in the redistricting process from the beginning of the process. Before the commissioners draft even one plan, the Commission must "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." Const 1963, art 4, §6(8). The Commission must "provide advance public notice of its meetings and hearings." *Id.* at §6(10). It must also "conduct its hearings in a manner that invites wide public participation throughout the state" and "use technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings." *Id.*

Everyone has the right to send the Commission "written submissions of proposed redistricting plans and any supporting materials," which submissions themselves are public records. *Id.* at §6(8). After the Commission develops "one proposed redistricting plan for each type of district," it must "publish the proposed redistricting plans and any data and supporting materials used to develop the plans." *Id.* at §6(9). And before the Commission votes to adopt a plan, it 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." *Id.* at §6(14)(b).

B. The Commission has a clear legal duty to publish all supporting materials upon which it relied, including the memoranda withheld on claims of privilege.

A clear legal duty exists when the defendant has a constitutional obligation to perform a specific act. Cf. *Barrow v City of Detroit Election Comm*, 301 Mich App 404, 412–13; 836 NW2d 498 (2013) (so holding where there was a statutory obligation to perform a specific act). The same constitutional clause that establishes Plaintiffs' right to review the supporting materials that the Commission used to develop the proposed redistricting plans also establishes the Commission's clear legal duty to publish those

materials for public inspection. Const 1963, art 4, §6(9). The Commission, however, has not publicly disclosed those materials. That failure is an unambiguous violation of a clear legal duty the Redistricting Amendment imposes on the Commission.

C. The Court should enter a declaratory judgment that confirms that the Redistricting Amendment *requires* the Commission to publicly disclose *all* supporting materials it uses to develop redistricting plans.

1. There is a case of actual controversy between Plaintiffs and the Commission regarding the Commission's constitutionally mandated duty to publicly disclose all materials it uses to develop redistricting plans.

A plaintiff seeking a declaratory judgment must—among other things—show that there is a "a case of actual controversy" between the parties. MCR 2.605(A)(1); *League of Women Voters*, 506 Mich at 586. "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters*, 506 Mich at 586. Here, Plaintiffs seek a declaratory judgment to preserve their constitutional rights to (*i*) access all the supporting materials the Commission used to develop redistricting plains and (*ii*) meaningfully weigh in on the proposed redistricting plans during the rapidly shrinking public comment period. Const 1963, art 4, §§ 6(9), 6(14)(b). Without a judgment, Plaintiffs'—and the public's—right to meaningfully participate in the redistricting process will be infringed. Thus, there is an actual controversy between Plaintiffs and the Commission.

2. The Court has jurisdiction over the actual controversy.

A plaintiff seeking declaratory judgment must also establish that the case of actual controversy is within the court's jurisdiction. MCR 2.605(A)(1); *League of Women Voters*, 506 Mich at 586. A case of actual controversy is within the Court's jurisdiction when "the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." MCR 2.605(A)(1); see *Allstate*, 442 Mich at 66 (recognizing that if—among other things—"a court would not otherwise

have subject matter jurisdiction over the issue before it," the court would lack the authority to "declare the rights and obligations of the parties before it"). The Constitution directs that the Court, "in the exercise of original jurisdiction, shall direct … the commission to perform [its] duties." Const 1963, art 4, §6(19). Accordingly, the controversy between the parties (*i.e.*, whether the Commission is failing to perform its constitutional duty by refusing to publicly disclose all materials it has used to develop redistricting plans), is within the Court's jurisdiction to adjudicate.

Accordingly, for the reasons given above, the Court should enter a declaratory judgment that clarifies and confirms that the Commission has a clear constitutional duty to publicly disclose all materials that it used to develop redistricting plans, including the materials enumerated in Paragraph 51 of the Complaint.

D. The Court should enter a writ of mandamus that orders the Commission to (*i*) immediately publicly disclose the withheld materials and (*ii*) publicly disclose any future materials it uses to develop redistricting plans.

As explained in Arguments I.A and I.B, *supra*, the Redistricting Amendment imposes a clear legal duty on the Commission to publicly disclose all supporting materials it used to develop redistricting plans, including the withheld materials. None of the likely arguments from the Commission relieve it of that clear legal duty.

1. The attorney-client privilege does not negate the Commission's clear legal duty to publicly disclose all supporting materials that it used to develop redistricting plans.

(a) The Commission's invocation of the attorney-client privilege—a creature of the common law—must yield to the higher authority of the Constitution.

The attorney-client privilege is a common law privilege. *Sterling v Keidan*, 162 Mich App 88, 92; 412 NW2d 255 (1987), citing *Passmore v Passmore's Estate*, 50 Mich 626, 627; 16 NW 170 (1883); MRE 501. It is not a constitutional right. *People v Joly*, —Mich App—; —NW2d— (2021) (Docket No. 354379); slip op at 5.

The common law is preserved only to the extent it is "not repugnant" to the Constitution. Const 1963, art 3, §7. See also *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 473; 952 NW2d 434 (2020) (holding that "both legislation and the common law are secondary to our Constitution); *Stout v Keyes*, 2 Doug 184 (Mich, 1845) (so holding when interpreting a similarly worded clause in Const 1835, Sched §2). Although the word "repugnant" has come to mean in common speech "something that provokes distaste or aversion," *Oxford English Dictionary* (3d ed), Sense 3, www.oed.com/view/Entry/163187, in the legal sense it means "inconsistent or irreconcilable with; contrary or contradictory to." *Black's Law Dictionary* (11th ed). See also *Oxford Lexico* ("in conflict with; incompatible with"), https://perma.cc/3Y66-L577. The privilege protects confidential communications between a client and an attorney made for the purpose of obtaining or giving legal advice. *In re Adams*, 494 Mich 162, 174 n12 (2013); *Stavale v Stavale*, 332 Mich App 556, 560; 957 NW2d 387 (2020). The Constitution therefore supersedes the attorney-client privilege whenever the confidentiality necessary to invoke it is inconsistent or irreconcilable with the Constitution.

At issue, then, is the intersection of the confidentiality element of the privilege with the Commission's duty to "conduct all of its business at open meetings," Const 1963, art 4, §6(10) . As the Attorney General persuasive opined, the Commission is plainly required to "conduct *all* of its business at open meetings, [not] *some* of its business." OAG, 2021, No. 7,317 (Nov. 22, 2021). "There is no broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions." *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994). The question, then, is what qualifies as the Commission's business.

In the parliamentary setting, "business" means "[t]he matters that come before a deliberative assembly for its consideration and action, or for its information with a view to possible action in the future." *Black's Law Dictionary* (11th ed). See also *Oxford English Dictionary* (3d ed), Sense 12a ("[w]ork that has to be done; matters demanding attention"), www.oed.com/view/Entry/25229. The matters that come before the Commission are

defined in the Constitution. The Commission exists to "develop," "propose," and "adopt a redistricting plan" for legislative and congressional districts. Const 1963, art 4, §§6(7), 6(9), 6(13), 6(14). It follows that the business of the Commission encompasses all matters related to the development, proposal, and adoption of redistricting plans.

The Commission's authority to establish nonsubstantive rules of practice and procedure does not empower it to authoritatively define the scope of its business. That is, after all, the "business" of the courts. *Makowski v Governor*, 495 Mich 465, 477; 852 NW2d 61 (2014), quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 178; 2 L Ed 60 (1803) ("it is the province and duty of the judicial department to say what the law is").[14] Even so, it is worth pausing here to note that the Commission has defined "redistricting matter" to mean "any matter on the subject of determining or revising state legislative and U.S. congressional district boundaries, or the redistricting-related activities of the Commission," while carving out the "organizational, administrative or operational work of the Commission not directly associated to the core activity of redistricting." ICRC Rules of Proc., Rule 1.2.F (Oct. 1, 2021), https://perma.cc/ PF5E-G4CD. The withheld memoranda certainly qualify as "matter on the subject of determining or revising … district boundaries" or the "redistricting-related activities of the Commission." [15]

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[14] Also cf. *People v Glass*, 464 Mich 266, 281; 627 NW2d 261 (2001) (holding that powers over practice and procedure do not extend to substantive law when interpreting a similar grant of power to this Court in Const 1963, art 6, §5).

[15] While on the topic of rules adopted by the Commission, it may contend that it has adopted the Freedom of Information Act as its rule of procedure for providing records to the public. While Plaintiffs do not quarrel with the Commission's power to adopt FOIA's procedure for making requests and responding to them, see, e.g., MCL 15.235(1)–(2), they do contend that it is beyond the Commission's authority to adopt FOIA's *substantive* provisions. For example, the definition of "public record" in FOIA is a legislative definition, not a constitutional one, MCL 15.232(i), and nothing in the Redistricting Amendment suggests that the electorate intended to graft into the Constitution the Legislature's policy choices behind that statutory definition. Consider also that FOIA also contains a list of

Because all of the Commission's business must occur in public, Const 1963, art 4, §6(10), its receipt and consideration of legal advice related to the development, proposal, and adoption of redistricting plans must also occur in public. Since the attorney-client privilege facilitates confidential communications, yet the Constitution requires the business of the Commission to be conducted at nonconfidential open meetings, it would be repugnant to the Constitution to allow the Commission to receive privileged memoranda from counsel on matters related to the development, proposal, and adoption of redistricting plans.

From the titles of the memoranda currently known to be withheld, it is evident that the subject-matter of each (if not all) of them relates to the development of redistricting plans.[16] For example, memoranda titled *Voting Rights Act* and *One Person, One Vote and*

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exemptions from disclosure. MCL 15.243. Those are legislative policy choices, not constitutional mandates. The Redistricting Amendment contains no language expressly or impliedly allowing the Commission to withhold any records from the people.

Moreover, the adoption of the Redistricting Amendment was a rebuke of how the Legislature handled redistricting in the past; it took power away from that body and prohibits legislators from interfering with the Commission's work. One would be hard pressed to conclude that the "great mass of the people" would have understood the Redistricting Amendment to constitutionalize FOIA, incorporating "jot for jot, bag for baggage" all of FOIA's definitions and exemptions without ever once referencing that statute. See *Frey v Dept of Mgt & Budget*, 429 Mich 315, 334; 414 NW2d 873 (1987) (the "common understanding rule" requires courts to "interpret the constitution as the great mass of the people would"). See also *In re House of Reps Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 243, 270–71 (2019) (CLEMENT, J., concurring; VIVIANO, J., dissenting) (both applying the common understanding rule as stated in *Frey*); 1 Cooley, Constitutional Limits (6th ed), p 81 ("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").

[16] See Compl. Exh. 3, Press Letter, p 1 n 1. For convenience, the titles of the memoranda are reproduced here: *Guidance on Subsection 11 of Article IV, § 6 of the Michigan Constitution—Commission Communications with the Public* (Jan. 21, 2021); *MICRC Litigation Options to Address Delay of Census Data* (Mar. 2, 2021); *Update on Michigan Supreme Court Petition and Next Steps* (May 25, 2021); *One Person, One Vote and Acceptable*

Acceptable Population Deviations are plainly related to the Commission's business when the first ranked criterion for mapmaking is compliance with the equally populated districts mandated by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and other federal laws, including the Voting Rights Act, which is mentioned by name: "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." Const 1963, art 4, §6(13)(a). So too memoranda titled *Redistricting Criteria* and *Legal Considerations and Discussion of Justifications re: Criteria* are surely related to the Commission's work when the Redistricting Amendment requires it to "abide by" specified "criteria in proposing and adopting each plan." Const 1963, art 4, §6(13). Likewise, a memorandum titled *The History of Discrimination in the State of Michigan and its Influence on Voting* is naturally related to Commission business. The Redistricting Amendment makes the third ranked criterion for mapmaking "districts [that] reflect the state's diverse population and communities of interest." Const 1963, art 4, §6(13)(c). Commissioners would naturally want to understand the effects of historical discrimination on voting rights to avoid drawing maps that would propagate past wrongs.[17] Finally, the *Memorandum Concerning Subsections 9 and 14 of Article IV, §6* facially relates to the Commission's redistricting work. Subsection 9 requires the Commission to publish proposed plans and the data and

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Population Deviations (Jun. 24, 2021); *Legal Considerations and Discussion of Justifications re: Criteria* (Oct. 7, 2021); *Voting Rights Act* (Oct. 14, 2021); *The History of Discrimination in the State of Michigan and its Influence on Voting* (Oct. 26, 2021); *Memorandum Regarding Renumbering of Electoral Districts* (Nov. 3, 2021); *Redistricting Criteria* (Nov. 4, 2021); *Memorandum Concerning Subsections 9 and 14 of Article IV, §6* (Nov. 7, 2021).

[17] See, e.g., Rhein, *Michigan Independent Redistricting Commission Aims to be Open and Transparent*, WDET Detroit Today (Jun. 17, 2021) ("[Commissioner Brittni] Kellom says the commission aims to fairly represent communities who've historically been left out of redistricting decisions. "The [Voting Rights Act] is something that is definitely ingrained in our thought process. We want to make sure we are not revictimizing those folks who have been disenfranchised"), https://perma.cc/4AGA-D6MX.

supporting material used to develop them, and to solicit comments on them from the public over at least five public hearings throughout the State. *Id.* at §6(9). Subsection 14 establishes the procedure by which the Commission adopts a final plan. *Id.* at §6(14).

The remaining memoranda may or may not sufficiently relate to the Commission's business of developing, proposing, and adopting redistricting plans so as to require their release in light of the Repugnancy Clause. That can only be determined by an *in camera* review by the members of this Court. Because it is reasonably likely that they do relate to the business of redistricting, the Court should review them *in camera*. *In re Costs & Atty Fees*, 250 Mich App 89, 100–01; 645 NW2d 697 (2002) (holding that an *in camera* review is the appropriate vehicle to determine whether information is protected by a privilege);[18] *Koster* v. *June's Trucking, Inc*, 244 Mich App 162, 172; 625 NW2d 82 (2000) (remanding for *in camera* review when it was determined that the records at issue "could" be privileged but where the state of the record left the court unable to determine if they were).

(b) Even if the constitutional barrier were not present, the Commission had already waived the attorney-client privilege on the subjects covered by the two memoranda.

It is well established that the attorney-client privilege is "the client's alone and may only be waived by the client." *Grubbs v KMart Corp*, 161 Mich App 584, 590; 411 NW2d 477 (1987). A client may waive the privilege by "conduct which implies a waiver of the privilege or a consent to disclosure." *In re Columbia/HCA Healthcare Corp Billing Pracs Litig*, 293 F3d 289, 294 (CA 6, 2002). "[T]he attorney-client privilege can be waived by conduct such as partial disclosures which would make it unfair for a client to invoke the privilege elsewhere." *Henry* v *Quicken Loans, Inc*, 263 FRD 458, 465 (ED Mich, 2008) (citing McCormick, Evidence (6th ed), §93).

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[18] *In re Costs and Attorney Fees* incorrectly refers to the attorney-client privilege as a statutory privilege, but the statutory or common law nature of a privilege does not alter the appropriateness of an *in camera* review to determine whether records are privileged.

On June 15 and July 9, Bruce Adelson, the Commission's Voting Rights Act counsel, discussed the Voting Rights Act, race, and redistricting with the Commission during open meetings and gave legal advice on those subjects.[19] At both meetings, he used a PowerPoint presentation, both of which are on the Commission's website.[20] As Commissioner Szetela confirmed at the Commission's meeting on December 2, the withheld memoranda from the nonpublic meeting on October 27 covered the same topics and were from the same attorney.[21] Because the information and advice that the Commission received from Mr. Adelson on the Voting Rights Act, race, and redistricting was never confidential (*i.e.*, the Commission received it publicly at the June and July open meetings), the Commission forfeited its option to have the attorney-client privilege shield information and advice on the same subjects from the same attorney at the later nonpublic meeting in October. Cf. *United States v Collis*, 128 F3d 313, 320 (CA 6, 1997) ("The scope of the waiver turns on the scope of the client's disclosure, and the inquiry is whether the client's disclosure involves the same 'subject matter' as the desired testimony.").

2. The work-product doctrine does not negate the Commission's clear legal duty to publicly disclose all supporting materials that it used to develop redistricting plans.

When the Commission met on December 2, its litigation counsel suggested—for the first time—that the work-product doctrine also protects the withheld memoranda from

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[19] Video of Commission Meeting 0:28:52–1:24:51 (Jun. 15, 2021), https://bit.ly/3oqjAYI; Video of Commission Meeting 0:18:51–1:49:38 (Jul. 9, 2021), https://bit.ly/3GgTSMf; Compl. Exh. 14, Commission Meeting Tr. 5–33 (Jul. 9, 2021).

[20] Adelson, *Redistricting and Race: The Voting Rights Act & U.S. Constitution for the Michigan Independent Citizens Redistricting Commission* (Jun. 16, 2021), https://perma.cc/ D86J-DXHV; Adelson, *The Law of Redistricting, DOJ, and Cautionary Tales* (Jul. 9, 2021), https://perma.cc/Q3V3-LW5G.

[21] Video of Commission Meeting 3:47:57–3:50:12 (Dec. 2, 2021), https://bit.ly/3EuGxPV.

disclosure.[22] The memoranda are not eligible for work-product protection, but even if they were, that doctrine must yield to the higher authority of the Constitution. Moreover, even if the memoranda qualified for the work-product privilege, the necessity exception would entitle Plaintiffs to access the memoranda.

(a) The Commission's invocation of the work-product privilege—a creature of the court rules—must yield to the higher authority of the Constitution.

Although "Michigan's civil work-product privilege may be traced to the common-law work-product privilege," *D'Alessandro Contracting Gp, LLC v Wright*, 308 Mich App 71, 84; 862 NW2d 466 (2014), it is now codified in MCR 2.302(B)(3)(a), *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 639; 591 NW2d 393 (1998).[23] The Redistricting Amendment unambiguously mandates that the Commission "*shall* publish the proposed redistricting plans and *any* data and *supporting materials* used to develop the plans." Const 1963, art 4, §6(9) (emphases added). When voters ratified this language, they left no room for the Commission to publicly disclose only *some* of the supporting materials that they used to develop redistricting plans. Accordingly, just as with the attorney-client privilege, the work-product doctrine does not negate the Commission's higher constitutional duty to publicly disclose the withheld memoranda.

(b) Even absent this constitutional barrier, the Commission's invocation of the work-product privilege still fails because (*i*) the withheld materials were not prepared in anticipation of litigation and (*ii*) the necessity exception applies.

The work-product doctrine applies only to documents prepared in anticipation of litigation or for trial. MCR 2.302(B)(3)(a). The Commission's counsel has reportedly

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[22] Video of Commission Meeting 3:29:06–3:29:16 (Dec. 2, 2021), https://bit.ly/3EuGxPV.

[23] If the work-product privilege's protection still flows from the common law, the Commission's invocation of it fails for the same reasons as the invocation of the attorney-client privilege (a creature of the common law). See Argument I.D.1(a), *supra*.

taken the position that redistricting is so contentious that the Commission is bound to be sued no matter which map they adopt; therefore, everything counsel prepares for the Commission is work product. Although it does not appear Michigan courts have dealt with such a sweeping assertion of an "anticipation" of litigation, federal courts have consistently rejected it. "The abstract possibility that an event might be the subject of future litigation will not support a claim of privilege." *Resident Advisory Bd v Rizzo*, 97 FRD 749, 754 (ED Pa, 1983). See also *Horn & Hardart Co v Pillsbury*, 888 F2d 8, 12 (CA 2, 1989) ("[t]he work product doctrine protects 'an attorney's mental impressions, opinions or legal theories *concerning specific litigation* from disclosure'"), quoting *Grumman Aerospace Corp v Titanium Metals Corp*, 91 FRD 84, 88 (EDNY, 1981).[24]

Additionally, even if we suppose—for the sake of argument—that the withheld memoranda were protected under the work-product doctrine, the necessity exception applies. When a party seeking the materials has a substantial need for them and is unable and without undue hardship to obtain the substantial equivalent of the materials by others in preparation of the case, production of fact work product is appropriate.[25] MCR 2.302 (B)(3)(a). See also *Messenger*, 232 Mich App at 644 (recognizing that "to obtain pretrial

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[24] See also *Myers Controlled Power, LLC v Daily Express, Inc*, unpublished opinion of the United States District Court for the Northern District of Ohio, issued May 22, 2009 (Case No. 08-cv-2222); 2009 WL 10689009, at *8 ("[g]enerally, documents prepared in the ordinary course of business, *without a tie to specific litigation*, are not protected by work product immunity," and noting that the omnipresent risk of litigation in modern society "does not, by itself, cloak materials with work product immunity" (emphasis added); *Amway Corp v Procter & Gamble Co*, unpublished opinion of the United States District Court for the Western District of Michigan, issued April 3, 2001 (Case No. 98-cv-726); 2001 WL 1818698, at *6 ("The failure to specify the litigation for which documents were reportedly created is fatal to a claim of work-product protection. As a necessary corollary, when [documents clearly] would have been prepared independent of any anticipation of use in litigation (*i.e.*, because some other purpose or obligation was sufficient to case them to be prepared), no work product can attach" (cleaned up)).

[25] Deliberative work product cannot be invaded. *Augustine*, 292 Mich App at 421.

discovery of an opposing party's work product, the requesting party must demonstrate both substantial need and undue hardship"). These showings are satisfied "where the moving party establishes that the work product cannot be otherwise obtained and that the work product would be useful to the moving party." *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 655; 385 NW2d 296 (1986).

There is no other way to obtain the disputed materials from the Commission. The Commission has repeatedly refused requests to release them. A writ of mandamus—and the overriding of any applicable work-product protection—is the only way to obtain the disputed materials, which are needed so that Plaintiffs and the public can meaningfully weigh in on the proposed redistricting plans during the vanishing public comment period. Const 1963, art 4, §6(14)(b). And "meaningful public participation in the redistricting process" is the heart of the Redistricting Amendment. *Id.* at §6(10). Accordingly, even if the Commission's invocation of the work-product doctrine could clear the constitutional hurdle and the "anticipation of litigation" hurdle, it would still fail because Plaintiffs have a substantial need for the disputed materials and cannot obtain the substantial equivalent of the disputed materials by other means.

3. Plaintiffs have a clear legal right to have the Commission publicly disclose all supporting materials it used to develop redistricting plans.

As explained in Arguments I.A and I.B, *supra*, Plaintiffs have a clear legal right to have the Commission publicly disclose all supporting materials it used to develop redistricting plans. Accordingly, Plaintiffs satisfy this requirement for a writ of mandamus regarding the withheld materials.

4. The act of publishing all supporting materials used to develop redistricting plans is ministerial.

"A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of

discretion or judgment." *Nykoriak*, 334 Mich App at 374. The Redistricting Amendment unambiguously requires the Commission to publish with the proposed redistricting plans "any data and supporting materials used to develop the plan." Const 1963, art 4, §6(9). "Shall publish" leaves nothing to discretion or judgment. *Id.* Plaintiffs therefore satisfy the third element necessary to obtain the writ.

5. No other adequate legal or equitable remedy exists that might achieve the same result.

The Redistricting Amendment assigns to this Court the duty to direct the Commission to perform its duties. *Id.* at §6(19). Thus, by constitutional limitation, the exclusive power to grant relief lies with this Court. Unless this Court finds that a direct cause of action is sanctioned by the Constitution, there is no legal or equitable means to order the Commission to comply with its constitutional duties other than by a writ of mandamus. Plaintiffs therefore satisfy the fourth element necessary to obtain the writ.

II. The Commission violated the Michigan Constitution when it conducted business during its October 27, 2021 non-open meeting and the Court should enter a declaratory judgment and a writ of mandamus to cure the violation.

A. Plaintiffs have a clear legal right to observe and participate in the business of the Commission at public meetings.

The Redistricting Amendment repeatedly affirms that the public has a right to attend and participate in the Commission's business. Const 1963, art 4, §6(8) (requiring the Commission to hold at least 10 public hearings before drafting a proposed redistricting plan, and requiring the Commission to receive and consider proposed plans, data, and supporting materials from members of the public); §6(9) (requiring the Commission to hold at least five public hearings on proposed redistricting plans and any data and supporting materials used to develop the plans "for the purpose of soliciting comment from the public about the proposed plans"); §6(10) (requiring the Commission to "conduct all of its business at open meetings," to "provide advance public notice of its meetings and

hearings," and to "conduct its hearings in a manner that invites wide public participation throughout the state," including those the "use [of] technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings").

B. The Commission has a clear legal duty to conduct its business at meetings open to the public; it has no authority to hold meetings closed to the public.

There are no clearer statements of the Commission's duty to conduct all business in the open than what the people ratified in the Redistricting Amendment. "The commission shall conduct all of its business at open meetings." Const 1963, art 4, §6(10). "The commission shall provide advance public notice of its meetings and hearings." *Ibid.* "The commission shall conduct its hearings in a manner that invites wide public participation throughout the state." *Ibid.* And "[t]he Commission shall use technology to provide contemporaneous *public observation* and *meaningful public participation* in the redistricting process *during all meeting and hearings*." *Ibid.* (emphases added).

The Commission having a clear legal duty to hold its meetings open to the public, Plaintiffs satisfy the second element necessary to obtain a writ of mandamus directing the Commission to hold all meetings in public.

C. The Court should enter a declaratory judgment that confirms that the Constitution requires the Commission to conduct all of its business in open meetings.

1. There is a case of actual controversy between Plaintiffs and the Commission regarding the Commission's constitutionally mandated duty to conduct all of its business in public meetings.

A plaintiff seeking a declaratory judgment must show that there is a "a case of actual controversy" between the parties. MCR 2.605(A)(1); *League of Women Voters*, 506 Mich at 586. "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve [its] legal rights." *League of Women Voters*,

506 Mich at 586. Here, Plaintiffs seek a declaratory judgment to preserve their constitutional rights—as members of the public—to (*i*) "observation and meaningful public participation in the redistricting process during all meetings and hearings" and (*ii*) meaningfully weigh in on the proposed redistricting plans during the vanishing public comment period. Const 1963, art 4, §§ 6(10), 6(14)(b). Without the judgment, Plaintiffs'—and the public's—right to meaningfully participate in the redistricting process will be drastically undermined. Accordingly, there is an actual controversy between Plaintiffs and the Commission.

2. The Court has jurisdiction over the actual controversy.

A plaintiff seeking declaratory judgment must also establish that the case of actual controversy is within the court's jurisdiction. MCR 2.605(A)(1); *League of Women Voters*, 506 Mich at 586. A case of actual controversy is within the Court's jurisdiction when "the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." MCR 2.605(A)(1); See *Allstate*, 442 Mich at 66 (recognizing that if—among other things—"a court would not otherwise have subject matter jurisdiction over the issue before it," the court the court would lack the authority to "declare the rights and obligations of the parties before it"). The Constitution directs that the Court, "in the exercise of original jurisdiction, shall direct … the commission to perform [its] duties." Const 1963, art 4, §6(19). Accordingly, the controversy between the parties (i.e., whether the Commission violated its mandatory constitutional duty to conduct all of its business in open meetings), is within the Court's jurisdiction to adjudicate.

For the reasons given above, the Court should enter a declaratory judgment that clarifies and confirms that the Commission has a clear constitutional duty to conduct all of its business in open meetings that the public can contemporaneously observe and participate in meaningfully.

D. The Court should enter a writ of mandamus that orders the Commission to (*i*) conduct *all* of its future business in open meetings and (*ii*) immediately disclose to the public the recording of all nonpublic meetings.

1. The Commission has a clear legal duty to conduct *all* of its business at open meetings.

As explained in Arguments II.A and II.B, *supra*, Article 4, Section 6(10), of the Constitution imposes a clear legal duty on the Commission to conduct ***all*** meetings in public. The Commission must conduct all of its business at meetings, and all of its meetings must be open to the public. Const 1963, art 4, §6(10) (requiring the Commission to "conduct all of its business at open meetings," and requiring the Commission to "use [of] technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings"). Accordingly, Plaintiffs satisfy this requirement for a writ of mandamus.

2. The Commission's invocation of the Open Meetings Act does not relieve it of its clear legal duty to conduct all of its business in open meetings.

The Redistricting Amendment plainly commands that the Commission "shall conduct all of its business at open meetings," Const 1963, art 4, §6(10), and no clause in the amendment authorizes it to conduct any business in secret. Nevertheless, the Commission takes the view that it can meet in secret so long as it complies with the Open Meetings Act. The Commission is incorrect.

The Commission has the power to adopt certain procedural provisions in the OMA to govern notice and regulation of Commission meetings, but it lacks the authority to adopt *substantive* OMA provisions. The allowance for closed sessions in the OMA is a legislative balancing of interests; it is not constitutional in nature. As with FOIA, nothing in the Redistricting Amendment suggests that the electorate chose to graft into the Constitution the Legislature's policy choices for *closed* meetings when expressly providing that the Commission must "conduct all of its business *at open meetings*." The "great mass of the

people" would not have understood the Redistricting Amendment to constitutionalize the OMA any more than FOIA, incorporating all of the OMA's closed meeting provisions without ever once referencing that statute. See *Frey*, 429 Mich at 334; *In re House of Reps*, 936 NW2d at 243, 270–71 (CLEMENT, J., concurring; VIVIANO, J., dissenting); 1 Cooley, Constitutional Limits (6th ed), p 81.

Plaintiffs further contend, like the Attorney General, that the Commission's reliance on OMA is essentially the inverse of *Federated Publications, Inc v Trustees of Michigan State University*, 460 Mich 75; 594 NW2d 491 (1999). See OAG, 2021, No. 7317. There, the Michigan State University's presidential selection procedure was challenged under the OMA. *Id.* at 78. The Court noted that "formal sessions" of the governing boards "shall be open to the public" under Const 1963, art 8, §4. *Id.* at 84. Tracing the origin of this clause to the public and the press struggling to gain access to meetings of university governing boards, the Court interpreted the reference to "formal" sessions as giving constitutionally chartered universities the right to conduct some business "informally" in a nonpublic setting. *Id.* at 90. Therefore, applying the OMA to the university presidential search process would impermissibly *narrow* the governing board's constitutional power to decide for itself which meetings to hold formally and which to hold informally. *Id.* at 88–92. Here, in contrast, allowing the Commission to apply OMA would impermissibly *expand* the commissioners' power by allowing them to hold closed meetings that are not otherwise authorized under the Redistricting Amendment.[26]

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[26] Even assuming arguendo that the closed meeting provisions in OMA applied to the Commission, OMA only permits closed meetings for specific pending litigation. MCL 15.268 (e). Further, oral legal opinions cannot be given during a closed meeting. *People v Whitney*, 228 Mich App 230, 246; 578 NW2d 329 (1998). It would also be improper to invoke, as here, the attorney-client privilege to "merely" obtain "a written opinion from an attorney in the substantive discussion of a matter of public policy for which no other exemption in the OMA would allow a closed meeting." *Id.* at 246–47. The "proper discussion of a written legal opinion is limited to the meaning of any strictly legal advice presented in

3. Plaintiffs have a clear legal right to have the Commission conduct all of its business in open meetings.

As explained in Arguments II.A and II.B, *supra*, Plaintiffs have a clear legal right to have the Commission conduct all of its business in open meetings. Accordingly, Plaintiffs satisfy this requirement for a writ of mandamus regarding this constitutional violation.

4. The act of conducting all of business in open meetings is ministerial.

As noted earlier, a "ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Nykoriak*, 334 Mich App at 374. The Redistricting Amendment unambiguously commands that the Commission "shall conduct *all* of its business at open meetings." Const 1963, art 4, § 6(10) (emphasis added). The terms "shall" and "all" leave no room for the Commission to exercise discretion or judgment on whether to conduct any of its business in secret. Accordingly, the act of conducting all of the Commission's business in open meetings is ministerial and Plaintiffs satisfy the third element to obtain the writ.

5. No other adequate legal or equitable remedy exists that might achieve the same result.

As noted earlier, the exclusive power to grant relief lies with this Court. See Argument I.D.5, *supra*. Unless the Court concludes that a direct cause of action is sanctioned by the Constitution, there are no other legal or equitable means available to compel the Commission to comply with the open meeting requirement in the Redistricting Amendment. Plaintiffs therefore also satisfy the fourth element necessary to obtain the writ.

[that] opinion." *Id.* at 247 (emphasis added). Thus, any discussion about how the legal written advice applies to the business of redistricting would be impermissible under the OMA.

CONCLUSION

Therefore, Plaintiffs respectfully ask the Court to grant the following relief:

1. Enter a declaratory judgment that the Commission has a mandatory duty under Article 4, Section 6(9), of the Constitution to publicly disclose all supporting materials it uses to develop redistricting plans;

2. Find that the Commission violated this constitutional duty by withholding the memoranda listed in the Complaint, and issue a writ of mandamus that orders the Commission to immediately publicly disclose the withheld materials;

3. Enter a declaratory judgment that the Commission has a mandatory duty under Article 4, Section 6(10) of the Constitution to conduct all of its business in open meetings; and

4. Find that the Commission violated this constitutional duty by holding a nonpublic meeting on October 27, 2021, and issue a writ of mandamus that orders the Commission to (*a*) immediately disclose to the public the recording of that meeting, and (*b*) conduct all of its future business at open meetings and not in closed session.

Respectfully submitted,

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Dated: December 7, 2021

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