

STATE OF MICHIGAN
IN THE SUPREME COURT

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

MSC No. 163823

Plaintiffs,

v.

INDEPENDENT CITIZENS
REDISTRICTING COMMISSION,

Defendant.

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DEFENDANT MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION'S ANSWER TO PLAINTIFFS' VERIFIED COMPLAINT

NOW COMES Defendant, the Michigan Independent Citizens Redistricting Commission, by and through its attorneys and for its answer to Plaintiffs' Verified Complaint hereby states as follows:

INTRODUCTION

1. In November 2018, dissatisfied with the secretive and politicized process for legislative redistricting that had prevailed in Michigan for decades, Michigan 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).

Admitted.

2. Transparency is the touchstone of the Redistricting Amendment. 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, the Commission has adopted rules that purport to let the commissioners meet in secret and to withhold several memoranda upon which they relied, on the basis that these meetings and memoranda purportedly contained communications subject to the attorney-client privilege. Plaintiffs have repeatedly requested the release of all materials related to the closed meeting and copies of the withheld memoranda. Despite these efforts, Plaintiffs being unable to persuade the commissioners to hold all meetings in public and to release the memoranda. With 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 declaration of the Commission's constitutional duties and a writ of mandamus directing the Commission to comply with those duties.

Defendant admits only that transparent decision-making is a “touchstone of the Redistricting Amendment” and that Plaintiffs have requested the legal memoranda identified in their Complaint. Defendant denies the remaining allegations in this paragraph because they are not true for the reasons explained in Defendant’s Brief. Defendant objects on the basis that the form of this allegation violates MCR 2.111(A)(1) because it is not “clear, concise, and direct.”

PARTIES

3. Plaintiff The Detroit News, Inc., a domestic corporation, owns and operates *The Detroit News*, Michigan’s second largest daily newspaper and one of the State’s longest operating newspapers. Its principal office is located at 160 West Fort Street, Detroit, Michigan 48226.

Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3.

4. Plaintiff Detroit Free Press, Inc., a domestic corporation, owns and operates the *Detroit Free Press*, Michigan’s largest daily newspaper and news site. Its principal office is located at 160 West Fort Street, Detroit, Michigan 48226.

Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4.

5. Plaintiff The Center for Michigan, Inc. / Bridge Michigan is a domestic nonprofit corporation and nonpartisan news organization. Its registered address is 4100 North Dixboro Road, Ann Arbor, Michigan 48105.

Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5.

6. Plaintiff Michigan Press Association is the official trade association for more

than 280 print and digital newspapers in Michigan. Its principal office is 827 North Washington Avenue, Lansing, Michigan 48906.

Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6.

7. Plaintiff Lisa McGraw is a citizen of Michigan domiciled in Harrison Township, a municipality in Macomb County. She is the public affairs manager for the Michigan Press Association.

Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7.

8. Defendant Independent Citizens Redistricting Commission (the “Commission”) is a permanent commission in the legislative branch of government. Const 1963, art 4, §6(1).

Admitted.

JURISDICTION

9. The Court has original subject-matter jurisdiction over this action under Article IV, Section 19, of the Michigan Constitution of 1963.

Defendant denies the allegation that this Court has original subject-matter jurisdiction under “Article IV, Section 19, of the Michigan Constitution of 1963” because it is not true. By way of further answer, Defendant admits that this Court has original subject-matter jurisdiction over this action under Const 1963, art 4, § 6(19).

10. The Court also has subject-matter jurisdiction under Section 217(3) of the Revised Judicature Act, MCL 600.217(3), and Michigan Court Rules 3.301(A)(1)(c) and (g) and Michigan Court Rule 3.305(A)(2).

Admitted as to MCL 600.217(3), MCR 3.301(A)(1)(c), and MCR 3.305(A)(2). Defendant denies as untrue that “MCR 3.301(A)(1)(g)” applies because it does not exist.

11. The Court has general jurisdiction over *The Detroit News*, *Detroit Free Press*, The

Center for Michigan, Inc. / Bridge Michigan, and Michigan Press Association under Section 711 of the Revised Judicature Act, MCL 600.711(1)–(3).

No contest.

12. The Court has general personal jurisdiction over Lisa McGraw under Section 701(3) of the Revised Judicature Act, MCL 600.701(3).

No contest.

13. The Court has general personal jurisdiction over the Commission under Section 2051(4) of the Revised Judicature Act, MCL 600.2051(4).

Admitted.

BACKGROUND

14. In 2017, Voters Not Politicians, a ballot proposal committee, filed an initiative petition to amend the Michigan Constitution. See *Citizens Protecting Michigan’s Constitution v Secy of State*, 324 Mich App 561 (2018). The proposal principally sought to amend the apportionment provisions in Article 4, Section 6, of the Constitution.

Admitted. By way of further answer, Defendant states that the Court of Appeals case cited was affirmed by the Michigan Supreme Court in *Citizens Protecting Michigan’s Constitution v Secretary of State*, 503 Mich 42; 921 NW2d 247 (2019).

15. Identified as Proposal 18-2 on the November 6, 2018 general election ballot, the proposal passed overwhelmingly. 2018 Michigan Election Results, available at <https://bit.ly/3y0WqLP>. The amendments became effective December 22, 2018. See Const 1963, art 12, §2.

Admitted.

16. The amendments established a commission—the Independent Citizens Redistricting Commission—charged with redrawing Michigan’s state senate, state house, and congressional districts according to specific criteria. Const 1963, art 4, §§ 6(1), (13). The

commissioners for this redistricting cycle were initially selected by a random draw on August 17, 2020. See *History made with selection of 13 commissioners to redraw election districts statewide* (Aug. 17 2020), <https://bit.ly/301cLTY>. One commissioner was randomly selected on October 21, 2020, to fill a vacancy. Const 1963, art 4, §6(3).

Admitted.

17. Under the Constitution, the Secretary of State was required to convene the Commission by October 15, 2020, which she did. The first meeting was held September 17, 2020. Const 1963, art 4, §6(7). Thereafter, the Commission was required “to hold at least ten public hearings throughout the state for the purpose of informing the public about the redistricting process . . . and soliciting information from the public about potential plans,” before the Commission may draft plans. *Id.*, § 6(8).

Admitted.

18. The Commission has a website where it posts meeting notices, agendas, minutes, transcripts and copies of materials presented and/or discussed at the meetings. ICRC Meeting Notices & Materials, <https://bit.ly/3pt5zZC>. The website also provides access to data, support materials and other information related to the redistricting process.

Admitted.

19. On October 27, 2021, the Commission conducted a noticed meeting from 3:17 pm to 5:26 pm located at the Michigan State University Union. Exhibit 1, Proposed Meeting Minutes, 1 (Oct. 27, 2021). The meeting began in open session, with the adoption of an agenda and hearing public comments, after which the Commission voted to go into closed session. *Id.* at 1–3.

Admitted.

20. The Commission met privately for about 75 minutes to discuss two memoranda

from one of its attorneys: a memorandum on the Voting Rights Act dated October 14, 2021, and a memorandum concerning the history of discrimination in Michigan and its influence on voting dated October 26, 2021. Exhibit 2, Commission Meeting Tr., 9–12 (Oct. 27, 2021). During this nonpublic meeting, the Commission, on information and belief, discussed how the contents of the memoranda (*i.e.*, the Voting Rights Act, discrimination in Michigan, and how that discrimination affects voting) would inform redistricting plans, thereby using these memoranda to develop proposed redistricting plans. 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>; Exhibit 14, Commission Meeting Tr. 5–33 (Jul. 9, 2021); Video of Commission Meeting 3:47:57–3:50:12 (Dec. 2, 2021), <https://bit.ly/3EuGxPV>. The Commission did not release the two memoranda to the public at the time of the meeting.

Defendant admits only that it held a closed session on October 27, 2021 to discuss two legal memoranda prepared as privileged and confidential attorney-client communications and work product, focused on Voting Rights Act compliance issues specific to the Commission’s work in Michigan. By way of further answer, the related privileged closed meeting is replete with questions a client would ask their attorney about how to comply with the law and candid answers and guidance by the Commission’s attorneys. Defendant admits only that it did not publicly release the memoranda at the time of the October 27, 2021 closed session. Defendant denies the remaining allegations contained in this paragraph because they are not true for the reasons more fully explained in Defendant’s Brief.

21. After the Commission’s nonpublic meeting on October 27, 2021, Plaintiffs Michigan Press Association and The Center for Michigan, Inc. / Bridge Michigan asked the Commission’s communications director for copies of the two memoranda that the Commission discussed during the nonpublic meeting. See Exhibit 3, Letter from Julie Stafford, President of the Michigan Press Association, John Bellow, President of The Center for Michigan, Inc. / Bridge

Michigan, Peter Bhatia, Editor of the *Detroit Free Press*, and Gary Miles, Editor and Publisher of *The Detroit News*, to Julianne V. Pastula, General Counsel to the Commission (Nov. 30, 2021) (“PRESS LETTER”), p. 2. The Commission’s communications director denied the request. *Id.*

Admitted.

22. On October 28, 2021, Senator Ed McBroom and Senator Jeff Irwin asked the Attorney General to provide her opinion on whether the Commission, by entering a closed session on October 27, 2021, violated the Redistricting Amendment. The Senators specifically referenced the two memoranda of October 14 and October 26. Exhibit 4, Letter from Senator Ed McBroom and Senator Jeff Irwin to the Attorney General, 1 (Oct. 28, 2021).

Admitted.

23. On October 29, 2021, the *Detroit Free Press* formally requested copies of the memoranda discussed at the nonpublic meeting. Exhibit 5, Letter from Clara Hendrickson, Reporter for the *Detroit Free Press*, to Julianne V. Pastula, General Counsel to the Commission, 1 (Oct. 29, 2021). The Commission denied the request on November 23, 2021 and continued to assert that the documents were protected from disclosure by the attorney-client privilege. Exhibit 6, Letter from Julianne V. Pastula, General Counsel to the Commission, to Clara Hendrickson, Reporter for the *Detroit Free Press*, 1 (Nov. 23, 2021).

Admitted.

24. On November 5, 2021, the Michigan Press Association and The Center for Michigan, Inc. / Bridge Michigan asked the Commission’s Executive Director and Commissioners Rothhorn and Szetela for copies of the memoranda. Exhibit 7, Letter from Michigan Press Association and The Center for Michigan, Inc. / Bridge Michigan to Sue Hammersmith, Rebecca Szetela, & M.C. Rothhorn, 1–2 (Nov. 5, 2021). The Commission’s general counsel responded on November 12, 2021, that the Commission interpreted the request as a request for documents under the Freedom of Information Act and that it would answer the request on or before December 2, 2021. Exhibit 8, Email from Julianne V. Pastula, General Counsel to the Commission to the Michigan Press Association and The Center for Michigan, Inc. /

Bridge Michigan, 1 (Nov. 12, 2021). The Commission denied the request on December 2, 2021, claiming that the documents were “information or records subject to the attorney- client privilege and therefore exempt from disclosure under MCL 15.243(1)(g).” Exhibit 9, Letter from Julianne V. Pastula, General Counsel to the Commission, to John Bebow, President of The Center for Michigan, Inc. / Bridge Michigan, and Lisa McGraw, Public Relations Manager of the Michigan Press Association, 1 (Dec. 2, 2021, sent via email on Dec. 1, 2021).

1, 2021).

Admitted.

25. On November 5, 2021, *The Detroit News* also sent a letter to Commission Chair Szetela asking her to (1) disclose the documents discussed during the nonpublic meeting and (2) conduct all meetings in public. Exhibit 3, Press Letter at 2. *The Detroit News* received no response to that letter. *Id.* at 3.

Admitted.

26. On November 16, *The Detroit News* followed up with 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.” Exhibit 10, Email from Julianne V. Pastula, General Counsel to the Commission, to Craig Mauer, *The Detroit News* (Nov. 19, 2021). Since general counsel participated in the public meeting at which the memoranda were identified as supporting a nonpublic session, and also participated in the nonpublic meeting where 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 and would be perceived as bad faith delay.

Defendant admits only that it received a FOIA request from The Detroit News on November 16, 2021 and that the Commission responded on November 19, 2021, extending its time to respond by 10 business days in accordance with the plain language of MCL

15.235(2)(d). Defendant denies the remaining allegations in this paragraph because they are not true for the reasons more fully explained in Defendant's Brief.

27. Plaintiffs have learned that the Commission's attorneys have also given to the Commission at least eight additional memoranda that have not been released to the public:

- a. *Guidance on Subsection 11 of Art. IV § 6 of the Michigan Constitution ICRC Communications with the Public* (Jan. 21, 2021);
- b. *MICRC Litigation Options to Address Delay of Census Data* (Mar. 2, 2021);
- c. *Update on Michigan Supreme Court Petition and Next Steps* (May 25, 2021);
- d. *One Person, One Vote and Acceptable Population Deviations* (Jun. 24, 2021);
- e. *Legal Considerations & Discussion of Justifications re: Criteria* (Oct. 7, 2021);
- f. *Memorandum Regarding Renumbering of Electoral Districts* (Nov. 3, 2021);
- g. *Redistricting Criteria* (Nov. 4, 2021); and
- h. *Memorandum Concerning Subsections 9 and 14 of Art. IV, § 6* (Nov. 7, 2021).

Exhibit 11, Email from Julianne V. Pastula, General Counsel to the Commission, to Edward Woods III, Communications and Outreach Director of the Commission, 1 (Nov. 9, 2021). On information and belief, the Commission has also used these eight memoranda to develop redistricting plans.

Defendant admits only that it has received the listed legal memoranda from counsel on the dates specified and that the same have not been publicly released because they are protected by attorney-client privilege and/or the work-product doctrine. Defendant denies the remaining allegations contained in this paragraph because they are not true for the reasons more fully explained in Defendant's Brief.

28. The commission has withheld the two memoranda referenced in paragraph 20, the eight memoranda referenced in paragraph 27, and an unknown number of other records (the

“**Withheld Materials**”), despite using them to develop proposed redistricting plans, based on claims of attorney-client privilege.

Defendant admits only that it has withheld the referenced legal memoranda because the legal memoranda are protected from disclosure by attorney-client privilege and/or the work-product doctrine. Defendant denies the remaining allegations contained in this paragraph because they are not true for the reasons more fully explained in Defendant’s Brief.

29. On November 12, 2021, the Commission published its proposed redistricting plan.

Defendant admits that on November 12, 2021 it published its proposed redistricting plans, triggering the 45-day comment period pursuant to Const 1963, art 4, § 6(14)(b).

30. Plaintiffs and the public lost *15 days* (October 28–November 12, 2021) to review the withheld materials and comment before publication of the proposed plans during the six meetings the Commission held during that period.

Defendant denies the allegation because it is not true. The Commission published all required materials pursuant to Const 1963, art 4, § 6(9) on or around October 11, 2021.

31. On November 22, 2021, the Attorney General issued Opinion No. 7317, in which she opined that a closed meeting to discuss memoranda presumably providing commissioners with certain legal parameters and historical context that should be considered in developing, drafting, and adopting the redistricting plans, required not only that the memoranda be disclosed under Article 4, Section 6(9) of the Constitution, but also that the discussion be held at an open meeting. Exhibit 12, Attorney General Opinion, 6–14 (Nov. 22, 2021). On November 30, 2021 in anticipation of the Commission’s next meeting on December 2, 2021, the corporate Plaintiffs sent a letter to the Commission’s general counsel urging release of the withheld materials. Exhibit

3, Press Letter, 1–4. The same day, the Commission’s general counsel, together with its litigation counsel, local counsel, and Voting Rights Act counsel, sent a letter to the commissioners urging them not to release the memoranda. Exhibit 13, Letter to the Commission 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, 13 (Nov. 30, 2021).

Defendant objects on the basis that the form of this allegation violates MCR 2.111(A)(1) because it is not “clear, concise, and direct.” Subject to and without waiving the foregoing objection, Defendant admits only that the Attorney General issued Opinion No. 7317 on November 22, 2021. Defendant admits only that corporate Plaintiffs sent a letter requesting release of the memoranda at issue on December 2, 2021. Defendant admits only that its counsel sent a letter to the Commission on December 2, 2021 urging the Commission not to waive attorney-client privilege with regard to memoranda containing legal advice from counsel. Defendant denies the remaining allegations in this paragraph for reason that they are not true as fully explained in Defendant’s Brief.

32. On December 2, the Commission voted 7–5 against releasing the withheld materials and 8–4 against releasing the recording of the closed meeting.

Admitted.

33. Plaintiffs and the public lost *20 additional days* (November 13–December 2) because of the unwarranted “extensions” that the Commission claimed under FOIA.

Defendant denies the allegation because it is not true for the reasons fully described in Defendant’s Brief.

34. Within three business days of the Commission’s decision, Plaintiffs now come

to this Court seeking a declaratory judgment and a writ of mandamus to force the Commission to disclose the withheld materials.

Defendant admits that Plaintiffs filed their Complaint for declaratory judgment and a writ of mandamus within three business days of the Commission’s decision. Defendant denies as untrue that Plaintiffs are entitled to the relief sought for the reasons explained in Defendant’s Brief.

35. As of the filing of this 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.

Defendant denies the allegations because they are not true.

36. The 45-day public comment period will close on December 27.

Admitted.

STANDARD FOR DECLARATORY JUDGMENT

37. The Court has the power to enter declaratory judgments. MCR 2.605(A)(1).

This allegation is a recitation of law to which no responsive pleading is required.

38. A declaratory judgment “declare[s] the rights and other legal relations of an interested party.” MCR 2.605(A)(1). “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 the people.” *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72, 82 (1978). “One great purpose [of declaratory judgments] is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds” *Merkel v Long*, 368 Mich 1, 13; 117 NW2d 130, 136 (1962) (citation omitted).

This allegation is a recitation of law to which no responsive pleading is required.

39. To bring a successful declaratory judgment action, a plaintiff must demonstrate that (i) there is “a case of actual controversy” and (ii) the case of actual controversy is within the Court’s jurisdiction. MCR 2.605(A)(1); *League of Women Voters of Mich v Secy of State*, 506 Mich 561, 586; 957 NW2d 731, 743 (2020).

This allegation is a recitation of law to which no responsive pleading is required.

40. “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 of Mich*, 506 Mich at 586.

This allegation is a recitation of law to which no responsive pleading is required.

41. The 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, 747 (1993) (recognizing that if—among other things—“a court would not otherwise have subject matter jurisdiction over the issue beforeit,” the court would lack the authority to “declare the rights and obligations of the parties before it”).

This allegation is a recitation of law to which no responsive pleading is required.

STANDARD FOR MANDAMUS

42. The Court has the power to issue prerogative writs, including writs of mandamus. Const 1963, art 6, §4; MCL 600.217(3); MCR 3.301(A)(1), (G)(1); MCR 3.305(A)(2).

This allegation is a recitation of law to which no responsive pleading is required.

43. “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 Gov’t v Dep’t of Technology, Mgt & Budget*, —Mich—; —NW2d— (2021) (Docket No. 160660); slip op at 27 (cleaned up).

This allegation is a recitation of law to which no responsive pleading is required.

44. To obtain a writ of mandamus, the plaintiff must show that (i) the plaintiff has a clear legal right to the performance of the specific duty to be enforced, (ii) the defendant has a clear legal duty to perform the act; (iii) the act is ministerial; and (iv) no other adequate legal or equitable remedy exists that might achieve the same result. *Id.*

This allegation is a recitation of law to which no responsive pleading is required.

45. “A clear legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.” *Nykoriak v Napoleon*, 334 Mich App 370, 374; 964 NW2d 895 (2020) (cleaned up).

This allegation is a recitation of law to which no responsive pleading is required.

46. 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; 836 NW2d 498 (2013) (so holding where there was a statutory obligation to perform a specific act).

This allegation is a recitation of law to which no responsive pleading is required.

47. “A ministerial act is one 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 (cleaned up).

This allegation is a recitation of law to which no responsive pleading is required.

**COUNT I
VIOLATION OF THE REDISTRICTING AMENDMENT
FOR WITHHOLDING SUPPORTING MATERIALS**

48. Plaintiffs incorporate all the earlier paragraphs by reference.

No response required.

49. The Court, “in the exercise of original jurisdiction, shall direct . . . the commission to perform [its] duties.” Const 1963, art 4, §6(19). Accordingly, the Plaintiffs bring this direct action to have the Court order the Commission to perform one of its duties.

The first sentence of this allegation is a recitation of law to which no response is required. Defendant admits only that Plaintiffs have filed a lawsuit purporting to request the Court to order the Commission to perform one of its duties. Defendant denies that it has failed to perform any of its duties under the Constitution for the reasons explained in Defendant’s Brief.

50. The Redistricting Amendment unambiguously commands 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) (emphasis added).

Defendant admits only that Const 1963, art 4, § 6(9) contains the quoted language. Defendant denies that it has failed to comply with Const 1963, art 4, § 6(9) for the reasons explained in Defendant’s Brief.

51. Despite that constitutional requirement, the Commission is withholding these materials, which it used to develop redistricting plans:
- a) *Guidance on Subsection 11 of Art. IV § 6 of the Michigan Constitution ICRC Communications with the Public* (Jan. 21, 2021);
 - b) *MICRC Litigation Options to Address Delay of Census Data* (Mar. 2, 2021);
 - c) *Update on Michigan Supreme Court Petition and Next Steps* (May 25, 2021);
 - d) *One Person, One Vote and Acceptable Population Deviations* (Jun. 24, 2021);
 - e) *Legal Considerations & Discussion of Justifications re: Criteria* (Oct. 7, 2021);
 - f) *Voting Rights Act* (Oct. 14, 2021);
 - g) *The History of Discrimination in the State of Michigan and its Influence on Voting* (Oct. 26, 2021)
 - h) *Memorandum Regarding Renumbering of Electoral Districts* (Nov. 3, 2021);
 - i) *Redistricting Criteria* (Nov. 4, 2021); and

j) *Memorandum Concerning Subsections 9 and 14 of Art. IV, § 6 (Nov. 7, 2021).*

Defendant admits only that it has withheld the specified legal memoranda because they are protected by the attorney-client privilege and/or the work-product doctrine. Defendant denies the remaining allegations contained in this paragraph because they are not true for the reasons explained in Defendant’s Brief.

52. Accordingly, by withholding those materials, the Commission is violating its clear constitutionally imposed duty that it “shall publish the proposed redistricting plans and any data and supporting materials used to develop the plans.” Const 1963, art 4, § 6(9).

Defendant denies the allegation because it is not true for the reasons explained in Defendant’s Brief.

**COUNT II
DECLARATORY JUDGMENT
FOR WITHHOLDING SUPPORTING MATERIALS
IN VIOLATION OF REDISTRICTING AMENDMENT**

53. Plaintiffs incorporate all the earlier paragraphs by reference.

No response required.

54. Plaintiffs seek a declaratory judgment that the Redistricting Amendment requires the Commission to publicly disclose *all* supporting materials it uses to develop redistricting plans.

Defendant admits only that Plaintiffs are seeking the relief of a declaratory judgment. Defendant specifically denies that Plaintiffs are entitled to the relief they request for the reasons explained in Defendant’s Brief.

55. A declaratory judgment requires—among other things—the existence of an actual case of controversy between the parties. Plaintiffs and the Commission starkly disagree on whether the Commission is violating its constitutionally imposed duty to publicly disclose all the supporting materials it used develop redistricting plans by withholding materials, including the materials enumerated in Paragraph 51. Accordingly, an actual case of controversy exists between

the parties.

Defendant admits only the existence of an actual case of controversy between the parties because Defendant requires clarity regarding its rights and responsibilities under the Redistricting Amendment, specifically whether it may conference with its attorneys in closed session with the protections of the attorney-client privilege and work-product doctrine. Defendant denies the remaining allegations contained in this paragraph because they are not true for the reasons explained in Defendant’s Brief.

56. Additionally, the actual case of controversy must be within the Court’s jurisdiction to adjudicate. 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.

Defendant admits only that the actual case of controversy between the parties is within the Court’s jurisdiction to adjudicate. Defendant denies the remaining allegations contained in this paragraph because they are not true for the reasons explained in Defendant’s Brief.

**COUNT III
WRIT OF MANDAMUS
TO RELEASE SUPPORTING MATERIALS WITHHELD
IN VIOLATING OF THE REDISTRICTING AMENDMENT**

57. Plaintiffs incorporate all the earlier paragraphs by reference.

No response required.

58. Plaintiffs seek a writ of mandamus to compel the Commission to publicly disclose the withheld materials, which it used to prepare proposed redistricting plans.

Defendant admits only that Plaintiffs are seeking a writ of mandamus. Defendant specifically denies the remaining allegations as untrue for the reasons explained in Defendant's Brief.

59. The Redistricting Amendment imposes an unambiguous and mandatory legal duty on the Commission to publish with the proposed redistricting plans all data and supporting materials used to prepare the plans. Const 1963, art 4, §6(9).

Defendant admits only that Const 1963, art 4, § 6(9) contains a publication requirement. Defendant denies that it has failed to comply with any constitutional requirements for the reasons explained in Defendant's Brief.

60. Plaintiffs have a clear legal right to have the Commission perform the act—*i.e.*, to have it publish the withheld materials. This right flows from the express requirements in the Redistricting Amendment that the Commission conduct all business in open meetings and provide all supporting materials to the public, in addition to the guarantees in the Redistricting Amendment that the public can robustly participate in the redistricting process by attending and offering public comment at all of the Commission's meetings and hearings, by submitting proposed plans for redistricting with data and other supporting materials, and by commenting on the Commission's proposed plans. See, *e.g.*, Const 1963, art 4, §§6(8)–6(10), 6(14)(b). Michigan voters went to great lengths to ensure transparency and meaningful public participation in the redistricting process. *Id.* Accordingly, Plaintiffs, as members of the public, have the necessary clear legal right to public disclosure of the redistricting materials.

The allegations contained in this paragraph are conclusions of law to which no responsive pleading is required. To the extent that a response is required, Defendant specifically denies that Plaintiffs have a clear legal right for the reasons explained in Defendant's Brief.

61. The Commission’s duty to publish the withheld materials is accomplished by a ministerial act. The Redistricting Amendment plainly commands that the Commission “*shall* publish the proposed redistricting plans and *any* data and supporting materials used to develop the plans.” *Id.* at §6(9) (emphasis added). The term “shall” makes the command mandatory. The term “any” that precedes “supporting materials used to develop the plans” means that the Commission must publicly disclose *everything* in the category of “supporting materials used to develop the plans.” The voters chose precise and certain constitutional language on this point; the language leaves no discretion for the Commission to publicly disclose only *some* of the supporting materials, but not others. Accordingly, the act—the Commission’s public disclosure of the withheld materials that it used to develop redistricting plans—is ministerial.

The allegations contained in this paragraph are conclusions of law to which no responsive pleading is required. To the extent that a response is required, Defendant specifically denies the allegations as untrue for the reasons explained in Defendant’s Brief.

62. No other adequate legal or equitable remedy exists that might achieve that same result as a writ of mandamus.

Defendant denies because the allegation is not true for the reasons explained in Defendant’s Brief.

**COUNT IV
VIOLATION OF THE REDISTRICTING AMENDMENT
FOR CONDUCTING BUSINESS IN CLOSED MEETING**

63. Plaintiffs incorporate all the earlier paragraphs by reference.

No response required.

64. The Court, “in the exercise of original jurisdiction, shall direct . . . the commission to perform [its] duties.” Const 1963, art 4, §6(19). Accordingly, the Plaintiffs bring this direct action to have the Court order the Commission to perform one of its duties.

The first sentence of this allegation is a recitation of law to which no response is required. Defendant admits only that Plaintiffs have filed a lawsuit requesting that the Court order the Commission to perform one of its duties that it allegedly has failed to perform. Defendant denies that it has failed to perform any of its duties under the Constitution for the reasons explained in Defendant’s Brief.

65. Specifically, the Redistricting Amendment unambiguously commands that the Commission “shall conduct all of its business at open meetings.” Const 1963, art 4, §6(10).

This allegation is a recitation of law to which no responsive pleading is required. To the extent that a response is required, Defendant denies as untrue that it has failed to abide by Const 1963, art 4, §6(10).

66. Despite that constitutional requirement, the Commission conducted business during a closed meeting on October 27, 2021. The business manifested as the Commission—on information and belief—discussing how the contents of the memoranda dated October 14, 2021 and October 26, 2021 (*i.e.*, the Voting Rights Act, discrimination in Michigan, and how that discrimination affects voting), would inform redistricting plans, which amounted to using those memorandum to develop proposed redistricting plans.

Defendant denies the allegation because it is not true for the reasons explained in Defendant’s Brief.

67. Accordingly, by using those two memoranda to develop redistricting plans in a nonpublic meeting, the Commission violated its clear constitutionally imposed duty that it “shall conduct all of its business at open meetings.” Const 1963, art 4, §6(10).

Defendant denies the allegation because it is not true for the reasons explained in Defendant’s Brief.

**COUNT V
DECLARATORY JUDGMENT
THAT NONPUBLIC BUSINESS MEETINGS
VIOLATE THE REDISTRICTING AMENDMENT**

68. Plaintiffs incorporate all the earlier paragraphs by reference.

No response required.

69. Plaintiffs seek a declaratory judgment that the Redistricting Amendment requires the Commission to conduct all of its business in open meetings.

Defendant admits that Plaintiffs seek a declaratory judgment requiring the Commission to conduct all of its “business” in open meetings but denies that Plaintiffs are entitled to any such relief for the reasons explained in Defendant’s Brief.

70. A declaratory judgment requires—among other things—the existence of an actual case of controversy between the parties. Plaintiffs and the Commission starkly disagree on whether the Commission has violated its constitutionally imposed duty to conduct all of its business in open meetings when it conducted business at a nonpublic meeting on October 27, 2021. Accordingly, an actual case of controversy exists between the parties.

This allegation is a recitation of law to which no responsive pleading is required. To the extent that a response is necessary, Defendant admits that an actual case of controversy exists between the parties.

71. Additionally, the actual case of controversy must be within the Court’s jurisdiction to adjudicate. 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 failed to perform its constitution duty when it conducted business during a nonpublic meeting), is within the Court’s jurisdiction to adjudicate.

This allegation is a recitation of law to which no responsive pleading is required. To the extent that a response is necessary, Defendant admits that there is an actual case of controversy between the parties within the Court’s jurisdiction to adjudicate that is explained fully in Defendant’s Brief.

**COUNT VI
WRIT OF MANDAMUS
TO RELEASE RECORDING OF NONPUBLIC MEETING AND TO REQUIRE ALL
FUTURE BUSINESS MEETINGS BE OPEN TO THE PUBLIC**

72. Plaintiffs incorporate the earlier paragraphs by reference.

No response required.

73. Plaintiffs seek a writ of mandamus to compel the Commission to (a) release the audio recording of the nonpublic meeting that it held on October 27, 2021, and (b) conduct all of its future business only at open meetings that the public can observe contemporaneously and in which the public can meaningfully participate.

Defendant admits that Plaintiffs are seeking the relief of a writ of mandamus but denies that Plaintiffs are entitled to any such relief for the reasons explained in Defendant’s Brief.

74. The Redistricting Amendment imposes an unambiguous and mandatory legal duty on the Commission to perform the requested acts. Specifically, it commands that the Commission “*shall* conduct *all* of its business at *open* meetings.” Const 1963, art 4, §6(10) (emphasis added). Moreover, the Constitution mandates that the Commission “*shall* use technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings.” *Id.*

The allegations contained in this paragraph are conclusions of law to which no responsive pleading is required. To the extent that a response is required, Defendant denies

that it has failed to abide by Const 1963, art 4, §6(10) for the reasons explained in Defendant’s Brief.

75. Plaintiffs have a clear legal right to have the Commission perform these two acts. Their clear legal right flows from the guarantees in the Redistricting Amendment that the Commission conduct all of its business in open meetings and in such a manner that the public can observe the Commission doing its business and robustly participate in the redistricting process. Const 1963, art 4, §6(10). Michigan voters went to great lengths to ensure transparency in the redistricting process and meaningful public participation in that process. *Id.* Accordingly, Plaintiffs, as members of the public, have the necessary clear legal right to the conduct of all Commission business at open meetings.

Defendant objects on the basis that the form of this allegation violates MCR 2.111(A)(1) because it is not “clear, concise, and direct.” The allegations contained in this paragraph are conclusions of law to which no response is required. To the extent that a response is required, Defendant denies that it has failed to abide by Const 1963, art 4, §6(10) as untrue for the reasons explained in Defendant’s Brief.

76. The Constitution plainly commands that the Commission “*shall* conduct all of its business at open meetings.” Const 1963, art 4, § 6(10). The term “shall” makes the command mandatory. The term “all” that precedes “its business at open meetings” means that anytime the Commission is conducting business, the Commission must be at an open meeting. The voters chose precise and certain constitutional language on this point; the language leaves no discretion for the Commission to conduct only *some* of its business in open meetings. Accordingly, the act—the Commission conducting all of its future business on in public meetings and releasing the audio recording of the nonpublic meeting that it held on October 27, 2021—is ministerial.

Defendant objects on the basis that the form of this allegation violates MCR 2.111(A)(1) because it is not “clear, concise, and direct.” Subject to and without waiving the foregoing objection, Defendant admits only that Const 1963, art 4, § 6(10) includes the quoted (but not italicized) language cited by Plaintiffs. Defendant denies the remaining allegations as untrue for the reasons explained in its Brief.

77. No other adequate legal or equitable remedy exists that might achieve that same result as a writ of mandamus.

Defendant denies the allegation because it is not true.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs’ request for a declaratory judgment and writ of mandamus should be denied.

December 13, 2021

Respectfully submitted,

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AFFIRMATIVE DEFENSES

For its Affirmative Defenses, the Michigan Independent Citizens Redistricting Commission states as follows:

1. The Plaintiffs have failed to state a claim on which relief can be granted.
2. Defendant is entitled to exercise its discretion to invoke the attorney-client privilege and work-product doctrine.
3. Plaintiffs have suffered no damages as a result of any conduct by the Commission and Plaintiffs are not entitled to any relief.
4. Defendant is an independent commission, and its decisions should be afforded appropriate deference.
5. Plaintiffs' constitutional right is not clearly defined.
6. The writ of mandamus is not appropriate because the actions in question involve discretion and were not ministerial acts.
7. The Commission reserves the right to name additional affirmative defenses as they become known.

Respectfully submitted,

December 13, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2021, I electronically filed the foregoing paper with the Clerk of the Court using the MiFILE system, which provided a copy to all counsel of record registered for efileing in this case.

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