Upon review of the final privileged and confidential memorandum submitted by counsel, the MICRC is disclosing this document pursuant to guidance set forth by the Michigan Supreme Court in *The Detroit News, Inc. v Independent Citizens Redistricting Commission*, ___ Mich ___ (2021) (Docket No. 163823).

BakerHostetler

Baker&Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
T 202.861.1500
F 202.861.1783
www.bakerlaw.com

Katherine L. McKnight
direct dial: 202.861.1618
kmcknight@bakerlaw.com

ATTORNEY-CLIENT PRIVILEGED AND ATTORNEY WORK PRODUCT CONFIDENTIAL

TO: Julianne Pastula, Esq.

FROM: Katherine L. McKnight
Patrick T. Lewis

DATE: December 1, 2021

SUBJECT: Guidance Concerning Procedures For Adoption Of Final Plans In Light of Litigation Risks
Mich Const (1963) art 4, § 6(14)

EXECUTIVE SUMMARY

This memorandum provides guidance concerning several discrete questions, with a focus on analyzing litigation risk related to the voting and plan-adoption process. For ease of reference, we list the questions below and provide short answers, with detailed explanation to follow.

1. What is the process set forth in the constitution for adoption of final maps set forth in Subsection 14?

   SHORT ANSWER: The process calls for a plan selection process proceeding in two distinct stages, if necessary. The first stage is an attempt to obtain a majority vote on a single plan for each type of district that satisfies the "2/2/2" majority rule. The second is a rank-ordering of individual plans. If neither stage produces a winner, the Secretary of State will select a final plan at random.

2. If no plan garners the requisite 2/2/2 majority support for that district, the ranked choice voting provisions are triggered. Does this mean one (or none) of the following:
   a. Any Commissioner may submit plans (whether they are collaborative or individual plans that have been through the 45-day cycle or "new" plans), that

must satisfy 14(a) and be published for 45-days under 14(b) prior to any ranked choice vote under 14(c); or

b. Any Commissioner may submit plans (whether they are collaborative or individual plans that have been through the 45-day cycle or "new" plans), that must satisfy 14(a) but do not have to be published for 45-days under 14(b) prior to any ranked choice vote under 14(c); or
c. Pursuant to the motion adopted on Nov. 4th (motion language included below for reference), Commissioners may only select plans to advance to ranked choice voting from those that have already been through the 45-day public comment period. Any Commissioner may submit plans (whether they are collaborative or individual plans that have been through the 45-day cycle but not "new" plans), that must satisfy 14(a), have already been published under 14(b) and can proceed directly to ranked choice vote under 14(c). How does this restriction to plans that have failed the majority vote process impact an individual Commissioner's constitutional right to submit plans under 14(c)(i)?
d. Other?

SHORT ANSWER: The Constitution does not explicitly address this question, but we believe the Commission's November 4 motion is an appropriate interpretation of Subsection 14(c)(i)-(iii) and, indeed, presents the more conservative and defensible of possible readings.

3. The Commission has committed to have final plans adopted by 12/30/21 to accommodate the downstream work of the Bureau of Elections/Secretary of State's office and adopted is mapping process to concretize that understanding. How does this agreement impact the operation of Subsection 14?

   SHORT ANSWER: We believe time is of the essence and the Commission should attempt to honor its commitment. We understand the voting under Subsection 14(c) and 14(c)(iii) can occur by December 30, and it would therefore be ideal if the Commission would comply with this target deadline.

4. Do changes to the plans during the 45-day public comment period require republication prior to a vote?

   SHORT ANSWER: The safest course of action would be for the Commission to adopt a plan in the form presented at the notice-and-comment stage without additional amendments. However, cogent arguments can be tendered in favor of limited modifications without a new notice-and-comment period, but only if such modifications are responsive to public feedback and tailored to that feedback.

5. What level of changes/adjustments to maps can be considered scrivener's errors?

SHORT ANSWER: We believe that scrivener's errors are any "de minimis" changes—those driven by technical issues in the map-drawing process like minor misalignments in census and state geography data, quirky precinct splits, and so forth—and can defensibly be modified during the notice-and-comment stage.

6. How many voting attempts to garner the majority w/2/2/2 may occur prior to shifting to the alternative voting procedures under Subsection 14(c)(i)-(iii)?

   SHORT ANSWER: The Constitution requires at least one vote on each plan published under Subsection 14(b) during the initial round of voting in an effort to secure a 2/2/2 majority. The Constitution, however, provides no express limits on the number of rounds of voting at this stage. The question of how many "attempts" the Commission may undertake is controlled by its governing rules (Robert's Rules of Order).

7. How many ranked choice voting cycles may occur prior to shifting to the random selection draw under Subsection 14(c)(iii)?

   SHORT ANSWER: There is only one "cycle" under this provision.

8. What is the process if maps are challenged and remanded to the MICRC, does the Commission start its work at Subsection 9, 14, or other?

   SHORT ANSWER: There is no clear answer to this question, as the nature of remedial proceedings is case-specific and will be impacted by the scope of the remand, the forum of litigation, and the nature of the violation identified. The Commission may seek guidance from the reviewing court on the question. Strictly speaking, it may be safer for the Commission to conduct a new redistricting process, but time limitations and upcoming elections may call for a different position. The Commission will need to assess the risks and benefits of competing positions based on the facts as they arise.

ANALYSIS

I. PROCESS FOR ADOPTION OF PLANS UNDER SUBSECTION 14

The Michigan constitution prescribes a multistage procedure for the Commission's adoption of final plans. The adoption procedure is set forth in Const 1963, art 4, § 6(14). This section of the memorandum will first provide a general overview of the Subsection 14 process (addressing questions 1, 3, 6, and 7), and will then address the question around notice-and-comment requirements for modifications of a proposed plan (questions 4 and 5) and the scope of plans eligible to be proposed under the second-phase selection procedure in Subsection 14(c)(iii) (question 2). Litigation risk analysis of these topics is also offered.

A. General Overview of Plan Adoption Process

Subsection 14, which governs plan adoption, addresses both preconditions for voting on a plan as well as procedures for selecting final plans. Subsections 14(a) and (b) are best described as setting forth preconditions for voting on a plan. The first, Subsection 14(a), requires that "before voting to adopt a plan, the commission shall ensure that the plan is tested, using appropriate technology, for compliance with the criteria described below." The second, Subsection 14(b), is that "before voting to adopt a plan, the commission shall provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans."

The plan selection procedure is set forth in Subsection 14(c). It proceeds in two stages.

Under the first stage, a vote is taken, and "a final decision of the commission to adopt a redistricting plan requires a majority vote of the commission, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party." This provision—which we understand the Commission terms the "2/2/2" rule—requires bipartisan and nonpartisan support for the adoption of a proposed plan. Under the second stage, Commissioners propose maps, each Commissioner ranks each proposed map in order of preference, and the plan that achieves the highest score, subject to certain other requirements, is selected. If no plan is selected in this stage, under the third stage, the Secretary of State selects a plan at random from those submitted in the second stage (or, if two or more plans "tie", will select a plan at random from among the "tied" plans).

The Commission has asked how many "voting attempts" are required at the first stage before the Commission moves on to the second stage. The constitutional text imposes only one requirement: that *each* proposed plan submitted under Subsection 14(b) be voted on at least once in an attempt to achieve a 2/2/2 majority. Under Subsection 14(c), the second phase cannot occur unless "no plan" is found to attain the 2/2/2 majority. Therefore, a vote on each plan appears to be required. On the other hand, the Constitution imposes no *limit* on the number of votes per plan. Accordingly, that question is best understood to be subject to the Commission's discretion to establish "its own rules of procedure." Const 1963, art iv, § 6(4); *see also Anderson v Atwood,* 273 Mich 316, 319; 262 NW 922 (1935) (stating familiar rule that legislative bodies have discretion to establish their own rules of procedure).

In this instance, the Commission has voted to adopt Robert's Rules of Order to govern its proceedings. MICRC Am R Proc § 4.10. To best mitigate litigation risk, the Commission should conform its voting process to Robert's Rules (or some other reasonable process the Commission first adopts by rule), and the Commission should seek guidance from its parliamentarian concerning that procedure. We note, however, that legislative bodies sometimes undertake complex voting processes when conducting officer elections with multiple candidates and a required vote threshold—a situation analogous to the contemplated voting here.

At the second stage, each Commissioner may submit "one proposed plan for each type of district to the full commission for consideration." Subsection 14(c)(i). Each Commissioner shall "rank the plans submitted according to preference," and each plan will be "assigned a point value inverse to

its ranking among the number of choices, giving the lowest ranked plan one point and the highest ranked plan a point equal to the number of plans submitted." Subsection 14(c)(ii). The plan scoring the highest—which is *also* ranked among the top half of plans[1] submitted by two commissioners not affiliated with the party of the commissioner submitting a plan (or, in the case of a plan submitted by a non-affiliated commissioner, at least two commissioners affiliated "with a major party")—is then adopted. Subsection 14(c)(iii). If no plan meets those requirements, then the Secretary of State shall randomly select the plan from those submitted under Subsection 14(c)(i), and if there is a tie-vote, the Secretary of State shall select the plan at random from among the plans receiving the tie vote. *Id.*

This second stage does not, contrary to the question posed, proceed in multiple "cycles." It is a one-round process. To illustrate the point, a simplified example follows that involves nine hypothetical commissioners (3 R, 3 D, and 3 U) and seven hypothetical plans – plans A through G. Each Commissioner's top-ranked plan is scored a 7, and the lowest ranked plan scored with a 1, in accordance with the scoring rules set forth in Subsection 14(c)(ii):

Plan	**R1**	**R2**	**R3**	**D1**	**D2**	**D3**	**U1**	**U2**	**U3**	**Total**
Plan A	7	7	7	1	1	1	3	1	1	29
Plan B	6	6	6	2	3	2	6	7	2	40
Plan C	5	5	3	3	2	3	7	6	7	41
Plan D	4	4	4	4	4	4	4	2	6	36
Plan E	3	3	5	5	5	5	5	4	5	40
Plan F	2	2	2	6	6	6	2	5	4	35
Plan G	1	1	1	7	7	7	1	3	3	31

In this example, regardless of whether Plan C was proposed by a Republican, Democratic, or Unaffiliated commissioner, Plan C attained the highest point score *and* was ranked in the top-half by at least two Republicans and two Unaffiliated Commissioners. It would therefore become the adopted plan.

Subsection 14(c)(iii) is unambiguous in prescribing only a single round of rank voting in the second phase of voting. We do not read that Subsection as permitting multiple "cycles" of plan-ranking.

[1] If there is an odd number of plans, the "top half" would be calculated by rounding down from the half to reach the closest whole figure (e.g., if there are seven plans then the top half would consist of three plans, not 3.5 or four).

Finally, the Commission has asked how its commitment to the Michigan Secretary of State to adopt final plans by December 30, 2021, impacts the operation of Subsection 14. Strictly speaking, the commitment does not "impact" Subsection 14, but the Commission would accept legal risks if it does not comply with this commitment. The Commission has already exceeded the time limit under the Michigan Constitution to adopt redistricting plans, and in July 2021 the Michigan Supreme Court declined to extend that deadline. Further, any delay beyond the December 30 deadline, including any delay created by the submission of any "new" maps restarting the 45-day public comment period, would create delay to downstream election administration. The Commission should attempt to cooperate with the Michigan Secretary of State to the extent possible.

We also recommend the Commission pass final plans in 2021 to reduce the risk that third-party litigants might commence an "impasse" suit in federal court to attempt to seize control of the process from the Commission. In such an action, parties could file suit in federal court alleging that Michigan has failed to redistrict and, in the absence of new districts, the federal court should intervene to fashion districts to remedy the State's malapportioned plans (i.e., the prior decade's plans that the Commission's plans would replace). Although federal impasse suits do not operate according to strictly identified deadlines, federal courts are empowered to intervene based on "evidence that the[] state branches will fail timely to perform [the] duty" to redistrict. *Branch v. Smith*, 538 US 254, 261–62; 123 S Ct 1429, 1435; 155 L Ed 2d 407 (2003) (citation and edit marks omitted). A failure by the Commission to adhere to a self-imposed deadline, especially one driven by election-administration concerns, may be viewed by a federal court as evidence of inability to timely perform the duty to redistrict.

II. OBLIGATION TO REPUBLISH FOR NOTICE AND COMMENT

The Commission also seeks guidance concerning the 45-day notice-and-comment period and, in particular, asks whether amendments may be made to plans after that period without a new 45-day notice-and-comment period. Relatedly, the Commission has asked for our views on the scope of "de minimis" changes to proposed plans that may defensibly be made during the notice-and-comment period. The Constitution does not speak clearly to this question, and that ambiguity presents a risk-management problem for the Commission. It would be safest for the Commission to adopt a plan presented at the notice-and-comment stage, without amendment. However, other courses of action are defensible under the "logical outgrowth" theory we addressed in our memorandum of November 8, 2021. In particular, we believe that "de minimis" changes—those driven by technical issues in the map-drawing process like minor misalignments in census and state geography data, quirky precinct splits, and so forth—can defensibly be modified during the notice-and-comment stage.

Subsection 14(b) provides that, "[b]efore voting to adopt a plan, the commission shall provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans." Const 1963, art iv, § 14(b). The requirement that "each plan that will be voted on" must be subject to a notice-and-comment procedure could be construed to restrict the Commission to voting on, and adopting, only plans as published in that process, without

change. That reading—which appears consistent with the Mackinac Center's description[2] it—is that the purpose of the notice-and-comment period is to allow the public to aid the Commission in selecting *which* of the proposed plans it should adopt wholesale, not what changes it should make. Under this interpretation of Subsection 14, the time for making modifications to incorporate public input occurred during the Subsection 9 hearing process. Accordingly, the Commission's safest option would be to adopt, without amendment, a plan that has been subject to notice and comment.

But that is not the only possible reading of Subsection 14. The notice-and-comment procedure appears to have been adopted from administrative law, which has seen decades of experience with the notice-and-comment process. Some commentators informed the public at the time the initiative was under public debate that the Subsection 14(b) notice-and-comment process is analogous to administrative rulemakings. *See* Van Beek, *supra* n. 1, at 7 (noting a "similar procedure is used by other public agencies that propose and implement state regulations and policies"). As we previously explained, it is established that agencies during such rulemakings "can obviously promulgate a final regulation that differs in some respects from its proposed regulation." *Nat Res Def Council, Inc v Thomas*, 838 F2d 1224, 1242 (CA DC, 1988). "A hearing is intended to educate an agency to approaches different from its own; in shaping the final rule it may and should draw on the comments tendered." *S Terminal Corp v EPA*, 504 F2d 646, 659 (CA1, 1974). As a leading administrative-procedure treatise explains, "[i]f an agency were required to issue a second notice and provide an opportunity for a second set of comments every time it decided to make a change in response to the first round of comments, the rulemaking process would be endless." I Hickmand & Pierce, Administrative Law Treatise § 5.3, p 565 (6th ed). The text courts apply is whether the final rule is a "a 'logical outgrowth' of [the] proposed rule." *Nat Res Def Council*, 838 F2d at 1242 (citation omitted).

Michigan case law applying Michigan's Administrative Procedures Act appears to be in accord. In *Mich Charitable Gaming Ass'n v Michigan*, the court concluded that the Michigan APA did not require a new public hearing after the agency made changes to its proposed rule after the public hearing that were "responsive" to comments received, finding that the rulemaking process is "a process comprised of various stages" and is intended to be "responsive to comments and suggestions offered at the public hearing." 310 Mich App 584, 601-602; 873 NW2d 827, 836 (2015). After that case (which noted silence in the APA's text governing how changes to proposed rules should be handled), the Michigan Legislature amended the APA to endorse the ruling and "allow modifications to proposed rules without necessarily needing to alter an RIS [i.e., a Regulatory Impact Statement]." *Oakland County Water Resources Corp v Dep't of Environmental Quality*, No 18-000259-MZ, 2019 WL 5819542, *4 (Mich Ct Claims July 26, 2019) (citing MCL 24.245(c)(4)). Only if the amendments render the RIS materially inaccurate is a new RIS required. *See id.* These cases suggest Michigan recognizes the "logical outgrowth" test.

Under this precedent, the Commission would have a cogent argument that limited amendments related to public comments, and tailored to them, are permissible even after the notice-and-

[2] Michael Van Beek, *Proposal 2 of 2018: An Explainer of Key Arguments*, Mackinac Center for Public Policy, Oct. 5, 2018, p. 6, https://www.mackinac.org/archives/2018/s2018-11.pdf ("Following the window for public comment, the commission votes on which plan to adopt.").

comment stage. There would be structural arguments in favor of this approach, as the purpose of notice and comment is not only to solicit comments but to implement them. That is to say, the Subsection 14 process can be viewed as a rulemaking *process* such that the "proposed plan" described in that Subsection can be modified during the process without ceasing to be the same "proposed plan" that was properly published at the notice-and-comment stage. *See Mich Charitable Gamin Ass'n*, 310 Mich App at 600, 873 NW2d at 835("we do not ascribe significance to the fact that § 45(a)(7) speaks of withdrawing 'the rule'" and that "in other contexts, the act uses the term 'rule' and 'proposed rule' to describe a rule both *before and after* it has been amended by the agency") (emphasis in original). Furthermore, the logical-outgrowth process may serve the constitutional structure and purpose by facilitating agreement by Commissioners and adoption of a plan under the favored Subsection (c) process by a 2/2/2 majority vote, rather than on the ranked-choice run-off process. And, although Subsection 9 (as noted) provides an initial round of public input, the second round of solicitation under Subsection 14(b) was intended to provide additional input. There are solid arguments that limiting that impact of that input to merely picking, rather than altering, plans would be too restrictive.

Notwithstanding this precedent and these principles, adopting an amended plan would present the Commission with a legal risk. We cannot guarantee that the Michigan Supreme Court would endorse the logical-outgrowth theory in this context. Moreover, the logical-outgrowth theory is limited. The Commission would have very low odds of success under this theory unless it establishes a record tying each plan change to a public comment and demonstrating that changes are tailored to comments and do not go beyond them in scope. At some point, a critical mass of changes would transform the plan from one properly presented to the public under Subsection 14(b) into a new plan that fails the Subsection 14(b) standard. Compounding these risks is the fact that no clean line can be provided signaling how much change is too much. The Commission and its legal counsel may have a different view from what the courts ultimately adopt.

On the other hand, the legal risk under Subsection 14(b) may not be the only risk the Commission faces, and there may be circumstances where competing concerns outweigh the Subsection 14(b) risk of adopting an amended plan without republication. For example, if Commissioners were to discover during the notice-and-comment period that its proposed plans contain flaws that subject them to strong legal challenges, the Commission may decide the better course is to permit amendments rather than tie itself to deficient plans. Likewise, the risks discussed above about delays in plan adoption may factor into the Commission's analysis. If the Commission sees the need to make amendments for whatever reason, there will be litigation risk in conducting a new 45-day comment period, which would take the Commission into 2022 without having redistricted at least one of the plans within its responsibility. The Commission may determine that reliance on the logical-outgrowth theory presents the less risky of two or more risky paths.

In the main, we currently see the safest position for the Commission is to vote only on maps that have been published and gone through a full notice-and-comment period, without amendment. If the Commission chooses otherwise, it should establish a clear record as to the basis of each change and seek to make the changes as limited as possible to achieve its purpose. Ultimately, the balance of risks and benefits is a choice for the Commission based on all the facts and circumstances known to it at the time, not its counsel.

Finally, we have been asked about whether "de minimis" changes—i.e., technical changes to address minor issues like deviations in geography between the census and other data sets—discovered during the comment period can be amended without republication and a new 45-day notice-and-comment period. In our experience, these types of "de minimis" changes to correct scrivener's errors during the plan process are not uncommon due to the complexity of the GIS and other datasets involved, and correction of those issues is in our experience rarely the subject of litigation. As an example, Colorado's constitution expressly provides its redistricting commission authority to empower commission staff to make those corrections as necessary. *See* Co Const, art v, § 48.2(d) ("The commission may grant its nonpartisan staff the authority to make technical de minimis adjustments to the adopted senate and house plans prior to their submission to the supreme court."). We believe the Commission has a strong and legally defensible basis to make minor, technical amendments to proposed plans during the 45-day notice-and-comment period to account for such scrivener's errors. While there is no hard-and-fast rule about the magnitude of "de minimis" changes permitted under such an approach, they should impact only discrete geographic areas of the state and few voters—both individually and in the aggregate.

III. UNIVERSE OF PLANS THAT MAY BE SUBMITTED UNDER SUBSECTION 14(C)(I)

The Commission has also asked for guidance (question 2) on the universe of plans that a Commissioner may "submit" for voting under the second-phase, rank voting under Subsection 14(c)(i)-(iii). You have informed us that, on November 4, the Commission adopted the following motion governing this process:

> "If no final map meets the 2 Dem/2 Rep/2 Ind under 14(c)(i), Commissioners can only propose plans that have gone through the 45-day public comment period."

Because the Commission has already adopted this motion under its authority to enact procedural rules governing its internal processes, our analysis focuses on the defensibility of the Commission's adopted process. We think Commission has chosen the safest, if not the optimal, reading of Subsection 14(c)(iii) by limiting each Commissioner to proposing a plan that was subject to notice and comment under Subsection 14(b).

That provision, as discussed, provides that "each plan that will be voted on" must be presented at the notice-and-comment stage. The provision appears not to distinguish the Commission's voting at the first stage from the plan-ranking process at the second stage (which resembles a form of ranked-choice voting). There is a meaningful possibility that the limitation of Subsection 14(b) applies to Subsection 14(c) in full, not merely to its first paragraph.[3] For that reason, we believe the Commission's November 4 motion is both reasonable and defensible.

[3] To be sure, the Commission would not be without defenses if it made a different choice. The second-step process of Subsection 14(c)(i)–(iii) does not expressly use the term "vote," and it arguably grants discretion to Commissioners in choosing the one plan they may propose. For the textual and structural reasons discussed, however, the Commission is on much firmer ground limiting plans submitted in the second-stage to plans presented for notice and comment.

The Commission has also asked how Subsection 14(c)(i) impacts "collaborative" maps versus a map created by a single Commissioner. We do not see any impact under the text of the Michigan Constitution. Subsection 14(c)(i) allows each Commissioner to submit one plan for consideration in the ranked vote, and the political party affiliation of the submitting Commissioner under Subsection 14(c)(i) controls the vote-counting process under Subsection 14(c)(iii). If a group of Commissioners jointly developed a plan, one Commissioner would need to submit the plan to satisfy Subsection 14(c)(iii). We do not see why multiple Commissioners would need to "submit" the same plan more than once.

IV. PROCESS FOLLOWING REMAND IN THE EVENT ANY OF THE COMMISSION'S PLANS ARE STRUCK DOWN

The Commission has asked for guidance concerning the process it must follow if a court finds that one of its plans "fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law." Const 1963, art 4, § 6(19). The Commission has specifically asked whether it must "restart" the redistricting process with all component steps—beginning with public hearings—or if it may revise plans to bring them into compliance with the court's decree. This is a difficult question to answer in the abstract, as various points of context may impact the outcome.

As an initial matter, the Constitution does not speak directly to this question. It provides merely that, if a court invalidates a plan, it "shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution." Const 1963 art iv, § 6(19). The term "further action" is not defined in Subsection 19, and "no other guidelines are provided as to what the commission must do if this [i.e., a remand] occurs." Van Beek, *supra* n.1, at 7.

This definition yields ambiguity. On the one hand, "further action" could be interpreted to authorize any action necessary to cure violations, without recourse to beginning the entire redistricting process anew. Arguably, if a new process were intended, the Constitution would have required it. On the other hand, "further action" could be read to refer only to action the Commission is otherwise entitled to take. In terms of enacting a plan, the Commission is only authorized to take action consistent with its own constitutional limitations. The cases we have identified in other states seem more consistent with that latter approach—though they are not controlling or even particularly insightful. In Pennsylvania in 2011, the state supreme court disapproved the state legislative plans drawn by the state's Legislative Reapportionment Commission as contrary to law, and remanded to the commission to redraw. *Holt v Legislative Reapportionment Comm'n*, 38 A3d 711, 761 (Pa 2012). On remand, the Legislative Reapportionment Commission "produced a new preliminary redistricting plan in April 2012" and, after receipt of exceptions and alternative plans, "adopted the preliminary plan as its 2012 Final Plan," though the courts did not adjudicate that question of procedure directly. *Holt v. Legislative Reapportionment Comm'n*, 67 A3d 1211, 1216 (Pa 2013) ("*Holt II*"). Likewise, after the Alaska Supreme Court struck down the Alaska Redistricting Board's state legislative plans for violating the Alaska Constitution, and remanded the case back to the Board with instructions to adopt a compliant plan, *In re 2011 Redistricting Cases,* 294 P3d 1032, 1034 (Ak 2012), the Board argued to the lower court that it was not required to hold public hearings—which were required for the Board's initial work pursuant to Ak Const

art 6, § 10 prior to a vote to finally adopt plans—to adopt remedial plans. The Alaska Superior Court rejected this position and interpreted art 6, § 10 to require new public hearings on proposed remedial plans. *In re 2011 Redistricting Cases*, No. 4FA112209, 2013 WL 6911879, *1-2 (Ak Superior Ct May 30, 2013).

There would therefore be a meaningful possibility that the Commission would be required to undertake a new process to enact a remedial plan, but that is far from certain. In this regard, context will likely prove important. The nature of "further action" required, or appropriate, will depend on various factors that will emerge as cases arise. Although it is impossible to envision all of these potential circumstances at this time, we have tried to survey possibilities. As we hope the following survey demonstrates, the legal strategy at the remedial phase is complex and very fact- and forum-specific—and best decided on the basis of events that have not occurred and, we hope, never occur.

A. *The Relationship Between Violation, Remedy, and Prior Actions*. A key question impacting any remedial process is the exact violation the court orders the Commission to remedy. To the extent the violation does not undermine discrete stages of the Commission's process, the Commission may be in a position to rest on the work it has performed in those stages. For example, Subsection 8 requires the Commission to host at least 10 hearings across Michigan before drawing any plans. It would seem that, in many or most instances where a court invalidates a plan, the Commission could plausibly claim at the remedial phase that it *already* conducted Subsection 8 hearings, that the process was not germane to the violation, and that Commissioners can therefore draw on the information received. A similar argument could be made regarding the Subsection 9 hearings. But, of course, if the court invalidated a plan based on deficiencies at the Subsection 9 or Subsection 8 stage, that stage may need to be redone to cure the deficiencies.

In this way, the closer the violation is to procedure, the more likely a given procedure may need to be redone. Likewise, the later the procedure is in the redistricting, the more likely the procedure is to prove necessary. For example, there will be a strong argument that any new map will be subject to the Subsection 14(b) notice-and-comment period, but even that is not certain to be correct in all cases. Some remedial phases may require relatively small changes defensible under the above-described logical-outgrowth theory. Some remedial phases may progress if the Commission identifies a map already published at the prior notice-and-comment stage and which does not suffer the deficiency the court identified.

B. *The Authority of the Forum Court*. Another significant factor impacting the remedial phase is the court's remedial powers. Those powers vary based on the forum court. Litigation challenging the Commission's work under state law will be brought in the Michigan Supreme Court under its original jurisdiction, MCR 7.306(B), whereas federal claims would be brought in federal court. The remedial process is, at least legally speaking, different in each forum.

The Constitution makes clear that, "[i]n no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state." Const 1963, art iv, § 6(19). This likely operates to deprive the Michigan Supreme Court of any authority to implement a remedial plan. However, it will not bind a federal court, which has authority to remedy federal-law violations under the Supremacy Clause, US Const

art vi, § 2. To be sure, federal courts will ordinarily afford a redistricting authority the first opportunity to correct a violation. *Wise v Lipscomb*, 437 US 535, 539-540; 98 S Ct 2493, 2496-97; 57 L Ed 2d 411 (1978). *See also McGhee v Granville Cty, NC*, 860 F2d 110, 115 (CA 4, 1988) (appropriate legislative body should be "given [. . .] the first opportunity to devise an acceptable remedial plan"); *Bethune-Hill v. Virginia State Bd of Elec*, 326 F Supp 3d 128, 181 (ED Va, 2018) (same); *United States v City of Euclid*, 523 FSupp2d 641, 644 (ND Ohio, 2007) (same). But this doctrine is a matter of comity and does not restrict the federal courts' authority if equitable considerations counsel in favor of implementing a federal remedy, and, frequently, federal courts impose deadlines and other restrictions on the state redistricting authorities' remedial opportunity.

This important difference between state and federal courts will impact the remedial process in complex ways that may call for different legal strategies depending on the situation and court. The Commission will have greater control over the final remedial plan in a state-court proceeding because the Michigan Supreme Court lacks authority to adopt its own remedial plan. In federal court, by contrast, the court *does* have inherent remedial authority and *can* adopt its own plan. Therefore, while a federal court would likely give the Commission an opportunity to submit a proposed remedial plan, it will *also* give the challengers such a possibility, and the court will likely employ a special master to review the proposed plans and craft the final remedial plan.

On the other hand, the Commission may have recourse to a federal court's own remedial powers to effectuate a remedy without undergoing all of the lengthy Subsection 9 and 14 processes. This is due to a nuance in federal doctrine requiring federal courts to "defer" to remedies proposed by state legislative actors. *See, e.g., Buchanan v City of Jackson, Tenn*, 683 FSupp 1537, 1541 (WD Tenn 1988) (in considering remedial plan for violation of VRA, "where the legislative body proposes a plan that is not unconstitutional or otherwise illegal, a federal court must defer to that legislative judgment, even if it is not the plan the court would have chosen"); *United States v Euclid City School Bd*, 632 FSupp2d 740, 750 (ND Ohio, 2009) (same). However, federal courts have not always required a proposal to go through the totality of a state's procedures to qualify as a legislative plan—though the contours of this doctrine remain unclear. *See Large v Fremont Cty, Wyo*, 670 F3d 1133, 1140 (CA10, 2012) (discussing the fractured opinions in *Wise v Lipscomb*, 437 US 535, 548; 98 S Ct 2493, 2501; 57 L Ed 2d 411 (1978)). There is some possibility, then, for the Commission to submit a proposed plan to a federal court and have the court adopt it under the court's remedial authority, without strict compliance with all procedures of the Constitution.

Such a result is by no means guaranteed. In particular, a federal court will scrutinize any proposed plan to determine if it "*completely* remedies the" violation and "*fully* provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *Dillard v Crenshaw Cty, Ala,* 831 F2d 246, 250 (CA 11, 1987) (emphasis in original); *see also McGhee*, 860 F2d at 115 (citing *Chapman v Meier*, 420 US 1, 27; 95 S Ct 751, 766; 42 L Ed 2d 766 (1975)); *Seastrunk v. Burns*, 772 F2d 143, 151 (CA 5, 1985)); *Euclid City School Bd*, 632 F Supp 2d at 751 (if the redistricting authority's proposed remedy "is not legally acceptable, the district court must then craft its own remedy."). The Commission would also have to persuade the court that a plan adopted without full utilization of Commission procedures qualifies as a legislative plan meriting deference (or that it otherwise should be adopted by the court). It is impossible to say in the abstract whether that result would occur in a given case.

C. *Timing and Equitable Considerations*. Another question will be whether there is sufficient time for the Commission to conduct all of its processes consistent with election deadlines—many of which are federal deadlines and do not yield to state law. *See Foster v. Love*, 522 US 67, 67; 118 S Ct 464, 465; 139 L Ed 2d 369 (1997) (finding state's change in congressional election date preempted by federal law). If there is not sufficient time, a court—particularly the Michigan Supreme Court—will likely be hesitant to read the Michigan Constitution as strictly requiring adherence to all redistricting procedures because to do so would frustrate the Commission's role and the peoples' choice in authorizing the Commission.

If, for example, a state-court challenge yielded a ruling invalidating a Commission plan as the election cycle had begun to progress, the state court would lack authority to implement a plan. To require the Commission to adhere to a procedure that could not be complete in time to meet federal deadlines would mean that *no* Commission plan would govern that election. The result would, in all likelihood, be for the election to be conducted under the prior decade's plan.[4] *See Reynolds v. Sims*, 377 US 533, 586; 84 S Ct 1362, 1394; 12 L Ed 2d 506 (1964) (establishing the rule that malapportioned or otherwise unlawful plan may be used based on election exigencies). That would be a controversial result because it would replace the Commission's plan with a malapportioned plan from the last decade and would replace a plan adopted by the Commission passed by the people of Michigan to replace a partisan process *with one adopted by a partisan legislative body*. In that instance, rigid adherence to one or a few provisions of Article IV, § 6 would result in negating *every* provision of Article IV, § 6, at least for purposes of the next election. We think the Michigan Supreme Court will not do this.

There is, however, some risk that in a *federal* action, a federal court could use the timing of the Subsection 9 and 14(b) process against the Commission by concluding that the time required to conduct public meetings and/or the 45-day notice-and-comment process is unacceptable and take that delay as an invitation to implement its own remedy, even if on an interim basis for the next election. We do not think this is a certain outcome by any stretch but flag it as a potential risk.

D. *Guidance from the Court*. Finally, there will be some leeway for the Commission to obtain guidance from the reviewing court in the event one of its plans is invalidated, particularly if the reviewing court is the Michigan Supreme Court. For reasons explained, the posture of the case is likely to be complicated and involve complicated considerations, and the Commission will likely be able to request a court ruling on the scope of the remedial phase and the Commission's obligations before attempting a remedy.

[4] This would be a legal impossibility for the congressional plan, since Michigan lost a U.S. House seat with the 2020 census results and could not run an election that sends more people to the next Congress than Michigan has seats.