STATE OF MICHIGAN
IN THE SUPREME COURT

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

Supreme Court No. 162891

BRIEF OF
ATTORNEY GENERAL TEAM
SUPPORTING MICHIGAN SUPREME COURT JURISDICTION

ORAL ARGUMENT REQUESTED

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

Ann M. Sherman (P67762)
Deputy Solicitor General

Christopher M. Allen (P75329)
Linus Banghart-Linn (P73230)
Assistant Solicitors General

Attorneys Supporting Michigan
Supreme Court Jurisdiction
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
AllenC28@michigan.gov
Banghart-LinnL@michigan.gov

Dated: June 2, 2021

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STATEMENT OF QUESTIONS PRESENTED

To supplement the arguments presented by Petitioners, this Court asked Attorney General teams to argue both sides of the following questions:

1. Does the petition properly invoke this Court's original jurisdiction under Const 1963, art 6, § 4 or Const 1963, art 4, § 6(19)?

   Petitioners answer: Yes

   AG Team Supporting Jurisdiction answers: Yes

   AG Team Opposing Jurisdiction presumably answers: No

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

   Petitioners answer: Yes

   AG Team Supporting Jurisdiction answers: Yes

   AG Team Opposing Jurisdiction presumably answers: No

3. If the answer to Question 2 is "yes," does the unprecedented delay in the transmission of federal decennial census data justify a deviation from the constitutional timeline?

   Petitioners answer: Yes

   AG Team Supporting Jurisdiction's answer: Yes

   AG Team Opposing Jurisdiction presumably answers: No

CONSTITUTIONAL PROVISIONS INVOLVED

Michigan Constitution, Article 4, § 6. Independent citizens redistricting commission for state legislative and congressional districts

(1) An independent citizens redistricting commission for state legislative and congressional districts (hereinafter, the "commission") is hereby established as a permanent commission in the legislative branch. The commission shall consist of 13 commissioners. The commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts. . . .

* * *

(4) The secretary of state shall be secretary of the commission without vote, and in that capacity shall furnish, under the direction of the commission, all technical services that the commission deems necessary. The commission shall elect its own chairperson. The commission has the sole power to make its own rules of procedure. The commission shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(5) Beginning no later than December 1 of the year preceding the federal decennial census, and continuing each year in which the commission operates, the legislature shall appropriate funds sufficient to compensate the commissioners and to enable the commission to carry out its functions, operations and activities, which activities include retaining independent, nonpartisan subject-matter experts and legal counsel, conducting hearings, publishing notices and maintaining a record of the commission's proceedings, and any other activity necessary for the commission to conduct its business, at an amount equal to not less than 25 percent of the general fund/general purpose budget for the secretary of state for that fiscal year. Within six months after the conclusion of each fiscal year, the commission shall return to the state treasury all moneys unexpended for that fiscal year. The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law. Each commissioner shall receive compensation at least equal to 25 percent of the governor's salary. The state of Michigan shall indemnify commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover such costs.

* * *

(7) The secretary of state shall issue a call convening the commission by October 15 in the year of the federal decennial census. Not later than November 1 in the year immediately following the federal decennial census, the commission shall adopt a redistricting plan under this section for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts.

(8) Before commissioners draft any plan, the commission shall 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. The commission shall receive for consideration written submissions of proposed redistricting plans and any supporting materials, including underlying data, from any member of the public. These written submissions are public records.

(9) After developing at least one proposed redistricting plan for each type of district, the commission shall publish the proposed redistricting plans and any data and supporting materials used to develop the plans. Each commissioner may only propose one redistricting plan for each type of district. The commission shall hold at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans. Each of the proposed plans shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and a map and legal description that include the political subdivisions, such as counties, cities, and townships; man-made features, such as streets, roads, highways, and railroads; and natural features, such as waterways, which form the boundaries of the districts.

(10) Each commissioner shall perform his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process. The commission shall conduct all of its business at open meetings. Nine commissioners, including at least one commissioner from each selection pool shall constitute a quorum, and all meetings shall require a quorum. The commission shall provide advance public notice of its meetings and hearings. The commission shall conduct its hearings in a manner that invites wide public participation throughout the state. The commission shall use technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings.

(11) The commission, its members, staff, attorneys, and consultants shall not discuss redistricting matters with members of the public outside of an open meeting of the commission, except that a commissioner may communicate about redistricting matters with members of the public to gain information relevant to the performance of his or her duties if such communication occurs (a) in writing or (b) at a previously publicly noticed forum or town hall open to the general public.

The commission, its members, staff, attorneys, experts, and consultants may not directly or indirectly solicit or accept any gift or loan of money, goods, services, or other thing of value greater than $20 for the benefit of any person or organization, which may influence the manner in which the commissioner, staff, attorney, expert, or consultant performs his or her duties.

(12) Except as provided in part (14) of this section, a final decision of the commission requires the concurrence of a majority of the commissioners. A decision on the dismissal or retention of paid staff or consultants requires the vote of at least one commissioner affiliating with each of the major parties and one non-affiliating commissioner. All decisions of the commission shall be recorded, and the record of its decisions shall be readily available to any member of the public without charge.

(13) The commission shall abide by the following criteria in proposing and adopting each plan, in order of priority:

> (a) 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.
>
> (b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.
>
> (c) Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

(d) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

(e) Districts shall not favor or disfavor an incumbent elected official or a candidate.

(f) Districts shall reflect consideration of county, city, and township boundaries.

(g) Districts shall be reasonably compact.

(14) The commission shall follow the following procedure in adopting a plan:

(a) Before voting to adopt a plan, the commission shall ensure that the plan is tested, using appropriate technology, for compliance with the criteria described above.

(b) 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. Each plan that will be voted on shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and shall include the map and legal description required in part (9) of this section.

(c) 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. If no plan satisfies this requirement for a type of district, the commission shall use the following procedure to adopt a plan for that type of district:

(*i*) Each commissioner may submit one proposed plan for each type of district to the full commission for consideration.

(*ii*) Each commissioner shall rank the plans submitted according to preference. Each plan shall 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 value equal to the number of plans submitted.

(*iii*) The commission shall adopt the plan receiving the highest total points, that is also ranked among the top half of plans by at least two commissioners not affiliated with the party of the commissioner submitting the plan, or in the case of a plan submitted by non-affiliated commissioners, is ranked among the top half of plans by at least two commissioners affiliated with a major party. If plans are tied for the highest point total, the secretary of state shall randomly select the final plan from those plans. If no plan meets the requirements of this subparagraph, the secretary of state shall randomly select the final plan from among all submitted plans pursuant to part (14)(c)(*i*).

(15) Within 30 days after adopting a plan, the commission shall publish the plan and the material reports, reference materials, and data used in drawing it, including any programming information used to produce and test the plan. The published materials shall be such that an independent person is able to replicate the conclusion without any modification of any of the published materials.

(16) For each adopted plan, the commission shall issue a report that explains the basis on which the commission made its decisions in achieving compliance with plan requirements and shall include the map and legal description required in part (9) of this section. A commissioner who votes against a redistricting plan may submit a dissenting report which shall be issued with the commission's report.

(17) An adopted redistricting plan shall become law 60 days after its publication. The secretary of state shall keep a public record of all proceedings of the commission and shall publish and distribute each plan and required documentation.

* * *

(19) The supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties, may review a challenge to any plan adopted by the

commission, and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law. In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.

(20) This section is self-executing. If a final court decision holds any part or parts of this section to be in conflict with the United States constitution or federal law, the section shall be implemented to the maximum extent that the United States constitution and federal law permit. Any provision held invalid is severable from the remaining portions of this section.

* * *

(22) Notwithstanding any other provision of this constitution, or any prior judicial decision, as of the effective date of the constitutional amendment adding this provision, which amends article IV, sections 1 through 6, article V, sections 1, 2 and 4, and article VI, sections 1 and 4, including this provision, for purposes of interpreting this constitutional amendment the people declare that the powers granted to the commission are legislative functions not subject to the control or approval of the legislature, and are exclusively reserved to the commission. The commission, and all of its responsibilities, operations, functions, contractors, consultants and employees are not subject to change, transfer, reorganization, or reassignment, and shall not be altered or abrogated in any manner whatsoever, by the legislature. No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in this section.

INTRODUCTION

In drawing district lines, the Constitution requires Petitioners to do two things that, due to the unprecedented delay in the 2020 census data, cannot *both* be done. Petitioners can do only one or the other. They can choose to accomplish all the substantive tasks set forth in article 4, § 6 of the Constitution, with the most up-to-date census data (which these important tasks warrant), but be late. Or they can choose to be on time at the expense of the quality and accuracy of their work. It is rather like the construction of a building, with the contractor up against deadlines, but due to unforeseen circumstances, unable to secure materials that meet safety requirements. We would all agree that a modest delay is preferable to using shoddy materials that could cause injury. Here, it is difficult to imagine a dilemma that more strongly cries out for the Court to exercise its seldom-used original jurisdiction, its extraordinary power, and its authority to direct rather than mandate.

The People could not have contemplated a worldwide pandemic coinciding with and delaying the constitutionally mandated federal census. But when they chose an independent commission to govern Michigan's redistricting process, they nevertheless anticipated that the unanticipated could happen, and thus tasked this Court with a role in directing the Commission and the Secretary of State in their duties. Through the language of article 4, § 6(19) and the clear purpose for which the Commission was intended, it becomes evident that the People granted this Court original jurisdiction broad enough to resolve the conflict here. And in the

exercise of that jurisdiction, this Court has the authority to treat the September and November deadlines in § 6 as directory, not mandatory.

Should the Court exercise that authority here? Absolutely. The importance of redistricting and the will of the People demand it in response to these extraordinary, unforeseeable, and unprecedented circumstances. And notably, the Commission and the Secretary of State acted promptly to give this Court the opportunity to create a remedy, instead of waiting to be sued for failing to perform a clear legal duty. Finally, the end result will not negatively affect voters or cast doubt on the validity of an election. Nor, contrary to the Senate amicus, will it invite others to willy-nilly seek to rewrite the Constitution in other contexts—unbridled and based on personal preference rather than the preference of the People. Section 6(19) cabins this Court's exercise of authority to the redistricting context and is wholly consistent with the People's intent. And Petitioners clearly have not engineered circumstances in order to affect a timing they *prefer*.

The Commission and the Secretary have expressed confidence that their proposed dates would allow them to meet their other deadlines and carry out the paramount duties with which the People tasked them. This Court's action in ordering these deadlines will protect the important process of ensuring that *our* building (Michigan's district lines) are properly built using the best and required materials (up-to-date census data).

ARGUMENT

I. The Petition properly invokes this Court's original jurisdiction.

In a 2018 revision to our Constitution, the People created a Commission to draw district lines for state and federal legislative offices. They tasked the Commission with prioritizing vote equality among the districts and eschewing favoritism among parties or candidates. They asked the Commission to rely on census data to support their plans, and to hold hearings so the public could be involved. And, no doubt relying on the federal government's clockwork delivery of census data over the decades, they set deadlines for the Commission to complete certain phases of its work. But because of the COVID-19 pandemic and the consequent delay of the federal government's delivery of the final dataset, neither the Commission nor the Secretary of State can complete all of their duties.

Fortunately, and consistent with this Court's historical involvement in Michigan's redistricting process, the People granted this Court original jurisdiction to "direct" the Commission and the Secretary in their duties pertaining to redistricting—which is precisely what the Petitioners seek. If that grant of jurisdiction is not properly invoked here, this Court should alternatively review the Petition under its jurisdiction over prerogative writs, including mandamus.

A. General principles of constitutional interpretation.

"Construction of the Constitution is the province of the courts[.]" *Richardson v Hare*, 381 Mich 304, 309 (1968). "The primary rule" of constitutional construction, as distinct from statutory construction, is "the rule of 'common understanding.' " *In*

re Proposal C, 384 Mich 390, 405 (1971). For that principle, the Court has consistently relied on Justice Cooley's formulation:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed . . . .

Citizens Protecting Michigan's Constitution v Secy of State, 503 Mich 42, 61 (2018) (*CPMC*) (cleaned up). In addition to reviewing the language of a constitutional provision, "the courts may consider the circumstances leading to the adoption of the constitutional provision and the purpose sought to be accomplished." *Bolt v City of Lansing*, 459 Mich 152, 160 (1998).

B. The Court has jurisdiction pursuant to Article 4, § 6(19).

The provision granting this Court jurisdiction within the Redistricting Amendments reads in pertinent part, "The supreme court, in the exercise of original jurisdiction, *shall direct the secretary of state or the commission to perform their respective duties* . . . ." Const 1963, art 4, § 6(19) (emphasis added).

This plain text, the context of this grant of jurisdiction, and the purpose of the Redistricting Amendments, in conjunction with the facts in the Petition, support this Court's jurisdiction over this petition.

1. The Commission has a duty to ensure that districts are "of equal population," and those districts must be "verif[ied]" by "census data."

"Our Constitution is clear that 'all political power is inherent in the people.' " *CPMC*, 503 Mich at 59, quoting Const 1963, art 1, § 1. And in enacting the Redistricting Amendments in 2018, the People were clear that they desired the Commission to have the sole control over "promulgat[ing] and adopt[ing] a redistricting plan or plans for this State." Const 1963, art 4, § 6(19). Through their Constitution, the People charged the Commission with several duties regarding the development, proposal, publishing, and adoption of redistricting plans. See art 4, §§ 6(7), (9), (14)(b).

First, the Commission is obligated to follow certain criteria when it adopts a plan—it does not have free rein to draw districts as it sees fit. Instead, the People imposed and prioritized specific criteria that the "commission *shall* abide by . . . in proposing and adopting each plan." § 6(13) (emphasis added).

The first and highest priority imposed by the Constitution is that "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." § 6(13)(a) (emphasis added). Moreover, the districts "shall be geographically contiguous," § 6(13)(b), and "shall reflect the state's diverse population and communities of interest," § 6(13)(c). Among other limitations, the districts "shall not favor or disfavor an incumbent elected official or a candidate." § 6(13)(e). And the Commission "shall reflect consideration of county, city, and township boundaries." § 6(13)(f).

Second, in order to effectuate these criteria, the Commission is charged with supporting their plans with census data to ensure the resulting plans that are accurate and "verify the population of each district." § 6(9).

The Constitution requires that "[a]fter developing at least one proposed redistricting plan . . . , the commission *shall* publish the proposed redistricting plans *and any data and supporting materials* used to develop the plans." § 6(9) (emphasis added). The proposed plan must then be the subject of several public hearings to "solicit[ ] comment from the public." *Id.* Pertinent here, the proposed plans, among other things, "*shall* include such census data as is necessary to *accurately* describe the plan and *verify the population* of each district." *Id.* (emphasis added). The same duties apply to the Commission's adoption of a plan. § 6(14)(b).

Third, in addition to these weighty duties, there are temporal deadlines. One is particularly pertinent to this case: for each type of district, the Commission "shall adopt a redistricting plan" "[n]ot later than November 1 in the year immediately following the federal decennial census." § 6(7). Moreover, the Commission must publicly propose the plans at least 45 days in advance of that November 1 date—September 17—so that the public may comment. § 6(14)(b).

2. In the redistricting process, the People granted this Court original jurisdiction, which the Petitioners properly invoked here.

As described above and in the Petition, the number and weight of the substantive duties—to propose and adopt a plan that ensures equality of

population, among other criteria, and is supported by census data that verifies the accuracy of the districts' populations—is at odds with the September 17 and November 1 deadlines as a result of the federal government's delay in providing census data. The question becomes: which duty or set of duties should the Secretary and the Commission comply with? The substantial duties regarding the accurate drawing of district maps, or several particular dates? Because the Commission and Secretary cannot comply with *all of* their duties under the Constitution, through no fault of their own, this Court has jurisdiction to direct which duties they must meet.

In the same article of our Constitution as the above-described duties, the People granted this Court original jurisdiction over aspects of the enterprise of adopting a redistricting plan. The language of that provision reads, in full:

> The supreme court, in the exercise of original jurisdiction, *shall direct the secretary of state or the commission to perform their respective duties*, may review a challenge to any plan adopted by the commission, and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law. Const 1963, art 4, § 6(19) (emphasis added).

Given the myriad duties imposed on the Commission and the Secretary as described above, the italicized passage of article 4, § 6(19) plainly provides this Court the opportunity to "direct" them to "perform their . . . duties." Between the deadlines placed on the Commission to propose plans, present them to the public through numerous public hearings, comply with the People's criteria, and do so within certain time constraints, it is no wonder that, in extraordinary circumstances, certain duties could be irreconcilable. Thus, the Petition asks this

Court to "direct" the Commission and the Secretary in the performance of their duties. Since § 6(19) separately gives this Court jurisdiction to "review a challenge" to a redistricting map and remand for further action, the Court's jurisdiction to "direct" Petitioners to perform their duties must have some independent work to do.

Aside from the broad language in the Redistricting Amendments, this Court's jurisdiction with regard to the original commission buttresses this expansive understanding of the Court's jurisdiction for the new Commission. The 1963 Constitution created a commission to draw district lines, much as the Redistricting Amendments do today. Const 1963, art 4, § 6 (as ratified); *CPMC*, 503 Mich at 84; see also MCL 4.11 *et seq*. This Court's original jurisdiction was provided in language familiar to the Redistricting Amendments: "the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties." Const 1963, art 4, § 6 (as ratified).

But, notably, that substantially similar language was preceded by a strict limitation, a limitation that was not re-adopted in the Redistricting Amendments:

> *Upon the application of any elector filed not later than 60 days after final publication of the plan*, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution. [Const 1963, art 4, § 6 (as ratified) (emphasis added).]

This original, as-ratified version limited the Court's exercise of original jurisdiction in at least two fundamental ways. First, it required an elector to file the application. Second, it imposed a temporal window for such challenges, limiting the grant of jurisdiction to challenges "after final publication of the plan." As a

consequence of that temporal limitation, this Court's original jurisdiction could not be invoked anticipatorily.

These limitations do not appear in today's Constitution, suggesting that the People intended a broader scope for this Court's original jurisdiction under this provision. Comparing these provisions is helpful in understanding the scope of this Court's jurisdiction, and this Court is familiar with consulting the lineage of our earlier constitutions for clues about the current Constitution's meaning. See, e.g., *Consumers Power Co v Attorney Gen*, 426 Mich 1, 7 (1986) (comparing the language of the 1908 Constitution with that of the 1963 Constitution concerning the Legislature's role in regulating constitutional ballot initiatives). The narrower provision of the as-ratified Constitution was not proposed in the Redistricting Amendments, even though the provision is otherwise very similar to the original grant. This choice, and the People's vote to adopt the provision, supports the conclusion that Redistricting Amendments expanded the scope of this Court's original jurisdiction on this point. This Court's broadened jurisdiction permits this Court's exercise over the Petition.

3. Both the history of this Court's role in the redistricting process and the greater context of the Redistricting Amendments support this Court's exercise of jurisdiction here.

Discussion of this earlier jurisdictional provision highlights this Court's "long standing" "involvement in the process" of apportionment. *In re Apportionment of State Legislature–1992*, 439 Mich 715, 716 (1992). The 1963 Constitution created a

commission that is "materially similar" to the one later created by the Redistricting Amendments. *CPMC*, 503 Mich at 55. The Petition lays out much of this Court's history in the context of redistricting, but suffice to say this Court's involvement was substantial, reviewing redistricting plans for consistency with constitutional mandates and choosing a redistricting plan when competing plans did not attain majority support of the commission. See, e.g., *In re Apportionment of State Legislature–1972*, 387 Mich 442 (1972); *In re Apportionment of State Legislature–1982*, 413 Mich 96 (1982); *In re Apportionment of State Legislature–1992*, 439 Mich 251 (1992); *In re Apportionment of State Legislature–1992*, 439 Mich 715.

A considerable piece of the Court's prior involvement in redistricting in conjunction with the old commission has receded under the Redistricting Amendments. The Court is not charged with the onerous role of deciding among competing alternative plans, as it was under the as-ratified version of the Constitution. See Const 1963, art 4, § 6, ¶ 7 (as ratified). Rather than making this Court the tiebreaker, § 6 sets forth a new tiebreaker provision—one that involves only the Commission. See Const 1963, art 4, § 6(14)(c). But, § 6(19) nevertheless creates an essential role for this Court to play: to direct the government actors in their duties, and to entertain challenges to plans that are alleged to violate the state or federal constitution.

The breadth of this grant of original jurisdiction recognizes that not all roadblocks are foreseeable. But the People themselves, through granting this Court the broad measure of original jurisdiction, anticipated that those unforeseen

problems may require independent resolution. Cf *In re Apportionment of State Legislature–1972*, 387 Mich at 450–451 ("We, having no reasonable alternative, must carry out the constitutional mandate placed upon us by the people of this State, and that is to determine 'which plan complies most accurately with the constitutional requirements.' "). One would be hard-pressed to find anyone who predicted that a deadly, worldwide pandemic would engulf the country (and the world) during the period set to conduct the decennial census.

In fact, the People *would have* expected that the census data be available in the timeframe it has historically been available. And the People, intending the Commission to use that data, embodied that intention in the Redistricting Amendments. It is widely known that census data is essential to redistricting. See, e.g., *Voting and Democracy v Trends in State Self-Regulation of the Redistricting Process*, 119 Harv L Rev 1165, 1165 (2006) ("Every ten years, the release of the national census results stimulates a flurry of state political activity as governments redraw congressional and legislative district lines."). Thus, it is no surprise that the People adopted a procedure that requires the Commission to adopt plans supported by census data. § 6(9). With the breadth of this court's original jurisdiction described above, the Commission and the Secretary seek "direct[ion]" concerning their several duties under the Constitution, including whether to meet the November 1 deadline no matter the consequences.

The fact that the Commission and the Secretary have not filed a comparable petition before is unsurprising, and not only because of the unprecedented

circumstances creating the delay of the delivery of the census data. The original commission was not bound to complete a plan by a specific date, as is the current Commission. Instead, "[t]he commission had to complete its work within 180 days of the census data becoming available." *CPMC*, 503 Mich at 85; Const 1963, art 4, § 6 (as ratified) ("The commission shall complete its work within 180 days after all necessary census information is available."). The original commission would have had no opportunity or need to decide between following its substantive duties and meeting the deadlines linked to adopting a plan.[1]

What's more, the People also included a severance clause in the Redistricting Amendments that requires, in the event of a conflict with the federal constitution or federal law, that the Amendments "be implemented to the *maximum extent* that the United States constitution and federal law permit." Const 1963, art 4, § 6(20) (emphasis added). While not directly at issue here as there is no challenge under federal law, this is yet another reflection of the People's expectation that the Commission would be able to carry out its work—to develop, propose, publish, and

[1] The Michigan's Senate's contention that the lack of adversity is fatal is not well-taken. (Senate Amicus Br, pp 6–9.) This Court is no stranger to redistricting cases without an adverse party—the 1963 Constitution envisioned the Court as the tie breaker where the commission could not settle on a plan, permitting members of the commission to "submit a proposed plan to the supreme court." Const 1963, art 4, § 6 (as ratified); MCL 4.17. No adversity existed; the Constitution did not require it. While this specific provision was not re-adopted in the Redistricting Amendments, the expanded grant of original jurisdiction in article 4, § 6(19) also contains no plain adversity requirement, and is therefore in keeping with the historical exercise of this Court's jurisdiction over such cases.

adopt redistricting plans that effectuate the designated criteria—to the "maximum extent" possible.

Ultimately, considering the text, history, and "the purpose sought to be accomplished" by the Amendments, *Bolt*, 459 Mich at 160, this Court may exercise original jurisdiction over the Petition. The Commission "shall" develop, propose, publish, and adopt redistricting plans with the aid of census data, and "shall" do so by a date certain. But for reasons outside of its control, it cannot do both. Where these duties are at odds, the People task this Court to direct the Commission and the Secretary which duties to carry out.

C. Alternatively, the Petition properly invokes this Court's original jurisdiction under article 6, § 4.

If this Court determines that it does not have original jurisdiction under article 4, § 6(19), this Court alternatively has jurisdiction over the Petition pursuant to its "power to issue, hear and determine prerogative and remedial writs." Const 1963, art 6, § 4. Of those writs, mandamus is the proper one here. "Mandamus is properly categorized as both an 'extraordinary' and a 'prerogative' writ." *O'Connell v Dir of Elections*, 316 Mich App 91, 100 (2016). The Petition's reliance on article 6, § 4 is not surprising, as it has been a "traditional vehicle" in redistricting cases. *LeRoux v Secy of State*, 465 Mich 594, 606 (2002).

This Court has original jurisdiction to decide whether to grant a writ of mandamus. The Petition properly invokes this Court's original jurisdiction over

prerogative writs, seeking to compel the Commission and the Secretary to carry out their substantive duties under the Redistricting Amendment.

1. An original action under article 6, § 4 is proper under applicable law.

Under MCR 3.301(A)(1), "an original action may not be commenced in the Supreme Court . . . if the circuit court would have jurisdiction of an action seeking that relief." But this Court has made clear that MCR 3.301(A)(1) is just the "general rule." *LeRoux*, 465 Mich at 606. And, generally, "[a]n action for mandamus against a state officer shall be commenced in the court of appeals, or in the circuit court in the county in which venue is proper or in Ingham county." MCL 600.4401.

But this case does not fall within the general rule, and instead is governed by the more specific provision, MCL 3.71, which states, "The supreme court has original and exclusive state jurisdiction to hear and decide all cases and controversies in Michigan's 1 court of justice involving a congressional redistricting plan." Because the Petition concerns, among other things, the Commission's duty to "adopt a redistricting plan for . . . congressional districts," Const 1963, art 4, § 6, this Court has both original *and* exclusive jurisdiction. See *LeRoux*, 465 Mich at 607 ("M.C.L. § 3.71 expressly provides that the Court of Appeals and state trial

courts do not have jurisdiction of such cases, making an action in this Court appropriate . . . .").[2]

2. The Petition properly seeks a writ of mandamus.

The Petition properly invokes article 6, § 4 of the Constitution, as it effectively seeks the prerogative writ of mandamus. *Tawas & BCR Co v Iosco Circuit Judge*, 44 Mich 479, 483 (1880) ("Mandamus is a prerogative writ designed to afford a summary and specific remedy in those cases when without it the party will be subjected to serious injustice."). Mandamus is available in the face of a public official's "clear legal duty." *State Bd of Ed v Houghton Lake Cmty Sch*, 430 Mich 658, 666 (1988). "The primary purpose of the writ of mandamus is to enforce duties created by law." *Waterman-Waterbury Co v Sch Dist No 4 of Cato Twp*, 183 Mich 168, 174 (1914). In short, the writ of mandamus is a "discretionary writ which does not issue unless there is a plain, positive duty to perform the asserted duty, and a clear legal right of the petitioner to the performance of that duty." *Pillon v Attorney Gen*, 345 Mich 536, 539 (1956).

As discussed above, the Commission is entrusted with several duties pertaining to the adoption of redistricting plans. (See Argument I.B.1.) It is no defect that the named duties are not simple ministerial duties, because "mandamus

[2] Notably, per *LeRoux*, the statutory provision governing the procedure of such applications, MCL 3.74, is not applicable here. 465 Mich at 607 n 15. Just as in *LeRoux*, this case should be "processed under [the Court's] rules for original actions and the general provisions governing proceedings in this Court." *Id.*; see also MCR 7.303(B)(6); MCR 7.316(A)(7).

will lie to compel the exercise of discretion," even though it may "not compel its exercise in a particular manner." *Teasel v Dept of Mental Health*, 419 Mich 390, 410 (1984). "[T]he writ will lie to require a body or an officer charged with a duty to take action in the matter, notwithstanding the fact that the execution of that duty may involve some measure of discretion." *Id.* So while the drawing of district lines contemplates a large measure of discretion, even when guided by criteria, the bare duty to draw those lines consistent with those criteria is a matter that this Court may direct under *Teasel*.

That kind of direction appears to be what the Commission and the Secretary ask for in their Petition. They ask this Court to compel them to exercise their paramount duties under the Redistricting Amendments, notwithstanding the constitutionally imposed November 1 deadline. In other words, they seek to be held to their duties—for example, to meet the People's criteria for drawing districts maps, § 6(13), and to propose and adopt plans that include such census data necessary "to *accurately* describe the plan and *verify the population* of each district." §§ 6(9), (14)(b) (emphasis added). As explained by the Petitioners, adopting a plan by November 1 would compromise these other duties. (Pet Br in Support, pp 13–16, 19.) Thus, the Commission and the Secretary ask this Court to permit them to adhere to their substantive duties, while obviating the need to follow the directory deadlines, as discussed more fully below.

While no doubt unusual, the fact that the party seeking the writ is the same as the party against whom it would be enforced appears not to have been foreclosed

in Michigan. In our State, the concept of standing is only a "prudential limit, which is to say that the court's decision to invoke it was 'one of discretion and not of law.' " *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355 (2010). "Historically, the standing doctrine grew out of cases where parties were seeking writs of mandamus to compel a public officer to perform a statutory duty." *Id.*

This Court has the discretion to determine who may properly seek mandamus. In *People ex rel Ayres v Bd of State Auditors*, the Court considered whether a book publisher was a proper party to seek a writ of mandamus to compel the board of state auditors to advertise and solicit bids to prepare the supreme court reporters as required by statute. 42 Mich 422, 424–425 (1880). The publisher "was and is anxious and prepared to make bids," but could not do so until the board advertised that it was seeking bids. *Id.* at 425. This Court emphasized that it was within judicial discretion to determine who was an appropriate party to do so. *Id.* at 429–430 ("we find no reason to consider the matter as one lying outside of judicial discretion, which is always involved in mandamus cases"). So long as the proposed relator is not an "officious interloper, and gives sufficient assurance that the controversy is genuine and in good faith," seeking a writ of mandamus is appropriate. *Id.* at 429.

Applying *Ayres* here, the Commission and Secretary obviously seek relief in good faith, faced with the impossible choice of picking and choosing which functionally contrary duties to abide by. Their good faith is demonstrated by the

fact that they come to this Court pleading for direction and seeking to be bound by its orders.

Finally, mandamus will lie only if there is no other adequate legal remedy. This AG Team agrees that, if this Court has original jurisdiction under article 4, § 6(19), mandamus would neither be appropriate nor needed. *People ex rel La Grange Twp v State Treasurer*, 24 Mich 468, 477 (1872) ("It is the inadequacy, and not the mere absence, of all other legal remedies, and the danger of a failure of justice without it, that must usually determine the propriety of this writ [of mandamus]. Where none but specific relief will do justice, specific relief should be granted if practicable."). But if this Court disagrees that § 6(19) gives the Court the power to grant the Petition, then Petitioners lack any adequate legal remedy—making mandamus wholly appropriate. Whether or not the Court decides to grant the writ, it has jurisdiction to decide whether to grant the relief sought in the Petition.

II. This Court has the authority to recognize that the timing requirement in article 4, § 6(7) is directory, not mandatory.

This Court the authority to deem a constitutional timing requirement as directory instead of mandatory. Just as the Legislature is capable of imposing timing requirements that are directory as well as timing requirements that are mandatory, the People in amending the Constitution have no less power to do the same. For this Court to hold that it lacks the power to deem a constitutional timing requirement directory would mean one of two things: either (a) that the People lack

the power to do what the Legislature may, i.e., to enact directory timing requirements, or (b) that when the People do exercise their power to enact directory timing requirements, this Court will refuse to give effect to the People's will.

The first possibility is not tenable. "*All* political power is inherent in the people." Const 1963, art 1, § 1 (emphasis added). The People have, through the Constitution, delegated the legislative power to the Legislature. "The people, by the adoption of the Constitution, have vested the legislative power in the legislature of the State, subject to the initiative[,] referendum[,] and recall[.]" *In re Brewster Housing Site*, 291 Mich 313, 340 (1939). And this Court has recognized that the initiative power, which the People exercised in passing the Redistricting Amendments, is a "*reservation* of legislative authority by the people." *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 214 (1985). This reinforces the point—the legislative power retained by the People is inherent, and the legislative power vested in the Legislature is delegated. But it is axiomatic that the People could not delegate a power they do not possess. If the Legislature has the power to enact directory timing requirements, then of necessity the People have the same power when amending the Constitution by initiative.

And the Legislature does have the power to enact directory timing requirements. This Court recognized as much in *In re Forfeiture of Bail Bond*, 496 Mich 320 (2014). In that case, this Court considered whether timing requirements in MCL 765.28 are mandatory, such that a failure to comply with them bars forfeiture of a surety's bail bond. Although this Court ultimately determined that

the timing requirements were mandatory, it recognized that "[t]he general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory." *Id.* at 329–330, quoting 3 Sutherland on Statutory Construction § 57:19.[3] Indeed, the *Forfeiture of Bail Bonds* decision could have been much shorter and much simpler if *all* statutory timing requirements were mandatory. The reason it required this Court's careful analysis is that some are directory ("[t]he general rule"), and others, like that in MCL 765.28, fall within exceptions to the general rule.

In *Forfeiture of Bail Bonds*, this Court identified other cases in which timing requirements had been held directory. For example, in *Hooker v Bond*, this Court considered the timing requirements for acts leading up to a tax foreclosure, and again endorsed a general rule that timing requirements are directory only: "It should clearly appear that the act was mandatory. Otherwise it will be held directory." 118 Mich 255, 257 (1898). And this Court held that the timing requirement was indeed directory in *Hooker*.

In *WR Reynolds & Co v Secretary of State*, this Court considered a timing requirement that, similar to the requirement at issue in this case, related to the setting of legislative districts. 238 Mich 552 (1927). The statute required the county board of supervisors to divide the county into two legislative districts before July 1. *Id.* at 554. The board did so after July 1, and this Court upheld the action,

[3] In the current edition of Sutherland, the quoted section is at § 57:17.

holding that the board's "neglect to act within the time fixed by the statute did not prevent action thereafter." *Id.*

Because this Court has exercised its authority to examine whether statutory requirements are directory or mandatory, it must be true that the Legislature has the power to enact directory timing requirements. Indeed, that is the "general rule." And if the Legislature can enact a directory requirement, the People can as well. So the first possibility—that this Court lacks the authority to deem a constitutional timing requirement directory because the People cannot enact a directory timing requirement—must fail.

That leaves the second possibility—that the People *have* the power to enact directory timing requirements in the Constitution, but that this Court *lacks* the power to deem them directory. That cannot be the case, as it would fly in the face of the "primary rule" of constitutional construction—that this Court must interpret the Constitution the way the People themselves would have understood it. See *CPMC*, 503 Mich at 61. If this Court has the power to interpret the Constitution, it must have the power to interpret it correctly.

In sum, the People have the power to enact directory timing requirements, this Court has the power to interpret the Constitution, and this Court's duty in interpreting the Constitution is to give meaning to its provisions as the People would have understood them. Therefore, this Court has the authority to deem a constitutional requirement directory rather than mandatory.

III. The importance of this issue and the extraordinary circumstances here warrant this Court's exercise of its authority to deem § 6's constitutional timing requirements as directory, and exercising that authority, this Court should grant Petitioners' requested relief.

These circumstances cry out for this Court to deem the deadlines in § 6 directory rather than mandatory. And in doing so, this Court should grant the reasonable relief the Commission and the Secretary of State request in their Petition.

Redistricting goes to the heart of democracy, and the People of Michigan have sought to prevent gerrymandering in the drawing of districts. One way they have done so is to require the complete decennial census data, which is essential to the redistricting process because it most accurately reflects population and demographic shifts. And in order to perform its paramount duties utilizing this data, the requested adjustment in time is needed. This Court and other jurisdictions have granted similar relief when extraordinary circumstances have warranted it, and this Court should do so here.

A. Fair and accurate redistricting is crucial to our democracy.

Redistricting is the process by which districts get drawn. *How* that process occurs has an enormous impact on who runs for public office, who gets elected, and the manner in which voters' choices are heard.

Redistricting occurs because our country's—and our State's—population is constantly changing and moving. Areas that were dense become less so over time, and vice versa, and districts also may change demographically. That is why district boundaries are redrawn every ten years—to ensure that each district has about the

same number of people and that districts are reflective and representative of the electorate. Brennan Center for Justice, *7 Things to Know about Redistricting*, July 3, 2017.[4] That is, redistricting attempts to ensure that everyone's vote counts equally. See *Reynolds v Sims*, 377 US 533, 558 (1964) (reaffirming the one person, one vote rule, meaning that one person's voting power ought to be roughly equivalent to another person's within the same State). That principle of equality is not only protected by the federal constitution, but also enshrined in our state Constitution as the most important principle in redistricting. See § 6(13)(a) ("Districts shall be of equal population as mandated by the United States constitution . . . .").

This Court has long recognized that questions of redistricting "go[ ] to the heart of the political process in a constitutional democracy." *In re Apportionment of State Legislature–1982*, 413 Mich at 136. Indeed, the "periodic appointment and districting that follows each decennial census" is a "recurring part of the American political scene." *In re Apportionment of State Legislature–1992*, 439 Mich at 716. Unfortunately, for many years, that process was tainted by a thirst for partisan advantage.

[4] Available at https://www.brennancenter.org/our-work/analysis-opinion/7-things-know-about-redistricting#:~:text=Some%20districts%20gain%20residents%2C%20others%20lose%20them.%20Districts,districts%20are%20reflective%20and%20representative%20of%20the%20electorate, last visited 5/31/2021.

1. Partisan gerrymandering posed a danger to democracy.

This Court has confirmed the obvious: "It is axiomatic that apportionment is of overwhelming importance to the political parties." *Id.* As Justice Sandra Day O'Connor candidly put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Rucho v Common Cause*, 139 S Ct 2484, 2498 (2019), quoting *Davis v Bandemer*, 478 US 109, 145 (1986), abrogated by *Rucho*, 139 S Ct 2484. Suffice to say, redistricting is political.

With political consequences come the incentive for abuse. Over a hundred years ago, this Court's Chief Justice Morse warned that the " 'greatest danger to our free institutions' occurs when a political party retains its political power by dividing election districts in a manner to give special advantages to one group." *Citizens Protecting Michigan's Const v Sec'y of State*, 324 Mich App 561, 569, aff'd 503 Mich 42 (2018), quoting *Giddings v Sec'y of State*, 93 Mich 1, 13 (1892) (Morse, C.J., concurring). He went on to explain that if gerrymandering[5] is permitted, "a political party may control for years the government, against the wishes, protests,

[5] The term "gerrymander" is a portmanteau of the name of Elbridge Gerry—a signer of the Declaration of Independence, fifth Vice President of the United States, and the eighth Governor of Massachusetts—who was known for designing legislative districts in strange shapes, one of which resembled a salamander. *Citizens Protecting Michigan's Const*, 324 Mich App at 567–70, fn 4, citing *Arizona State Legislature v Arizona Indep Redistricting Comm*, 576 US 787, 791 n 1 (2015). See also Black's Law Dictionary 816 (6th ed, 1990) (defining "gerrymander" as "the process of dividing a state or other territory into authorized civil or political divisions . . . to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines").

and votes of a majority of the people of the State, each Legislature, chosen by such means, perpetuating its political power by like legislation from one apportionment to another." *Id.* at 569–570. Indeed, when districts are not accurately drawn, citizens can be deprived of "the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." *Rucho*, 139 S Ct at 2509 (Kagan, J., dissenting). In short, "partisan gerrymanders . . . are incompatible with democratic principles." *Arizona State Legislature v Arizona Indep Redistricting Comm*, 576 US 787, 791 (2015) (cleaned up).

2. A driving force behind the Redistricting Amendments was the promise of accurate districts.

Although the Founders of the U.S. Constitution "certainly did not think proportional representation was required," *Rucho*, 139 S Ct at 2499, the People of Michigan heartily disagree. Through the Redistricting Amendments, the People overwhelmingly rejected the status quo of permitting the Legislature to draw districts, instead appointing a citizen Commission to do so.[6] We decided " 'that the voters should choose their representatives, not the other way around.' " *Arizona State Legislature*, 576 US at 824, quoting Berman, *Managing Gerrymandering*, 83 Texas L Rev 781, 781 (2005).

[6] Over 60% voted in favor and approximately 39% opposed the initiative, which appeared on the ballot as Proposal 18-2. Department of State, 2018 Michigan Election Results, available at https://mielections.us/election/results/2018GEN_CENR.html (last accessed 5/31/2021).

Although our state Constitution contains safeguards against partisan gerrymandering, see Const 1963, art 4, § 6(13), some of the same dire consequences of a partisan gerrymander could occur if the data on which the Commission's work is based is inaccurate or incomplete. The Commission's charge of following the very criteria that the People adopted to avoid the ills of gerrymandering could be compromised.

Without the most complete and accurate dataset available, how can the Commission (and the People) be confident that districts "be of equal population," § 6(13)(a)? Or that the maps "reflect the state's diverse population and communities of interest," § 6(13)(c)? Or that the districts do not improperly provide "a disproportionate advantage" to a political party or favor an incumbent over a candidate, §§ 6(13)(d), (e)? The input affects the output, and it stands to reason that potentially incomplete or inaccurate data will affect the districts in which we choose our elected representatives.

That is precisely why it is so important to honor the voters' purpose in enacting the Redistricting Amendments. See Kubin, *The Case for Redistricting Commissions*, 75 Tex L Rev 837, 838 (1997) (opining that redistricting commissions "offer a viable means of restoring a degree of efficiency, fairness, and finality to a state's decennial gerrymander."). "Free and fair and periodic elections are the key" to the vision espoused by James Madison, that "the power 'is in the people over the Government, and not in the Government over the people.' " *Rucho*, 139 S Ct at 2511 (Kagan, J., dissenting), quoting 4 Annals of Congress 934 (1794).

B. The finalized census data most accurately reflects up-to-date population and demographic statistics.

No one seems to dispute that the decennial census data is the best evidence of population. As the Petition explains, the delayed dataset, named PL 94-171, "is critical for redistricting because it provides geographic and special detail on where people live and their key demographic characteristics." (Pet, ¶ 22.)

Although federal law does not require states to use the decennial census data, see *Burns v Richardson*, 384 US 73, 91–97 (1966), various provisions of our Constitution call for its use. Article 4, §§ 6(2)(a)(i), (2)(c)–(f), (5), and (7) reference decennial census data as a starting point of the redistricting process. The language of §§ 6(9) and 6(14)(b) references "such census data as is necessary to accurately describe the plan and verify the population of each district." The decennial census data is the only data that will accurately verify the population of each district. Accordingly, that data would allow the Commission to meet the implied directives of § 6.

Moreover, the "common understanding" of the voters who adopted the Redistricting Amendments, with its deadlines, is that the decennial census data would be available to the Commission in its undertaking of its substantive duties, as it historically has been. Indeed, it was widely known that census data is released in a certain timeframe every ten years. See US Const, art I, § 2. And by its very nature as a count of "the whole Number of free Persons," the census is a well-known phenomenon across the country.

C. An adjustment in time is needed to allow the Commission to adequately perform its substantive duties.

It follows that an adjustment of time would allow Petitioners to realize the intent of the voters who adopted the Redistricting Amendments—namely, that the Commission's work should be based on the most accurate information, information that reflects population shifts over the past decade. That is how the Commission can meet the criteria set forth in § 6(13): ensuring that each district meets the equal population mandates under the Equal Protection Clause; analyzing data on race and ethnicity to comply with the Voting Rights Act; and weighing demographic and socioeconomic characteristics to determine the possible presence of communities of interest. Art 4, § 6(13).

The Michigan Senate argues that the lack of tabulated data is not a barrier to the Commission's work, because the Commission could work off the untabulated data and still meet the constitutional deadline. (Senate Amicus Br, p 18.) But that is shortsighted. The Commission acknowledges that it can work with the legacy format data—the untabulated data—but nevertheless explains why the U.S. Census Bureau's release of that data will "not have a meaningful impact on [its] ability to perform its duties under the current constitutionally imposed deadline." (Br in Support of Pet, p 15.) The non-tabulated data would need to be reconciled with the tabulated data, which the Commission estimates could take between 7 and 10 days. (*Id.*) And the Commission has advised this Court that, even if it begins working with the untabulated data, it would be left with "insufficient time to perform its work in mapping district lines for congressional and state legislative districts, meet

the 45-day publication requirements, and hold the second round of constitutionally required public hearings in advance of a final vote to adopt district plans." (Pet, ¶ 41.) Assuming the Commission theoretically *could* rush the mapping process in time for the publication requirements and public hearings, given the importance of its work, is that really a process that *ought* to be rushed where a constitutionally permissible remedy is available? This AG Team thinks not, particularly where the Amendments seek to ensure ample public participation in the process. § 6(10) ("The commission shall provide advance public notice of its meetings and hearings. The commission shall conduct its hearings in a manner that invites wide public participation throughout the state."); see also § 6(9) (requiring at least five public hearings after developing a proposed plan).

Likewise, the Secretary has told this Court that the delay in receiving the census data impacts her ability to update the qualified voter file (QVF). (Pet, ¶¶ 42–49.) The Secretary has a duty to maintain the QVF, is experienced in doing so, and is best positioned to estimate how long certain activities will take to complete.

In short, Petitioners' assessment of how much time it will take to perform their constitutionally mandated tasks is entitled to deference—especially since they have *no* motive to delay, *every* incentive to work expediently, and are not coming in after the fact and trying to justify their delay. And they have reflected that they will be ready to proceed "as quickly as possible once the data is received." (Br in Support of Pet, p 18.) That pledge of good-faith effort, too, is entitled to deference based on the extraordinary circumstances here.

D. The Redistricting Amendments call for this Court to exercise its authority to deem a constitutional provision directory.

As discussed above in Argument II, this Court has the authority to deem a constitutional provision directory or mandatory as appropriate, depending on the purpose of the provision. In determining when to exercise that authority, the general rule is that "if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory" but that "when a statute provides that a public officer 'shall' do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, . . . it is mandatory." *In re Forfeiture of Bail Bond*, 496 Mich at 323, 327 (cleaned up).

This Court has recognized this rule in the specific context of election-related deadlines—a case in which it exercised its original jurisdiction, no less. See *Attorney Gen ex rel Miller v Miller*, 266 Mich 127, 135 (1934). This Court cited approvingly to multiple authorities in affirming that "the mode and manner of conducting the mere details of the election, are directory." *Id.* at 134. In other words, substance is valued over form: "Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form." *Id.* at 133. Put yet another way, and more concretely, if a "statute simply provides that certain acts or things shall be done within a particular time . . . , and does not declare that their performance is essential to the validity of the election, then they will be regarded as . . . directory if they do not[ ] affect the actual merits of the election." *Id.* at 134.

The provision at issue here, directing the Commission to adopt a redistricting plan by November 1, 2021, does not contain any "language denying performance after a specified time" or any "words of absolute prohibition." *In re Forfeiture of Bail Bond*, 496 Mich at 329–330. Nor is the November 1 deadline "provided to safeguard a private right[.]" *Id.* at 339–340. To the extent the deadline exists "to safeguard . . . a public interest," *id.*, that public interest is the same interest as that of the Commission itself and the Secretary herself—the interest in moving the redistricting process along. The September 17 and November 1 deadlines are provisions that "simply provide[] that certain acts or things shall be done within a particular time," and the Constitution "does not declare that their performance is essential to the validity of the election." *Miller*, 266 Mich at 134. Accordingly, the deadlines "will be regarded as . . . directory if they do not[ ] affect the actual merits of the election." *Id.* at 134. No election has occurred, and the merits of any future election will not depend on whether the Commission finalizes districts by November 1 or by any other arbitrary date. Thus, that provision is directory, and that result is consistent with what the People would have wanted.

To be sure, the People wanted the Commission to adopt a plan by November 1, 2021. Const 1963, art 4, § 6(7). But of course, the People did not want the Commission to adopt just *any* plan by that date—rather, the People wanted a plan that met certain criteria, § 6(13), and was adopted according to a particular procedure, §§ 6(8), (9), (12), (14). And so the question is, when circumstances arise that could not have been contemplated by the People in adopting article 4, § 6, that

make it impossible to perform both duties—adopt an adequate plan and do so by November 1, 2021—what would the People have wanted?

The first thing worth noting is that, although article 4, § 6 provides several date-certain timing requirements (§§ 6(2)(a)(i), (2)(d), (2)(e), (2)(f), (5), (7)), as well as several timing requirements expressed in a number of days or months (§§ 6(5), (14)(b), (15), (16)), it does not specify any penalties for a failure to abide by any of these requirements. This is the first reason to believe that the timing requirements are intended to be directory only, rather than mandatory.

Section 6 does, however, include a provision for non-compliance—not specifically for failure to comply with a timing requirement, but more generally for a situation in which "the plan fails to comply with the requirements of this constitution." Art 4, § 6(19). In such a case, the People determined that the consequence is that this Court, "in the exercise of original jurisdiction, . . . shall remand a plan to the commission for further action[.]" *Id.* In adopting this, the People rejected any number of other remedies. For example, they also could have provided that a new plan would be instituted by this Court, by the Legislature, the Governor, or the Secretary of State—but they explicitly foreclosed that possibility. See art 4, §§ 6(19) ("In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state."); (22) ("No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in this section."). Instead, the People chose a "remand . . . for further

action," a process that would *necessarily* result in a delay in the adopted plan becoming law.

In short, the People already contemplated the choice between a redistricting plan done right but late, and one that was timely but flawed. They chose to accept the possibility that the process might be delayed, to ensure that the substantive and other procedural requirements of § 6 were followed. This provides strong evidence that the People did not wish the November 1 deadline to be deemed as mandatory.

E. In the past, this Court has adjusted constitutional deadlines based on extraordinary circumstances and impossibility.

This is not the first time this Court has been asked, and has agreed, to adjust constitutional deadlines. It did so in *Ferency v Secretary of State*, 409 Mich 569 (1980). There, in the context of the initiative and referendum process, the Court examined whether a mandamus action against the Secretary was moot because defendant Board of State Canvassers failed to certify the petition within 60 days of the general election as required by Const 1963, art 12, § 2 and MCL 168.477. *Id.* at 598. The Court held that it was not moot, and it extended the filing deadline for initiative petitions. *Id*. at 602.

The Court's reasoning was twofold. First, it explained, "the filing deadline d[id] not relate to the sufficiency or validity of the petitions themselves." *Id*. at 601. Instead, it was intended to "facilitate the electoral process" by allowing clerks sufficient time to print ballots. *Id*. Second, the defendants had acted quickly rather than "sit[ting] back and wait[ing] for the judicial process to proceed according to its

normal pace." *Id*. at 600. The Court specifically noted that the Defendant Board of Canvassers "was ready to timely perform its constitutional duties" but was prohibited from doing by circumstances beyond its control. *Id*. In that respect, the Court distinguished its earlier decision in *Kuhn v Department of Treasury*, 384 Mich 378 (1971), where the request was similar, but relief was denied because the "inaction of the plaintiffs who wished to invoke the referendum procedure created the delay." *Ferency,* 409 Mich at 600. Notably, this Court in *Ferency* explained that it "d[id] not suspend constitutional directory limits deadline lightly." *Id*. at 602. It did so because it recognized that the circumstances were "unique" and "extreme." *Id*. ("Only the most extreme circumstances . . . can justify deviation."),

The twin reasoning in *Ferency* applies with even more force here. First, the deadlines in § 6 do not relate directly to the important work of redrawing accurate and fair redistricting maps, except insofar as they facilitate that process and ensure that it is completed timely. Therefore, the September 17 and November 1 deadlines should not supersede the Commission's paramount duties—those related to the drawing of fair maps based on the most accurate population and demographics data. Second, as was true of the Board in *Ferency,* Petitioners appear to be attempting to do "everything the constitution requires" of them. *Ferency*, 409 Mich at 600. While they cannot control the timing of the receipt of the data from the Census Bureau, they have stated that they have been discussing, planning, and allotting resources to timely completing their work once the tabulated data is received. (Pet, ¶¶ 50–52.) Regrettably, as in *Ferency*, the circumstances are "most

extreme" and impossible to avoid. Just as this Court extended the constitutional deadline in *Ferency*, cautioning the defendants to observe "to the maximum extent practicable" the time limits prescribed for the performance of their various duties, 409 Mich at 602, so here this Court should grant Petitioners' request for a reasonable adjustment of the constitutional deadlines.

The result in *Ferency* is consonant with three guiding principles used to interpret Michigan's Constitution, although admittedly they are not a perfect fit since the plain meaning of article 4, § 6 is clear. First, when two provisions of the Constitution appear to conflict in a measure, it is a court's "duty to reconcile them as far as possible with an eye to accomplishing the result intended by the pertinent sections when construed together." *Kunzig v Liquor Control Comm'n,* 327 Mich 474, 480–481 (1950). Second, an interpretation resulting in a holding that a provision is constitutionally valid is preferred over an interpretation that finds a provision constitutionally invalid. *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 406 (1971). And third, a construction of a constitutional provision that renders a clause inoperative should be rejected. *Id.*

F. Other state supreme courts have already adjusted constitutional deadlines based on the delay in the 2020 Census data.

It is compelling that California, in the same dilemma as Michigan, resolved it in much the same way as Petitioners request here—asking their court of last resort to extend the deadline for adopting redistricting plans by four months to accommodate the late census data. See *Legislature of the State of California v*

Padilla, 469 P3d 405, 412–413 (Cal 2020). Equally compelling is the Supreme Court of California's reasoning for and limitations on that relief: "[T]hese [one-time] adjustments to the relevant deadlines are limited to this redistricting cycle and these extraordinary circumstances," in order "to enable the relevant constitutional and statutory redistricting provisions otherwise to *operate as written and intended*." *Id.* at 413 (emphasis added).

The court noted that it had "the inherent authority to reform a statute in situations where *impossibility* would have the same effect as invalidity, preventing the statute from being carried out in accordance with its literal terms," but only if it could do so "consistent with the enactors' intent." *Id.* at 410 (emphasis in original). And the court then asked whether the deadline could be "reformed in a manner that closely approximate[d] the framework designed by its enactors, and whether the enactors would have preferred the reform to the effective nullification of the statutory language." *Id.* (internal citation and quotation omitted). The court's answer to both questions was yes. *Id.*

The Oregon Supreme Court, in *State ex rel Kotek v Fagan*, 484 P3d 1058 (2021), fashioned similar relief based on the delay of the decennial census data. Due to the unavoidable delay, the Oregon Legislative Assembly asked the Oregon Supreme Court to extend the constitutional deadlines for submitting new legislative and congressional district maps. *Id.* at 1059. In resolving the dilemma and ultimately revising the schedule, the court, like the Supreme Court of California, focused on the impossibility of compliance. It noted that the federal government's

delayed release of the 2020 census data "ma[de] it *impossible* for the Legislative Assembly and the Secretary to fulfill their constitutional responsibilities without an adjustment of those deadlines, " but that it was "*possible* for the state to fulfill its *paramount* duties in compliance with modified deadlines." *Id.* at 1062–1063 (emphasis added).

Additionally, the court noted that the deadlines could be modified "without significantly affecting the duties of the Legislative Assembly and the Secretary, or the rights of the electors, and without interfering with the general election cycle." *Id.* at 1059–1060. Significantly, the court noted that it had been "presented with no reason why the voters who adopted the 1952 amendments would have been *concerned with the exact date* by which the Legislative Assembly or Secretary are required to enact or make a plan, except as part of a larger framework calculated to result in the adoption of a timely final plan." *Id.* at 1062 (emphasis added). And it observed that there was no indication that the voters "would have intended to require the Legislative Assembly to adhere to the July 1 deadline for legislative action in the unforeseen event that federal census data—the impetus for drawing new district lines in the first place—was not available by that date." *Id.*

The reasoning of these jurisdictions, though not binding on this Court, is persuasive and applies here. As previously noted, the Commission is faced with conflicting duties, and the timing requirement jeopardizes Petitioners' ability to comply with their *paramount* duties, as envisioned by the voters. And as in *Fagan*, there is nothing in § 6 to indicate that the specific dates were anything more than

an attempt to make sure maps were submitted timely. That being the case, an adjusted deadline will allow the other provisions of § 6 to operate as intended.

Moreover, the requested reasonable adjustment to the deadlines would create no discernable adverse consequences to the electors, the general election, or the ultimate work of the Commission and the Secretary. Nor would it have unintended future consequences. The relief Petitioners request is reasonable, limited to this context, and based on an extraordinary set of circumstances unlikely to repeat itself. This Court would not be granting relief that allows Petitioners or others to "rewrite" the constitutional deadlines to accommodate future delays that are well within their control.

* * *

The Secretary and the Commission should be commended for their foresight and for proactively seeking permission from this Court to carry out the paramount interests of the People. To reject their reasonable request in light of the extraordinary circumstances would require they sit on their hands, blow a constitutional deadline, and wait to be sued in order to plead for forgiveness. But the People created a mechanism by which this Court can (and should) direct the Commission and the Secretary to perform the paramount duties the People charged them with. This Court should exercise its authority to deem § 6's constitutional timing requirements as directory, and should grant Petitioners' requested relief.

CONCLUSION AND RELIEF REQUESTED

Under article 4, § 6(19), this Court has original jurisdiction over the Petition. This Court also has the inherent authority to make the timing requirements of § 6 directory rather than mandatory. And this unprecedented circumstance cries out for this Court to exercise that authority here—consistent with the will of the People to fashion a remedy for redistricting that ensures compliance with the constitutional criteria they enacted.

WHEREFORE, the AG Team Supporting Jurisdiction respectfully asks this Court to assume jurisdiction and grant the relief requested in the Petition.

Respectfully submitted,

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

/s/ Ann M. Sherman
Ann M. Sherman (P67762)
Deputy Solicitor General

Christopher M. Allen (P75329)
Linus Banghart-Linn (P73230)
Assistant Solicitors General

Attorneys Supporting Michigan
Supreme Court Jurisdiction
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
AllenC28@michigan.gov
Banghart-LinnL@michigan.gov

Dated: June 2, 2021