STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

LEAGUE OF WOMEN VOTERS OF MICHIGAN, AMERICAN CITIZENS FOR JUSTICE, APIA VOTE - MICHIGAN, DETROIT ACTION, LGBT DETROIT, NORTH FLINT NEIGHBORHOOD ACTION COUNCIL, RISING VOICES, KENT BLOHM, CATHY BROCKINGTON, DENISE HARTSOUGH, DONNA HORNBERGER, GILDA JACOBS, JUDY KARANDJEFF, MARGARET LEARY, ATHENA MCKAY, CHRISTINE PAWLAK, KATHERINE PRIMEAU, RONALD PRIMEAU, SUSAN ROBERTSON, SUE SMITH,

Plaintiffs,

v.

INDEPENDENT CITIZENS REDISTRICTING COMMISSION,

Defendant.

S. Ct. No. 164022

ORAL ARGUMENT REQUESTED

PLAINTIFFS' REPLY IN SUPPORT OF COMPLAINT AND RESPONSE TO AMICUS CURIAE BRIEF OF THE SECRETARY OF STATE

SARAH RILEY HOWARD (P58531)
PINSKY SMITH FAYETTE & KENNEDY LLP
Attorney for Plaintiffs
146 Monroe Center St NW, Ste. 805
McKay Tower
Grand Rapids, MI 49503
(616) 451-8496
showard@psfklaw.com

MARK BREWER (P35661)
GOODMAN ACKER, P.C.
Attorneys for Plaintiffs
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Page

Constitutional Provisions

INTRODUCTION

With its quip about "angels dancing on the head of a pin," the ICRC improperly minimizes the rights to representation of 10 million Michiganders which are at stake here.

Far from refuting Plaintiffs' concerns, the ICRC admitted or reinforced Plaintiffs' claims. The ICRC's Response admitted that the Adopted Plan for the State House map discriminates against voters based on urban residence by diluting the votes of Democrats living in urban areas. The ICRC also conceded that it is possible to achieve greater measures of partisan fairness than the Adopted Map does, but attempts to wave away those concerns by claiming the level of disproportionate advantage above zero is "de minimis," and by claiming a list of communities of interest ("COIs") which it failed to identify in the record requires ignoring of the partisan fairness requirement. Critically, Plaintiffs' expert is unrefuted in his opinion that the Adopted Plan permits the Republican Party a "disproportionate advantage" since it can control the State House even if it fails to earn a majority of voters' support. That is not "de minimis." That is contrary to the plain language of the Michigan Constitution, and any commonly-understood definition of what "disproportionate advantage" means.

Further, the ICRC's position that it is immune to judicial review is incorrect. This Court's original jurisdiction and review is specifically contained in the text of the Constitutional language. Moreover, there is nothing in the text which indicates substantial compliance with the required factors is close enough, or that deference should be given to the ICRC. In any event, the ICRC has made wholly inadequate showing of the basis for its decisions, particularly with respect to COIs that it apparently believes allows it to override or ignore other mandatory criteria, necessary to be given such deference even if that were the standard. It was telling that the ICRC's Response detailed two alleged COIs, but a post-hoc mention in a brief does not

provide what should have been a complete list of evidence-based findings related to the COIs considered. The PTV map, or other public submissions containing COI descriptions and other underlying data – submissions again specifically contemplated in the Constitutional text – can be relied upon by the ICRC if it decides to do so. This Court should instruct the ICRC accordingly, since its advisors have misdirected the Commissioners away from their main task of making the underlying decisions and toward the idea that they are supposed to spend all their time drawing the actual maps. That isn't part of the Constitutional requirements.

Finally, the compressed timeframe of the ICRC's own making does not tie this Court's hands. The ICRC failed to refute Plaintiffs' citation of historical examples of a variety of tools to accommodate the time for meaningful review by this Court, for oral argument, and for the necessary remand for the ICRC to fix its work. For all the reasons in Plaintiffs' opening brief and in reply, Plaintiffs respectfully request this Court grant the relief they seek, including remand of the Adopted Plan to the ICRC with specific instructions.

I. The Commission's Adopted Plan Unconstitutionally Dilutes Votes Based on Voters' Residence.

> "Diluting the weight of votes because of place of residence impairs basic constitutional rights. . . . The fact that a citizen lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote . . . the weight of a citizen's vote cannot be made to depend on where he lives . . . A citizen, a qualified voter, is no more or less so because he lives in the city or on the farm."
>
> - *Reynolds v Sims,* 377 US 533, 566-68; 84 S Ct 1362; 12 LEd 2d 506 (1964).

The principal argument of the Commission repeated throughout its Response in defense of its unfair State House map is the claim that "Democratic voters are clustered in cities whereas

Republican voters are more spread out in suburban and rural areas." Response at 8-10; *see also, e.g., id.* at 23, 34-35. Therefore, it argues, it can't do any better on partisan fairness than it has.

Unfortunately for the Commission, the United States Supreme Court found that excuse unconstitutional nearly 60 years ago. The Commission cannot simply throw its hands up as it did here and claim that residential patterns justify the partisan discrimination in its State House map. The Supreme Court was crystal clear that "the weight of a citizen's vote cannot be made to depend on where [he/she] lives." 377 US at 567. Yet that is precisely what the Commission did – its State House plan gives more weight to Republican voters in State House elections based on where they live and less weight in those elections to Democratic votes due solely to where they live. The Commission had an affirmative obligation under the federal Constitution and the Michigan Constitution 1963 Art 4 § 6(13) to avoid that result, an obligation it *admits* to, see Response at 9, but its State House plan failed to fulfill that obligation.

This violation of *Reynolds* is compounded by the fact, as its Response also admits (at 34), the Commission *knew* that its State House plan discriminated against Democratic voters in urban areas and in favor of Republican voters in suburban and rural areas, but it adopted the plan anyway. Thus, this wasn't accidental or inadvertent discrimination – it was *knowing* and *intentional* discrimination against Democratic voters on the basis of partisan affiliation in violation of the state constitutional rights of those voters under Article 1, §§ 3 and 5 and the Purity of Elections Clause. Accord *Harper v Hall*, __ NC __, No 413PA21, found at 2022 NC Lexis 71 (N Carolina, Feb 4, 2022).

II. The Commission's Discrimination Against Urban, Democratic Voters Is Not *De Minimis* Because Control of the State House During the Next Decade Is At Stake.

Alternatively, the Commission argues that its knowing and intentional discrimination against urban and Democratic voters is *de minimis* and should be ignored by this Court. See, e.g., Response at 35-38.

With this argument the Commission asks the Court to ignore the forest for the trees by focusing on the differences between the percentages in the partisan fairness measures instead of the *effect* of those differences. The **effect** of the Adopted Plan is clear under all measures and not disputed by the Commission – Democrats can win a majority of the votes for the State House during elections in the next decade without winning a majority of the seats, while conversely Republicans can control the State House with only a minority of the vote. See Warshaw Report at 11-16. As Dr. Warshaw concludes:

> This report has provided a comprehensive, holistic evaluation of the partisan fairness of the . . . Hickory State House Plan. Based on three methods of projecting future elections and four different, generally accepted partisan bias metrics, I find that the plan provides a disproportionate advantage to the Republican Party . . . . *On this plan Republicans are likely to win the majority of the seats even if they win a minority of the votes. Conversely, Democrats could win a minority of the seats while winning a majority of the vote. . . . Moreover, on nearly every metric I examine, Promote the Vote's proposed plan is fairer than the Hickory plan.*

Id. at 17 (emphasis added). This effect is not remotely *de minimis* because control of the State House is at stake. The stakes could not be higher because the Adopted Plan will very likely actually perpetuate the effect of the current partisan gerrymander for another decade, contrary to the very purpose of 2018 Proposal 2.

This is also contrary to the plain language requirement of "no disproportionate advantage." Mich Const 1963 Art 4 § 6(13). A lack of partisan symmetry to the extent in the Adopted Plan surely provides a disproportionate advantage to one political party, as that term would be

understood by the average person. Even if the ICRC is correct that a meaning of "disparity" should be grafted upon the plain language of this criterion, which Plaintiffs dispute, the measures of partisan fairness are not "small" in the context here. Under the current map, and the history of electoral results unique to Michigan, Plaintiffs brought unrefuted expert opinion to this Court to demonstrate that the Republican Party could easily control the State House by a relatively large margin, while earning the support of a minority of voters. That cannot possibly be consistent with the plain language of "no disproportionate advantage."

III. No Deference Is Due The Adopted Plan, Nor Any Assumption of Constitutionality, Regardless of This Court's Ultimate Determination of Standard of Review Here.

There is no textual support in Constitutional language surrounding the ICRC process for the ICRC's assertion that this Court's standard of review should be deferential, or that the Adopted Plan should be considered like a statute entitled to be upheld unless no possible reading renders it constitutional. (See Response at 13-14.) As Plaintiffs briefed in their opening submission, there is no modifier permitting or implying the sufficiency of "substantial compliance" with the requirements, and all the textual references establish *de novo* review. See, e.g., Mich Const 1963 Art 4 § 6(13), ("The commission shall abide by the following criteria in proposing and adopting each plan …"); § 6(19) ("[This Court] shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution … ."). The Response did not refute Plaintiffs' reasoning from the opening brief, but merely drew from general propositions of law which should be rejected in favor of specific provisions of Art 4 § 6.

In any event, the ICRC has made inadequate showing of "good reasons" for its decisions even if some sort of non-*de novo* standard applies. (See, e.g., Response at 30.) The method for completing their work that the ICRC's advisors guided the Commissioners toward essentially

guaranteed failure to comply with Constitutional mapping criteria, and deliberately treated the partisan fairness criterion as a disfavored stepchild to the other criteria. The Response's claim that Plaintiffs are criticizing Commissioners for turning to PlanScore to try to evaluate partisan fairness before they were "allowed" to do so by their advisors (See Response at 39-40) is entirely incorrect. Plaintiffs were **applauding** those efforts, not denigrating them, since reviewing partisan fairness data is what should have been happening all along. As Plaintiffs' expert pointed out, use of a rigorous composite form of the data measures like PlanScore or another option (not just simplistic averaging of the various measures) was necessary for providing good advice to Commissioners on partisan fairness measurements. Instead, though, lower-ranked criteria (like geographical boundary lines) were repeatedly allowed consideration and emphasis when ICRC was still being denied measurement and data on partisan fairness. Frankly, the VRA data was treated the same way in the process in which the ICRC's advisors guided the Commissioners. ICRC's brief does not deny this.

As the most prominent example, the ICRC has failed to demonstrate or adequately document what the COIs are that it has determined it must accommodate, by what standard those are measured, and with what evidence it considered to determine that the COIs met whatever standard ICRC used. This Court, and the public for that matter, has no way of weighing how well ICRC did in honoring the totality of criteria in the list when, as here, a mystery list of COIs is being used to block the requirement that "no disproportionate advantage" be given to any political party.

From the Response, we now know the ICRC apparently considers "Flint" and Chaldeans as COIs. But there is nothing in the record to determine that that was the ICRC's reasoning. And naming two COIs without record citations to support their conclusions hardly provides a complete

picture of all COIs considered. Even if a deferential standard were appropriate, which it isn't as Plaintiffs have argued, this would not meet even an assumption of constitutionality or a deferential review. All the Court has is a post-hoc statement in a brief.

Another reason why it was important for the ICRC to document its findings particularly with respect to COIs lies in the fact that there is no definition of "community of interest" in the Constitution, nor any commonly-understood definition. Unfortunately, as Plaintiffs noted in their opening brief, some public commenters asserted that various groups were COIs, when their comments reflected not actual evidence of what could be considered a COI under any possible defensible conception, but instead more of desire not to be included with some of their neighbors for unlawful reasons, like dog-whistle comments for race bias. (E.g., see 5/25/21 Meeting Video, 56:55, speaker #22 [as to why the speaker wants Midland County to stay connected with the agricultural counties: "we might be neighbors with Saginaw, Bay City, and Gratiot, but they have much different populations, much different tax base, and different issues such as crime."]; 7/1/21 Meeting Video, 2:46:46, speaker #58 ["Newton Township is a rural, conservative, predominately farming community. The farming community is a more simple way of living where most individuals know their neighbors and protect their neighbors and their property. Newton Township has minimal crime compared to the larger surrounding Metropolitan areas. … The [current] District boundaries allow our smaller communities to have a greater impact locally without the negative influence of larger surrounding municipalities. …"].)

IV. The PTV Plan, Plus Other Public Portal Submissions, Demonstrate ICRC Can Do Significantly Better Meeting All Criteria.

Plaintiffs do believe that it is necessary for this Court to explicitly say that ICRC may adopt in whole or in part a submitted plan by PTV, or another submitted map, instead of directly mapping themselves. The ICRC's advisors have led Commissioners astray on the alleged

requirement or importance of "communal" mapmaking. The Commissioners are supposed to make the **decisions** about map choice in consultation with one another and by considering public comment. The idea that the Commissioners actually have to draw the **maps** themselves is not required by the Constitution despite what the ICRC's advisors advocated. A relevant comparison is the legislative function of enacting statutes and amendments to current laws. Legislators do not often draft bills themselves – they rely upon professional staff and/or constituents. Sometimes, legislators use model statutes or borrow from suggestions from other sources. The ICRC has that same ability if it decides to do so.

Indeed, the Constitution requires ICRC to receive "for consideration" submissions of plans and supporting materials, including underlying data. Mich Const 1963 Art 4 § 6(8). That was the entire point of the ICRC's public portal. If the ICRC was required to wholesale ignore any plan submitted in favor of entirely drafting its own, there would have been no rationale for including that provision. The point is that the PTV plan demonstrates ICRC could have done meaningfully better in accommodating all criteria to the extent legally required. Indeed, there were other plan submissions in the portal which accomplished the same that ICRC could draw from if desired.

V. The Constitution's Text Plainly Refutes ICRC's Argument That Its Map Is Immune To Judicial Review. Moreover, History Demonstrates Feasibility Of Remedy Here.

The ICRC's position that this Court cannot order it to correct a legally non-compliant map is simply wrong, as seen in the plain text of the Constitution. Mich Const 1963 Art 4 § 6(19). Upon remand by this Court, ICRC could and likely would make revisions to the Adopted Plan necessary to bring it into compliance, or adopt or create an entirely new State House map, in order to do so. However, if ICRC did not do so on its own, this Court has broad remedial powers which do not require it to enter the business of map-making to ensure compliance with

the Michigan Constitution. Moreover, the provision to which the Response refers – § 6(19) – refers to ICRC being the only "body" permitted to "promulgate and adopt" a redistricting plan, meaning an administrative or legislative "body", are not words associated with this Court's authority and functions. This meaning is further supported by § 6(22):

> "… 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.

Id. (emphasis added). The intent of these two provisions was clearly to prevent **the Legislature** from usurping the ICRC's redistricting function either for itself or with delegation to an administrative agency. When judicial review is specifically authorized by the statutory language, Section 6(19) could not have been intended to effectively insulate ICRC from judicial review in the manner the Response suggests.

Nor is the idea that the ICRC gets a free pass until after the 2022 election the correct result. That would reward the ICRC's violation of the law.

Finally, there are solutions for how to appropriately order a remand, while accommodating actual practicalities raised by ICRC and by the Secretary in her amicus brief. ICRC's Response failed to address or refute historical examples cited by Plaintiffs. The Legislature has the power – as well as a bipartisan incentive, since it affects both parties – to implement different measures to accommodate Court decision on the State House map. Filing deadlines have been moved, filing fees can be substituted for nominating petitions for 2022, and residency requirements can be amended for 2022 election (i.e., a candidate fulfills residency

requirements by residing in the district on the date of filing). Filing deadlines were historically later in the year than they are now, and the demands upon the Secretary and local clerks were the same or harder in an era of less advanced technology. If necessary, the Court can also order these or other measures as part of its remedial power.

The districts at issue will be in place for ten years. The first priority must be to get them right.

VI. Oral Argument Is Necessary In This Matter.

Given the multiple legal issues of first impression, and the importance of this original action to the public, this Court should grant Plaintiffs' request for oral argument.

CONCLUSION AND RELIEF SOUGHT

For the reasons herein and in their opening brief, Plaintiffs respectfully ask that the Court:

A. Vacate the Adopted Plan and stay implementation pending final order of this Court;

B. Remand the matter of a State House plan to ICRC;

C. Require the ICRC to promptly adopt a State House plan whose partisan fairness metrics match or improve on the metrics of the PTV State House Plan;

D. Authorize the ICRC to adopt the PTV State House Plan as its plan;

E. Award Plaintiffs costs and reasonable attorney fees;

F. Award Plaintiffs such other relief as may be just and equitable.

Respectfully submitted,

/s/ Sarah R. Howard
SARAH RILEY HOWARD (P58531)
PINSKY SMITH FAYETTE
& KENNEDY LLP
Attorneys for Plaintiffs
146 Monroe Center St NW, Ste. 805
Grand Rapids, MI 49503
(616) 451-8496

/s/ Mark Brewer
MARK BREWER (P35661)
GOODMAN ACKER, PC
Attorneys for Plaintiffs
17000 West 10 Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

showard@psfklaw.com

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