RECEIVED by MSC 6/9/2021 4:55:36 PM

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

RESPONSE BRIEF OF ATTORNEY GENERAL TEAM OPPOSING MICHIGAN SUPREME COURT JURISDICTION

S. Peter Manning (P45719)
Christopher W. Braverman (P70025)
Matthew B. Hodges (P72193)
Kyla L. Barranco (P81082)
Rebecca A. Berels (P81977)
Assistant Attorneys General
Attorneys for Attorney General Team Opposing Michigan Supreme Court Jurisdiction
P.O. Box 30758
Lansing, MI 48909
(517) 335-7569

Dated: June 9, 2021

TABLE OF CONTENTS

Page

Index of Authorities iii

Introduction 1

Argument 2

I. This Court lacks jurisdiction over the Petition........ 2

A. Article 6, § 4 does not vest this Court with jurisdiction, and regardless, Petitioners are not entitled to mandamus relief........ 2

1. This Court's jurisdiction under Article 6, § 4 was limited and abrogated by Article 4, § 6(19) and cannot be statutorily expanded........ 2

2. Regardless of this Court's lack of jurisdiction under Article 6, § 4, mandamus cannot lie against Petitioners. 4

B. Article 4, § 6(19) does not vest this Court with the expansive jurisdiction necessary to entertain the Petition........ 6

1. Article 4, § 6(19)'s text is plain and unambiguous and does not need further context to help inform its meaning. 7

2. The changes to Article 4, § 6(19) do not give this Court jurisdiction to *preemptively* order the Commission to comply only with certain constitutional duties at the expense of others. 9

3. The grant of jurisdiction under Article 4, § 6(19) is narrow, and only allows this Court to order the Commission to carry out its duties. 12

II. This Court does not have authority to deem Article 4, § 6(7)'s November 1, 2021 deadline directory........ 14

A. Both the People and the Legislature have the power to enact directory *statutes*. 14

B. If, by the express language or by necessary implication of a constitutional provision, the People express a clear intent that the provision be treated as directory only, this Court can give effect to that intent........ 15

RECEIVED by MSC 6/9/2021 4:55:36 PM

C. *Dettenthaler* established the general rule that constitutional provisions must be deemed mandatory, and that rule applies with no less force to Article 4, § 6(7). 17

D. If the rules governing directory statutes govern constitutional provisions, those rules do not alter the mandatory nature of Article 4, § 6(7). 17

E. *Ferency* should be limited to its facts, and the "extraordinary circumstances" present in *Ferency* are not present here. 22

F. The Oregon and California redistricting cases presented "extraordinary circumstances" of impossibility, similar to those present in *Ferency*, and unlike those present here. 22

III. Neither the nature of Article 4, § 6(7) nor the circumstances surrounding the release of the census data justify a deviation from the constitutionally imposed November 1, 2021 deadline. 24

A. Article 4, § 6(7)'s deadline meaningfully impacts the redistricting process. 24

B. The U.S. Census Bureau's delay in releasing the census data does not foreclose the Commission from completing its work in compliance with the November 1, 2021 deadline. 27

Conclusion and Relief Requested 31

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

INDEX OF AUTHORITIES

Page

Cases

Am Axle & Mfg, Inc v City of Hamtramck,
461 Mich 352 (2000) 8

Attorney General ex rel Miller v Miller,
266 Mich 127 (1934) .... passim

Bolt v City of Lansing,
459 Mich 152 (1998) 7

Chicago & WMR Co v Nester,
63 Mich 657 (1886) 3

Citizens Protecting Michigan's Constitution v Secretary of State,
503 Mich 42 (2018) 12

Durant v Dep't of Ed,
186 Mich App 83 (1990) 5

Ferency v Secretary of State,
409 Mich 569 (1980) 22, 24, 25, 29

In re Apportionment of State Legislature—1982,
413 Mich 96 (1982) 24

In re Forfeiture of Bail Bond,
496 Mich 320 (2014) 14, 18

Kearney v Bd of State Auditors,
189 Mich 666 (1915) 8

Legislature of the State of California v Padilla,
9 Cal 5th 867 (2020) 23, 30

Mich State Highway Comm v Vanderkloot,
392 Mich 159 (1974) 16

Okrie v Mich,
306 Mich App 445 (2014) 3

People ex rel Ayres v Bd of State Auditors,
42 Mich 422 (1880) 4

People v Dettenthaler,
118 Mich 595 (1898) 17

Pillon v Attorney General,
345 Mich 536 (1956) 5

Powers v Secretary of State,
309 Mich 530 (1944) 5

Salisbury v City of Detroit,
264 Mich 250 (1933) 6

State Bd of Ed v Houghton Lake Cmty Sch,
430 Mich 658 (1988) 5, 6

State ex rel Kotek v Fagan,
367 Or 803 (2021) 22, 29, 30

Teasel v Dep't of Mental Health,
419 Mich 390 (1984) 5

TOMRA of North America, Inc v Dep't of Treasury,
505 Mich 333 (2020) 26

Traverse Sch Dist v Attorney General,
384 Mich 390 (1971) 7, 8

Waterman-Waterbury Co v Sch Dist No 4 of Cato Twp,
183 Mich 168 (1914) 5

Statutes

MCL 3.71 3

MCL 168.544f 26

MCL 168.551 26

Other Authorities

Merriam-Webster's Collegiate Dictionary (11th ed) 21

Oklahoma House of Representatives, *2021 Redistricting Committee Rules* 29

Oklahoma House of Representatives, *Enacted District Maps* 29

RECEIVED by MSC 6/9/2021 4:55:36 PM

Constitutional Provisions

Const 1963, art 2, § 9 15

Const 1963, art 4, § 6 .... 1, 6, 16

Const 1963, art 4, § 6(7) .... passim

Const 1963, art 4, § 6(9) 27

Const 1963, art 4, § 6(13)(a) 13

Const 1963, art 4, § 6(15) 25, 26

Const 1963, art 4, § 6(17) 25, 26

Const 1963, art 4, § 6(19) .... passim

Const 1963, art 4, § 6(22) 26

Const 1963, art 5, § 2 26

Const 1963, art 6, § 4 .... 1, 2, 3, 4

Former Const 1963, art 4, § 6 .... 10, 13, 16

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

INTRODUCTION

The new Article 4, § 6 of the Michigan Constitution is the rulebook by which legislative redistricting in Michigan is now played, and the jurisdiction granted to this Court is limited: it can enforce those rules, but it cannot change them, and it cannot tell the players to follow different rules. Yet, that is the relief the Commission and Secretary now seek. Pointing to a delay in federal census data, they ask for one key rule to be changed: the new, constitutionally fixed requirement to adopt a redistricting plan by November 1, 2021. But this Court lacks the jurisdiction and authority to preemptively extend the Commission's deadline.

First, the jurisdiction that once existed under Article 6, § 4 in redistricting disputes was limited and abrogated by the People. Whatever historic role it once played, it is no longer a source of jurisdiction with respect to the Petition. That jurisdiction now resides in Article 4, § 6(19), and it does not extend to the type of anticipatory relief requested. Instead, it is a narrow grant of jurisdiction that allows this Court to enforce the rulebook, specifically to "direct" the Commission and Secretary "to perform their respective duties." Const 1963, art 4, § 6(19). *Second*, this Court does not have authority to deem the fixed November 1 deadline as directory. For over 100 years, this Court has refused to lower the status of constitutional requirements unless the People expressed a clear intent that they are not mandatory. And *third*, the facts presented by the delay in census data do not amount to the "most extreme" circumstances required to justify a deviation from a constitutional deadline.

Accordingly, the Petition should be denied.

RECEIVED by MSC 6/9/2021 4:55:36 PM

ARGUMENT

I. This Court lacks jurisdiction over the Petition.

Neither Article 6, § 4 nor Article 4, § 6(19) of the Michigan Constitution fit the background, posture, or relief sought in this case; therefore, neither provision vests this Court with jurisdiction over this action.

A. Article 6, § 4 does not vest this Court with jurisdiction, and regardless, Petitioners are not entitled to mandamus relief.

Article 6, § 4 cannot provide Petitioners with the relief they seek for two reasons. First, given the "limited and abrogated" language of Article 4, § 6(19), Article 6, § 4 is no longer an appropriate jurisdictional vehicle in redistricting cases. Second, even ignoring the lack of jurisdiction under Article 6, § 4, well-established case law precludes mandamus relief under the facts of this case.

1. This Court's jurisdiction under Article 6, § 4 was limited and abrogated by Article 4, § 6(19) and cannot be statutorily expanded.

As fully detailed in the AG Opposition Team's opening brief, beginning with the ratification of the 1963 Constitution and continuing with the passage of Proposal 2018-2, this Court's jurisdiction in redistricting matters no longer stems from Article 6, § 4. AG Opposition Team's Br, pp 5–14. In fact, following the passage of Proposal 2018-2, this Court's authority over redistricting disputes was expressly limited and abrogated by Article 4, § 6(19)'s now-limited grant of jurisdiction to (among other things not relevant here) "direct" Petitioners "to perform their duties." Const 1963, art 4, § 6(19). Thus, regardless of what

Petitioners' request "effectively seeks," (AG Support Team's Br, p 15), regardless of how it appears, (AG Support Team's Br, p 16), and regardless of case law interpreting pre-Proposal 2018-2 constitutional provisions, (Pets' Supp Br, p 5; AG Support Team's Br, p 13), mandamus relief under Article 6, § 4 is foreclosed here.

And MCL 3.71, which states that "[t]he 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," cannot expand this Court's original jurisdiction beyond that granted in the Constitution. *Okrie v Mich*, 306 Mich App 445, 454 (2014) ("Given that the Legislature's task is to enact laws in accordance with the authority that has been granted to it, it follows that the Legislature does not have the authority to alter the jurisdiction of a court in a manner that is inconsistent with our constitution."), citing *Chicago & WMR Co v Nester*, 63 Mich 657, 660 (1886). This Court's jurisdiction over redistricting matters has been constrained to that granted in Article 4, § 6(19) and cannot be statutorily expanded beyond that limited constitutional grant.

In arguing that Article 6, § 4 vests this Court with jurisdiction over this action, AG Support Team goes to great lengths to discuss the mandamus factors and how Petitioners' requested relief allegedly meets those factors. In so doing, the AG Support Team appears to reason that, because the mandamus factors are met, this Court has jurisdiction. AG Support Team's Br, pp 15–18. But that puts the cart before the horse. That is, this Court must *first* have jurisdiction *before* it can

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

consider the mandamus factors. And this Court does not. Thus, the mandamus factors—and whether the Petition satisfies those factors—are irrelevant.

2. Regardless of this Court's lack of jurisdiction under Article 6, § 4, mandamus cannot lie against Petitioners.

Even assuming this Court has jurisdiction to consider granting mandamus relief under Article 6, § 4 in a redistricting matter, it is inappropriate under the current facts. The AG Support Team relies on *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422 (1880), as support for the "unusual" application of mandamus here. AG Support Team's Br, pp 16–17. *Ayres* stands for the proposition that mandamus relief is not precluded where an interested private citizen, rather than the Attorney General, seeks to enforce an official's compliance with a statute. 42 Mich at 429 ("The rule which rejects the intervention of private complainants against public grievances is one of discretion and not of law."). There, the Attorney General "refuse[d] to appear and seek the enforcement of the statutory provisions," which the Court held did not prevent their enforcement through a writ of mandamus requested by an aggrieved citizen acting in good faith. *Id.* (explaining that the petitioner was not "an officious interloper" and "g[ave] sufficient assurance that the controversy [was] genuine and in good faith"). While Petitioners no doubt come to this Court in good faith, they do not seek the enforcement of Article 4, § 6(7)—they seek to change it. *Ayres* does not support entitlement to the sought-after relief.

The other cases cited by the AG Support Team fare no better. See *State Bd of Ed v Houghton Lake Cmty Sch*, 430 Mich 658, 666 (1988) (explaining that, "to obtain a writ of mandamus, the plaintiff must have a clear legal right to the performance of the specific duty sought to be compelled. . . ."); *Waterman-Waterbury Co v Sch Dist No 4 of Cato Twp*, 183 Mich 168, 175 (1914) ("The writ of mandamus is designed to enforce a plain, positive duty, upon the relation of one who has a clear legal right to have it performed. . . .") (citation omitted); *Pillon v Attorney General*, 345 Mich 536, 547 (1956) (explaining that "[n]either the legislature, nor this Court, has any right to amend or change a provision in the Constitution," and "command[ing] [the respondents] to timely perform the duty imposed upon them by article 17, § 2"); *Teasel v Dep't of Mental Health*, 419 Mich 390, 410 (1984) ("[M]andamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner."). Indeed, neither Petitioners nor the AG Support Team cite to a single authority with facts similar to the instant case. Each case cited was brought by an interested, adversarial party seeking to achieve compliance with—not alteration of—statutory or contractual duties.

Finally, contrary to the AG Support Team's brief, the fourth mandamus factor—the absence of another legal remedy—has yet to be satisfied. Generally, "[w]here factual issues exist, mandamus . . . will not lie." *Durant v Dep't of Ed*, 186 Mich App 83, 119 (1990), citing *Powers v Secretary of State*, 309 Mich 530 (1944) (denying request for writ of mandamus without prejudice where "the matter [was] still open to lawful inquiry"); see also *Salisbury v City of Detroit*, 264 Mich 250, 252

RECEIVED by MSC 6/9/2021 4:55:36 PM

(1933) ("[M]andamus will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts."). As explained in Part III, whether the Commission can timely comply with the November 1 (and thus, September 17) deadline is yet to be seen. If the Commission is able to comply with that deadline—as all sides undoubtedly should hope will be the case—another legal remedy *does* exist: full compliance with Article 4, § 6. In the event compliance becomes unachievable, the other available legal remedy is an order from this Court "direct[ing]" the Commission "to perform its duties." Const 1963, art 4, § 6(19). To conclude that mandamus will lie in all cases where Petitioners *think* they might fail to comply with their constitutionally imposed duties would render Article 4, § 6(19)'s grant of jurisdiction mere surplusage. *State Bd of Ed*, 430 Mich at 671 (rejecting an interpretation of a constitutional provision that would "render the succeeding financial penalty mere surplusage").

For these reasons, this Court should deny the Petition.

B. Article 4, § 6(19) does not vest this Court with the expansive jurisdiction necessary to entertain the Petition.

That leaves Article 4, § 6(19). But the plain text of Article 4, § 6(19)—even when viewed in context with past amendments—provides only *limited* jurisdiction to "direct" Petitioners "to perform their duties." That limited grant of jurisdiction does not encompass the relief sought in the Petition.

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

1. Article 4, § 6(19)'s text is plain and unambiguous and does not need further context to help inform its meaning.

The AG Support Team begins its answer to the first supplemental question with general principles of constitutional interpretation, which are largely uncontroversial and not in dispute. AG Support Team's Br, pp 3–4. It goes further, though, and urges this Court to specifically consider not only the plain text of Article 4, § 6(19), but also "the context of this grant of jurisdiction," "the purpose of the Redistricting Amendments," and "the facts in the Petition" to find that jurisdiction has been properly invoked. *Id.* at 4. But this principle—considering the circumstances surrounding the adoption of a particular constitutional provision—only comes into play when the meaning of the provision is in doubt or there is ambiguity in its language. *Traverse Sch Dist v Attorney General*, 384 Mich 390, 405 (1971). There is no ambiguity in the relevant text of Article 4, § 6(19)—this Court only has jurisdiction to "direct" the Commission and Secretary "to perform their respective duties[.]" It does not give this Court general advisory or supervisory authority over the Commission, and it does not allow the Court to "direct" the Commission *not* to comply with one of its duties.

The AG Support Team relies on *Bolt v City of Lansing*, 459 Mich 152, 160 (1998), for the proposition that "the courts may consider the circumstances leading to the adoption of the constitutional provision and the purpose sought to be accomplished." AG Support Team's Br, p 4. But *Bolt* limits this interpretive approach to instances where consideration of the circumstances is needed "to clarify meaning" of a particular constitutional provision. *Bolt*, 459 Mich at 160, citing

Traverse Sch Dist, 384 Mich at 405. *Traverse School District* explains this concept, noting that the "primary rule" is the familiar approach that looks to "the sense most obvious to the common understanding" of the people who ratified it. 384 Mich at 405 (quotation marks omitted). Beyond that, the "second rule is that *to clarify meaning*, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered." *Id.* (emphasis added). *Traverse School District* Court relied on a 1915 case for this principle:

> In construing constitutional provisions *where the meaning may be questioned*, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished. [*Id.*, quoting *Kearney v Bd of State Auditors*, 189 Mich 666, 673 (1915) (quotation marks omitted) (emphasis added).]

Kearney involved a provision of the 1908 Constitution (related to the salaries of public officers) that had changed from the 1850 Constitution, and the Court specifically noted that "it may be conceded that the change *has rendered the provision, unaided by context, less complete and more obscure*" when trying to ascertain its intent. *Kearney*, 189 Mich at 671 (emphasis added). The Court went so far as to say that "[n]o one would accept strict construction and the literal meaning of this provision, if it has a meaning standing alone and exactly as it reads." *Id.* Thus, because the language was "neither sufficiently precise nor complete in itself to make plain the intent," additional context and interpretation was needed. *Id.* at 671–672; accord *Am Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 362 (2000) (finding that "reliance on extrinsic evidence" to interpret Const 1963, art 9, § 31 "was inappropriate because the constitutional language is clear.").

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

The pertinent text of Article 4, § 6(19) is not in need of further context or deeper clarification of meaning. It provides that this Court can exercise original jurisdiction to "direct the secretary of state or the commission to perform their respective duties[.]" Const 1963, art 4, § 6(19). As the AG Opposition Team argued in its opening brief, the plain meaning of those terms authorize this Court to order the Commission or the Secretary to carry out or fulfill their constitutionally required tasks and actions, but do not authorize this Court to change those duties or provide "direction" generally. AG Opposition Team's Br, pp 19–23. Given the plain meaning of Article 4, § 6(19), the "circumstances" surrounding its adoption are not necessary to explain or inform the reach of this jurisdiction.

2. The changes to Article 4, § 6(19) do not give this Court jurisdiction to *preemptively* order the Commission to comply only with certain constitutional duties at the expense of others.

That said, even if those circumstances are considered, they do not call for any different conclusion—this Court lacks jurisdiction to afford the sort of preemptive and anticipatory relief Petitioners seek here.

Both the Petitioners and the AG Support Team point to a change in the language from the 1963 Constitution to the current version of Article 4, § 6(19) as one of the "circumstances" that supports reading the new language as an expansive grant of jurisdiction. Pets' Supp Br, pp 3–5; AG Support Team's Br, pp 8–9. But giving that change such an expansive reading would be inappropriate, as the relevant changes simply removed two limitations: one on *who* can bring an action,

and the other on *when* that action must be filed. They do not go further than that, and they do not support a broader reading or a more expansive view of the precise jurisdiction that was granted to this Court in Article 4, § 6(19).

Proposal 2018-2 indisputably altered certain language with respect to this Court's original jurisdiction over redistricting cases. The 1963 version stated:

> *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[.] [Former Const 1963, art 4, § 6 (emphasis added).]

The current version, as passed by the voters through Proposal 2018-2, eliminated the italicized language above, and now reads:

> 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).]

Thus, while the change in the language is self-evident, its significance does not go as far as the Petitioners and AG Support Team argue. Petitioners say that because of these changes, "nothing in the plain language of § 6(19), as amended, precludes Petitioners . . . from seeking to invoke this Court's original jurisdiction" and that the "request is timely as there is no condition precedent that must occur under § 6(19) before Petitioners can seek" their relief. Pets' Supp Br, p 4. *First*, there does not appear to be any dispute that the Commission and the Secretary *could* bring an action under Article 4, § 6(19) in this Court. In other words, the AG Opposition Team does not contend that the Commission and Secretary are inherently improper parties or that they are generally prohibited from initiating an action under Article 4, § 6(19). But that does not answer this Court's core question

RECEIVED by MSC 6/9/2021 4:55:36 PM

of whether *this* Petition properly invokes that jurisdiction. The answer to that question turns on the relief sought, not the parties seeking it. *Second*, there is no dispute that Proposal 2018-2 removed the 60-day deadline for filing an action following the final publication of a redistricting plan. But as with the first issue (regarding the proper parties), noting this difference does not address the underlying question of whether *this* Petition properly invokes the jurisdiction, which must be analyzed according to the relief sought.

The AG Support Team, like Petitioners, cites these changes as evidence of an "expansive understanding of the Court's jurisdiction for the new Commission." AG Support Team's Br, p 8. The AG Support Team takes this a step further in explicitly stating that this expansive jurisdiction should be understood to include actions—like the Petition here—that are brought "anticipatorily." *Id*. at 8–9. As that argument goes, freed from the prior limits of the 1963 Constitution pre-Proposal 2018-2, this Court should now exercise original jurisdiction over "anticipatory" actions like this, where the Petitioners seek "direction in the performance of their duties," Pets' Supp Br, p 5, or request an order telling the Commission which constitutional duties it should comply with at the expense of others, AG Support Team's Br, p 7.

To be sure, altering the jurisdictional grant in Article 4, § 6(19) to eliminate limitations on *who* could bring an action and *when* the action must be filed, did expand the Court's jurisdiction when compared to the as-ratified 1963 Constitution. But that expansion was modest, and should not be carried beyond its natural

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

reading to cover actions that are not confined to the remaining, central text—to "direct" the Commission and Secretary "to perform" their duties. In fact, this Court has already reasoned that Proposal 2018-2 did not represent a dramatic expansion of its jurisdiction: While "the review [under Proposal 2018-2] is slightly broader," this Court "would maintain the same general powers it wielded under the 1963 Constitution as ratified." *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 99 (2018). The Petition's fundamental ask of this Court is to provide "direction" and to tell the Commission that it does not need to comply with the plain constitutional deadline by which it must adopt its plans. Article 4, § 6(19) does not contemplate such relief.

3. The grant of jurisdiction under Article 4, § 6(19) is narrow, and only allows this Court to order the Commission to carry out its duties.

In focusing on the "context" of the new grant of jurisdiction set forth in Article 4, § 6(19), Petitioners and the AG Support Team do not give appropriate weight to the key element of the Petition: the specific relief sought. It bears repeating that through this Petition, the Commission and the Secretary are asking this Court to "anticipatorily" wade into the business of redistricting by providing "direction" in how to reconcile their constitutional duties in light of a delay in federal census data. As argued in its opening brief and further detailed above, the AG Opposition Team contends that the plain language and common understanding of Article 4, § 6(19)'s grant of jurisdiction does not reach that far. Rather, the jurisdiction to "direct [Petitioners] to perform their respective duties" means that

this Court can order them to *actually carry out* what the Constitution requires them to do when they are required to do it. It does not contemplate the broader "direction" that Petitioners try to invoke, and it does not carry with it the power to pick for the Commission which duties to follow and which to suspend or change.

One of those constitutionally established duties is the plain requirement that the Commission, "[n]ot later than November 1" of 2021, "shall adopt a redistricting plan[.]" Const 1963, art 4, § 6(7). In keeping with the idea of "consulting the lineage of our earlier constitutions for clues about the current Constitution's meaning," AG Support Team's Br, p 9, it could also be said that the People made a deliberate choice to abandon the more flexible deadline of "180 days after all necessary census information is available[,]" and instead fix a date certain in the Constitution for adopting a plan. Former Const 1963, art 4, § 6, ¶ 5. By adding this fixed deadline to the Commission's duties, this Court can no more direct the Commission to follow a different timeline than it could direct the Commission to draw districts that fail to follow the hierarchy of the established redistricting criteria in order to meet the deadline. See Const 1963, art 4, § 6(13)(a). This Court does not have the authority to decide which duties the Commission must comply with and which duties the Commission can avoid. By asking for an order directing the Commission to follow timelines different than the fixed constitutional deadline, Petitioners have not properly invoked this Court's jurisdiction under Article 4, § 6(19), and the Petition should be denied on that basis.

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

II. This Court does not have authority to deem Article 4, § 6(7)'s November 1, 2021 deadline directory.

As argued in the AG Opposition Team's brief, this Court does not have the authority to deem the November 1, 2021 deadline of Article 4, § 6(7) directory rather than mandatory. For the reasons discussed below, the AG Support Team's and Petitioners' arguments to the contrary are unpersuasive.

A. Both the People and the Legislature have the power to enact directory *statutes.*

It bears repeating that the AG Opposition Team does not dispute that this Court has the authority to deem *statutes* directory rather than mandatory. E.g., *Attorney General ex rel Miller v Miller*, 266 Mich 127, 133–134 (1934); *In re Forfeiture of Bail Bond*, 496 Mich 320 (2014). However, this Court *does not* have the same authority with respect to constitutional provisions, because constitutional provisions stand on a higher ground than statutes. See AG Opposition Team's Br, pp 24–32. It is for this reason that the AG Support Team's comparison of the Legislature's enactment of *statutes* with the People's ratification of *constitutional amendments* falls short.

In making this comparison, the AG Support Team improperly conflates statutory and constitutional provisions. It asserts that, to hold that this Court lacks the authority to deem a constitutional provision directory, this Court necessarily must conclude that "the People lack the power to do what the Legislature may, i.e., to enact directory timing requirements." AG Support Team's Br, pp 18–19. But the delegation of authority to the Legislature to enact statutes is not comparable to the

People's authority to ratify constitutional amendments. Rather, to the extent there is equivalency between delegated legislative power and power reserved to the People, that equivalency would be between the legislative process, on one hand, and the People's authority to propose, enact, approve, and reject *statutes*, i.e., initiative and referendum process, on the other. See Const 1963, art 2, § 9 ("The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum."). And regardless of the method of enactment (through the initiative and referendum process or through the legislative process), this Court has the authority to deem a statute directory. In short, *both* the People and the Legislature have the power to enact *statutes*, and this Court has the authority to deem those *statutes* directory only. Therefore, contrary to the AG Support Team's claim, the Legislature does not possess a power that the People lack.

B. If, by the express language or by necessary implication of a constitutional provision, the People express a clear intent that the provision be treated as directory only, this Court can give effect to that intent.

The AG Support Team next argues that this Court must have the authority to deem constitutional provisions as directory; otherwise, "when the People do exercise their power to enact directory timing requirements, this Court will refuse to give effect to the People's will." AG Support Team's Br, pp 19. This argument ignores the exception to the general rule that all constitutional provisions be treated as mandatory, which applies where it is clear from the express terms or by

RECEIVED by MSC 6/9/2021 4:55:36 PM

necessary implication of the provision that the provision was intended to be directory only. See, e.g., *Mich State Highway Comm v Vanderkloot*, 392 Mich 159, 180–181 (1974). Thus, constitutional provisions *may* be deemed directory if the People have expressed a clear intent that they be so treated. But when the People establish a clear constitutional deadline, it should be presumed to be mandatory.

Here, the People have not expressed *any* such intent that Article 4, § 6(7)'s November 1, 2021 deadline be treated as directory. To the contrary, such an intent is belied by the plain language that provision—i.e., its use of "shall" and "not later than"—which demonstrates an intent that the provision be treated as mandatory. *Mich State Highway Comm,* 392 Mich at 180 ("Certainly the popular and common understanding of the word 'shall' is that it denotes mandatoriness."). It is also contradicted by the history of Article 4, § 6: Prior to the enactment of Proposal 2018-2, the deadline for adopting a redistricting plan was *not* a date certain, but was a fluid deadline of "180 days after all necessary census information is available." Former Const 1963, art 4, § 6. By moving away from this fluid deadline to a date certain, the People expressed their intent that the redistricting plan be adopted by a specific date, and *only* by that date.

Thus, while the general rule that constitutional provisions must be treated as mandatory controls here, that does not mean that this Court will "refuse to give effect to the People's" intent to enact a directory constitutional provision. AG Support Team's Br, p 19. It simply means that the People have not expressed such intent here.

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

C. *Dettenthaler* established the general rule that constitutional provisions must be deemed mandatory, and that rule applies with no less force to Article 4, § 6(7).

Petitioners' argument that *Dettenthaler* is distinguishable misses the mark. They state that, because *Dettenthaler* did not consider a constitutional timing provision, it is inapplicable here. Pets' Supp Br, p 8. But this argument fails to recognize that the analysis employed within *Dettenthaler* was not so constrained. That is, *Dettenthaler*'s rebuke of treating constitutional provisions as directory employed a *broad* analysis applicable to *all* constitutional provisions—including constitutional timing provisions. See, e.g., *People v Dettenthaler*, 118 Mich 595, 600–601 (1898). In fact, *Dettenthaler* explicitly recognizes that, where constitutional provisions give "directions . . . respecting *the times or modes of proceeding* in which a power should be exercised, there is at least a strong presumption that the people designed" that power to be "exercised *in that time and mode only*." *Id.* (quotation marks omitted) (emphasis added). Thus, contrary to Petitioner's contention, *Dettenthaler*'s rule and reasoning applies to constitutional timing provisions. See also AG Opposition Team's Br, pp 26–28, 32 (collecting cases holding that constitutional timing provisions are mandatory).

D. If the rules governing directory statutes govern constitutional provisions, those rules do not alter the mandatory nature of Article 4, § 6(7).

Even if this Court determines that the rules governing directory statutes also govern constitutional provisions, application of those rules to Article 4, § 6(7) demonstrates that provision's mandatory nature.

Both the AG Support Team and Petitioners rely on *Attorney General ex rel Miller v Miller*, 266 Mich 127 (1934), and *In re Forfeiture of Bail Bond*, 496 Mich 320 (2014) (*Bail Bond*)—two cases outlining the rules for declaring statutory timing provisions directory rather than mandatory. AG Support Team's Br, pp 30–33; Pets' Supp Br, pp 6–8, 10. The general rule under these cases states that, "[w]hen a statute provides that a public officer 'shall' undertake some action within a specified period of time, and that period of time is provided to safeguard another's rights or the public interest, . . . it is mandatory that such action be undertaken within the specified period of time." *Bail Bond*, 496 Mich at 323. But if the 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 (quotation marks omitted).

Here, the language of Article 4, § 6(7) provides that the Commission "shall" undertake an action within a specified period of time, i.e., November 1 in the year following the census, and contains words of absolute prohibition denying performance after a specified time, i.e.¸ "[n]ot later than." Const 1963, art 4, § 6(7). Moreover, the November 1, 2021 deadline exists to safeguard private rights and public interests and is no "arbitrary date." AG Support Team's Br, p 31. The People carefully selected the November 1, 2021 deadline to preserve enough time within the election process to allow for: (1) challenges to the sufficiency and validity of the redistricting plans;[1] and (2) potential candidates for office to determine their

[1] The AG Support Team appears to all but recognize the fact that the preservation of such time was crucial to allow for challenges to the redistricting plan because

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

district and gather sufficient signatures on nominating petitions. AG Opposition Team's Br, p 40–43. As such, under the general "directory statute rule" outlined in *Bail Bond*, Article 4, § 6(7)'s November 1, 2021 deadline is mandatory.

The AG Support Team also argues that the lack of a penalty for noncompliance demonstrates that Article 4, § 6(7)'s deadline should be deemed directory. AG Support Team Br, p 32. However, it cites no caselaw in support of that proposition. Regardless, a constitution does not routinely prescribe penalties for failure to comply with its provisions, yet its provisions are regularly deemed mandatory. This is not surprising since a constitution is not a regulatory statute, it establishes the core framework with which all branches of government are expected to comply. And, in any event, there *is* a remedy for noncompliance here—i.e., this Court's directing Petitioners to perform their duties. Const 1963, art 4, § 6(19).

And while *Miller* appears to stand for the proposition that *all* statutes that outline "mode and manner of conducting the mere details of the election[ ] are directory," the adoption of redistricting plan is not a "mere detail[ ] of [an] election." *Miller*, 266 Mich at 134. Far from it, as the enactment of a redistricting plan affects the substance of Michigan's elections: It is a necessary precursor for the conduct of *all* statewide elections for a 10-year period. See *Miller*, 266 Mich at 134 ("Those provisions of a statute which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election, while

---

such challenges "would *necessarily* result in a delay in the adopted plan becoming law." AG Support Team's Br, pp 32–33.

those touching the recording and return of the legal votes received, and the mode and manner of conducting the mere details of the election, are directory.”). Indeed, Petitioners recognize that “the redistricting process is of fundamental importance to the people of Michigan.” Pets’ Supp Br, p 10. And, as outlined above, the adoption of a redistricting plan by the constitutionally imposed November 1, 2021 deadline is “essential to the validity” of all of those future elections because it protects both the right to challenge the sufficiency and validity of the plans and the ability of potential candidates for office to file nominating petitions.

But whether a deadline is “essential to the validity of an election” is not a *sine qua non* for a determination that the deadline is mandatory. *Miller* recognized that there was a difference between challenges brought *before* an election—where statutory provisions related to the conduct of the election would always be deemed mandatory—and challenges brought *after* an election—where statutory provisions related to the conduct of the election would be deemed directory unless certain circumstances were present:

> Before election it is mandatory if direct proceedings for its enforcement are brought, but after election it should be held directory, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or the ascertainment of the result, or unless the provisions affect an essential element of the election, or it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission will render it void” [*Miller*, 266 Mich at 133 (quotation marks omitted).]

Thus, rather than prescribing a general requirement that, to be deemed mandatory, the statute must concern an act that is “essential to the validity of the election,” *Miller* utilizes the “essential validity” language in outlining an exception

RECEIVED by MSC 6/9/2021 4:55:36 PM

to the rule that, in *post*-election challenges, statutes outlining the time and manner of performing an act will be deemed directory. But this exception is inapplicable in *pre*-election challenges—where, again, *all* provisions must be deemed mandatory. And here, as the AG Support Team recognizes, "[n]o election has occurred," so there can be no post-election challenge. AG Support Team's Br, p 31. Nor has any redistricting plan been adopted, so there is no post-plan challenge. This action—a "direct proceeding for [the] enforcement" of Article 4, § 6(7)—therefore falls within the pre-election rule that *all* statutes related to the conduct of an election be deemed mandatory. *Miller*, 266 Mich at 133. As such, there is no requirement that the action be "essential to the validity of the election."

In a similar vein, if this Court finds that the above-quoted language does not outline exceptions, but prescribes requirements for an election-related statute to be deemed mandatory, *Miller*'s use of "or" rather than "and" in outlining its list demonstrates that *Miller* presents alternative circumstances in which statutes will be deemed mandatory. *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "or" as "used as a function word to indicate an alternative"). Thus, in addition to circumstances where the statute relates to an action that is "essential to the validity of an election," a statute will be deemed mandatory if it affects "an essential element of the election." *Miller*, 266 at 133 (quotation marks omitted). A redistricting plan is undoubtedly an essential element of an election: Elections cannot go forward without one. As such, provisions related to the enactment of a redistricting plan—including established deadlines—must be deemed mandatory.

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

E. *Ferency* should be limited to its facts, and the "extraordinary circumstances" present in *Ferency* are not present here.

The AG Support Team and Petitioners are correct that, in *Ferency v Secretary of State*, 409 Mich 569 (1980), this Court deemed a constitutional timing provision directory. Pets' Supp Br, pp 8–9; AG Support Team's Br, pp 33–35. However, for the reasons stated in the AG Opposition Team's opening brief and as further outlined in Part III below, *Ferency* does not control here. AG Opposition Team's Br, p 33–35. For one, the *Ferency* Court reached its conclusion for equitable reasons due to "the unique circumstances of [the] case," i.e., impossibility of compliance due to third-party interference, 409 Mich at 602—circumstances the likes of which are not present here. For two, *Ferency*'s conclusion is at odds with the great weight of authority holding that constitutional provisions should be treated as mandatory unless a contrary intent is expressed or necessarily implied, and therefore should be expressly limited to its facts.

F. The Oregon and California redistricting cases presented "extraordinary circumstances" of impossibility, similar to those present in *Ferency*, and unlike those present here.

Finally, both Petitioners and the AG Support Team cite two extra-jurisdictional cases—one from Oregon and one from California—in support of their claim that this Court has the authority to deem a constitutional provision directory. Pets' Supp Br, pp 10–11; AG Support Team's Br, pp 35–38. But they fail to give proper weight to the fact that, those cases, like *Ferency*, rested on a finding of impossibility of performance—an impossibility that does not yet exist in this case. *State ex rel Kotek v Fagan*, 367 Or 803, 807, 810–811, 814 (2021) ("If it were possible

RECEIVED by MSC 6/9/2021 4:55:36 PM

for the State of Oregon to comply with all the requirements of Article IV, section 6, we of course would require that it do so."); *Legislature of the State of California v Padilla*, 9 Cal 5th 867, 875 (2020) (holding that "extraordinary and unforeseen circumstances[,]" i.e., the delayed release of *any* census data until July 31, 2021,[2] "ma[de] it impossible for the Commission to meet the statutory July 1 deadline.").[3]

The impossibility present in both *Fagan* and *Padilla* is not yet present here. While the Commission's predicament is not ideal, the Commission admits that it still has the ability to utilize the legacy data—set to be released mid- to late-August—to create a redistricting plan. Thus, to the extent *Fagan* and *Padilla* (and, for that matter, *Ferency*) are persuasive, at most, they recognize a second exception to the mandatoriness rule for impossibility of performance—an exception that cannot yet be invoked in this case. See Part III, *infra*.

In sum, this Court does not have the authority to deem constitutional timing provisions as directory in the absence of either a clear intent that they be treated as such or, in the most unique and extreme circumstances, impossibility of compliance. Because there is no such intent or impossibility here, Article 4, § 6(7)'s deadline must be treated as mandatory. And, to the extent this Court finds it does have the authority to apply the doctrine of directory statutes to constitutional provisions, application of that doctrine here does not alter Article 4, § 6(7)'s mandatory nature.

---

[2] At the time *Padilla* was decided, the U.S. Census Bureau predicted it would release the census data by July 31, 2021.

[3] In addition, *Padilla* lacks even persuasive value in the context of the mandatory-directory distinction as it opined on a *statutory* provision rather than a *constitutional* provision. 9 Cal 5th at 875.

RECEIVED by MSC 6/9/2021 4:55:36 PM

III. Neither the nature of Article 4, § 6(7) nor the circumstances surrounding the release of the census data justify a deviation from the constitutionally imposed November 1, 2021 deadline.

The AG Opposition Team agrees that fair and accurate redistricting is a worthy and important goal. It also agrees that the Redistricting Amendments sought to further this goal. Despite these mutual understandings, Petitioners have not demonstrated that the November 1, 2021 deadline is impossible to meet. Thus, the "most extreme circumstances" justifying a deviation from Article 4, § 6(7)'s deadline are absent, and the Petition should be denied.

To the extent this Court has the authority to deem a constitutional deadline directory, it cannot do so "lightly." *Ferency*, 409 Mich at 602. Indeed, as both Petitioners and the AG Support Team acknowledge, "[o]nly the *most extreme* circumstances . . . justify deviation." *Id.* (emphasis added); Pets' Supp Br, p 8; AG Support Team's Br, p 34. *Ferency* sets the standard for what those circumstances look like. In broad terms, the Court must consider both (1) the nature of the deadline, and (2) the cause of any constitutional delinquency. 409 Mich at 598–602. Neither consideration supports a departure from Article 4, § 6(7)'s deadline.

A. Article 4, § 6(7)'s deadline meaningfully impacts the redistricting process.

There is no dispute regarding the importance of Article 4, § 6(7)'s mandate that the Commission adopt redistricting plans. Redistricting—and thus, a redistricting plan—"goes to the heart of the political process" in our democracy. *In re Apportionment of State Legislature—1982*, 413 Mich 96, 136 (1982); Pets' Supp

Br, pp 1, 10; AG Support Team's Br, pp 22–23. What is disputed is the importance of *when* that critical task must be completed.

The AG Support Team likens the November 1, 2021 deadline to the deadline in *Ferency*, which "d[id] not relate to the sufficiency or validity of . . . [initiative] petitions" at issue. 409 Mich at 601; AG Support Team's Br, p 33. In *Ferency*, the Constitution mandated that the Board of State Canvassers certify initiative petitions within 60 days of the general election. 409 Mich at 598. But this deadline was perfunctory in nature—it was "designed to facilitate the electoral process by giving the Secretary of State and county clerks enough time to print and distribute ballots and ready the machinery for election day." *Id.* at 601. In other words, failure to comply with this deadline would result in mere inconvenience.

Not so here. Article 4, § 6(7)'s deadline kick-starts other constitutional deadlines and requirements that ultimately relate to the constitutional sufficiency and validity of the redistricting plans. For example, "[w]ithin 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." Const 1963, art 4, § 6(15). The redistricting plans also "shall become law 60 days after [their] publication." Const 1963, art 4, § 6(17). Thus, the Commission must publish its plan not later than December 1, 2021, and it shall become law not later than January 31, 2022.

As written, this leaves approximately six months before the August 2022 primary election. But significantly, a redistricting plan adopted on November 1,

RECEIVED by MSC 6/9/2021 4:55:36 PM

2021, can be challenged in this Court. Const 1963, art 4, § 6(19). And, in the event this Court finds a redistricting plan invalid, it must "remand [the] plan to the commission for further action. . . ." *Id.* Conceivably, at that point, the Commission will be required to adopt and publish a new plan before it becomes law. Const 1963, art 4, § 6(15), (17). See also AG Support Team's Br, pp 32–33 (stating that a remand "would *necessarily* result in a delay in the adopted plan becoming law"). And, in the meantime, those required to comply with election-related statutory requirements will be waiting in the balance. See e.g., MCL 168.544f; MCL 168.551. Consequently, the impact of the constitutional deadline here—i.e., triggering a chain of constitutional and statutory events and deadlines—is distinguishable from the mere inconvenience noted in *Ferency*.

The intent of the People in adopting Proposal 2018-2 also distinguishes Article 4, § 6(7) from the provision at issue in *Ferency*. In adopting Proposal 2018-2, the People made clear the import of the Commission's duties in two constitutional provisions. Article 4, § 6(22) provides:

> 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. [Const 1963, art 4, § 6(22).]

Another section of the Constitution, Article 5, § 2, places the same limitation on the Governor. Const 1963, art 5, § 2. Thus, the People made it abundantly clear that the Commission's responsibilities were not to be altered by the other branches of government. See *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 349 (2020) (explaining that courts must read statutory "text as a whole, in view

RECEIVED by MSC 6/9/2021 4:55:36 PM

of its structure and of the physical and logical relation of its many parts") (quotation marks omitted). For these reasons, the nature of the Redistricting Amendments as a whole do not support application of *Ferency*'s rationale here.

B. The U.S. Census Bureau's delay in releasing the census data does not foreclose the Commission from completing its work in compliance with the November 1, 2021 deadline.

Of course, the Commission must have sufficient information to adopt redistricting plans. See Const 1963, art 4, § 6(9). Traditionally, this information comes in the form of PL 94-171 data, which—under normal circumstances—the U.S. Census Bureau would have provided to the States by March 31, 2021. Pets' Supp Br, Am Ex A, ¶ 4(B). Unfortunately, the COVID-19 pandemic, along with other unforeseeable events, disrupted the timely release of this information. Fortunately, the Constitution does not require the Commission to use the PL 94-171 data in adopting a redistricting plan, or even the federal census data at all. Pets' Br in Support, p 10 ("[T]he Michigan Constitution does not expressly require that decennial census data be used to redistrict[.]").

Petitioners acknowledge this fact. Pets' Br, p 14 ("It is true that article 4, § 6(9) does not expressly refer to the tabulated PL 94-171 data."). Still, they assert that in adopting Proposal 2018-2, the People intended the Commission to "use census data in a reliable and accepted format to perform its duties." *Id.* And because the states "have used the PL 94-171 data since its availability," Petitioners claim that the PL 94-171 data is that reliable and accepted format. *Id.* Thus, Petitioners contend that, while the Commission can *begin* its work with data in

RECEIVED by MSC 6/9/2021 4:55:36 PM

legacy format, prior to proposing a plan, the Commission must reconcile the legacy format files with the PL 94-171 data "to mitigate the risk of error and promote confidence in the maps as drawn." *Id.*

Interestingly though, Petitioners have explained that "[t]he data in the legacy format files is identical to the PL 94-171 redistricting data files expected to be delivered by September 30." Pets' Supp Br, p 14; Pets' Supp Br, Am Ex A, ¶ 8. And it is "subject to the same exacting quality assurance processes." *Id.*; Pets' Supp Br, Am Ex A, ¶ 8. In truth, "[t]he sole difference" between the data in the legacy format and the PL 94-171 data "is in the format the census data is presented."[4] *Id.*; Pets' Supp Br, Am Ex A, ¶ 8. So why the need to delay?

Petitioners attempt to answer that question with an affidavit from Kimball W. Brace—the "president and . . . authorized agent of Election Data Services Inc., ("EDS"), a consulting firm that specializes in redistricting, election administration, and the analysis and presentation of census and political data." Pets' Supp Br, Am Ex A, ¶ 1.A. Mr. Brace avers that "less than one month to draft and publish proposed plans for congressional and state legislative districts" is insufficient. Pets'

[4] In light of Petitioners' description of the legacy data as "identical" to the PL 94-171 data, the AG Support Team's analogy to a building loses some effect. AG Support Team's Br, p 1 ("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."). If the suggestion is that legacy data represent the "shoddy" building materials, and the PL 94-171 data represent the "safe" materials, that comparison seems dispelled by the Petitioners' own characterization. Perhaps a better example is that they represent the exact same building materials, both in terms of quality and safety, but one set comes in packaging that is hard to open and the other comes in user-friendly packaging that the builder prefers because of its convenience.

RECEIVED by MSC 6/9/2021 4:55:36 PM

Supp Br, Am Ex A, ¶ 9. But neither Mr. Brace, Petitioners, nor the AG Support Team explain *why* this is the case. *Id.* at ¶ 11; Pets' Supp Br, p 13 (explaining that it is "highly unlikely if not impossible" for the Commission to complete its work) (quotations omitted); AG Support Team's Br, pp 28–29.[5] To be sure, it is not ideal that Petitioners must perform their duties on a condensed timeline. But absent impossibility—which at this juncture is speculative at best—the "most extreme circumstances" cannot be said to exist here. Indeed, in *Ferency*, the Board of Commissioners "was ready to timely perform its constitutional duties," but was prevented from doing so. 409 Mich at 600. Petitioners have not yet made any such attempt to timely comply here.[6]

The potential to timely comply with the Constitution also distinguishes this case from the extra-jurisdictional cases on which Petitioners and the AG Support Team rely. In *Fagan*, 367 Or at 805–806, the Oregon Supreme Court permitted release of reapportionment plans under a revised schedule. Its reasoning was two-

---

[5] The AG Support Team's brief seems to suggest that, even if the Commission *can* timely complete its work with the legacy format data, it should not be required to do so. AG Support Team's Br, p 29. This rationale is not supported by this Court's holding in *Ferency*, 409 Mich at 600–601, which was premised on a finding of *impossibility*, not preference.

[6] It is worth noting that at least one state (Oklahoma) proceeded with its redistricting process without the federal census data, opting instead to use population data from the U.S. Census Bureau's "5-Year American Community Survey" (ACS) from 2015–2019. See Oklahoma House of Representatives, *2021 Redistricting Committee Rules* https://www.okhouse.gov/documents/Districts/ADOPTED%202021%20House%20Rules%20for%20Redistricting.pdf (accessed June 8, 2021). Oklahoma was thus able to complete its work and enact its new district maps in April 2021. Oklahoma House of Representatives, *Enacted District Maps* https://www.okhouse.gov/publications/PropDistMaps.aspx (accessed June 8, 2021).

RECEIVED by MSC 6/9/2021 4:55:36 PM

fold. First, neither the text of the constitutional provision "nor the history of the amendments to" the provision "indicate[d] that the voters intended the specific deadlines to serve a purpose other than to provide a means to those ends." *Id*. at 810. Thus, like *Ferency* and distinguishable from Article 4, § 6(7), the deadline was perfunctory rather than substantive. Second, the mid-to-late August release of *any* census data (legacy or tabulated) made compliance with Oregon's July 15 and August 15 deadline impossible. *Id*. at 807, 811. Michigan's September 17 and November 1 deadlines are still technically feasible. See *id*. at 811 ("If it were possible for the State of Oregon to comply with all the requirements . . . we of course would require that it do so.").

The same was true in *Padilla*, 9 Cal 5th at 872. Like Oregon's July 1 and August 15 constitutional deadlines, California's statute mandates that the California redistricting commission release one set of draft redistricting maps for public comment by July 1, and approve and certify the final maps by August 15. *Id*. at 872. Noting "the extraordinary and unforeseen circumstances that . . . rendered compliance with the deadline impossible"—again, the U.S. Census Bureau's delayed release of *any* census data—the Court granted an extension. *Id*. at 875.

The Petition and supporting briefs do not demonstrate the high threshold that warrants departure from a constitutionally imposed deadline. Unless and until the "most extreme circumstances" manifest themselves—either through further delay or insurmountable obstacles—Article 4, § 6(7)'s November 1, 2021 deadline should not be excused.

RECEIVED by MSC 6/9/2021 4:55:36 PM

RECEIVED by MSC 6/9/2021 4:55:36 PM

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above and in the Attorney General Team Opposing Michigan Supreme Court Jurisdiction's opening brief, this Court should deny the Petition for Directory Relief.

Respectfully submitted,

/s/ Christopher W. Braverman
S. Peter Manning (P45719)
Christopher W. Braverman (P70025)
Matthew B. Hodges (P72193)
Kyla L. Barranco (P81082)
Rebecca A. Berels (P81977)
Assistant Attorneys General
Attorneys for Attorney General Team
Opposing Michigan Supreme Court
Jurisdiction
P.O. Box 30758
Lansing, MI 48909
(517) 335-7569
ManningP@michigan.gov
BravermanC@michigan.gov
HodgesM@michigan.gov
BarrancoK@michigan.gov
BerelsR1@michigan.gov

Dated: June 9, 2021

LF: Independent Citizens Redistricting Commission DAG2; AG# 2021-0320588-A/AG Team Opposing Mich Supreme Court Jurisdiction – Response Brief 2021-06-09