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

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SUPPLEMENTAL BRIEF OF ATTORNEY GENERAL TEAM OPPOSING MICHIGAN SUPREME COURT JURISDICTION

ORAL ARGUMENT REQUESTED

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

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COUNTER-STATEMENT OF JURISDICTION

This matter is before the Michigan Supreme Court on the "Petition for Directory Relief" filed by Petitioners Michigan Independent Citizens Redistricting Commission and Secretary of State Jocelyn Benson (collectively, Petitioners). Petitioners invoke two constitutional provisions for this Court's exercise of original jurisdiction over the Petition: Const 1963, art 6, § 4 and Const 1963, art 4, § 6(19). In a May 20, 2021 order, this Court requested that the Attorney General submit briefing on both sides of three supplemental questions, the first of which directly asks whether the Petition properly invokes this Court's original jurisdiction under those two constitutional provisions. As will be addressed further, the undersigned Attorney General Team Opposing Michigan Supreme Court Jurisdiction contends that neither of these constitutional provisions vests this Court with jurisdiction over the Petition, and that, lacking jurisdiction, the Petition should be dismissed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In its May 20, 2021 order, this Court ordered supplemental briefing on 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.

   Attorney General Team Supporting Michigan Supreme Court Jurisdiction's answer: Yes.

   Attorney General Team Opposing Michigan Supreme Court Jurisdiction's answer: No.

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

   Petitioners' answer: Yes.

   Attorney General Team Supporting Michigan Supreme Court Jurisdiction's answer: Yes.

   Attorney General Team Opposing Michigan Supreme Court Jurisdiction's answer: No.

3. Does the unprecedented delay in the transmission of federal decennial census data justify a deviation from the constitutional timeline?

   Petitioners' answer: Yes.

   Attorney General Team Supporting Michigan Supreme Court Jurisdiction's answer: Yes.

   Attorney General Team Opposing Michigan Supreme Court Jurisdiction's answer: No.

CONSTITUTIONAL PROVISIONS INVOLVED

Art 4, § 6(7) provides:

> 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.

Art 4, § 6(19) & (22) provide:

> (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.
>
> (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.

Art 5, § 2 provides, in part:

> 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 independent citizens redistricting commission for state and congressional districts (hereinafter, "commission") are legislative functions not subject to the control or approval of the governor, 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 governor. No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in article IV, section 6.

Art 6, § 1 & 4 provide:

> (1) Except to the extent limited or abrogated by article IV, section 6, or article V, section 2, the judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.
>
> (4) Except to the extent limited or abrogated by article IV, section 6, or article V, section 2, the supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

INTRODUCTION

When Michigan voters approved sweeping changes to the state's legislative redistricting process in 2018, an important question went unanswered: What happens if the federal government fails to provide the decennial census data in time to adopt the new redistricting plans? The newly formed Commission, which has been enshrined in Michigan's Constitution and is required by that Constitution to adopt a redistricting plan by November 1, 2021, now finds itself in the unenviable position of facing that looming deadline while lacking its preferred means to meet it, through no fault of its own.

But the Commission's unfortunate predicament, and the uncertainty of what may follow, does not give this Court jurisdiction over the pending Petition. Nor does it give this Court authority to rewrite the plain terms of the Constitution to help the Commission avert future challenges. Thus, the Attorney General Team Opposing Michigan Supreme Court Jurisdiction submits this Court should answer all three of the supplemental questions in the negative.

First, as a threshold issue, the Petition does not properly invoke this Court's original jurisdiction under either Article 6, § 4 or Article 4, § 6(19) of the Constitution. *Second*, even if this Court has jurisdiction to hear the Petition, it lacks authority to deem the November 1, 2021 deadline as directory rather than mandatory. And *third*, even if this Court has that authority, the circumstances surrounding the U.S. Census Bureau's delayed release of census data do not present the "extreme circumstances" necessary to justify a deviation from this constitutionally established deadline.

The delay from the U.S. Census Bureau, which itself is faced with the daunting task of preparing the nation's census data in the midst of a pandemic, has placed Michigan (indeed, all 50 states) in a difficult position. And the Commission and Secretary, by all appearances, come to this Court with the best intentions in seeking to fulfill their newly minted responsibilities. But this Court has no authority—under either the Constitution or its own jurisprudence—to rewrite the express constitutional deadline at issue and grant Petitioners' requested relief. For these reasons, the only legally appropriate disposition at this time is to dismiss the Petition, allow the Commission to proceed with its work in the most expeditious manner possible, and address any future issues or challenges if they arise.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

For the purpose of this supplemental briefing, the facts set forth in the Petition are accepted as true and relied on herein. Pet, ¶¶ 10–52; Pets' Br, pp 3–19.

ARGUMENT

I. The Petition does not properly invoke this Court's original jurisdiction under Article 6, § 4 or Article 4, § 6(19) of the Constitution.

This Court lacks jurisdiction over the Petition because it does not raise any disputed matter falling under this Court's original jurisdiction as outlined in Const 1963, art 6, § 4, or Const 1963, art 4, § 6(19).

A. Article 6, § 4 does not vest this Court with original jurisdiction over the Petition.

This Court's general jurisdiction, outlined in Article 6, § 4, is broken into three categories—the first and third of which (superintending control and appellate review) do not apply because this action is not premised on a lower-court decision.[1] This leaves the second category, prerogative and remedial writs, and the only type applicable among them, mandamus.[2] But this Court's original jurisdiction to issue

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[1] As it relates to Article 6, § 4 of the Constitution, Petitioners cite only this Court's "power to issue, hear and determine prerogative and remedial writs" as the basis of jurisdiction in this case. Pets' Br, iv, p 21. Petitioners are correct in part; this matter does not involve this Court's power of superintending control or this Court's appellate jurisdiction under the court rules. Indeed, lower courts lack jurisdiction over "cases and controversies . . . involving a congressional redistricting plan," making superintending control or appellate review an impossibility. MCL 3.71. But, as explained more fully below, Petitioners do not properly invoke this Court's jurisdiction to issue, hear, or determine a prerogative or remedial writ in this case.

[2] The "prerogative" or "remedial writs" recognized by this State's jurisprudence include "writs of error, habeas corpus, mandamus, quo warranto, procedendo and other original and remedial writs[,]" such as the "writ of prohibition," *Chem Bank & Trust Co v Oakland Co,* 264 Mich 673, 678 (1933); *People ex rel Leonard v Papp,* 386 Mich 672, 681 (1972). These devices are collectively and commonly called extraordinary writs or remedies. See MCR 3.301; FRAP 21. Here, the writs of habeas corpus (a criminal law concept), quo warranto (a challenge to right to hold

mandamus in redistricting disputes is, under the 1963 Constitution, particularly following the adoption of Proposal 2018-2, significantly limited from its pre-amendment historical breadth and does not reach the circumstances presented here. And, in any event, Petitioners fail to meet the well-established factors required to grant mandamus relief. As a result, this Court lacks jurisdiction to address the Petition.

1. Neither the plain language of Article 6, § 4 nor this Court's historical exercise of mandamus power in redistricting disputes authorizes mandamus relief here.

Petitioners first cite Article 6, § 4, of the Michigan Constitution as granting this Court jurisdiction over the Petition. Pets' Br, iv. Article 6, § 4 provides:

> Except to the extent limited or abrogated by article IV, section 6, or article V, section 2, the supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge. [Const 1963, art 6, § 4.]

From that, Petitioners cite only this Court's "power to issue, hear and determine prerogative and remedial writs," specifically, a writ of mandamus, as the basis of jurisdiction here. Pets' Br, iv, p 21. However, Petitioners do not properly invoke this Court's jurisdiction to issue, hear, or determine a writ of mandamus.

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public office), and procedendo and error (involving appellate court instructions to lower court) do not apply. Further, the Michigan Rules of Court have superseded many of these historical, extraordinary remedies, including "writs of certiorari, mandamus and prohibition," to provide "one simplified procedure for reviewing or supervising the actions of lower court and tribunals." *Papp,* 386 Mich at 679. Thus, mandamus is the only remaining option.

That is, while mandamus relief—the only possible remaining "prerogative or remedial writ[ ]"—may have been "the traditional vehicle for challenging redistricting and apportionment schemes," *LeRoux v Secretary of State*, 465 Mich 594, 606 (2002), citing *In re Apportionment of the State Legislature—1992,* 439 Mich 715, 717 (1992); *Stenson v Secretary of State,* 308 Mich 48, 51 (1944), as outlined below, that tradition ended with the ratification of the 1963 Constitution and, later, the passage of Proposal 2018-2. As such, mandamus relief under Article 6, § 4 is inapplicable here.[3]

a. The historical exercise of this Court's mandamus power in redistricting disputes has no application to this Petition.

That this Court has, historically, used its mandamus authority to resolve redistricting disputes is unquestionable. *LeRoux*, 465 Mich at 606, citing *In re Apportionment of the State Legislature—1992*, 439 Mich at 717; *Stenson*, 308 Mich at 51. Yet, the use of mandamus in redistricting disputes arose under different constitutional redistricting schemes and different facts and procedural stances than those at issue in this Petition. For example, in *Stenson*, the dispute arose under the 1908 Constitution, which did not provide an express method of judicial review of

[3] At the outset, it should be noted that there does not appear to be any historical precedent for a redistricting body to preemptively seek relief from this Court *as against itself* and to *avoid* a clear duty or obligation. Notwithstanding the historical use of mandamus—whether under this Court's authority provided in Const 1963, art 6, § 4 or under Const 1963, art 4, § 6 (in its prior iterations)—every known case exercising mandamus jurisdiction otherwise met the basic adversarial litigation requirement, or mandamus requirements, or both. See footnote 5, *infra*. This Petition is not on the same plane as that prior line of cases.

proposed redistricting plans. 308 Mich at 56. Other previous disputes included cases and controversies either: (1) between opposing parties relative to proposed or approved redistricting plans, or (2) related to a wholesale failure to propose or approve plans. And the resulting mandamus petitions were brought by third-party litigants[4] challenging the decisions (or the impasse) reached by the Legislature or appointed commission. See generally, *In re Apportionment—1992*, 439 Mich at 716–720 (discussing historical legal challenges to redistricting).

Subsequent to the 1908 Constitution, litigants challenging redistricting plans under the 1963 Constitution did not invoke this Court's authority under the general jurisdictional provision of Article 6, § 4. Rather, they premised this Court's jurisdiction on Article 4, § 6, as it was written prior to the passage of Proposal 2018-2. Until Proposal 2018-2's passage, the text of Article 4, § 6 created a legislative committee for the purpose of apportionment, required that committee to adopt a redistricting plan, and, if the committee could not agree on a plan, vested jurisdiction in this Court to "determine which plan complies most accurately with

[4] See, e.g., *Giddings v Blacker*, 93 Mich 1, 3 (1892) (involving a request from a citizen and elector for a writ of mandamus to prohibit the Secretary "from giving notice of the election of senators, under the act of 1891, and to compel him to give notice under the apportionment act of 1885"); *Williams v Secretary of State*, 145 Mich 447, 448 (1906) (involving a request from a Wayne County resident for a writ of mandamus against the Secretary "to compel him to give notice of the election" using a different apportionment method); *Scholle v Hare*, 367 Mich 176 (1962) (on remand) (involving a request from a Michigan citizen for a writ of mandamus compelling the Secretary to utilize notices based on a prior apportionment formula because of equal protection concerns).

the constitutional requirements and . . . direct that it be adopted by the commission and published as provided in this section." Former Const 1963, art 4, § 6.

And that is exactly how redistricting disputes were lodged following the ratification of the 1963 Constitution (and until the ratification of Proposal 2018-2) under then-Article 4, § 6. See *In re Apportionment of Mich State Legislature—1964*, 372 Mich 418, 419 (1964) (holding that its jurisdiction in redistricting disputes arose under Article 4, § 6, not Article 6, § 4, because the challenge "was not initiated or brought and, hence, has no existence under the authority of Article VI, but only that of Article IV"); *In re Apportionment of Mich Legislature—1972*, 387 Mich 442, 450 (1972) ("This matter having been brought to this Court under the provisions of Article IV, section 6 of the 1963 Constitution of the State of Michigan. . . ."); *In re Apportionment of State Legislature—1982*, 413 Mich 96, 105 & n 2, 116 (1982) (citing Article 4, § 6 as the basis for its jurisdiction in a redistricting matter); *In re Apportionment of State Legislature—1992*, 439 Mich 715, 723–724 (1992) (noting that jurisdiction was invoked under Article 4, § 6). Thus, beginning with the ratification of the 1963 Constitution, mandamus was no longer the vehicle through which redistricting disputes were raised.

Consequently, while historical redistricting decisions may remain valuable for their substantive legal analysis (i.e., on the merits), their precedential value in determining whether this Court has jurisdiction to reach the merits is greatly diminished under the 1963 Constitution (and, as outlined below, perhaps even extinguished because of Proposal 2018-2). To the extent the historical decisions

discuss and decide jurisdictional issues, this Court should treat those decisions as products of the redistricting systems and constitutional language of times past, which differ from the system and constitutional language in place now.

b. Proposal 2018-2 limited this Court's jurisdiction over redistricting matters.

Further limiting this Court's jurisdiction over redistricting matters is the constitutional amendment enacted through the passage of Proposal 2018-2. Notably, none of the historical actions cited above—whether brought under the 1908 Constitution or the 1963 Constitution prior to the ratification of Proposal 2018-2—addressed the constitutional language added by that proposal; specifically, its addition of an exception to this Court's general authority in redistricting matters: "Except to the extent limited or abrogated by article IV, section 6, or article V, section 2." Const 1963, art 6, § 4.

The People, in passing Proposal 2018-2, limited the authority of each of the three branches of state government in matters related to redistricting. Specific to the judicial branch, Article 6, § 4 now provides that this Court's general authority over redistricting matters is constricted "to the extent limited or abrogated by article IV, section 6, or article V, section 2." This Court's historical exercise of mandamus authority in redistricting disputes falls under the broad heading of "the exercise of original jurisdiction" otherwise conferred under Const 1963, art 6, § 4. That jurisdiction has since been "limited or abrogated" by Proposal 2018-2. The question is, to what degree?

i. The words "limited and abrogated" in Article 6, § 4 deprive this Court of its historical authority to issue mandamus in this case.

"When interpreting constitutional provisions," courts must be "mindful that the interpretation given the provision should be 'the sense most obvious to the common understanding' and one that 'reasonable minds, the great mass of the people themselves, would give it.'" *Adair v State,* 486 Mich 468, 477 (2010), quoting *Traverse City Sch Dist v Attorney General,* 384 Mich 390, 405 (1971) (quotations and citation omitted). Thus, "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. . . ." *Adair*, 486 Mich at 477–478, quoting *Traverse City Sch Dist*, 384 Mich at 405 (citation omitted).

Under this rule of interpretation, "the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.'" *People v Nutt*, 469 Mich 565, 573–574 (2004), quoting 1 Cooley Constitutional Limitations (6th ed), p. 81. When terms are not defined within the applicable constitutional provision this Court may consult a dictionary to determine how those words were commonly understood by the ratifying voters. See, e.g., *Adair,* 486 Mich at 492–493.

Webster's New World College Dictionary (3d ed) defines "limited" as "confined within bounds; restricted" and "exercising governmental powers under constitutional restrictions; not having absolute power." And it defines abrogate as "to repeal" and "to cancel or repeal by authority; annul." *Id.*

"Limited" and "abrogated" must be read as the People's desire to pare back this Court's authority in the realm of redistricting. That reading is also consistent with the People's decision, in the same vote, to limit the role of the Judiciary generally (Article 6, § 1),[5] the Executive (Article 5, § 2), and the Legislature (Article 4, § 6(22)) in redistricting matters that are explicitly assigned to the Commission. It is also consistent with the rule of "common understanding," a concept applied when attempting to "discern the original meaning attributed to the words of a constitutional provision by its ratifiers." *Nutt*, 469 Mich at 573, citing *People v DeJonge (After Remand),* 442 Mich 266, 274–275 (1993).

Regardless of exactly how the words "limited or abrogated" restrict this Court's authority, in no way can they be read as enlarging this Court's jurisdiction. Nor should they be understood to merely reaffirm this Court's historic or existing authority in redistricting matters; otherwise, they would be mere surplusage and rendered nugatory, "failing to give [the words] meaning or effect." *Apsey v Mem Hosp*, 477 Mich 120, 131 (2007) (citations omitted).

As a result, this Court's authority in redistricting matters is no longer what it was prior to 2018. In fact, the People made clear that Article 6, § 4's limitation was intended to be effective "notwithstanding . . . any prior judicial decisions." Const

[5] The People limited the "one court of justice" as a whole in redistricting matters, providing that, "[e]xcept to the extent limited or abrogated by article IV, section 6, or article V, section 2, the judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house." Const 1963, art 6, § 1.

1963, art 5, § 2; Const 1963, art 4, § 6(22). This Court must then consider what those provisions say relative to this Court's role and authority.

ii. Article 4, § 6(19) limits this Court's authority to directing the Secretary or Commission to perform their duties, reviewing challenges to adopted plans, and remanding plans to the Commission for further action.

The provision that provides the "limitation" or "abrogation" of this Court's original jurisdiction is Article 4, § 6(19), which now provides:

> 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.

Thus, as has been historically true, this Court retains authority to "exercise . . . original jurisdiction" in matters involving redistricting under the first clause found in Article 4, § 6(19). But the succeeding sentence now provides that when this Court exercises such jurisdiction in these matters, its role is to: (1) "direct the secretary of state or the commission to perform their respective duties," (2) "review a challenge to any plan adopted by the commission," and (3) "remand a plan to the commission for further action" if the plan does not comply with the U.S. Constitution or other, superseding federal laws. Const 1963, art 4, § 6(19). But in no event shall "any body" other than the Commission, including this Court, "promulgate and adopt a redistricting plan or plans for this state." *Id.* That

limitation—which runs contrary to the history of redistricting in Michigan and this Court's longstanding, albeit reluctant, role in that process—clearly limits this Court's authority in redistricting disputes to directing ministerial acts of the Secretary or Commission, as further discussed in Part I.B. below.

Perhaps with similar effect, both Article 4, § 6(22) and Article 5, § 2 limit the applicability of prior judicial decisions related to redistricting. Article 4, § 6(22) provides:

> 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.

And Article 5, § 2 provides, in part:

> 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 independent citizens redistricting commission for state and congressional districts (hereinafter, "commission") are legislative functions not subject to the control or approval of the governor, 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 governor. No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in article IV, section 6.

The language of these two provisions casts a shadow over the applicability of (1) this Court's authority under Const 1963, art 6, § 4 (one "other provision of this constitution") in Commission-related disputes, and (2) court decisions that arose under prior, and different, apportionment laws and systems. The first sentence of each provision can be read to limit this Court's authority over *Commission* disputes to the specific authority provided in Article 4, § 6(19), discussed below. For the same reason, the "traditional" role of mandamus in these actions, as announced in *LeRoux*, may no longer be relevant as that authority has been "limited or abrogated" following ratification of Proposal 2018-2.

2. Petitioners do not satisfy any of the requirements necessary for mandamus relief.

Even if the above arguments did not deprive this Court of jurisdiction, mandamus relief would still not be appropriate here. In fact, Petitioners seem to recognize as much, having framed the Petition as a request for direction (to "be directed") rather than referencing mandamus relief. See, e.g., Pet, p 23, ¶ 6.

The requirements for seeking mandamus relief perhaps best explain why that relief is not implicated, much less appropriate, here. In an action for mandamus, the petitioning party must show that: (1) it "has a clear legal right to the performance of the specific duty sought to be compelled"; (2) the party against which mandamus is sought has "a clear legal duty to perform such act"; and (3) the desired act or result "must be a ministerial act, one where the law prescribes and defines the duty to be performed with such precision and certainty as to leave

nothing to the exercise of discretion of judgment." *Toan v McGinn*, 271 Mich 28, 34 (1935) (internal quotation and citations omitted). See also *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 618 (2012). Michigan courts also recognize a fourth requirement: Mandamus relief is only available when there is no other adequate remedy. *Hill v State*, 382 Mich 398, 402 (1969); *see also Delly v Bureau of State Lottery*, 183 Mich App 258, 261 (1990) (holding that mandamus is only appropriately granted "when there is, in practical terms, no other remedy, legal or equitable, which might achieve the same result").

Unlike prior redistricting disputes in which this Court held that it had original jurisdiction to review a mandamus request, including the cases supporting the premise that mandamus has been "the traditional vehicle for challenging redistricting and apportionment schemes," as cited in *LeRoux*, 465 Mich at 606, here there are no adverse parties and there is no disputed or disregarded ministerial act. Petitioners are not challengers seeking to compel completion of a ministerial act by a third party—in fact, there are no adverse parties at all. The Petition is not brought *against* the Commission or Secretary alleging improper action or inaction, but *by* the constitutionally bound actors themselves asking this Court to compel a change to their constitutional duties.

Nor has there been any decision or proposed plan from which a challenge might be brought before this Court. Rather, the "specific duty sought to be compelled" is to change a date certain by which Petitioners must act. *Toan*, 271 Mich at 34. This requester has no "clear legal right to performance" by any date

other than that set forth in the Constitution thus failing factor one above. *Id.* Quite the opposite, as the Constitution explicitly sets the required date by which the Commission must act: November 1, 2021. Const 1963, art 4, § 6(7). This Court held more than 175 years ago that the plain and exacting language found in our Constitution controls, a foundational legal premise that scarcely needs citation. *Green v Graves*, 1 Doug 351, 357 (1844) ("Where a provision of the constitution is couched in language explicit and clear, this court is restrained from enlarging or restricting the plain and obvious import of such provision.").

For the same reason, the request also fails to satisfy the second and third mandamus factors; the party to be compelled here does not have "a clear legal duty to perform such act" by any date other than November 1, 2021, and to act by any other date would not qualify as "a ministerial act, one where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion of judgment." *Toan,* 271 Mich at 34 (quotations omitted). The Petition seeks to turn what is already a ministerial act into a discretionary act, the inverse of mandamus.

In fact, there is no impasse, failure to submit an approved plan, or any other missed ministerial duty for this Court to order completed. The final date for action, November 1, 2021, has not yet passed. Const 1963, art 4, § 6(7). And, while relief from the plain language of the Constitution is an extraordinary request, it is not appropriate subject matter for relief of any sort, including by extraordinary writ. So

factor four, whether the requested relief is available by any other means, is neither ripe nor relevant.

The nature of the requested relief in the Petition does not conform to the method by which it is sought. It is not merely ill-fitting—the proverbial square peg in a round hole—here there is no peg. So, while this Court has entertained mandamus requests in redistricting and apportionment cases historically, this Petition is factually and procedurally different from those prior determinations in nearly every way. Accordingly, this Court should find that the Petition fails to properly invoke the jurisdiction of Article 6, § 4.

B. Article 4, § 6(19) does not vest this Court with original jurisdiction because the Petition asks this Court to change the Commission's constitutional duties rather than direct the Commission to perform them.

Petitioners also invoke Article 4, § 6(19) as a basis for this Court's original jurisdiction. True, Article 4, § 6(19) does create and vest in this Court *some* original jurisdiction related to the Commission and its redistricting plans. But that jurisdiction is narrow and specific, limited to certain enumerated categories and actions. And the Petition, which does not fall within these enumerated categories and actions, therefore does not invoke Article 4, § 6(19)'s narrow and specific grant of jurisdiction. Accordingly, this Court should find that the Petition does not properly invoke this Court's original jurisdiction under Article 4, § 6(19).

1. Article 4, § 6(19) creates a narrow and specific range of matters over which this Court has original jurisdiction.

It is fundamental that this Court's jurisdiction "is fixed and defined by the Constitution." *In re Mfr's Freight Forwarding Co*, 294 Mich 57, 69 (1940). As Petitioners recognize, aside from the grant of jurisdiction in Article 6, § 4 of the Constitution, the only other constitutional provision that could possibly vest this Court with original jurisdiction over this action is Article 4, § 6(19), which was enacted through voter-initiated constitutional amendment in 2018. This section reads in its entirety:

> 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. [Const 1963, art 4, § 6(19).]

By its own terms, this section creates three avenues for this Court to exercise original jurisdiction: (1) to "direct" the Secretary or the Commission "to perform their respective duties"; (2) to review a challenge to one of the Commission's adopted redistricting plans; and (3) to remand a redistricting plan to the Commission under certain circumstances. The second and third avenues are not relevant to the analysis here, as there is no redistricting plan to challenge and thus no ability to remand a plan to the Commission. The critical language for the purpose of this Petition, then, is this Court's jurisdiction to "direct" the Commission and the Secretary "to perform their respective duties." Const 1963, art 4, § 6(19).

As more fully addressed below, this limited grant of jurisdiction does not encompass Petitioners' request to alter the constitutional November 1, 2021 deadline.

2. The plain and ordinary meaning of Article 4, § 6(19) does not encompass the relief Petitioners seek.

Having eliminated the potential bases of original jurisdiction set forth in Article 4, § 6, and the other categories in Article 4, § 6(19), Petitioners are left with only this Court's original jurisdiction to "direct the [Secretary] or the [Commission] to perform their respective duties. . . ." Const 1963, art 4, § 6(19). A plain reading of this constitutional text demonstrates that it does not extend to the type of relief sought in the Petition, and therefore does not provide a basis for this Court to exercise jurisdiction over this action.

a. The constitutional text must be given its plain meaning and common understanding.

An interpretation of Article 4, § 6(19) begins with familiar principles of construction. "When reviewing constitutional provisions, the objective of such review is to effectuate the intent of the people who adopted the constitution." *Straus v Governor*, 459 Mich 526, 533 (1999). To achieve that aim, the "primary rule" for interpreting a constitutional provision is "the rule of common understanding," which identifies the interpretation "which reasonable minds, the great mass of people themselves, would give it." *In re Proposal C*, 384 Mich 390, 405 (1971) (citation and quotation omitted). Stated differently, "[t]he first rule a court should follow in ascertaining the meaning of words in a constitution is to give

effect to the plain meaning of such words as understood by the people who adopted it." *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 699 (1970).

Indeed, as stated by this Court with respect to the initiative petition that ultimately created the Commission, "the objective of our interpretation 'is to determine the text's original meaning to the ratifiers, the people, at the time of ratification.' " *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 61 (2018), quoting *People v Tanner*, 496 Mich 199, 223 (2014). In arriving at that understanding, courts must suppose that the People accepted the words of the provision "in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." *Id.* (cleaned up).

To apply the canon of "common understanding" to constitutional text, this Court will look to a dictionary for the definitions of relevant words and phrases. See *Makowski v Governor*, 495 Mich 465, 487 (2014) (defining "grant" in the context of commutations in Const 1963, art 5, § 14). "The enactment into law of these texts was an open democratic process, and every citizen was entitled to think that the words in the texts that were enacted meant what a good dictionary in use at the time said they meant." *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 490 n 11 (2020) (Viviano, J., concurring) (quotations omitted).

When the rule of common understanding is applied to Article 4, § 6(19), it becomes evident that it would not have been understood by the voters to open the doors of this Court to the relief sought by Petitioners here—relief that would change

the very requirements the voters simultaneously approved when they "overwhelmingly" passed Proposal 2018-2. See Pets' Br, p 5.

b. This Court only has jurisdiction to direct the Commission and Secretary to perform their duties.

The operative text in Article 4, § 6(19) provides that this Court has original jurisdiction to "*direct* the secretary of state or the commission *to perform* their respective *duties* . . . ." Const 1963, art 4, § 6(19) (emphasis added). To "direct," in the verb tense used in this section, means "to order or command with authority." *Webster's New World College Dictionary* (3d ed). "Perform" means "to carry out; meet the requirements of; fulfill." *Id*. And "duties" means "any action, task, etc. required by or relating to one's occupation or position." *Id*.

In other words, this Court's original jurisdiction under this text is limited to ordering the Secretary or the Commission to carry out or fulfill their respective constitutionally required tasks and actions. For the reasons outlined above, this specific grant of authority to "direct" – which limits and abrogates this Court's general and historical mandamus authority – grants jurisdiction only to issue an order requiring the Secretary or Commission to perform a specific, constitutionally required task. Thus, if the Commission or Secretary fail to perform a required duty, another party could bring an action in this Court seeking an order that commands the Commission or Secretary to perform that particular duty. But that is the only relief available under this provision—an order requiring the Secretary or the Commission to perform a specific, constitutionally required task.

c. The Petition exceeds the limited jurisdiction of Article 4, § 6(19).

This leads to the fundamental problem with Petitioners' request: They are seeking relief that is altogether different in kind and beyond the narrow scope of the constitutional text. First, rather than seeking an order requiring them to *fulfill* their duties, they are asking for the opposite—an order that preemptively allows them to *not* comply with the duties outlined in the Constitution. And second, they are asking this Court to actually *change* the constitutional text to alter those duties, at least for this census cycle.

Using the anticipated September 30, 2021 date as the time when their preferred form of redistricting data will be received from the U.S. Census Bureau, Petitioners ask this Court to enter an order directing the Commission to adopt its plans by January 25, 2022, "notwithstanding" the November 1, 2021 deadline established in Article 4, § 6(7). Pets' Br, p 31. And if the Commission receives the data on a different date, Petitioners ask this Court to enter an order directing the Commission to propose its plans within 72 days of receipt and adopt the plans 45 days after they are proposed. *Id*. In either instance, the order from this Court would be directing the Commission to act outside of (and contrary to) the duties and requirements that are plainly spelled out in the Constitution.

This request exceeds the scope of Article 4, § 6(19) because it is not simply seeking an order requiring the Commission to fulfill the duties contained in the Constitution. As Petitioners readily acknowledge, their constitutional duty is to adopt the plans by November 1, 2021. So, in their attempt to bring the Petition

within the bounds of Article 4, § 6(19), Petitioners employ a subtle—but significant—change in the phrasing of this relief. Rather than asking this Court to "direct the Petitioners *to perform* their duties," Petitioners ask this Court to direct them "*in the performance of* their duties." Pets' Br, pp 2, 20, 28 (emphasis added).

To slightly rephrase Petitioners' request, they are essentially claiming that this Court has original jurisdiction to provide "direction" to the Commission and Secretary in *how* to perform their duties. Petitioners state that they "seek direction from this Court," Pets' Br, p 2, that "[d]irection from this Court is necessary," *id.* p 21, and that they "request direction from this Court," *id.* p 22. But nothing in the plain language at issue here requires "direction," as the November 1, 2021 deadline is fixed and clear. Nor does anything in the plain meaning of the text discussed above suggest that this Court was given jurisdiction to sit as a de facto advisory body with the power to tell the Commission and Secretary when and how to carry out the many duties that the voters bestowed upon them. Rather, this Court has *limited* jurisdiction to order them to *fulfill* those duties—in the constitutionally prescribed manner and at the constitutionally prescribed time—when they have failed to do so. That is not the context in which Petitioners seek relief. Petitioners ask this Court to provide "direction" to allow them to propose and adopt plans on a timeline different than that expressly established in the Constitution. The plain language of Article 4, § 6(19) does not contemplate such relief.

For those reasons, this Court should hold that it lacks jurisdiction over the Petition under Article 6, § 4 or Article 4, § 6(19) of the Constitution.

II. Generally, this Court does not have the authority to deem a constitutional timing requirement as directory instead of mandatory, and this case is no exception.

It is undisputed that Article 4, § 6 of the Constitution requires the Commission to adopt a redistricting plan by November 1, 2021. Const 1963, art 4, § 6(7). Despite this unequivocal constitutional requirement, Petitioners ask this Court to rewrite the November 1, 2021 deadline. For the reasons discussed below, this Court does not have authority to do so.

A. A constitutional provision must be treated as mandatory unless, by its express terms or by necessary implication from the language used, it is clear that it was intended to be treated as directory.

It is well-established that a *statute* that relates to "the proper, orderly, and prompt conduct of business"—such as a statute that "provides that certain acts or things shall be done within a particular time or in a particular manner"—may, in certain circumstances, be construed as directory rather than mandatory. E.g., *Attorney General ex rel Miller v Miller*, 266 Mich 127, 133–134 (1934) (quotations omitted). The same is not true with respect to constitutional provisions.

In *People v Dettenthaler*, 118 Mich 595 (1898), this Court addressed the directory-versus-mandatory distinction in the context of a constitutional provision that required that all state laws be passed with enacting clauses. Quoting favorably the late Justice Cooley's "Constitutional Limitations," the Court noted that "courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution." *Id*. at 600 (quotations omitted). Recognizing the "solemn and permanent character"

of a constitution, Justice Cooley observed that such an instrument "fix[es] those unvarying rules by which all departments of the government must at all times shape their conduct." *Id.* (quotations omitted). In his assessment, to view constitutional provisions as "prescribing mere rules of order in an unessential matter" would be to "lower[ ] the proper dignity of such an instrument, and usurp[ ] the proper province of ordinary legislation." *Id.* (quotations omitted). Thus, "[i]f directions are given 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 it [to] be exercised in that time and mode only." *Id.* at 600–601 (quotations omitted).

In addition to Justice Cooley's analysis, the *Dettenthaler* Court cited two diverging lines of extra-jurisdictional cases. *Id.* at 599–602. The first line of cases—which the Court cited with approval—hold that the "language of the constitution should be literally followed" and are "strong in [their] condemnation of the practice of treating constitutional requirements as directory." *Id.* at 601–602, citing *In re Seat of Government Case*, 1 Wash T 115, 116 (1861); *State v Rogers*, 10 Nev 250 (1875); *State v Patterson*, 98 NC 660, 662 (1887). The second—which the Court cited with disapproval—hold that certain constitutional provisions may be deemed directory. *Id.* at 599–600, citing *Swan v Buck*, 40 Miss 268, 270 (1866); *McPherson v Leonard*, 29 Md 377 (1868); *City of Cape Girardeau v Riley*, 52 Mo 424, 427 (1873). Ultimately, the *Dettenthaler* Court concluded that, while there were "some cases . . . where the doctrine of directory statutes has been applied to

constitutional provisions," those cases were "so plainly at a variance with the weight of authority" that they no longer could "sanction the application" of the doctrine in such a manner. *Id.* at 601. See also *People ex rel Twitchell v Blodgett*, 13 Mich 127, 185 (1865) (Martin, C.J.) (finding that an opinion was "not capable of controversion" where it held that, "if the constitution declares that a thing *shall be done* in a particular way or manner, it is implied, necessarily, that it shall not be done in any other; but . . . if there is no such *express* declaration, and none fairly to be implied, the whole subject is within legislative discretion" (quotations omitted)).

The *Dettenthaler* Court's rationale is not an outlier, nor is it an outdated or arcane view of constitutional requirements.[6] Indeed, courts from many other

[6] E.g., 16 Am Jur 2d Constitutional Law § 98 ("[I]t is the general rule to regard constitutional provisions as mandatory and not to leave any discretion to the will of a legislature to obey or disregard them unless it appears from the express terms thereof or by necessary implication from the language used that they are intended to be directory only. . . . so strong is the inclination in favor of giving obligatory force to the terms of organic law that it has even been said that neither by the courts nor by any other department of the government may any provision of the constitution be regarded as merely directory but that each one of its provisions should be treated as imperative and mandatory without reference to the rules distinguishing between directory and mandatory statutes." (footnotes omitted)); 3 Sutherland Statutory Construction (8th ed) ("In general, Constitutions are more likely to have mandatory effect than any other class of organic law. Such a result accords with the generally acknowledged import of constitutional fiat, that its character requires absolute compliance in all cases without exception. Additionally, our institutional principles entail concepts of constitutional supremacy, and so reasonably engender the presumption that the framers of a Constitution intended for it to have just such efficacy." (footnotes omitted)); 16 CJS Constitutional Law § 138 ("The provisions of a state constitution—as the organic and fundamental law of the land—stand upon a higher plane than statutes and will ordinarily be deemed mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required. Under this principle, restrictions and prohibitions in constitutional provisions are mandatory and must be obeyed. Constitutional provisions are to be construed as mandatory unless a different intention is

jurisdictions have reached the same result. E.g., *State ex rel Justice v King*, 244 W Va 225, 299–300 (2020) ("We have also stated that the provisions of the Constitution, the organic and fundamental law of the land, stand upon a higher plane than statutes, and they will as a rule be held mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required." (quotations omitted)); *Scott v Hinkle*, 259 So 3d 982, 985 (Fla App Ct, 2018) ("When the Florida Constitution prescribes the manner of doing something, doing it in a different manner is prohibited."); *Fletcher v Kentucky*, 163 SW3d 852, 866 (Ky, 2005) ("'[C]onstitutional provisions are *mandatory* and never directory.'"), quoting *Arnett v Sullivan*, 279 Ky 720 (1939) (holding that a constitutional timing provision was mandatory and not directory); *Hornsby v Sessions*, 703 So2d 932, 939–940 (Ala, 1997) (holding that a constitutional judicial term-limit provision was mandatory and stating, "[a]s a general proposition, constitutional provisions are given mandatory effect."); *State ex rel Wood v King*, 93 NM 715, 719 (1979) ("[C]onstitutional provisions prescribing the exact or exclusive times or methods for certain acts are mandatory, and must be complied with, otherwise the enactment will be declared void."); *Scoggins v Southwestern Elec Serv Co*, 434 SW2d 376, 380 (Tex App Ct, 1968) ("In this jurisdiction, we follow the rule that where a power is expressly given by the Constitution, and the means by which, or the manner in

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manifested either by express provision or by necessary implication. Usually, therefore, constitutional provisions are mandatory rather than directory, and there are expressions to the effect that all constitutional provisions are mandatory." (footnotes omitted)).

which it is to be exercised, is prescribed, such means or manner is exclusive of all others."); *Robinson v First Judicial Dist Court*, 73 Nev 169, 175 (1957) ("[A]n express constitutional provision requiring a certain thing to be done in a certain way is exclusive to like extent as if it had included a negative provision to the effect that it may not be done in any other way."). Thus, under the great weight of authority, the general rule holds true: *All* constitutional provisions must be treated as mandatory and should not be deemed directory.[7]

And, while some courts have recognized an exception to the general rule, it applies only in circumstances where it is clear—either by the express terms of the constitution or by necessary implication from the language used—that the constitutional provision was intended to be directory only. E.g., *Williamson v Schmid*, 237 Ga 630, 632 (1976) (holding that the use of "notwithstanding" and "may" within a constitutional provision demonstrated that the provision was permissive); *In re Advisory Opinion to Governor*, 510 A2d 941, 942 (RI, 1986) ("The language of art. I, sec. 2, has been construed to be advisory and not mandatory[,] . . . [and] [t]hus, art. I, sec. 2, presents no constitutional restraint upon the legislative power of the General Assembly."); *Cook v Illinois State Bd of Elections*, 59 NE3d 148, 154–155 (Ill App Ct, 2016) (holding that the language of the constitutional provision, including the use of "may," indicates that it was intended to be viewed as directory only).

[7] But see *State ex inf Dalton v Dearing*, 364 Mo 475, 483 (1954) (holding that a constitutional timing provision was directory, rather than mandatory, because the failure to comply with the timing provision did not invalidate the action).

In fact, this Court appears to have recognized this limited exception in *Michigan State Highway Commission v Vanderkloot*, 392 Mich 159 (1974). In that case, a "threshold question" presented to the Court was whether a constitutional provision stating that "[t]he legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction," *id.* at 178, "prescribe[d] a [m]andatory duty or whether it [wa]s merely [d]eclaratory," *id.* at 179. To answer the threshold question, the Court undertook a plain-language analysis of the constitutional provision at issue, concluding that, among other things, the language of the provision (i.e., its use of "shall") dictated that the provision be viewed as mandatory. *Id.* at 180–181. Thus, while not directly on point, this Court's reasoning in *Michigan State Highway Commission* resembles an analysis under the exception to treating a constitutional provision as mandatory where it is clear that the provision was intended to be directory only.

Applying the limited exception to the constitutional provision at issue here, the timing requirement of Article 4, § 6(7) does not, by its express terms or by necessary implication, clearly reveal an intent that it be deemed directory only. Quite to the contrary: The "common understanding" of Article 4, § 6(7) demonstrates its compulsory nature. *Nutt*, 469 Mich at 573 (noting that the "goal in construing our Constitution is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers" and, to that end, it "appl[ies] the rule of common understanding"); see *id.* at 573–574 (noting that in applying the rule of common understanding, "the people are understood to have accepted the

words employed in a constitutional provision in the sense most obvious to the common understanding"); *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 533 (2014) (noting that "consideration of dictionary definitions used at the time of passage may be appropriate").

Article 4, § 6(7) provides, in relevant part:

> *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." [Const 1963, art 4, § 6(7) (emphasis added).]

It is well understood that use of the word "'shall' indicates a *mandatory* directive." *People v Lockridge*, 498 Mich 358, 387 (2015), citing *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114 (2014); *Co Rd Ass'n of Mich v Governor*, 260 Mich App 299, 306 (2004), aff'd in part, 474 Mich 11 (2005) (when interpreting a provision of the Michigan Constitution, "[i]t is well-established that the use of the 'shall' rather than 'may' indicates a mandatory, rather than discretionary, action"); *Mich State Highway Comm'n,* 392 Mich at 180 ("Certainly the popular and common understanding of the word 'shall' is that it denotes mandatoriness."). This is especially true where, as here, "the supporting language is unequivocal." *Mich State Highway Comm'n*, 392 Mich at 180. Article 4, § 6(7)'s language—"the commission *shall* adopt a redistricting plan"—leaves no room for doubt on its intended meaning.[8] Const 1963, art 4, § 6(7) (emphasis added).

[8] But see *Guastello v Citizens Mut Ins Co*, 11 Mich App 120, 136 (1968) (holding that the use of the word "shall" was equivocal where the mandatory language of the court rule at issue was at odds with its official comment).

Nor does the remainder of the provision, which provides that a redistricting plan "shall" be adopted "[n]ot later than November 1 in the year immediately following the federal decennial census," provide any sort of equivocation. Const 1963, art 4, § 6(7). "Not later than" is defined as "by (a specific time)" or "before (a specific time)." *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, in the sense most obvious to the common understanding of Article 4, § 6(7), the Commission must complete its specified task *by* or *before* a specific time. The drafters of Article 4, § 6(7) chose a date certain for that time: "November 1 in the year immediately following the federal decennial census." Const 1963, art 4, § 6(7).[9] There is nothing equivocal about this deadline, and thus, Article 4, § 6 does not, by its express terms or by necessary implication, reveal any intent that it be deemed

[9] Notably, the drafters could have written Article 4, § 6(7)'s deadline differently. See Const 1963, art 2, § 9 ("Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect *10 days after the date of the official declaration of the vote*." (emphasis added)). In fact, other states have taken such an approach and tied their redistricting deadlines to the receipt of the census data. Compare Const 1963, art 4, § 6, with Colo Const, art 5, § 44.4(1) ("The commission shall begin by considering a plan, created by nonpartisan staff alone, to be known as the 'preliminary plan'. The preliminary plan must be presented and published no earlier than thirty days and no later than forty-five days after the commission has convened or the necessary census data are available, whichever is later."); Mont Const, art 5, § 14(3) ("Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law."); La Const, art 3, § 6(A) ("By the end of the year following the year in which the population of this state is reported to the president of the United States for each decennial federal census, the legislature shall reapportion the representation in each house as equally as practicable on the basis of population shown by the census."). The drafters also could have vested the Commission with discretion to determine when to adopt its plans, similar to the way the Legislature has authority to determine when its regular sessions adjourn. Const 1963, art 4, § 13.

directory only.[10] See *Zemprelli v Thornburg*, 47 Pa Cmwlth 43, 56 (1979) (holding that a constitutional timing provision was mandatory because "[a]n express direction that the function not be performed after expiration of the time limit is characteristic of a mandatory requirement"), citing *Tausig v Lawrence*, 328 Pa 408, 413 (1938) (requiring strict compliance with a three-month limitation because to hold otherwise would result in an improper constitutional amendment).

In sum, as a general rule, constitutional provisions must be deemed mandatory, and this Court does not have the authority to rule otherwise. And, to the extent an exception applies to the general rule where it is clear that the constitutional provision was to be read as directory only, that exception does not apply to Article 4, § 6(7). Ultimately, the People set a date certain for the adoption of proposed redistricting plans—a date that makes sense given the myriad other deadlines within the election law that would be impacted by a failure to meet that date certain. To read Article 4, § 6(7)'s deadline as anything but mandatory would be contrary to the People's intent.

[10] Moreover, the plain text of Michigan's Constitution provides only two ways in which it may be amended: (1) amendment by legislative proposal and vote of the electors, Const 1963, art 12, § 1; or (2) amendment by petition and vote of electors, Const 1963, art 12, § 2. To deem Article 4, § 6 directory only and extend the deadline would be equivalent to amending the constitution in a manner not sanctioned by its text. See *Tausig v Lawrence*, 328 Pa 408, 413 (1938) ("To withhold strict compliance with the three months' limitation and substitute a different method of advertisement which substantially accomplishes the desired result would be to rewrite the constitutional provision.").

B. *Ferency* stands as an outlier and should be limited to its facts.

The authority discussed above provides the lens through which this Court must view its prior decision in *Ferency v Secretary of State*, 409 Mich 569 (1980).

In *Ferency*, this Court addressed, among other things, Article 12, § 2 of the Constitution—which establishes a constitutionally imposed deadline for the filing and certification of proposed constitutional amendments—and the impact of that provision upon an untimely certification of a proposed constitutional amendment. *Id.* at 598. Article 12, § 2, framed in mandatory terms, states that electors "shall" file a proposed amendment to the constitution "at least 120 days before" the general election at which the proposed amendment is to be voted on, and the Board of State Canvassers "shall" certify the proposed amendment "at least 60 days before" the general election. *Id.* at 603 n 1. The proponents of the proposed amendment in *Ferency* "complied with constitutional dictates" and the "Board of State Canvassers also attempted to fulfill its constitutional duties in a timely fashion." *Id.* at 600. However, circumstances beyond the control of both the proponents of the proposed amendment and the Board of State Canvassers— namely, a circuit court order prohibiting the Board of State Canvassers from acting on the proposed amendment[11]—prevented compliance with the 60-day certification deadline. *Id.*

The Court framed the issue presented in *Ferency* as "whether we will protect the [constitutional-amendment] process from court interference with procedural

[11] The Court found that, "but for court interference, all the constitutional and statutory requirements for presenting the amendment to the voters [at the general election] would have been met." *Id.* at 601.

deadline requirements," and ultimately held that, because the failure to meet the 60-day certification deadline was due to court interference, and not through fault of the proponents of the amendment, its expiration did not preclude certification of the proposed amendment. *Id.* at 601–602. To reach this conclusion, *Ferency* began with an equitable analysis, finding that the "unique circumstances" present in that case—i.e., the interference by the circuit court—justified it taking the "extraordinary action" of disregarding the constitutionally imposed 60-day requirement. *Id.* at 599–600.

Once it determined that relief was necessary to prevent "manifest unfairness," the Court turned to the "nature" of the 60-day requirement. *Id.* at 601. The 60-day requirement, if deemed mandatory, would have posed a barrier to awarding the desired equitable relief. To remove this barrier, the Court deemed the 60-day requirement a "constitutional directory limit[ ]" that could be suspended. *Id.* Notably, however, in concluding that the 60-day requirement was directory, *Ferency* did not address *any* of the above-outlined authority related to the mandatory-directory dichotomy and its application to constitutional provisions. Instead, the Court engaged in a rather perfunctory analysis, stating in full:

> In addition, our holding is based on the nature of the constitutional requirement in issue. The 60-day requirement does not relate to the sufficiency or validity of the petitions themselves. We read the time limit as essentially 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. See, e. g., *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 185 NW2d 392 (1971). It should not be used to prevent a proposal from appearing on the ballot when its proponents have done everything the constitution requires of them.

> This is not to say that the 60-day requirement may be circumvented as a matter of course. We do not suspend constitutional directory limits lightly. Only the most extreme circumstances, such as the last-minute active judicial intervention in the instant case, can justify this deviation. [*Id.* at 601–602.]

Thus, *Ferency,* though premised on a relatively cursory analysis and limited citations, appears to hold that constitutional timing provisions may be directory—even when framed in mandatory terms. *Id.* And, despite arguably being limited to its facts, *id.* at 602 (stating its holding was due to "the unique circumstances of th[e] case"), *Ferency* nevertheless stands in stark contrast to the widely accepted general rule that, unless otherwise expressly stated or implied, constitutional provisions are mandatory. It should therefore be expressly limited to its facts.

Moreover, *Ferency* should not be interpreted as holding that all constitutional timing provisions related to elections should be deemed directory. Indeed, *Ferency*'s own language arguably forecloses any such interpretation. See *id.* at 602 ("[U]nder the unique circumstances of this case, the expiration of the 60-day deadline does not preclude the certification of the proposed Tisch Amendment."). Instead, *Ferency*, at most, provides an exception to the general rule that all constitutional provisions must be treated as mandatory but for "extreme circumstances" on par with the "last-minute active judicial intervention" in that case. *Id.* at 602. See also *State ex rel Scott v Kirkpatrick*, 484 SW2d 161, 163 (Mo, 1972) ("Absent . . . impossibilities of precise compliance, [t]his court is quite firmly wedded to the doctrine that constitutional requirements must be considered as mandatory rather than directory."). As detailed in Part III below, such "extreme circumstances" are not present here.

III. Even if this Court can deem a constitutional timing requirement as directory, the facts here do not justify a deviation from Article 4, § 6(19)'s deadline.

Unquestionably, the COVID-19 pandemic has had a significant impact on all facets of life, including in the carrying out of necessary governmental functions. The U.S. Census Bureau's release of census data was and is not immune from this plight. But when viewed in conjunction with the other facts present here, the delay in the release of census data—while unprecedented—does not present the "unique" and "most extreme circumstances" that would warrant such an extraordinary departure from the express constitutional deadline of Article 4, § 6. *Ferency*, 409 Mich at 599, 602.

In *Ferency*, a circuit court had enjoined the Board of State Canvassers' certification of a proposed constitutional amendment for alleged failure to comply with a statutory requirement. 409 Mich at 586–587. On appeal, this Court overturned the legal basis for the circuit court's injunction, meaning the proposed constitutional amendment could be certified. *Id.* at 597. But, by the time the case reached this Court, the 60-day certification deadline for proposed constitutional amendments imposed by Article 12, § 2 of the Constitution had passed. *Id.* at 598. Thus, the plaintiff argued that the case was moot because, despite this Court's reversal of the legal basis for the injunction, the proposed constitutional amendment could no longer be certified. *Id.*

This Court rejected this argument, holding that the case "present[ed] such unique circumstances" that justified the "extraordinary action" of suspending the constitutional deadline. *Id.* at 599–600. In reaching this conclusion, the Court first

noted that the proponent of the proposed amendment complied with its constitutional duties by "collect[ing] the necessary petition signatures" and "fil[ing] its petitions with the Secretary of State at the proper time." *Id.* at 600. The Court further observed the Board of State Canvassers attempted to comply with its constitutional duties as well: It timely met and was prepared to certify the petition within the 60-day deadline, but was prevented from doing so by the circuit court's order.[12] *Id.* Thus, the Court found that, *but for* the circuit court's affirmative interference, the petition would have been both adequate and timely under the Constitution. Compare *id.* (setting aside deadline when the "Board was ready to timely perform its constitutional duties, but was prohibited from doing so by the active intervention of the circuit court"), with *Kuhn v Dep't of Treasury*, 384 Mich 378, 387 (1971) (refusing to set aside deadline where the plaintiff did not attempt to timely obtain signature for referendum). These unique facts, along with the Court's "tradition of jealously guarding against legislative and administrative encroachment on the people's right to propose laws and constitutional amendment through the petition process," set the stage for the Court's "extraordinary departure" from the text of Article 12, § 2. *Id.* at 601, citing *Wolverine Golf Club*, 384 Mich 461.

Next, the Court found its holding was necessary to reach an equitable result for two reasons. First, it found that "[i]t would be manifestly unfair to hold that

[12] Additionally, both the petitioner and Board of State Canvassers "immediately filed an emergency appeal in this Court," and thus, "[t]hey did not sit back and wait for the judicial process to proceed according to its normal pace." *Id.*

because the deadline has passed this Court can afford no relief." *Id.* Second, it determined that, to hold otherwise "would encourage opponents of a proposal to try to keep it off the ballot by waiting until the last minute to file a challenge in the circuit court." *Id.*

Finally, the Court analyzed the constitutional provision at issue, finding that, because the 60-day requirement was merely "designed to facilitate the electoral process" and "[did] not relate to the sufficiency or validity of the petitions themselves," the provision could be deemed directory rather than mandatory. *Id.* at 601–602. And while the Court indicated that it does "not suspend constitutional directory limits lightly," it found that the facts outlined above presented "the most extreme circumstances," such that compliance with the 60-day requirement could be excused. *Id.* at 602.

The facts at issue here are distinguishable from those in *Ferency* for five reasons. *First*, in *Ferency*, both the petitioner and Board of State Canvassers attempted to fully comply with constitutional requirements but were prevented from complying with the 60-day deadline through no fault of their own. Petitioners here have not yet made any such attempt to comply with Article 4, § 6's November 1, 2021 deadline, and, in fact, all but concede in their Petition that nothing prevents the Commission from doing so. That is, Petitioners acknowledge that, while not ideal, the Commission *could* use legacy format data—expected to be provided by the U.S. Census Bureau by "mid-to-late August 2021"—in drawing the redistricting plans. Pet, pp 13–14, ¶¶ 37, 38. And, as explained by Petitioners, the legacy format

data and tabulated PL-94-171 data "is *identical*" and "subject to the same exacting quality assurance processes" as the more "user friendly" tabulated redistricting data set.[13] *Id.* p 14, ¶¶ 39, 40 (emphasis added); Pets' Br, p 14. Thus, it appears that it is still possible to fulfill the Commission's constitutional duties,[14] and no third party has affirmatively prevented them from doing so.[15]

Second, while the facts in *Ferency* implicated "the people's right to propose laws and constitutional amendments through the petition process," no such right is implicated here. To the contrary, the constitutional requirements of Article 4, § 6 *resulted from* the People's right to propose constitutional amendments. Through Proposal 2018-2, the People of Michigan voted to amend the Constitution and

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[13] Petitioners caution that to eliminate any risk of using the legacy format data, they plan to reconcile it with "the tabulated PL 94-171 redistricting data set for release by September 30, 2021." *Id.* at 14, ¶¶ 39, 40. While these efforts may be laudable, they are not required to meet the Commission's constitutional requirements. In fact, as Petitioners note, the Constitution does not even expressly mandate that the Commission utilize census data in making redistricting determinations. *Id.*

[14] In fact, while perhaps unlikely, it is still possible for the Legislature to propose an amendment to the Constitution that would alter the November 1, 2021 deadline and take effect before that deadline. See Const 1963, art 12, § 1.

[15] The possibility of timely compliance with constitutional mandates distinguishes this case from two extra-jurisdictional cases cited by Petitioners. In *State ex rel Kotek v Fagan*, 367 Or 803, 806 (2021), the Oregon Legislature was required to enact a reapportionment plan by July 1, 2021, and, if they are unable, the Oregon Secretary of State must create one by August 15, 2021. Thus, assuming that the federal census data is released at the earliest anticipated date . . . it will come after the constitutional due dates for the plans either enacted or made by the Legislative Assembly or the Secretary." *Id.* Similarly, in *Legislature of the State of Calif v Padilla*, 9 Cal 5th 867, 872 (2020), state law dictates that California's Citizens Redistricting Commission "must release draft maps for public comment" by July 1, and the California Constitution mandates that the commission must then approve and certify the maps to the California Secretary of State by August 15.

require, among other things, that the Commission meet certain constitutional deadlines. Thus, while the Court in *Ferency* was concerned with safeguarding "against legislative and administrative encroachment," here, the Court would be sanctioning such encroachment by chipping away at the People's constitutional amendment and its requirements.

Third, unlike *Ferency*, this case does not present concerns of foul play. That is, the *Ferency* Court was concerned that a decision to deny relief would motivate opponents of future proposals to "wait until the last minute to file a challenge in circuit court" to keep a proposal off the ballot. *Ferency*, 409 Mich at 601. Petitioners neither accuse the U.S. Census Bureau of foul play nor raise concerns of the potential for foul play in the future. And that makes sense. The U.S. Census Bureau has explained that the delays have been caused, not by circumstances under its control, but by unprecedented events, including the COVID-19 pandemic, natural disasters, and civil unrest. *Ohio v Raimondo*, unpublished opinion of the United States District Court for the Southern District of Ohio, issued March 24, 2021 (Case No. 3:21-cv-064), p 2; 2021 WL 1118049. Thus, a decision to deny relief would not forebode future foul play.[16]

Fourth, the constitutional deadline at issue here does, in some part, relate to the sufficiency or validity of the redistricting plans. In *Ferency*, the 60-day requirement was "designed to . . . giv[e] the Secretary of State and county clerks

[16] *Ferency*'s rationale could become applicable *in the future* if the Commission becomes prepared to timely comply with its constitutional duties but is prevented from doing so by an eleventh-hour injunction.

enough time to print and distribute ballots and ready the machinery for election day." 409 Mich at 601. Here, the November 1, 2021 deadline conceivably serves a larger purpose—to allow for sufficient time to raise challenges to the sufficiency and validity of the redistricting plan before it becomes law.

The November 1, 2021 deadline does not conclude the redistricting process. To the contrary, a redistricting plan does not itself become law until 60 days after its adoption. Const 1963, art 4, § 6(17). In the interim, that is, "[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. . . ." Const 1963, art 4, § 6(15). At some point, the Commission must also "issue a report that explains the basis on which [it] made its decisions in achieving compliance with plan requirements. . . ." Const 1963, art 4, § 6(16). And, most significantly, before an adopted redistricting plan becomes law, a challenge may be brought in this Court and, if necessary, this Court "shall remand [the] plan . . . for further action if the plan fails to comply with the requirements of th[e] [Michigan] constitution, the constitution of the United States or superseding federal law." Const 1963, art 4, § 6(19). Thus, the timing requirement in Article 4, § 6(7) ostensibly relates to the sufficiency or validity of the redistricting plans, given that it triggers the ability to challenge a redistricting plan.

Fifth, and similarly, unlike in *Ferency*, the November 1, 2021 deadline is not merely "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." *Ferency*, 409 Mich at 601. Instead, re-writing the November 1, 2021 deadline could impact individuals outside of those who facilitate the electoral process. The 2022 primary election will be held in Michigan on August 2, 2022. Consequently, under Michigan law, candidates for state senate districts, state house of representative districts, and congressional districts must submit nominating petitions with a minimum number of valid signatures by April 19, 2022. MCL 168.544f; MCL 168.551. Notably, "[t]he number of signatures [required]. . . [is] based upon the population of the district involved according to the most recent federal census . . . ." MCL 168.544f. When filing their petition, candidates "must include the correct district number," which is directly impacted by the boundaries drawn in the redistricting plans.[17] And, because district boundaries drawn after the 2010 census may change following the 2021 redistricting process, the Secretary of State's guide to "Filing for Office" warned that "[c]andidates for US Representative in Congress, State Senator or State Representative who file for office before the redistricting process is complete do so at their own risk."[18] This is because district boundaries drawn after the 2010 census may change following the

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[17] Michigan Department of State, *Filing for Office* (March 2021), p 3 < https://www.michigan.gov/documents/sos/Filing_for_Office_Partisan_Offices_2022_719292_7.pdf> ("District boundaries for the August 2, 2022 primary and November 8, 2022 general election are expected to be drawn in late 2021. These boundaries will determine whether candidates are required to file with the Secretary of State or County Clerk and are used to identify the population of registered voters eligible to sign candidates' nominating or qualifying petitions. Candidates intending to file for Congress, Michigan Senate or House of Representatives must include the correct district number on the Affidavit of Identity and petition heading to qualify for the ballot (among other requirements).").

[18] *Id.*

2021 redistricting process.[18] Accordingly, at minimum, a delay in adopting a redistricting plan may shorten the time in which potential candidates for office have to determine what districts in which they reside and collect the requisite number of signatures.[19] This delay will only be compounded if a challenge is brought concerning the redistricting plan's validity.

On this last point, it should be noted that the importance of the November 1, 2021 deadline does not, as Petitioners argue, justify the extreme step of *extending* that deadline. See Pets' Br, pp 16–18. Rather, the constitutionally appropriate view is that the Commission and Secretary should be required to make all reasonable efforts to *meet* that deadline, and thus avoid the chain reaction of election-deadline fallout that would loom over the 2022 primary elections.

In sum, while unprecedented and unfortunate, as it now stands, the delay in transmission of the federal decennial census data does not present the extreme circumstances necessary to deviate from Article 4, § 6's November 1, 2021 deadline. For this reason, this Court should deny the Petition.

[19] *Id.*

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, 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

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LF: Independent Citizens Redistricting Commission DAG2; AG# 2021-0320588-A/Supplement Brief AG Team Opposing Mich Supreme Court Jurisdiction 2021-06-02