

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Supreme Court No. 162891

**BRIEF OF *AMICUS CURIAE* THE NATIONAL REDISTRICTING FOUNDATION
IN SUPPORT OF PETITIONERS**

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INTRODUCTION

Every 10 years, the U.S. Constitution requires Michigan to redraw congressional and state legislative district boundaries to reflect changes in population and comply with the “one person, one vote” principle. Following a post-2010 redistricting cycle in which elected politicians used their control over the redistricting process to entrench their own power and ignore the will of the voters, Michiganders passed a constitutional amendment (the “Redistricting Amendment” or “Amendment”) vesting authority over redistricting in an independent redistricting commission (the “Commission”). In response to the secret, backroom process by which politicians drew maps in the last cycle, the Redistricting Amendment expressly requires the Commission to engage in an open and transparent process that relies on public engagement in order to adopt fair and politically neutral maps.

Relying on the assumption that the federal government would release decennial census data to the states by the federal statutory deadline of April 1, 2021, the Redistricting Amendment gave the Commission and the public seven months to: analyze the census population data, hold several hearings throughout the state, submit and comment on proposed maps, and ultimately adopt final maps. But in the wake of a historically unprecedented pandemic, the Census Bureau was unable to complete its work and release the data by the April 1 deadline. Instead, the complete redistricting file that was due to be sent to Michigan by April 1 will now be sent a full six months later (by September 30), and even an unprocessed, non-tabulated version of the data will not be sent until nearly five months later (by August 16).

As a consequence, the independent redistricting process that was overwhelmingly approved by Michigan’s voters has been threatened. In particular, the public’s constitutional right to participate in the redistricting process cannot be honored if the Commission is required to adopt

a final map by November 1. To safeguard the public rights that Michigan voters enshrined in the state Constitution just three years ago, this Court must declare the November 1 deadline to be directory and direct the Commission to adopt a final plan by a later date.

STATEMENT OF INTEREST

The National Redistricting Foundation (“NRF”) is a nationwide, non-profit organization founded in 2017, whose mission is to prevent and reverse invidious gerrymandering, by promoting the public’s awareness of reapportionment and redistricting processes and engaging in legal action as appropriate to ensure that states’ redistricting and electoral processes result in fair representation. NRF has supported a variety of litigation related to redistricting, election administration, and the census, including as amicus curiae. Central to NRF’s mission is supporting fair redistricting procedures like the commission that Michigan voters created by constitutional amendment in 2018.

BACKGROUND

I. Michigan Is Required by the United States Constitution to Redraw Congressional and State Legislative Districts Upon the Release of Decennial Census Population Data.

Michigan is required by federal law to redraw its congressional and legislative districts before the 2022 elections. The Equal Protection Clause of the U.S. Constitution mandates that congressional and legislative districts within a state contain equal population—commonly referred to as the “one person, one vote” principle. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”). Consequently, the release of decennial census population data showing changes in the geographic distribution of a state’s population triggers a state’s constitutional duty to redraw congressional and legislative districts in order to ensure compliance with the equal population requirement. *See, e.g., Georgia v. Ashcroft*,

539 U.S. 461, 488 n. 2 (2003) (grounding the requirement to redistrict in the occurrence of the decennial census). Indeed, all states—including Michigan—have historically redrawn both congressional and state legislative districts based on the decennial census population data released every 10 years by the U.S. Secretary of Commerce.

The requirement to redistrict is especially significant this year for Michigan, which must draw new congressional districts reflecting the loss of a seat in the U.S. House of Representatives.¹ It would be impossible, in addition to unconstitutional, for Michigan to conduct an election with more congressional districts than congressional seats. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 727 (1983) (“After the results of the 1980 decennial census had been tabulated . . . the number of Representatives to which [New Jersey] was entitled had decreased from 15 to 14. Accordingly, the New Jersey Legislature was *required to reapportion the State’s congressional districts.*”) (emphasis added).

II. Michigan Voters Reformed the State’s Redistricting Procedure to Improve Fairness and Transparency, and Ensure Public Input.

A. The 2010 redistricting cycle featured extreme partisan gerrymandering in many states, including Michigan.

Until recently, elected politicians in Michigan—as in many states—had complete control over the redistricting process. This led to widespread political gerrymandering, by which

¹ *See* Todd Spangler, “Michigan to lose another seat in Congress as population moves West and South,” DETROIT FREE PRESS (Apr. 26, 2021), <https://www.freep.com/story/news/politics/elections/2021/04/26/michigan-congressional-seats/7388701002/>.

politicians carefully draw district lines in order to entrench their power and maximize political and partisan advantages.² The effects of such gerrymandering on the integrity of the democratic process are severe. A system that allows politicians to choose their voters—rather than the other way around—insulates elected officials from democratic accountability, resulting in representation that does not reflect the views of the electorate and leading politicians to adopt more ideologically extreme positions.³

Political gerrymandering has become especially extreme in recent redistricting cycles. Following the 2010 decennial census, redistricting for more than half of all congressional districts

² See Laura Royden & Michael Li, Brennan Center for Justice, *Extreme Maps* 8 (2017), <https://www.brennancenter.org/our-work/research-reports/extreme-maps> (finding that “[t]he seven states with high levels of partisan bias are all states where one political party had sole control of the redistricting process”); see also Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 833–34 (2015) (showing dramatic increase in efficiency gaps for congressional and state house plans after 2010); Nicholas Stephanopoulos, *The Causes and Consequences of Gerrymandering*, Wm. & Mary L. Rev. 2115, 2144 (2018) (finding that “unified control of the redistricting process considerably benefits the party in charge”).

³ *The Causes and Consequences of Gerrymandering*, *supra* note 2, at 2146; see also *id.* at 2144 (noting that “large efficiency gaps substantially shift state houses’ ideological midpoints as well as states’ enacted policies”); The Campaign Legal Center, *Make Democracy Count: Ending Partisan Gerrymandering* 7, <https://campaignlegal.org/document/make-democracy-count-ending-partisan-gerrymandering> (noting that “gerrymandering exacts a terrible democratic toll,” including “[e]nabling the legislative enactment of laws that the people oppose and that would never have been passed under a neutral map” and “[d]istorting the lawmaking process by awarding the gerrymandering party more seats, and more influence over policy, than it otherwise would have had”).

was carried out by entirely Republican- or Democratic-controlled legislatures.⁴ The resulting congressional maps reflected this partisanship. By one calculation, the adoption of politically gerrymandered maps (instead of maps that would have resulted from a politically neutral process) changed the electoral outcome of 59 seats per election, on average, in the U.S. House of Representatives during the 2012, 2014, and 2016 elections.⁵ This kind of egregious political gerrymandering is not a one-party problem: both Republican- and Democratic-controlled state legislatures have perpetuated partisan gerrymandering to unfairly secure and retain power.⁶

Michigan’s post-2010 redistricting process was a paradigmatic example of how politicians and political operatives can draw maps in closed backrooms—without any public input—to entrench their power and undermine democratic accountability. Hearing a challenge to Michigan’s post-2010 congressional and state legislative maps, a unanimous three-judge federal court concluded in 2019 that the maps “deliberately dilute[d] the power” of large swaths of voters “by placing them in districts that were intentionally drawn to ensure a particular partisan outcome in

⁴ Sundeep Iyer & Keesha Gaskins, Brennan Center for Justice, *Redistricting and Congressional Control: A First Look* 4 (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Redistricting_Congressional_Control.pdf.

⁵ Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, Center for American Progress (Oct. 1, 2019, 9:01 AM), <https://www.americanprogress.org/issues/democracy/news/2019/10/01/475166/impact-partisan-gerrymandering/>.

⁶ Alex Tausanovitch, *Voter-Determined Districts*, Center for American Progress (May 9, 2019, 9:00 AM), <https://www.americanprogress.org/issues/democracy/reports/2019/05/09/468916/voter-determined-districts/>.

each district.” *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 880 (E.D. Mich. 2019), *vacated sub nom. Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429 (2019). The court found that the state’s Republican-controlled legislature had engaged various Republican political operatives to draw maps that favored Republicans and disadvantaged Democrats. *Id.* at 883.⁷

In reaching its conclusion, the court emphasized the map-drawers’ concerted efforts to avoid public scrutiny. The political operatives retained by the legislature drew their maps “in a secure location to which nobody else had access.” *Id.* at 886. The map-drawers and Michigan’s Republican leadership continued to collaborate on the maps throughout the spring and summer of 2011, without any participation by Democratic legislators or public interest groups. *Id.* at 886–91. And when the redistricting legislation was formally introduced, “the Republican-controlled legislature concealed the contents of the redistricting plan and expedited its progression through the legislative process to prevent it from being subject to meaningful public scrutiny.” *Id.* at 891. During the one public hearing held in summer 2011, “many attendees at the hearing voic[ed] their complaints about the lack of transparency and public involvement,” yet nonetheless “the bill made it out of committee after a vote along party lines, with Democrats voting against the bill and

⁷ Based on these factual findings, the court struck down the challenged maps as a partisan gerrymander. *League of Women Voters of Mich.*, 373 F. Supp. 3d at 960. The ruling was ultimately reversed when the U.S. Supreme Court held that federal courts lack the power to block partisan gerrymanders, but the factual findings were undisturbed.

Republicans voting for it” and was later signed into law by the governor on August 9, 2011. *Id.* at 892.

The results of Michigan’s politician-led redistricting in the 2010 cycle was a map with “extreme levels” of partisan bias across three different quantitative measures.⁸ In 2017, the Brennan Center for Justice ranked Michigan in the top three states for its level of partisan bias in its congressional redistricting map.⁹ Although Michigan voters cast more than 50 percent of their ballots for Democratic Party legislative candidates between 2012 and 2016, Democrats received only 44 percent of seats in the Michigan House of Representatives, 31 percent of seats in the Michigan Senate, and 35 percent of the seats in Michigan’s delegation to the U.S. House of Representatives.¹⁰ The partisan bias in Michigan’s legislative maps continued in the 2018 midterm elections: “Democrats earned approximately 55.8% of the vote in congressional elections but gained only 50% of the congressional seats; 52.6% of the vote in the House but only 47% of the House seats, and over 50% of the vote in the Senate but only 42% of the Senate seats.” *League of Women Voters of Mich.*, 373 F. Supp. at 892–93.

⁸ See Royden & Li, *supra* note 2, at 1–2; see also The Redistricting Majority Project, 2012 REDMAP Summary Report (Jan. 4, 2013), <http://www.redistrictingmajorityproject.com/?s=2013+report&task=search> (noting that the “effectiveness of REDMAP[, a partisan redistricting effort,] is perhaps most clear in the state of Michigan The 2012 election was a huge success for Democrats at the statewide level in Michigan: voters elected a Democratic U.S. Senator by more than 20 points and reelected President Obama by almost 10 points. But Republicans at the state level maintained majorities in both chambers of the legislature and voters elected a 9-5 Republican majority to represent them in Congress.”).

⁹ See Royden & Li, *supra* note 2, at 2–13.

¹⁰ Tausanovitch, *supra* note 6.

B. Michigan voters responded to partisan gerrymandering by passing the Redistricting Amendment.

The egregious gerrymandering that marked the post-2010 redistricting cycle led to a series of successful challenges in federal and state court to partisan gerrymandering by both major political parties. State courts in Florida, Pennsylvania, and North Carolina held that maps drawn by those states' legislatures violated state constitutional provisions banning partisan gerrymandering. *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 413–17 (Fla. 2015); *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 818–25 (Pa. 2018); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *108 (N.C. Super. Sept. 3, 2019). After several federal district courts likewise held that partisan gerrymanders in various states violated the federal Constitution—including in Michigan, as described above—the United States Supreme Court ruled that, while partisan gerrymandering is “incompatible with democratic principles,” claims based on such gerrymandering “present political questions beyond the reach of the federal courts.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (quotation marks omitted). However, in doing so, the Court recognized the severity of the problem and affirmatively suggested that states and voters could address gerrymandering through reforms like independent commissions—just as Michigan's voters had done. *See id.* at 2507 (noting as an example Michigan's approval, in November 2018, of a constitutional amendment creating an independent redistricting commission).

In response to the state legislature's flagrant post-2010 gerrymandering, Michigan voters took to the polls to reform the state's redistricting procedure and ensure that maps are drawn in a fair and neutral manner with meaningful opportunities for public input. In 2018, Michiganders enacted a constitutional amendment through a citizen-led ballot initiative designed to transfer control of the redistricting process from politicians to the public, with an independent bipartisan

commission adopting a map based on public proposals and comments.¹¹ The Redistricting Amendment includes the following key provisions:

Independent Commission. Under Michigan’s new redistricting scheme, a non-politician commission conducts redistricting for the Michigan Senate, Michigan House of Representatives, and U.S. Congress. The Commission is comprised of 13 members—four Democrats, four Republicans, and five unaffiliated voters or members of minor parties. MICH. CONST. art. IV, § 6(1). In order for a map to be enacted, seven members of the commission must vote to approve it. *Id.* art. IV, § 6(14)(c). If a map enacted by the Commission is later found unconstitutional by a court, it must be remanded to the Commission, for, “[i]n no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.” *Id.* art. IV, § 6(19).

Transparency and Public Involvement. The Michigan Constitution requires extensive public input as part of the redistricting process, as the result of public reaction against the closed-door redistricting process that took place during the 2010 cycle. All meetings held by the Commission must be open to the public, and the Commission must use technology to provide public observation and participation for people who cannot be present in person. *Id.* art. IV, § 6(10). The Commission must hold at least ten public hearings throughout the state *before* commissioners draft any plan, for the purposes “of informing the public about the redistricting process and the purpose and responsibilities of the commission and soliciting information from

¹¹ Paul Egan, “Michigan’s anti-gerrymandering proposal is approved. Now What?,” DETROIT FREE PRESS (Nov. 7, 2018), <https://www.freep.com/story/news/politics/elections/2018/11/07/proposal-2-anti-gerrymandering-michigan/1847402002/>.

the public about potential plans.” *Id.* art. IV, § 6(8). After proposing redistricting plans, but before voting to adopt a plan, the Commission “shall provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans. Each plan that will be voted on shall include such census data as is necessary to accurately describe the plan and verify the population of each district” *Id.* art. IV, § 6(14)(b). The Commission must also hold an additional five public hearings to receive public comments on its proposed maps. *Id.* art. IV, § 6(9).

Use of Census Population Data. The Amendment implicitly requires the use of federal decennial census data in drawing districts. *Id.* art. IV, § 6(9) (“After developing at least one proposed redistricting plan for each type of district, the commission shall publish the proposed redistricting plans and any data and supporting materials used to develop the plans . . . Each of the proposed plans *shall include such census data* as is necessary to accurately describe the plan”) (emphasis added); *see also id.* art. IV, § 6(18) (“The terms of the commissioners shall expire once the commission has completed its obligations for a census cycle but not before any judicial review of the redistricting plan is complete.”).

An Extended Time Period for Redistricting. The Michigan Constitution directs the Commission to adopt redistricting plans by November 1 in the year immediately following the census and to propose a plan 45 days before that, on September 17. Although the Amendment does not explicitly reference the date on which receipt of census population data is expected, federal law has long required the Census Bureau to release state-level population data for redistricting purposes to the states by April 1 in the year following a decennial census. Thus, the Amendment contemplates that both the Commission and the public will have seven months to complete the process of analyzing population data, proposing and commenting on maps, and adopting final maps for congressional and state legislative districts.

III. Across the Country, States Have Adjusted Redistricting Timelines in Response to 2020 Census Delays.

Delivery of the 2020 census data has been delayed as a result of an extraordinary combination of unforeseen events, including the onset of the COVID-19 pandemic, hurricanes, wildfires, civil unrest, and data processing anomalies.¹² These delays have caused substantial disruption and uncertainty with regard to the prescribed schedules for redistricting and elections in many states. Given that all states are constitutionally required to redistrict following the decennial census, these states have been forced to come up with solutions despite the schedule conflicts created by the delay in census data.

Where possible, some states are considering legislative changes to the redistricting process in order to provide sufficient time to undertake redistricting before elections in 2022. For example, the Alabama Legislature is considering moving the 2022 primary and runoff election dates.¹³ In Virginia, lawmakers are considering holding an extra election in 2022 because the state will be unable to redistrict in time for its 2021 legislative elections.¹⁴ In Vermont, the legislature extended

¹² See Press Release, United States Census Bureau, Census Bureau Statement on Redistricting Data Timeline (Feb. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>; 2020 Census Operational Adjustments Due to COVID-19, United States Census 2020, <https://2020census.gov/en/news-events/operational-adjustments-covid-19.html>.

¹³ Mary Sell, “Census Data Delay Puts Redistricting on Hold, Could Impact Candidates,” ALABAMA DAILY NEWS (Feb. 16, 2021), <https://birminghamwatch.org/census-data-delay-puts-redistricting-on-hold-could-impact-candidates/> (discussing legislation to “to move the 2022 primary and runoff dates further into the year”).

¹⁴ Gregory S. Schneider, “Census data delay could freeze Virginia House districts, raises prospect of elections for three straight years,” WASHINGTON POST (Feb. 16, 2021),

the deadline for the Legislative Apportionment Board to submit their proposed maps.¹⁵ And in Arkansas, the General Assembly recently approved a joint resolution that allows it to enter an “extended recess[] while lawmakers wait for delivery of population data from last year’s . . . [c]ensus” and empowers legislative leaders to convene the General Assembly “at any time to . . . complete redistricting.”¹⁶

In other states, legislative responses to the census delay are impossible because redistricting deadlines are constitutional. For that reason, four states—Michigan, California, Maine, and Oregon—have sought the only available remedy: judicial action to adjust redistricting deadlines. In California and Oregon, state supreme courts have already granted such relief. *See Legislature v. Padilla*, 469 P.3d 405 (Cal. 2020) (granting four month extension of statutory and constitutional redistricting deadlines); *Kotek v. Fagan*, 484 P.3d 1058 (Or. 2021) (establishing new deadlines for constitutionally mandated redistricting). In Maine, judicial action is still pending.¹⁷ Moreover, in Iowa, the state Supreme Court recently released a statement of its own volition announcing plans to “implement[] a process which permits . . . the redistricting framework presently set forth in

https://www.washingtonpost.com/local/virginia-politics/census-delays-virginia-elections/2021/02/16/0f4488ac-706f-11eb-b8a9-b9467510f0fe_story.html.

¹⁵ H. 338, 2021 Leg. (Vt. 2021).

¹⁶ Michael R. Wickline, “*Senate OKs resolution to extend legislative session*,” ARKANSAS DEMOCRAT-GAZETTE (Mar. 24, 2021), <https://www.arkansasonline.com/news/2021/mar/24/senate-oks-resolution-to-extend-legislative/>.

¹⁷ *See* Colin Woodard, “*Maine redistricting thrown into confusion by census delay, constitutional Catch-22*,” PORTLAND PRESS-HERALD (Apr. 18, 2021), <https://www.pressherald.com/2021/04/18/maine-redistricting-thrown-into-confusion-by-census-delay-constitutional-catch-22/>.

[Iowa law] to proceed after [the state constitutional deadline].”¹⁸ NRF is not aware of any state in which a court has rejected requests to adjust redistricting deadlines to account for the census delay.

ARGUMENT

Michigan voters have acted to take control of the redistricting process away from politicians and political operatives and put it in the hands of the people. In doing so, they have enshrined a constitutional right for the public to participate in the redistricting process—requiring the Commission to solicit and consider proposed maps from members of the public before selecting its own final proposals, and then requiring 45 days of public comment before the Commission adopts final maps. Unlike the November 1 deadline, these provisions have substantive significance, and compliance with them is necessary to fulfill the will of Michigan voters and the provisions of the state constitution. The November 1 deadline, by contrast, carries no substantive weight or consequence, and under this Court’s precedents, constitutes a directory deadline that must yield to other constitutional imperatives.

I. The Michigan Constitution Entitles the Public to an Extended Period of Participation in the Redistricting Process That Cannot Be Completed by November 1—Even if Non-Tabulated Data is Received in August.

The purpose of the Redistricting Amendment was to reform the redistricting process so that it would be shaped by the public rather than elected politicians. To that end, the Amendment does not simply vest final authority to approve maps in the hands of the Commission, but includes

¹⁸ See Press Release, Iowa Judicial Branch, Iowa Supreme Court Statement on Redistricting (Apr. 8, 2021), <https://www.iowacourts.gov/newsroom/news-releases/iowa-supreme-court-statement-on-redistricting/>; Stephen Gruber-Miller, “*Iowa Supreme Court will seek to maintain nonpartisan redistricting process if state misses deadline*,” DES MOINES REGISTER (Apr. 8, 2021), <https://www.desmoinesregister.com/story/news/politics/2021/04/08/iowa-supreme-court-redistricting-census-data-delay-legislature-state-constitution-deadline/7144799002/>.

several provisions expressly requiring the Commission to solicit and rely on public input. Petitioners rightly focus on the mandatory 45-day period for public comment on the specific redistricting plan or plans proposed by the Commission—a period that requires the Commission to hold at least five public hearings throughout the state for purposes of soliciting public comment. But even *before* the Commission formally proposes a specific redistricting plan or plans, the Commission is required to receive and consider “written submissions of proposed redistricting plans and any supporting materials, including underlying data, from any member of the public.” MICH. CONST. art. IV, § 6(8). And prior to proposing a specific plan, the Commission must hold no less than ten public hearings throughout the state. *Id.*

These provisions were critical to the constitutional amendment. They were enacted in response to a post-2010 redistricting process in which the state legislature “concealed the contents of the redistricting plan and expedited its progression through the legislative process to prevent it from being subject to meaningful public scrutiny.” *League of Women Voters of Mich.*, 373 F. Supp. 3d at 891. During the debate over the Amendment, proponents expressly argued that “[o]ne of the biggest faults of the current redistricting process is the lack of transparency or public participation”¹⁹ and that the Amendment “would take the drawing of political maps out of the

¹⁹ Voters Not Politicians Michigan, *Michigan Independent Citizens Redistricting Commission: Ensuring Maximum Transparency, Meaningful Public Participation, and Independent Decisionmaking*, https://votersnotpoliticians.nationbuilder.com/icrc_independence_participation_transparency (last visited June 10, 2021).

political back rooms and into the light of day.”²⁰ Indeed, at the time voters were considering the proposal, it was generally understood that there would be multiple opportunities for public input.²¹ And far from being intended to circumscribe this period of public engagement, the November 1 deadline underscores just how long it was supposed to be. Because federal law requires the Census Bureau to deliver redistricting data to the states by April 1, the drafters of the Amendment would have selected the November 1 deadline on the assumption that this would provide the Commission and the public with *seven months* to analyze the data, hold hearings, submit maps, consider and debate those maps, develop final proposed maps, solicit public comment on those proposed maps, and ultimately vote on a final map. Likewise, the drafters would have expected a five and one-half month window between the publication of redistricting data and the September 17 deadline for the Commission’s release of a proposed map.

As Petitioners note, the anticipated receipt of census data on September 30 makes it inherently impossible for the Commission to first develop plans based on that data and then make those plans available for 45 days of public comment by November 1, because 45 days before November 1 is September 17. (Pet’rs’ Br. 13–16.) But even if, as the Michigan Senate argues, the Commission could begin its work upon the receipt of Census data in legacy format in mid-August (*see* Senate Amicus Br. 8–9), a strict November 1 deadline would still make it impossible to effectuate the requirements and purposes of the Redistricting Amendment, as the Commission

²⁰ Paul Egan, “*Proposal 2 in Michigan: Pros and cons, what gerrymandering is,*” DETROIT FREE PRESS (Sept. 21, 2018), <https://www.freep.com/story/news/local/michigan/2018/09/21/michigan-gerrymandering-proposal/1266999002/>.

²¹ See Riley Beggin, “*Here’s How Michigan’s Redistricting Commission Would Work,*” BRIDGE MICHIGAN (Aug. 30, 2018), <https://www.bridgemi.com/michigan-government/heres-how-michigans-redistricting-commission-would-work>.

would be unable to carry out its constitutional duty to solicit proposals and comments from the public *before* presenting a set of proposed maps. *See* MICH. CONST. art. IV, § 6(8).

A closer examination of the Constitution’s language and deadlines helps elucidate why it would be impossible to comply with the Constitution’s public engagement requirements under existing deadlines. The Constitution provides that before the Commission drafts any plan, it must hold hearings at which members of the public submit proposed plans, “*including underlying data*” supporting those plans. *Id.* However, the public will not have access to the necessary “underlying data”—PL 94-171 data from the Census Bureau—until the end of August at the earliest, since the Bureau expects to release legacy format data in mid-to-late August and it will take seven to ten days to tabulate that data.²² Thus, instead of five and one-half months, there would be only about three weeks between the time that a member of the public or civic group can *begin* working on a proposed map and the September 17 deadline for the Commission to release its initial maps for review. Even in the unlikely event that all interested members of the public and civic groups could study the census data and draw their own proposed maps within two weeks, that would give the Commission only a week to review every single proposal, discuss the proposals internally, agree on how to incorporate the proposals, and draw and release a proposed map by September 17. (*See* Brace Aff. 5 (explaining some steps of Commission’s process).) Thus, the practical effect of leaving the current deadlines in place would be to violate the constitutional requirement that the Commission “shall receive and consider” public proposals.

²² As noted above, the Constitution implicitly requires that the Commission use census data to draw its maps, and that is what the Commission plans to do. (*See* Pet’rs’ Br. 10). Therefore, while members of the public have already begun making general comments about map-drawing principles to the Commission, the public will be unable to present accurate proposed maps until the Census Bureau releases the necessary data.

II. The Court Should Deem the November 1 Deadline as Directory to Safeguard the Public’s Constitutional Rights.

This Court has the authority to declare constitutional deadlines as directory rather than mandatory, and has done so before where the deadline was administrative in nature and did not affect substantive constitutional rights. *See Ferency v. Secretary of State*, 409 Mich. 569, 602 (1980). The Court is clearly within its authority and justified to do so again here, where no injury or prejudice would result from non-compliance with the deadline at issue, and adherence to the deadline would deprive the public of its constitutionally mandated role in Michigan’s redistricting process. Indeed, adherence to the November 1 deadline would require the Commission to violate the 45-day public comment requirement—a requirement that is unquestionably mandatory.

In *Ferency*, this Court was called on to interpret a constitutional deadline for the certification of signatures on petitions for a ballot proposal, which circumstances outside the parties’ control made it impossible for the state to meet. *Id.* Rather than prevent the proposal from appearing on the ballot as a result of noncompliance with the deadline, the Court determined that the deadline was directory, as opposed to mandatory, and that it could be suspended as a result of the “unique circumstances” presented in that case. *Id.* at 600. In assessing whether the deadline was directory or mandatory, the *Ferency* Court noted that it did “not relate to the sufficiency or validity of the petitions themselves,” and instead should be read “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.” *Id.* at 601.

Although *Ferency* is the only instance in which this Court has declared a constitutional deadline to be directory, the Court’s rationale in that case is entirely consistent with other Michigan cases holding that statutory deadlines intended to protect rights are mandatory while those intended to facilitate processes are generally directory. As this Court has explained: “The general rule is

that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory. However, if the time period is provided *to safeguard someone's rights*, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.” *In re Bail Bond Forfeiture*, 496 Mich. 320, 329–30 (2014) (citing 3 Sutherland, *Statutory Construction* (5th ed.) § 57:19, at 47–48). *See also In re Embree*, No. 263795, 2006 WL 141855, at *2 (Mich. Ct. App. Jan. 19, 2006); *People v. Smith*, 200 Mich. App. 237, 242 (1993). This Court has also stated in the elections context that, “[w]hether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition.” *Attorney General ex rel Miller v. Miller*, 266 Mich 127, 133 (1934). *Ferency* and these related cases make clear that the November 1 redistricting deadline should be deemed directory rather than mandatory.

First, the November 1 deadline does not safeguard anyone’s rights or carry any substantive weight. It is a matter of form, not substance, and is essentially administrative in its purpose and effect, designed to facilitate the redistricting process under normal circumstances in which that deadline would be possible to meet. *See Ferency*, 409 Mich. at 601. If anything, the November 1 deadline simply articulates the expectation that the redistricting process will take up to seven months following the receipt of state-level census data. Temporarily suspending this deadline for this redistricting cycle would in no way disenfranchise or otherwise harm the public, since it would

not affect the substance of the maps or the conduct of any upcoming elections.²³ Likewise, suspending the November 1 deadline would not abridge the rights of any other entity involved in the redistricting process, because the Commission is the *only* entity with the power to draw maps under the Michigan Constitution—a deliberate choice to ensure that maps are drawn by a neutral, independent entity. MICH. CONST. art. IV, § 6(19).

Second, the Constitution clearly contemplates situations in which the Commission must “perform its official duty after the time requirement has passed,” meaning that the timeline provision can only be directory. *See In re Bail Bond Forfeiture*, 496 Mich. at 330. In the event that a Commission-drawn map is later struck down by a court for violating federal law or other provisions of the Amendment, the only permissible outcome under the Constitution is for the Commission to draw another map, which would necessarily occur after November 1. *See id.* It follows that the November 1 deadline is not sacrosanct and must yield to other constitutional imperatives.

Third, this case involves the same type of “unique circumstances” that were present in *Ferency*—where strict adherence to a constitutional deadline would actually undermine the purpose of the constitutional provision and unfairly deprive innocent parties of their constitutional rights based on circumstances outside of their control. The very purpose of the Redistricting Amendment was to ensure that the redistricting process would be open and accountable to the public. *See supra* Section II.B. A directory construction is necessary to preserve the constitutional right to participate in the redistricting process—a right that voters themselves created in 2018 and

²³ Notably, the candidate filing deadline in Michigan is not until April 19, 2022, meaning that the Commission’s proposed timeline will not create further complications.

have not yet had the chance to exercise. By contrast, a mandatory construction would force the Commission to curtail the public comment period and deprive the public of its constitutional right to participate in the redistricting process.

In this case, “a mandatory construction [of the timeline provision] might do great injury to persons not at fault.” *In re Bail Bond Forfeiture*, 496 Mich. at 333 (citation omitted); *see Ferency*, 409 Mich. at 600–01 (holding that the constitutional deadline should not prevent the ballot proposal from appearing on the ballot because, unlike a situation in which the parties’ own actions caused the delay, the initiative’s “proponents have done everything the constitution requires of them,” “complied with constitutional dictates” where possible, and “attempted to fulfill [their] constitutional duties in a timely fashion”). The civic groups and other members of the public who would be deprived of the opportunity to participate in the redistricting process are blameless for the census delays that have created this situation. So too is the Commission itself. As in *Ferency*, it would be grossly unfair to deprive the public of their constitutional rights based on strict adherence to a deadline that cannot be met due to circumstances entirely outside of their control.

Fourth, the 45-day public comment period is itself a mandatory constitutional time requirement. Unlike the November 1 deadline, the 45-day public comment requirement is intended to safeguard the public’s right to participate in the redistricting process—a right that is essential to the transparent, nonpartisan redistricting process that Michigan’s voters have chosen. Interpreting the November 1 deadline to be mandatory would put the Commission in an impossible position, forcing it to choose between two mandatory constitutional time requirements which are mutually irreconcilable.

In light of the unprecedented census delay, the only factually and legally viable resolution is to declare the November 1 deadline to be directory and allow the Commission to adopt a final map by a later date.

CONCLUSION AND REQUESTED RELIEF

For the reasons stated above, this Court should grant the Petition for Directory Relief.

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Respectfully submitted,

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