

**SURVEY OF THE MICHIGAN INDEPENDENT CITIZENS  
REDISTRICTING COMMISSION’S INAUGURAL  
REDISTRICTING CYCLE**

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I. INTRODUCTION

This *Survey* period coincided with the decennial redistricting process in which each state redrew its congressional and state legislative districts.<sup>1</sup> In any state, the redistricting process can be as fascinating as it is contentious, with a select few individuals drawing new maps that will determine control of their state’s legislature and possibly even control of Congress.<sup>2</sup> And in Michigan, the most recent redistricting cycle was particularly interesting because it was the state’s first with an independent, politician-free commission responsible for drawing the new districts: the Independent Citizens Redistricting Commission.<sup>3</sup> Michiganders approved this change in 2018 when they adopted a voter-initiated amendment to the Michigan Constitution that created the Commission and, among other reforms, prioritized public participation in the map-drawing process and established redistricting criteria like not providing any political party with

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1. This *Survey* period ran from June 1, 2021, to May 30, 2022.

2. See, e.g., *Who Draws the Lines - Congressional Redistricting*, BLOOMBERG GOV’T (Nov. 9, 2022), <https://about.bgov.com/brief/who-draws-congressional-districts/> [<https://perma.cc/889B-KZPC>].

3. See MICH. CONST. art. IV, § 6.

a disproportionate advantage.<sup>4</sup> In making this change, Michigan took politicians out of the line-drawing process and replaced them with everyday citizens, joining a small but growing number of states whose citizens have responded to decades, and in some cases centuries, of partisan gerrymandering by establishing independent citizen redistricting commissions.<sup>5</sup>

Not only was this the first redistricting cycle under the Commission, but it was also the state's first since the U.S. Supreme Court's 2019 decision in *Rucho v. Common Cause*, which held that partisan gerrymandering claims present nonjusticiable political questions beyond the reach of federal courts.<sup>6</sup> Leading up to *Rucho*, federal courts had increasingly invalidated redistricting plans that gave what they deemed to be unfair—and unconstitutional—advantages to one political party over another. Indeed, just a few months before *Rucho*, a federal court invalidated Michigan's 2011 redistricting plan, which was largely drawn in secrecy and heavily favored the Republican Party, declaring it a "political gerrymander of historical proportions."<sup>7</sup> However, after *Rucho*, the decision was vacated, the redistricting plan was left in place, and federal courts were closed off to future litigants seeking to challenge partisan gerrymanders.<sup>8</sup> As a result, state courts, like the Michigan Supreme Court, were expected to be even bigger battlegrounds for redistricting litigation than before.

Given the historic context for this most recent redistricting cycle, this contribution to the *Survey* concentrates on the court decisions that concerned the Commission's redistricting process and plans.<sup>9</sup> In total, there were seven cases involving the Commission during the *Survey* period: five in the Michigan Supreme Court and two in federal court.

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4. See MICH. CONST. art. IV, § 6(13).

5. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019) (highlighting policies implemented by states, including Michigan, to restrict partisan gerrymandering).

6. *Id.*

7. *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867, 958 (E.D. Mich. 2019), *vacated*, *Chatfield v. League of Women Voters of Michigan*, 140 S. Ct. 429 (2019).

8. *Id.*

9. For additional significant election law decisions from this *Survey* period, see *League of Women Voters of Michigan v. Sec'y of State*, 508 Mich. 520, 975 N.W.2d 840 (2022) (rejecting efforts from the Michigan Legislature to restrict Michiganders' rights to propose laws and constitutional amendments by initiative petition); Christopher M. Trebilcock, Vincent C. Sallan, *Michigan Election Law Survey*, 67 WAYNE L. REV. 509, 540–53 (2022) (summarizing the full history of *League of Women Voters* in the prior edition of the *Survey*); *Bailey v. Antrim County*, No. 357838, 2022 WL 1193720 (Mich. Ct. App. Apr. 21, 2022) (denying a claim that another voter-approved constitutional amendment from 2018 created a right for private citizens to audit election results), *motion for leave to appeal denied by*, 982 N.W.2d 175 (2022).

These cases involved a range of issues related to the Commission's work, including the impact of delays in the transmission of census data on deadlines set forth in the Michigan Constitution, the scope of the Commission's attorney-client privilege, and several challenges to the redistricting plans the Commission ultimately adopted.

While the significance of the legal issues raised makes each case noteworthy in its own right, the cases, when read together, also serve to tell much of the story of the Commission's inaugural redistricting cycle. And as will become apparent, the judges and justices involved all seemed acutely aware of the gravity of the issues raised, and each expressed a strong desire to respect the will of the state's voters and let the redistricting process move forward in accordance with the terms of the voter-initiated constitutional amendment.

## II. BACKGROUND: THE COMMISSION'S CREATION, STRUCTURE, AND PROCEDURE

The effort that led to the Commission's creation started with a 27-year-old's Facebook post two days after the 2016 general election. It read, "I'd like to take on gerrymandering in Michigan" and asked, "[i]f you're interested in doing this as well please let me know."<sup>10</sup> The response was immediate, and volunteers quickly started to organize online through a Facebook group and Google Sheets.<sup>11</sup> They reportedly discussed their options with political scientists and researched other states' processes before deciding to pursue an initiative campaign to amend the Michigan Constitution.<sup>12</sup> They then held over thirty town hall meetings all over the state to get input from voters on whether and how they would like to see Michigan's redistricting process change.<sup>13</sup> They also formed a political action committee named Voters Not Politicians to support the effort.<sup>14</sup> And then through an entirely volunteer effort, they collected over 425,000 petition signatures in 180 days—well more than the approximately

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10. Riley Beggin, *One Woman's Facebook Post Leads to Michigan Vote Against Gerrymandering*, BRIDGE MICH. (Nov. 7, 2018), <https://www.bridgemi.com/michigan-government/one-womans-facebook-post-leads-michigan-vote-against-gerrymandering> [<https://perma.cc/FK99-94L8>]; Jane C. Timm, *Gerrymandering Has Voters Incensed. How Fed-Up Constituents are Fighting Back.*, NBC NEWS (Aug. 4, 2018, 8:00 AM), <https://www.nbcnews.com/politics/donald-trump/gerrymandering-has-voters-incensed-how-fed-constituents-are-fighting-back-n896536> [<https://perma.cc/5K5P-3T9C>].

11. Beggin, *supra* note 10.

12. *Id.*

13. *Id.*

14. *Id.*

315,000 signatures they needed to qualify the measure for placement on the ballot.<sup>15</sup>

The proposal, which was ultimately adopted as Article IV, Section 6 of the Michigan Constitution, called for the creation of an “independent” redistricting commission made up of citizens instead of elected officials and that had additional features meant to insulate the commissioners from the political process.<sup>16</sup> There would be a total of thirteen commissioners randomly selected through an application process.<sup>17</sup> Commissioners had to be Michigan voters, with four members from each of the two major political parties and five voters who do not affiliate with either major party.<sup>18</sup> There would also be rules designed to exclude more overt partisans and individuals with connections to overt partisans from serving on the Commission. For instance, anyone who currently is, or in the prior six years was, a partisan elected official or candidate for partisan office, political consultant or campaign staff, political party official, legislative employee, lobbyist, or an unclassified state employee would be prohibited from serving on the Commission.<sup>19</sup> Parents, children, and spouses of these individuals would be prohibited from service, too.<sup>20</sup> And once selected, commissioners would be prohibited from running for any state or local partisan office for five years after the date of their appointment.<sup>21</sup>

Under the proposal, the Commission’s map-drawing process would take about a year, with a deadline to adopt maps on November 1 in the year after the decennial census.<sup>22</sup> During this time, the Commission would have to follow required procedures designed to involve the public in the map-drawing and to ensure that the process takes place in the open.<sup>23</sup> For instance, the Commission would be required to “conduct all of its business at open meetings,”<sup>24</sup> and the commissioners, their staff, and their attorneys would be prohibited from discussing redistricting matters with members of the public outside of an open meeting (with limited exceptions).<sup>25</sup> The

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15. Kathleen Gray, *Anti-Gerrymander Group Turns in Signatures to Get on Nov. Ballot in Michigan*, DETROIT FREE PRESS (Dec. 18, 2017, 5:36 PM), <https://www.freep.com/story/news/politics/2017/12/18/gerrymander-redistricting-michigan-petition-constitutional-amendment/962509001/> [<https://perma.cc/LX9W-RGRE>].

16. See MICH. CONST. art. IV, § 6.

17. MICH. CONST. art. IV, § 6(1), (2).

18. MICH. CONST. art. IV, § 6(1)(a), (2)(f).

19. MICH. CONST. art. IV, § 6(1)(b).

20. MICH. CONST. art. IV, § 6(1)(c).

21. MICH. CONST. art. IV, § 6(1)(c), (e).

22. See MICH. CONST. art. IV, § 6(7).

23. MICH. CONST. art. IV, § 6(8)–(10).

24. MICH. CONST. art. IV, § 6(10).

25. MICH. CONST. art. IV, § 6(9).

Commission would also be required to hold at least ten public hearings before drafting any plans and at least five public hearings after drafting proposed plans in order to solicit comments and feedback from the public.<sup>26</sup> For each proposed plan, the Commission would be required to publish the plan along with relevant census data and supporting materials used to develop the plans.<sup>27</sup> And before the Commission could adopt a plan, the Commission would have to make the proposed plan and its supporting materials available to the public for a 45-day public comment period.<sup>28</sup>

The proposal set forth seven redistricting criteria, ranked in order of priority, that the Commission would have to follow when drawing the plans: (1) districts must be in compliance with federal law, including the one-person, one-vote principle and the federal Voting Rights Act; (2) districts must be contiguous; (3) districts must “reflect the state’s diverse population and communities of interest,” the latter of which is defined to include but is not limited to “populations that share cultural or historical characteristics or economic interests”; (4) districts must not “provide a disproportionate advantage to any political party”; (5) districts must not favor or disfavor an incumbent official or a candidate; (6) the plan must consider county, city, and township boundaries; and (7) districts shall be “reasonably compact.”<sup>29</sup>

The proposal also had rules to encourage cross-partisan support for the Commission’s plans. Most importantly, it would require a majority vote of the commissioners with support from at least two commissioners who affiliate with *each* major party and support from at least two of the unaffiliated commissioners to adopt a final redistricting plan.<sup>30</sup> The proposal also set forth a backup procedure in the event that no redistricting plan garnered enough cross-partisan support; under the procedure, each commissioner would rank their preferred plans and a plan would be selected through a process that had cross-partisan support requirements.<sup>31</sup> If the backup procedure were to result in a tie, the Secretary of State, who would otherwise serve the Commission in a non-voting role as its secretary, would randomly select a plan from those that received the most support from the commissioners.<sup>32</sup>

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26. MICH. CONST. art. IV, § 6(8)–(10).

27. MICH. CONST. art. IV, § 6(8)–(9).

28. MICH. CONST. art. IV, § 6(14)(b).

29. MICH. CONST. art. IV, § 6(13).

30. MICH. CONST. art. IV, § 6(14)(c).

31. MICH. CONST. art. IV, § 6(14)(c)(ii).

32. MICH. CONST. art. IV, § 6(14)(c)(iii).

The proposal also called for the Michigan Supreme Court to have original jurisdiction to enforce its provisions.<sup>33</sup> The court would be able to review plans for compliance with the established redistricting criteria and procedural requirements, and it would also be empowered to direct the Commission and the Secretary of State to perform their respective duties.<sup>34</sup> But the proposal expressly prohibited the court from adopting its own plan—something courts are often called upon to do in redistricting litigation; only the Commission (or the Secretary of State in the second backup plan) would be able to adopt a redistricting plan.<sup>35</sup>

Once the proposal had been certified for placement on the November 2018 general election ballot, it faced immediate resistance. An opposition group formed, called Citizens Protecting Michigan's Constitution, and it filed a lawsuit that sought to keep the measure off the ballot.<sup>36</sup> The lawsuit alleged that the proposed changes to the redistricting process were so sweeping that the proposal amounted to the creation of an entirely new state constitution—something that could not be accomplished through the initiative process and instead required a constitutional convention.<sup>37</sup> The argument was ultimately rejected by the Michigan Supreme Court in a 4-3 Decision.<sup>38</sup> The majority emphasized that Michigan's 1963 Constitution had actually created a bipartisan redistricting commission and that although the commission had been “deactivated” by the court in 1982 due to unconstitutional rules—as a stopgap until the constitution was changed, the court had authorized the Michigan Legislature to draw its own redistricting plans—the text creating the commission remained in the state constitution.<sup>39</sup> The Voters Not Politicians' proposal, the majority explained, was simply a reform of existing constitutional language that “leaves the form and structure of the government essentially as it was envisioned in the 1963 Constitution” and “is not equivalent to a new a constitution.”<sup>40</sup> The dissenting justices vehemently disagreed and contended that the transfer of redistricting authority from the elected state legislature to an unelected—and therefore “unaccountable”—commission

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33. MICH. CONST. art. IV, § 6(19).

34. *Id.*

35. *Id.*

36. *See Beggin, supra* note 10.

37. *Citizens for Protecting Mich.'s Const. v. Sec'y of State*, 503 Mich. 42, 921 N.W.2d 247 (2018); *see also* MICH. CONST. art. XII, §§ 2–3.

38. *Citizens for Protecting Mich.'s Const.*, 503 Mich. 42, 921 N.W.2d 247.

39. *Id.* at 83–89, 921 N.W.2d at 265–68.

40. *Id.* at 100, 921 N.W.2d at 274.

amounted to a “fundamental” change to the constitution that required a constitutional convention.<sup>41</sup>

The court’s decision cleared the way for the proposal’s submission to the voters at the 2018 general election. However, the dissenting justices’ argument that commissioners would be troublingly unaccountable went on to be one of the primary criticisms of the proposal.<sup>42</sup> Other criticisms included concerns about whether ordinary citizens would be able to understand the redistricting process and whether the proposed redistricting criteria were sufficiently defined.<sup>43</sup> In response, supporters of the measure highlighted what they contended was an inherent conflict of interest in allowing legislators to draw their own districts and the unfairness of political gerrymandering.<sup>44</sup> They also emphasized the proposed changes to require transparency in the map-drawing process and encourage cross-

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41. *Id.* at 137, 921 N.W.2d at 295 (Markman, C.J., dissenting) (“[t]he [proposal] would affect the ‘foundation’ power of government by removing altogether from the legislative branch authority over redistricting and consolidating that power instead in an ‘independent’ commission made up of 13 randomly selected individuals *who are not in any way chosen by the people, representative of the people, or accountable to the people*”).

42. See Jonathan Oosting, *Former Michigan House Speaker Backs Anti-Gerrymandering Initiative*, DETROIT NEWS (Sept. 19, 2018, 5:41 PM), <https://www.detroitnews.com/story/news/local/michigan/2018/09/19/former-michigan-speaker-backs-anti-gerrymandering-initiative/1361995002/> [<https://perma.cc/7X5V-8LWZ>] (quoting a Michigan Republican Party spokeswoman criticizing the proposal to place “the power of redistricting out of the hands of elected officials who are held accountable to voters and into the hands of a randomly selected group who will be unelected and unaccountable with no qualifications, eliminating checks and balances”); Jason Torchinsky & Dennis W. Polio, *How Independent Is Too Independent?: Redistricting Commissions and the Growth of the Unaccountable Administrative State*, 20 GEO. J.L. & PUB. POL’Y 533, 543 (2022).

43. See David Eggert, *Anti-Gerrymandering Group Defies Odds with 2018 Ballot Drive*, U.S. NEWS & WORLD REPORT (Nov. 20, 2017, 12:05 AM), <https://www.usnews.com/news/best-states/michigan/articles/2017-11-20/anti-gerrymandering-group-defies-odds-with-2018-ballot-drive> [<https://web.archive.org/web/20201121152727/https://www.usnews.com/news/best-states/michigan/articles/2017-11-20/anti-gerrymandering-group-defies-odds-with-2018-ballot-drive>] (quoting a Republican strategist predicting that the commissioners would be “absolute neophytes . . . not having a clue about redistricting.”); *Editorial: Vote No on All Ballot Proposals*, DETROIT NEWS (Oct. 9, 2018, 10:43 PM), <https://www.detroitnews.com/story/opinion/editorials/2018/10/09/editorial-vote-no-all-ballot-proposals/1565860002/> [<https://perma.cc/XG3X-NYEQ>].

44. *Michigan Elections Are Rigged. Proposal 2 Offers a Path to Fairness*, DETROIT FREE PRESS (Sept. 23, 2018, 7:30 AM), <https://www.freep.com/story/opinion/2018/09/23/michigan-anti-gerrymandering-initiative/1379228002/> [<https://perma.cc/7257-VWBH>]; *Editorial: How We Vote Matters, So Support Proposals 2 and 3*, LANSING STATE J. (Oct. 8, 2018, 8:47 AM), <https://www.lansingstatejournal.com/story/opinion/2018/10/08/voter-access-gerrymandering-proposals-editorial-support/1535447002/> [<https://perma.cc/6E7C-ETB3>]; *Editorial: Proposal 2 – Give Democracy a Chance*, TRAVERSE CITY RECORD EAGLE (Oct. 24, 2018), [https://www.record-eagle.com/opinion/editorials/editorial-proposal-give-democracy-a-chance/article\\_558973e1-d3bc-5930-959e-955c2be2adf6.html](https://www.record-eagle.com/opinion/editorials/editorial-proposal-give-democracy-a-chance/article_558973e1-d3bc-5930-959e-955c2be2adf6.html) [<https://perma.cc/TND9-XXGB>].

partisan support to adopt final plans and contended that the proposed process would be much preferable to the then-existing system.<sup>45</sup> In the end, the proposal was approved by the voters with over 61% of the vote.<sup>46</sup>

Following the 2018 general election, the measure faced another legal challenge. The Michigan Republican Party and a group of individuals whom the restrictions excluded from service on the Commission challenged the political activity restrictions, the random selection process, and the restriction on the commissioners' ability to speak publicly about redistricting matters.<sup>47</sup> They alleged that these provisions unconstitutionally infringed upon their First and Fourteenth Amendment rights—though their broader goal was to have the Commission declared unconstitutional and to presumably put redistricting back in the hands of the Michigan Legislature.<sup>48</sup> The claims were unsuccessful, however, as the Sixth Circuit emphasized that the burdens imposed upon the plaintiffs' constitutional rights were minimal and justified by Michigan's compelling interests in structuring its government and "in limiting the conflict of interest implicit in legislative control over redistricting."<sup>49</sup> With this challenge out of the way, the Commission's structure remained intact as the commissioners began their work.

### III. SURVEY OF CASES INVOLVING THE COMMISSION

#### A. *Census Delay Cases*

Like every state, Michigan redraws its districts using block-level data from the decennial census conducted in years ending in zero.<sup>50</sup> The U.S. Census Bureau was supposed to deliver this data to the states for redistricting by the end of March 2021, but citing delays caused by COVID-19, the Bureau announced in February 2021 that transmission of the data would be delayed until the end of September 2021.<sup>51</sup> This created

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45. *Id.*

46. JOCELYN BENSON, MICHIGAN SEC'Y OF STATE, 2018 MICHIGAN ELECTION RESULTS, [https://mielections.us/election/results/2018GEN\\_CENR.html#90000002](https://mielections.us/election/results/2018GEN_CENR.html#90000002) [<https://perma.cc/5NZ3-A3JB>].

47. *See Daunt v. Benson*, 956 F.3d 396, 401 (6th Cir. 2020); *Daunt v. Benson*, 999 F.3d 299 (6th Cir. 2021).

48. *Id.*

49. *Daunt*, 956 F.3d at 406–09.

50. CRVRDO, *Decennial Census P.L. 94–171 Redistricting Data*, U.S. CENSUS BUREAU (Sept. 16, 2021) <https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html> [<https://perma.cc/22ZR-9PM8>].

51. Press Release, U.S. 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> [<https://perma.cc/LE2L-Y3TD>].



a tough situation for many states as most had statutory or constitutional deadlines that required adoption of new district plans by certain dates in 2021—deadlines that, unless changed, would be impossible to meet.<sup>52</sup>

Michigan was in the camp of states with a constitutional deadline to adopt a redistricting plan—specifically, by November 1, 2021.<sup>53</sup> In addition, the required 45-day public comment window that must precede the adoption of any plan meant that the Commission had to propose maps and begin the public comment period by September 17, 2021—nearly two weeks *before* the Bureau expected to release the final census data.<sup>54</sup> This unusual situation led to two legal actions in the Michigan Supreme Court: *In re Independent Citizens Redistricting Commission for State Legislative and Congressional District’s duty to redraw districts by November 1, 2021* (“*In re Independent Citizens Redistricting Commission*”)<sup>55</sup> and *Davis v. Independent Citizens Redistricting Commission*.<sup>56</sup>

Anticipating that the census data would not be released until after the September 17<sup>th</sup> deadline to propose plans, the Commission and the Secretary of State filed a petition with the Michigan Supreme Court for an order extending the constitutional deadlines.<sup>57</sup> The petition laid out the unusual facts; explained that the Commission and the Secretary did not think it would be possible, let alone prudent, to amend the state constitution in time to provide for a new timeline; and expressed a concern that without new deadlines, the Commission and its potentially untimely maps would be at legal risk.<sup>58</sup>

Presumably due to the unprecedented nature of the circumstances, the court sought more input. The court set the matter for oral argument and requested supplemental briefing to address whether the court even had jurisdiction over the petition, whether the court had the authority to deem

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52. See, e.g., *2020 Census Delays and the Impact on Redistricting*, NAT’L CONF. OF STATE LEGIS. (Sept. 23, 2021), <https://www.ncsl.org/research/redistricting/2020-census-delays-and-the-impact-on-redistricting-637261879.aspx> [<https://perma.cc/ZES2-KGQE>].

53. MICH. CONST. art. IV, § 6(7) (“[n]ot 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 Cong. districts”).

54. MICH. CONST. art. IV, § 6(14)(b).

55. *In re Indep. Citizens Redistricting Comm’n*, 507 Mich. 942, 958 N.W.2d 855 (2021).

56. *Davis v. Indep. Citizens Redistricting Comm’n*, 508 Mich. 935, 963 N.W.2d 600 (2021).

57. *Petition for Relief, In re Indep. Citizens Redistricting Comm’n*, 507 Mich. 942, 958 N.W.2d 855, (No. 164022), [https://www.courts.michigan.gov/SysGlobalAssets/migrated/courts/michigansupremecourt/clerks/msc-briefs/156150-162949/162891/162891\\_01\\_01\\_petition.pdf](https://www.courts.michigan.gov/SysGlobalAssets/migrated/courts/michigansupremecourt/clerks/msc-briefs/156150-162949/162891/162891_01_01_petition.pdf) [<https://perma.cc/F8YH-3SDM>].

58. *Id.* at 18–22.

a constitutional timing requirement as “directory” instead of mandatory, and if so, whether the delay in the transmission of the census data justified a deviation from the constitutional timeline.<sup>59</sup> The court also asked the Attorney General’s office to submit separate briefs arguing both sides of the same questions and invited interested persons or groups to file amicus briefs.<sup>60</sup> The petitioners and Attorney General’s office complied, and four amicus briefs were filed—three in support of the Commission’s request from Count MI Vote, the League of Women Voters of Michigan, and the National Redistricting Foundation, and one effectively in opposition by the Michigan Senate.<sup>61</sup>

In early July, the court released a unanimous, one-sentence order that denied the petition and did not provide an explanation other than stating that it was “not persuaded that it should grant the requested relief.”<sup>62</sup> Offering some insight into the court’s thinking, Justice Elizabeth Welch filed a concurring opinion that Justice Megan Cavanagh joined. She suggested that the court was uncomfortable issuing an “anticipatory” remedy and wrote that she was even less inclined to do so after the Commission indicated during oral argument that it planned to follow a delayed map-drawing timeline with or without the court’s advanced blessing.<sup>63</sup> Still, she suggested that the court was sympathetic to the Commission and might remain so were the Commission’s failure to meet any deadlines to become an issue in a future lawsuit.<sup>64</sup> In this vein, she acknowledged the “difficult and unenviable position” the Commission was in “through no fault of its own,” and praised the petitioners’ “sensible decision to alert this Court and the public” of the situation.<sup>65</sup> She also emphasized that the court’s decision was “not a reflection of the merits of the questions briefed or how this Court might resolve a future case raising similar issues” and highlighted a few prior decisions in which the court had “accepted something less than strict-to-the-letter compliance with a constitutional requirement when doing so was more faithful to the purpose and intention of those who ratified the requirement.”<sup>66</sup> The court would have the opportunity to resolve a future case raising similar issues just a few months later.

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59. *In re Indep. Citizens*, 507 Mich. 942, 958 N.W.2d 855.

60. *Id.*

61. Docket, *In re Indep. Citizens Redistricting Comm’n*, 507 Mich. 1025, 961 N.W.2d 211 (Case No. 162891), <https://www.courts.michigan.gov/c/courts/msc/case/162891> [<https://perma.cc/DHL5-5J6L>].

62. *In re Indep. Citizens.*, 507 Mich. 1025, 961 N.W.2d 211.

63. *Id.* at 212 (Welch, J., concurring).

64. *Id.*

65. *Id.*

66. *Id.* at 212–13.

The Census Bureau released 2020 census data on August 12, 2021, and one week later, the Commission approved a timeline in which the 45-day public comment period would commence by November 14, 2021—about two months after the September 17<sup>th</sup> deadline and almost two weeks after the November 1<sup>st</sup> deadline to adopt plans.<sup>67</sup> Shortly thereafter, an aspiring congressional candidate with a litigious reputation<sup>68</sup> filed a lawsuit in the Michigan Supreme Court that sought a writ of mandamus compelling the Commission to comply with the September 17<sup>th</sup> and November 1<sup>st</sup> deadlines.<sup>69</sup>

Unlike *In re Independent Citizens Redistricting Commission*, the court did not order any supplemental briefing nor were any amicus briefs filed. Like that earlier case, however, the court rejected the matter with a short, unsigned order; this time, it was a 5-2 decision.<sup>70</sup> The order was issued on September 16, 2021—one day before the September 17<sup>th</sup> deadline—and it indicated that the case was dismissed because the court was “not persuaded that it should grant the requested relief at this time.”<sup>71</sup> The order also stated that the court would issue emergency rules establishing the procedural requirements for future original actions challenging the Commission’s actions.<sup>72</sup> (The court amended its rules to provide for such a procedure in October 2021.)<sup>73</sup>

Offering some insight into the court’s thinking, Justice Brian Zahra filed a concurring opinion. He first questioned whether mandamus was an

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67. See Press Release, U.S. Census Bureau, *U.S. Census Bureau Delivers Data for States to Begin Redistricting Efforts* (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html> [<https://perma.cc/CZB7-Q5T8>]; *Davis v. Indep. Citizens Redistricting Comm’n*, 508 Mich. 935, 963 N.W.2d 600 (2021) (Zahra, J., concurring).

68. See Clara Hendrickson, *Michigan Redistricting Commission Sued in Anticipation of Missing Constitutional Deadline*, DETROIT FREE PRESS (Sept. 7, 2021, 5:00 PM), <https://www.freep.com/story/news/local/michigan/2021/09/07/redistricting-commission-sued-ahead-september-deadline/5760402001/> [<https://perma.cc/CQ3Y-UPS6>] (describing the plaintiff as a “serial litigant”); Beth LeBlanc, *Michigan High Court Dismisses Complaint About Delayed Voting District Maps*, DETROIT NEWS (Sept. 16 2021, 2:45 PM), <https://www.detroitnews.com/story/news/local/michigan/2021/09/16/michigan-high-court-dismisses-complaint-delayed-voting-district-maps/8366261002/> [<https://perma.cc/G2TX-6CF7>] (describing the plaintiff as a “serial plaintiff”).

69. *Davis*, 508 Mich. 935, 963 N.W.2d 600.

70. *Id.*

71. *Id.*

72. *Id.*

73. Michigan Supreme Court, Order, ADM File No. 2021-45, Amendment of Rule 7.306 of the Michigan Court Rules (Oct. 27, 2021), [https://www.courts.michigan.gov/4aaef9/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2021-45\\_2021-10-27\\_formattedorder\\_amendto\\_fmcr7.306.pdf](https://www.courts.michigan.gov/4aaef9/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2021-45_2021-10-27_formattedorder_amendto_fmcr7.306.pdf) [<https://perma.cc/G4U8-TDDS>].

appropriate remedy and highlighted language in the Michigan Constitution that suggested that the appropriate remedy in a redistricting-related challenge is an order to “direct the secretary of state or the commission to perform their respective duties” instead of a writ of mandamus.<sup>74</sup> Justice Zahra also contended that even if mandamus were appropriate, the claims were not yet ripe; his reasoning for this contention was that mandamus requires a showing that the defendant had a clear legal duty to perform the requested act and that because the Commission had not yet missed any deadlines, the Commission did not yet have a clear legal duty to comply with them.<sup>75</sup>

Justice Elizabeth Clement wrote a separate opinion—joined by Justice David Viviano—that dissented from the denial of the writ of mandamus but concurred with the decision to promulgate rules for future redistricting challenges.<sup>76</sup> She argued that the Commission’s “avowed intention to breach the deadlines” created a live controversy and emphasized her desire to enforce the specific constitutional deadlines that the voters had approved.<sup>77</sup>

Curiously, neither Justice Zahra nor Justice Clement mentioned the court’s earlier decision in *In re Independent Citizens Redistricting Commission* or even the U.S. Census Bureau’s delay. Nevertheless, the effect of the court’s order was to allow the Commission to proceed with its delayed schedule. And although future litigants did not bring any claims based on the missed deadlines, some of the court’s justices later seemed to hold the delay against the Commission despite the justices’ silence in these two actions.

### *B. The Commission’s Attorney-Client Privilege*

Once the Commission had the census data, the next issue that went before the Michigan Supreme Court concerned the extent to which the work and advice of the Commission’s legal counsel was shielded by the attorney-client and work product privileges. The case was *Detroit News, Inc. v. Independent Citizens Redistricting Commission*, and in a 4-3 decision, a sharply divided court held that these common law privileges were “repugnant” to the Michigan Constitution’s transparency requirements for the Commission.<sup>78</sup>

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74. *Davis*, 508 Mich. at 935, 963 N.W.2d at 600 n.2 (Zahra, J., concurring) (citing MICH. CONST. art. IV, § 6(19)).

75. *Id.* at 935, N.W.2d at 600.

76. *See id.* at 935, N.W.2d 600–01 (Clement, J., concurring in part, dissenting in part).

77. *Id.* at 935, N.W.2d at 601–02.

78. *Detroit News, Inc. v. Indep. Citizens Redistricting Comm’n*, 508 Mich. 399, 412, 976 N.W.2d 612, 620 (2021).

The dispute arose from a public hearing the Commission hosted at which many commenters expressed concerns that the proposed redistricting plans might violate the federal Voting Rights Act.<sup>79</sup> Following these comments, the Commission held a subsequent meeting that began in open session but eventually went into a closed session to discuss two legal memoranda the Commission’s counsel prepared concerning the Voting Rights Act.<sup>80</sup> Afterwards, several media outlets requested copies of the memoranda and a recording of the closed-session meeting.<sup>81</sup> The media outlets later learned of and requested eight additional legal memoranda that the Commission considered but did not disclose.<sup>82</sup> The Commission declined all the requests, citing the attorney-client and work product privileges.<sup>83</sup> This eventually led to the Attorney General issuing a legal opinion concluding that the Commission’s meeting should have been open to the public and that the memoranda should be disclosed.<sup>84</sup> But even after this, the Commission continued to deny the requests, prompting the media outlets to file a lawsuit.<sup>85</sup>

The court’s ensuing opinion is particularly interesting because it reflects the challenges in interpreting and enforcing a voter-initiated constitutional amendment.<sup>86</sup> The justices all agreed that the analysis turned on whether the ratifiers of the amendment (i.e., the voters) understood the amendment to shield the Commission’s communications with its legal counsel from disclosure, but the justices disagreed on what the voters’ “understanding” was.<sup>87</sup> Justice Viviano wrote the majority opinion—joined by Justices Zahra, Clement, and Bernstein.<sup>88</sup> Justice Clement filed an opinion that concurred in part and dissented in part.<sup>89</sup> And Justice Welch wrote a dissenting opinion that Chief Justice Bridget Mary McCormack and Justice Cavanagh joined.<sup>90</sup> Each opinion asserted that *its* rationale reflected the voters’ true understanding.<sup>91</sup>

To begin its analysis, the majority identified the source of any attorney client privileges and work product doctrines. The Commission contended

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79. *Id.* at 455–56, 976 N.W.2d 643–43 (Welch, J., dissenting).

80. *Id.* at 406, 976 N.W.2d at 617.

81. *Id.*

82. *Id.* at 407, 976 N.W.2d at 617.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 409, 976 N.W.2d at 618.

87. *See id.* (citing *Citizens Protecting Michigan’s Constitution v. Sec’y of State*, 503 Mich. 42, 61, 921 N.W.2d 247 (2018)).

88. *Id.* at 431, 976 N.W.2d at 630.

89. *Id.*

90. *Id.* at 437, 976 N.W.2d at 633.

91. *Id.* at 431, 976 N.W.2d at 630.

that these privileges derived from both common law and a constitutional provision that authorized the Commission to retain legal counsel; the Commission argued that its authority to retain legal counsel implied a right to have privileged communications with said counsel.<sup>92</sup> The majority rejected the latter argument, reasoning that because the provision did not *explicitly* address whether the Commission's communications with its legal counsel were intended to be shielded from disclosure, it could not serve as a source of such a privilege.<sup>93</sup> This left common law as the only source of a privilege, and as the majority emphasized, the state constitution incorporates common law only to the extent that it is not "repugnant" to the constitution.<sup>94</sup>

In determining whether the common law privileges were repugnant to the constitution, the majority examined the numerous constitutional provisions that require the Commission to operate in the view of the public. The majority first looked at a requirement for the Commission to "conduct all its business in open meetings."<sup>95</sup> The majority consulted contemporaneous dictionaries and defined the Commission's "business" as the "development and adoption of redistricting plans," and concluded that communications with legal counsel on how to draw maps constitute a "business" activity since it is necessary to the development and adoption of a redistricting plan.<sup>96</sup> The majority then reasoned that although such advice might ordinarily be privileged under common law, the constitution's requirement that "all" of the Commission's business be conducted in an open meeting required even the Commission's conversations with its legal counsel concerning the development of redistricting plans to take place in view of the public.<sup>97</sup> The court, therefore, ordered the Commission to disclose the recording of the closed-session meeting.<sup>98</sup>

In addition to the "open meetings" requirement, the majority also examined a constitutional provision that required the Commission to publish its proposed plans along with "any data and supporting materials used to develop the plans."<sup>99</sup> The media outlets argued that the legal memoranda constituted "supporting materials," but the Commission

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92. *See id.* at 408–09, 976 N.W.2d at 618.

93. *Id.* at 409, 976 N.W.2d at 618.

94. *Id.* (citing MICH. CONST. art. 3, § 7).

95. *Id.* at 412, 976 N.W.2d at 620 (citing MICH. CONST. art. 4, § 6(10)).

96. *Id.* at 413–14, 976 N.W.2d at 620–21.

97. *Id.* at 416–18, 976 N.W.2d at 622–23 (distinguishing legal advice given during the map-drawing stage from advice given in connection with pending—but not anticipated—litigation).

98. *Id.* at 418, 976 N.W.2d at 623.

99. *Id.* (citing MICH. CONST. art. 4, § 6(9)).

contended that the term should be understood in the context of the associated term “data,” which connotes more fact-based materials rather than opinions.<sup>100</sup> The majority rejected the Commission’s argument, reasoning that the common quality of the terms “data” and “supporting materials” are that they are “things used in the development of maps,” not that they are more focused on facts over opinions.<sup>101</sup> The majority also rejected an argument that because some of the legal memoranda were created *after* the Commission released its proposed plans then they could not have been materials used to “develop the plans”; the majority reasoned that because the Commission remained free to alter its proposals after they were unveiled, the legal memoranda informed the Commission as it weighed whether to adjust its proposed plans.<sup>102</sup> Finding that any legal memoranda related to the development of plans should be disclosed, the majority then examined the memoranda’s descriptions and identified those that purported to contain relevant advice.<sup>103</sup> The majority ultimately determined that seven of the ten memoranda contained relevant advice and ordered their disclosure.<sup>104</sup>

Justice Clement filed a separate opinion that explained that while she agreed with the majority’s analysis, she would have gone further and ordered the disclosure of *all* legal memoranda.<sup>105</sup> Picking up on the theme of an early criticism of the Commission’s structure, she contended that the Commission members were largely unaccountable in that they were neither elected to their role nor answerable to elected officials; further, elected officials did not select the members.<sup>106</sup> Continuing, she wrote that “[w]ith this radical insulation from accountability comes requirements for radical transparency”<sup>107</sup> and argued that the design of the text indicated that the “great mass of the people” would have understood the open meetings requirement as defeating any assertion the Commission made of the attorney-client privilege.<sup>108</sup>

Justice Welch filed an impassioned dissent, calling the majority opinion a “Trojan horse” meant to undermine the Commission’s independence and hamper its ability to defend itself in future litigation.<sup>109</sup>

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100. *Id.*

101. *Id.* at 419, 976 N.W.2d at 623–24.

102. *Id.* at 420–22, 976 N.W.2d at 624–25.

103. See *id.* at 423–25, 976 N.W.2d at 626.

104. *Id.* at 422–28, 976 N.W.2d at 625–28.

105. *Id.* at 432, 976 N.W.2d at 630 (Clement, J., concurring in part and dissenting in part).

106. *Id.*

107. *Id.*

108. *Id.* at 434–35, 976 N.W.2d at 631–32.

109. *Id.* at 440, 976 N.W.2d at 634 (Welch, J., dissenting).

She agreed with the Commission that its communications with legal counsel should be protected from disclosure under the attorney-client and work product privileges.<sup>110</sup> Justice Welch also identified what she saw as the majority's numerous errors: she argued that there is no jurisdiction where the right to legal representation does not include the right to receive legal advice in confidence, that no constitutional text restricts or repeals the common law privileges, and that no other court in a state with an independent redistricting commission had concluded that its commission's right to legal representation meant something less than what would be enjoyed by any other public body.<sup>111</sup> And to conclude, she asserted that the majority had "put its own views above those of the voters."<sup>112</sup>

It does not appear that any of the information contained in the disclosed memoranda went on to play a significant role in the subsequent challenges to the Commission's maps. The court's ruling in *Detroit News, Inc.* was, however, later cited by critics of the Commission to contend that the Commission had failed to live up to its goal of transparency.<sup>113</sup>

### *C. Challenges to the Commission's Maps*

The Commission finally adopted congressional and state legislative plans on December 28, 2021.<sup>114</sup> Leading up to this, the Commission held 105 public meetings, 10 public committee meetings, 21 public hearings, and more than 220 informal presentations, town-hall forums, and interviews.<sup>115</sup> In addition, the Commission also received more than 10,000 online comments and thousands of written comments on its proposals.<sup>116</sup> Ultimately, nine commissioners supported the state senate plan, eleven supported the state house plan, and eight supported the congressional plan, with each garnering the required cross-partisan support from the Republican, Democratic, and unaffiliated commissioners.<sup>117</sup>

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110. *Id.* at 437–39, 976 N.W.2d at 633–34.

111. *Id.* at 447–50, 976 N.W.2d at 638–39.

112. *Id.* at 460, 976 N.W.2d at 644.

113. See Torchinsky & Polio, *supra* note 42, at 546.

114. See *Final and District Maps*, MICH. INDEP. CITIZENS REDISTRICTING COMM'N, <https://www.michigan.gov/micrc/mapping-process/final-maps> [https://perma.cc/ZG8J-XNJB].

115. *Detroit News*, 508 Mich. at 441 n.3, 976 N.W.2d at 635 (Welch, J., dissenting).

116. *Id.*

117. See Beth LeBlanc, *Michigan Redistricting Panel Wraps Adoption of State House, Senate, Congressional Maps*, DETROIT NEWS (Dec. 28, 2021, 3:44 PM), <https://www.detroitnews.com/story/news/local/michigan/2021/12/28/michigan-redistricting-panel-maps-vote-congress-state-house-senate/9028496002/> [https://perma.cc/FEJ6-2KDZ].



Early analyses suggested that the Commission's plan would give Democrats a 7-6 advantage in the congressional delegation compared to the then-evenly split 7-7 delegation (Michigan lost a congressional seat under the latest reapportionment),<sup>118</sup> a 20-18 advantage in the state senate compared to the Republicans' then-22-16 advantage,<sup>119</sup> and a 57-53 advantage in the state house compared to the Republicans' then-55-52 advantage.<sup>120</sup>

While the Commission's plans appeared to benefit the Democratic Party, the plans also reduced the number of majority-Black districts.<sup>121</sup> Under the prior redistricting plans, there were two majority-Black congressional districts, five majority-Black state senate districts, and ten majority-Black state house districts.<sup>122</sup> Under the Commission's plans, however, all that remained were six majority-Black state house districts.<sup>123</sup> This resulted in concerns that a core constituency of the Democratic Party would be underrepresented in Michigan despite the Democratic Party's overall gains. Michigan was not alone in this trend, either. By one report, the twenty-two majority-Black congressional districts from the prior redistricting cycle had been reduced to nine during the latest redistricting cycle.<sup>124</sup> Several contributing factors have been cited for this, including the quick growth of the nation's Hispanic population, a trend of Black voters moving to suburbs, and the U.S. Supreme Court's 2013 invalidation of a key component of the Voting Rights Act that previously served as a bulwark against redistricting plans (among other voting changes) that had a retrogressive effect on minority communities.<sup>125</sup>

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118. See Sergio Martínez-Beltrán, *Congressional Map Adopted by Michigan Panel Gives Democrats 7-6 Edge*, BRIDGE MICH. (Dec. 28, 2021), <https://www.bridgemi.com/michigan-government/congressional-map-adopted-michigan-panel-gives-democrats-7-6-edge> [<https://perma.cc/QMH8-E9GH>].

119. See Sergio Martínez-Beltrán, *New Districts Give Democrats Chance to Flip Michigan Legislature*, BRIDGE MICH. (Dec. 28, 2021), <https://www.bridgemi.com/michigan-government/new-districts-give-democrats-chance-flip-michigan-legislature> [<https://perma.cc/YT6G-FHD9>].

120. See *id.*

121. John E. Johnson, Jr., *Analysis of MICRC's Proposed Maps*, MICH. DEP'T OF C.R. (Dec. 9, 2021), <https://www.michigan.gov/mdcr/-/media/Project/Websites/mdcr/memos/MDCR-Analysis-of-MICRC-Proposed-Maps--12-9-2021.pdf?rev=a67ec070fa8d4a38be647de029dae8c4&hash=D88369C86A2391DC2583760B209FBF31> [<https://perma.cc/2NUV-DUV4>].

122. *Id.*

123. *Id.*

124. Gregory Korte, *Black Districts Guttled as Suburban Flight Reshapes Congress Maps*, BLOOMBERG (July 20, 2022, 4:00 AM), <https://www.bloomberg.com/news/articles/2022-07-20/black-districts-guttled-as-suburban-flight-reshapes-congress-maps> [<https://perma.cc/N8TV-6N8U>].

125. *Id.*; see also *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

These issues and others came to the fore in several challenges filed against the Commission's maps during the first few months of 2022.

### *1. Voting Rights Act Challenges*

The Commission faced two challenges that alleged that its redistricting plan would result in unlawful vote dilution of Michigan's Black communities in violation of Section 2 of the Voting Rights Act:<sup>126</sup> *Detroit Caucus v. Independent Citizens Redistricting Commission*<sup>127</sup> and *Agee v. Benson*.<sup>128</sup>

*Detroit Caucus* was the first Voting Rights Act challenge filed. The plaintiffs were a group of Black elected officials and voters, and they brought their action in the Michigan Supreme Court; the court ultimately rejected the challenge in an unsigned 4-3 order.<sup>129</sup> *Detroit Caucus* turned primarily on the plaintiffs' evidence—or lack thereof. The plaintiffs argued that the mere absence of an equivalent number of majority-Black districts in the new plan compared to the prior plan was, alone, sufficient to maintain a vote dilution claim.<sup>130</sup> The majority disagreed, explaining that the U.S. Supreme Court's controlling decision for vote dilution claims in *Thornburg v. Gingles*<sup>131</sup> requires a statistical and racial bloc-voting analysis to establish the need for additional majority-minority districts; specifically, claimants must establish that: (1) the minority group is sufficiently large and geographically compact to constitute a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate.<sup>132</sup> The plaintiffs did not provide this analysis for the court and instead filed what the majority opinion described as a "conclusory expert affidavit with no accompanying bloc-voting analysis."<sup>133</sup>

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126. 52 U.S.C. § 10301(a) (providing that "[n]o voting . . . standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color").

127. *Detroit Caucus v. Indep. Citizens Redistricting Comm'n*, 969 N.W.2d 331 (Mich. 2022).

128. Docket, *Agee v. Benson*, No. 1:22-cv-00272 (W.D. Mich. filed Mar. 23, 2022); see also *Agee v. Benson*, AM. REDISTRICTING PROJECT (Dec. 28, 2022), <https://thearp.org/litigation/agee-v-benson/> [<https://perma.cc/G8ZL-KFL2>].

129. *Detroit Caucus*, 969 N.W.2d at 335.

130. *Id.* at 331–32.

131. *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986).

132. *Id.* at 333 (quoting *Cooper v. Harris*, 137 S.Ct. 1455, 1470 (2017)).

133. *Id.* at 332.

The majority also gave weight to the Commission's un rebutted evidence that *Gingles* did not require additional majority-Black districts.<sup>134</sup> An expert working for the Commission conducted a racial bloc-voting analysis and concluded that the amount of white crossover voting for Black-preferred candidates was significant enough that Black voters had an equal opportunity to elect representatives of their choice even without 50%+ majority-Black districts.<sup>135</sup> Based on this finding, the Commission determined that the third *Gingles* precondition had not been met and that the Voting Rights Act, therefore, did not require additional majority-Black districts.<sup>136</sup> The *Detroit Caucus* majority accepted this finding and reasoned that if the Commission had nevertheless maintained the same number of majority-Black districts from the prior plans *without* justification under *Gingles*, as the plaintiffs effectively argued for, then the Commission "would have easily invited a potentially meritorious challenge as an unconstitutional racial gerrymander."<sup>137</sup>

A jointly signed dissent from Justices Zahra, Viviano, and Bernstein argued that it was too early to reject the case, which they emphasized involved the redistricting criteria the voters ranked highest (i.e., compliance with federal law, including the Voting Rights Act). They agreed that *Gingles* controlled the analysis but felt that a variety of factors counseled in favor of giving the parties more time to develop the record and arguments.<sup>138</sup> They criticized the court rule governing redistricting challenges that was adopted following *Davis*, which they contended did not sufficiently notify the plaintiffs as to what particular facts or evidence were required to be included with the complaint.<sup>139</sup> (The court's relevant rule requires plaintiffs in an original action to file a complaint, a brief on the merits, proof of service, and a filing fee, and also provides that "[c]opies of relevant documents, record evidence, or supporting affidavits may be attached as exhibits to the complaint."<sup>140</sup> It also provided for an expedited briefing schedule, including giving the defendant(s) three days to file an answer to the complaint and a response brief and the plaintiffs

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134. *Id.* at 333–34.

135. *Id.* at 333; *see also* LISA HANDEY, REPORT TO THE MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION (2021), [https://www.michigan.gov/micrc/-/media/Project/Websites/MiCRC/Nov82021TOJan312022/Handley\\_Final\\_\\_Report\\_to\\_MiCRC\\_with\\_Appendices.pdf?rev=44e5d468277240879b7d496e133d5e1c&hash=D0131E88C91486F842B29E88030D671C](https://www.michigan.gov/micrc/-/media/Project/Websites/MiCRC/Nov82021TOJan312022/Handley_Final__Report_to_MiCRC_with_Appendices.pdf?rev=44e5d468277240879b7d496e133d5e1c&hash=D0131E88C91486F842B29E88030D671C) [https://perma.cc/7JRR-QSQ2].

136. *Detroit Caucus*, 969 N.W.2d at 333.

137. *Id.* at 334.

138. *Id.* at 335–42 (Zahra, Viviano, and Bernstein, JJ., dissenting).

139. *See id.*

140. MICH. CT. RULE § 7.306(C); *Detroit Caucus*, 969 N.W.2d at 335–42.

three days after that to file a reply brief.)<sup>141</sup> Perhaps in response, the majority noted that all the justices had *unanimously* approved the rule change that the dissent criticized.<sup>142</sup> The dissent also argued that it was unfair how little time the plaintiffs had to file and pursue their challenge; they noted that the Commission was nearly two months late in adopting plans and also curiously expressed skepticism of the Commission's need for the census data to create the maps despite the fact that none of the dissenting justices raised this concern in either of the court's earlier census delay cases.<sup>143</sup> And citing *Detroit News, Inc.*, they also criticized the Commission for not disclosing its Voting Rights Act-related materials earlier,<sup>144</sup> though the majority pushed back on this assertion, too, arguing that the election results and demographic data needed for a vote dilution claim "are, and always have been, publicly available."<sup>145</sup>

Presumably in response to the dissent's criticism, the majority noted that during oral argument, the plaintiffs repeatedly maintained that they had submitted all the evidence they needed to establish their claim and that "the case was 'ready' for adjudication."<sup>146</sup> The dissent pushed back on this, asking rhetorically whether the plaintiffs' concession at oral argument is "so damning?"<sup>147</sup> The dissent called it "patently unfair" for the majority to have effectively required the plaintiffs' counsel to concede that the plaintiffs' claim, on the record presented, lacked factual support in order to obtain the opportunity to engage in further factual discovery.<sup>148</sup> Whether the plaintiffs truly felt the matter was ready for adjudication, the dissent at least highlighted the practical challenges that redistricting litigants face.<sup>149</sup>

As an epilogue to *Detroit Caucus*, the 2022 election cycle did indeed see a decrease in the number of Black officials elected to Michigan's congressional delegation and state legislature. The number of Black lawmakers elected to the state senate dropped from five to three, and the number elected to the state house of representatives dropped from fifteen to thirteen.<sup>150</sup> (The new Democratic majority in the state house of

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141. *Id.*

142. *Id.* at 331.

143. *Id.* at 339.

144. *Id.* at 340 n.39 (citing *Detroit News, Inc. v. Indep. Citizens Redistricting Comm'n*, 508 Mich. 399, 976 N.W.2d 612 (2021)).

145. *Id.* at 334 n.2 (majority opinion).

146. *Id.* at 332.

147. *Id.* at 340 n.36 (Zahra, Viviano, and Bernstein, JJ., dissenting).

148. *Id.*

149. Alyssa Burr, *Democrats Big Midterm Win Overshadows Loss of Black Voices*, MLIVE (Nov. 15, 2022, 3:10 PM), <https://www.mlive.com/politics/2022/11/democrats-big-midterm-win-overshadows-loss-of-black-voices.html> [<https://perma.cc/XE5T-ZDFA>].

150. *Id.*

representatives is, however, led by the state's first Black Speaker of the House.<sup>151</sup>)”The number of Black representatives in the Congressional delegation remained the same at one representative.<sup>152</sup> But in a historic shift, Detroit will not have a Black member of Congress for the first time in almost seventy years, though some pointed to a crowded primary election as a contributing factor.<sup>153</sup>

Shortly after the decision in *Detroit Caucus*, a different group of plaintiffs filed an action in the U.S. District Court for the Western District of Michigan alleging that the Commission's redistricting plan violates Section 2 of the Voting Rights Act and the federal Equal Protection Clause, *Agee v. Benson*.<sup>154</sup> The complaint contains similar arguments as those made in *Detroit Caucus*, though the arguments were notably buttressed with racial bloc voting analyses.<sup>155</sup> As of publication, the complaint had survived a motion to dismiss filed by Secretary of State Benson who had argued that she was an improper party, and the action remains pending with oral argument on dispositive motions scheduled for July 2023.<sup>156</sup>

## 2. One-Person, One-Vote and Equal Protection Clause Challenge

In addition to *Agee*, another challenge to the Commission's congressional districts was filed in the U.S. District Court for the Western District of Michigan in early 2022, *Banerian v. Benson*.<sup>157</sup> The plaintiffs had two claims: first, they alleged that there was too much deviation in the population of the districts resulting in a violation of the “one person, one

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151. See Dave Boucher, *Michigan Democrats Make History, Pick First Woman and Black Man to Lead Legislature*, DETROIT FREE PRESS (Nov. 10, 2022, 6:51 p.m.), <https://www.freep.com/story/news/politics/2022/11/10/michigan-senate-majority-leader-house-speaker/69636590007/> [<https://perma.cc/BE3W-6VQ8>].

152. Quinn Klinefelter, *For the First Time in About 70 Years, Detroit Won't Have a Black Democrat in Congress*, NPR (Nov. 7, 2022, 5:00 AM), <https://www.npr.org/2022/11/07/1134525422/detroit-black-representation-house-bivings-thanedar> [<https://perma.cc/K2PP-25PE>].

153. See *id.*; Clyde McGrady, *Why a Black Democratic City Won't Have a Black Democrat in the House*, N.Y. TIMES (Oct. 25, 2022), <https://www.nytimes.com/2022/10/24/us/detroit-congress-black-thanedar.html> [<https://perma.cc/3AKP-EY69>].

154. Docket, *Agee v. Benson*, No. 1:22-cv-00272 (W.D. Mich. filed Mar. 23, 2022); see also *Agee v. Benson*, AM. REDISTRICTING PROJECT (Dec. 28, 2022), <https://thearp.org/litigation/agee-v-benson/> [<https://perma.cc/G8ZL-KFL2>].

155. *Agee v. Benson*, Case No. 1:22-cv-00272, First Am. Compl. (W.D. Mich. Apr. 13, 2022).

156. See *Agee v. Benson*, Case No. 1:22-cv-00272, Order Denying Defendant's Motion to Dismiss (W.D. Mich. Sept. 21, 2022), Case Management Order (W.D. Mich. Nov. 1, 2022), Order Scheduling Motions Hearing (W.D. Mich. Dec. 14, 2022).

157. See *Banerian v. Benson*, 589 F. Supp. 3d 735 (W.D. Mich. 2022).

vote” requirement;<sup>158</sup> second, they alleged that the Commission applied the Michigan Constitution’s redistricting criteria in an inconsistent and arbitrary manner in violation of the federal Equal Protection Clause, particularly the requirement for districts to “reflect the state’s diverse population and communities of interest.”<sup>159</sup> A three-judge panel unanimously rejected both claims, though in separate decisions.<sup>160</sup>

The court first addressed the Equal Protection claim in response to a motion to dismiss the defendants filed.<sup>161</sup> The plaintiffs claimed that the congressional districts “fragmented” *their* “communities of interest”; this diminished their ability to elect candidates of their choice.<sup>162</sup> But the court, invoking the U.S. Supreme Court’s decision in *Rucho*, described the plaintiffs’ claim as “just a political-gerrymandering claim by another name.”<sup>163</sup> The panel explained that the Michigan Constitution contemplates that voters might belong to multiple communities of interest and that the federal Constitution does not contain a discernable principle that would allow the court to define particular communities of interest or to review the Commission’s “trade-offs” in defining such communities.<sup>164</sup> Based on this, the court concluded that the claim presented a nonjusticiable political question and dismissed the claim.<sup>165</sup>

The court addressed the one-person, one-vote claim in a separate opinion that considered—and denied—the plaintiffs’ motion for preliminary injunction.<sup>166</sup> The plaintiffs’ claim focused on a slight deviation in the populations of the congressional districts; based on the 2020 census, the ideal population for each congressional district in Michigan was 775,179, while the Commission’s plan deviated from that ideal by 0.14%.<sup>167</sup> Under the one-person, one-vote principle, a state must draw congressional districts containing roughly equal populations, but slight deviations are permissible if the state can “show with some

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158. *Id.* at 736 (citing *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964)).

159. *Id.* at 736.

160. *Id.*; *Banerian v. Benson*, 597 F. Supp. 3d 1163, 1165 (W.D. Mich. 2022) *appeal dismissed*, 2022 WL 3061439 (6th Cir. May 5, 2022), *appeal dismissed as moot*, 143 S. Ct. 400 (2022); *see also* 28 U.S.C. § 2284(a) (requiring federal constitutional challenges to congressional district plans to be heard and determined by a panel of three district court judges).

161. *Banerian*, 589 F. Supp. 3d at 736–37.

162. *Id.* at 738.

163. *Id.* at 738 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019)).

164. *Id.* at 738–39.

165. *Id.* at 739.

166. *Banerian v. Benson*, 597 F. Supp. 3d 1163 (W.D. Mich. 2022), *appeal dismissed*, 2022 WL 3061439 (6th Cir. May 5, 2022), *appeal dismissed as moot*, 143 S. Ct. 400 (2022).

167. *Id.*

specificity” that the population differences “were necessary to achieve some legitimate state objective.”<sup>168</sup> The degree of “specificity” the state needs to show turns on four factors: “the size of the deviations, the importance of the State’s interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.”<sup>169</sup>

The court applied this test, and ultimately determined that the Commission had “only a light burden” to show that the plan’s population deviation was necessary to achieve its goal of maintaining communities of interest.<sup>170</sup> As to the first two factors, the court found the population deviation in the Commission’s plan to be “small” compared to other deviations that have been allowed by the U.S. Supreme Court<sup>171</sup> and that the Commission’s objective to preserve communities of interest was “indisputably legitimate.”<sup>172</sup>

As to the third factor, the plaintiffs pointed to what they felt were inconsistencies in the Commission’s purported preservation of communities of interest: the Commission kept intact a Chaldean community in one district and an LGBTQ community in another but split an Orthodox Jewish community between two districts and also split a Middle Eastern community between two others.<sup>173</sup> The court acknowledged that the plaintiffs had a point “[t]o some extent” but reasoned that “keeping some communities intact inevitably means separating others.”<sup>174</sup> The court then emphasized that the Commission has “broad discretion” under the state constitution to define and identify communities of interest and to make “tradeoffs” between keeping some together while splitting others.<sup>175</sup> And finding further support for the Commission’s decisions, the court also noted that the Commission had received relatively few public comments urging it to keep the Orthodox Jewish community intact and that the Commission largely *had* kept the Middle Eastern community intact.<sup>176</sup>

As to the fourth factor, the court noted that the plan the *plaintiffs* put forward did not even attempt to preserve the same communities of interest

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168. *Id.* at 1168 (quoting *Tennant v. Jefferson Cnty. Comm’n*, 567 U.S. 758, 760 (2012)).

169. *Id.* at 1168 (quoting *Karcher v. Daggett*, 462 U.S. 725, 741(1983)).

170. *Id.* at 1170.

171. *Id.* at 1168 (citing *Tennant*, 567 U.S. at 759 (allowing a deviation of 0.79%)).

172. *Id.*

173. *Id.* at 1169–70.

174. *Id.* at 1169.

175. *Id.*

176. *Id.*

it had criticized the Commission for not preserving.<sup>177</sup> The court also ruled out the other congressional plans the Commission considered as viable alternatives because each alternative plan contained *higher* deviations than the approved plan.<sup>178</sup> The court, therefore, found each factor to favor deference to the Commission's judgment to slightly deviate from absolute population equality.<sup>179</sup>

Under the last step of the analysis, the court found that the Commission was "very likely" to carry its burden that the population deviation was necessary to achieve its interest in preserving communities of interest.<sup>180</sup> The Commission contended that it relied on the public comment process to identify communities of interest throughout the state.<sup>181</sup> The plaintiffs challenged this assertion with respect to eight congressional districts.<sup>182</sup> To resolve this dispute, the court examined the 351 public comments that the Commission received for these districts and found that 298 comments supported the Commission's determination.<sup>183</sup> Based on this finding, the court determined that the "overwhelming weight of the record" supported the Commission's judgment that the slight deviation was necessary to achieve its goal of maintaining communities of interest.<sup>184</sup> The court, therefore, concluded that the plaintiffs were unlikely to succeed on the merits of their one-person, one-vote claim.<sup>185</sup>

The court turned to the remaining preliminary injunction factors and noted that because constitutional cases are typically decided on the likelihood of success factor, it is usually unnecessary to "dwell" on the

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177. *Id.* at 1169–70.

178. *Id.* at 1169.

179. *Id.* at 1168–70.

180. *Id.*

181. *Id.* (listing several of the communities of interest that the Commission had identified and sought to maintain with its congressional plan: "the rural and agricultural northern regions and Native American communities in District 1; the rural farming counties of Barry, Ionia, Montcalm, Gratiot, and Isabella in District 2; the economic I-96 corridor between Muskegon and Grand Rapids in District 3; the people who live in Battle Creek but work or shop in Kalamazoo in District 4; the communities along the southern border of Michigan, with all the unique cultural and economic interests of communities that border another state, in District 5; the white-collar workforce that resides in District 6; the 'tri-county area' of Clinton, Eaton, and Ingham Counties in District 7; the Midland County community of interest in District 8; the rural, agricultural communities in the 'thumb' of Michigan in District 9; the Chaldean and other cultural communities in District 10; the 'core townships' of Oakland County in District 11; the blue-collar workforce in Livonia, Detroit, Dearborn, and Southfield in District 12; and the 'Detroit-centered' communities in District 13").

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*



other factors.<sup>186</sup> But the court nevertheless found that because Michiganders had exercised their direct democracy power “to prescribe for their state government—rather than having their state government prescribe for them—the manner in which the lines for congressional districts shall be drawn,” the public interest supported allowing the 2022 election cycle to proceed with the redistricting plan the Commission approved under the voter-initiated rules.<sup>187</sup> The court then denied the plaintiffs’ motion for preliminary injunction.<sup>188</sup>

After the decision, the plaintiffs appealed directly to the U.S. Supreme Court.<sup>189</sup> The Court dismissed the appeal as moot on November 7, 2022—the day before the 2022 general election.<sup>190</sup> The plaintiffs subsequently dismissed their action on January 14, 2023.<sup>191</sup>

### 3. Partisan Fairness Challenge

The final challenge during the *Survey* period was *League of Women Voters of Michigan v. Independent Citizens Redistricting Commission*.<sup>192</sup> A coalition of voting and civil rights advocates filed the action in the Michigan Supreme Court.<sup>193</sup> The plaintiffs alleged that although the plan was projected to result in the Democratic Party winning a slight majority of seats in the House, several different statistical tests used to measure partisan fairness showed that the plan still gave a disproportionate advantage to the Republican party in violation of the state constitution.<sup>194</sup>

The court did not set the case for argument or order any additional briefing, though two third parties filed amicus briefs.<sup>195</sup> The court rejected

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186. *Id.* at 1170–71.

187. *Id.* at 1171.

188. *Id.*

189. *See* Banerian v. Benson, 143 S. Ct. 400 (2022) (dismissing the appeal as moot); *see also* 28 U.S.C. § 1253 (allowing parties in an action heard and determined by a three-judge panel to appeal directly to the U.S. Supreme Court).

190. *Banerian*, 143 S. Ct. 400 (2022).

191. *Banerian v. Benson*, Case No. 1:22-cv-00054, Stipulation of Voluntary Dismissal (W.D. Mich. Jan. 14, 2023).

192. *League of Women Voters of Mich. v. Indep. Citizens Redistricting Comm’n*, 509 Mich. 885, 971 N.W.2d 595 (2022).

193. *Id.*

194. *See id.*; *see also* Complaint at 16, *League of Women Voters*, 509 Mich. 885, 971 N.W.2d 595 (No. 164022).

195. Brief for Emerging American Majorities as Amicus Curiae Supporting Plaintiffs, *League of Women Voters*, 509 Mich. 885, 971 N.W.2d 595 (No. 164022); Brief for Secretary of State Jocelyn Benson as Amicus Curiae Regarding Election Administration Timeline and Map Implementation, *League of Women Voters*, 509 Mich. 885, 971 N.W.2d 595 (No. 164022) (taking no position on the merits but informing the court of relevant approaching deadlines).

the plaintiffs' action in another short, one-sentence order that explained: "the Court is not persuaded that it should grant the requested relief."<sup>196</sup> Although there was no majority opinion on the merits of the challenge, Justice Cavanagh filed a concurring opinion that Chief Justice McCormack joined,<sup>197</sup> while Justice Welch filed a dissenting opinion that Justice Bernstein joined,<sup>198</sup> revealing a rare split among the court's four Democratic-nominated justices.

In her concurring opinion, Justice Cavanagh gave two reasons why she believed the plaintiffs had not sustained their burden to demonstrate that the Commission's plan provided a disproportionate advantage to the Republican Party.<sup>199</sup> First, she emphasized the Commission's obligation under the Michigan Constitution to "respect the full list of prioritized criteria, including higher priority criteria such as communities of interest."<sup>200</sup> She credited the Commission's explanation that it had balanced the partisan fairness factor against other criteria, including its consideration of identified communities of interests, and explained that the plaintiffs did not rebut this explanation as a permissible choice.<sup>201</sup> Second, Justice Cavanagh indicated that she agreed with the plaintiffs that the Commission *could have* drawn a slightly fairer district plan but reasoned that the differences between the Commission's plan and the proposed alternative were so minimal that they were not legally significant.<sup>202</sup>

In her dissenting opinion, Justice Welch emphasized that she wanted the court to take more time to hear the case and to give further consideration to whether the Commission's map complied with the constitutional criteria.<sup>203</sup> She reasoned that because the case presented the court with its first opportunity to interpret several aspects of the newly adopted redistricting procedures, the court should have allowed the parties to further develop the record and their arguments.<sup>204</sup> She contended that more time would have allowed the court to determine relevant questions of first impression such as what amount of partisan advantage to a political party is "disproportionate," what statistical methods of measuring partisan fairness are acceptable, and how to balance the different redistricting criteria.<sup>205</sup> Justice Welch concluded, "[b]y failing to engage in a

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196. *League of Women Voters*, 509 Mich. at 885, 971 N.W.2d at 595–96.

197. *Id.* (Cavanagh, J., concurring).

198. *Id.* at 886, 971 N.W.2d at 596 (Welch, J., dissenting).

199. *Id.* at 885–86, 971 N.W.2d at 596 (Cavanagh, J., concurring).

200. *Id.* at 886, 971 N.W.2d at 596.

201. *Id.*

202. *Id.*

203. *Id.* at 887, 971 N.W.2d at 596 (Welch, J., dissenting).

204. *Id.*

205. *Id.* at 878–88, 971 N.W.2d at 596–98.

meaningful examination of what the law requires, the Court invites a watered-down approach that may ultimately frustrate the intentions of the more than 60% of Michigan voters who supported the prohibition of partisan gerrymandering.”<sup>206</sup>

Following these decisions, the 2022 election cycle went forward with the Commission’s adopted plans intact. The maps performed about as projected: the Democratic Party won a 7-6 advantage in the state’s congressional delegation (and nearly won an eighth seat in the 10th congressional district), a 56-54 advantage in the state house, and a 20-18 advantage in the state senate.<sup>207</sup> But with a Voting Rights Act challenge still pending in federal court and uncertainty as to whether the U.S. Supreme Court will upend the states’ congressional redistricting processes during its 2022–23 term in *Moore v. Harper*,<sup>208</sup> the Commission could find itself back to the drawing board—and back in court—before the end of the decade.

#### IV. CONCLUSION

Together, the cases from the *Survey* period show a bumpy inaugural redistricting cycle for Michigan’s Independent Citizens Redistricting Commission as it navigated an unexpected crisis with the delay of the census data and ironed out the extent of its confidential communications with its legal counsel. The end result, however, was a set of congressional and legislative maps that were drawn in view of the public, based largely on public feedback, and that have thus far withstood a variety of legal challenges in both federal and state court—a monumental change from how the redistricting process worked before and sharp contrast to how the redistricting process played out in some neighboring states.<sup>209</sup>

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206. *Id.* at 598.

207. See Dave Boucher, *Michigan Democrats Take Control of State House, Senate in Historic Power Shift*, DETROIT FREE PRESS (Nov. 9, 2022, 11:49 AM), <https://www.freep.com/story/news/politics/elections/2022/11/09/michigan-house-senate-democrats-election-results/69632658007/> [<https://perma.cc/7ESL-FJHL>].

208. See Eliza Sweren-Becker & Ethan Herenstein, *Moore v. Harper, Explained*, BRENNAN CTR. FOR JUST. (Aug. 4, 2022), <https://www.brennancenter.org/our-work/research-reports/moore-v-harper-explained> [<https://perma.cc/9VNQ-ZX2Y>].

209. See, e.g., Andy Chow, *From Constitutional Reform to Crisis, Ohio Redistricting Saga Nears Federal Intervention*, WOSU PUB. MEDIA (May 9, 2022, 5:03 PM), <https://news.wosu.org/politics-government/2022-05-09/from-constitutional-reform-to-crisis-ohio-redistricting-saga-nears-federal-intervention> [<https://perma.cc/7RWN-4UNM>] (summarizing the litigation over Ohio’s state legislative redistricting plan); Michael Wines, *Wisconsin Supreme Court Approves Republican-Drawn Legislative Maps*, N.Y. TIMES (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/us/wisconsin-districts-gerry>

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mander-supreme-court.html [<https://perma.cc/U6UX-CQAP>] (summarizing the litigation over Wisconsin's congressional redistricting plan).