Confidential and Privileged - do not disclose in response to FOIA or discovery requests.

Legal Considerations and Discussion of Justifications Re: Criteria

Dated: October 7, 2021

Michigan voters, in a purposeful and intentional way, granted the MICRC full authority to implement the redistricting process in accordance with the new constitutional amendment that includes ranked criteria to be followed in that ranked numerical priority order. Advocacy efforts for adherence to criteria that are obsolete or that disregard the plain language of the current Constitution shall be rejected. Now that the MICRC is in its compliance phase and moving into its final work, that nature of that work and the language, framing and context used to describe it deserve heightened sensitivity. Particularly given that the MICRC is reviewing its prior work and will need to clearly articulate why revisions are or are not being made. When drawing district maps, Commissioners may review the following considerations based on the ranked constitutional criteria.

1. Consider that districts shall be of equal population…and shall comply with the Voting Rights Act.

- **Congressional districts must be drawn to be "nearly equal as possible." "**One person, One vote" codifies the legal mandate that the population of each election district AND the population variance of ALL the districts (of the same body: state, county, city, etc.) combined must be so substantially equal as to not violate the principle of counting each person's vote equally with all others votes.
- **Legislative districts do not have the same requirement and may be "substantially equal" or drawn with some deviations from virtually equal population.** However, such deviations must be explained and justified as complying with legitimate policy considerations, such as compliance with the Voting Rights Act, to be constitutional.

Legally compliant explanations must include HOW equal population was considered and HOW did the commission consider VRA compliance, such as not dividing minority populations, not diluting minority voting strength, following racially polarized voting and election analysis, and including applicable Voting Rights Act-related communities of interest identified by citizen comments. The U.S. Supreme Court has held that population deviations can be justified by demonstrating a rational policy in making the choices that resulted in the deviation.

2. Consider that districts shall be geographically contiguous...

Be prepared to explain how contiguity was considered or evaluated and whether the district is contiguous because all of the lines that create it are connected. A district consisting of two or more unconnected areas is not contiguous.

3(a). Consider that districts shall reflect the state's diverse population.

Explain how you considered diversity or made adjustments to accommodate a diverse population present in an area. For example, diversity can include or involve people from a range of different social and ethnic backgrounds and of different genders, sexual orientations, races, religions, economic situations, etc.

3(b). Consider that districts shall reflect the state's communities of interest.

Explain and describe the relevant community(ies) of interest included in the district and the reasons for their inclusion. Please note your own research into why a particular community of interest was included or not included in your district. Evidence of shared interests should be demonstrated. If a COI coincides with race/ethnicity, it should not be the sole focus or "predominant factor" and compliance with the VRA is required.

4. Consider that districts shall not provide a disproportionate advantage to any political party using "acceptable measures of partisan fairness."

Explain and describe how this was achieved, whether through adjustments to district lines or acceptance of the testing results. Explain and describe your consideration of political fairness testing methodologies and identify those methodologies (i.e., seats/votes ratio, lopsided margins, mean-median difference and efficiency gap).

5. Consider that districts shall not favor or disfavor an incumbent elected official or a candidate.

Be prepared to explain and describe how this was achieved. Explain whether or not you knew the address/location of any incumbent state legislature or Congressional elected official or political candidates when creating the district. This can demonstrate both direct and circumstantial evidence of intent (or lack of intent) to favor nor disfavor incumbents. Generally, this criterion

represents an effort to ban partisan gerrymandering by rejecting influence of current elected officials or preservation of their seats.

6. Consider that districts shall reflect consideration of county, city, and township boundaries.

Explain and describe HOW you considered such political boundaries while complying with the Constitution's ranked order priorities. This may include adjustments to district lines to either include or exclude portions of the political subdivisions listed in the criteria while considering other criteria. The Commission could choose to note the number of boundary splits in a given plan.

7. Consider districts shall be reasonably compact.

Explain and describe HOW you considered compactness while complying with the Constitution's ranked order priorities. If you created a Voting Rights Act majority minority or minority plurality district, explain how your district is "reasonably compact." A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact according to the U.S. Supreme Court. Explain and describe your consideration of compactness measures and identify those scores. Note whether adjustments were made and, if so, why.

What is NOT an acceptable consideration or justification when drawing districts?

Below are some examples of considerations and justifications for drawing a district that are not acceptable based on the terms and criteria provided in the Michigan Constitution. Compliance with the constitutional criteria is critical to producing legally defensible maps.

⊗ **Example:** *"I drew this district because I think the shape of it is pretty!"*
Instead: Aesthetically pleasing districts is not one of the ranked criteria. Commissioners must utilize the constitutional criteria and use the ranked order when drawing district lines and providing justifications.

⊗ **Example:** *"I heard a lot of public comment that we should only draw straight lines."*
Instead: Public comment is critical for several criteria, like Communities of Interest, but some input may not comply with the constitutional criteria. Only use the constitutional criteria to justify how district lines are drawn. Public comments may not be legally dispositive or legally

compliant with state and federal laws, and those laws must be primarily relied upon when creating districts.

⊗ **Example:** *"I drew this district to make life easier for the election clerk."*
Instead: Consideration of election clerks is not a constitutional consideration for drawing districts. Use the constitutional criteria and consider the ranked order when drawing district lines and providing your justifications.

⊗ **Example:** *"I don't think there are people living there because the voter turnout is low in this area, and we should accommodate that."*
Instead: Do not speculate or guess facts in the absence of data particularly if the topic is not a consideration in redistricting. Only use the constitutional criteria to justify how district lines are drawn.

For the Michigan Independent Citizens Redistricting Commission (MICRC)

Voting Rights Act

By Bruce L. Adelson, MICRC Voting Rights Act Legal Counsel

October 14, 2021

CONFIDENTIAL – Attorney Client Privileged

The Voting Rights Act, also known as the VRA, was enacted by Congress in 1965. Section 2 of the VRA is a nationwide prohibition against voting practices and procedures (including redistricting plans and at-large election systems and voter registration procedures) that discriminate on the basis of race, color, or membership in a language minority group. Section 2 prohibits not only election-related practices that are intended to be racially discriminatory, but also those that are shown to have a racially discriminatory result.

The Voting Rights Act protects minority voters' opportunity to elect their candidates of choice through the analysis of election results, voting patterns, and racial block voting analysis, as Dr. Lisa Handley did for the Commission.

- **The VRA DOES NOT** require the creation of any majority minority districts.
- **The VRA DOES NOT** require that Michigan or any state have any majority minority districts.
- **The VRA DOES NOT** guarantee, require, or mandate that any state has a certain number of majority minority districts.

These VRA analyses inform redistricting commissions' decision making on the demographic composition of each district they draw to ensure minority voting rights are not weakened or damaged.

The United States Supreme Court[1] has been crystal clear that the Voting Rights Act neither mandates nor requires a numerical majority of voters in any district, anywhere. Instead, the Supreme Court states that the VRA only requires that a compact and politically cohesive minority group, for example, Black voters in Detroit, have the opportunity to elect their candidates of choice, **NOT** that these voters must live in majority Black districts. Creating majority-minority districts without appropriate, VRA recognized and required analyses is illegal and violates the US Constitution's 14th amendment as a racial gerrymander.

[1] *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Alabama Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

For the Michigan Independent Citizens Redistricting Commission (MICRC)

The History of Discrimination in the State of Michigan and its Influence on Voting

By Bruce L. Adelson, MICRC Voting Rights Act Legal Counsel[1]

CONFIDENTIAL – Attorney Client Privileged

This memorandum presents an introductory overview and summarizes various barriers faced by minority groups in Michigan regarding their voting rights and the overall history of discrimination in this state. This memorandum is not all inclusive and is provided as background information for redistricting.

Under the Voting Rights Act ("VRA"), there is a "permanent nationwide prohibition on voting practices that discriminate on the bases of race, color, or membership in a language minority group."[2] Section 2 of the VRA, specifically, is broadly construed. VRA §2 prohibits practices or standards that "result in citizens being denied equal access to the political process on account of race, color, or membership in a language minority group."[3]

[1] We gratefully thank and acknowledge the invaluable assistance of our subcontractor, Praneeta Govil (JD, MPH, Bar pending) for her research and writing in preparing this memorandum. We also gratefully acknowledge the historical sleuthing inspiration and acumen of Michael Adelson (Ursinus College '23, Zacharias Honors Scholar, Writing Fellow, Summer Fellow).

[2] DEPARTMENT OF JUSTICE, GUIDANCE UNDER SECTION 2 OF THE VOTING RIGHTS ACT, 52 U.S.C. 10301, FOR REDISTRICTING AND METHODS OF ELECTING GOVERNMENT BODIES (2021).

[3] *Id.*

Under *Thornburg v. Gingles,* which the U.S. Supreme Court considers "our seminal §2 vote-dilution case," there are three preconditions that need to be established to prove vote dilution in redistricting.[4] These preconditions generally require that (1) the minority group is large and compact enough to be a majority in a single-member district, (2) there is significant political cohesiveness within the minority group, and (3) the current majority group is able to vote as a bloc to usually defeat the current minority's preferred candidate.[5] If these preconditions are met, then a court will evaluate the alleged violation in a holistic manner incorporating certain factors called the Senate Factors.

The factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;

---

[4] *Id.*

[5] *Id.*

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;
8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[6]

The Senate Factors and the federal courts indicate that only one of these factors need exist for an electoral device or redistricting plan to be considered as discriminatory when all three *Gingles* preconditions are also satisfied. This list is not exhaustive, allowing courts to consider additional evidence at their discretion.[7]

A recent example of *Gingles* being applied in Michigan is the case of *United States of America v. Eastpointe*. In *Eastpointe*, the court found that the city's at large election system was potentially diluting the vote of Black citizens, thus running afoul of Section 2 of the VRA.[8] The court looked at the history of discrimination in Eastpointe extensively.[9] Aside from deliberating whether the three preconditions were met, the court also considered how the Black community in the area voted and whether the community was ever successful in electing their preferred

[6] *Id.*

[7] *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992), *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc), and Mulroy, Steven J., *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. (1998).

[8] *United States v. Eastpointe*, 378 F. Supp. 3d. 589 (2019).

[9] *See generally, Id.*

candidates.[10] Ultimately the court considered both the *Gingles* preconditions test and several of the Senate Factors in its decision.[11]

Pursuant to the VRA and *Gingles,* Dr. Lisa Handley conducted a racially polarized voting analysis for the Michigan Independent Citizens Redistricting Commission in which she concluded that racial bloc voting exists in Michigan.[12]Applying *Gingles* and the Senate factors, we have prepared this memorandum to address the history of discrimination in Michigan.

I. Slavery and Historic Discrimination in Michigan

Michigan is viewed as a Northern abolitionist state that was not affected by the Jim Crow laws seen in the deep South. However, some of Detroit's first families were slaveholders.[13] From 1760 to 1815, Indigenous people and Black people were enslaved and considered property in Detroit.[14] A 1782 census showed 78 male and 101 female slaves living in the Michigan Territory. [15]In 1805, only 15 African Americans lived in Detroit, but it is unknown how many were enslaved people. Many if not most of the enslaved people living in Michigan may have fled to British Canada after the Revolutionary War and the subsequent Treaty of Paris. The 1830 census reveals that 32 enslaved people lived in the Michigan Territory. Slavery persisted in Michigan but

---

[10] Id. at 589-594.

[11] *See generally*, *Id.*

[12] Michigan Independent Citizen Redistricting Commission, *Lisa Handley Presentation: Determining if a Redistricting Plan Complies with the Voting Rights Act* (September 2, 2021, https://www.michigan.gov/micrc/0,10083,7-418-106525---,00.html.

[13] Mandira Banerjee, *Detroit's Dark Secret: Slavery,* MICHIGAN TODAY (Feb. 19, 2018), https://michigantoday.umich.edu/2018/02/19/detroits-dark-secret-slavery/.

[14] *Id.*

[15] http://absolutemichigan.com/michigan/slavery-in-the-northwest-territory/

gradually declined until statehood was granted and slavery abolished in the new state on January 26, 1837.

Slavery in the Detroit area began under French control of the region as the fur trade flourished in the 18th century. Merchants wanted an inexpensive labor force for their burgeoning business and eventually "trading in the pelts of beavers and trading in the bodies of persons became contiguous endeavors in Detroit, forming an intersecting market in skins that takes on the cast of the macabre."[16] Slavery continued under subsequent British control of the Great Lakes. In the late 18th century, French and British settlers already living in the Michigan Territory when it was acquired by the United States were allowed to keep their slaves even though the federal government banned slavery in the unincorporated territory.[17]

After statehood, slavery's legacy remained. For example, the state's initial constitution prevented Black people from voting or serving on a jury, as was true in some other states in the 19th century.[18] The Michigan legislature banned *de jure* segregation after the Civil War, but Detroit did not follow the statewide call and instead determined that schools in the city would be segregated by race.[19]

During & after the 20th Century's Great Migration, many Black migrants to Michigan from the South faced intense racial discrimination in employment. Higher-paying jobs in the industrial

---

[16] *Id.*

[17] https://www.michiganradio.org/arts-culture/2017-12-08/detroits-forgotten-history-of-slavery-detailed-in-new-book)

[18] Chris Jaehnig, *African American Michigan: The Reconstruction Era,* THE DAILY MINING GAZETTE (May 9, 2020), https://www.mininggazette.com/news/features/2020/05/african-american-michigan-the-reconstruction-era/.

[19] *Id.*

sector were primarily held by White Detroiters, while Black Detroiters typically held lower-paying ones. This continued through the post-World War II era – Jobs in Detroit's police force, fire department, and other city departments were primarily held by whites. [20]

By the early 20th century, Detroit had become a stronghold of the Ku Klux Klan (KKK). In the 1920s, there reportedly were more Klansmen living in Michigan than in any state in the country. Roughly half of Michigan Klansmen lived in metro Detroit. [21] Even after the later dissolution of the KKK, a splinter vigilante group called the Black Legion continued to exist into the 1930s in Detroit. An estimated one third of the Black Legion's members (approximately 5,000-10,000 people) operated in Detroit and targeted the city's black population in the '30s.[22]

> "By the 1940s Detroit already had a long history of racial conflict. Race riots had occurred in 1863 and as recently as 1941. By the 1920s the city had become a stronghold of the Ku Klux Klan…. The industrial plants provided jobs but not housing…. As a result, the city's 200,000 black residents were cramped into 60 square blocks on the East Side and forced to live under deplorable sanitary conditions.
>
> In 1943 the National Association for the Advancement of Colored People held an emergency war conference in Detroit and accused the nation of its hypocritical commitment to personal freedoms abroad and discrimination and segregation at home."

On the evening of June 20, 1943, several racial incidents occurred on Belle Isle, including multiple fights between teenagers of both races. As violent confrontations continued into the next day, silence reigned over the city as 6,000 U.S. Army troops were stationed throughout Detroit in an ultimately successful effort to quell the violence. Twenty-five Black people and nine White people were killed in the violence that began on Belle Isle. The number injured approached 700 while the property damage, including looted merchandise, destroyed stores, and burned automobiles, totaled approximately $2 million.

---

[20] SUGRUE, THOMAS J., "*THE ORIGINS OF THE URBAN CRISIS : RACE AND INEQUALITY IN POSTWAR DETROIT* : PRINCETON, NJ, PRINCETON UNIVERSITY PRESS, 2005

[21] https://www.hourdetroit.com/community/the-dark-days-of-the-black-legion/,

What became known as the "12th Street Riot" occurred in 1967, initially as a confrontation between Black Detroiters and the largely White Detroit police force. In response, President Johnson deployed federal troops. The violence resulted in 43 dead, 467 injured, and more than 2,000 buildings destroyed. The "Riot" occurred mostly in Black communities. As a result, thousands of small businesses relocated out of Detroit and the affected area remained in a state of disrepair for decades. [23]

Aforementioned 20th century racial disparities in employment led to unequal housing opportunities in Detroit. Housing options available to Black Detroiters were extremely limited throughout most of the 20th century. Black Detroiters were often left with unsanitary and eventually unsafe areas as their few housing options. Banks and federal housing groups frequently denied black home-owners' loans, gave them unfairly inflated interest rates, and denied them the chance to improve their housing conditions. According to Author Thomas Sugrue, "you cannot underestimate the intensity [of] segregation in housing and the role that it played in dividing metropolitan Detroit by race." [24]

Detroit and its suburbs continued the segregation of public schools into the 1970s. On August 18th 1970, the NAACP filed a lawsuit against Michigan state officials and the governor, accusing them of maintaining racial segregation in education. Part of the lawsuit also alleged a direct relationship between unfair housing practices and educational segregation. The composition

---

[23] Sidney Fine, *Violence in the Model City: The Cavanaugh Administration, Race Relations, and the Detroit Riot of 1967* (1989)

[24] SUGRUE, THOMAS J., "*THE ORIGINS OF THE URBAN CRISIS : RACE AND INEQUALITY IN POSTWAR DETROIT* : PRINCETON, NJ, PRINCETON UNIVERSITY PRESS, 2005

of students in schools adhered closely to segregated neighborhoods. The U.S. Supreme Court eventually ruled 5-4 against the NAACP's allegations of racial discrimination in education. [25]

Throughout the early to late 20th century, Detroit remained highly segregated by race.[26] In addition, relators often did not show houses in predominantly White neighborhoods to Black people while educational and financial racial discrimination and racially motivated violence persisted.[27]

Grand Rapids was another area of high racial tension and inequality during Michigan's Jim Crow era.[28] A small but prominent middle class African-American community made its home in Grand Rapids after World War I. However, Black people in the city were denied equal rights of access to and use of many public places. Such discriminatory practices were known nationally as "Jim Crow." Despite state laws against racial discrimination, Grand Rapids decided to go its own way and implemented local *de jure* and *de facto* racial discrimination.[29] Black people came to Grand Rapids wanting equality but instead experienced racism.[30] In one telling event, KKK members marched through the streets of Grand Rapids without wearing their hoods on July 4, 1925

---

[25] *Milliken v. Bradley*: The Northern Battle for Desegregation: The State Bar of Michigan: http://www.michbar.org/file/journal/pdf/pdf4article1911.pdf

[26] *Historian: Divide Between "White Detroit" and "Black Detroit" Led to City's 1967 Rebellion,* MICHIGAN TODAY (July 17, 2017), https://www.michiganradio.org/families-community/2017-07-17/historian-divide-between-white-detroit-and-black-detroit-led-to-citys-1967-rebellion.

[27] *Id.*

[28] Chris Jaehnig, *African American Michigan: The People v. Jim Crow,* THE DAILY MINING GAZETTE (May 16, 2020), https://www.mininggazette.com/news/features/2020/05/african-american-michigan-the-people-v-jim-crow/.

[29] *Id.*

[30] *A History of the Civil Rights Movement in Grand Rapids, Michigan* (last visited Sept. 26, 2020), https://www.arcgis.com/apps/MapJournal/index.html?appid=0642f76537354f3982b58f09ed514932.

in a show of defiance and demonstration of their local power.[31] In Grand Rapids, business owners refused to serve Black patrons. Even though the city was known for furniture manufacturing, Black people were routinely denied these skilled-labor jobs.[32] Instead, they often worked lower paid, service jobs like busboy or other waitstaff.[33] Black citizens tried to counteract the discrimination, ultimately without full success, by forming the Grand Rapids Study Club, which focused on education, social and moral support, and a safe space for women of color.[34]

An 1885 Michigan statute made "discrimination in public places illegal," but it was not enforced until 1925 when Emmett Bolden asked for seating on the main floor of Keith's Theatre in Grand Rapids.[35] The theater refused his seating request, instead directing him to its segregated balcony. Keith's Theater was blatant in its racism, with its balcony where the theater segregated Black people known as "N***** Heavens."[36] Mr. Bolden sued the theater for discrimination. The Michigan Supreme Court overturned a lower court decision in favor of Keith's Theatre. Chief Justice Nelson Sharpe ruled that "the public safety and general welfare of our people demand that, when the public are invited to attend places of public accommodation, amusement, and recreation, there shall be no discrimination among those permitted to enter because of race, creed, or color. (The Civil Rights Statute) is bottomed upon the broad ground of the equality of all (persons) before the law." Even though the state Supreme Court found that the theater's behavior was against the

---

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Supra* note 22.

[36] *Id.*

law, the court nevertheless limited how and when the 1885 non-discrimination statute would apply.[37]

There was racial discrimination in affordable housing, education, and politics as well.38 For example, in 1908, the Grand Rapids Medical College began refusing re-admittance of students of color it had once accepted. A lawsuit followed and the court ruled in favor of the students: "All citizens according to the court's findings are entitled to the privilege of education… and the drawing of the color line is an unjust discrimination." After the decision, several white students protested and walked out of class, declaiming "This is a white man's school," and "Lynch 'em if they don't keep out." White students placed an effigy of an African American in the school's lobby and paraded the effigy through the streets. In response, the college barred the two Black students who had sued the school. The college claimed that as a private institution, they could "discriminate as they pleased." The ruling in favor of the Black students was eventually overturned by the state Supreme Court in favor of the college.[39]

While the state Supreme Court made progress towards *de jure* racial equality in Michigan, the court still limited the non-discrimination statute to governmental discrimination only and upheld racial covenants in housing and other matters the court deemed to be private.[40]

In another pivotal case, *Meisner*, the defendant bought the Bois Blanc Island and chartered a boat from Detroit to the island for his patrons to enjoy recreational activities.[41] However, the defendant, a private citizen, was allowed to deny patronage, including denials based on race, at his

---

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Jim Crow Laws: Massachusetts, Michigan, Minnesota and Mississippi,* AMERICANS ALL, https://americansall.org/legacy-story-group/jim-crow-laws-massachusetts-michigan-minnesota-and-mississippi.

[41] Case Law Access Project, *Meisner v. Detroit, Belle Isle & Windsor Ferry Co.,* 154 Mich. 545 (1908), https://cite.case.law/mich/154/545/.

sole discretion.[42] The plaintiff was denied passage on the boat on multiple occasions because he had previously "created [unspecific] disturbances."[43] Ultimately, the Michigan Supreme Court found that, "theaters, circuses, racetracks, private parks, and the like were private enterprises," and could engage in discriminatory activity.[44]

After the Keith's Theater case, the state Supreme Court pivoted to holding that discrimination in public places was prohibited.[45] In *Bolden*, the state Supreme Court found that the state's civil rights statute §15570 not only applied to criminal charges explicitly stated in the statute, but also allowed individuals to bring civil actions against a violator.[46] The case helped to end "customary segregation" or *de facto* segregation in Michigan.[47]

In terms of voting, Indigenous people were afforded the right to vote in Michigan with the passage of the Snyder Act in 1924.[48] In 1867 Michigan legislators intended to give Black people the right to vote. However, although the 1867 constitutional convention supported Black suffrage, Michigan voters rejected such suffrage changes to the state constitution.[49] A majority at the convention decided not to make Black suffrage its own separate provision, a decision which

---

[42] *Id.*

[43] *Id.*

[44] *Supra* note 22.

[45] *Id.*

[46] *Bolden v. Operating Corporation,* 239 Mich. 318, 323 (1927).

[47] *Supra* note 22.

[48] *Voting Rights for Native Americans,* LIBRARY OF CONGRESS, https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans/#:~:text=Nast.,rights%20granted%20by%20this%20amendment.

[49] *Supra* note 15.

contributed to the defeat of voting rights for Black Michiganders.[50] It would not be until 1869 that Black people would have the right to vote in Michigan.[51]

Today, Michigan is experiencing an increase in incidents of intolerance, ranking in the top 20 of all 50 states for Asian American and Pacific Islander (AAPI) hate incidents.[52] Nationally, there has been a recent rise in anti-Asian sentiment, specifically against Chinese people due in part to China being blamed for the Coronavirus-19 pandemic.[53] Further, there has been a general upward trend in racial harassment and White Supremacist activity in the state.[54] In 2019, the FBI reported 434 hate crimes in Michigan with 313 of the crimes being racially motivated.[55]

II. Discriminatory Housing Practices and Voting Impacts

A. Racially Restrictive Covenants Survive Though They are Legally Unenforceable

Racially restrictive covenants, prohibiting home sales to Black people for example, though illegal, still influence housing patterns. Indeed, in a series of court cases from 1925[56] through 1963, the Michigan Supreme Court held that "racial covenants" were not illegal under Michigan or federal civil rights laws. While the court ruled in favor of Black people who were denied access to

---

[50] *Id.*

[51] *Id.*

[52] Russell Jeung et. al, *Stop AAPI Hate National Report*, (March 31, 2021), https://stopaapihate.org/wp-content/uploads/2021/05/Stop-AAPI-Hate-Report-National-210506.pdf.

[53] Malachi Barrett, *Racial Harassment, White Supremacist Propaganda on the Rise in Michigan*, MICHIGAN LIVE (May 7, 2021), https://www.mlive.com/politics/2021/05/racial-harassment-white-supremacist-propaganda-on-the-rise-in-michigan.html.

[54] *Id.*

[55] *Id.*

[56] *Parmalee v. Morris–Michigan*, 1925 (188 N.W. 330).

theaters and other public accommodations, the court repeatedly made clear that it would not give civil rights precedence over private property rights, until the court reversed itself in 1963 in the case of *McKibbin v. Corporation & Securities Commission*, (119 N.W.2d 557, 1963).

Although such covenants are legally unenforceable today, their lingering presence in deeds can still result in segregation.[57] For example, many houses in Ann Arbor suburbs still have racially restrictive covenants in their deeds.[58] These covenants often state that "no part of such land shall be occupied by persons not of the Caucasian race except as guests or servants," and are usually found under the homeowner obligations detailed in closing documents.[59] When Professor Michael Steinberg bought his house in the 1980s, he also had this racially restrictive covenant and tried to have it removed but was told that the removal process would be long and that it "would not be worth it."[60]

These covenants have an impact on housing segregation as a stark reminder of pervasive, historical housing discrimination. For example, according to Kiera O'Connor, who is helping develop community education programs around these covenants:

> You know you're buying this wonderful house and you're so excited…and then you see this [covenant] and you just don't really feel welcome in the community. And it's just, it's really just imagining how uncomfortable that would be. And also,

---

[57] Shannon Stocking, *U-M Research Raises Awareness of Racially Restrictive Covenants in Ann Arbor Housing,* THE MICHIGAN DAILY (2021), https://www.michigandaily.com/ann-arbor/u-m-professors-reveal-racially-restrictive-covenants-ann-arbor-housing/.

[58] *Id.*

[59] *Id.*

[60] *Id.*

> these restrictive covenants have kind of created Ypsilanti in a way, because they drove people of color out of Ann Arbor.[61]

B. Redlining Still Affects Community Demographics

Redlining is the historical practice of denying Black people low interest loans and mortgages that are routinely granted to White people based on where they lived.[62] The practice made it inordinately difficult or practically impossible to have home ownership in communities where much of the population was Black.[63] Though the practice is now illegal, areas where redlining occurred remain highly segregated today.[64] Redlining has led to disparities in wealth among Black and White Americans.[65] Data and studies reveal that people of color are still denied mortgages that are routinely given to White people in similar circumstances.[66] The legacy of redlining, residential, and housing discrimination continue today.

> The wall in Watson's backyard was built by white real estate developers who struggled to secure financing for their white neighborhood until they cut it off from a Black one. It is one of a number of segregation walls built in the mid-20th century for this purpose and one of a few still standing.

---

[61] *Id.*

[62] *History of Housing Discrimination Against African Americans in Detroit* (last visited Sept. 26, 2021),

https://www.naacpldf.org/files/our-work/Detroit%20Housing%20Discrimination.pdf.

[63] Kelsey Yandura, *Redlining was Banned Over 50 Years Ago. It Still Makes Voting Difficult for Black Americans Today*, SUPERMAJORITY NEWS (Oct. 6, 2020), https://supermajority.com/2020/10/redlining-was-banned-over-50-years-ago-it-still-makes-voting-difficult-for-black-americans-today/.

[64] *Id.*

[65] Andre Perry and David Harshbarger, *America's Formally Redlined Neighborhoods Have Changed, and So Must Solutions to Rectify Them,* BROOKINGS (Oct. 14, 2019), https://www.brookings.edu/research/americas-formerly-redlines-areas-changed-so-must-solutions/.

[66] Lindsey Smith et. al., *Data Analysis: "Modern-Day Redlining" Happening in Detroit and Lansing,* NPR (Feb. 15, 2018), https://www.michiganradio.org/news/2018-02-15/data-analysis-modern-day-redlining-happening-in-detroit-and-lansing.

> The divider — called the "Birwood Wall," the "Eight Mile Wall" or the "Wailing Wall" — can't be blamed for inventing segregation. But the barrier, and the policies that led to its existence, would have far-reaching repercussions for the people, both Black and white, who lived in its shadow. [67]
>
> With the sale of a parcel of land to Grosse Pointe Park, that city and the city of Detroit are working out a deal to remove a physical barrier that separates the two cities.
>
> The barrier at the intersection of Kercheval Ave. and Alter Road is symbolic according to Detroit and removing it would end long-simmering racial tensions between the wealthier and majority white city of Grosse Pointe Park and majority black Detroit.[68]

In addition to the consequences of redlining, in Detroit, unlawful foreclosures have arisen as its ostensible successor.[69] Detroit has one of the "highest rates of property tax foreclosures in the nation."[70] In 2010, property tax assessments were 10 times higher than the legal limit and this practice is disproportionately applied when assessing lower-valued homes.[71] Often foreclosed houses and properties end up being sold to White-owned corporations or White families.[72]

---

[67] Built to keep Black from White: NBC News: https://www.nbcnews.com/specials/detroit-segregation-wall/

And see:

[68] WXYZ, 2019: HTTPS://WWW.WXYZ.COM/NEWS/DETROIT-IS-DEMANDING-GROSSE-POINTE-PARK-REMOVE-PHYSICAL-BARRIER-WITH-SALE-OF-LAND AND SEE: 'DETROITERS STAY OUT': RACIAL BLOCKADES DIVIDE A CITY AND ITS SURBURBS: THE GUARDIAN: HTTPS://WWW.THEGUARDIAN.COM/US-NEWS/2015/FEB/03/DETROIT-APARTHEID-CITY-SURBURBS-GROSSE-POINTE

[69] Steven Shelton, *How Redlining Produced Poverty in Detroit,* TELEGRAM NEWSPAPER (Sept. 26, 2019), https://www.telegramnews.net/story/2019/09/26/news/how-redlining-produced-poverty-in-detroit/750.html.

[70] *Id.*

[71] *Id.*

[72] *Id.*

The 2020 census shows movement of Black people from Detroit to suburbs like Eastpointe.[73] The 2020 census further reveals that 25% of children in Eastpointe are White but only 13% attend the public school in their district.[74] There is also a misconception that such flight leads to a reduction in property value, which can then motivate others to leave, but the property value in areas that have diversified have remained stable.[75]

C. Disparities and Poverty Can Adversely Affect Voting

Generally, those with lower socioeconomic status tend to vote less frequently.[76] Owning property in the United States is one of the primary ways to accumulate wealth such that denying property ownership can continue the cycle of poverty.[77] Banks and other lenders may engage in the practice of reverse redlining.[78] Reverse redlining is defined as "targeting residents within certain geographic boundaries, often based on income, race, or ethnicity, and giving those targeted borrowers credit on unfair terms."[79] [internal quotes omitted]. Such behavior was seen in Detroit

---

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Supra* note 7 at 591.

[77] Caroline LLanes, *Detroit Ranked as One of the Most Segregated Cities in the Country,* MICHIGAN RADIO NPR (June 21, 2021), https://www.michiganradio.org/post/detroit-ranked-one-most-segregated-cities-country.

[78] Khristopher J. Brooks, *Redlining's Legacy: Maps are Gone, but the Problem Hasn't Disappeared*, CBS NEWS (June 12, 2020), https://www.cbsnews.com/news/redlining-what-is-history-mike-bloomberg-comments/.

[79] Asma Husain, *Reverse Redlining and the Destruction of Minority Wealth,* MICH. J. L. & RACE (Nov. 2, 2016), https://mjrl.org/2016/11/02/reverse-redlining-and-the-destruction-of-minority-wealth/.

prior to the 2008 housing crash. Commentators and experts opine that the city has yet to recover from these lending practices.[80]

The persistent segregation that remains today due in large part to redlining results in lower local government resources for voting.[81] Redlining has led to disparities in wealth among Black and White Americans.[82] Places that have larger communities of color and/or have lower income generally experience longer polling wait times during elections.[83] Around 90% of voters of color had increased vote times compared to their White counterparts.[84]

Voting in elections can be expensive for some. Voting requires time, skills, information, a certain level of health, and access to transportation, among others. Thus, even getting to the polling place might be difficult for those with lower income.[85] In Detroit, about one-third of people living in the city do not have a car.[86] Many Detroiters have expressed concerns about reliable public transportation to polling locations.[87] Further, the state Supreme Court recently held that

---

[80] *Supra* note 87.

[81] *Supra* note 63.

[82] *Supra* note 65.

[83] Justine Coleman, *Minority, Low-Income Districts Saw Longer Wait Times to Vote in 2018: Study,* The Hill (Nov. 4, 2019), https://thehill.com/blogs/blog-briefing-room/news/468943-minority-low-income-districts-saw-longer-wait-times-to-vote-in.

[84] *Id.*

[85] Matt Stevens, *Poorer Americans Have Much Lower Voting Rates in National Elections than the Nonpoor, A Study Finds*, NEW YORK TIMES (Aug. 11, 2020), https://www.nytimes.com/2020/08/11/us/politics/poorer-americans-have-much-lower-voting-rates-in-national-elections-than-the-nonpoor-a-study-finds.html.

[86] Monica Williams, *Need a Ride to the Polls? Amid a Court Ban, Detroiters Giving Free Lifts,* BRIDGE DETROIT (Oct. 28, 2020), https://www.bridgedetroit.com/need-a-ride-to-the-polls-amid-a-court-ban-detroiters-giving-free-lifts/.

[87] *Id.*

ridesharing services like Lyft or Uber cannot provide a discounted rate to transport people to polling places, thus reducing public transportation options to facilitate voting.[88]

D. Housing and the Coronavirus-19 Pandemic's Disparate Impacts

Segregation in housing and income inequality have played a role in the rates of coronavirus cases among minority populations.[89] Such disparities are especially apparent in metropolitan areas. Cities where Black and Hispanic populations are more segregated from the White population had higher rates of death due to COVID.[90] Coronavirus rates can also be impacted by implicit racial bias in healthcare.[91] Michigan implemented a coronavirus task force on racial disparities and the resultant report found that the rate of cases of the virus among the Black population was 40% higher than among the White population.[92]

The rates of death due to the coronavirus are three times higher among the Black population in comparison to the White population in Michigan.[93] Michigan has an above average mortality

---

[88] *Id.*

[89] Jared Wadley, *Segregation, Income Disparity Fueled High COVID-19 Numbers,* MICHIGAN NEWS Feb. 18, 2021), https://news.umich.edu/segregation-income-disparity-fueled-high-covid-19-numbers/.

[90] *Id.*

[91] *Id.*

[92] Michigan Department of Health and Human Services, *Michigan Coronavirus Racial Disparities Task Force Interim Report,* 4 *(*Nov. 2020), https://www.michigan.gov/documents/coronavirus/Interim_Report_Final_719168_7.pdf.

[93] *Id.*

rate for Black Americans due to the virus.[94] COVID case rates have also been higher among the state's Hispanic population at 70% compared to the White population.[95]

III . Michigan Today

Detroit remains the most segregated city in the United States with Detroit and the surrounding areas of Warren and Livonia being the fourth most segregated metropolitan area in the United States.[96] Detroit and other similarly situated places, such as Flint, have also historically experienced disinvestment.[97]

As the auto industry in Detroit grew through the early to mid-20th century, many Black Americans who lived in the city experienced income growth that enabled them to move into the majority White, middle-class, suburban neighborhoods.[98] However, many White Americans in those neighborhoods were staunchly against this change.[99] For instance, Grosse Pointe had a point system in the 1950s that measured how "ethnic" a potential homeowner was along with a ban on selling homes to Black and Jewish people.[100] Both Dearborn and Warren are areas where Black

---

[94] Rashawn Ray et. al., *Examining and Addressing COVID-19 Racial Disparities in Detroit,* BROOKINGS (Mar. 2, 2021), https://www.brookings.edu/research/examining-and-addressing-covid-19-racial-disparities-in-detroit/.

[95] *Supra* note 106 at 5.

[96] *Supra* note 86.

[97] *Id.*

[98] Gordon Trowbridge and Oralandar Brand-Williams, *Cost of Segregation: Policies of Exclusion* Created Boundaries Between Black, White Suburbs, DETROIT NEWS (Apr. 15, 2020), https://www.detroitnews.com/story/news/special-reports/2020/04/15/segregation-policies-create-boundaries-between-white-black-suburbs/5142654002/.

[99] *Id.*

[100] *Id.*

people have historically been denied housing.[101] One of Dearborn's past mayors, Orville Hubbard, aimed to keep Dearborn "clean" and made it clear that "[Black people] can't get in here."[102] However, a street and a senior center are named after Orville Hubbard, the city made his birthday a holiday, and there was a statute of him in front of City Hall until its removal in June 2020.[103]

A. Michigan's Emergency Manager Laws and Their Impact on Voting

Michigan's Emergency Manager Law, Public Act 436 allows the state government to replace all locally elected officials in cities and school boards where there is a finding that the area is financially distressed.[104] In such situations, the community affected does not have the ability to elect their local representatives.[105] The electoral power instead goes to state-appointed "emergency managers" who have historically been appointed more frequently in communities of color.[106] Such managers had effective political control over Detroit, Flint, Highland Park, Benton Harbor, and

---

[101] *Id.* and Niraj Warikoo, *Statue of Former Dearborn Mayor Orville Hubbard Taken Down,* DETROIT FREE PRESS (June 5, 2020), https://www.freep.com/story/news/local/michigan/wayne/2020/06/05/statue-dearborn-mayor-orville-hubbard-removed/3161044001/.

[102] *Supra* note 118.

[103] *Id.*

[104] *Michigan Residents Ask Supreme Court to Review Law that Led to Flint Water Crisis,* CENTER FOR CONSTITUTIONAL RIGHTS (March 31, 2017), https://ccrjustice.org/home/press-center/press-releases/michigan-residents-ask-supreme-court-review-law-led-flint-water.

[105] *Id.*

[106] *Id.*

Pontiac for 18 years.[107] These cities each have a predominately Black population.[108] In 2018, Emergency Managers were removed from those cities and school districts.[109]

The Flint Water Crisis resulted from a cost cutting measure taken by the emergency manager and against the advice of the EPA in 2014.[110] Because the water was now being drawn from the Flint River, which is the waste disposal site for local industries, rather than from Detroit's treated water plant, it has high levels of lead, legionnaires disease bacteria, and total trihalomethanes, which are cancer-causing chemicals.[111] The lead levels are particularly harmful to children and the health effects from consuming the water are long lasting.[112]

Studies have shown, generally, that those who are chronically sick are less likely to vote.[113] It is unclear what the exact relationship is between health and voting but "people who had poor self-rated health, no insurance, disabilities, and less emotional support were also less likely to vote

---

[107] Paul Egan, *Michigan Without State-Appointed Emergency Managers for First Time in 18 Years*, DETROIT FREE PRESS (June 27, 2018), https://www.freep.com/story/news/local/michigan/2018/06/27/michigan-without-emergency-managers-first-time-18-years/737821002/.

[108] Julie Mack, *See List of Michigan Cities with Most African American Residents, and Geographic Shifts Since 1970*, MICHIGAN LIVE (June 23, 2020), https://www.mlive.com/public-interest/2020/06/see-list-of-michigan-cities-with-most-african-american-residents-and-geographic-shifts-since-1970.html.

[109] *Supra* note 138.

[110] ACLU 2016 IMPACT REPORT, https://www.aclu.org/sites/default/files/field_document/2016_impact_report.pdf.

[111] Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NRDC (Nov. 8, 2018), https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know.

[112] *Id.*

[113] Chloe Reichel, *How Health Affects Voter Turnout: A Research Roundup*, JOURNALIST'S RESOURCE (Oct. 29, 2018), https://journalistsresource.org/politics-and-government/voter-turnout-health-research/.

than the general population."[114] Experts have concluded that the likelihood of voting can be reduced when an individual suffers from chronic, debilitating illness. [115]

B. Educational Disparities in Michigan

There are significant barriers faced by Indigenous families and their children. In Michigan, there are 12 federally recognized tribes and four state recognized tribes, which when taken together means that there are about 100,000 Indigenous people living in Michigan.[116] Thus, Michigan ranks among the top ten states with the largest Indigenous populations.[117]

In exit poll surveys, Indigenous people are often not recognized as a distinct group and are instead within the catch all group of "others."[118] Many are also stopped from voting due to the address listed on their ID because they are likely to have a P.O box listed if they live on a reservation.[119] Poll workers are not given clear instructions on the various forms of a valid address and because of this, many Indigenous people can be turned away from voting.[120] The polling places that normally serve Indigenous people can be far away from reservations, can require

---

[114] *Id.*

[115] *Id.*

[116] Meghanlata Gupta, *Debunking 10 Misconceptions About Michigan's' Native Americans*, BRIDGE MICHIGAN (June 24, 2020), https://www.bridgemi.com/guest-commentary/opinion-debunking-10-misconceptions-about-michigans-native-americans.

[117] *Id.*

[118] *Often Overlooked Native American Voters Poised to Become Powerful Voting Bloc in Michigan*, MICHIGAN RADIO NPR (Nov. 11, 2020), https://www.michiganradio.org/post/often-overlooked-native-american-voters-poised-become-powerful-voting-bloc-michigan.

[119] *Id.*

[120] *Id.*

traversing inadequate roads, and typically lack funding and equipment.[121] Even registering to vote can be challenging because many reservations do not have adequate broadband access, thus making it difficult to access the internet.[122]

There is also a clear divergence in the percentages of bachelor's degrees earned by Indigenous people, African Americans, and Hispanic individuals in Michigan when compared to Caucasian and Asian individuals. In the total Michigan population, only 14% of Indigenous people have their bachelor's degree; 18% of Black people have their bachelor's degree; and 20% of Hispanic people have their Bachelor's degree.[123] These percentages are quite low when compared to the percentages of Bachelor's degrees held by White people, 31%, and Asians, 66%.[124]

There are disparities in resources available to lower income, urban public schools, many of which are predominantly Black.[125] This is partially because funding for schools does not consider the additional costs associated with teaching in low-income communities.[126] On average,

---

[121] Native American Rights Fund, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*(2020), https://www.narf.org/wordpress/wp-content/uploads/2020/05/NARF_2020FieldHearingReport_SummaryDocument.pdf and Native American Rights Fund, *Barriers to Casting a Ballot* (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_ballot_summary.pdf.

[122] Native American Rights Fund, *Vote By Mail in Native American Communities* (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_votebymail_summary.pdf.

[123] Alex Rossman, *Michigan Has Stark Racial Disparities in Educational Attainment, Ranks Third Worst in Nation for Number of Bachelor Degrees Earned By Black Students*, MICHIGAN LEAGUE FOR PUBLIC POLICY (May, 29, 2020), https://mlpp.org/michigan-has-stark-racial-disparities-in-educational-attainment-ranks-third-worst-in-nation-for-number-of-bachelor-degrees-earned-by-black-students/.

[124] *Id.*

[125] Peter Ruark, *Expanding the Dream: Helping Michigan Reach Racial Equity in Bachelor's Degree Completion,* MICHIGAN LEAGUE FOR PUBLIC POLICY (May 29, 2020), https://mlpp.org/expanding-the-dream-helping-michigan-reach-racial-equity-in-bachelors-degree-completion/.

[126] *Id.*

providing education to a grade school child costs around $9,590 annually but these costs can be higher for students who live in poverty.[127] Schools located in wealthier areas can buffer their expenses with revenue from property taxes in the area.[128] Low-income schools do not have this buffer.[129] Teacher turnover in low-income schools or schools with larger populations of color is high.[130] It is common for a low-income school to train a teacher and for that teacher to take a job at a higher-income school that could offer a higher salary.[131] There are also issues of low literacy rates in low-income schools especially those located in communities of color.[132] In Muskegon Heights, for example, only 6% of students were proficient in English as of 2018.[133]

Black people may have relatively lower rates of bachelor's degrees due to poverty.[134] Michigan has high college tuition costs, and the amount of financial aid has not kept pace with increases in tuition.[135] Simply put, college education is expensive. Over the years, Michigan state government grants on average approximately $5,466 in student aid to White students while

---

[127] Michigan Association of School Boards, *Cost of Educating a Child* (last visited Sept. 26, 2021), https://www.masb.org/SFRC.

[128] Lily Altavena, *Report: High Poverty Districts Bear the Brunt of the Teacher Turnover in Michigan,* DETROIT FREE PRESS (May 18, 2021), https://www.freep.com/story/news/education/2021/05/18/edtrust-report-teacher-turnover/5128745001/.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Melissa Frick, *High-Poverty Michigan School Districts Awarded $3M to Help Improve Reading, Writing Skills,* MLIVE (Mar. 10, 2021), https://www.mlive.com/news/2021/03/high-poverty-michigan-school-districts-awarded-3m-to-help-improve-reading-writing-skills.html.

[133] *Id.*

[134] *Supra* note 163.

[135] *Id.*

granting about $4,461 in student aid to students of color.[136] The total average of student aid provided in Michigan is the 12th lowest in the nation.[137] In 2018, Michigan used 4.1% of its total budget on higher education, which is significantly lower than the national average of 10.1%.[138]

The disparities in higher education attainment also vary by location. Cities that have a predominantly Black population have even lower levels of Bachelor's degrees.[139] Places like Benton Harbor, Muskegon, and Saginaw can have as few as 10% of residents with Bachelor's degrees.[140] Generally, Michigan is found to be the third worst in the nation for its percentage of Bachelor's degrees earned by Black students in comparison to the total Black population in Michigan.[141] Specifically, only 6.8% of Black students in the state earned a Bachelor's degree, which is less than the national average of 17.1%.[142]

IV. Voting in Michigan: VRA Section 5 Coverage and Language Barriers

In 1976, the U.S. Attorney General and Census Director added Michigan to the list of only 14 states, and the only Midwestern State, to be covered by Section 5 of the Voting Rights Act, which required advance approval or preclearance from the Department of Justice or the U.S. District Court for the District of Columbia before any "change affecting voting" could be

---

[136] Allison Donahue, *Study: Low-income, Students of Color Squeezed in Michigan's College Affordability Crisis,* MICHIGAN ADVANCE (Sept. 7, 2019), https://michiganadvance.com/2019/09/07/study-low-income-students-of-color-squeezed-in-michigans-college-affordability-crisis/.

[137] *Id.*

[138] *Id.*

[139] *Supra* note 160.

[140] *Id.*

[141] *Id.*

[142][142] *Id.*

implemented. In 2007, the Department of Justice used Section 5 to prevent the State of Michigan from closing a Secretary of State branch office in Buena Vista Township, deciding that the State could not prove that the closure did not discriminate against minorities and could not prove that the closure "neither has the purpose nor will have the effect of effect of denying or abridging the right to vote on account of race."[143]

Michigan's Section 5 coverage applied to Clyde Township in Allegan County and Buena Vista Township in Saginaw County as a result of the townships not providing election materials in Spanish pursuant to the Voting Rights Act. [144], [145]

In 2020, the Secretary of State for Michigan started the Language Access Task Force that aimed to translate voter information into various languages.[146] The voter information translated is on the state government's website, however, this translation effort does not include absentee or in-

[143] December 26, 2007 Section 5 objection letter from DOJ to State of Michigan: https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_071226.pdf

[144] FEDERAL REGISTER, VOL. 41, NO. 158— FRIDAY, AUGUST 13, 1976

[145] On June 25, 2013, the United States Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Voting Rights Act, Shelby County v. Holder, 133 S. Ct. 2612 (2013). The Supreme Court did not rule on the constitutionality of Section 5 itself. The effect of the Shelby County decision is that the jurisdictions identified by the coverage formula in Section 4(b) no longer need to seek preclearance for the new voting changes, unless they are covered by a separate court order entered under Section 3(c) of the Voting Rights Act. (USDOJ)

[146] Malak Silmi, *Michigan Secretary of State Rolls Out Voter Information in 10 Languages,* DETROIT FREE PRESS (Oct. 10, 2020), https://www.freep.com/story/news/politics/elections/2020/10/10/michigan-voter-information-translations-arabic-bengali-korean-spanish-tagalog/5916704002/. The languages now provided are Arabic, Bengali, Burmese, Hindi, Korean, Mandarin, Spanish, Tagalog, Thai, and Urdu. *Id.*

person ballots.[147] About 10% of Detroiters speak a different language than English at home and Hamtramck has around 67% of individuals speaking a different language at home.[148]

About 38.1% of individuals in Michigan who were born outside the United State are Limited English Proficient ("LEP"), among the highest rates in the United States, while 0.6% of individuals who were born anywhere in the United States are LEP.[149] The 2020 census data for Wayne County show that the LEP percentages in Michigan range from 3.5% to 13.1%.[150] However, some census tracts that are located in Hamtramck and Dearborn show that limited English proficiency among the population is 32.5% or higher.[151]

Some LEP voters may prefer in-person translation while voting rather than seeking out information online, especially when the online translation is done poorly.[152] Further, though a voter can ask individuals not associated with a candidate or their labor union to assist them while voting, poll workers get inconsistent guidance on the matter.[153] Thus, poll workers have turned

---

[147] *Id.*

[148] Maggie McMillin, *Michigan Made it Easier than Ever for Non-English Speakers to Vote This Year. But the Work's Not Done,* DETOUR DETROIT (Nov. 9, 2020), https://detourdetroiter.com/michigan-voting-other-languages-access/.

[149] Migration Policy, *State Immigration Data Profiles: Michigan* (last visited Sept. 26, 2021), https://www.migrationpolicy.org/data/state-profiles/state/language/MI.

[150] United States Census, *People that Speak English Less than "Very Well" in the United States* (Apr. 8, 2020), https://www.census.gov/library/visualizations/interactive/people-that-speak-english-less-than-very-well.html.

[151] *Id.*

[152] *Supra* note 193.

[153] *Id*.

away individuals who are accompanied to the polls by a voting individual to help them understand the ballot.[154]

The federal government sued Hamtramck for discriminatory election practices in 2003 for the city's conduct in a 1999 local election.[155] At the time, Hamtramck allowed challenges to an individual's voter registration under Michigan Law.[156] The "Citizens for a Better Hamtramck" were able to register as polling place challengers claiming that their aim was to keep the election "pure."[157] This group of challengers brought citizenship challenges only against people of color and those with Arab sounding names.[158] No White voter's citizenship was challenged during this election.[159] When complaints were made to the elections office, city officials did not address the issue.[160] Some Arab citizens decided not to vote in that election citing this racial intimidation and harassment.[161] The United States brought suit to enforce the non-discriminatory requirements of the Voting Rights Act and U.S. Constitution.

As part of the 2003 consent decree settling the United States' lawsuit, Hamtramck was ordered to cease discrimination against voters based on race or color as prohibited by federal law, ordered to train election officials and polling place challengers about non-discrimination in

---

[154] *Id.*

[155] *United States v. Hamtramck*, No. 0073541 at 1 (Mich. Sept. 3, 2003) (First Amended Consent Order and Decree).

[156] *Id.*

[157] *United States v. Hamtramck,* No. 00-73541 at 2 (Mich.) (Complaint).

[158] *Id.* at 3.

[159] *Id.*

[160] *Id.* at 4.

[161] *Id.* at 2.

elections, ordered to provide both Bengali and Arabic interpreters at the polls, voting information and ballots in both languages, and notices in the major newspapers for both communities about the consent order.[162] In 2021, Hamtramck was again in violation of the VRA because the city did not provide Bengali interpreters nor voting information and ballots in Bengali.[163] The most recent consent order states that the city must provide these resources, with the court order effective until July 13, 2025.[164] In other Michigan jurisdictions such as Dearborn, where nearly half the population is Arabic speaking, there have also been issues of not providing citizens with translated materials or providing sample ballots that are translated only three days before an election.[165]

---

[162] *Supra* note 200 at 9.

[163] *U.S. District Court for the Eastern District of Michigan Enters Consent Decree and Order in Voting Rights Act Lawsuit—Hamtramck's Bengali Language Election Program Ordered for Four Years,* ASIAN AMERICAN LEGAL DEFENSE & EDU. FUND (July 13, 2021), https://www.aaldef.org/press-release/u.s.district-court-for-the-eastern-district-of-michigan-signs-and-enters-consent-decree-and-order-in-voting-rights-act-lawsuit-hamtramck-s-bengali-language-election-program-ordered-for-four-years/.

[164] *Id.*

[165] Beenish Ahmed, *Dearborn Needs Arabic-Language Election Materials, Arab-American Advocates Say,* NPR (July 29, 2021), https://www.michiganradio.org/post/dearborn-needs-arabic-language-election-materials-arab-american-advocates-say.

Conclusion

Minority groups in Michigan face several barriers to voting. *Gingles* and the Senate Factors provide guidance on what the state can consider when evaluating election and voting barriers. The U.S. Supreme Court has ruled that such considerations can include income, education, and health inequalities along with the presence of significant segregation in an area. This memorandum has attempted to address the various issues raised by the U.S. Supreme Court under *Gingles* and the Senate Factors while also providing the context of historical discrimination in Michigan dating to its time as a slave holding territory in the 18th century.

For the Michigan Independent Citizens Redistricting Commission (MICRC)

One Person, One Vote and Acceptable Population Deviations

By Bruce L. Adelson, MICRC Voting Rights Act Legal Counsel

CONFIDENTIAL – Attorney Client Privileged

The 14th Amendment's equal protection clause as interpreted by the U. S. Supreme Court requires that each voter's choice in exercising their franchise is weighted the same as each other voter's choice. This interpretation has acquired a short-hand name: "One person, One vote." This phrase codifies the legal mandate that in drawing election districts the population of each election district AND the population variance of ALL the districts (of the same body: state, county, city, etc.) combined must be so substantially equal as to not violate the principle of counting each person's vote equally with all others votes.

The process starts with establishing an "ideal district population," which is determined by dividing the total population of a jurisdiction by the number of districts to be drawn for that jurisdiction. For example, if a jurisdiction had a population of 4 million and elected ten office holders by districts, the average or "ideal" district population would be 400,000. If the line drawers instead create a districting plan that has five districts with a population of 380,000 each and five districts with a population of 420,000 each, the "deviations" across the districts would be -20,000 and +20,000, or minus 5 percent and plus 5 percent. The "average deviation" from the ideal would be 20,000 or 5 percent, and the "overall range" would be 40,000, or 10 percent.

Most courts have used what statisticians call this "overall range" to measure the population equality of a redistricting plan, though they have usually referred to it by other names, such as "maximum deviation," "total deviation," or "overall deviation."

> "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives . . . . The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions . . . . By necessity, whether deviations are justified requires case-by-case attention to these factors."
>
> *Karcher v. Daggett*, 462 U.S. 725 (1983)

The Court in *Karcher* and other cases stresses that absolute population equality across districts is not dispositive concerning the districts' constitutionality. Rather, a jurisdiction's providing appropriate justifications, such as Voting Rights Act compliance or 14th Amendment equal protection concerns for any deviations will outweigh the "mathematical certainty" that Chief Justice Earl Warren once derided. As Chief Justice Warren observed: "mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that they achieve "substantial equality of population among the various districts." *Reynolds v. Sims*, 377 U.S. 533 (1964)

The Ten Percent Deviation Standard

"Substantial equality of population" has come to mean that a legislative plan with an "overall range" of less than ten percent may survive an equal protection attack, unless there is proof of intentional discrimination within that range. *Gaffney v. Cummings*, 412 U.S. 735 (1973), *White v. Regester*, 412 U.S. 755 (1973), and *Reynolds v. Sims*, 377 U.S. 533 (1964)

However, redistricting plans within the "ten percent" standard are not immune from attack. The attacking plaintiffs must present compelling evidence that the plan ignores legitimate reasons for population disparities (such as VRA and 14th Amendment compliance) and creates the deviations solely for the benefit of certain persons to the constitutional detriment of others.

While ten percent is a good guideline, it is not a "safe harbor" ensuring the defeat of one person, one vote challenges. The case of *Larios v. Cox* is instructional here. In its decision invalidating a Georgia legislative plan with an "overall deviation" of 9.98%, the *Larios* court found that:

- Georgia had systematically under-populated districts in rural south Georgia and inner-city Atlanta and overpopulated districts in the suburban areas north, east, and west of Atlanta in order to favor Democratic candidates and disfavor Republican candidates;
- The plan systematically paired Republican incumbents while reducing the number of Democratic incumbents who were paired; and
- The plan ignored the traditional districting principles used in previous decades, such as keeping districts compact, not allowing the use of point contiguity, keeping counties whole, and preserving the cores of prior districts.

Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), affirmed 542 U.S. 947 (2004).

In evaluating the legality of districts' population deviations, courts look for the answer to the following seminal question:

Was the jurisdiction following a "rational policy" in making the choices that resulted in the particular plan being enacted?

Answering this query, the Supreme Court has regularly held that "[a]ny number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives" *Reynolds v. Sims*, 377 U.S. 533 (1964). *Mahan v. Howell*, 410 U.S. 315 (1973), *Brown v. Thomson*, **462 U.S. 835 (1983)**, and *Voinovich v. Quilter*, 507 U.S. 146 (1993), *Karcher v. Daggett*, 462 U.S. 725 (1983) and *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301, 194 L. Ed. 2d 497 (2016).

PRIVILEGED AND CONFIDENTIAL
Attorney/Client Communication
Attorney Work Product

TO:	Julianne Pastula, General Counsel, Michigan Independent Citizens Redistricting Commission
FROM:	Fink Bressack
DATE:	November 3, 2021
SUBJECT:	**Memorandum Regarding Renumbering of Electoral Districts**

The Michigan Independent Citizens Redistricting Commission (MICRC) has requested that Fink Bressack provide guidance as to (1) whether the renumbering of districts affects Michigan's constitutionally-established legislative term limits; and (2) whether renumbering of districts could unconstitutionally "favor or disfavor an incumbent elected official or a candidate." While there is no explicit constitutional guidance regarding the MICRC's authority to renumber districts, it appears that the Commission has the ability to renumber districts as it sees fit as part of its authority to redistrict. Renumbering districts should not violate any constitutional, statutory or common law restrictions regarding term limits or favoring or disfavoring of incumbents.

Governing Law

The MICRC's authority to redistrict flows from the Michigan Constitution, as amended by Proposal 2, which was approved by Michigan voters in 2018. Specifically, Const 1963, art 4, § 6 establishes the Commission and describes its authority to propose and adopt redistricting plans. This section is silent as to the Commission's authority to renumber districts. However, the Commission is expressly authorized to "adopt a redistricting plan" for Michigan's congressional and state legislative districts. Const 1963, art 4, § 6(1). The Commission's express authority to adopt redistricting plans appears to include the authority to renumber districts by implication.

The Michigan Constitution explicitly establishes certain criteria that the Commission must follow in proposing and adopting redistricting plans. Const 1963, art 4, § 6(13)(a)-(g). All of these criteria involve considerations for the drawing of district boundaries and do not include any guidance as to the Commission's authority to renumber districts. Const 1963, art 4, § 6(13)(e) provides that "[d]istricts shall not favor or disfavor an incumbent elected official or candidate." Const 1963, art 4, § 6(13)(a) provides that all proposed maps must comply with the Voting Rights Act (VRA) and other federal law. Neither the VRA, nor any other federal law, includes a requirement that states maintain continuity in the manner in which electoral districts are numbered or otherwise identified.

The authority to create districts for the election of members of the U.S. House of Representatives is committed to the Michigan Legislature by the Federal Constitution. US Const, art 1, § 4. Prior to the 2018 amendment of the Michigan Constitution, the Michigan Legislature enacted Public Act 221 of 1999, which included guidelines for the drawing of federal congressional districts. This

Act contained a "secondary guideline" that "[e]ach congressional district shall be numbered in a regular series, beginning with congressional district 1 in the northwest corner of the state and ending with the highest numbered district in the southeast corner of the state." MCL 3.63(c)(ix). [1] It does not appear that there are any statutory guidelines requiring that state legislative districts be numbered in a similar manner.

Term limits for members of the Michigan Legislature are imposed by Const 1963, art 4, § 54, which provides "[n]o person shall be elected to the office of state representative more than three times. No person shall be elected to the office of state senate more than two times."

Historical Practice

The history of redistricting efforts in Michigan suggests that the ability to renumber districts inheres in the authority to redraw districts. Prior to the U.S. Supreme Court's establishment of the "one person, one vote" principle in *Wesberry v Sanders*, 376 US 1; 84 S Ct 526 (1964) and *Reynolds v Sims*, 377 US 533; 84 S Ct 1362 (1964), Michigan followed the "federal" model of determining representation, with state senate districts determined by jurisdictions (counties) and state house districts determined by a combination of land and population. Const 1908, art 5, § 2-3. In 1964, the state senate districts established by the Michigan Constitution of 1908 were mostly renumbered when the Michigan Supreme Court adopted the Austin-Kleiner redistricting plan in order to bring Michigan into compliance with *Wesberry* and *Reynolds* in *In re Apportionment of Mich State Legislature*, 373 Mich 250; 128 NW2d 722 (1964). For example, under the 1908 Constitution, state senate District 22 was coextensive with Saginaw County. Under the Austin-Kleiner plan, Saginaw County was split between the 34th and 35th state senate Districts, and District 22 was moved to the southwest corner of the state, covering Berrien, Cass, and St. Joseph counties.[2] Under the current state senate districting scheme, Berrien, Cass and St. Joseph counties are in state senate District 21, and the 22nd District covers Livingston County and the western portion of Washtenaw County.

Michigan's federal congressional districts have also been renumbered over time, although they have mostly followed the MCL 3.63(c)(ix) numbering scheme, with the lowest numbered district in the northwestern corner of the state and the highest in the southeastern corner.

[1] This memo does not address whether the Commission is bound in any way by MCL 3.63. See *LeRoux v Secretary of State*, 465 Mich 594, 615-620; 640 NW2d 849 (2002) (holding that legislature was not bound to follow redistricting guidelines enacted by prior legislature); *Parise v Detroit Entertainment*, 295 Mich App 25, 28; 811 NW2d 98 (2011) ("a more recently enacted law has precedence over the older statute").

[2] Compare Const 1908, art 4, § 2 with Austin-Kleiner Senate Plan map, available at https://digmichnews.cmich.edu/?a=d&d=IsabellaSA19640624-01&e=-------en-10--1--txt-txIN---------

Analysis and Recommendation

A. Term Limits.

The renumbering of Michigan state legislative districts does not create issues with term limits. Const 1963, art 4, § 54 bars persons serving more than three terms in the Michigan House of Representatives, or more than two terms in the Michigan Senate. The section makes no reference to which district a candidate is elected to represent.

B. Prohibition on Favoring or Disfavoring Incumbents or Candidates.

It also does not appear that renumbering districts would violate Const 1963, art 4, § 6(13)(e), which provides that "[d]istricts shall not favor or disfavor an incumbent elected official or a candidate." While no Michigan court has directly interpreted this provision, it would be inconsistent with the very nature of redistricting if this prohibition precluded any potentially adverse impact on an incumbent. On the other hand, it clearly prohibits actions undertaken for the purpose of favoring or disfavoring an incumbent or candidate. Such an interpretation is consistent with the Michigan Constitution's "purity of elections" clause, which the courts have interpreted as "requiring fairness and evenhandedness in the election laws." Const 1963 art 2, § 4(2); *McDonald v Grand Traverse County Election Com'n*, 255 Mich App 674, 693; 662 NW2d 804 (2003). Such an interpretation is also consistent with the purpose of redistricting itself, as the redrawing of district lines in accordance with constitutional requirements will inevitably have the side effect of disadvantaging or advantaging some incumbents.

Our review supports the conclusion that the Commission's authority to propose and adopt redistricting plans carries with it the authority to renumber districts. As noted above, the 2018 Constitutional amendment that authorized the creation of the Commission is silent as to its authority to renumber districts. However, the Constitution does authorize the Commission to "adopt a redistricting plan." Const 1963, art 4, § 6(1). The authority to redraw the boundaries of districts rationally carries with it the authority to change the way the districts are labeled, and the numbering of Michigan's electoral districts has been changed in previous redistricting efforts. While there has been significant litigation concerning redistricting in Michigan over the years, the issue of renumbering districts has not been addressed in any published case, suggesting that the power to renumber inheres in the power to redistrict. Notably, in 1992 a federal three-judge panel renumbered Michigan's congressional districts in a "more logical sequence." *Good v Austin*, 800 F Supp 557, 567 (ED and WD Mich 1992)(three-judge panel). The panel decided to do so after finding that "[t]he old numbering, which saw the 1st district adjoining the 13th, was the residue of several decades of court-ordered changes in the number and location of districts." *Id*. The *Good* court did not attempt to justify its renumbering of the districts by any authority, but did so pursuant to its "equitable power to adopt a congressional districting plan for the State of Michigan…that not only complied with the mandatory constitutional and statutory criteria but also properly balanced the relevant secondary criteria in a way that advanced the collective interests of the citizens of the State of Michigan." *Id*.

In other states, renumbering has been rejected for reasons that do not apply here.[3] For example, in 2012 the Florida Supreme Court was asked to review the renumbering of the Florida state senate districts. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So 3d 597 (2012). In Florida, elections for state senate are staggered and the year in which a seat is up for election is determined by whether the district has an odd or even number. *Id*., at 658. The court determined that the renumbering of the state senate districts violated the state constitution, because the legislature had renumbered the districts in a way that gave advantage to certain incumbents by moving back the date of their next election and allowing them to exceed the state's term limits. *Id*., at 659. A similar issue would not be caused by the renumbering of districts in Michigan, because Michigan does not stagger its elections for the state legislature, and no statutory rights are tied to the number assigned to a district. Const 1963, art 4, § 2-3.

In conclusion, the absence of any restriction on renumbering districts, together with the fact that past redistricting plans have renumbered districts suggests that the power to redraw districts carries with it the power to renumber districts. Renumbering districts does not affect term Michigan's legislative term limits and does not violate the constitutional prohibition on favoring or disfavoring an incumbent elected official or a candidate.

[3] See also, *State ex rel Steinke v Lautenbaugh*, 263 Neb 652; 642 NW2d 132 (2002) (holding that county election commissioner exceeded his authority when he renumbered school board election districts based on political advantage in staggered elections); compare *In re Lackawanna County Bd of Elections*, unpublished opinion of the Court of Common Pleas of Pennsylvania, Lackawanna County, issued January 13, 2005 (Docket No. 04 CV 4650), 2005 WL 4867630, at *9 (holding that consolidation and renumbering of districts under apportionment plan was lawful in absence of political considerations).

BakerHostetler

Baker&Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
T 202.861.1500
F 202.861.1783
www.bakerlaw.com

ATTORNEY-CLIENT PRIVILEGED &
ATTORNEY WORK PRODUCT

VIA E-MAIL (PASTULAJ1@MICHIGAN.GOV)

TO: Julianne Pastula, State of Michigan
Independent Citizens Redistricting Commission

DATE: November 4, 2021

SUBJECT: Redistricting Criteria

This memorandum addresses criteria governing the work of the Michigan Independent Citizens Redistricting Commission (the Commission). In particular, it addresses constitutional requirements that "[d]istricts shall not provide a disproportionate advantage to any political party" and that "[d]istricts shall not favor or disfavor an incumbent elected official or a candidate." This memorandum concludes that these provisions, though thematically similar, operate in different ways.

Table of Contents

I. Summary

The **disproportionate-advantage criterion** establishes an objective standard prohibiting the effect of a disproportionate advantage for any party. Accordingly, the Commission should take affirmative steps to identify advantages, according to recognized partisan-fairness measures, and configure districts to minimize any such advantages on a statewide basis and thereby ensure no advantage becomes "disproportionate." On the other hand, this provision does not require that the Commission achieve strictly proportional representation or ideal measures under the partisan-fairness measures it chooses. Partisan fairness measures do not dictate proportional representation, and minor deviations from ideal measures to achieve compliance with other criteria are likely consistent with this criterion. The Commission should look to its own partisan-fairness measures and the advice of its expert to ascertain what an acceptable deviation from the ideal is and work within appropriate ranges.

The **incumbency and candidacy criterion** does not operate like the disproportionate-advantage criterion. It establishes a subjective standard forbidding both favoring and disfavoring incumbents and candidates. The Commission can satisfy the criterion by simply ignoring incumbents and candidates. To make affirmative efforts to advantage or disadvantage candidates or incumbents would likely place the Commission in conflict with either the prohibition on favoring or the prohibition on disfavoring candidates or incumbents.

II. Background

"A recurring part of the American political scene is the periodic apportionment and districting that follows each decennial census." *In re Apportionment of State Legislature–1992*, 439 Mich 715, 716; 486 NW2d 639, 640 (1992). Beginning in 1982—when the Michigan Supreme Court held that the Commission of Legislative Apportionment established in the 1963 Constitution was unconstitutional, being inextricably intertwined with a population weighting requirement that contravened the federal one-person, one-vote standard, *In re Apportionment of State Legislature–1982*, 413 Mich 96, 139–40; 321 NW2d 565, 582 (1982)— "redistricting in Michigan was accomplished through a legislative process." Ronald Liscombe & Sean Rucker, *Redistricting in Michigan Past, Present, and Future*, 99 Mich B J 18–19 (August 2020). "Given that the plan was established by the legislature following each census year, Michigan's redistricting scheme . . . facilitated gerrymandering." *Id.*

In 2018, the nonpartisan advocacy organization Voters Not Politicians (VPN) successfully placed an initiative on the statewide ballot (Proposal 18-2) to constitute a new redistricting commission, bring its work in line with federal constitutional standards, and orient the body and its plans around new redistricting policies. *Citizens Protecting Michigan's Const v Sec'y of State*, 503 Mich 42, 56–57; 921 NW2d 247, 250 (2018). VPN contended that Proposal 18-2 would establish "a fair, impartial, and transparent redistricting process." Voters Not Politicians, *Frequently Asked Questions*, https://votersnotpoliticians.com/faq/ (last visited Nov. 2, 2021). VPN also asserted that Proposal 18-2 would combat gerrymandering, which occurs "when those in charge use the redistricting process to draw district maps to give one political party an unfair advantage." *Id.* ("What is 'gerrymandering?'"). Proposal 18-2 was "overwhelmingly" approved by Michigan

voters and codified at Article IV, Section 6 of the State Constitution ("Section 6"). *In re Indep Citizens Redistricting Comm'n for State Legislative & Cong Dist's Duty to Redraw Districts by Nov. 1, 2021*, 961 NW2d 211, 212 (Mich, 2021) (Welch, J., concurring).

Section 6 addresses gerrymandering in three basic ways:

First, it mandates a balanced body of commissioners "composed of thirteen registered voters, randomly selected by the Secretary of State, of whom four each would be affiliated with Michigan's two 'major political parties' and five would be unaffiliated with those two parties." *Daunt v Benson*, 999 F3d 299, 304 (CA 6, 2021) (citation omitted). Individuals with various types of recent experience (e.g., as political candidates, lobbyists, or legislative employees) are barred from service. Const 1963, art 4, § 6(1).

Second, it ensures that no plan will take effect without bipartisan support within the Commission, either through a plan garnering a majority vote and votes from "at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party," or else—if the majority-vote process fails—in a run-off procedure through a plan receiving the highest total points and which ranked among the top half of plans "by at least two commissioners not affiliated with the party of the commissioner submitting the plan." *Id.* art 4, § 6(14)(c) & § 6(14)(c)(iii).

Third, Section 6 requires that the Commission "shall abide by" enumerated "criteria in proposing and adopting each plan, in order of priority." *Id.* art 4, § 6(13). Subsection 13 identifies seven criteria, labeled (a) through (g). The first is compliance with federal law, including the United States Constitution and the Voting Rights Act. *Id.* art 4, § 6(13)(a). The second requires that districts be "geographically contiguous." *Id.* art 4, § 6(13)(b). The third mandates that districts "shall reflect the state's diverse population and communities of interest." *Id.* art 4, § 6(13)(c). These communities "may include," without limitation, "populations that share cultural or historical characteristics or economic interests," but they "do not include relationships with political parties, incumbents, or political candidates." *Id.* art 4, § 6(13)(c). The fourth criterion states, in full:

> Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

Id. art 4, § 6(13)(d). The fifth states, in full: "Districts shall not favor or disfavor an incumbent elected official or a candidate." *Id.* art 4, § 6(13)(e). The final two criteria dictate that districts "shall reflect consideration of county, city, and township boundaries" and "shall be reasonably compact." *Id.* art 4, § 6(13)(f) & (g). In addition to adhering to these criteria, the commission, [b]efore voting to adopt a plan . . . shall ensure that the plan is tested, using appropriate technology, for compliance with the criteria . . . ." *Id.* art 4, § 14(a).

III. Analysis

The meaning of Section 6's requirements presents a question of Michigan constitutional interpretation. *Michigan v Long*, 463 US 1032, 1038; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). Because this provision has yet to be interpreted in Michigan courts, we rely upon foundational principles of constitutional interpretation identified in Michigan precedent to discern its meaning. Michigan courts "have established that '[t]he primary and fundamental rule of constitutional or statutory construction is that the Court's duty is to ascertain the purpose and intent as expressed in the constitutional or legislative provision in question.'" *Adair v State*, 486 Mich 468, 477; 785 NW2d 119 (2010) (quoting *White v City of Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979)). Accordingly, "the interpretation given the provision should be 'the sense most obvious to the common understanding' and one that 'reasonable minds, the great mass of the people themselves, would give it.'" *Id.* (quoting *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971)). "[T]he intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed . . . ." *Id.* at 477–78 (quoting *Traverse City Sch Dist*, 384 Mich at 405). "In determining the common understanding of the voters, the Court may also consider the circumstances surrounding the adoption of the provision and the purpose sought to be accomplished by the provision." *Taxpayers for Michigan Const Gov't v Dep't of Tech, Mgmt & Budget*, --NW2d--, 2021 WL 3179659, at *6 (Mich, July 28, 2021).

A. Disproportionate Advantage

Subsection 13(d) provides that the Commission "shall not provide a disproportionate advantage to any political party." This phrase, read textually and contextually, suggests two basic propositions. First, the Commission must avoid the effect (not just the intent) of a disproportionate partisan disadvantage. Second, the Commission is likely to have flexibility in ascertaining when a disproportionate advantage occurs. It should evaluate that question by choosing recognized partisan-fairness metrics, adopting an acceptable range of fairness identified by these metrics, then determining if a given proposed plan's partisan fairness lies within the range the Commission has identified. Any proposed plan that lies in the range should be viewed as satisfying the requirements of Subsection 13(d).

1. Objective Effects Standard

Subsection 13(d) establishes an objective standard that cannot be met merely by avoiding consideration of political data or voting patterns. The language of the provision is objective in character and would be infringed by a plan disproportionately advantaging a given party, whether or not the Commission intended that advantage. The Commission therefore should consider partisan data for the purpose of ensuring that any map it adopts does not disproportionately advantage one party over others, as measured by accepted partisan-fairness metrics.

The operative words of this provision bear out that objective standard by referring "to the consequences of actions and not just to the mindset of actors," which is a common means of signaling an objective effects standard. *Texas Dep't of Hous & Cmty Affs v Inclusive Communities*

Project, Inc., 576 US 519, 533; 135 S Ct 2507; 192 L Ed 2d 514 (2015).[1] In the legal context, court-identified standards of intent are not satisfied merely because of "disproportionate impact." *Vill of Arlington Heights v Metro Hous Dev Corp*, 429 U.S. 252, 265; 97 S Ct 555; 50 L Ed 2d 450 (1977). Although Subsection 13(d) prohibits purposeful advantages, it extends beyond that prohibition by directing the Commission to avoid any "disproportionate advantage," which speaks to partisan effect. Michigan courts are likely to view this language as arising to "a legal term of art" establishing an objective standard. *See Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).

Moreover, the legal meaning of these terms matches their ordinary meaning. *Adair*, 486 Mich at 477. The noun "advantage" signals "the quality or state of being superior" or "a more favorable or improved position or condition," regardless of how that quality, state, position, or condition came to be. *Webster's Third New International Dictionary, Unabridged Edition* (1971), p 30. And the Commission could, in principle, "provide" such an advantage intentionally or unintentionally. *See id.* at 1827 (relevant definition of "provide" is to "equip" or "supply for use"). To avoid unintentionally providing any disproportionate advantage, the Commission would be best served by taking affirmative steps to avoid doing so.

That reading is confirmed insofar as Subsection 13(d) provides that the existence of a "disproportionate advantage . . . shall be determined using accepted measures of partisan fairness." Const 1963, art 4, § 6(13)(d). This language compels the Commission to consider political data for the purpose of avoiding any disproportionate advantage that may unintentionally result from its configurations. Importantly, where other states have sought to curb or forbid partisan intent—and not compel partisan fairness—they have used language speaking to that motive. For example, Florida's constitutional provision concerning partisanship forbids Florida's legislature from enacting any plan or district with the "intent to favor of disfavor a political party or incumbent." Fla Const art 3, § 20(a). This verbiage, "intent," "favor," and "disfavor," establishes a subjective standard, and Florida courts have accordingly read the standard to turn on "the motive in drawing the districts." *League of Women Voters of Fla v Detzner*, 172 So3d 363, 388 (Fla, 2015) (quotation marks omitted). Subsection 13(d) is materially different.

2. No Standard of Strict Proportional Representation

Subsection 13(d) does not go so far as to require the Commission to achieve strict proportionality of votes obtained by a party to projected seats in the State's legislative chambers or congressional delegation. "In a purely proportional representation system, a party would be expected to pick up votes and seats at a one-to-one ratio, i.e., for every additional percentage of the statewide vote the party gains, it should also gain a percentage in the share of the seats." *Whitford v. Gill*, 218 F Supp 3d 837, 904 (WD Wis 2016), vacated on other grounds, 138 S Ct 1916; 201 L Ed 2d 313 (2018). Michigan's voters, however, did not adopt a purely proportional system. The voters instead adopted Subsection 13(d), which forbids disproportionate advantage and requires the existence or absence of disproportionate advantage to be tested using partisan-fairness metrics. Subsection

[1] Michigan courts look to U.S. Supreme Court authority as persuasive precedent on interpretive principles. *See, e.g.*, *Ernsting v Ave Maria Coll*, 480 Mich 985, 986; 742 NW2d 112 (2007).

13(d) is best read to require the Commission to adopt partisan-fairness metrics and to require that the plans it adopts fall within an acceptable range of deviation appropriate to those metrics, as well as allowing minor deviations as necessary to achieve other Subsection 13 criteria. Multiple textual and contextual indicators bear this out.

First, the text of Subsection 13(d) does not speak in terms of strict proportionality. The provision gives a negative prohibition—that the Commission not "provide" a "disproportionate advantage" to "any political party." It does not affirmatively command the Commission *to* provide a *proportionate* share of seats to *every* party. In terms of how redistricting works in practice, the difference between forbidding a disproportionate advantage and compelling proportional representation is significant.

In linguistic terms, the key modifier, "disproportionate," speaks to a "lack of symmetry or proper relation," i.e., a "disparity." *Webster's Third New International Dictionary, Unabridged Edition* (1971), p 655 (definition "disproportion"); *see also id.* (material identical definition of "disproportionate"). There is a material difference between an item being "too large or too small in comparison to something else, or not deserving its importance or influence," *Disproportionate*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/disproportionate, and its being relatively close to proper symmetry, but not exactly symmetrical. In the redistricting context, the concepts of proportion and disproportion have been understood as a matter of degree, resting on the "conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Rucho v Common Cause*, 139 S Ct 2484, 2499; 204 L Ed 2d 931 (2019) (quoting *Davis v Bandemer*, 478 US 109, 159; 106 S. Ct. 2797; 92 L Ed 2d 85 (1986) (O'Connor, J., concurring in the judgment)); *see also Whitford*, 218 F Supp 3d at 906 (distinguishing between a requirement of "proportional representation" and "highly *dis*proportional representation").[2] The constitutional line adopted in Michigan appears to fall between a great departure from proportionality and a small one.

Second, Subsection 13(d) provides clarity in instructing the Commission to "determine[]" a "disproportionate advantage" using "accepted measures of partisan fairness." The best-known measurements of partisan fairness, such as the efficiency gap, the mean-median gap, and the partisan symmetry metrics proposed by Professors Gelman and King (1994), are not strict measures of proportional representation. They all account for the fact that a geographic system of representation is not proportional,[3] and they generally rate fairness as a matter of degree and treat minor deviations from an ideal as inconsequential. For example, the efficiency gap need not be

[2] Although these articulations concerned standards the U.S. Supreme Court ultimately rejected in *Rucho*, they are useful in ascertaining the standards Michigan voters adopted in amending the State Constitution, as these lawsuits provide context for understanding the "accepted measures" of fairness referenced in Subsection (d).

[3] For example, political scientists have found that "[partisan] bias can also emerge from patterns of human geography," including in some jurisdictions a tendency of Democratic voters to be "concentrated in large cities and smaller industrial agglomerations . . . ." Chen & Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Qtrly J Pol'y Sci 239, 239 (2013).

exactly zero (meaning, that a plan causes all parties to "waste" votes at identical rates) to be considered "fair"; rather, the method proposes that "an efficiency gap in the range of 7% to 10%" is suspect. *Gill v Whitford*, 138 S Ct 1916, 1933; 201 L Ed 2d 313 (2018). Likewise, mean-median gaps within a certain range are treated as "normal" rather than as evidence of partisan unfairness. *See League of Women Voters v Commonwealth,* 178 A3d 737, 774, 820 (Pa 2018).

Further, Subsection 13(d) instructs the Commission to utilized "accepted *measures*" of fairness—i.e., more than one measure. There are innumerable measures of fairness in existence, and many more to come, and any number of political scientists and experts able to attest that they are "accepted." To achieve perfection under one measure may cause a plan to depart from perfection under another, and vice versa. Reading Subsection 13(d) to subject the Commission to any standard that might be presented in hearings, or later in court, would place it in the impossible position of achieving ideal fairness under inconsistent measures.

Third, the context and structure of Subsection 13 undermine any asserted requirement of strict proportionality. Subsection 13 establishes seven criteria and makes them all mandatory, in descending "order of priority." Const 1963, art 4, § 6(13). Subsection 13(d) falls fourth in line, and two of the criteria above it are state-law (not federal) impositions. It would be unworkable to require the Commission to achieve these goals and, at the same time, achieve an ideal standard of proportionality, because parties' constituents are not evenly divided in any given jurisdiction. The requirement that districts "shall reflect the state's diverse population and communities of interest," *id.* art 4, § 6(13)(c), may conflict with achieving ideal proportionality, or even ideal scores on some partisan-fairness metrics, yet it is a constitutional mandate of higher priority than partisan fairness. Requirements under federal law, including the Voting Rights Act, may also create conflict with perfect notions of partisan fairness. By the same token, two other criteria require that districts "shall" reflect consideration of political-subdivision lines and be reasonably compact. *Id.* art 4, § 6(13)(f) & (g).

In establishing many criteria, the Constitution appears to contemplate a give-and-take process requiring flexibility, as plans depart in small degrees from perfection under some criteria to honor other criteria. Courts in other jurisdictions have viewed the multiplicity of factors, and complexity in balancing them, as a basis to afford deference to the redistricting authority, rather than to micromanage its work. *See, e.g.*, *Arizona Minority Coal for Fair Redistricting v Arizona Indep Redistricting Comm'n*, 220 Ariz 587, 600; 208 P3d 676 (2009); *Bonneville Cty v. Ysursa*, 142 Idaho 464, 472; 129 P3d 1213 (2005); *Vesilind v Virginia State Bd of Elections*, 295 Va 427, 446; 813 SE2d 739 (2018). And at least one court in a pre-*Rucho* partisan-gerrymandering dispute drew an analogy between permissible, minor deviations from ideal partisan-fairness scores and permissible minor deviations from ideal population, opining that, just as the latter is permissible, so is the former. *Whitford*, 218 F Supp 3d at 907 n.299.

It therefore appears that the Commission "is empowered to exercise judgments concerning how to" best ensure partisan fairness. *Goldstone v Bloomfield Twp Pub Libr*, 479 Mich 554, 565; 737 NW2d 476 (2007). Subsection 13(d) does not enumerate specific "accepted measures of partisan fairness," and the text appears to create a range of permissible metrics that the Commission may choose. So long as the Commission has a reasonable basis for the measures it selects—such as the

advice of a recognized expert—those measures—and not other measures—are likely to be afforded deference in court. Likewise, Subsection 14(a) requires that any plan subject to a vote be "tested, using appropriate technology, for compliance with the criteria," including Subsection 13(b). This is yet another discretionary choice. Where a constitutional provision affords discretion, Michigan courts generally "defer to th[e] judgment" of the legislative body vested with that discretion. *Id.* By the same token, a determination by the Commission to work within acceptable ranges of fairness to achieve other mandatory criteria is likely to receive deference as a legitimate judgment call of the body constitutionally charged with the difficult task of redistricting.

Fourth, Proposal 18-2 appears not to have been sold to the public as a proportional-representation amendment. VPN's website informed voters that the requirement ultimately codified at Subsection (d) was meant to: "Not give an unfair advantage to any political party, politician, or candidate (no partisan gerrymandering)." Voters Not Politicians, *supra*, *Frequently Asked Questions* ("How will the Commission draw maps?"). A leading proponent and drafter of Proposal 18-2 asserted publicly that "a Michigan redistricting commission won't change the fact that some seats will be considered safe for Republicans and others safe for Democrats, based on the fact [that] far more Republicans than Democrats live in Allegan and far more Democrats than Republicans live in Detroit." 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/ (quoting Nancy Wang, "an Ann Arbor attorney who helped draft the Michigan proposal and is president of Voters Not Politicians"). "But, she said, they will no longer be gerrymandered to favor incumbent politicians and political parties."[4] *Id.* Other contemporaneous evidence of "the circumstances surrounding the adoption of the provision and the purpose sought to be accomplished," *Taxpayers for Michigan*, 2021 WL 3179659, at *6, are in accord with these examples. Notably, the sponsors of Proposal 18-2 emphasized the primacy of communities of interest in advocating its enactment, which (as noted) can create tension with partisan-fairness measures on the margins. *See* Voters Not Politicians, *supra*, *Frequently Asked Questions* ("What are communities of interest and how will the Commission incorporate them into maps?"). We have located no contemporaneous evidence of the proponents of Proposal 18-2 informing the public that, if adopted, the provision would ensure that all political parties would be guaranteed the same number of seats in a legislative chamber or delegation as their percentage of the vote.

Fifth, a stringent court-imposed standard of proportionality would seem inconsistent with the carefully calibrated constitutional framework of creating the Commission, vesting it authority over redistricting, and requiring that bipartisanship to some level be achieved in the enactment of any plan. The Commission is structured to frustrate partisan gerrymandering largely by eliminating any potential or perceived conflict of interest legislators face in redistricting. If the people of Michigan did not intend the Commission to exercise discretion in balancing criteria, including on the difficult question partisan fairness, one wonders why they went through the trouble of crafting

[4] Indeed, this and much of the contemporaneous evidence could form the basis of an argument that only intentional gerrymandering is prohibited. However, for reasons discussed above, we believe the text of Subsection 13(d) is clear in setting an objective standard prohibiting disproportionate effects as well as intention gerrymandering.

such a complex system of commissioner selection and proposal and adoption of plans. As discussed above, this argument does not imply that the Commission may disregard mandatory criteria of Subsection 13, but rather that a deferential standard is likely to be applied in court. *See Goldstone*, 479 Mich at 565. A strict proportionality standard would seem too stringent and inconsistent with the overall constitutional structure and purpose.

Finally, the discretion identified above will not be without limits. It is impossible for this memorandum to delineate precisely where those limits will be, both because this provision has yet to be interpreted and because the limit of discretion is, in all cases, fact-dependent. A few guiding principles, however, seem clear. One is that the Commission will be best served by hiring qualified experts for advice on accepted measures of partisan fairness, as it has done in hiring Dr. Lisa Handley. Another is that the closer the enacted plans are to the ideal measures under the metrics the Commission chooses, the more defensible; the further, the less defensible. Another is that departures from the ideal based on conflicts with the Subsection 13 criteria will be more defensible than departures from the ideal based on other considerations (if any) and, moreover, departures based on conflicts with criteria having priority in rank under Subsection 13 will be more defensible than departures based on conflicts that are below the partisan-fairness criterion in rank. Finally, the more support a plan has from Commissioners, especially Commissioners from all three constituencies (Republican, Democratic, and Independent) the stronger the defense of that plan will be.

B. Incumbents and Candidates

Subsection 13(e) differs from Subsection 13(d) in its text and its apparent meaning. It provides that "[d]istricts shall not favor or disfavor an incumbent elected official or a candidate." This provision implicates a subjective standard that can—and should—be met through blindness to incumbencies and candidacies.

The terms "favor" and "disfavor"—unlike the term "advantage"—speak to subjective intent. Relevant definitions of "favor" (as a verb) include "to show partiality toward" and "to regard or treat with favor or goodwill," *Webster's Third New International Dictionary, Unabridged Edition* (1971), p 830, and its antonym "disfavor" bears similar, opposite meanings, including to "regard with disesteem" and "to withhold or withdraw favor from," *id.* at 649. A redistricting plan that has the effect of advantaging or disadvantaging an incumbent or candidate could not reasonably be said to favor or disfavor that incumbent or candidate, unless the Commission intended that effect. In this respect, Subsection 13(e) mirrors the language other states have used to curb intent. *See League of Women Voters of Fla*, 172 So3d at 387–88. For context, it is important to note that redistricting authorities around the country have traditionally considered the impact of a proposed plan on incumbent office-holders; this concept, known as "incumbency protection," is considered a traditional districting principle. *See, e.g., Karcher v Doggett,* 462 US 725, 740; 103 S Ct 2653; 77 LEd 2d 133 (1983); *Vieth v. Jubelirer,* 541 US 267, 298; 124 S Ct 1769; 158 L Ed 2d 546 (2004) (plurality opinion). The apparent purpose of Subsection 13(e) was to prohibit incumbency protection as a consideration available to the Commission. Hence, the optimal way to avoid subjectively favoring or disfavoring candidates or incumbents is to give them no consideration in the process at all—i.e., to abandon "incumbency protection" entirely.

To read an objective standard into the provision would make it practically impossible to implement. The standard prohibits both favoring and disfavoring a candidate, and it is hard to see how the Commission could be expected to avoid the *effect* of doing either, especially where to cure a perceived effect may amount to favoring or disfavoring the incumbent or candidate. For example, if the Commission became aware that an incumbent was drawn out of the incumbent's prior district, the Commission would have an impossible choice in deciding how to respond. To reconfigure the district to retain the incumbent would "favor" the incumbent; to leave the configuration as is would "disfavor" the incumbent. This "absurd result[]" is unlikely to gain traction in the Michigan courts. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010).

To be sure, Section 14(a), as noted, requires the commission to "ensure that the plan is tested, using appropriate technology, for compliance with the criteria . . . ." But this provision does not alter the meaning of the criteria, including the incumbency/candidacy requirement of Subsection 13(e). Rather, this provision requires that testing be done by reference to what the criteria require by their terms. Appropriate technology would not likely include incumbency or candidacy data. Instead, technology would include reasonable technological means of ensuring that incumbency and candidacies were not considered, such as by examination of computers to ensure such information was not uploaded.

IV. Conclusion

This memorandum articulated the differing legal standards we believe are implicated by Subsection 13(d) and (e) of Section 6. We appreciate that legal standards can seem abstract in relation to specific problems confronting the Commission, and we therefore stand ready to answer more specific questions or address specific issues before the Commission.