STATE OF MICHIGAN
IN THE SUPREME COURT

THE DETROIT NEWS, INC., DETROIT FREE PRESS, INC., THE CENTER FOR MICHIGAN, INC./BRIDGE MICHIGAN, MICHIGAN PRESS ASSOCIATION, and LISA McGRAW,

Plaintiffs,

v.

INDEPENDENT CITIZENS REDISTRICTING COMMISSION,

Defendant.

MSC No. 163823

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DEFENDANT MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION'S BRIEF IN SUPPORT OF ITS ANSWER TO PLAINTIFFS' VERIFIED COMPLAINT

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STATEMENT OF JURISDICTION

The Supreme Court has original jurisdiction over this matter pursuant to Const 1963, art 4, § 6(19); MCR 7.306(B).

STATEMENT OF QUESTIONS PRESENTED

I. Is the Michigan Independent Citizens Redistricting Commission (the "Commission") empowered to receive confidential attorney-client privileged communications from its counsel without disclosing the contents of those communications to the public at large?

Defendant's Answer: Yes.

II. Is the Commission empowered to receive confidential attorney work product from its counsel without disclosing the contents of that work product to the public at large?

Defendant's Answer: Yes.

III. Is the Commission empowered, pursuant to Const 1963, art 4, § 6(4), to make its own rules of procedure—including adopting the provisions of Michigan's Open Meetings Act, MCL 15.261, *et seq.*—under which the Commission may meet in closed session to consult with its counsel and review privileged materials?

Defendant's Answer: Yes.

IV. Does Const 1963, art 4, § 6, which created the Commission, abrogate the Commission's right to receive confidential, privileged communications from its counsel?

Defendant's Answer: No.

INTRODUCTION

In 2018, Michigan voters overwhelmingly adopted a Constitutional Amendment creating the Michigan Independent Citizens Redistricting Commission (the "Commission")—an independent public body that would "[e]stablish new redistricting criteria . . . reflecting Michigan's diverse population and communities of interest" without partisan scheme or favor.[1] The voters created a Commission that was empowered to act independently, for the benefit of the people, to create legislative districts that "shall not provide disproportionate advantage to political parties or candidates."[2] In order to effectuate this mandate, Const 1963, art 4, § 6 (the "Redistricting Amendment" or the "Amendment") empowers the Commission to take necessary steps to secure its independence and to act in the interests of the people. Among those powers are the authority to "make its own rules of procedure," engage expert "staff and consultants," and secure "legal representation." § 6(4). The Redistricting Amendment explicitly contemplates that the Commission will be required to "defend any action regarding [its] adopted plan," and ensures sufficient resources so that the Commission may carry out its mission, "which activities include retaining independent, nonpartisan subject-matter experts and legal counsel . . . ." §§ 6(6), (5). All of these provisions are intended to secure the will of the people—to establish a Commission that can act independently, free of partisan influence. And all of these provisions require full and frank communication between the Commission and its counsel—communication that cannot occur without the promise of confidentiality secured by the attorney-client privilege.

Contrary to Plaintiffs' contention, the Redistricting Amendment does not abrogate the Commission's right to have privileged communications—whether through the receipt of legal

[1] Proposal 18-2, Official Ballot Wording <https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf> (accessed Dec 12, 2021).

[2] *Id.*

memoranda or in confidential consultation—with its attorneys. Rather, the Amendment presupposes that the Commission will engage legal counsel, and that counsel cannot be effective (and thus the Commission cannot fulfill its mandate) without a guarantee of privilege.

To be sure, the Redistricting Amendment requires the Commission to conduct its business in the open. Const 1963, art 4, § 6(10). And indeed, the Commission has done just that: over the past fifteen months, the Commission has held 136 open, public meetings, and engaged the public in myriad ways to receive comments, questions, and feedback on its work. When the voters adopted the Redistricting Amendment, they did so employing the common understanding of what it means for a public body to conduct its business in the open. The Commission honored that understanding in adopting "its own rules of procedure," rules that reflect the most generally-understood provisions for transparent government, contained in the Open Meetings Act. In so doing, the Commission fulfilled its obligation to act with transparency, balanced with its need—in certain limited, specific circumstances—to receive confidential legal advice in order to effectuate its mission. Plaintiffs' demand that each and every piece of counsel provided in confidence to the Commission must be made public, including to parties that would challenge the independent work of the Commission, would render that mission impossible. It should be rejected.

STATEMENT OF FACTS

I. The Commission Has Conducted the Most Open, Transparent Redistricting Process in Michigan's History

Identified as Proposal 18-2 on the November 6, 2018 general election ballot, the Redistricting Amendment was adopted with more than 61% of the vote.[3] The Amendment became effective on December 22, 2018, and the Michigan Independent Citizens Redistricting

[3] 2018 Michigan Election Results <https://mielections.us/election/results/2018GEN_CENR.html> (accessed Dec 12, 2021).

Commission was created. Const 1963, art 12, § 2. The Redistricting Amendment envisioned an extremely open process, with opportunities for the public to observe that process and to provide input, and the Commission embraced that mandate aggressively.

Every metric of public observation and participation has been met or exceeded. From September 17, 2020, through May 6, 2021, during the first phase of its work, the Commission convened 35 meetings open to the public to address preliminary matters such as operational processes, hiring staff, procurement activities, and adoption of procedures. The Redistricting Amendment required ten public hearings prior to drafting any plans, Const 1963, art 4, § 6(8), and the Commission held sixteen public hearings across the state from May 11 through July 1, 2021.[4] After the release of redistricting data from the U.S. Census Bureau on August 12, the Commission, in an extraordinarily public process, created a set of draft proposed maps. Engaging the public in this mapping process, the Commission held 38 more public meetings throughout the state.

Consistent with the procedures set forth in the Redistricting Amendment, after the Commission had drafted at least one plan for each type of district (state legislative and congressional), it held a second round of public hearings throughout the state to obtain public comment about the draft proposed plans.[5] The Commission received significant public feedback on its draft proposed maps, and it held nine public meetings between October 27 and November 8 to review and discuss this feedback, engage with its experts, make substantive revisions to the draft proposed maps, and vote to publish proposed maps.

[4] See Meeting Notices & Materials <https://www.michigan.gov/micrc/0,10083,7-418-106525---,00.html> (accessed Dec 12, 2021).

[5] See Meeting Notices & Materials, n 4, *supra*.

The Commission is currently in the midst of the constitutionally mandated 45-day public comment period required before any vote to adopt final plans. Const 1963, art 4 § 6(14). A notice of publication of the plans was issued on November 12, 2021.[6] Meetings during the 45-day period have been held on November 18 in Ann Arbor and December 2 in Lansing, with the next meeting scheduled for December 16 in Detroit. The Commission has scheduled its final vote for December 28.

As of this writing, the Commission has held 105 public meetings, ten public committee meetings, and 21 public hearings. The Commission has also implemented robust public education and outreach programs, as well as an extensive public relations campaign, and has maintained a comprehensive website of materials and information generated by the Commission and provided to it. The Commission has been proactive, reaching out to the public to encourage participation in the ongoing redistricting process.[7]

One important measure of public engagement is the input received from interested citizens. In the first round of public hearings, the Commission heard in-person comments from 936 citizens and 55 comments from remote participants. The second round of public hearings elicited 694 in-person comments, and 310 remote comments. Through December 7, the

[6] See Nov 12, 2021 Public Notice <https://www.michigan.gov/documents/micrc/MICRC_Plan_Publication_Notice_741252_7.pdf > (accessed Dec 12, 2021)

[7] In addition to the 136 formal meetings and hearings, the Commission has engaged in over 220 informal presentations, town hall forums and interviews between February and December 2021, educating residents throughout the state about the Commission and encouraging involvement in the redistricting process <https://www.michigan.gov/documents/micrc/MICRC_Public_Hearings_and_townhall_forums_722380_7.pdf> (accessed Dec 12, 2021); provided formal support to establish a public comment portal to provide a transparent, user-friendly and centralized location for the public to offer feedback and information to the Commission <https://www.michigan.gov/documents/sos/APPROVED_MICRC_02_04_2021_IMtg_Mins_716591_7.pdf> (accessed Dec 12, 2021); and publicized email and regular mail, which are also available to the public to provide comment.

Commission's online public comment portal had received 7,265 submissions. In addition, more than 10,000 public comments regarding proposed maps have been submitted to the Commission's "MyDistricting" website. Thousands of written public comments have also been submitted to the Commission. The Commission continues to receive public comments via each of these methods of communication. The Commission has made all of these comments, however they are submitted, available to the public.

Through its 136 open meetings and myriad public engagement efforts, the Commission has demonstrated its commitment to operating openly and transparently, reviewing, discussing, and assimilating public feedback into its work.[8] And, in the fifteen months of its active operations, the Commission has conducted exactly one closed session.

II. The History of the Redistricting Amendment's Enactment is Replete with References to the Commission's Need for Effective Legal Counsel

The circumstances surrounding the adoption of the Redistricting Amendment and the purpose sought to be accomplished by the people in adopting the Amendment demonstrate that the voters intended to create an effective and independent redistricting commission and did not intend to strip the Commission of its ability to have privileged communications with its counsel. The ballot summary language for the Independent Redistricting Commission Amendment Proposal explains that the Commission would be composed of four members who identify with each of the state's two major political parties and five independents; that partisan officeholders, candidates and those with certain relationship to them would be prohibited from serving on the commission; that new redistricting criteria would be established to prevent "disproportionate

[8] In contrast, during the 2011 redistricting process, the Senate Redistricting Committee held a total of only seven public meetings. <https://www.senate.michigan.gov/committeeMinTestimony/2011-2012.aspx> (accessed Dec 13, 2021). Only one of those Senate meetings included public comment.

advantage of political parties or candidates"; and that public funds would be appropriated to accomplish these purposes.[9]

The ballot summary does not suggest in any way that the commission would be constrained from receiving legal advice from counsel in confidence. Instead, the ballot summary describes the creation of a commission free from partisan influence, with the ability to accomplish redistricting in a nonpartisan manner. Neither the text of Const 1963, art 4, § 6 nor the ballot summary language states the Commission's attorney-client privilege would be abrogated. Rather, legislative analysts and policy experts who reviewed the proposed Redistricting Amendment affirmed that counsel to the Commission would play a vital role in ensuring the Commission complied with its mandate.

Both the House Fiscal Agency[10] and the Senate Fiscal Agency[11] prepared reports concerning Proposal 18-2. The House Fiscal Agency analyzed the proposed Amendment's fiscal impact and stated, "[t]he proposed constitutional amendment would result in increased costs to the state related to funding the Independent Citizens Redistricting Commission, administrative costs to the Department of State (DOS), and likely litigation costs stemming from defending challenges to the commission's redistricting plans."[12] Under a separate heading titled "Legal Costs," the House Fiscal Agency noted: "Section 6(6) of the amendment states that the

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[9] Official Ballot Wording, Prop 18-2 <https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf> (accessed Dec 12, 2021).

[10] House Fiscal Agency Report on Proposal 18-2 <https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_2018-2_VNP_Redistricting.pdf> (accessed Dec 12, 2021).

[11] Senate Fiscal Agency Report on Proposal 18-2 <https://www.senate.michigan.gov/SFA/Publications/BallotProps/Proposal18-2.pdf > (accessed Dec 12, 2021).

[12] House Fiscal Agency Report at 6, n 10, *supra*.

legislature shall provide 'adequate funding to allow the commission to defend any action regarding an adopted plan.' . . . Michigan should anticipate some potential legal costs related to the commission's redistricting plans."[13] The Senate report likewise described anticipated costs associated with "legal representation."[14]

Policy centers around the state focused on the fiscal impact of legal representation for the Commission, as well. The Citizens Research Council of Michigan observed that the Redistricting Amendment would result in additional litigation costs based on anticipated legal challenges to the Commission.[15] And the Michigan Department of State, Michigan State University Institute for Social Policy and Public Research, the University of Michigan Ford School of Public Policy's Center for Local, State, and Urban Policy, and the Princeton Gerrymandering Project prepared a set of "Commissioner Orientation and Resource Materials" that described the Commission's need for "[l]egal counsel to provide legal expertise in possible litigation, to serve as a general counsel/staff attorney(s) and to provide expertise regarding the Voting Rights Act."[16]

In addition to publicly recognizing the role legal counsel would play in advising the Commission, policy groups highlighted the importance of the Commission conducting its work

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[13] *Id*. at 7.

[14] Senate Fiscal Agency Report at 6 <https://www.senate.michigan.gov/SFA/Publications/BallotProps/Proposal18-2.pdf> (accessed Dec 12, 2021).

[15] Citizens Research Council of Michigan Summary of Prop 18-2 at 9 <https://crcmich.org/wp-content/uploads/memo1150-redistricting_proposal.pdf> (accessed Dec 12, 2021); see also slide 21 at Citizens Research Council of Michigan Webinar, "Everything you need to know about Proposal 2 – Redistricting Reform" <https://www.youtube.com/watch?v=FdqRqDE9AnQ> (accessed Dec 12, 2021).

[16] Commissioner Orientation and Resource Materials, Sept 2020 <https://www.michigan.gov/documents/sos/ICRC_Materials_for_Commission_701253_7.pdf > (accessed Dec 12, 2021).

in the open. A policy brief published on October 5, 2018 by the Mackinac Center for Public Policy observed:

> All of the commission's business must be conducted in open meetings, with advance notice published publicly. ***The commission would have to conduct its business in a manner that complies with Michigan's Open Meetings Act of 1976.*** This law requires certain public bodies to make their meetings open to the public and host them in a publicly available space. Attendees can record and broadcast the meeting, and all decisions of the public body must be made at an open meeting.[17] (emphasis added).

Such analyses reflect the "common understanding"[18] informing voters' decision to adopt the Amendment: the Commission would be advised by counsel who would defend it against anticipated legal challenges, and the Commission would conduct its business in the open—in a manner that complies with the Open Meetings Act. That is precisely what the Commission has done. In short, the Commission has acted to effectuate its mission—to draw legislative districts in an independent manner, free of partisan influence—in exactly the way voters intended.

III. Other States with Redistricting Commissions Recognize Their Need for Privileged, Confidential Legal Counsel

Plaintiffs cannot identify a single independent redistricting commission anywhere in the United States that has been prevented from obtaining confidential legal advice from its attorneys. Indeed, in other states, all independent redistricting commissions have the power to privately consult with their attorneys under appropriate circumstances similar to, or broader than, the circumstances under which other public bodies in Michigan are able to obtain confidential and privileged legal advice. Specifically, while the redistricting commissions of Alaska, Arizona, California, Colorado, Hawaii, Idaho, and Washington all require compliance with open meetings

[17] See Policy Brief at 5 <https://www.mackinac.org/archives/2018/s2018-11.pdf> (accessed Dec 12, 2021)

[18] See *Frey v Dept of Mgt & Budget*, 429 Mich 315, 334; 414 NW2d 873 (1987).

laws (allowing the public to view, attend, and comment on the commission's work), they all *also* recognize the attorney-client privilege.

To be sure, the approaches followed in different states vary. But each state allows, at a minimum, confidential attorney-client communications between a public body and its attorneys concerning pending or potential litigation:

- *See, e.g., Cool Homes, Inc v Fairbanks N Star Borough*, 860 P2d 1248, 1262 (Alaska, 1993) (recognizing closed sessions to protect attorney-client privilege "where public interest may be injured or there is some other recognized purpose in keeping the communication confidential," including to discuss avoiding liability, litigation strategies or discussion of facts, settlement, etc.);
- California Gov't Code § 11126 (permitting closed meetings to protect attorney-client confidentiality to allow body to "confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation" and defining 'pending litigation' to include situations where there is "significant exposure to litigation");
- Colorado Rev Stat Ann § 24-6-402 (authorizing public commissions to meet in executive session for "conferences with an attorney representing the state public body concerning disputes involving the public body that are the subject of pending or imminent court action, concerning specific claims or grievances, or for purposes of receiving legal advice on specific legal questions"); see also Colo Const art v, § 44.2(4)(b)(I)(A) (making commission subject to open-meetings statute);

- Idaho Code Ann § 74-206 (allowing closed attorney-client sessions "to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated."); and
- Washington Rev Code Ann § 42.30.110 (authorizing closed sessions "[t]o discuss with legal counsel representing the agency matters relating to agency enforcement actions," or to discuss litigation or potential litigation "to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party" if public knowledge of the discussion "is likely to result in an adverse legal or financial consequence to the agency.").

Other states go even farther. Arizona, for instance, recognizes a broad exception for hosting closed sessions between public bodies and their attorneys. Under Arizona law, a public body may hold a closed executive session for the purpose of "[d]iscussion or consultation for legal advice with the attorney or attorneys for the public body," or "[d]iscussion or consultation for legal advice with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position regarding contracts that are subject to negotiation, in pending or contemplated litigation or in settlement discussions in order to avoid or resolve litigation." Ariz Rev Stat Ann § 38-431.03. And in Hawaii, a public body may hold an executive meeting closed to the public upon the affirmative vote of two-thirds of the board's present members. Haw Rev Stat Ann § 92-4. Attorney-client executive sessions are permitted to "consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." *Id*. at § 92-5.

None of these states abrogated the attorney-client privilege for their redistricting commissions, and all allow for confidential attorney-client communications to enable their

commissions to obtain legal advice during all phases of the redistricting process to mitigate legal risk, and to avoid—or respond to—litigation over the plans they create.

IV. On October 27, 2021, The Commission Determined that Meeting in Closed Session Was Necessary to Discuss Attorney-Client Privileged Information

At its October 27 meeting in East Lansing, the Commission considered and approved a motion to enter into closed session "to discuss two attorney-client privileged and confidential memoranda providing legal advice from its counsel."[19] The closed session was held in a manner consistent with the provisions of the Open Meetings Act, MCL 15.268(h) ("[t]o consider material exempt from discussion or disclosure by state or federal statute") for the purpose of discussing privileged and confidential legal memoranda exempt from disclosure under the Freedom of Information Act, MCL 15.243(1)(g) ("information or records subject to the attorney-client privilege").[20] The closed session meeting with the Commission's counsel lasted a little over one hour.[21]

STANDARDS OF REVIEW

Writ of Mandamus

The Commission agrees with Plaintiffs that in order to obtain a writ of mandamus, a Plaintiff must show: (1) the plaintiff has a clear, legal right to performance of the specific duty

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[19] October 27, 2021 Commission Meeting Minutes <https://www.michigan.gov/documents/micrc/MICRC_Proposed_Meeting_Minutes_10_27_2021_740798_7.pdf> (accessed Dec 12, 2021).

[20] On February 4, 2021, the Commission adopted its official Rules of Procedure. Those rules prescribed that "[t]he Commission shall conduct meetings under these rules in accordance with the Open Meetings Act." Section 5.1, p 6 <https://www.michigan.gov/documents/sos/MICRC_Rules_of_Procedure_Adopted_Feb_4_715375_7.pdf> (accessed Dec 13, 2021). The Commission's Rules of Procedure also state that "[a]ll Commission records are available to the public for reading, copying and other purposes as governed by the Freedom of Information Act, except those specifically exempted under applicable laws including but not limited to FOIA or the OMA." Section 13.1(B), p 16.

[21] October 27, 2021 Commission Meeting Minutes, n 19, *supra*.

sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. *Taxpayers for Mich Const Govt v Dept of Tech, Mgt & Budget,* —Mich—; —NW2d— (2021) (Docket No. 160660), slip op at 27.

A clear legal right is "one clearly founded in, or granted by law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143; 369 NW2d 277 (1985) (internal quotations omitted) (quoting 55 C.J.S. Mandamus § 53, p. 93). By its very definition, the existence of the right must be clear. Statutory language that outlines permissive means of obtaining a plaintiff's desired performance but stops short of making that performance mandatory does not create a clear legal right or a clear legal duty. See *Arnold v Torch Lake Twp Tax Assessor*, unpublished per curiam opinion of the Court of Appeals, issued Nov 19, 2009 (Docket No 287626), p 3 (affirming the denial of a writ of mandamus where plaintiff sought specific tax assessment but statutory language was either permissive or silent regarding the performance sought).

When an action is ministerial, the "law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale Co Senior Servs Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013). On the other hand, where—as here—the law or statute contains permissive language that empowers the governmental body with discretionary authority, the resulting actions are not ministerial. See *Am Eagle Fireworks, Inc v Lansing Fire Marshall*, unpublished opinion of the Court of Appeals, issued Mar 1, 2002 (Docket No 228474), p1 (denying a writ of mandamus where language in an ordinance stated that the "council or commissioner of a city . . . may grant a permit . . . .")

"The general principle which governs proceedings by mandamus is that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy." *Clark v Peninsular Bldg & L Ass'n*, 268 Mich 584, 585; 256 NW 556 (1934) (citation omitted). In this case, because the Commission has no clear legal duty to publish the privileged memoranda or transcript of the October 27 closed session identified in Plaintiffs' complaint, and the Redistricting Amendment empowers the Commission to act with discretionary authority (pertinently by vesting the Commission with the "sole power to make its own rules of procedure," Const 1963, art 4, § 6(4)), Plaintiffs are not entitled to this extraordinary remedy.

Declaratory Judgment

The Commission agrees with Plaintiffs that an actual controversy exists, and that it would be salutary for the Court to provide guidance concerning the Commission's ability to have confidential, privileged communications with its counsel.

ARGUMENT

I. The Redistricting Amendment Does Not Abrogate the Attorney-Client Privilege

A. The Plain Language of the Redistricting Amendment Contemplates that the Commission Will Receive Privileged Legal Counsel

The Redistricting Amendment expressly contemplates that the Commission will be engaged in litigation and authorizes the Commission to retain legal counsel.

- Const 1963, art 4, § 6(4) provides in relevant part that "[t]he commission shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation";

- § 6(5) requires the Legislature to appropriate funds sufficient to allow the Commission to "carry out its functions, operations, and activities[,]" which includes "retaining . . . legal counsel";
- § 6(6) expressly authorizes the Commission to sue and be sued;
- § 6(11) establishes that certain rules that apply to the Commission also apply to its attorneys; and
- § 6(18) explicitly anticipates litigation, providing that the terms of Commissioners can expire, "but not before any judicial review of the redistricting plan is complete."

The express authorization for the Commission to hire counsel and engage in litigation in Const 1963, art 4, § 6—along with the absence of any stated limitation of the scope of the Commission's legal representation—shows that the people, in adopting the Redistricting Amendment, intended that the Commission would have the ability to receive legal advice from counsel in confidence and did not intend to abrogate the Commission's ability to rely on the attorney-client privilege.

B. The Attorney-Client Privilege is a Requisite, Foundational Element to a Client's Receipt of Candid Legal Counsel

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co v United States*, 449 US 383, 389; 101 S Ct 677; 66 L Ed 2d 584 (1981). The privilege has its roots in Roman law, founded on the notion "that the loyalty owed by the lawyer to his client disables him from being a witness in his client's case." 1 McCormick on Evid. § 87 (8th ed 2020). This Court has, since at least the mid-1800s, recognized the attorney-client privilege. *See, e.g., Alderman v People*, 4 Mich 414, 422 (1857); *People v Barker*, 60 Mich 277, 297; 27 NW 539 (1886); *Mack v Sharp*, 138 Mich 448,

451; 101 NW 631 (1904); *People v Dahrooge*, 173 Mich 375, 379; 139 NW 22 (1912). The attorney-client privilege is deeply rooted in the Anglo-American legal tradition and it is essential to the Commission's effective operations. The Commission's ability to receive confidential legal advice from its attorneys should not be abrogated by some unstated implication in the publication requirement in Const 1963, art 4, § 6(9).

"The attorney-client privilege is fundamental to our system of justice." *People v Brocato*, 17 Mich App 277, 303; 169 NW2d 277 (1969). The "purpose of the attorney-client privilege is to foster open communications between attorney and client." *People v Nash*, 418 Mich 196, 219; 341 NW2d 439 (1983). *See also McCartney v Attorney General*, 231 Mich App 722, 730; 587 NW2d 824 (1998) (recognizing the privilege "is designed to permit a client to confide in his attorney, knowing that his communications are safe from disclosure."). As this Court has recognized, confidentiality is essential to effectuate the "right" of a client "to consulting an attorney for the purpose of ascertaining" what the law requires of the client. *In re Bathwick's Will*, 241 Mich 156, 159-60; 216 NW 420 (1927).

Confidentiality is *essential* to a properly functioning attorney-client relationship. If a client believes communications made with that client's attorney could be disclosed, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v United States*, 425 US 391, 403; 96 S Ct 1569; 48 L Ed 2d 39 (1976). Indeed, as the Sixth Circuit Court of Appeals has observed with respect to confidential communications involving public business, "[u]pholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. *Abrogating the privilege undermines that culture and thereby impairs the public interest*." *Ross v City of Memphis*, 423 F3d 596, 602 (CA 6, 2005)

(emphasis added). *See also McCartney*, 231 Mich App at 732 (refusing to compel disclosure of letters to Governor sent to attorney for legal advice, finding that "to hold otherwise would have a chilling effect on the Governor's ability to seek advice from his counsel related to correspondence directed to his office").

Equally important to a client's open communications with her or his lawyer is the lawyer's ability to confidentially convey legal advice to the client. The Court of Appeals has held that "[c]onfidential client communications, along with opinions, conclusions, and recommendations based on those communications, are protected by the attorney-client privilege because they are at the core of what is covered by the privilege." *McCartney*, 231 Mich App at 735. Michigan courts have applied the attorney-client privilege to communications directed from an attorney to her or his client. See e.g., *Leibel v General Motors Corp*, 250 Mich App 229, 238; 646 NW2d 179 (2002) (holding that legal memorandum prepared by in-house counsel was protected by attorney-client privilege); *Sterling v Keidan*, 162 Mich App 88, 91; 412 NW2d 255 (1987) (affirming trial court's determination that letter from attorney to client regarding potential litigation strategies was protected by the attorney-client privilege).

C. The Commission's Right to Assert the Attorney-Client Privilege is Not Repugnant to the Constitution

This Court's precedent is clear that the attorney-client privilege exists by force of common law, unless a constitutional or statutory provision clearly abrogates it "in no uncertain terms." *People v Moreno*, 491 Mich 38, 48; 814 NW2d 624, 629 (2012) (quotation marks omitted). Plaintiffs identify no constitutional provision that eliminates the Commission's attorney-client privilege. Nor could they, because none exists. The privilege therefore cannot be deemed abrogated.

Const 1963, art 3, § 7 provides that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Contrary to Plaintiffs' assertion that the Commission's ability to communicate confidentially with its counsel "must yield to the higher authority of the Constitution," Pl.'s Br. at 8, that very Constitutions preserves "the common law and statutes . . . not repugnant" to it. Michigan case law significantly limits the circumstances in which common law doctrines are found to be repugnant to the Constitution, particularly when the established law is only impliedly or ambiguously inconsistent with the Constitution.

Fisher v Provin, 25 Mich 347, 349-350 (1872), decided nearly 150 years ago, may be the only Michigan case to directly address whether a particular common law doctrine was repugnant to the Constitution. There, this Court was asked to decide whether the common law rule that a husband and wife receiving a joint conveyance of real property "took as tenants by entirety" had been abrogated by the Constitution of 1850 or the "married woman's act" of 1855. Defendant contended that the common law rule was repugnant to the Constitution of 1850 because it was inconsistent with Const 1850, art 16, § 5, which provided that a married woman could acquire, hold and dispose of property as though she were unmarried.[22] Defendant's argument was Const 1850, art 16, § 5's provision that property held by a married woman "may be devised or bequeathed by her as if she were unmarried" was inconsistent with the common law rule for creation of a tenancy by the entirety, because a tenant by the entirety cannot separately alienate his or her interest in the property. See *Tkachik v Mandeville*, 487 Mich 38, 46-47; 790 NW2d

[22] Const 1850, art 16, § 5 provided in full: "The real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled, by gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried."

260 (2010). The *Fisher* court's holding that the common law rule for the creation of tenancy by the entireties was not abrogated by the Constitution of 1850 suggests that where established common law is only impliedly or indirectly inconsistent with a Constitutional provision, the common law is not rendered repugnant to the Constitution. *Fisher*, 25 Mich at 351. That conclusion applies here.

This holding effectively applied the standards for determining whether the Legislature has abrogated an element of the common law and suggests that the standard applies equally to a purported constitutional abrogation. It is well established that "[t]he common law remains in force until modified." *Dawe v Dr. Reuven Bar-Levav & Assocs, P.C.*, 485 Mich 20, 28; 780 NW2d 272, 277 (2010). Although the Legislature has the authority to abrogate the common law, it will not be assumed to have done so "by implication." *Rusinek v Schultz Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981). The Legislature must "speak in no uncertain terms" to accomplish an abrogation of the common law. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). A legislative amendment of the common law will not be lightly presumed. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652 n 17; 513 NW2d 799 (1994). Instead, "statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law." *Rusinek*, 411 Mich at 508. (internal citations omitted). Similarly, the Commission's ability to rely on the attorney-client privilege should not be eliminated by Constitutional language that is not unambiguously inconsistent with the privilege.

As Plaintiffs admit, used as a legal term of art, "repugnant" means "inconsistent or irreconcilable with; contrary or contradictory to." *Black's Law Dictionary* (11th ed.), Br. at 10. As a matter of textual interpretation, it can hardly be said that Const 1963, art 4, § 6(9) is

inconsistent with the Commission's ability to assert the attorney-client privilege where it is not obvious from the text of the provision whether otherwise privileged materials that are considered during the drafting process are required to be published. This is particularly true where Const 1963, art 4, § 6 clearly contemplates that the Commission will be involved in litigation and expressly authorizes the Commission to retain legal counsel.

The text of the Redistricting Amendment makes clear that materials merely reviewed by the Commission are not subject to the Const 1963, art 4, § 6(9) publication requirement. Even if Const 1963, art 4, § 6(9) were ambiguous as to whether it applies to materials merely reviewed by the Commission, that ambiguity renders it insufficient to abrogate the Commission's common-law attorney client privilege. [23] Accordingly, the § 6(9) publication requirement only abrogates the Commission's attorney-client privilege regarding memoranda containing legal advice received from counsel to the extent that the privilege is repugnant to the Constitution.

II. The Legal Memoranda Identified in the Complaint Should Be Protected from Public Disclosure

A. The Memoranda at Issue are Not "Data and Supporting Materials Used to Develop the [Redistricting] Plans"

The legal memoranda identified in the Complaint are not "supporting materials used to develop the plans" as described in Const 1963, art 4, § 6(9), and they should not be deemed so "by implication." *Rusinek*, 41 Mich at 508. Constitutional interpretation begins with the text. *Makowski v Governor*, 495 Mich 465, 472; 852 NW2d 61 (2014). This Court has developed two rules of constitutional construction. *Id.*, quoting *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745; 330 NW2d 346 (1982). First, the Court interprets the text in "the

[23] A provision of the law is ambiguous when it is equally susceptible to more than a single meaning. *Mayor of City of Lansing v Michigan Public Service Com'n*, 470 Mich 154, 166; 680 NW2d 840 (2004).

sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it." *Soap & Detergent Ass'n*, 415 Mich at 728. (citations and quotation marks omitted). Second, the Court considers "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." *Id.* (citations and quotation marks omitted).

Plaintiffs try to contort the plain text of Const 1963, art 4 § 6(9), which requires the Commission to publish "data and supporting materials" with proposed plans, to abrogate the Commission's attorney-client privilege by requiring the production of privileged legal memoranda. But the definition of "supporting materials" in Subsection 9 cannot reasonably be stretched to abrogate privileged legal memoranda used to advise the Commission on legal risk and requirements. The provision requires the publication only of "data and supporting materials used to develop the plans." "Used" means "employed in the accomplishing of something."[24] "Develop" means "to make visible or manifest" or "to set forth or to make clear by degrees or in detail."[25] Therefore, the more natural meaning of "supporting materials used to develop the plans" is that Const 1963, art 4, § 6(9) requires the Commission to publish all supporting materials that were actually employed in the manifesting or setting forth of specific proposed plans published under Subsection 9. In the context of redistricting, such material would include census data, geographic information, demographic records, or any other materials that were directly used by the Commission in creating a proposed map. Interpreting "supporting materials used to develop the plan" in this manner avoids the illogical result of the Commission's being

[24] Merriam-Webster Online Dictionary <https://www.merriam-webster.com/dictionary/used> (accessed Dec 12, 2021).

[25] Merriam-Webster Online Dictionary <https://www.merriam-webster.com/dictionary/develop> (accessed Dec 12, 2021).

required to publish—alongside any proposed plan—any document, recording or statement that had any potential impact on the Commission's overall process.

This natural reading of Subsection 9 is also consistent with the *noscitur a sociis* interpretive canon, under which, as this Court explained, "a word or phrase is given meaning by its context or setting," because "words and clauses will not be divorced from those which precede and those which follow." *Griffith ex rel Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005) (internal citations and quotations omitted). Hence, the term "supporting materials" should not be defined in a vacuum, but should be interpreted using the textual clues of the rest of Subsection 9 and its interaction with the provisions of other subsections referring to "data" and "supporting materials," including in subsections 8 and 15. When read in this context, it is clear that "supporting materials" must be read together with "data" to refer to factual information used to create proposed plans and not to privileged memoranda from Commission counsel giving advice about the law.

First, consider Subsection 8, which requires that before the Commission drafts any plans, it "shall receive for consideration written submissions of proposed redistricting plans and ***any*** supporting materials, including underlying data, from any member of the public. These written submissions are public records." This provision treats "data" as a subset of "supporting materials," which supports an interpretation that "supporting materials" refers to other types of factual information apart from "data" that fed into the plan's creation. This view is further supported by the fact that Const 1963, art 4, § 6(8) treats any "supporting materials, including underlying data," received from the public as public records. Legal memoranda from the Commission's counsel not directly used to create specific plans are not public records. *See Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003) ("The canon

of construction *expressio unius est exclusio alterius*, means that 'the expression of one thing suggests the exclusion of all others'").

Also consider the publication requirement of Const 1963, art 4, § 6(15), which requires that after the Commission adopts a plan it must publish materials and data "such that an independent person is able to replicate the conclusion without any modification of any of the published materials." While census data, election results, demographic information, and related information would assist an independent person "to replicate the conclusion" of the plan, legal memoranda and other background considerations referred to during the overall process but not directly tied to the plan do not. Accordingly, Const 1963, art 4, § 6(9) does not require that the Commission publish legal memoranda received from counsel that are considered during the map drawing process, but which are not directly used to develop the proposed maps.

B. Plaintiffs' Interpretation of "Supporting Materials" is Overly Broad

Plaintiffs contend that the text of § 6(9) means that they are owed a "clear right of access" to otherwise privileged attorney memoranda that members of the Commission considered during the drafting process. Br. at 6-8. But their argument proves too much. Plaintiffs' position appears to be that *all* materials considered by the Commissioners, which may in some way influence their mapping decisions, are subject to mandatory disclosure.[26]

As discussed in Argument § II.A., *supra*, the text of the Redistricting Amendment carries no such implication. Indeed, accepting Plaintiffs' interpretation would lead to absurd results: the Commission would be required to publish every magazine article, newspaper article, book, radio or television story, podcast, social media posting or internet website that in any way informed

[26] Notably, Plaintiffs occasionally depart from the Constitutional text and assert that § 6(9) requires the Commission to disclose "**all supporting materials upon which it relied**," Br. at 7 (emphasis in original), *cf.* "any data and supporting materials used to develop the plans."

any of the decisions that Commissioners made during the mapping process. A commissioner's proposed map might be impacted by his or her reading of books on the history of partisan gerrymandering, racial discrimination, or geography, but it would be nonsensical to interpret Const 1963, art 4, § 6(9) as requiring the Commission to publish those books simply because a commissioner in some way relied upon them in developing the plans.

C. The Legal Memoranda Identified in the Complaint Are Protected by the Attorney-Client Privilege

Plaintiffs assert that two Voting Rights Act memoranda, and related attorney-client communication about those memoranda, are not protected by the attorney-client privilege. Plaintiffs allege that the memoranda titled Voting Rights Act (dated October 14, 2021), and The History of Discrimination in the State of Michigan and its Influence on Voting (dated October 26, 2021) (together the "October VRA Memoranda"), and the Commission's closed meeting with counsel on October 27, 2021 to discuss those memoranda, are not privileged. Plaintiffs are wrong that the October VRA Memoranda and related discussion are not privileged. Those documents and the attendant meetings are privileged, and a brief discussion of the underlying legal context clarifies the privileged nature of those communications.

In the field of Voting Rights Act litigation, a review of "historical context" is not just prudent but *required* for compliance with the Act and preparation for potential litigation. The "essence of a § 2 claim [under the Voting Rights Act] is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities" of minority groups to elect their preferred candidates of choice. *Thornburg v Gingles*, 478 US 30, 47; 106 S Ct 2752; 92 L Ed 2d 25 (1986). A plaintiff alleging violation of Section 2 of the Voting Rights Act must first establish three "*Gingles* factors"—named after this seminal Supreme Court case. If those preconditions are met, a plaintiff must then demonstrate

that "under the totality of the circumstances, the devices result in unequal access to the electoral process" in violation of the Act. *Id.* at 46. The totality of circumstances analysis requires a court to conduct "a searching practical evaluation of the 'past and present reality'" to determine "whether the political process is equally open to minority voters." *Id.* at 79 (internal citations and quotation marks omitted). This totality-of-circumstances review is guided by nine factors detailed in the Senate Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act. *Id.* at 36, 43. The first factor in the Senate Report is: "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." *Id.* at 36-37.[27]

This first factor—employed in judicial review of Voting Rights Act litigation—is reflected in the title of the October 26, 2021 VRA Memorandum challenged by Plaintiffs here as not privileged: "The History of Discrimination in the State of Michigan and its Influence on Voting." That is, the title of the memorandum itself conveys the nature of the legal advice it contains. Plaintiffs choose not to acknowledge the significance of these factors and their place of import in Voting Rights Act litigation in suggesting that, based on title alone, a memorandum titled "The History of Discrimination [. . .]" could only include non-privileged content. (*See* Pl.'s Br. at 12-13.)

In fact, this memorandum was titled after the first totality-of-circumstances factor identified in *Gingles* and was offered to the Commission by legal counsel the Commission hired

[27] Other Senate Factors include racial polarization, the existence of other voting practices or procedures that may enhance the opportunity for discrimination, and the extent to which members of the minority group in the state bear the effects of discrimination in education, employment, health, or other areas that hinder their ability to participate effectively in the political process. *Id.*

to provide counsel about compliance with the Voting Rights Act. *Thornburg v Gingles* is the seminal vote-dilution case governing every Voting Rights Act vote-dilution lawsuit since its 1986 publication. *See, e.g., Brnovich v Democratic Nat'l Comm.*, 141 S Ct 2321, 2337; 210 L Ed 2d 753 (2021) ("In *Gingles*, our seminal § 2 vote-dilution case [. . .]."). Though Plaintiffs' argument elides references to the Voting Rights Act, *Gingles*, and the totality of circumstances review (*Gingles* is cited nowhere in their papers), the Commission's compliance with the Voting Rights Act is not optional, or taken lightly—it is required under law. The Commission has hired Voting Rights Act counsel to guide its work in map-drawing compliance. This compliance work necessarily supports the Commission in defending against any resulting litigation challenging that compliance.

Plaintiffs further broaden their theory, contending that even memoranda not discussed in closed session should be released because, based on the titles of each, they may relate to the development of redistricting plans. Br. at 12-13. Plaintiffs' assumption that these memoranda are "plainly related" to redistricting, and therefore must be made public, is wrong. The Commission has drawn a line between "supporting materials used to develop the [redistricting] plans" and protected attorney work product analyzing issues of legal compliance and potential future litigation.[28] To remove that protection would deprive the Commission of its ability as a multi-member public body to avail itself of the customary and traditional attorney-client

[28] Examples of the former include: Report of Dr. Lisa Handley, "Some Mathematical Measures for Determining if a Redistricting Plan Disproportionally Advantages a Political Party" <https://www.michigan.gov/documents/micrc/MCRC_Handley_memo_on_three_partisan_fairness_737249_7.pdf> (accessed Dec 12, 2021); Presentation of Bruce Adelson, "Bias, Race, and Tolerance at Work, School & In Society" <https://www.michigan.gov/documents/micrc/MICRC_Adelson_Implicit_Bias_July_8_729823_7.pdf> (accessed Dec 12, 2021); Presentation of Bruce Adelson, "Redistricting & Race" <https://www.michigan.gov/documents/micrc/MICRC_Adelson_B_Redistricting_and_Race_727863_7.pdf> (accessed Dec 12, 2021).

relationship. This would negatively impact not only the Commission's ability to receive legal advice, but its attorneys' ability to provide sound counsel and, ultimately, defend the adopted plans in litigation. More plainly stated, the ability of the Commission's legal team to provide full, frank, and candid legal advice, consistent with their ethical obligations, is under direct threat, as is the Commission's right to receive that advice.

The Commission has invoked the attorney-client privilege and attorney work product protection intentionally and sparingly. The ten confidential memoranda at issue here discuss legal strategies such as the applicability and impact of caselaw as well as legal risks associated with redistricting:

1. *Guidance on Subsection 11 of Art. IV § 6 of the Michigan Constitution – ICRC Communications with the Public*, January 21, 2021. Attorney-client communication and attorney work product providing interpretation and legal advice with associated risks and penalties outlined regarding constitutional restrictions on individual Commissioner behavior.

2. *MICRC Litigation Options to Address Delay of Census Data*, March 2, 2021. Attorney-client communication and attorney work product regarding the potential filing of litigation on behalf of client. Commission adopted Resolution 2021.02.10 to Authorize Legal Action to Address the Impact of the Delay in the Release of 2020 Census Data on March 5, 2021.

3. *Update on Michigan Supreme Court Petition and Next Steps*, May 25, 2021. Attorney-client communication and attorney work product regarding pending litigation.

4. *One Person, One Vote and Acceptable Population Deviations*, June 24, 2021. Attorney-client communication and attorney work product providing case law interpretation and legal advice analyzing issues of compliance in Michigan and potential future litigation.

5. *Legal Considerations and Discussion of Justifications re: Criteria*, October 7, 2021. Attorney-client communication and attorney work product providing case law interpretation and legal advice analyzing issues of compliance in Michigan and potential future litigation.

6. *Voting Rights Act*, October 14, 2021. Attorney-client communication and attorney work product providing case law interpretation and legal advice with associated litigation risks related to certain redistricting criteria.

7. *The History of Discrimination in the State of Michigan and its Influence on Voting, October 26*, 2021. Attorney-client communication and attorney work product providing case law interpretation and legal advice with associated litigation risk related to certain redistricting criteria. Sets forth research, interpretation and legal advice regarding threshold issues required to be met by Plaintiffs in Voting Rights Act challenges. See further analysis *infra*.

8. *Memorandum Regarding Renumbering of Electoral Districts*, November 3, 2021. Attorney-client communication and attorney work product providing interpretation, legal advice and guidance with associated litigation risks.

9. *Redistricting Criteria*, November 4, 2021. Attorney-client communication and attorney work product demonstrating attorney mental impressions and legal approach. Sets forth interpretation of relevant case law and provides legal advice analyzing issues of compliance in Michigan and potential future litigation.

10. *Memorandum Concerning Subsections 9 and 14 of Art. IV, § 6*, November 7, 2021. Attorney-client communication and attorney work product demonstrating attorney mental impressions and legal approach. Sets forth interpretation of relevant case law and provides legal advice analyzing issues of compliance in Michigan and potential future litigation.

All of these memoranda contain privileged legal counsel and should be protected from public disclosure to ensure that the Commission can act independently, through the receipt of frank and effective legal advice, to fulfill its Constitutional mandate.

D. The Legal Memoranda Identified in the Complaint Are Privileged Attorney Work Product

Plaintiffs contend that attorney work product protections only apply to materials created in connection with "specific litigation," Br. at 17 n 24. This is not the law in Michigan. Rather, work product is prepared in anticipation of litigation "'if the prospect of litigation is identifiable, either because of the facts of the situation or the fact that claims have already arisen.'" *D'Alessandro Contracting Grp., LLC v Wright*, 308 Mich App 71, 78; 862 NW2d 466, 471 (2014) (*quoting Great Lakes Concrete Pole Corp. v Eash*, 148 Mich App 649, 654 n 2; 385 NW2d 296 (1986)). Contrary to Plaintiffs' contention, "the work-product doctrine does not require that an attorney prepare the disputed document only after a specific claim has arisen."

Leibel v General Motors Corp, 250 Mich App 229, 246; 646 NW2d 179, 188 (2002). "Obviously, a document may be prepared in anticipation of litigation if the attorney rendered legal advice in order to protect the client from future litigation concerning a particular transaction or issue." *Id. See also People v Gilmore*, 222 Mich App 442, 455-56; 564 NW2d 158, 165 (1997) ("It is generally understood that litigation need not be commenced or threatened before materials can be considered 'prepared in anticipation of litigation'") (citation omitted).

Further, Plaintiffs are wrong to characterize the Commission's invocation of work-product protection as arising merely because redistricting is "contentious." Br. at 17. The anticipation of litigation here could not be more clear.[29] The Redistricting Amendment explicitly refers to the anticipated "judicial review of the redistricting plan." Const 1963, art 4, § 6(18). Today, litigation is even more likely than it may have appeared in 2018. The 2020 decennial census revealed that the State's existing districting plans are malapportioned, which creates a present or imminent violation of the federal and Michigan constitutional right to vote for millions of Michigan voters—at this present time. See *Reynolds v Sims*, 377 US 533, 577; 84 S Ct 1362, 1389-90; 12 L Ed 2d 506 (1964) (requiring states to make an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable"). Where the constitutional rights of innumerable Michiganders are subject to present or imminent impairment, there is a reasonable expectation of litigation. The Commission reasonably obtained legal counsel to prepare for litigation as it crafts a set of new redistricting plans to remedy the malapportionment of the prior decade's plans.

[29] Indeed, in an October 19, 2018 editorial opposing Proposal 18-2, Plaintiff Detroit News opined "the language defining how communities of interest should be grouped is vague and opens the door to endless litigation." <https://www.detroitnews.com/story/opinion/editorials/2018/10/09/editorial-vote-no-all-ballot-proposals/1565860002/> (accessed Dec 13, 2021)

There is more: at the Commission's October 20, 2021 meeting, multiple public comments gave rise to the prospect of litigation against the Independent Commission. One speaker stated: "[the maps] may not pass the Voting Rights Act and end up in court[.]" Another: "[s]peaking as respectfully and as candidly as possible[,] we know lawsuits are coming so why are we compromising on the integrity of this constitutional amendment." And another: "I implore this Commission to take the time to get it right . . . otherwise you look forward to a robust and vigorous Constitutional fight." [30] The prospect of litigation is identifiable; the question is *when*, not *if*, the Commission's redistricting plans will be challenged in court.

As a matter of law, access to attorney work product is limited to "situations where the party seeking [a document] demonstrates both a substantial need for the material plus a lack of other reasonable avenues for obtaining it." *Messenger v Ingham Cty Prosecutor*, 232 Mich App 633, 639; 591 NW2d 393, 396–97 (1998). Even where that substantial need is demonstrated, "the rule nonetheless unconditionally directs that the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* Here, Plaintiffs cannot establish a "substantial need and undue hardship" for the memoranda at issue. *Id*. at 644. While Plaintiffs contend that their inability to review the privileged memoranda inhibits their ability to "meaningfully weigh in on the redistricting plans," Br. at 18, this assertion is belied by the facts. Myriad materials reviewed by the Commission relating to its redistricting plans have been discussed in open session and can be found posted to the Commission's website. See Statement of Facts, § I, *supra*.

[30] October 20, 2021 Commission Meeting Transcript <https://www.michigan.gov/documents/micrc/MICRC_Meeting_Transcript_10_20_2021_740711_7.pdf> (accessed Dec 13, 2021)

Making these memoranda publicly available would reveal the Commission's attorneys' "thoughts, mental impressions, formulations of litigation strategy, and legal theories," and would unfairly and unnecessarily intrude on the attorney-client relationship. *D'Alessandro Contracting Grp.*, 308 Mich App at 78-79; see also *In re Powerhouse Licensing, LLC*, 441 F3d 467, 473 (CA 6, 2006), citing *Hickman v Taylor*, 329 US 495, 510, 67 S Ct 385, 91 L Ed 451 (1947) ("It is axiomatic that the purpose of the work-product doctrine is to allow an attorney 'to assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . to promote justice and to protect [his] clients' interests." Just such an interest is involved here.

E. The Commission Has Not Waived Any Privilege

Plaintiffs claim that the Commission waived attorney-client privilege for the October VRA Memoranda and October 27 closed meeting because, four months before those memoranda were circulated, the Commission conducted business in an open meeting and discussed non-privileged supporting information.[31] Plaintiffs allege that the contents of the October VRA Memoranda were published in open meetings in June and July and, therefore, privilege has been waived. Plaintiffs' argument errs in two ways.

First, the public content in the June and July materials and meetings is not the same as the privileged and confidential content covered in the October VRA Memoranda and related closed meeting. The June and July meetings, which Plaintiffs claim constitute a "waiver" of privilege concerned three presentations that the Commission's VRA counsel prepared and presented publicly. Specifically, these were PowerPoint presentations titled (1) The Law Of Redistricting,

[31] Br. at 15. Plaintiffs do not make this claim as to any other privileged materials or discussions.

DOJ, And Cautionary Tales (July 9, 2021)[32]; (2) What Do We Do Now? Bias, Race, And Tolerance At Work, School, & In Society (July 8, 2021)[33]; and (3) Redistricting & Race: The Voting Rights Act & U.S. Constitution For The Michigan Independent Citizens Redistricting Commission (June 15, 2021)[34] (together the "Public Presentations"). The Public Presentations in June and July were prepared for public discussion and were designed to educate the Commission and the public on important issues related to race and redistricting at a general level. For example, the June 15 presentation cites to general principles in Supreme Court precedent[35]; so too, the July 9 presentation on the Law of Redistricting.[36]

The October VRA Memoranda, on the other hand, were prepared as privileged and confidential attorney-client communications and work product, focused on VRA compliance issues specific to the Commission's work in Michigan. The privileged communications during the October 27 closed meeting are replete with questions a client would ask his or her attorney about how to comply with the law and candid answers and guidance by the Commission's attorneys. This is precisely the kind of open and confiding communication protected by the attorney-client privilege. *People v Nash*, 418 Mich 196, 219; 341 NW2d 439 (1983) (stating that the "purpose of the attorney-client privilege is to foster open communications between attorney and client."); *McCartney*, 231 Mich App at 730 (recognizing the privilege "is designed to permit a client to confide in his attorney, knowing that his communications are safe from disclosure.").

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[32]<https://www.michigan.gov/documents/micrc/MICRC_Adelson_DOJ_Const_July_9_729826_7.pdf.> (accessed Dec 13, 2021).

[33]<https://www.michigan.gov/documents/micrc/MICRC_Adelson_Implicit_Bias_July_8_729823_7.pdf. > (accessed Dec 13, 2021).

[34]<https://www.michigan.gov/documents/micrc/MICRC_Adelson_B_Redistricting_and_Race_727863_7.pdf> (accessed Dec 13, 2021).

[35] *Id.*

[36] See n 32, *supra.*

These October communications have never been publicly disclosed, certainly not four months before they happened. Under these circumstances—where the contents of the October VRA Memoranda and discussions during the October 27 closed meeting are not the same as the information in public meetings—there can be no waiver by publication, because the privileged information remains confidential.

This leads to the second reason Plaintiffs' waiver argument fails: a "waiver of the privilege does not arise by accident." *Leibel*, 250 Mich App at 240 (citing *Sterling v Keidan*, 162 Mich App 88, 95–96, 99, 412 NW2d 255 (1987)). "A true waiver is an intentional, voluntary act and cannot arise by implication. It has been defined as the voluntary relinquishment of a known right." *Kelly v Allegan Cty Cir Judge*, 382 Mich 425, 427, 169 NW2d 916, 917 (1969). Here, there was no intentional, voluntary act waiving the privilege over the October VRA Memoranda and October 27 closed meeting. While the Public Presentations and related open meetings were understood and treated by both the Commission and its VRA counsel as *not* privileged, the October VRA Memoranda and related closed meeting have always been treated by the Commission as privileged and remain confidential.

F. The Redistricting Amendment's Publication Requirement Applies Only to Documents Reviewed On or Before October 11, 2021.

Plaintiffs' argument that the legal memoranda identified in their complaint are subject to the Const 1963, art 4, § 6(9) publication requirement suffers from a fundamental flaw. Const 1963, art 4, § 6(9) requires that "[a]fter developing at least one proposed redistricting plan for each type of district, the commission shall publish the proposed redistricting plans and any data and supporting materials used to develop the plans." The Commission published at least one

proposed map for each type of district on October 11, 2021.[37] Plaintiffs identify November 12, 2021 as the date that the Commission triggered the Const 1963, art 4, § 6(9) publication requirement. Complaint ¶ 29, p 12. But this is plainly incorrect, as November 12, 2021 was the date that the Commission began the procedure for adopting a plan under Const 1963, art 4, § 6(14), not the date it developed "at least one redistricting plan for each type of district" under § 6(9).[38]

The Const 1963, art 4, § 6(9) publication requirement was therefore triggered on October 11, 2021 and nothing in the text of § 6(9) suggests that the publication requirement is an ongoing duty. Many of the legal memoranda identified in the Complaint—including, crucially, the October VRA Memoranda—were provided to the Commission after October 11, 2021, a fact that Plaintiffs never acknowledge.[39] Legal memoranda that had not yet been provided to the Commission when the Commission published the proposed redistricting plans could not have been "used to develop the plans" and cannot possibly be subject to the Const 1963, art 4, § 6(9) publication requirement.

Const 1963, art 4, § 6(14) governs procedures the Commission shall follow in adopting a plan. Subsection (b) provides that "Before voting to adopt a plan, the commission shall provide

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[37] See *Michigan's Redistricting Commission Just Approved Draft Maps. What Happens Next*, DETROIT FREE PRESS, Oct. 11, 2021 <https://www.freep.com/story/news/local/michigan/detroit/2021/10/11/michigan-redistricting-committee-whats-next/6069719001/> (accessed Dec 12, 2021).

[38] See Commission Public Notice of Nov 12, 2021 <https://www.michigan.gov/documents/micrc/MICRC_Plan_Publication_Notice_741252_7.pdf > (accessed Dec 12, 2021). The Commission also held the five public hearings required under Const 1963, art 4, § 6(9) between October 20, 2021 and October 26, 2021, well before the November 12, 2021 date identified by Plaintiffs as triggering the Commission's duties under § 6(9). See Commission Meeting Notices and Materials <https://www.michigan.gov/micrc/0,10083,7-418-106525---,00.html> (accessed Dec 12, 2021).

[39] The titles of the legal memoranda at issue and the dates they were provided to the Commission are listed in Argument § II.C., *supra*.

public notice of each plan that will be voted on . . . . Each plan that will be voted on shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and shall include the map and legal description required . . . ." Plaintiffs do not contend—nor could they—that the Commission has failed to provide to the public the census data, map, or legal description required under this provision. In sum, then, Plaintiffs have no argument that any legal memoranda provided to the Commission after October 11, 2021 were improperly withheld.

III. The Commission is Empowered to Meet in Closed Session to Consult with its Counsel and Review Privileged Materials

A. The Redistricting Amendment Does Not Prohibit the Commission from Meeting in Closed Session

Contrary to Plaintiffs' claims, Const 1963, art 4, § 6(10)'s requirement that the Commission "shall conduct all of its business at open meetings" does not abrogate the Commission's ability to invoke the attorney-client privilege or prevent the Commission from receiving confidential legal advice during the map-making process. Plaintiffs argue that the term "business" encompasses "all matters related to the development, proposal, and adoption of redistricting plans," Br. at 11, and therefore the Commission must receive legal advice related to the redistricting process at public meetings. Plaintiffs are mistaken.

1. Plaintiffs' Interpretation of "Business" is Overly Broad

Plaintiffs' position is that the Commission may not consider any information that may inform a decision regarding redistricting outside of an open meeting, suggesting that the Commission's "business . . . encompasses all matters" related to the Commission's purpose. Br. at 11. This definition of "business" is both illogically broad and inconsistent with the common understanding of "public meetings." It is also not supported by the text of Const 1963, art 4, § 6.

The term "business" is not defined in Const 1963, art 4, § 6. A more natural interpretation of the term "business" is the decisional actions[40] by which the Commission develops, drafts, and adopts a redistricting plan.

The definition of "business" as "decisional action" is consistent with the legislative history of the Open Meetings Act. Prior to the enactment of the Open Meetings Act, Michigan law required only that public bodies conduct final votes at open meetings. The Legislature, concerned that public bodies may be insulated from public accountability because they could privately decide what action to take and then simply hold a formal vote in public, enacted the Open Meetings Act with the intent that it would require public bodies to take all decisional actions at public meetings. See *Booth Newspapers, Inc v University of Mich Bd of Regents*, 444 Mich 211, 221-232; 507 NW2d 422 (1993).

2. Conducting the Business of a Public Board in the Open Does Not Preclude Closed Sessions

Plaintiffs argue that the Commission may not discuss redistricting matters with its attorneys outside of an open meeting. But Const 1963, art 4, § 6 expressly contemplates that the Commission may do just that. Const 1963, art 4, § 6(11) provides in relevant part that "[t]he commission, its members, staff, attorneys, and consultants shall not discuss redistricting matters with members of the public outside of an open meeting of the commission." The fact that § 6(11) forbids the Commission, or its attorneys, from discussing redistricting matters with the

[40] By "decisional action" the Commission means both any deliberative action intended to produce a consensus for a decision and the formal decision itself. The Commission is not suggesting that it could go into a closed session, deliberate and arrive at a consensus on a decision, and then fulfil its obligations under Const 1963, art 4, § 6(10) merely by holding the formal vote at an open meeting. The Commission did not take any decisional action at the October 27, 2021 closed session; it merely received legal advice from counsel. It did not engage in any deliberations aimed at reaching a consensus on any redistricting matter and it did not make any formal decisions on any redistricting matter.

public outside of an open meeting—but does not preclude the Commission or its attorneys from discussing redistricting matters or confidential matters outside of open meetings among themselves—implies that the people did not intend to bar the Commission and its attorneys from discussing privileged matters, so long as the Committee is not conducting business by taking a decisional action towards the development, drafting, or adoption of a redistricting plan.

A narrower definition of the Commission's "business" is also supported by Const 1963, art 4, § 6(5), which states in relevant part that "the legislature shall appropriate funds sufficient to . . . enable the commission to carry out its functions, operations, and activities, which activities include retaining . . . legal counsel . . . and any other activity necessary for the commission to conduct its business." As § 6(5) states that hiring legal counsel is an activity necessary for the commission to conduct its business, it follows that the receipt of legal advice from counsel is not "business" itself, but rather an activity necessary for the commission to conduct its business by making formal decisions regarding the development, drafting, and adoption of redistricting plans.

3. The Commission's Adoption of Procedures in Accord with the Open Meetings Act is Consistent with the Voters' Understanding of Open Meetings

A more reasonable, less expansive, definition of the Commission's "business" is also supported by the commonly understood meaning of term "open meetings" as used in Const 1963, art 4, § 6(10). The Open Meetings Act, which requires most public bodies to conduct their business at public meetings, is relevant to determining the common understanding of the term "open meetings."[41] The Open Meetings Act defines "meeting" as "the convening of a public

[41] The Open Meetings Act is so foundational to the commonly understood meaning of the term "open meetings" that when the Redistricting Amendment was being considered prior to the 2018 election, the Mackinac Center for Public Policy released a policy brief which interpreted the Amendment's open meetings requirement to mean that "[t]he commission would have to conduct its business in a manner that complies with Michigan's Open Meetings Act of 1976." See n 17, *supra*.

body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy . . . .” MCL 15.262(b). The Open Meetings Act defines “decision” as “a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.” MCL 15.262(d).

Accordingly, under the Open Meetings Act a public body is required to meet in public when it convenes for the purpose of deliberating toward or rendering some kind of decisional action on a matter of public policy. However, the Open Meetings Act does not require a public body to hold an open meeting merely to consider information that may inform a decision made in the future. Indeed, the Open Meetings Act authorizes public bodies to conduct closed sessions to consider and discuss legal memoranda protected by the attorney-client privilege. MCL 15.268(h); *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 467-468; 425 NW2d 695 (1988) (holding that “§ 8(h) of the OMA authorizes closed sessions to discuss matters which are exempt from disclosure or discussion by a statute (such as FOIA), or which are reasonably related thereto.”).

The purpose of the Commission’s October 27, 2021 closed session was to receive legal advice about the risk of potential litigation arising out of the redistricting process. This legal advice may (or may not) have affected later decisions that individual Commissioners made (or may make) regarding the development, drafting, and adoption of a redistricting plan. However, no decisions regarding any redistricting matter were made by the Commission during the October 27, 2021 closed session. Any decisions the Commission has made that might have been informed by the legal advice received during the closed session were made at open meetings, and the Commission will continue to make all future decisions regarding redistricting matters at open

meetings. Because the Commission did not take any decisional action with regard to any redistricting matter during the closed session, it was not conducting "business" within the meaning of Const 1963, art 4, § 6(10). The Commission's decision to meet in closed session to receive legal advice from counsel was therefore not inconsistent with Const 1963, art 4, § 6, and it was not repugnant to the Constitution for the Commission to invoke the attorney-client privilege as a basis for holding a closed session.

B. To Fulfill its Constitutional Mandate, the Commission Must Be Able to Communicate Confidentially with its Counsel

Under Plaintiffs' theory, there exists no situation in which the Commission, as a full body, could hold private conversations or obtain privileged legal advice (either in writing or orally) from its counsel. Plaintiffs' interpretation is divorced from logic. For the reasons set forth in Argument § I.A., *supra*, the people clearly intended the Commission to seek out, retain, and benefit from professional legal advice from counsel.

To be sure, the permissible purposes for closed sessions under the Open Meetings Act function to limit the activities of public bodies[42] that occur outside of the public view. *See* MCL 15.268. Certain of the twelve listed purposes apply to the Commission, including handling employment issues under subpart (a); considering trial or settlement strategy under subpart (e); and "to consider material exempt from discussion or disclosure by state or federal statute" in subpart (h). MCL 15.238. Plaintiffs encourage this Court to interpret article 4, § 6 in such a way that it would deprive the Commission of the opportunity to address employment and personnel

[42] "Public body" means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o; MCL 15.262(a).

issues in private, and would force the full body to receive legal advice and counsel on litigation risk (and options to mitigate such risk) in open session with not only the public, but also opposing counsel, listening. Even written communications from counsel are not protected under Plaintiffs' proffered arguments. They envision and advocate that "anytime the Commission is conducting business, the Commission must be at an open meeting" and there is "no discretion for the Commission to conduct only *some* of its business in open meetings." (Complaint ¶76, p 16, emphasis in original.)

The sole function and purpose of the Commission is the promulgation and adoption of redistricting plans in accordance with art 4, § 6. It is not unreasonable to expect that almost all of the information offered to the Commission from any source will relate to redistricting, whether it be from advocacy groups advancing their interests, individuals, or the Commission's counsel. The critical distinction is that communications from counsel appropriate for public consumption are provided in open session and in materials posted to the website. In stark contrast, there should be no expectation that privileged and confidential communications and attorney work product providing legal advice regarding potential litigation risks, and legal strategy in addressing potential risks, would be publicly available.

The plain language of the Redistricting Amendment clearly regulates oral and written communications with the public (Const 1963, art 4, § 6(11)) and designates all proposed redistricting plans received from the public as public records (Const 1963, art 4, § 6(8)). There is no such language, express or implied, associated with its attorneys, and to insert such language would deprive the Commission the full benefit of counsel and require all discussions regarding legal risks to be conducted in open meetings. Plaintiffs' proposed interpretation would

effectively operate as a gag order on counsel and severely restrict the Commission's ability to receive candid legal advice.

Nothing, however, in article 4, § 6 indicates that the people intended the requirement in subsection 10 to "conduct all of its business at open meetings" to be interpreted so broadly as to eviscerate the Commission's attorney-client relationship and render its counsel ineffectual. Without more express limitations in the plain language of article 4, § 6, it would be unreasonable to conclude that the people—in conferring the ability and authority of an independent Commission to retain counsel, legal experts, and engage in litigation as either a plaintiff or defendant—intended to preclude the Commission from availing itself of effective assistance of counsel in its affairs.

C. The Commission is Currently Constrained from Receiving Privileged Legal Counsel Absent This Court's Guidance

The Commission implores this Court to reject Plaintiffs' proffered interpretation and preserve the well-established and normal attorney-client relationship to ensure it has all of the tools needed to perform its Constitutionally-mandated work with the benefit of full and frank legal counsel. The Commission's ordinary understanding of the domain of privileged communications between an attorney and client does not violate the Constitution or impair the public's right to participate in the redistricting process. Rather, the Commission's position respects the distinct roles and responsibilities of the public, the Commission as a body, and its relationship with counsel.[43] As the United States Supreme Court has stated: "The attorney client privilege is one of the oldest recognized privileges for confidential communications. The privilege is intended to encourage full and frank communication between attorneys and their

[43] Notably, this Court has interpreted constitutional language in other redistricting cases. See, e.g., *In re Apportionment of State Legislature – 1982*, 413 Mich 96, 122-116 (1982); *In re Apportionment of State Legislature – 1972*, 387 Mich 422, 451 (1972).

clients and thereby promote broader public interest." *Swidler & Berlin v United States*, 524 US 399; 118 S Ct 2081; 141 L Ed 2d 379 (1998) (quotation marks and citations omitted).

CONCLUSION

For the foregoing reasons, Plaintiffs' request for a declaratory judgment and writ of mandamus should be denied.

Respectfully submitted,

December 13, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2021, I electronically filed the foregoing paper with the Clerk of the Court using the MiFILE system, which provided a copy to all counsel of record registered for efiling in this case.

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