

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

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RE: LIVINGSTON COUNTY  
APPORTIONMENT COMMISSION

Case No:

\_\_\_\_\_/

David G. Stoker (P24959)  
Timothy M. Perrone (P37940)  
COHL, STOKER & TOSKEY, P.C.  
Attorneys for Petitioner  
601 N. Capitol Ave.  
Lansing, MI 48933  
(517) 372-9000

\_\_\_\_\_/

**PETITION TO EXTEND TIME FOR  
COMPLETION OF COUNTY APPORTIONMENT PLAN**

The Livingston County Apportionment Commission, by its counsel, Cohl, Stoker & Toskey, P.C., pursuant to MCL 46.407, submits this Petition to Extend Time for Completion of County Apportionment Plan, and in support, states the following:

1. MCL 46.401 requires that the County Apportionment Commission complete an apportionment plan within 60 days of the publication of the latest United States Official Decennial Census Figures.

2. Pursuant to MCL 46.407, if the Apportionment Commission does not complete the apportionment plan within the 60-day time frame, the Apportionment Commission loses authority to adopt its own apportionment plan, and must instead choose a plan from one submitted by the public.

3. Pursuant to MCL 46.404(a), the Secretary of State shall furnish the latest United States official published census figures to the Apportionment Commission within 15 days after publication of the official census figures.

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4. On August 12, 2021, the Census Bureau made available on its website its official 2020 census data (non-tabulated data in legacy format), for use in redrawing local district boundaries, but also indicated that it would deliver the final redistricting data toolkit (to make the same official figures more “user-friendly”) by September 30, 2021,

5. Therefore, the 60-day deadline for the Apportionment Commission to adopt its own apportionment plan is October 11, 2021, as determined by its legal counsel. (See August 18, 2021 Cohl, Stoker & Toskey, P.C. opinion letter, attached as Exhibit 1).

6. The Michigan Association of County Clerks also sought a legal opinion as to the 60-day deadline, and was advised that the 60-day timeframe began to run on August 12, 2021. (See August 23, 2021 Warner Norcross + Judd, LLP opinion letter, attached as Exhibit 2).

7. However, on September 10, 2021, the Michigan Bureau of Elections notified all County Clerks that the 60-day timeframe for completion of an apportionment plan would begin on the date that the Census Bureau announced for the release of its final data, i.e., on September 16, 2021, rather than the previously announced date of September 30, 2021. (See September 10, 2021 Michigan Bureau of Elections email, attached as Exhibit 3).

8. The Bureau of Elections email was accompanied by a memorandum from the Michigan Attorney General’s Office, which opined that the 60 days within which County apportionment commissions must apportion counties would commence on September 16, 2021, with the Census Bureau’s release of the final, tabulated data, i.e., the “latest” “official” census data published by the Census Bureau. (See September 10, 2021 Attorney General Memorandum, attached as Exhibit 4.)

9. The Bureau of Elections email and the Attorney General’s Memorandum cause confusion, because they state that the official census figures that would be forthcoming on

September 16 are the same official figures released on August 12, such that they would not be “the latest.” Moreover, the Attorney General’s Memorandum by its terms is not an official Attorney General’s Opinion, and refers County Clerks to their local counsel.

10. As advised by local counsel for the Livingston County Apportionment Commission (Exhibit 1), and legal counsel for the Michigan Association of County Clerks (Exhibit 2), the prudent course is to comply with the 60-day deadline measured from August 12, i.e., approve a plan by Oct. 11.

11. As a consequence of the conflicting advisements, County Apportionment Commissions across the State of Michigan are split on ascertaining when the date of publication of the latest official census figures is, and what the deadline is for completion of a County apportionment plan.

12. Depending on which guidance is followed, the Apportionment Commission could lose its power to approve its own plan, and could become involved in litigation as to the appropriate deadline.

13. Under all of the circumstances, including the decreased timeframe from the late release of data by the Michigan Secretary of State, and controversy in determining the actual date of publication by the U.S. Census Bureau, the Livingston County Apportionment Commission has determined to request an extension of the deadline to file an apportionment plan to a date certain, being 12:00 p.m. on November 15, 2021.

14. Pursuant to MCL 46.407, this Court may grant an extension for good cause shown in a petition.

15. In *Richards v McNamee*, 240 Mich App 444, 452; 613 NW2d 366, 369–70 (2000), this Court defined “good cause” as “a substantial reason amounting in law to a legal excuse for failing to perform an act required by law,” citing *Franchise Management Unlimited, Inc v*

*America's Favorite Chicken*, 221 Mich App. 239, 246; 561 NW2d 123 (1997), quoting Black's Law Dictionary (6th ed.), p. 692. The current edition of Black's Law Dictionary defines 'good cause' more simply as a "legally sufficient reason." Black's Law Dictionary (7th ed.), p. 213. *Id.*

16. The Livingston County Apportionment Committee approved a motion to file this Petition on September 27, 2021, by a 5-0 vote.

17. In *In re Branch County Apportionment Commission*, Case No. 358490 (September 16, 2021), this Court granted an extension to the Branch County Apportionment Commission on similar grounds to those presented in this Petition. (See September 16, 2021 Order, attached as Exhibit 5).

**WHEREFORE**, the Livingston County Apportionment Commission respectfully requests that this Honorable Court enter an Order extending the time to complete the County Apportionment Plan to 12:00 p.m. on November 15, 2021, together with such other and further relief as may be required.

Respectfully submitted,

COHL, STOKER & TOSKEY, P.C.

Date: September 28, 2021

/s/ David G. Stoker  
David G. Stoker (P24959)  
Timothy M. Perrone (P37940)  
Attorneys for Petitioner  
601 N. Capitol Ave.  
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(517) 372-9000

**EXHIBIT 1**

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COHL, STOKER & TOSKEY, P.C.

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OF COUNSEL

RICHARD D McNUITY

August 18, 2021

Elizabeth Hundley  
Livingston County Clerk  
200 E. Grand River Ave.  
Howell, MI 48843

Re: County Apportionment Commission Plan Time Frames

Dear Ms. Hundley:

You have requested this office's review of the "start date" for the County Apportionment Commission's establishment of new County Board of Commissioner districts under MCL 46.401 *et seq.* MCL 46.401(1) states:

**46.401 County apportionment commission; apportionment of county into county commissioner districts.**

(1) **Within 60 days after the publication of the latest United States official decennial census figures**, the county apportionment commission in each county of this state shall apportion the county into not less than 5 nor more than 21 county commissioner districts as nearly of equal population as is practicable and within the limitations of section 2. (*Emphasis added*)

\* \* \*

Failure of the County Apportionment Commission to establish these districts within this time frame requires the Commission to select from plans submitted by registered voters rather than establishing their own approved plan. This limitation is provided for at MCL 46.407, which in pertinent part provides:

**46.407 Apportionment plan; failure of apportionment commission to submit; submission by registered voter.**

**If the apportionment commission has failed to submit a plan for its county within 60 days but not less than 30 days after the latest official published census figures are available or within such additional time as may be granted by the court of appeals for good cause shown on petition from the**

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**apportionment commission, any registered voter of the county may submit a plan to the commission for approval. The commission shall choose from among those submitted to it a plan meeting the requirements of the laws** of this state and file such plan in the office of the county clerk as set forth in section 5 within 30 days after the deadline for the filing of the commission's own plan or any extension granted thereon. (*Emphasis added*)

Therefore, the statutory time frame for submitting a plan is measured from “**when the latest official published census figures are available**” unless an extension is granted by the Court of Appeals.<sup>1</sup>

It is our understanding that the Michigan Secretary of State Election Bureau is suggesting that the official start date of this time frame will instead be September 30, 2021, though they also suggest each county consult with their legal counsel. September 30, 2021, was in fact the initial time frame anticipated for the release of the 2020 census data.<sup>2</sup> However, this apparently changed when a federal lawsuit was filed by the State of Ohio seeking an earlier release date.<sup>3</sup> The federal Court of Appeals for the Sixth Circuit on appeal held that Ohio had standing as an appropriate party to seek such an earlier release of data for redistricting, and remanded the case to the Ohio federal District Court.<sup>4</sup> The Census Bureau and State of Ohio then agreed to hold the case in abeyance as the Census Bureau agreed to release the redistricting data by August 16, 2021, in the “legacy” format used in prior censuses.<sup>5</sup> Subsequently the Census Bureau announced that it would in fact be releasing the data on August 12, 2021, and held a news conference for that release.<sup>6</sup>

The Census Bureau’s website now reflects that the “**2020 CENSUS REDISTRICTING DATA IS NOW AVAILABLE**”, and, in pertinent part, further states<sup>7</sup>:

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<sup>1</sup> The law, at MCL 46.404(a), also provides that the Michigan Secretary of State is to furnish the latest official published figures to the county apportionment commissions within 15 days after publication of the United States official census figures. However, the Apportionment Commission’s time limit runs from the “publication” and not receipt of the figures from the State.

<sup>2</sup> <https://www.census.gov/data/what-is-data-census-gov/upcoming-releases.html>

<sup>3</sup> *State of Ohio v Gina Raimondo, In her official capacity as Secretary of Commerce, et al.*, Case No. 3:21-cv-00064-TMR (SD Ohio, 2021).

<sup>4</sup> *State of Ohio v Gina Raimondo, et al*, Case No. 21-3494, 848 Fed.Appx. 187 (Mem), (6th Cir, May 21, 2021)[See: <https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0245n-06.pdf>]

<sup>5</sup> See: <https://www.documentcloud.org/documents/20788367-state-of-ohio-may-25-2021-joint-motion-to-hold-case-in-abeyance>

<sup>6</sup> <https://twitter.com/uscensusbureau/status/1423351861160161291> and <https://www.census.gov/newsroom/press-releases/2021/news-conference-2020-census-redistricting-data.html?linkId=100000059333136>

<sup>7</sup> <https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census-results.html>

**Decennial Census P.L. 94–171 Redistricting Data Summary Files,**

Includes the **official data**, documentation, and support materials to assist in assessing PL 94–171 redistricting data.

On August 12, we released the redistricting data to the states and the public. **States may use these data in redrawing congressional, legislative, and local district boundaries.** The Census Bureau will also deliver the final redistricting data toolkit to all states and the public by September 30. COVID-19-related delays and prioritizing the delivery of these apportionment results delayed our original plan. *(Emphasis added)*

\* \* \*

It is our understanding that the Census Bureau has therefore released the official 2020 census for redistricting as of August 12, 2021, but will also be providing a “toolkit” by no later than September 30, 2021, to make the official data more user-friendly. The Census release states the August 12, 2021, data is the “official” data for redistricting use, but it is published in a “legacy” format as used in prior censuses. This apparently is less user-friendly, and a toolkit will be forthcoming which will make this data “easier-to-use” and more compatible for the public generally. However, per the Census Bureau’s own website, the August 12, 2020, data is in a format that has been used “*the last two decades,*” and “*The data included in the August and September deliveries will be identical. States can use either the August delivery or the September delivery as appropriate, taking their own statutes and constitutional requirements into account. The Census Bureau considers both releases to be official and fit for use.*”<sup>8</sup>

Thus, it appears clear that the official data from the 2020 Census for redistricting was in fact made “available” on August 12, 2021, and published on the Census Bureau’s website that date. Based on the foregoing, it is our opinion that the 60-day time limit for submitting the County Apportionment Commission’s plan would run from this August 12, 2021, release date. As noted above, the time limit for the Apportionment Commission filing a plan per MCL 46.407 runs from 60 days “after the latest official published census figures are available” unless an extension is granted by the Court of Appeals. Thus, the time limits appear to have started with this internet publication of these “official” redistricting census figures. Note that there is no distinction in the Michigan law for the start of the time limit as to whether the release publication to be in any specific format.

This would then require the County apportionment to be completed by approximately October 11, 2021. As noted, failure to meet this time limit (unless an extension is granted by the Court of Appeals) would provide for submission of plans by any registered voter in the County, and the Apportionment Commission would then be required to select from those

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<sup>8</sup> See Questions 2, 4 and 8 from the Census August 12, 2021 FAQ Section at: <https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/release/redistricting-data-product-faqs.html>



submitted plans rather than a plan of its own.<sup>9</sup> However, if a Commission plan is timely filed, but it is then appealed and rejected by the Court of Appeals, the County Apportionment Commission would still have the option of coming up with its own plan that complies with the Court's Order.<sup>10</sup> Thus, complying with the 60-day time frame is important for allowing the County Apportionment Commission to retain authority to draft its own plan. To the extent there may be any arguable legal or factual question regarding the operative census publication date, the most prudent course in our opinion would be using the earliest date in that there are no adverse ramifications to acting in advance of the statutory date.

Do not hesitate to contact this office if you have any additional questions.

Sincerely,

COHL, STOKER & TOSKEY, P.C.

*/s/ David G. Stoker*

DGS/gmk

cc: Livingston County Apportionment Commission

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<sup>9</sup> MCL 46.407

<sup>10</sup> *In re Apportionment of Wayne County--2001*, 250 Mich App 614 (2002)

**EXHIBIT 2**

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Warner Norcross + Judd LLP

August 23, 2021

Michigan Association of County Clerks  
120 N. Washington Square, Suite 110A  
Lansing, Michigan 48933

Re: **Reapportionment Plan 60-Day Time Limit**

Dear Clerks:

You asked us to analyze the timeframe applicable to Michigan county clerks and apportionment commissions in developing a reapportionment plan as required by MCL 46.401 *et seq.* The Michigan Bureau of Elections has determined that the subject 60-day limit runs from the date the Bureau furnishes the counties with the needed census data, and *not* the date the information is published by the federal government. The Michigan Association of County Clerks (the “Clerks”), though, is concerned that the 60-day limit runs from the date census information was published. We believe, based on our reading of the relevant statutes that the Clerks’ interpretation is correct and that the 60-day limit began to run when the census data was published by the federal government on August 12, 2021.<sup>1</sup>

### Interpretation of Statute

In Michigan, statutes are construed according to their plain and unambiguous meaning. *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 71-72; 894 NW2d 535 (2017) (“If the statute’s language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written.”). Any interpretation that would render a portion of a statute superfluous is improper. *Id.* (“This Court, as with all other courts, must give effect to every word, phrase, and clause in a statute, to avoid rendering any part of the statute nugatory or surplusage.”). And where a “statute does not define a word, [courts] consult dictionary definitions to determine the plain and ordinary meaning of the word.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008).

The relevant statute here is MCL 46.401, *et seq.* That section provides:

“Within 60 days after the **publication** of the latest United States official decennial census figures, the county apportionment commission in each county of this state **shall** apportion the county into not less than 5 nor more than 21 county commissioner districts

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<sup>1</sup> See <https://www.census.gov/newsroom/press-kits/2021/2020-census-redistricting.html>

as nearly of equal population as is practicable and within the limitations of section 2.” MCL 46.401.

As to the Michigan Secretary of State’s obligation, the statute says:

“The secretary of state **shall** furnish the latest official published figures to the county apportionment commissions forthwith upon this act taking effect, and **within 15 days after publication of subsequent United States official census figures.**” MCL 46.404.

The Bureau of Elections has said that it believes the “publication” date of the 2020 census data is September 30, 2021. The Bureau’s rationale is not entirely clear, though. It appears that the Bureau of Elections has taken the position that either (i) whatever date it chooses to furnish the census data to the counties constitutes the date of “publication” for purposes of MCL 46.401, or (ii) the date that the census bureau provides the data in “easier-to-use formats” constitutes the publication date, not the August 12, 2021 date on which the information was first made available to the public.<sup>2</sup> Neither position, however, is tenable.

The Michigan statute does not define “publication,” and neither does the relevant federal statute directing the U.S. Secretary of Commerce to provide the redistricting data to the states. 13 U.S.C. § 141. But both the plain meaning of the word “publish,” and its usage elsewhere in the same act give us the word’s meaning as the legislature used it here. First, to publish is to “make generally known” or “to disseminate to the public.”<sup>3</sup> Second, the Bureau’s reading would render the language in MCL 46.404 superfluous. If the date of “furnishing” and “publication” are the same, then that section is meaningless and of no effect.

Taken together, section MCL 46.401 and 46.404 and the definition of “publish” demonstrate that the federal census bureau *publishes* the data (*i.e.*, makes it available to the public), and the Secretary of State then *furnishes* the published data to counties. The Secretary of State must act within 15 days of that publication, and the counties must act within 60 days of that publication.

### **Effects of Late Reapportionment**

The Clerks are justified in their discomfort with the Bureau’s position here. If the county commissions miss their 60-day deadline, they lose the power to create their apportionment plans. MCL 46.407 says:

“If the apportionment commission has failed to submit a plan for its county within 60 days but not less than 30 days after the latest

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<sup>2</sup> See <https://www.census.gov/newsroom/press-kits/2021/2020-census-redistricting.html> (distinguishing between August 12, 2021 release date and later, anticipated September 30, 2021 release date of same information in “easier-to-use format”).

<sup>3</sup> <https://www.merriam-webster.com/dictionary/publish>

official published census figures are available or within such additional time as may be granted by the court of appeals for good cause shown on petition from the apportionment commission, **any registered voter of the county may submit a plan to the commission for approval.** The commission **shall choose from among those submitted to it** a plan meeting the requirements of the laws of this state and file such plan in the office of the county clerk as set forth in section 51 within 30 days after the deadline for the filing of the commission's own plan or any extension granted thereon.”

The plain language of this section says that the commission loses the right to create its own apportionment plan and, instead, *must* choose one of the voter-created options submitted to it.

### **The Clerks and Counties’ Options Now**

According to the above-quoted section, it appears the Clerks and their respective apportionment commissions do have the ability to protect their right to create an apportionment plan. MCL 46.407 refers to the 60-day deadline “or within such additional time as may be granted by the court of appeals for good cause shown on petition from the apportionment commission.” This means the counties’ apportionment commissions have a right to petition the court of appeals for an extension of time. It would be very surprising if the court did not find the Bureau’s unilateral delay of the necessary information to constitute good cause for an extension here.

A factually similar dispute was recently adjudicated by the United States Court of Appeals for the Sixth Circuit. The State of Ohio’s constitution requires reapportionment of district seats based on U.S. census data by a certain date. Ohio sued the U.S. Secretary of Commerce for failing to deliver census data by the April 1, 2021 federal statutory deadline because it would cause Ohio to be unable to meet its constitutional mandate. *Ohio v Raimondo*, 848 Fed Appx 187, 188 (CA 6, 2021). Overturning the trial court, the Sixth Circuit found that the State had sufficient standing to sue the Secretary for this failure, since a statute provided the publishing date, and the State was injured by the Secretary’s failure. *Id.*

Similarly here, Michigan statute requires the Michigan Secretary of State to furnish counties with the published census data within 15 days after publication. MCL 46.404. The Secretary’s failure to do so constitutes a violation of that statute, which injures county apportionment commissions. The commissions would seemingly have standing to sue the Secretary on that basis, given the Sixth Circuit’s rationale.

It appears the counties’ apportionment commissions have two options if the Bureau refuses to comply with its statutory obligations: (i) petition the court of appeals for an extension of time to file a reapportionment plan, or (ii) sue the Bureau and Secretary of State for that failure.

Michigan Association of County Clerks

August 23, 2021

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We hope that the foregoing has been helpful. Should you have any further questions or wish to discuss the foregoing in more detail, please do not hesitate to contact us.

Very truly yours,



Jonathan E. Lauderbach

JEL/bjc  
22182918

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**EXHIBIT 3**

**From:** Bourbonnais, Lori (MDOS) <[bourbonaisl@michigan.gov](mailto:bourbonaisl@michigan.gov)>  
**Sent:** Friday, September 10, 2021 5:02 PM  
**To:** Bourbonnais, Lori (MDOS) <[bourbonaisl@michigan.gov](mailto:bourbonaisl@michigan.gov)>  
**Subject:** [EXT] CCD Tool and County Apportionment Update  
**Importance:** High

"The e-mail below is from an external source. Please do not open attachments or click links from an unknown or suspicious origin."

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County Clerks and Election Directors,

The Bureau of Elections received the attached memo from the Civil Litigation, Employment, and Elections (CLEE) Division of the Michigan Attorney General's office today, regarding the timing for county reapportionment plans. The CLEE Division of the Attorney General's office has agreed with Bureau's understanding that the 60-day clock for counties to draw their plans begins on the day the official final September data is released. Please also note that since we last communicated, the Census Bureau has announced that the final data will be released on September 16, rather than September 30. In the Bureau's view, the 60 days will run from September 16. Counties should continue to consult with their own legal counsel on these issues.

Please also note that although the CCD Tool is designed to assist you in drawing County Commission Districts, counties must independently confirm that their districts comply with legal requirements, including population deviation. Because it is possible for an individual district to deviate by up to 11.9 percent, the CCD Tool permits deviation up to this level when drawing individual districts, but counties still need to confirm that the entire plan does not exceed the maximum deviation *between* districts. Counties should consult with their legal counsel to ensure that districts comply with population deviation and other requirements.

Lori A. Bourbonnais, Director  
Election Administration Division  
Michigan Bureau of Elections

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**EXHIBIT 4**

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STATE OF MICHIGAN  
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL  
ATTORNEY GENERAL

**M E M O R A N D U M**

September 10, 2021

TO: Mike Brady, Chief Legal Counsel  
Department of State

Jonathan Brater, Director of Elections  
Department of State

FROM: Heather S. Meingast, Division Chief  
Erik A. Grill, Assistant Attorney General  
Civil Litigation, Employment, and Elections Division

RE: **Timing for county re-apportionment plans**

**Issue Presented**

You have asked whether the statutory obligations imposed on county apportionment commissions to redraw county commissioner districts commenced upon the release of non-tabulated, legacy format census data by the U.S. Census Bureau on August 12, 2021, or will commence upon the release of final, tabulated census data by the Census Bureau on September 16, 2021.

**Short Answer**

The 60 days within which county apportionment commissions must apportion counties under MCL 46.401(1) will commence on September 16, 2021, with the U.S. Census Bureau's release of the final, tabulated PL 94-171 data. This is because the final, tabulated data constitutes the "latest" "official" census data that will be published by the Bureau. Likewise, the Secretary of State's duty to provide the latest, official census figures to the county apportionment commissions within 15 days of the Bureau's publication will commence on September 16. MCL 46.404(a). While the August 12 legacy format data is not the "official" census data, county apportionment commissions may use the legacy format data to begin the reapportionment process.

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## Background

Every ten years following the decennial United States Census, Michigan adjusts its state legislative and congressional district boundaries based on the population changes reflected in the census. Under the Michigan Constitution, as amended in 2018, the Independent Citizens Redistricting Commission (ICRC or Commission) is charged with redrawing state legislative and congressional district maps. See Const 1963, art 4, § 6.

Michigan counties also engage in redistricting. The governing body of a county is the board of county commissioners. See Const 1963, art 7, § 7; 1966 PA 261, as amended, MCL 46.401 *et seq.* By statute, counties must be apportioned into a certain number of county commissioner districts based on population as reported in the U.S. Census. See MCL 46.401(1). The body that conducts county reapportionment is the county apportionment commission, which consists of either the board of county commissioners or the county clerk, the county treasurer, the prosecuting attorney, and the county chairperson of the two political parties that received the greatest number of votes cast for the office of Secretary of State in the last election. MCL 46.403(1). The county apportionment commissions must apportion districts “[w]ithin 60 days after the publication of the latest United States official decennial figures[.]” MCL 46.401(1).<sup>1</sup>

For both the ICRC and the county apportionment commissions, the release of the U.S. Census data is a necessary component of the reapportionment process. See Const 1963, art 4, § 6(2)(a)(i), (c)-(f), (5), and (7); MCL 46.401(1), MCL 46.404(a). The U.S. Secretary of Commerce oversees the U.S. Census Bureau and the decennial census activities. 15 USC 1511(5), 13 USC 2. The decennial census data, specifically the population count, is important because it determines the number of representatives representing each state in Congress for the following decade. The more detailed dataset known as redistricting counts, or the Census PL 94-171 data, is critical for redistricting because it provides geographic and spatial detail on where people live and their key demographic characteristics.

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<sup>1</sup> The provisions relating to apportionment in charter counties are set forth in 1966 PA 293, MCL 45.501 *et seq.*, specifically, MCL 45.505. The apportionment requirements for charter counties track those of non-charter counties set forth in 1966 PA 261, as amended.

The following provisions are codified in the Census Act, 13 USC 1 *et seq.*, which governs U.S. Census Bureau activities:

- Decennial census of population shall occur on April 1. 13 USC 141(a).<sup>2</sup>
- Tabulation of total population required for apportionment of the U.S. House of Representatives “shall be completed within 9 months after the census date and reported by the Secretary [of the U.S. Census Bureau] to the President of the United States.” 13 USC 141(b).
- States shall have the opportunity to identify the small area geography for which they need data to conduct legislative redistricting or apportionment and deliver this data (PL 94-171 data) no later than one year from census day. 13 USC 141(c).

Based on these statutes, under federal law, the relevant dates for the 2020 census cycle are: census date of April 1, 2020, apportionment data due to the President by December 31, 2020, and redistricting data released to the states by April 1, 2021.

However, earlier this year representatives from the U.S. Census Bureau announced a four-month delay for apportionment data<sup>3</sup> and a 6-month delay<sup>4</sup> for redistricting data.<sup>5</sup> The U.S. Census Bureau cited the COVID-19 pandemic, wildfires in the western states, and the active hurricane season, among others, as causes of the delay in their 2020 census operations. See *Ohio v Raimondo*, 2021 WL 1118049 at \*1-2 (March 24, 2021, SD Ohio).

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<sup>2</sup> “Census of population” is defined in 13 USC 141(g) as “census of population, housing and matters related to population and housing.”

<sup>3</sup> See *Census Bureau Statement on Apportionment Counts*, Release Number CB21-RTQ.06, 1/28/21, available at [Census Bureau Statement on Apportionment Counts](#).

<sup>4</sup> See *Census Bureau Statement on Redistricting Data Timeline*, Release Number CB21-CN.14, 2/12/21, available at [Census Bureau Statement on Redistricting Data Timeline](#).

<sup>5</sup> The redistricting data includes counts of population by race, ethnicity (Hispanic or Latino origin), voting age, housing occupancy status, and group quarters population at the smallest geographic level, which is a census block.

The chart below demonstrates the progression of the delays in census data:

Action/Sent to	Deadline Under Title 13 “Statutory Plan”	Deadline under the Executive Summary <sup>6</sup> “Original Plan”	Updated Deadlines per 2020 Census Update <sup>7</sup> “COVID Plan”	Updated Deadlines per Press Releases <sup>8</sup> “Current Plan”
President (population counts for apportionment)	by December 31, 2020	by December 31, 2020	by April 30, 2021	by April 30, 2021
States (redistricting counts for redistricting)	by April 1, 2021	by March 31, 2021	by July 30, 2021	by September 30, 2021

In addition to the unprecedented delay, the Census Bureau is also taking the unprecedented approach of releasing two sets of redistricting data: non-tabulated “legacy” format data and final, tabulated PL 94-171 data. Legacy format data is a non-tabulated version of census data that must be processed before use. The data in the legacy format files is identical to the PL 94-171 redistricting data files and subject to the same quality assurance processes. The difference is in the format the census data is presented.

On August 12, 2021, the Census Bureau made available on its website the non-tabulated, legacy format data.<sup>9</sup> The ICRC is currently utilizing the August 12 legacy format data to commence drawing state legislative and congressional district maps; however, the ICRC plans to reconcile the legacy format data with the final, tabulated data.<sup>10</sup> Notably, on September 1, 2021, the Census Bureau announced

<sup>6</sup> See *2020 Census Operational Plan, Executive Summary, Prepared by the Decennial Census Management Division, U.S. Census Bureau Version 1.0, December 2015*. The document notes Final Version 1.0 was adopted November 6, 2015.

<sup>7</sup> On January 27, 2021, Kathleen Styles, an official at the U.S. Census Bureau, announced during a 2020 Census Update Meeting hosted by the National Conference of State Legislatures that the bureau intended to deliver redistricting data to the states by July 31, 2020.

<sup>8</sup> On January 27, 2021, Styles announced the bureau intended to deliver its final apportionment report. On February 12, 2021, the census bureau announced that it would delay transmission of redistricting data to the states.

<sup>9</sup> See 2020 Census Statistics Highlight Local Population Changes and nation’s racial and ethnic Diversity, August 12, 2021, available at [Local Population Changes and Nation’s Racial and Ethnic Diversity \(census.gov\)](https://www.census.gov/newsroom/press-releases/2021/pl94-171-redistricting-data.html), and Decennial Census PL. 940171 Redistricting Data, August 12, 2021, available at [Decennial Census P.L. 94-171 Redistricting Data Summary Files](https://www.census.gov/pl94-171-redistricting-data.html).

<sup>10</sup> See August 13, 2021, [With census data in hand, Michigan’s redistricting commission to start drafting new political maps next week - mlive.com](https://www.mlive.com/news/michigan/2021/08/13/with-census-data-in-hand-michigan-s-redistricting-commission-to-start-drafting-new-political-maps-next-week/).

that it intends to release the final, tabulated PL 94-171 redistricting data by September 16, 2021, instead of September 30.<sup>11</sup> The Census Bureau advised that the final, tabulated data will be available online through a tool, but will also be delivered to state officials on DVDs and flash drives.<sup>12</sup>

Not long after the legacy format data became available on August 12, the Bureau of Elections began to receive inquiries from county clerks regarding whether the county apportionment commissions' statutory obligations to redraw county commission districts stem from the release of the legacy format data or the final format data now set to be released on September 16.

The Bureau of Elections has advised county clerks that, in its opinion, the impending release of the final, tabulated census data triggers the county apportionment commissions' 60-day window to re-draw county commission districts. The Bureau, however, has further advised county clerks that the county apportionment commissions may commence drawing districts using the August 12 legacy format data if the county has the capability of using the non-tabulated data. The Bureau has shared with the county clerks the Census Bureau's link to the August 12 legacy format data, and the Bureau has created an optional tool that counties may use to draw county commission districts, which works with the legacy format data and is expected to work with the final data as well.

While the Bureau has informed county clerks that county apportionment commissions may begin working with the legacy format data, you have asked for our opinion regarding whether the counties must finish reapportionment work 60 days from the release of the legacy format data on August 12 or 60 days from the release of the final, tabulated data on September 16.

### Legal Analysis

When interpreting statutory language, the goal is to discern the Legislature's intent, the best indicator of which is the plain and ordinary meaning of the language used. *Odom v Wayne Co*, 482 Mich 459, 467 (2008). "Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Apportionment of Wayne Cty – 2001*, 250 Mich App 614, 617–618 (2002) (citations omitted). See also MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and

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<sup>11</sup> See Census Bureau Announces Release Date for Easier-to-Use Formats for Redistricting Data, September 1, 2021, available at [Release Date for Easier-to-Use Formats for Redistricting Data \(census.gov\)](#)

<sup>12</sup> *Id.*

appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”). “Further, the language must be applied as written, and nothing should be read into a statute that is not within the manifest intent of the Legislature as indicated by the act itself.” *In re Apportionment of Wayne Cty*, 250 Mich App at 617-618 (citations omitted).

MCL 46.401(1) provides, in part, that “[w]ithin 60 days after *the publication of the latest United States official decennial census figures*, the county apportionment commission in each county of this state shall apportion the county into not less than 5 nor more than 21 county commissioner districts as nearly of equal population as is practicable[.]” (Emphasis added).

MCL 46.404(a) provides the guidelines for conducting apportionment, and states, in part, that:

In apportioning the county into commissioner districts, the county apportionment commission shall be governed by the following guidelines in the stated order of importance:

(a) All districts shall be single-member districts and as nearly of equal population as is practicable. *The latest official published figures of the United States official census shall be used in this determination*, except that in cases requiring division of official census units to meet the population standard, an actual population count may be used to make such division. Other governmental census figures of total population may be used if taken subsequent to the last decennial United States census and the United States census figures are not adequate for the purposes of this act. *The secretary of state shall furnish the latest official published figures to the county apportionment commissions . . . within 15 days after publication of . . . United States official census figures.* [Emphasis added.]

And MCL 46.407 addresses the failure of county apportionment commissions to timely adopt apportionment plans:

If the apportionment commission has failed to submit a plan for its county within 60 days but not less than 30 days *after the latest official published census figures are available* or within such additional time as may be granted by the court of appeals for good cause shown on petition from the apportionment commission, any registered voter of the county may submit a plan to the commission for approval. The commission shall choose from among those submitted to it a plan meeting the requirements of the laws of this state and file such plan in the office of the county clerk as set forth in section 5 within 30 days

after the deadline for the filing of the commission's own plan or any extension granted thereon. [Emphasis added.]

Under subsection 1(1), MCL 46.401(1), the 60 days within which a county apportionment commission must approve an apportionment plan starts to run “after the publication of the latest United States official decennial census figures.” The statutes do not define the phrase “latest United States official decennial census figures” or “the latest official published census figures” as used in the above provisions.

The reference to United States decennial census figures must be understood to mean the specific population data compiled for each state and reported to the Governor and other public officials for each state under 13 USC 141(c),<sup>13</sup> which data is commonly referred to as redistricting data or the PL 94-171 data.<sup>14</sup>

As discussed above, the August 12 legacy format data is a version of the PL 94-171 data provided for in 13 USC 141(c). However, the question is whether it is the “latest,” “official” census data that will be “published” by the Census Bureau as those terms are used in MCL 46.401 and the other relevant statutes. It is not for two reasons.

First, even if the August 12 legacy format data could presently be considered the “latest” census data, it is undisputed that the Census Bureau intends to publish and physically provide to the states a final, tabulated version of the PL 94-171 data by September 16. The word “latest,” in its ordinary sense, may be understood to mean the “most recent; newest.” Webster’s New World Dictionary (3<sup>rd</sup> ed, 1988), p 763. See *Oakland Cty Bd of Cty Rd Comm’rs v Michigan Prop & Cas Guar Ass’n*, 456 Mich 590, 604 (1998) (“A court may consult dictionary definitions when terms are not expressly defined by a statute.”) Thus, the tabulated PL 94-171 data set to be published on September 16 will be the “most recent” and “newest” census data published by the Census Bureau, and therefor the “latest” data as that term is used in MCL 46.401(1) and related statutes.

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<sup>13</sup> 13 USC 141(c) provides, in part:

. . . . Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

<sup>14</sup> The apportionment data tabulated by the Census Bureau and reported to the President under 13 USC 141(b) reflects only the total population of each state and does not include or contain any county-level population data.



Second, the August 12 legacy format data is not the Census Bureau’s “official” “decennial census figures.” As used in the relevant statutes, the word “official” may be understood to mean “by, from, or with the proper authority; authorized or authoritative,” or “formally set or prescribed.” Webster’s New World Dictionary (3<sup>rd</sup> ed, 1988), p 941.

In a March 15, 2021, press release, the Census Bureau confirmed that it intended to release the legacy format data in August because it recognized the timing difficulties the September 30 release date for the tabulated data caused states. Releasing the legacy data allowed states to attempt to process the data, but the Bureau warned that states did so at their own risk:

In recognition of the difficulties this timeline creates for states with redistricting and election deadlines prior to Sept. 30, we have reviewed our timeline to identify any opportunities to shorten the processing schedule. Our review confirms that all steps of data processing and formatting will be complete by Sept. 30. However, the final steps in our process include creating “tabulations” (data tables) from the data we have collected for each state and creating a user-friendly system for data access. We have determined that states should be given the opportunity to use an outside vendor to process legacy format summary redistricting data files if states do not have the capacity to tabulate the data on their own. The declarations filed March 12 [in the case of *Ohio v. Raimondo*] note that given the difficulty of using the data in this format, any state using legacy format summary redistricting data files would have to accept responsibility for how they process these files; whether correctly or incorrectly.<sup>15</sup>

In its August 12, 2021, press release, the Census Bureau stated the following with respect to the legacy format data:

#### Legacy Data vs. Final Delivery of PL 94-171 Redistricting Data

These data released today are in the same format that the 2000 and 2010 redistricting data were provided. The term “legacy” refers to its prior use. By September 30, we will release these same data to state officials with an easy-to-use toolkit of DVDs and flash drives and we will make it available to the public on [data.census.gov](http://data.census.gov). The Census

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<sup>15</sup> See U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File, available at [Statement on Release of Legacy Format Summary Redistricting Data File \(census.gov\)](https://www.census.gov/2021/08/12/legacy-format-summary-redistricting-data).

Bureau will notify the public in September when it makes these same data available.<sup>16</sup>

And the September 1, 2021, press release announcing that the Census Bureau intended to release the final formatted version of the PL 94-171 data by September 16, states:

The U.S. Census Bureau will release easier-to-use formats of the [2020 Census Redistricting Data \(Public Law 94-171\) Summary File on September 16](#).

Also on September 16, redistricting data will be available through the Census Bureau's primary data dissemination tool, [data.census.gov](#). *The Census Bureau will also deliver an easy-to-use toolkit of DVDs and flash drives to state officials and public bodies responsible for their state's legislative apportionment or districting.*

These data — first [released August 12](#) — are currently available in a legacy format on the Census Bureau's FTP site. These data are also available through various [data visualizations](#). . . . [Emphasis added.]<sup>17</sup>

Given that it is not the practice of the Census Bureau to make legacy format data available, the Bureau's stated concerns regarding the states' abilities to utilize the legacy format data, and the Bureau's intent to release a final, tabulated version of the PL 94-171 data—and to send only that version of the data directly to the states—it cannot be concluded that the August 12 legacy format data constitutes the “official decennial census figures” contemplated by MCL 46.401(1) and the related statutes. While the underlying data is the same in both sets, the present circumstances support a conclusion that the final, tabulated version of the PL 94-171 data to be released on September 16 constitutes the “official”—meaning “authorized,” “authoritative,” or “formal”—version of the “decennial census figures” contemplated by the statutes.

Accordingly, in answer to your question, the 60 days within which county apportionment commissions must apportion counties under MCL 46.401(1) will commence on September 16, 2021, with the release of the final PL 94-171 data. Likewise, the Secretary of State's duty to “furnish the latest official published

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<sup>16</sup> See 2020 Census Statistics Highlight Local Population Changes and nation's racial and ethnic Diversity, August 12, 2021, available at [Local Population Changes and Nation's Racial and Ethnic Diversity \(census.gov\)](#).

<sup>17</sup> See Census Bureau Announces Release Date for Easier-to-Use Formats for Redistricting Data, September 1, 2021, available at [Release Date for Easier-to-Use Formats for Redistricting Data \(census.gov\)](#).

figures to the county apportionment commissions . . . within 15 days after publication of . . . United States official census figures,” will commence on September 16. MCL 46.404(a).<sup>18</sup> If the Census Bureau does not meet its September 16 deadline, the time periods will start on whatever date the Bureau publishes the final version of the census data.

Finally, while the August 12 legacy format data is not the “official” census data, nothing in Public Act 261 prohibits county apportionment commissions from utilizing that data to begin the apportionment process. As noted above, the ICRC has commenced its work using the August 12 legacy format data, but intends to reconcile that data with the final version of the data to be released on September 16.

**This memorandum is unofficial advice at the division level and should not be considered a formal opinion of the Attorney General.**

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<sup>18</sup> The Department of Attorney General is in receipt of a legal opinion provided to the Michigan Association of County Clerks dated August 23, 2021, that concluded the 60 days commenced with the release of the legacy format data on August 12, 2021. But for the reasons stated herein, we disagree with that conclusion.

**EXHIBIT 5**

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**Court of Appeals, State of Michigan**

**ORDER**

In re Branch County Apportionment Commission

Docket No. 358490

Jane M. Beckering  
Presiding Judge

David H. Sawyer


Mark T. Boonstra  
Judges

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The motion to waive the filing fees is GRANTED.

The motion for immediate consideration is GRANTED.

The petition to extend deadline for completion of apportionment plan is GRANTED, and the deadline to complete the plan is extended to 12 p.m. on November 15, 2021.



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Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

September 16, 2021  
Date



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Chief Clerk

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