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

DATE: November 4, 2021

SUBJECT: Redistricting Criteria

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

Table of Contents

I. Summary

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

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

II. Background

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

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

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

Section 6 addresses gerrymandering in three basic ways:

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

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

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

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

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

III. Analysis

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

A. Disproportionate Advantage

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

1. Objective Effects Standard

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

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

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

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

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

2. No Standard of Strict Proportional Representation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fourth, Proposal 18-2 appears not to have been sold to the public as a proportional-representation amendment. VPN's website informed voters that the requirement ultimately codified at Subsection (d) was meant to: "Not give an unfair advantage to any political party, politician, or candidate (no partisan gerrymandering)." Voters Not Politicians, *supra*, *Frequently Asked Questions* ("How will the Commission draw maps?"). A leading proponent and drafter of Proposal 18-2 asserted publicly that "a Michigan redistricting commission won't change the fact that some seats will be considered safe for Republicans and others safe for Democrats, based on the fact [that] far more Republicans than Democrats live in Allegan and far more Democrats than Republicans live in Detroit." Paul Egan, *Proposal 2 in Michigan: Pros and cons, what gerrymandering is*, Detroit Free Press (Sept. 21, 2018). https://www.freep.com/story/news/local/michigan/2018/09/21/michigan-gerrymandering-proposal/1266999002/ (quoting Nancy Wang, "an Ann Arbor attorney who helped draft the Michigan proposal and is president of Voters Not Politicians"). "But, she said, they will no longer be gerrymandered to favor incumbent politicians and political parties."[4] *Id.* Other contemporaneous evidence of "the circumstances surrounding the adoption of the provision and the purpose sought to be accomplished," *Taxpayers for Michigan*, 2021 WL 3179659, at *6, are in accord with these examples. Notably, the sponsors of Proposal 18-2 emphasized the primacy of communities of interest in advocating its enactment, which (as noted) can create tension with partisan-fairness measures on the margins. *See* Voters Not Politicians, *supra*, *Frequently Asked Questions* ("What are communities of interest and how will the Commission incorporate them into maps?"). We have located no contemporaneous evidence of the proponents of Proposal 18-2 informing the public that, if adopted, the provision would ensure that all political parties would be guaranteed the same number of seats in a legislative chamber or delegation as their percentage of the vote.

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

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

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

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

B. Incumbents and Candidates

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

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

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

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

IV. Conclusion

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