

# ESSAY

## LEGISLATIVE REDISTRICTING IN THE TIME OF COVID

by  
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*Due to the COVID pandemic, the U.S. Census Bureau was unable to provide 2020 census data to Oregon in time for the Legislature to engage in redistricting during the 2021 session, as required by the Oregon Constitution. As a result of this delay, the Oregon Legislature asked the Oregon Supreme Court to push back the constitutionally imposed deadlines for redistricting—a request which the Court agreed to in part. This Essay examines the Court’s power to revise constitutionally prescribed deadlines and the extent to which any districting plan must be based on federal census data.*

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### INTRODUCTION

Legislative redistricting is a challenging task even in the best of times. The 2021 redistricting cycle in Oregon, though, has proven to be more difficult and fraught than usual due to the U.S. Census. As a result of the COVID pandemic, the U.S. Census Bureau announced earlier this spring that it would not be able to provide the detailed census data needed for redistricting to any of the 50 states until mid-

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August at the earliest and potentially as late as September 30.<sup>1</sup> The Oregon Constitution, however, requires that redistricting be done by the Legislature by July 1—a deadline that could not be met this year, at least with the federal census data.<sup>2</sup>

As a result of the Census Bureau's announcement, the Oregon Legislature went to court, asking the Oregon Supreme Court to push back the constitutionally imposed deadlines for redistricting. In *State ex rel. Kotek v. Fagan*,<sup>3</sup> the Supreme Court agreed to the Legislature's request in part, but, as this Essay examines, the *Kotek* decision raises a host of questions and potential problems down the road. Among the questions raised, but left unanswered, is the extent of the Supreme Court's power to revise state constitutional deadlines and, more particularly for legislative redistricting, what substantive role the federal census must play in the crafting of any districting plan. In a more practical vein, the immediate and intended result of the *Kotek* decision is to enable the Legislature to convene a special, emergency session this August or September after the Census Bureau delivers the necessary data. However, as discussed more fully below, pushing back the legislative deadline required a corresponding set of deadline extensions for the judicial review and finalization of the districting plan. The net result will be a highly compressed primary election season in 2022 that will likely favor incumbents over challengers.

Last, but not least, while the *Kotek* decision alters the timeline for *state legislative* redistricting, the Legislature did not ask the Supreme Court to push back the statutorily-imposed July 1 deadline for *congressional* redistricting<sup>4</sup>—drawing the district lines for Oregon's soon-to-be six U.S. Representatives. As a result, the Oregon Legislature was forced to enact a bill that extends the statutory deadline for adopting a congressional districting plan to September 27.<sup>5</sup> If the Legislature fails to enact a congressional redistricting plan by that new deadline, however, the task of drawing the state's congressional districts will fall to a court with all of the race-to-the-courthouse tumult that entails. In short, *Kotek* did not solve all of the problems regarding redistricting caused by the census delay, and it may have unwittingly created several additional ones.

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<sup>1</sup> Michael Wines & Emily Bazelon, *A New Delay for Census Numbers Could Scramble Congressional Elections*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/us-census-figures-delay.html>.

<sup>2</sup> OR. CONST. art. IV, § 6(3) (providing July 1 deadline for state legislative redistricting); OR. REV. STAT. § 188.125(2)(b)(A) (2019) (providing July 1 deadline for congressional redistricting).

<sup>3</sup> 484 P.3d 1058 (Or. 2021).

<sup>4</sup> *Id.* at 1064.

<sup>5</sup> S.B. 259, 81st Cong., Reg. Sess. § 1 (Or. 2021).

## I. STATE LEGISLATIVE REDISTRICTING

This past February, the U.S. Census Bureau announced that, because of the COVID pandemic, it would not be able to provide states with the detailed census data used for redistricting by April 1, 2021, as required by federal law.<sup>6</sup> Instead, the Bureau declared that the data would not be provided until September 30.<sup>7</sup> The Bureau subsequently revised that timeline, promising to get the data to the states sometime between mid- and late-August,<sup>8</sup> but the damage had been done. The Bureau's announcements that the census data would not be released until the late summer sent shock waves through the capitols of all fifty states, which rely upon the spring release of the census data in order to initiate and complete the redistricting process well in advance of the beginning of the 2022 election cycle.<sup>9</sup> In Oregon in particular, the state constitution imposes a July 1 deadline for the Legislature to complete redistricting so as to enable the judicial review of the redistricting plan to be completed by mid-December, two weeks prior to the January 1 deadline for candidates for legislative office to have established residency in their district.<sup>10</sup> Given the delay in the census data, what was the state to do?

Oregon's legislative leadership decided to go to court. On March 10, the Oregon Legislature filed a petition for mandamus with the Oregon Supreme Court, asking the Court to modify the deadlines specified in Article IV, Section 6 of the Oregon Constitution regarding state legislative redistricting and the judicial review thereof. In particular, the Legislature asked the Court to extend the constitutionally-specified deadline for the Legislature to adopt a state redistricting plan from July 1 to December 31.<sup>11</sup> As the Legislature's petition argued in dramatic terms, the Census Bureau's "delay—absent intervention by this Court—creates a constitutional crisis."<sup>12</sup> The Oregon Legislature's decision to seek judicial

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<sup>6</sup> 13 U.S.C. § 141(c) (2018).

<sup>7</sup> *Census Bureau Statement on Redistricting Data Timeline*, U.S. CENSUS BUREAU (Feb. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>; Wines & Bazelon, *supra* note 1.

<sup>8</sup> *U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File*, U.S. CENSUS BUREAU (Mar. 15, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html> ("[T]he U.S. Census Bureau made clear that we can provide a legacy format summary redistricting data file to all states by mid-to-late August 2021.").

<sup>9</sup> In Oregon, for instance, candidates for state legislative office in 2022 may begin filing their candidacy petitions on September 9, 2021.

<sup>10</sup> *Compare* OR. CONST. art. IV, § 6(3) (imposing July 1 redistricting deadline), *with id.* art. IV, § 8(1)(b) (imposing January 1 residency requirement deadline).

<sup>11</sup> Representative Tina Koteck and Senator Peter Courtney's, on Behalf of the Oregon Legislative Assembly, Petition for a Preemptory or Alternative Writ of Mandamus at 8–9, *State ex rel. Koteck v. Fagan*, 484 P.3d 1058 (Or. 2021) (No. S068364).

<sup>12</sup> *Id.* at 2.

modification of the constitutional redistricting deadlines was modelled on a similar effort in California, where the California Supreme Court granted the state's independent redistricting commission an extension of time to engage in redistricting following delivery of the U.S. census data.<sup>13</sup>

The filing of the lawsuit itself revealed an unexpected, intra-party schism within the state's Democratic party, which controls both houses of the Oregon Legislature and all statewide offices, including the Governor's, Attorney General's, and, most importantly for this purpose, the Secretary of State's office. The lawsuit was filed by the Speaker of the House, Tina Kotek, and the President of the Senate, Peter Courtney, on behalf of the Legislature. While the principal purpose of the lawsuit was to have the Court push back the state constitutional deadline for the Legislature to enact a districting plan, the Legislature could not name itself as the defendant, *e.g.*, Legislature v. Legislature. Therefore, to manufacture an adversarial posture—i.e., to create a lawsuit with a plaintiff and defendant—the legislative leaders named the Oregon Secretary of State, Shemia Fagan, as the defendant. Naming the Secretary of State rather than, say, the Governor as the defendant made sense since the Secretary of State serves as the fallback redistricting agent under the Oregon Constitution if the Legislature fails to redistrict following a U.S. Census.<sup>14</sup> Thus, while the principal relief requested by the Legislature was the delay in the deadline for the Legislature to enact a redistricting bill, the Legislature's petition for mandamus also asked that the Secretary of State be prohibited from triggering her role as the fallback redistricting agent if the Legislature missed the July 1 deadline as expected.<sup>15</sup> The Secretary of State, though, is also a Democrat (and former state senator), and so the Legislature's naming of the Secretary as defendant at first seemed collusive—surely the three Democrats were all on the same page regarding what should happen regarding state legislative redistricting in light of the census delay.

Surprisingly, though, the Secretary of State, who was represented by the Oregon Attorney General, Ellen Rosenblum (also a Democrat), opposed the Legislature's petition, even at one point questioning whether the Court had the power to alter the constitutionally imposed deadlines.<sup>16</sup> The Secretary of State

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<sup>13</sup> In *Legislature of the State of California v. Padilla*, the California Supreme Court extended the state constitutional deadline for adoption of a redistricting plan from August 15 to December 15. 469 P.3d 405, 413 (Cal. 2020). In the wake of the Court's decision, the California Legislature adopted a bill pushing the state's primary election from March 8, 2022 to June 7, 2022. CAL. ELEC. CODE § 316 (West 2021).

<sup>14</sup> OR. CONST. art. IV, § 6, cl. 3.

<sup>15</sup> Petition for a Preemptory or Alternative Writ of Mandamus, *supra* note 11, at 2–3, 8.

<sup>16</sup> Letter to Oregon Supreme Court from Ellen F. Rosenblum on behalf of Shemia Fagan at 3, State *ex rel.* Kotek v. Fagan, 484 P.3d 1058 (Or. 2021) (No. S068364).

agreed that the census delay would present the state with “unprecedented challenges,”<sup>17</sup> but the Secretary argued that there was no need for any extension.

Instead, the Secretary proposed a “two-step” redistricting process: the Legislature would use non-census data compiled by the Portland State University Population Research Center<sup>18</sup> to create a redistricting map prior to the July 1 deadline; then, if there were any errors in the Legislature’s redistricting map as revealed by the subsequently released U.S. Census data, voters could file suit identifying the alleged errors, and, if the Oregon Supreme Court agreed with the voters that there were errors in the plan, the Secretary of State could amend the Legislature’s plan to correct those errors as provided for in Article IV, Section 6(2).<sup>19</sup>

On April 9, a month after the lawsuit was filed, the Oregon Supreme Court issued its decision in *State ex rel. Kotek v. Fagan*. The Court rejected the Secretary of State’s two-step solution and concluded that an extension of time was warranted, but the Court also rejected the Legislature’s requested six-month extension. Rather, the Court gave the Legislature a more modest, three-month extension.<sup>20</sup> In so doing, the Court framed the lawsuit as posing three questions: (1) Does the Court have the power to modify the constitutionally imposed deadlines? (2) If so, should the Court modify those deadlines? (3) If so, what should the new deadlines be?<sup>21</sup> The Court made a diligent effort to answer those three questions in a comprehensive fashion, but, as we shall examine, its answers left something to be desired, and it failed to consider a vital, alternative solution, albeit one that neither of the parties presented to it.

The Oregon Supreme Court made quick work of the first question, whether it had the authority to revise the constitutionally specified timeline for state legislative redistricting. Article IV, Section 6 lays out a host of specific dates by which redistricting and the judicial review of such must be concluded, but, in the Court’s view, the delay in the delivery of the census data justified ignoring the specific dates listed in the Constitution. The Court explained:

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<sup>17</sup> Secretary of State Shemia Fagan’s Memorandum in Opposition to Petition for a Preemptory or Alternative Writ of Mandamus at 27, *State ex rel. Kotek v. Fagan*, 484 P.3d 1058 (Or. 2021) (No. S068364).

<sup>18</sup> For more on the PSU Population Research Center, see Population Research Center, *PSU’s Population Research Center Releases Preliminary Oregon Population Estimates*, PORTLAND STATE UNIVERSITY (Nov. 16, 2020), <https://www.pdx.edu/news/psus-population-research-center-releases-preliminary-oregon-population-estimates-0>.

<sup>19</sup> Letter to Oregon Supreme Court, *supra* note 16, at 6–7. In response to written questions from the Supreme Court, though, the Secretary softened her opposition and agreed that some delay, albeit far more modest than that sought by the Legislature, was appropriate to allow electors to see the census data before filing suit. *Id.* at 7 (proposing delay in constitutional deadlines for filing of petition for judicial review and consideration thereof).

<sup>20</sup> *State ex rel. Kotek v. Fagan*, 484 P.3d 1058, 1067 app. 2 (Or. 2021).

<sup>21</sup> *Id.* at 1061, 1063, 1067 app 2.

As indicated, the voters' intent [in adopting Article IV, Section 6] was to require that reapportionment occur every 10 years based on census data and in time for the upcoming election cycle. Notably, neither the text of Article IV, section 6, nor the history of the amendments to that section, indicates that the voters intended the specified deadlines to serve a purpose other than to provide a means to those ends. We have been presented with no reason why the voters who adopted the 1952 amendments would have been concerned with the exact date by which the Legislative Assembly or Secretary are required to enact or make a plan, except as part of a larger framework calculated to result in the adoption of a timely final plan. Nor is there any indication that the voters would have intended to require the Legislative Assembly to adhere to the July 1 deadline for legislative action in the unforeseen event that federal census data—the impetus for drawing new district lines in the first place—was not available by that date.<sup>22</sup>

In short, like the California Supreme Court, the Oregon Supreme Court viewed itself as having the authority to reform the constitutionally specified deadlines for redistricting so as to give the Legislature time to adopt a redistricting plan after the delivery of the census data in August. In the Court's view, circumstances justified constitutional revision by judicial decree.

To be sure, the census delay provided a particularly sympathetic context for the Court to exercise this constitutional-revision-by-decree power—according to the Legislature, the U.S. Census Bureau's delay in release of the census data threatened a constitutional crisis that only the Supreme Court could forestall—but the Court's willingness to reform the constitutional deadlines raised profound questions about the scope of the Court's power. For instance, what grounds justify such constitutional revision? The answer cannot be just any professed need—surely, the Court would not have altered the redistricting dates for an insignificant reason, such as to accommodate the Legislative leadership's vacation plans—but the Court's opinion reveals little about how it would begin to distinguish in some non-subjective fashion between those situations in which it has the power to revise constitutional provisions and those in which it does not. Or, more particularly, which constitutional deadlines are sacrosanct, and which are not?<sup>23</sup> The Court viewed the

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<sup>22</sup> *Id.* at 1062.

<sup>23</sup> The Court's decision in *Kotek* raises anew a question about how strict to treat the deadlines for judicial review of a redistricting plan. Article IV, Section 6(3), for instance, sets a deadline of September 15 for an elector to file a petition in the Supreme Court challenging a redistricting plan drafted by the Secretary of State. In *Ater v. Kiesling*, one of the petitions was filed on September 16, but the Oregon Supreme Court held that, because September 15 was a Sunday, the filing deadline was extended by a day due to the state's general civil procedure statute, and therefore the petition was timely filed. 819 P.2d 296, 298 n.1 (Or. 1991). Ten years later, however, in *Hartung v. Bradley*, the Supreme Court questioned its decision in *Ater*. That year, September 15 fell on a Saturday, so one of the litigants availed herself of the same civil procedure

specific dates listed in Article IV, Section 6 as just illustrative “means” to the constitutional “ends” of ensuring redistricting takes place sometime this year. Are other specific dates and timelines listed in the Constitution equally revisable “means” that can be disregarded upon a sufficient showing of circumstantial need? One cannot help but suspect that the Court will be pressed in the months and years ahead to revise other constitutional provisions, whose terms the litigants will allege are equally difficult to comply with under the circumstances du jour.

Turning to the second question, whether it should modify the constitutionally imposed deadline for redistricting, the Supreme Court rejected the Secretary of State’s argument that redistricting could still take place within the constitutionally prescribed deadlines this year—that the Legislature could still adopt a redistricting plan based on non-census data by July 1, which plan could then be modified by the Secretary of State if the plan contained significant flaws in light of the subsequently released census data (i.e., the two-step solution). The Court gave three reasons for its decision, one based on the U.S. Census, another on the need to ensure adequate judicial review, and a final one based on the possibility that the Legislature’s non-census-based plan would become the operative one. On closer examination, each of the Court’s reasons for rejecting the two-step solution missed their mark, and, more importantly, the Court (albeit for understandable reasons) failed to consider a variation of the two-step solution that would have addressed all of its concerns and obviated the need for the Court to rewrite the constitutionally-prescribed process for redistricting.

As to the first of the Court’s reasons, the Court dismissed the propriety of the Legislature using non-census data to create a districting plan. According to the Court, the federal census data is the “best evidence” of the location of the state’s population and plays “the central role” in the state constitution’s framework for redistricting.<sup>24</sup> In the Court’s view, the availability of the federal census data was an essential part of the redistricting process for which there was no adequate substitute, hence the need to extend the constitutional deadline to enable the Legislature to receive the federal census data.

To be sure, Article IV, Section 6 requires the Legislature to redistrict “according to population” and to determine the ideal population of each legislative

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statute and filed her petition the following Monday, September 17. The *Hartung* Court, though, questioned whether the Legislature could alter “the plain wording of the Oregon Constitution, which appears to set September 15 as an absolute deadline regardless of the day on which it falls.” 33 P.3d 972, 985 n.23 (Or. 2001). The Court subsequently rejected the untimely petition on the merits, thereby obviating the need to overrule *Ater* on this point, but *Hartung* left unsettled whether the date-certain provisions of Article IV, Section 6 were absolute or subject to modification. Following the *Kotek* decision, it would seem incongruous, if not hypocritical, for the Court to adhere to the date-certain orthodoxy of *Hartung*: if the Court can push back the constitutionally prescribed dates of Article IV, Section 6 for good cause, why can’t the Legislature?

<sup>24</sup> *Kotek*, 367 Or. at 1063.

district by dividing “the total population of the state” by the number of legislators.<sup>25</sup> The Constitution, however, does not specify that the population figures must be drawn from U.S. Census data.<sup>26</sup> In fact, in 2001, the Oregon Supreme Court ordered the Secretary of State to use non-census data in correcting a districting error. That year, the Secretary adopted a districting plan in which the U.S. Census Bureau had made an obvious mistake—the Census Bureau had listed a census block containing the federal prison in Sheridan as having a population of zero, even though federal prison records showed the prison to have a population of almost 2,000 inmates. The Secretary defended his plan on the ground that he was obligated to use solely the U.S. Census data, but, in *Hartung v. Bradbury*, the Oregon Supreme Court disagreed and ordered the Secretary to use other “reliable” population data that is not “potentially biased” to recalculate the actual population of the district and, if necessary, redraw the district boundaries in the area.<sup>27</sup> The Court in *Kotek*, though, swept the *Hartung* decision under the rug with a footnote: according to *Kotek*, *Hartung* justified the use of non-census data only when the census data was “indisputably in error.”<sup>28</sup>

With all due respect to the *Kotek* Court, limiting *Hartung* in this fashion to its facts makes no sense. The *Kotek* Court gave no reason why the *absence* of census data should be treated differently than an *error* in the census data. Surely, *Hartung* would not have come out differently had the U.S. Census Bureau simply failed or refused to provide population numbers for the affected census block. Whether the census data is missing or is obviously wrong, the impact on redistricting is the same, and, if an error in the data justifies the use of non-census data, then surely the absence of such data does so too.

More generally, the *Kotek* Court seemed conflicted about the extent to which non-census data could be used in the districting process. To put the question bluntly: Is the federal census data constitutionally necessary or not? On the one hand, the whole point of the *Kotek* Court’s discussion of the census to this point was to justify its conclusion that the federal census data was constitutionally necessary—that is why the Secretary of State’s proposed two-step solution in which the Legislature relied on non-census data to draft its plan was not really a solution in the Court’s view. On the other hand, though, the Court was not prepared to overrule *Hartung* and hold that the use of non-census data was inappropriate.

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<sup>25</sup> OR. CONST. art. IV, § 6(1).

<sup>26</sup> The original version of Article IV, Section 6 from the Oregon Constitution of 1857 expressly contemplated that the state might engage in redistricting based on a population count made either by the U.S. government or the state itself. The 1952 constitutional amendment to Article IV, Section 6 removed the reference to a state census (which had last taken place in 1905), but the amendment did not ban the use of state population data.

<sup>27</sup> *Hartung*, 33 P.3d 972, 987 n.26.

<sup>28</sup> *Kotek*, 367 Or. at 812 n.8.



Indeed, the *Kotek* Court expressly observed that, given the delay in the federal census data this year, “it may be useful for the Legislative Assembly or the Secretary to prepare draft reapportionment plans using non-census data from the Population Research Center before enacting or making a plan.”<sup>29</sup> Wait, what? Either the federal census data is constitutionally necessary or it is not, and, if the federal census data is constitutionally necessary, which was the linchpin of the Court’s conclusion that extending the Legislature’s constitutional deadline was justified, then use of non-census data at an earlier stage might serve only to taint the legality of the Legislature’s districting plan.<sup>30</sup> That last observation by the Court must also have been particularly galling for the Secretary of State to read, as the Court seemed to be endorsing its own two-step solution in which the Legislature drafts a tentative districting plan based on non-census data and then corrects the plan once the federal census data is released. If non-census data could legitimately form the basis for a preliminary redistricting plan, then why was the Secretary’s proposed two-step solution invalid?<sup>31</sup>

More importantly for the future, treating the federal census data as constitutionally necessary as a *procedural* matter (i.e., that it is so important to the process that its unavailability justifies a delay in the constitutional timeline) implies that it is also constitutionally necessary as a *substantive* matter (i.e., that the resulting districting plan must be based on such census data). Treating the census data in such a sacrosanct fashion, though, would be a mistake. The census data is effectively just an estimate, albeit ordinarily a very good estimate, of the size and location of the state’s population. Even the federal census data, though, is imperfect, and, in fact, by the time it is released to the states, it is as much as a year or more out of date since the surveys that form the basis of the census were completed the year before—

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<sup>29</sup> *Id.*

<sup>30</sup> To illustrate the potential problem, suppose the Legislature drafts a preliminary plan based on non-census data in which House District X has whatever shape it has. Suppose further that, after the census data is released, the Legislature adopts a final districting plan in which House District X is unchanged—it still has the same geographic contours as it did in the preliminary, non-census-based plan—but the census data shows that District X’s population varies from the ideal district population by more than what the non-census data had projected but still within the outer limits of constitutional requirements regarding equal population. Is the final plan unconstitutional? If so, why would the Legislature ever risk such a result by relying on non-census data even in a preliminary plan? If not, why was the Secretary’s two-step proposal invalid?

<sup>31</sup> Perhaps the difference between the two “two-step” solutions is that, under the Court’s version, the Legislature rather than the Secretary is involved in the second step, correcting the draft plan in light of the federal census data. Giving the Legislature a preeminent place in the redistricting process makes a great deal of sense given the text and history of Article IV, Section 6, but, as discussed below, the Legislature’s preeminent position can be preserved without the need for the Court to alter the constitutional framework. See *infra* note 49 and accompanying text.

in this case, in early 2020.<sup>32</sup> Even more ominously, the federal census data can potentially be biased in ways that might call into question the propriety of using that data.

An excellent example of the possibility of such bias actually took place this census cycle: last year, President Trump directed the Census Bureau to exclude undocumented immigrants from the 2020 federal census count for purposes of calculating each state's congressional apportionment.<sup>33</sup> President Trump's announcement prompted a federal court lawsuit, which the U.S. Supreme Court dismissed as premature last December.<sup>34</sup> Following President Biden's inauguration in January, President Biden immediately reversed that policy and directed the Census Bureau to ensure that undocumented immigrants were included in the census count,<sup>35</sup> thereby mooting any further judicial challenge to the policy, but the episode illuminates the possibility that the federal census data could be manipulated for political or other reasons. In such a situation, surely the State would be justified in disregarding the federal census data and using state-generated data instead, but, if so, it is not quite true, as *Kotek* asserted, that federal census data must play a "central role" in the state redistricting process. In any given redistricting cycle, the Legislature (or Secretary of State) might reasonably choose to disregard the federal census data and use state-generated data instead, either for particular parts of the districting map (like in *Hartung*) or for the map as a whole. Strictly speaking, *Kotek* does not forbid disregarding erroneous or manipulated federal census data, but its treatment of the federal census data as constitutionally necessary, so much so that its absence justifies the Court in rewriting the constitutionally imposed deadlines for redistricting, ascribes far more importance to the federal census data than the Oregon Constitution actually requires.

The second reason the *Kotek* Court gave for rejecting the Secretary's two-step solution was that the two-step solution did not adequately provide for the judicial review of any redistricting plan. As the Court noted, Article IV, Section 6 requires

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<sup>32</sup> See *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) (noting that federal census is "more of an event than a process. It measures population at only a single instant in time."). That is true in a normal year and will only be more so this year, when the anticipated release will be more than a year and half after the census count actually began.

<sup>33</sup> Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). President Trump's policy would have excluded undocumented immigrants from the population count only for purposes of determining congressional apportionment, not from the census data generally, but the example still shows how the Census can be manipulated.

<sup>34</sup> *Trump v. New York*, 141 S. Ct. 530, 535–37 (2020) (concluding that the plaintiff states lacked standing, and the suit was not ripe since it was not clear prior to the actual declaration of congressional apportionment whether and to what extent the exclusion of undocumented immigrants would have on any state).

<sup>35</sup> Exec. Order No. 13,986, 86 Fed. Reg. 7015, 7016 §§ 3, 5 (Jan. 20, 2021).

any judicial challenge to the Legislature's redistricting plan be filed with the Oregon Supreme Court by August 1, by which point the census data would still not be available. As a consequence, the Court feared that voters would be required to file a "placeholder" lawsuit, challenging the Legislature's plan based on vague assertions of likely errors that the census data would later potentially reveal.<sup>36</sup> In the Court's view, such a lawsuit would put the Court in the undesirable position of having to conduct its own, open-ended review of the Legislature's plan. For that reason, the Court rejected the idea that such a placeholder lawsuit would be a permissible substitute for the type of judicial review contemplated by Article IV, Section 6.<sup>37</sup>

Unfortunately, both the premise of the Court's analysis—that any lawsuit would necessarily have to be a placeholder suit filled with vague assertions of legal flaws—and the conclusion that it drew from that premise—that the Secretary's two-step solution was therefore necessarily incompatible with the opportunity to have meaningful judicial review of the Legislature's plan—were misguided. As to the former, even without access to the federal census data, voters could still have challenged the Legislature's non-census-based plan for violating federal or state law on a number of grounds. For instance, the availability of federal census data is hardly necessary to allege that the Legislature intentionally violated districting requirements, such as respecting political subdivision boundaries and communities of interest or avoiding political gerrymandering.<sup>38</sup> Indeed, out of the *dozens* of redistricting claims raised in the Oregon Supreme Court in the past half century since the U.S. Supreme Court launched the reapportionment revolution, only *one* has alleged a violation of the equal population requirement rather than some other districting requirement for which the census data is irrelevant.<sup>39</sup> Moreover, even a claim that a districting plan violates the equal population requirement could be based on the non-census data used by the Legislature in drafting its plan. Indeed, outside Oregon, the state legislature's access to federal census data has not stopped the filing of equal population-based lawsuits—the typical equal population lawsuit focuses more on the sufficiency (or not) of the reasons that the Legislature had for drawing the district lines where it did and departing from perfect population equality (which consideration does not depend on the availability of census data) than the numerical extent of the departure (which does depend on such data).

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<sup>36</sup> State *ex rel.* Kotek v. Fagan, 367 Or. 803, 812–13 (Or. 2021).

<sup>37</sup> *Id.* (noting that a placeholder lawsuit was “not consistent with the constitutional expectation that electors should have adequate time to make objections and to have those objections heard.”).

<sup>38</sup> OR. REV. STAT. § 188.010 (2019).

<sup>39</sup> Norman R. Williams, Legislative Redistricting in Oregon: History, Law, and Politics (2021) (unpublished manuscript) (on file with author) (canvassing the history of Oregon Supreme Court redistricting decisions). The one equal-population challenge took place in 1981 in *McCall v. Legislative Assembly*, 634 P.2d 223, 229 (Or. 1981) (rejecting equal-population challenge to redistricting plan with maximum deviation of 5.34%).

The Court's "placeholder" lawsuit fear seemed to have been based on notion that the Legislature's non-census-based plan would comply with the equal population requirement (as based on the non-census data) but would later be revealed by the census data to depart impermissibly from the equal population requirement. To be fair, that was a possibility, though only a possibility,<sup>40</sup> but, more importantly, that takes us to the second problem with the Court's analysis—that the prospect of such an equal-population-based, placeholder lawsuit requires that redistricting be put off until after the census data is delivered. Even if the deadlines for the Court to commence and complete the judicial review of the plan must be extended (an issue to be discussed momentarily), that does not explain why the deadline for the *Legislature* to enact a districting plan must likewise be extended. It is a non-sequitur. At least as a matter of judicial review, the Court could have left the Legislature's July 1 deadline in place and just extended the constitution's judicial review deadlines to whatever extent it felt necessary to accommodate litigants wishing to challenge the plan with the benefit of the census data in hand. And here is the rub: that course of action would have entailed far less disruption to the constitutionally prescribed timeline than the one the Court ultimately ordered. Because it also extended the deadline for the Legislature, the Supreme Court itself in *Kotek* had to push back the filing deadline for filing a petition for judicial review to October 25 and, if the Secretary ends up drafting the plan, to November 15.<sup>41</sup> If, on the other hand, the Court had just extended the judicial review timelines, it could have accommodated the need for voters to have access to the census data before filing their equal-population challenge by delaying the petition deadline to, say, September 7. That is at least a week after the anticipated delivery of the census data but still more than a month earlier than what the Court in fact ordered given its extension of the Legislature's deadline.<sup>42</sup> In short, the two-step solution was not

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<sup>40</sup> It is far from certain, for instance, that a non-census-based plan would necessarily run afoul of the equal population requirement of the U.S. Constitution and Oregon Constitution. Neither the federal nor state constitutions require state legislative districts to have perfectly equal populations. Rather, the U.S. Constitution permits states to draw district lines with up to a 10% maximum population deviation. *Harris v. Arizona Independent Redistricting Comm'n*, 136 S. Ct. 1301, 1305 (2016); *see also* *Gaffney v. Cummings*, 412 U.S. 735, 750–51 (1973) (upholding state legislative districting plan with maximum deviation of 7.83%); *White v. Regester*, 412 U.S. 755, 764 (1973) (upholding plan with maximum deviation of 9.9%). *But cf.* *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (upholding state legislative districting plan even with a 16.4% maximum deviation because of state's long-standing interest in following county lines). Likewise, in *McCall v. Legislative Assembly*, the Oregon Supreme Court upheld a districting plan with a 5.34% deviation as consistent with the Oregon Constitution. 634 P.2d at 229 n.7. Thus, the actual population variance among the districts as revealed later by the census data may not have exceeded the maximum amount allowable under federal and state law.

<sup>41</sup> *Kotek*, 484 P.3d at 1067 app 2.

<sup>42</sup> A week after delivery of the census data is more than enough time for voters to prepare their equal-population-based lawsuit. Calculating the population of each legislative district is a

inherently incompatible with the need for adequate time for judicial review of any redistricting plan.

The third and last reason that the Court gave for rejecting the Secretary's proposed two-step solution was that there was no guarantee that the redistricting plan could be corrected or modified once the census data was released in mid- to late-August.<sup>43</sup> The Secretary of State only has the authority to modify the Legislature's plan if the Oregon Supreme Court finds a problem with the Legislature's plan and orders the Secretary of State to correct it; if there is no lawsuit challenging the Legislature's plan, then there will never be an opportunity for the Court to authorize the Secretary to correct the Legislature's plan. In short, the *Kotek* Court seemed to fear that the Secretary's two-step plan might become a one-step plan, in which the Legislature's non-census-based districting plan actually became the operative districting plan.

As an initial matter, it is far from clear that no lawsuit would be filed—since the adoption of the 1952 constitutional amendment providing for judicial review of redistricting plans, in only one redistricting cycle (2011) has there been no lawsuit challenging the redistricting plan<sup>44</sup>—but, even if that were to take place, so what? If no Oregon voter files a lawsuit challenging the non-census-based plan, what is the problem? The absence of any lawsuit challenging the non-census-based plan would seemingly be powerful evidence that the plan was legally valid and broadly acceptable to most Oregonians. That should be cause for celebration, not constitutional concern.

More importantly, the Court's fear that a poorly designed, non-census-based districting plan would ultimately go into effect hardly justifies the Court rewriting the constitutional deadlines. Once the census data is released, if the Legislature were to conclude that its non-census-based plan was problematic in whole or part, there was a solution: the Legislature could have called itself into special session in the fall to amend the plan. Under the state constitution, the Legislature retains the power to call itself into session,<sup>45</sup> and, if the Court harbored doubts about the Legislature's

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simple mathematical exercise that any litigant (or even the Court itself) could easily do itself within hours of the census data being released. From that stage, it is then an equally simple mathematical exercise to determine the maximum deviation of the redistricting plan and compare that figure to the 10% rule of thumb used by the U.S. Supreme Court. *See supra* note 40. At that point, if the maximum deviation exceeds the 10% threshold, the burden shifts to the Legislature to explain the reasons for why the district lines are drawn where they are, but those reasons will already be known prior to the release of the census data (i.e., when the Legislature adopted its non-census-based plan and made the districting choices that it did).

<sup>43</sup> *Kotek*, 484 P.3d at 1063–64.

<sup>44</sup> Williams, *supra* note 39.

<sup>45</sup> OR. CONST. art. IV, § 10a. To be sure, the Legislature can only call itself into session upon the written request of one half of the members of each House, but that would have been a threshold easily met this year if the Democratic membership, which constitutes a super-majority

ability to meet the procedural requirements for doing so, it could have just authorized such a special session itself—as it did later in its decision.<sup>46</sup> Moreover, the Governor can also call the Legislature into special session at any time for any reason.<sup>47</sup> To be sure, this scenario resembles the Court's ad hoc timeline constructed for this redistricting cycle (and therefore satisfies the Court's concerns about the Legislature having access to the federal census data and remaining the principal redistricting agent), but there is one critical difference: the Legislature's August/September session in this scenario would have been optional, not mandatory, and therefore there would have been no need for the Court to rewrite all of the constitutionally prescribed deadlines and delay all of the remaining stages of the redistricting process to accommodate the Legislature's late, initial entry onto the field.<sup>48</sup> In short, there was a two-step solution, albeit one different from that advocated by the Secretary of State, that was available and should have mollified any fears that the state would be unwittingly saddled with a non-census-based plan that the Legislature no longer wanted once it saw the census data. To put the point even more bluntly: there was no need to extend the constitutional deadlines so as to give the Legislature the opportunity to enact a redistricting plan based on the federal census data if it so wanted—that opportunity already existed under Oregon law.

At the end of the day, one cannot read *Kotek* without getting the feeling that, for the Court, the real problem with the Secretary of State's two-step solution had nothing to do with the three reasons given by the Court, such as the opportunities for judicial review or subsequent revision of a flawed non-census-based plan. Rather,

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in both houses, really did want to have a second bite at the redistricting apple after the census data was released.

<sup>46</sup> *Kotek*, 484 P.3d. at 1067 app. 2 (approving special session without need for written request of majority of legislators in both houses).

<sup>47</sup> OR. CONST. art. V, § 12.

<sup>48</sup> Such a two-step plan would have been workable, consistent with the constitutional framework for redistricting, and ensured the primacy of the Legislature in drafting any redistricting plan. The Legislature's adoption of a non-census-based plan prior to the July 1 deadline (the first step in this two-step plan) would have negated the need for and authority of the Secretary of State to draft a redistricting plan. To be sure, judicial review of the Legislature's initial plan might still be on-going when the Legislature convened itself in special session in the fall to amend the plan. Depending on when the Legislature actually adopted an amended plan, the Court might have had to extend its timeline for judicial review in order to consider whether the amended plan violated any federal or state law, but that extension would likely be of lesser duration than the one actually ordered by the Court in *Kotek*. More importantly, the prospect of such mid-judicial-review legislative amendment of the redistricting plan is always present, including in redistricting years in which there is no delay in the census data. Indeed, one can easily imagine a situation in which, after a litigant files a judicial challenge identifying a problematic error in the Legislature's plan, the Legislature convenes itself in special session to correct the error rather than have the Supreme Court invalidate the plan and transfer authority for the final redistricting plan to the Secretary of State, especially if the Secretary of State is from a different political party than the party in control of the Legislature.

the Court seemed concerned, though admittedly it did not say so, that the Secretary's two-step solution would transfer too much authority to the Secretary over redistricting in this cycle. As the Secretary herself proposed, if there was in fact some flaw in the Legislature's non-census-based redistricting plan, it would fall to the Secretary of State to make any changes to the redistricting plan after the federal census data was released. Of course, Article IV, Section 6(2) entrusts that power and task to the Secretary any time that the Legislature's plan contains some flaw and is struck down by the Court, which is probably why the Court did not mention this concern expressly, but the Court might nevertheless have worried that there was something qualitatively different this time around—that either it was more likely for there to be a flaw in the Legislature's plan due to its inability to use the federal census data, that the Secretary would have more discretion than in a normal year to make changes to the plan, or both. In short, the Court might have worried that the Secretary's two-step solution would have upended the constitutional hierarchy with regard to legislative redistricting—rather than serving as the fallback redistricting agent, the Secretary would have ended up this year as the principal redistricting agent. Indeed, the Court's insistence that the Legislature, not just the Secretary of State, be given the chance to draft a redistricting plan with the benefit of the federal census data only makes sense on this view of the relative roles of the two bodies with regard to redistricting.<sup>49</sup>

If this were, in fact, the root of the Court's aversion to the Secretary's two-step solution, there were two considerations that should have assuaged the Court's concerns on this score. First, under Article IV, Section 6(2), the Secretary of State's power to revise the redistricting plan is limited to correcting those flaws identified by the Supreme Court, which can cabin the scope of any changes to be made by the Secretary and which can correct any changes made by the Secretary that it finds unlawful. Second, and more importantly, even if the Secretary fundamentally altered the Legislature's redistricting plan in ways that the Legislature disliked, the Legislature could redraft the plan in its short session in 2022 or its regular session in 2023. The Legislature remains free to amend the state legislative districts at any time. The notion of multiple redistricting cycles within so short a time will surely strike some as odd, but there is nothing in the U.S. Constitution or Oregon Constitution that expressly forbids so-called mid-decade redistricting. Indeed, other states have engaged in such redistricting in recent years,<sup>50</sup> and Oregon itself regularly

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<sup>49</sup> See *supra* note 31.

<sup>50</sup> See, e.g., *Blum v. Schrader*, 637 S.E.2d 396 (Ga. 2006) (upholding Georgia's legislature's power to engage in mid-decade redistricting). Admittedly, some states ban the practice, construing their state constitutional redistricting provisions to limit redistricting to "once" a decade. See Justin Levitt & Michael P. McDonald, *Taking the "Re" out of Redistricting*, 95 GEO. L. J. 1247, 1264–65 (2007). The Oregon Constitution, however, lacks any comparable text suggesting that mid-decade redistricting is illegitimate or constitutionally prohibited.

engaged in mid-decade redistricting, albeit a long time ago.<sup>51</sup> Thus, if the Secretary's two-step, Legislature-then-Secretary, solution struck the Court as transferring too much power over redistricting to the Secretary at the Legislature's expense, there were other remedies available that obviated the need to rewrite the constitutional deadlines.

In short, there were two, two-step solutions available that would have enabled the Legislature to comply with the constitutionally prescribed deadlines and still have a redistricting plan ultimately based on the census data if so desired, one in which the Secretary corrected any judicially-identified flaws in the Legislature's non-census-based redistricting plan (which the Court considered and rejected) and one in which the Legislature itself corrected those flaws in a special session (which the Court did not consider). Neither of those two-step solutions may seem all that elegant, but neither was the Court's. Rather, the relevant question is whether either of those two-step solutions was preferable to the Court rewriting the constitutional deadlines itself so as to provide for a one-step process that will necessarily compress the 2022 election cycle. Obviously, the Court viewed the latter as the lesser of two evils, but its conclusion in that regard is debatable. Rewriting constitutional provisions is a tricky business and entails costs for both the Court itself and the political process more generally. Perhaps paying those costs will be worth it—that avoiding the messiness of the two-step solution was worth recasting the Supreme Court as constitutional revisionist and compressing the 2022 election season—but reasonable minds could easily come to the opposite conclusion.

In any event, having concluded that it should move the constitutionally prescribed deadlines for redistricting, the last task remaining for the Court was to announce what the new deadlines would be. Unlike in California, where the California Supreme Court only had to move one deadline, the Oregon Supreme Court's decision to extend the deadline for the Legislature to enact a redistricting plan required a cascading set of changes to a host of constitutionally prescribed deadlines.

First, redistricting in Oregon is performed in the first instance by the Legislature, which does not sit year-round. Rather, the Oregon Constitution limits the duration of the Oregon Legislature's regular session in odd-numbered years to 160 calendar days.<sup>52</sup> As a result, the Legislature had to adjourn its regular session no

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<sup>51</sup> The most recent instance was 1937, but from statehood until that time, the Legislature often made mid-decade changes to the legislative apportionment plan. *See* William H. Webster, Jr., *The Problem of Legislative Apportionment in Oregon* 91, 94–97 (1947) (unpublished MA thesis, University of Oregon) (on file with author).

<sup>52</sup> OR. CONST. art. IV, § 10(1)(a). The Legislature may extend the session for up to five calendar days and may do so repeatedly but only upon the vote of two-thirds of the members of each house. *Id.* § 10(3).



later than June 28 this year.<sup>53</sup> Thus, the Court authorized the Legislature to call itself back into a special emergency session in August following the release of the census data.<sup>54</sup> The Legislature then has until September 27—almost three months after the July 1 deadline and basically a month after the U.S. Census Bureau promised to provide the state with complete census data—to adopt a redistricting plan.<sup>55</sup>

Second, the Oregon Constitution provides that, if the Legislature fails to adopt a state legislative redistricting plan, the task falls to the Oregon Secretary of State, not to a court.<sup>56</sup> The Constitution provides a deadline of August 15 for the Secretary of State to perform this task if it falls to her, but, given its extension for the Legislature to enact a plan, the Supreme Court also recognized the corresponding need to push back the timeline for the Secretary of State to act if the Legislature failed to do so in its fall special session. Thus, if the Legislature fails to convene in special session this fall or to adopt a redistricting plan by September 27 as specified in the Oregon Supreme Court's order, the task of drafting a state legislative redistricting plan would then fall to the Oregon Secretary of State, who must adopt a plan by October 18.<sup>57</sup>

Third, the Oregon Constitution also specifies deadlines for the judicial review of that plan, which dates vary depending on whether it is the Oregon Legislature or Secretary of State that adopts the redistricting plan.<sup>58</sup> As the Court recognized, those

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<sup>53</sup> In actuality, the Legislature adjourned sine die on June 26 this year.

<sup>54</sup> *State ex rel. Kotek v. Fagan*, 484 P.3d 1058, 1064, 1067 app. 2 (Or. 2021).

<sup>55</sup> *Id.* at 1067 app. 2. The one-month timeframe may be in tension with Section 188.016, which requires the Legislature to conduct up to fifteen public hearings regarding redistricting. OR. REV. STAT. § 188.016 (2019). The Legislature conducted numerous public hearings during its regular session, and, presumably, the Court is prepared to count those regular session hearings towards the statutory requirement. If not, the one-month timeframe would likely be too short to hold all of the required hearings *and* do the substantive work of drafting and revising a plan. In 2011, it took the Legislature over two-and-a-half months from receipt of the census data on March 24 to final adoption of the districting plan on June 13, and the 2011 Legislature was not subject to Section 188.016, which had not been enacted yet. *See* S.B. 989, 76th Cong., Reg. Sess. (Or. 2011); *U.S. Census Bureau Delivers Final State 2010 Census Population Totals for Legislative Redistricting*, U.S. CENSUS BUREAU (Mar. 24, 2011), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn123.html](https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn123.html).

<sup>56</sup> OR. CONST. art. IV, § 6(3).

<sup>57</sup> In a normal year, the Oregon Constitution gives the Secretary a month and a half to hold a public hearing and draft a redistricting plan after the passing of the Legislature's deadline. *See id.* art. IV, § 6(3)(a) (providing August 15 deadline for Secretary of State to adopt a plan if Legislature fails to do so by its July 1 deadline). The revised timeline, however, gives the Secretary only three weeks to do that work. *Kotek*, 367 Or. at 1064. Again, that short time frame may cause difficulties for the Secretary, who must likewise comply with the public hearings requirement of Section 188.016. *See supra* note 55.

<sup>58</sup> OR. CONST. art. IV, §§ 6(2), 6(3).

dates too would need to be pushed back. The Oregon Constitution basically provides litigants a month following adoption of a redistricting plan to file a petition challenging the plan. It then gives the Oregon Supreme Court up to a month and a half for briefing to be completed, oral argument to be held, and the Court's ruling and opinion to be drafted; if there is a flaw in the plan, the Oregon Secretary of State than has from a month to a month and a half (depending on whether it was the Secretary of State or Legislature that drafted the original plan) to draft a corrected plan, which the Oregon Supreme Court then has two weeks to review. In its order, the Supreme Court extended each of those deadlines, keeping the respective time periods within the judicial review timeline constant.<sup>59</sup> Thus, if the Legislature enacts a plan by the September 27 deadline, electors have until October 25 to file a lawsuit with the Oregon Supreme Court; briefing must be completed by November 15; the Court has until November 22 to adopt an order upholding the Legislature's plan, in which case the plan becomes effective on January 1, 2022; if the Court concludes that the Legislature's plan contains some flaw, it has until December 6 to adopt an order striking down the Legislature's plan, in which case the Secretary of State must submit a corrected districting plan by January 17, the judicial review of which must be concluded by January 31; and, the corrected plan becomes effective on February 1, 2022.<sup>60</sup> If the Legislature fails to adopt a redistricting plan by September 27 and the task fails to the Secretary of State, then electors must file a challenge to the Secretary's plan by November 15; briefing must be completed by December 6; the Court has until December 13 to adopt an order upholding the Secretary's plan, in which case the plan becomes effective on January 1, 2022; if the Court concludes that the Secretary's plan contains some flaw, it has until December 27 to adopt an order striking down the Secretary's plan, in which case the Secretary of State must revise the districting plan to correct the identified

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<sup>59</sup> The Oregon Supreme Court could have potentially compressed the various stages of judicial review and thereby accelerated the completion of judicial review, but that would have recreated the problems under the original 1952 constitution amendment, which first provided for judicial review of redistricting plans, and which specified a more accelerated timeline for such review. After several Oregon Supreme Court justices complained about the 1952 amendment's accelerated timeline for judicial review, *see, e.g.*, *Cargo v. Paulus*, 635 P.2d 367, 370–72 (Or. 1981) (Linde, J., concurring), the 1986 constitutional amendment to Article IV, Section 6 expressly extended the time available to the periods discussed in the text. Thus, the Court could not compress that timeline without running afoul of the clear intent of the Oregon voters in 1986 to extend the timeline to its current parameters. By the same token, though, the Court's expressed discouragement that any amicus or reply briefs be filed this year, *see Koteck*, 484 P.3d at 1067 app. 2, is both unnecessary—the Court retained the same time periods for briefing as would take place in a normal year—and at least somewhat in tension with the 1986 amendment's desire to expand the opportunity for thoughtful judicial review.

<sup>60</sup> *Koteck*, 484 P.3d. at 1067 app. 2.

errors by January 24, the judicial review of which corrected plan must be concluded by February 7; and, the corrected plan becomes effective on February 8, 2022.<sup>61</sup>

Fourth, once judicial review is completed, a different provision of the Oregon Constitution, Article IV, Section 8, requires that legislators or candidates for a particular legislative district be a resident of that district by January 1 of the year of the election (i.e., January 1, 2022 for the 2022 elections).<sup>62</sup> Redistricting plans can often result in a district being drawn in a manner in which the legislator (or one or more of their challengers) is redistricted out of their district (i.e., due to changes in the location of the district boundaries, their residence is no longer located in the district in which they were elected or in which they planned to run for election). If the Supreme Court upholds the redistricting plan, there is no problem complying with this January 1 deadline; even under the revised timeline for redistricting, judicial review will be concluded with regard to a valid redistricting plan at least two weeks prior to the January 1 residency deadline, which is the amount of time that Article IV, Section 6 contemplates as sufficient for legislators or candidates to relocate if necessary, following the completion of judicial review. As the Supreme Court recognized, however, if the initial districting plan contains some error requiring correction by the Secretary of State, judicial review will not be completed until as late as either January 31 (if the Legislature adopts the original plan) or February 7 (if the Secretary of State drafts the original plan), both of which dates are well past the January 1 legislative residency deadline. Thus, to enable incumbent legislators and their potential challengers to relocate to stay within their district, the Court pushed back the residency deadline in this circumstance to February 1 (if the Legislature drafted the original plan) or February 8 (if the Secretary of State had drafted the original plan).<sup>63</sup> Critically, those dates are just one day after the judicial review of the corrected plan must be completed, which means that legislators and challengers may have as little as *one day* to relocate to stay in their legislative district.

Last, but not least, in this regard, the deadline for a candidate to file a petition to run for elected office this cycle is March 8, 2022, which is set by statute as 70 days prior to the primary election, which is currently scheduled for May 17, 2022.<sup>64</sup> Although it pushed back all of the redistricting deadlines, the Court refused to change the filing deadline or primary election date. The Court's unwillingness to do so was somewhat curious: having changed constitutionally prescribed deadlines, why were those statutorily prescribed deadlines treated as sacrosanct? Whatever the

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<sup>61</sup> *Id.*

<sup>62</sup> OR. CONST. art. IV, § 8(1)(b). This is actually a shorter durational residency requirement than ordinary and applies only for the general election in the year following legislative redistricting. For legislative elections in other years, the requirement is one year prior to election. *Id.* § 8(1)(a)(B).

<sup>63</sup> *Kotek*, 484 P.3d. at 1067–68.

<sup>64</sup> OR. REV. STAT. § 249.037 (2019); OR. REV. STAT. § 254.056 (2019).

answer to that question, the result of the Court's refusal to move the primary election date (as California did as part of its rejiggering of the redistricting timeline) meant that the *extension* of the timeline for redistricting will necessarily *compress* the time available for the primary campaign. That is an unavoidable consequence of the Supreme Court's decision, and it is one that may have significant political implications in some legislative races. Most notably, a shorter primary election season is likely to favor incumbents at the expense of challengers, who often need more time to canvass the voters in their district to build support.

The *Kotek* decision answered a host of questions about the timing of the various steps in the redistricting process this time around, but there was one last question that the *Kotek* decision failed to answer: must the Legislature engage in redistricting again in 2023? Given the *Kotek* decision, the notion that the Legislature must engage in redistricting again in 2023 may seem outlandish; after all, the Court extended the constitutionally prescribed redistricting deadlines in order to allow the Legislature to perform that task this year, not two years from now. Article IV, Section 6, however, specifies that the Legislature must redistrict “[a]t the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government.”<sup>65</sup> The key language in that phrase is “an enumeration . . . by the United States Government.” At what point has the U.S. Government made an enumeration? One could read that to mean the actual counting process by the U.S. Census Bureau, but that reading creates the very problem that took place this year—what happens if the U.S. Census Bureau does not provide the census data early in the year following the Census? As *Kotek* itself holds, redistricting need not take place until the Legislature has access to the detailed census data, but implicit in that holding is the notion that it is the delivery of the data, not its compilation by the U.S. Census Bureau, which takes place in secret, that triggers the Legislature's duty to act.<sup>66</sup> On that reading of the provision, then, the Legislature was not in fact obligated to adopt a redistricting plan this year *at all* because an actual enumeration did not take place before the 2021 regular session adjourned sine die.<sup>67</sup> By the same token, though, that reading of Article IV, Section

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<sup>65</sup> OR. CONST. art. IV, § 6(1).

<sup>66</sup> That conclusion necessarily follows from the *Kotek* ruling: If the Legislature must be given time to receive the census data—the core assumption upon which *Kotek* rests—then the Legislature's duty to redistrict should not begin to run until such time.

<sup>67</sup> One might respond that the U.S. Constitution requires redistricting to take place this year. To be sure, the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 583 (1964), said that compliance with the equal population, one-person-one-vote principle necessarily required state legislatures to redistrict on some “periodic” basis, but, as the Oregon Supreme Court in *Kotek* expressly recognized, *Kotek*, 484 P.3d. at 1061, the U.S. Supreme Court expressly rejected the suggestion that decennial redistricting was constitutionally required. *Reynolds*, 377 U.S. at 583. Rather, the U.S. Supreme Court noted only that redistricting done less often than every 10 years would be “constitutionally suspect.” Here, in a year in which the U.S. Government itself was

6 requires that the Legislature engage in state legislative redistricting in 2023. The Legislature's next regular session in an odd-numbered year following the mid-August 2021 census release date is the Legislature's regular session in 2023.

Now, it is true that the Oregon Supreme Court in 2023 could rule that the 2021 redistricting obviates the need for the Legislature to draw the map in 2023. In fairness, that was probably what the *Kotek* Court had in mind. Having rewritten Article IV, Section 6's timeline for redistricting this cycle, the Court probably viewed itself as having solved the problem caused by the census delay and obviated the need for another round of redistricting in 2023. But what happens if the Legislature does nothing in 2023 and the Secretary of State then adopts a new districting plan for the 2024 election cycle, citing the Legislature's failure to act? Is the Oregon Supreme Court prepared to hold that the Secretary's action is *ultra vires* because of the *Kotek* ruling? Perhaps so, but such a ruling would require the Court to read Article IV, Section 6 as requiring redistricting to have taken place in the Legislature's regular session in 2021 regardless of the fact that the federal census data was not delivered to the Legislature in time for it to act during its regular session. Only in that way can the Secretary's authority to act in 2023 be denied under the plain language of Article IV, Section 6, but that holding would contradict the *Kotek* decision, which expressly rejected the argument that the Legislature was required to act during its regular session this year!

In sum, the *Kotek* decision is not likely one that will go down well in history, but its weaknesses are not entirely the Justices' fault. The Court is composed of highly intelligent jurists of good faith and integrity, all of whom were put in a challenging position once the Legislature decided to invoke the Court's aid. In particular, both parties dramatized the situation—the Legislature even went so far as to characterize it as one of “constitutional crisis” that could only be averted by the Court—and they framed the lawsuit in a way that limited the Supreme Court's understanding and consideration of its options. As litigated by the parties, the Court was presented with a binary choice: either move the constitutionally prescribed deadlines (as the Legislature asked) or endorse a two-step process in which the Secretary of State would play the critical role in the second stage after the census data was delivered (as the Secretary advocated). No one pointed out that the Legislature could retain control of the process even under the constitutionally prescribed timelines and that adequate judicial review could still take place with at most a modest revision of the judicial review timeline (and, even then, only if the Court truly felt it necessary).

Compounding the problem caused by the parties' unnecessarily apocalyptic and binary framing of the lawsuit, the Court moved perhaps too quickly. Speed is

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unable to deliver the federal census data upon which redistricting is typically based, a state's inability to redistrict this year would surely pass federal constitutional muster—the U.S. Constitution does not require that to be done which cannot be done.

not the friend of judicial decision-making, and while the need for speed was entirely understandable given the July 1 deadline for the Legislature to adopt a redistricting plan, the accelerated nature of the Court's consideration of the case undoubtedly affected its deliberations. Indeed, in this respect, *Kotek* resembles the U.S. Supreme Court's decision in *Bush v. Gore*,<sup>68</sup> which likewise ran just one month from initial filing to final decision and which has been criticized as the product of accelerated judicial decision-making.<sup>69</sup> While *Kotek* does not rise (or sink) to the same level of judicial error as *Bush v. Gore*, one cannot help but think that the Oregon Supreme Court's decision in *Kotek* may come to be viewed as the Oregon analog to *Bush v. Gore*: a rushed decision that carries limited precedential effect.<sup>70</sup> Again, this was not entirely the Justices' fault—they were told that a constitutional crisis was looming and that they were the sole actor capable of preventing it, and so they did their best in a short time and with limited information to address it—but, by the same token, it seems doubtful that the Court will want to stand by some of its broader, less nuanced statements in future lawsuits. *Kotek* is most likely a ticket good for today and this train only.

## II. CONGRESSIONAL REDISTRICTING

The *Kotek* litigation involved only the timeline for the Legislature to engage in state legislative redistricting; the Legislature did not ask the Court to revise the deadlines for adopting a congressional districting in plan, no doubt because those deadlines are set by statute, not the Oregon Constitution, and therefore can be changed by the Legislature itself without the aid of the Court. By statute, the Oregon Legislature was originally required to adopt a congressional districting plan by July 1, 2021.<sup>71</sup> This summer, however, the Legislature enacted a bill that

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<sup>68</sup> 531 U.S. 98 (2001).

<sup>69</sup> See, e.g., CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 62–63 (2001).

<sup>70</sup> See *Bush*, 531 U.S. at 109 (noting that “[o]ur consideration is limited to the present circumstances . . .”). The U.S. Supreme Court has cited *Bush v. Gore* in only three cases, and even then, in those three cases, the Court did not cite it for the case's core holding regarding the constitutional requirements applicable to state election procedures.

<sup>71</sup> OR. REV. STAT. § 188.125(2)(b)(A) (2019); *id.* § 188.125(2). In fact, in what was surely an unintentional drafting oversight, the statute imposes that deadline regardless of whether the census data is available or not. Unlike Article IV, Section 6, which only requires the Legislature to act after the “enumeration . . . by the United States Government,” Oregon Revised Statutes Section 188.125 requires the Legislature to adopt a congressional redistricting plan by July 1 of a regular session of the Legislative Assembly held “in the year following the federal decennial census.” OR. REV. STAT. § 188.125(2)(b)(A); *id.* § 188.125(2). The statute's trigger point is the census itself, which took place in 2020, not the actual enumeration, which takes place the following year and is delayed this year. Perhaps the Oregon Supreme Court would construe the statutory language “federal decennial census” to mean the date on which the detailed census data

extended the timeline for adopting a congressional reapportionment plan until September 27 this year—the same deadline imposed by *Kotek* for state legislative redistricting. The Legislature was essentially forced to enact the measure since a new congressional district map had to be drawn this year regardless of the delay in the delivery of the census data.<sup>72</sup> Moreover, as the Legislature has itself recognized, once the *Kotek* decision authorized the Legislature to convene a special, emergency session later this fall to draw the state legislative district map, the Legislature could use the same session to draw the congressional district map too. Judicial review of the Legislature’s plan, if sought, would then take place either in state or federal court as described below.

But what if the Legislature fails to adopt a new congressional districting plan in the fall special session? Unlike with state legislative redistricting, there is no role for the Secretary of State to act as a fallback for congressional redistricting. In that scenario, it will be a court drawing the congressional district boundaries, but which court?

Unlike with respect to state legislative districting, there is no provision for direct review by the Oregon Supreme Court. Any lawsuit filed in state court must begin in circuit court. In 2001, a Multnomah circuit court judge ended up drawing the congressional districts for the state, which signaled to the Legislature the danger of allowing a litigant to engage in forum-shopping and choose the particular county in which a lone judge will potentially end up drawing all of the congressional districts for the entire state. In response, in 2013, the Oregon Legislature enacted Section 188.125, which authorizes an elector to file suit in Marion County Circuit Court, in which case a special, five-judge trial court with a judge selected from each of the state’s congressional districts is appointed to hear the suit. The requirement that the suit be brought in Marion County eliminates the potential for forum-shopping, and the statute’s requirement that there be five judges, each of which is drawn from one of the state’s congressional districts, provides a degree of geographic diversity in the composition of the special circuit court.

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is released, but that would clearly be at odds with the statutory text and cause problems down the road in a normal year: if the “federal decennial census” is the date of the release of the detailed census data, then this statute does not require the Legislature to redistrict in 2021 (or 2031 or 2041) but rather, as the language says, “in the year following” that date (i.e., 2022, 2032, or 2042). That would be too late for congressional elections in 2022 (or those subsequent even-numbered years) and could not have been the Legislature’s intent.

<sup>72</sup> The U.S. Supreme Court requires that congressional districts be redrawn every ten years to equalize the population of the state’s congressional districts, and, even if the courts were prepared to waive that requirement this year for some states because of the census delay, they could not do so for Oregon, which received a sixth congressional district as a result of this year’s congressional reapportionment and which therefore requires Oregon to redraw its now six congressional district boundaries in time for the 2022 congressional elections. *See* 2 U.S.C. § 2c (2018) (requiring states with more than one Representative to draw single-member districts for each of their Representatives).

With the anticipated delay in adopting a new congressional redistricting plan this year, the Legislature recognized the corresponding need to push back the deadline for seeking judicial review of the congressional redistricting plan (or its absence). Thus, a petition challenging the congressional plan in the special, five-judge circuit court must be filed by October 12, a date two weeks prior to the one chosen by the *Kotek* court for a judicial challenge to a legislatively adopted state legislative redistricting plan.<sup>73</sup> If the Legislature's plan is either non-existent or invalid, the special circuit court would then be required to either approve one of the litigants' proposed plans or create its own plan.<sup>74</sup> Any decision by the special, five-judge court is then subject to appeal as of right to the Oregon Supreme Court, which must hear the appeal on an accelerated timeline and which is empowered to draft its own redistricting plan if it finds a flaw in the Legislature's or special circuit court's plan.<sup>75</sup>

A litigant could also choose to file suit in federal court. The availability of judicial review under Section 188.125 does not and cannot divest the federal courts of the authority to hear a federal constitutional or statutory challenge to a congressional districting plan (or its absence). States do not control the subject matter jurisdiction of the federal courts. Thus, once the census data is released in mid- to late-August, an Oregon voter could commence suit in federal court, asking the federal court to draft its own plan.

The federal court's authority to draw its own congressional redistricting plan, though, is more circumscribed than the special, five-judge circuit court provided for by Section 188.125. Article I, Section 4 of the U.S. Constitution—the so-called Elections Clause—entrusts the regulation of elections of federal Representatives to state legislatures, though such state regulations are subject to revision by Congress.<sup>76</sup> As a result, the U.S. Supreme Court has therefore directed federal courts, “whenever practicable, to afford a reasonable opportunity for the legislature to meet

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<sup>73</sup> S.B. 259, 81st Cong., Reg. Sess. § 1 (Or. 2021). If litigants miss the filing deadline, they lose the ability to file suit in state court since Section 188.125, as amended by the 2021 statute, is expressly declared to be the “exclusive” mechanism for state court judicial review, thereby precluding review by a single circuit court judge elsewhere in the state after that date. In adopting Section 188.125, the Legislature did not intend for a litigant to be able to avoid the special, five-judge circuit court and have their suit heard by a regular, one-judge circuit court anywhere in the state at a litigant's choosing simply by delaying their suit past the statutorily-specified deadline. The whole point of adopting Section 188.125 was to prevent a repeat of 2001, when a lone Multnomah circuit court judge redrew the state's congressional district map. And if a litigant could avoid the special, five-judge circuit court this year by choosing to file suit after the statutory deadline, so too could a litigant do so in a future year in which the Legislature has adopted a congressional districting plan by the July 1 deadline—the filing deadline applies whether the litigant is challenging a legislatively-adopted plan or the failure of the Legislature to enact a plan.

<sup>74</sup> OR. REV. STAT. § 188.125(8)(b).

<sup>75</sup> *Id.* § 188.125(11)(b)(B)–(C).

<sup>76</sup> U.S. CONST. art I, § 4.



constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.”<sup>77</sup> The federal court would therefore need to give the Legislature an opportunity to adopt a plan or correct the errors in its original plan, most likely in the Legislature’s “short session” in early 2022,<sup>78</sup> and only if the Legislature failed to do so would the federal court be justified in drafting its own plan. Nor would the 2022 short session necessarily be too late. Notably, federal representatives are not and cannot be made subject to the January 1 district residency requirement that the Oregon Constitution applies to state legislators; rather, the U.S. Constitution requires only that federal Representatives be a resident of the State from which they are chosen.<sup>79</sup> Thus, the operative deadline for having a federal congressional districting plan in place is sometime in mid-February—in sufficient time for candidates to file their candidacy petition by March 8. Indeed, the Oregon Supreme Court’s *Kotek* decision tacitly endorses the notion that a districting plan need not be final until February 8 for state legislative races, so it would seem incongruous for a federal court to intervene and adopt a congressional districting plan prior to that date.

What happens if different Oregon voters rush to different courthouses? In other words, what happens if one set of voters commence suit in state circuit court pursuant to Section 188.125 and another set of voters file suit in federal district court? Parallel proceedings are obviously disfavored, but they do sometimes take place. In that circumstance, the U.S. Supreme Court has made clear that the federal court should ordinarily defer to the state court proceedings. In *Grove v. Emison*, the U.S. Supreme Court confronted precisely that situation: one set of litigants filed suit in state court asking that court to draft state legislative and congressional redistricting plans, while another set of litigants filed suit in federal court asking that court to draft the relevant plans. The federal court enjoined the state court from putting its state legislative districting plan into effect, and then it drafted its own plans. On appeal, the U.S. Supreme Court reversed and held that the federal district court should have deferred to the state court proceedings.<sup>80</sup> As the Court explained, “reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court,”<sup>81</sup> and that “other body” includes state courts entrusted to draft redistricting plans if the state legislature fails to do so. A federal court is empowered to draft its own redistricting plan only if it

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<sup>77</sup> *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality opinion).

<sup>78</sup> *Cf. Grove v. Emison*, 507 U.S. 25, 29 (1993) (noting that district court gave state legislature until January 20, 1992 to adopt revised redistricting plan for state legislative elections later that year).

<sup>79</sup> U.S. CONST. art I, § 2, cl 2; *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that the three qualifications for federal Representatives listed in Article I, Section 2 are exclusive and cannot be added to by States).

<sup>80</sup> *Grove*, 507 U.S. at 37.

<sup>81</sup> *Id.* at 34 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

appears that the state court will fail to draft its own plan in time for the new election cycle or if the state court plan itself violates federal law.<sup>82</sup> Federal courts, the Supreme Court warned, are not to engage in a “race to beat the [state court] to the finish line.”<sup>83</sup> Thus, if the Oregon courts have adopted a redistricting plan in a timely manner under Senate Bill 259, the federal court can only draft its own plan if it concludes that the state court plan itself violates federal law.

Last, but not least, is there anything the Legislature can do if it dislikes the redistricting plan adopted by the court? Yes, the Legislature always retains the authority to adopt its own plan for the future. Thus, the Legislature in 2023 could redraft the congressional district plan for the 2024 elections and beyond. As with state legislative districting, there is no state or federal constitutional ban on mid-decade redistricting, which the U.S. Supreme Court has approved as constitutionally permissible.<sup>84</sup> Indeed, the U.S. Supreme Court expressly endorsed mid-decade redistricting in situations in which the original redistricting plan was court-imposed.<sup>85</sup>

By the same token, though, there is no obligation for the Legislature to revisit the congressional districting map in 2023. Article IV, Section 6’s timeline for redistricting only applies to state legislative redistricting, not congressional redistricting, so, if the Legislature does not want to do so, it need not revisit the matter in 2023. That would be a shame—something as important as federal congressional districts should be drawn by someone other than the courts, which do not have any particular expertise regarding how to draw district lines<sup>86</sup>—but it would not be unconstitutional.

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<sup>82</sup> *Id.* at 36. For an example where the federal court litigation continued because the federal court litigants challenged the state court plan, see *Benavides v. Eu*, 34 F.3d 825, 834 (9th Cir. 1994).

<sup>83</sup> *Grove*, 507 U.S. at 37. In *Branch v. Smith*, the U.S. Supreme Court distinguished *Grove* and upheld a federal court’s districting plan because the state-court-adopted redistricting plan had not gone into effect in a timely manner due to the absence of preclearance under Section Five of the federal Voting Rights Act. 538 U.S. 254, 261–62, 265–66 (2003). The deadlines currently listed in Section 188.125, however, ensure the adoption of a state-court-imposed congressional districting plan in a timely manner well before the filing deadline for the primary election next March, making the *Branch* exception inapplicable.

<sup>84</sup> *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 415 (2006) (plurality opinion).

<sup>85</sup> *Id.* at 416 (“It should follow, too, that if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act.”); see also *id.* at 418–19 (“The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature’s decision to replace mid-decade a court-ordered plan with one of its own.”).

<sup>86</sup> *Id.* at 416 (“As the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts.”).

## CONCLUSION

The COVID pandemic has cost many lives and upended life as we know it. Sadly, the 2021 legislative and congressional districting process has likewise been impacted by the pandemic, as the U.S. Census Bureau was unable to provide the detailed 2020 census data to Oregon in time for the Legislature to engage in redistricting during the 2021 regular session. The Oregon Supreme Court's decision in *Kotek* extended the various deadlines for the Legislature to enact a state legislative redistricting plan and the judicial review thereof, but in so doing the Court raised troubling questions about its power to revise constitutionally prescribed deadlines and the extent to which any districting plan must be based on federal census data. More immediately, it truncated the 2022 primary election season, likely helping incumbent legislators fend off primary challenges from other candidates. For those reasons, the Oregon Supreme Court would have been better served to leave the constitutional deadlines of Article IV, Section 6 in place. The delay in delivery of the census data was unfortunate, but it did not create a true constitutional crisis, let alone one so severe as to require that the redistricting provisions of the Oregon Constitution be rewritten by judicial decree. In fact, the greatest challenge confronting the Legislature with regard to redistricting has nothing to do with COVID, the delay in the census, or the rigid deadlines laid out in the Oregon Constitution; rather, it is the politically fraught task of drawing districts in such a way as to create a broadly representative Legislature that will inspire public confidence in our democratic political system and enable the state to confront the public policy challenges of the future. That challenge still remains.