**STATE OF MICHIGAN**
**MICHIGAN COURT OF APPEALS**

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION, JOSEPH SPYKE, and JEANNE DAUNT,

Case No. _____

Plaintiffs,

v.

SECRETARY OF STATE, and MICHIGAN BOARD OF STATE CANVASSERS,

Defendants.

_____/

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**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR COMPLAINT FOR MANDAMUS**

**ORAL ARGUMENT REQUESTED**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

**Rules**

## STATEMENT OF BASIS OF JURISDICTION

This Court has original jurisdiction to entertain an action for "mandamus against a state officer." MCR 7.203(C)(2) (citing MCL 600.4401). The Secretary of State and Board of State Canvassers are "state officers" for the purpose of mandamus. See *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 282; 761 NW2d 210, *aff'd in part, appeal denied in part by* 482 Mich 960 (2008).

## STATEMENT OF QUESTION INVOLVED

On December 18, 2017, a ballot question committee known as Voters Not Politicians ("VNP") submitted an initiative petition to Defendant Secretary of State ("Secretary"). In general, the petition seeks to place before the voters at the 2018 general election a proposal to amend the Michigan Constitution (the "VNP Proposal"). The VNP Proposal seeks to make fundamental changes in Michigan government by "amending" three articles of the Constitution and changing 4,834 words in the articles of the Michigan Constitution governing the legislative, executive, and judicial branches; language in 11 sections would be deleted or amended.

The VNP Proposal is actually a general revision of the Michigan Constitution that cannot be accomplished by an amendment. See Const 1963, art 12, § 3. Further, the VNP Proposal failed to republish all sections of the existing Constitution that are to be altered or abrogated by the VNP Proposal—a requirement under state law.

Plaintiffs seek a writ of mandamus: (a) directing the Secretary and Board of State Canvassers ("Board") to reject the petition; and (b) directing the Secretary and Board to take no further steps to place the VNP Proposal on the ballot for the 2018 general election.

Question: Should this Court issue a writ of mandamus directing the Secretary and Board to reject the initiative petition and to take no further steps to place the VNP Proposal on the 2018 general election ballot?

Plaintiffs answer "Yes.

## I. INTRODUCTION

**"Constitutional modification requires *strict* adherence to the methods and approaches included in the constitution itself." *Citizens Protecting Michigan's Constitution v Sec'y ("Citizens")*, 280 Mich App 273, 276; 761 NW2d 210, *aff'd in part, appeal denied in part by* 482 Mich 960 (2008) (emphasis added).**

This is an original action for mandamus against Defendant Secretary of State Ruth Johnson ("Secretary") in her capacity as Michigan's chief election officer and Defendant Board of State Canvassers ("Board"). Plaintiff Citizens Protecting Michigan's Constitution ("CPMC") is a duly registered ballot question committee established pursuant to the Michigan Campaign Finance Act, MCL 169.201 *et seq*.

The petition at issue proposes to submit a ballot question at the 2018 general election; it is sponsored by a ballot question committee calling itself Voters Not Politicians ("VNP"). (The revisions included in the petition are hereinafter referred to as the "VNP Proposal.") CPMC seeks an order from this Court directing the Secretary and the Board to reject the petition. (See **Exhibit 1**, VNP Proposal.)

The VNP Proposal is set forth in 7 pages of single-spaced fine print in the petition. It would change approximately 4,834 words in the articles of Michigan's 1963 Constitution (the "Constitution") governing all three branches of government. The changes include amending, deleting, or inserting language across 11 different sections of the existing Constitution.

These revisions have multiple purposes, but chief among them is the creation of a 13 member "independent" redistricting commission in the legislative branch comprised of persons without recent political experience chosen by the secretary of state. The VNP Proposal would transfer the power to enact laws establishing congressional and state legislative districts from the Legislature to this new body which, though formed in the legislative branch, will act as a superagency, in reality, a new branch of government, exercising a powerful mixture of

legislative, executive, and judicial powers on the core issue of how the lawmakers of the state are to be elected. The new commission would be immune from any control by the legislature or the governor and its redistricting plans *would not even be subject to the People's reserved powers of initiative and referendum*. The revisions would, in tandem, alter the longstanding requirements underpinning the drawing of Michigan's voter districts, including the requirement—which has appeared in every version of the Constitution since 1835—that voting districts be drawn along county and municipal boundaries to the extent possible. Instead, under the VNP Proposal, consideration of the maintenance of county and municipal boundaries would be subordinated to a multitude of new, albeit nebulous, criteria, chief among them that the "districts shall reflect the state's diverse population and communities of interest" and shall reflect "accepted measures of political fairness." (Ex. 1, VNP Proposal, art 4, § 13(C)-(D).) (No "accepted measure" of political fairness has yet been recognized by the courts or even by political scientists.)

The multitude of changes the VNP Proposal works to the Constitution—including the transfer, limitation, or expansion of powers in all three branches of government—are too disruptive to the original constitutional structures and underpinnings of government to be accomplished by the amendment process. The scale and impact of the VNP Proposal is simply too great for its contents to be summarized for their presentation to voters in the voting booth or petitioner-signers passing a signature gatherer on a public sidewalk.

Mandamus should issue because the petition fails to comply with the requirements of Michigan law and the Constitution—requirements that must be satisfied for submission of ballot questions to the voters. First, the VNP Proposal's changes constitute a "general revision" of the Constitution, and not a mere amendment. Under longstanding, black-letter Michigan law, a revision can only be accomplished through a Constitutional Convention—it cannot be

accomplished by a ballot initiative. Second, the petition fails—as required by statute—to set forth all of the provisions of the existing Constitution that would be "altered" or "abrogated" by the VNP Proposal.

Collectively, these constitutional and statutory requirements serve to assure that voters understand the measures before them, and are not misled into supporting or voting for provisions with which they do not agree. The constitutional requirement that fundamental changes amounting to a general revision occur only through a constitutional convention is also designed to assure that appropriate study, debate, and analysis occur with respect to such changes by constitutional delegates before the voters are asked to approve them.

As discussed below, controlling case law exists for both issues. First, this Court has held that attempted revisions of the Constitution are not eligible for placement on the ballot and has also established the test for determining whether a proposal is an amendment which may be submitted directly to the electorate or a revision which may only be submitted after being proposed by a constitutional convention.[1] Second, the Supreme Court has held that a petition that fails to republish the provisions of the Constitution that will be altered or abrogated is not eligible for placement on the ballot and has also established the specific rules for determining whether an existing constitutional provision is being altered or abrogated.[2] The sponsors of the VNP Proposal failed to heed these cases. Under controlling case law, the VNP Proposal is not an amendment but, rather a revision, and it fails to identify and republish at least four existing constitutional provisions that would be altered or abrogated. These defects are fatal. Accordingly, the VNP Proposal is not eligible for placement on the 2018 ballot.

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[1] *Citizens*, 280 Mich App at 277, 305.

[2] *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 778, 781; 822 NW2d 534 (2012).

Mandamus is the appropriate remedy where, as a matter of law, the court determines that a ballot proposal is ineligible for submission to the electorate. Michigan courts have repeatedly ordered such relief over the years. This Court too should enter an order precluding submission of the VNP Proposal to the voters.

## II. FACTS

### A. Parties

#### 1. Plaintiffs

Plaintiff CPMC is a duly registered ballot question committee organized for, among other things, the purpose of opposing the VNP Proposal.

Plaintiff Joseph Spyke is an Ingham County resident and voter who will be aggrieved if the VNP Proposal is adopted because the VNP Proposal, if approved, would abridge his rights of initiative and referendum with respect to redistricting plans adopted for the State of Michigan. He will further be aggrieved because he has, within the past 6 years, been a paid employee of a political candidate, and is thus ineligible to serve on the redistricting commission. See Ex. 1, VNP Proposal, art 4, § 6(1)(b)(iv).

Plaintiff Jeanne Daunt is a Genesee County resident and voter who will be aggrieved if the VNP Proposal is adopted because the VNP Proposal, if approved, would preclude her from serving on the redistricting commission merely because she is the parent of a person otherwise disqualified from serving on the commission. See Ex. 1, VNP Proposal, art 4, § 6(1)(c).

#### 2. Defendants

Defendant Secretary is Michigan's chief election officer. MCL 168.21. She holds office under the Constitution, and is the single executive heading the Department of State. Const 1963, art 5, § 3. She has overall responsibility for the preparation of the ballot and the submission of

statewide ballot questions. MCL 168.31(1)(f). She is also the official with whom a petition calling for a constitutional amendment must be filed. MCL 168.471.

Defendant Board is a state board established pursuant to Const 1963, art 2, § 7. Among other things, the Board is responsible for determining the sufficiency of signatures submitted in support of a petition to amend the Constitution. MCL 168.476(1). Though Plaintiffs do not believe that the Board has jurisdiction to address the questions posed by this suit—and Plaintiffs further believe that the Secretary can provide adequate mandamus relief—the Board is included in this action as a cautionary measure in the event that this Court may disagree.[3]

### B. Schedule for Administrative Review

#### 1. Statutory Deadlines

On December 18, 2017, VNP filed the petition containing the VNP Proposal with the Secretary of State. Upon the receipt of a petition proposing a constitutional amendment, the Board is required to "canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors." MCL 168.476(1). The canvass of signatures must be completed not later than two months before the election, and the Board is required to issue an official declaration as to the sufficiency of petitions at least two months before an election. MCL 168.476(2); MCL 168.477(1). Here, such certification must thus occur by no later than September 6, 2018.

[3] Within the protest period as established by the Board for challenges to the VNP Proposal petition, Plaintiffs plan to make a *pro forma* protest to the Board, setting forth the claims in Count II of their Complaint out of an abundance of caution as well. In *Citizens*, the court held that this Court is the proper forum to present a challenge that a ballot initiative proposal constitutes a revision—requiring a constitutional convention under Const 1963, art 2, § 3—rather than an amendment permitted by Const 1963, art 2, § 2. See 280 Mich App at 282-283, 289-291.

In the case of a proposed constitutional amendment such as the VNP Proposal, the Secretary of State must certify the question to county clerks not less than 60 days before the election, MCL 168.480, to enable the question to be included in ballots presented in each county. Here, such certification would be required by September 7, 2018.

On April 18, 2018, Plaintiff CPMC sent a letter to the Secretary advising her of the deficiencies in the petition used to circulate the VNP Proposal and of the VNP Proposal's ineligibility to appear on the ballot. The Secretary did not respond prior to the filing of CPMC's Complaint.

**2. This case is ripe for judicial review.**

This controversy is ripe for review because it involves a threshold determination of whether the VNP Proposal petition on its face meets the constitutional prerequisites for acceptance. *Mich United Conservation Clubs v Sec'y of State*, 463 Mich 1009, 1009; 625 NW2d 377 (2001) (citing *Scott v Sec'y of State*, 202 Mich 629, 644; 168 NW 709 (1918); *Leininger v Alger*, 316 Mich 644, 654-655; 26 NW2d 348 (1947)). All of the information necessary to resolve this controversy—*i.e.*, whether the VNP Proposal is a constitutional revision rather than an amendment, or fails to republish altered or abrogated provisions of the Constitution as required by law—is presently available.

The procedural situation in this case is analogous to the procedural situations presented in *Citizens* and *Michigan United Conservation Clubs*. In each of those matters, the issue was whether a proposed ballot initiative complied with requirements for submission to the voters. In both cases, the courts found that the threshold issue of ballot eligibility was ripe, and ultimately, the proposals were blocked from the ballot. See *Mich United Conservation Clubs*, 463 Mich at

1009; *Mich United Conservation Clubs v Sec'y of State,* 464 Mich 359, 365-366; 630 NW2d 297 (2001); *Citizens*, 280 Mich App at 282-283.

## III. ARGUMENT

### A. Standard of Review

There are numerous issues presented by the VNP Proposal. All or parts of this proposal may violate provisions of the United States Constitution, federal statutes, or the Michigan Constitution. The Michigan Supreme Court, however, has made it plain that substantive attacks on the validity of a ballot proposal are premature if made before the voters adopt the proposition in question. *Hamilton v Vaughan*, 212 Mich 31, 33-35; 179 NW 553 (1920).

The Michigan Supreme Court, however, has made a distinction between those types of substantive challenges and questions relating to whether a proposal satisfies requirements as to content to be *eligible* to be placed on the ballot. Where a proposition is not eligible to be placed before the voters, the Court has not hesitated to issue a writ of mandamus ordering election officials not to place the question on the ballot. See *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 791-792; 822 NW2d 534 (2012).

The applicable test in actions for mandamus has been stated as follows:

> Generally, mandamus lies only where there exists a clear legal duty incumbent upon the defendant and a clear legal right in the plaintiff to the discharge of such duty. The legal duty must usually be a specific act of a ministerial nature, although occasionally mandamus will lie though the act sought to be compelled is discretionary. [*Wayne Cnty v State Treasurer,* 105 Mich App 249, 251; 306 NW2d 468 (1981).]

The Secretary is the state official whose duty it is to implement the amendment provisions in the Constitution. See MCL 168.471 *et seq.* It is the duty of the Secretary to preclude a ballot

initiative from being placed on a ballot if, as here, the question is not eligible for the ballot in the first instance. See *Leininger*, 316 Mich at 654-656; *Scott*, 202 Mich at 643-646.

A writ of mandamus directing the Secretary not to place a question on the ballot is the appropriate relief where the courts determine the proposal ineligible as a matter of law. See *Mich United Conservation Clubs*, 464 Mich at 365-366. This Court has authority to determine the lawfulness of particular proposals to amend the constitution, and once determined, can direct the Secretary to carry out her clear legal duties of preventing submission of proposals to the voters. *Citizens*, 280 Mich App at 287, 291.

In sum, mandamus is well recognized as the appropriate remedy for a party seeking to compel action by election officials with respect to certification of initiative petitions.

### B. The VNP Proposal is an attempted general revision of the Constitution and may not be accomplished without a constitutional convention.

#### 1. Whether a proposal is an "amendment" or a "revision" depends on both the quantity and quality of the proposed changes.

The People have reserved to themselves the authority to modify the Constitution. Such modification, however, "requires *strict* adherence to the methods and approaches included in the constitution itself." *Citizens*, 280 Mich App at 276 (emphasis added).

The Constitution provides three different methods by which its words may be changed. First, Const 1963, art 12, § 1 provides that the legislature may propose an amendment and present it to the electors. Second, Const 1963, art 12, § 2 permits an "amendment" to be proposed by petition and approved by vote of the electors. Third, Const 1963, art 12, § 3 provides for a "revision" of the Constitution through a constitutional convention, with subsequent approval by the voters of a new constitution or changes referred by the convention.

An "amendment" under Const 1963, art 12, §§ 1 and 2 is not the same as a "revision" under Const 1963, art 12, § 3. *Citizens*, 280 Mich App at 277, 295. The difference is described in *Citizens*. There (in 2008), this Court found that a proposal submitted by a ballot question committee called Reform Michigan Government Now! (the "RMGN Proposal") constituted a general revision that could not be accomplished through a ballot proposal. *Id.* at 307.

In making its determination, the *Citizens* Court undertook a comprehensive review of jurisprudence concerning the difference between an "amendment" and a "revision." In first reviewing Michigan jurisprudence, it found that the Michigan Supreme Court long ago had explained that a "revision" "'suggests *fundamental* change,'" in contrast to an "amendment" which is a mere "'*correction* of detail.'" *Id.* at 296 (quoting *Kelly v Laing,* 259 Mich 212, 217; 242 NW 891 (1932)) (emphasis added). From *Laing* and another decision—*Pontiac School District v City of Pontiac,* 262 Mich 338; 247 NW 474 (1933)—the court developed the proper analysis: "the analysis should consider not only the *quantitative* nature of the proposed modification, but also the *qualitative* nature of the proposed modification." *Citizens*, 280 Mich App at 298. The analysis "must take into account the degree to which the proposal interferes with, or modifies, the operation of government. . . . [T]he greater the degree of interference with, or modification of, government, the more likely the proposal amounts to a 'general revision.'" *Id.*

The *Citizens* Court then turned to jurisprudence from *other* states to both confirm and elaborate the contours of this test. *Id.* at 299. Decisions from Delaware and Alaska applied a similar "quantitative/qualitative" approach to distinctions between an "amendment" (permissibly submitted to voters as a ballot proposal) and a "revision" (requiring a constitutional convention) under analogous constitutional provisions of those states. See *Citizens*, 280 Mich App at 303-

304 (discussing *Bess v Ulmer*, 985 P2d 979, 987 (Alaska 1999) (interpreting Alaska Const, art 13, §§ 1, 2) and *Opinion of the Justices*, 264 A2d 342, 346 (Del 1970) (interpreting Del Const, art 16, §§ 1, 2)). In *Bess v Ulmer*, the Supreme Court of Alaska explained that, in determining whether a particular question could be submitted to voters or required a convention, the "core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole." *Bess*, 985 P2d at 987.

The *Citizens* Court also found particularly instructive several decisions from California. See *Citizens*, 280 Mich App at 299, 303 (discussing *McFadden v Jordan*, 32 Cal 2d 330; 196 P2d 787 (Cal 1948) and *Raven v Deukmejian*, 52 Cal 3d 336; 801 P2d 1077 (Cal 1990)). In *McFadden*, the California Supreme Court held that a proposed initiative entitled the "California Bill of Rights," which would have repealed or altered 15 of the 25 articles in the California Constitution, added five new topics, and impacted the functions of the legislative and judicial branches, constituted a "revision" rather than an "amendment." *McFadden*, 32 Cal 2d at 345, 349-350. The *McFadden* Court pointed out that while the amendment procedure was "relatively simple," the constitution entrusted general revision to "the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision." *Id.* at 347.

Subsequent decisions of the California Supreme Court found that a "revision" can result from a change to only a *small* portion of the constitution if the change is fundamental. See *Raven*, 52 Cal 3d at 342-343, 350-51. In *Raven*, the California Supreme Court found that an initiative proposal affecting only a *single article* would have caused a fundamental change to the Constitution by limiting the interpretive powers of the California judiciary. *Id.* at 354-355. The proposal in *Raven* would have prevented California courts from interpreting the rights of criminal defendants more broadly than interpretations applied to the federal Constitution. *Id.* at

352. The court held that the initiative "substantially alter[ed] the substance and integrity of the state Constitution" and thus was not a proper subject matter for a ballot proposal. *Id.* at 352, 355.[4] It further held that a quantitatively large change could constitute a revision even if not qualitatively fundamental—"[s]ubstantial changes [to the constitution] *in either respect* could amount to a revision." *Raven*, 52 Cal 3d at 350 (emphasis added).

The *Citizens* Court concluded by stating "[w]e agree with the reasoning of these decisions and find them to be consistent with Michigan law. . . ." *Citizens*, 280 Mich App at 304. The Court summarized the Michigan test as follows:

> [T]o determine whether a proposal effects a "general revision" of the constitution, and is therefore not subject to the initiative process established for amending the constitution, the Court must consider both the quantitative nature and the qualitative nature of the proposed changes. More specifically, the determination depends on, not only the number of proposed changes or whether a wholly new constitution is being offered, but on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government. [*Id.* at 305.]

Turning finally to the RMGN Proposal before it, the *Citizens* Court had little trouble concluding that the proposal constituted a revision rather than an amendment. *Id.* Quantitatively, the proposal affected four articles, 24 existing sections, and added four new sections. *Id.* Qualitatively, the proposal was multifarious and made fundamental changes to the structure of government by altering legislative, judicial, and executive branch powers as well as the election process itself. *Id.* at 306. The court held that "the proposal does not even approach the field of application for the amendment procedure." *Id.* at 305 (quotations omitted). The court issued a writ of mandamus, finding "[t]he substantial entirety of the petition alters the core, fundamental

[4] See also *Amador Valley Joint Union High Sch Dist v State Bd of Equalization*, 22 Cal 3d 208, 223; 583 P2d 1281 (Cal 1978) ("[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision. . . .").

underpinnings of the constitution," and thus the "power of initiative established by Const 1963, art 12, § 2, for amending the constitution does not extend to the RMGN initiative petition." *Id.* at 307.

The Michigan Supreme Court affirmed this Court's decision in *Citizens Protecting Michigan's Constitution v Sec'y of State*, 482 Mich 960; 755 NW2d 157, 157 (2008). A majority of the justices, however, did not agree on the reasoning. Accordingly, as to the principles of law discussed, the decision of this Court in *Citizens* is binding precedent. *Tebo v Havlik*, 418 Mich 350, 362; 343 NW2d 181 (1984).

As discussed in the following section, like the RMGN Proposal, the VNP Proposal also alters the legislative, judicial, and executive branch powers specified in the constitution, and makes sweeping changes to the election process as well. These are fundamental changes and they would disrupt the basic structure of government. The same conclusion and result as followed with the RMGN Proposal should follow here as well.

**2. The VNP Proposal is a general revision of the Constitution and thus not eligible for submission to the voters through the initiative process.**

**a. The VNP Proposal is a revision under the quantitative prong.**

Application of the quantitative prong weighs conclusively in favor of a determination that the VNP Proposal is a revision rather than an amendment. The VNP Proposal would impact all three branches of Michigan government, changing the articles governing the legislative, judicial, and executive branches, repealing or altering 11 sections. While the VNP proposal does not add new sections, it inserts fully 22 new *subsections* in Const 1963, art 4, § 6.

In any framing, the VNP Proposal is massive. It would change approximately 4,834 words[5] in the Constitution—adding approximately 3,375 words and striking an additional 1,459 words. *The 4,834 words changed in the VNP Proposal would comprise more than 25% of the Michigan Constitution of 1963 as originally ratified*.[6] The exceptional size of the VNP Proposal can be seen by comparing it to other amendments: Between 1963 and 2010, 31 amendments to the Michigan Constitution have been adopted.[7] On average, each added a mere 559 words.[8] The VNP Proposal, in contrast, adds more than *six times* this average, to say nothing of the 1,459 words it deletes. Indeed, absent action by this Court preventing its placement on the 2018 general election ballot, the VNP Proposal would be the *largest ever* proposal submitted to voters outside of the work of a constitutional convention.[9]

[5] For comparison, the entire United States Constitution as originally ratified (*i.e.,* without counting subsequent amendments) was only 4,543 words.

[6] As originally enacted, the 1963 Constitution was 19,203 words. See Citizens Research Council of Michigan, Amending the Michigan Constitution: Trends and Issues, Special Report, at 2, (No. 360-03, March 2010) available at http://www.crcmich.org/PUBLICAT/2010s/2010/rpt36003.pdf (last visited April 16, 2018).

[7] *Id.* at 1-2.

[8] *Id.*

[9] For discussion of prior initiatives submitted to voters and the number of articles and sections impacted, see Secretary of State, Initiatives and Referendums Under the Constitution of the State of Michigan of 1963 (2008), available at https://www.michigan.gov/documents/sos/Const_Amend_189834_7.pdf (last visited April 16, 2018).

The voters of Michigan cannot constitutionally be asked to vote on such a measure. Certainly, they should not be asked to do so without the benefit of the recommendation of a constitutional convention as required by Const 1963, art 12, § 3.[10]

Under the Constitution, amendments are meant to be mere "correction[s] of detail," *Citizens*, 280 Mich App at 296 (quotations omitted). They are not meant to be sprawling compilations of changes, with multiple purposes that voters must decide to adopt or reject all at once. As the California Supreme Court explained in *McFadden*, such proposals are unacceptable for submission to the voters without a convention:

> The proposal is offered as *a single amendment* but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such an appeal might well be proper in voting on a revised constitution, proposed under the safeguards provided for such a procedure, but it goes beyond the legitimate scope of a single amendatory article. [*McFadden*, 32 Cal 2d at 346 (emphasis added).]

[10] In addition to deciding on whether to recommend wholesale constitutional revision for submission to the voters, constitutional conventions are empowered to "explain and disseminate information about the proposed constitution" to the public. Const 1963, art 12, § 3. For the 1907-08 Convention, this included an "Address to the People" issued as part of the 1908 Report of the Committee on Submission; this Address described major changes and explained the Convention's the reasons behind submitting them. For the 1961-62 Constitutional Convention, this included a lengthy (109-page) pamphlet entitled "What the New State Constitution Means to You: A Report to the People of Michigan by their Elected Delegates to the Constitutional Convention of 1961-62," again explaining the process, purpose, and specific recommendations of the Convention. Voters do not have the benefit of similar official explanatory materials when considering whether to ratify an amendment.

The language of Michigan's Constitution supports this interpretation of the word "amendment" as meaning a short correction to the existing constitution with a narrow purpose. Const 1963, art 12, § 2 uses the word "amendment" in the singular ten times; it requires that each "ballot . . . contain a statement of the *purpose* of the proposed amendment"—not the *purposes*. Const 1963, art 12, § 2 (emphasis added). The VNP Proposal has multiple purposes and makes multiple amendments.

State law confirms that an "amendment" is to be limited in scope. Unlike revisions enacted through constitutional conventions, the purpose of a constitutional *amendment*, under state law, must be susceptible to summarization in 100 words. See Const 1963, art 12, § 2; MCL 168.32(2). The VNP Proposal is too massive and too varied in its purposes to possibly be summarized in 100 words in a way that will apprise the voters of its effects on their Constitution in the manner contemplated by law. See Const 1963, art 12, § 2; MCL 168.32(2). The sheer scale of the VNP Proposal similarly means that it could not have been reasonably summarized to apprise persons signing a circulated petition of those same effects.[11]

With these considerations in mind, there can be little doubt that the VNP Proposal works a revision to the Michigan Constitution under the quantitative prong. Further, as is set forth below, the qualitative prong *also* supports the VNP Proposal's lack of ballot eligibility.

[11] In *Citizens Protecting Michigan's Constitution*, three justices of the Michigan Supreme Court would have held that the RMGN Proposal's size and multiple purposes made summarizing its purpose in 100 words an impossibility, and that this provided an independent basis for withholding the RMGN Proposal from the 2008 general election ballot. See 482 Mich at 960 (Cavanagh, Weaver, and Markman, JJ., concurring). These justices noted that the 100 word requirement in article 12, § 2 "establishes a clear limitation on the scope of constitutional amendments under § 2." *Id.* Because of the VNP Proposal is expansive and multifarious, it is similarly unsusceptible to summary in 100 words in any manner that would meaningfully apprise voters of its purposes.

**b. The VNP Proposal is a revision under the qualitative prong.**

**i. The VNP Proposal creates a "superagency," in effect an additional branch of government that combines powers of all three branches, but is shielded from the checks and balances built into the Constitution.**

Like the RMGN Proposal at issue in *Citizens*, the VNP Proposal has many purposes. The VNP Proposal seeks to enact, among other things, the following major changes to the Constitution:

Impact on Legislative Powers and Oversight

1. The VNP Proposal creates a 13 member "independent" redistricting commission in the legislative branch and transfers to it *all lawmaking powers over redistricting* of the Legislature and the Michigan congressional delegation. (Ex. 1, VNP Proposal, art 4, § 6(1).)

2. Even though established in the legislative branch, the commission is vested with "exclusive" control over redistricting and is not subject to the control of the Legislature. (Ex. 1, VNP Proposal, art 4, § 6(22).)

3. The Legislature is stripped of control over commission appropriations and budgeting measures; the proposal mandates that the commission shall receive a minimum of an amount equal to 25% of the Department of State's annual budget—more if the commission alone determines it needs more. Further, the State is required to *indemnify* commission members for costs incurred even if the Legislature does not approve funds to do so, which is directly contrary to Const 1963, art 7, § 17. (Ex. 1, VNP Proposal, art 4, § 6(5).)

4. The VNP Proposal precludes legislative oversight, and the powers of the secretary of state are vastly expanded by placing that official in charge of the redistricting commission and the selection of redistricting commission members. (And because commission members are required to have no recent political experience, they will be susceptible to the influence of the partisan-elected secretary of state). (Ex. 1, VNP Proposal, art 4, § 6(2).)

Limitations on Executive Branch Oversight

5. Commission members are accountable to no one but themselves and cannot be removed by the governor under Const 1963, art 5, § 10, or disciplined by the Civil Service Commission. (Ex. 1, VNP Proposal, art 5, § 2.)

6. The governor is stripped of all budgeting control over the commission; the governor has no power to order expenditure reductions under Const 1963, art 5, § 20 as he or she can for other agencies. (*Id.*)

7. The commission is vested with exclusive control over procuring, contracting, and hiring staff, consultants, and lawyers. (Ex. 1, VNP Proposal, art 4, § 6(4).)

8. Commission members are guaranteed a salary equal to 25% of the governor's salary, and that amount may not be changed by any other body including the Legislature or the Civil Service Commission. (Ex. 1, VNP Proposal, art 4, § 6(5).)

Limitations on Judicial Powers

9. The VNP Proposal vests original jurisdiction in the Michigan Supreme Court to review redistricting plans for compliance with state and federal constitutional requirements but strips the Supreme Court and the judiciary of the power to fashion a remedy if a plan is found defective; the only allowable action is to return the plan to the commission. (Ex. 1, VNP Proposal, art 4, § 6(19).)

Changes to the Constitutional Criteria Governing Legislative and Congressional Districts

10. The VNP Proposal dispenses with the current requirement that districts be drawn along county and municipal boundaries to the extent possible, a requirement that has been in every Michigan constitution since 1835. (Ex. 1, VNP Proposal, art 4, § 6(13).)

11. The VNP Proposal also dispenses with the current mandatory requirement that districts be compact. (*Id.*)

12. Existing *mandatory* redistricting criteria (*i.e.*, the requirement that districts follow county and municipal boundaries) are scrapped and replaced with a laundry list (in descending order of priority) of *non-mandatory* criteria beginning with "Districts shall reflect the state's diverse population and communities of interest" which is no standard at all. "Reasonable" compactness is last on the list and "consideration of county, city, and township boundaries" is second to the last. (*Id.*)

13. The VNP Proposal's other new criteria may be impossible or nearly impossible to implement: "Districts shall not provide a disproportionate advantage to any political party" as determined by undefined "accepted measures of political fairness" of which there are none that have been recognized by the courts. Similarly, the VNP Proposal directs that districts shall not "favor or disfavor" incumbents without providing a clue

as to what that actually means. (*Id.*)[12]

Elimination of Direct Democracy Powers as to Redistricting

14. The VNP Proposal eliminates the right of the people to nullify a redistricting plan by referendum or to repeal or modify a plan by citizens' initiative.[13]

Any one of these changes will present a serious modification to and interference with the existing structures of the Constitution; taken as a whole, these changes unquestionably upend key constitutional foundations and reorganize the operation of the entirety of state government. No branch is spared—even the judiciary's powers over redistricting (both as to review and remedy) have been curtailed and displaced. The new commission is a "superagency"—a chimera,[14] helmed by a partisan-elected official in the executive branch (the secretary of state), but placed in the legislative branch (albeit with no legislative control or oversight), and moreover, immune from most types of remedial orders now available to the judicial branch. In this superagency, the

[12] Another requirement that will be impossible to comply with is the mandate in the VNP Proposal that the Secretary select each of the thirteen commissioners in a manner that "as closely as possible, mirror[s] the … demographic makeup of the state." See Ex. 1, VNP Proposal, art. VI, § 6(2)(D)(ii). There are literally hundreds if not thousands of demographic characteristics the Secretary can choose from, such as race, age, gender, income, military service, primary language, disability, education level, occupation, marital status, sexual preference, union membership, religious preference, or any other number of factors. The Secretary will be able to choose in each cycle whatever factors best suit the Secretary's political preference, but with only 13 commission members, it will never be possible to "mirror" the "demographic makeup of the state."

[13] In Const 1963, art 9, § 9, the Constitution provides that "[t]he people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature," which power "extends only to laws which the legislature may enact under this constitution." Because "exclusive" power over redistricting would be reposed in the new commission, the VNP Proposal would also eliminate the People's direct power—a fundamental change.

[14] Any mythical animal with parts taken from various animals. Chimera Definition, OxfordDictionaries.com, https://en.oxforddictionaries.com/definition/chimera (last visited April 16, 2018).

powers of all three branches are to be reposed, and many of the checks and balances otherwise imposed on the three branches are rendered inoperative.

The creation of a new, independent agency—standing fully outside of the control of the governor or the legislature—is contrary to one of the primary policies of the 1961-62 Constitutional Convention. By the late 1950s, the number of government agencies and questions over the location of executive control had grown unwieldy, and there was little central control over many of them. The executive branch contained some 120 agencies, many of which exercised unsupervised control over affairs within their respective realms. Following a 1959 cash crisis and payless payday, the delegates to the Convention proposed new measures for the streamlining of government by reducing such agencies to no more than 20 and for assuring centralized oversight and management of agencies by a single executive.[15] The VNP Proposal

[15] As explained by the Michigan Supreme Court in *House Speaker v Governor*, 443 Mich 560, 562; 506 NW2d 190 (1993) with respect to the purposes of the 1961 and 1962 constitutional convention: "Perhaps the biggest need for restructuring was in the executive branch, which, before the new constitution, was composed of so many boards, commissions, and departments that the executive branch lacked any kind of effective coordination or supervision." The Court explained further:

> To give the Governor, at its head, some real control over the executive branch, the convention delegates agreed that the executive branch had to be given some logical structure. To provide such structure, the constitution included a provision mandating that all entities within the executive branch be allocated among and within not more than twenty principal departments. [*Id.* at 562-563 (footnotes omitted).]

[Footnote continues….]

reverses these fundamental policy reforms made in the 1963 Constitution. The new commission creates a new fiefdom with no ability of the voters to reign in its powers by ordinary political means (except perhaps through yet another constitutional amendment).

### ii. The VNP Proposal abandons core redistricting criteria that have existed since the State's founding.

But perhaps most disruptive is the VNP Proposal's impact on the election process itself. Legislative districts are the building blocks of a representative government. The VNP Proposal disrupts the very means by which the People's representatives are chosen. Nothing is more fundamental to the entire legislative process.[16] For this reason, the Michigan Supreme Court long ago recognized that "[*a*]*ny* change in the means by which the members of the Legislature are chosen is a fundamental matter." *In re Apportionment of State Legislature—1982*, 413 Mich 96, 136-137; 321 NW2d 565 (1982) (emphasis added). In *Citizens*, this Court referred to authority over and the means of redistricting as affecting the "'foundation power' of government." *Citizens*, 280 Mich App at 306.

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The Court cited to the convention record for support. See *id*. at 562 n 1 and n 2 ("As one convention delegate stated: 'Reorganization is a must if the governor is to have a structure of government such that he can maintain contact with the heads of his principal departments in such a way as to not only know what is going on but to be able to give some supervision and direction to the functioning of state government."); see also *id*. at 582 n 28, 583 n 29 (citing further convention statements). The 1963 Constitution similarly added a provision establishing a bi-partisan legislative council to centralize and oversee bill drafting, research, and other services for members of the Legislature. See Const 1963, art 4, § 15; see also 2 Official Record, Constitutional Convention 1961, p. 2389 ("We felt, however, that there was a reason for adding this provision in the constitution, in that it gave additional strength to the one single thing which the legislature can do to make itself the strongest possible kind of a legislature, to go along with the strong governor here in Michigan.").

[16] The "Guarantee Clause" of the United States Constitution requires that every state have a "Republican Form of Government." US Const, art IV, § 4.

The VNP Proposal *both* transfers the historical legislative power over redistricting to a new commission, but also adopts nebulous and alien standards for the drawing of districts. These new standards abandon the longstanding core redistricting criteria that district boundaries follow existing county and municipal lines—criteria that have been imposed by every Michigan Constitution *since at least 1835*.

As the Michigan Supreme Court explained:

> We see in the constitutional history of this state dominant commitments to contiguous, single-member districts drawn along the boundary lines of local units of government which, within those limitations, are as compact as feasible. [*In re Apportionment of State Legislature—1982*, 413 Mich at 140.]

As further observed by Justices Levin and Fitzgerald:

> [O]ne cannot deny that throughout its history Michigan has remained firmly committed to avoiding the fragmentation of county lines and, more recently, . . . avoiding the fragmentation of city and township lines. . . . [C]ounty lines have remained inviolate. The reason for following county lines was not the "political unit" theory of representation but rather that each Michigan Constitution has required preservation of the electoral autonomy of the counties. [*In re Apportionment of State Legislature—1982*, 413 Mich 149, 186-187; 321 NW2d 585 (1982) (Levin and Fitzgerald, JJ., concurring).]

Indeed, "Michigan's adherence to the principle that county and township lines should be preserved in the creation of election districts *dates back to the formation of the Northwest Territory on July 13, 1787*, and has been voiced in every Michigan constitution adopted since that date." *In re Apportionment of State Legislature—1982*, 413 Mich at 129-130 n 18 (citing, *inter alia*, Northwest Ordinance 1787, § 9; Const 1835, art 4, § 4; Const 1835, art 4, § 6; Const 1850, art 4, § 2; Const 1850, art 4, § 3; Const 1908, art 5, § 2; Const 1908, art 5, § 3) (emphasis added).

The framers of the current 1963 Constitution also emphasized the primary importance of county lines. *Id.* at 131 n 19. As explained by the Supreme Court in *In re Apportionment of State Legislature—1982:*

> The overarching priority that the delegates to the constitutional convention attached to the preservation of county units, while discernible upon an examination of the final product of their deliberations, is underscored by statements made on the floor of the convention. . . . In speaking about the Senate plan, the majority report [of the Committee on Legislative Organization] said " . . . *the county unit become*[*s*] *the major building block in creating senate districts*." 2 Official Record, Constitutional Convention 1961, p 2036.
>
> Insofar as the House plan was concerned, the majority report said: "All house districts will follow county boundary lines. This is recommended in order to assure citizens clearly identifiable and traditionally recognized voting districts, and to conform to the long established county organization patterns of many groups, including the political parties. Many states follow county lines in districting, and the weight of testimony heard by the committee overwhelmingly favored continuing this practice in Michigan." 2 Official Record, p 2036. [*Id.*]

The Supreme Court went on to quote Delegate Dehnke:

> The paramount importance of the county line principle was also discussed at length by Delegate Dehnke, himself a member of the Committee on Legislative Organization, when he took the floor to defend the majority report[:] "Now it has been recognized—it became clear early in our proceedings before the committee—that the delegates from both sides were agreed that it would not be advisable to permit the cutting of counties in forming legislative districts in either house. Practical considerations convinced both groups that this would not be advisable and should not be done if it could possibly be avoided. Counties, of course, are not sovereign entities. I don't know of anyone who claimed that they were. But, historically, our counties have been formed for the convenience of the state, to facilitate the administration of government. They may be said to be the agents of the state, as a convenient unit for the administration of state laws and the maintenance of law and order; for judicial administration, for welfare administration, for keeping records of deeds, probates and so on." 2 Official Record, p 2099. [*Id.*]

The Supreme Court also pointed out that preserving county lines was more important to the framers than other redistricting criteria including compactness, uniformity, and squareness:

> When comments such as these are taken into account, there can be little room to doubt that the integrity of county lines was a *principle of prime importance* to the framers of the 1963 Constitution. The primacy under the 1963 Constitution of the county-line requirement is such that it takes precedence over the other criteria of preserving city and township lines (in those few instances where they cross county lines), compactness, uniformity and squareness. [*Id.*]

The Supreme Court—in adopting the integrity of county and municipal lines as the Court's *own* primary goal for drafting the 1982 apportionment plan—went on to explain, quoting delegate W. F. Hanna, the benefits of following county and municipal lines, including minimizing the potential for gerrymandering:

> The provisions of the 1963 Constitution requiring that election districts be organized along county, city and township lines to the extent possible (i) enable voters living in a particular community to combine their votes more effectively to elect a representative from that area, (ii) facilitate the conduct of the election by reducing the number of precincts and special ballots, (iii) tend to preserve existing political party organizations, and (iv) *limit the potential for gerrymandering*. [*Id.* at 133 n 20 (emphasis added).]

Ten years later, the Supreme Court reiterated the importance of honoring jurisdictional lines "in order to foster effective representative government." *In re Apportionment of the State Legislature—1992*, 439 Mich 251, 252; 483 NW2d 52 (1992).[17]

[17] In 1981-82, the Michigan Supreme Court was called upon to draft redistricting plans for the state legislature because the legislature and the governor were unable to agree on plans. The court established detailed redistricting criteria and rules premised on the constitutional preference for drawing district lines along county and municipal boundaries. These criteria came to be known as the "Apol Standards," named after the special master retained by the court in 1982. The Apol Standards were utilized by the court in 1982 and again in 1992 after both political parties endorsed their use. See *In re Apportionment of State Legislature—1982*, 413 Mich at 140-141; *In re Apportionment of State Legislature—1992*, 439 Mich 715, 720-722; 486 NW2d 639 (1992). [Footnote continues…]

The VNP Proposal, as detailed above, does much more than just depart from the principle of following county and municipal lines. It restricts powers of the courts to review plans, of the governor to remove public officers and control budgetary matters, and of Legislature (and the people themselves, for that matter) to make revisions to redistricting plans after their initial adoption by the VNP commission. It shifts the locus of power over redistricting decisions to an entirely new unelected body, and supplies an alien set of novel criteria for that body to use. According to the Supreme Court, "[*a*]*ny* change in the means by which the members of the Legislature are chosen is a fundamental matter." See *In re Apportionment of State Legislature—1982*, 413 Mich at 136-137. The VNP Proposal is not limited to a single change in the means by which members of the legislature are chosen; it makes *many* such fundamental changes.

This last point is well illustrated by the decision in *Citizens.* In its decision on the RMGN Proposal, this Court in *Citizens* highlighted one change *in particular* in explaining why the proposal satisfied the "qualitative" prong of the revision versus amendment test:

> The impact of the proposal on the operation of the three branches of government, and the electoral process, is substantial. As just

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The Apol Standards' application to State House and Senate districts was codified in 1996. See MCL 4.261. Congressional redistricting follows largely the same standards. See MCL 3.63 (adopted in 1999). The Apol Standards require single member districts, and require districts to be areas of convenient territory contiguous by land. MCL 4.261(a)-(c); see also MCL 3.63(c)(i). They further specify that State House and Senate districts shall have population not exceeding 105% and no less than 95% of the ideal district size, with even smaller variation (102% to 98%) permitted in cities or townships with more than one district. MCL 4.261(d), (i). The Apol Standards establish a hierarchy for their application. MCL 4.261(e)-(h); see also MCL 3.63(c)(i)-(ix). First, "district lines shall preserve county lines with the least cost to the principle of equality of population." MCL 4.261(e); see also MCL 3.63(c)(ii) ("Congressional district lines shall break as few county boundaries as is reasonably possible."). Second, the Legislature should avoid breaking municipal boundaries to the extent possible. MCL 4.261(f)-(g); see also MCL 3.63(c)(iv). Only when necessary to stay within the range of allowable population divergence may the Legislature break municipal lines. MCL 4.261(h); see also MCL 3.63(c)(v).

The Apol Standards will be abandoned if the VNP Proposal is adopted.

> one example, the proposal strips the Legislature of any authority to propose and enact a legislative redistricting plan. It abrogates a portion of the judicial [sic, legislative] power by giving a new executive branch redistricting commission authority to conduct legislative redistricting. It then removes from the judicial branch the power of judicial review over the new commission's actions. We agree with the Attorney General that the proposal affects the "foundation power" of government by "wresting from" the legislative branch and the judicial branch any authority over redistricting and consolidating that power in the executive branch, albeit in a new independent agency with plenary authority over redistricting. [*Citizens*, 280 Mich App at 306.]

As with the RMGN Proposal in *Citizens*, this Court should find that the expansive and fundamental changes of the VNP Proposal—including but not limited to changes displacing county lines as the primary criteria of redistricting—are too disruptive to the structures of government to be achieved as an amendment. These changes are not some mere "correction of detail," *Citizens*, 280 Mich App at 296 (quotations omitted), but a general revision of the Constitution, and a writ of mandamus should issue to prevent the VNP Proposal from being placed on the ballot.

### C. The VNP Proposal violates the requirement that petitions republish all provisions that would be altered or abrogated by a proposed amendment.

#### 1. State law requires that all portions of the constitution that are "altered or abrogated" must be published as part of the circulated petition.

To properly inform voters, the Constitution requires publication before election of all constitutional provisions that a proposed constitutional amendment would alter or abrogate. "Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law." Const 1963, art 12, § 2. Pursuant to the power granted by the Constitution to

prescribe the requirements for *petitions*, the legislature "extend[ed] the educational function of this requirement to persons signing petitions" as well. *Ferency v Sec'y of State*, 409 Mich 569, 592-593; 297 NW2d 544 (1980). Thus, in section 482 of the Michigan Election Law, the Legislature has required that "[i]f the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted. . . ." MCL 168.482(3).

These requirements are aimed at ensuring that all petition signers and, potentially, eventual voters "are fully informed of the [e]ffect" of the petition they are being asked to sign. See, e.g., *Carman v Sec'y of State*, 384 Mich 443, 454; 185 NW2d 1 (1971). That is, these protections "advise the elector" as to the constitutional changes being made by the petition he or she is being asked to support. *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 401; 686 NW2d 287 (2004) (quotations omitted). Without these protections, a petition signer would sign a petition without understanding the impact of doing so, thereby inadvertently supporting a proposition with which he or she does not understand or actually agree.

**2. A provision is abrogated when it is rendered a nullity.**

Before turning to the multiple, specific provisions of the existing Constitution abrogated by the VNP Proposal *but not republished in the petition*, Plaintiffs provide a brief summary of how the term "abrogated" has been defined by the Michigan Supreme Court. A proposed amendment "*abrogates* an existing provision when it renders that provision wholly inoperative." *Protect Our Jobs*, 492 Mich at 773 (emphasis added). An existing constitutional provision is rendered wholly inoperative "if the proposed amendment would make the existing provision a

nullity or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together." *Id.* at 783 (footnote omitted).

The Michigan Supreme Court has explained that the potential of abrogation is high where existing provisions of the Constitution confer exclusive or complete control on a particular person or entity:

> Determining whether the existing and new provisions can be harmonized requires careful consideration of the actual language used in both the existing provision and the proposed amendment. An existing provision that uses nonexclusive or nonabsolute language is less likely to be rendered inoperative simply because a proposed new provision introduces in some manner a change to the existing provision. . . . [A] proposed amendment more likely renders an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to such a provision would tend to negate the specifically conferred constitutional requirement. [*Id.*]

The analysis is also a granular one, and "requires consideration of not just the whole existing constitutional provision, but also the provision's discrete subparts, sentences, clauses, or even, potentially, *single words*." *Id.* at 784 (emphasis added).

This principle was applied by the Michigan Supreme Court in *Protect Our Jobs*. There, the Court considered, among other initiatives, a proposal to amend the Constitution to establish eight casinos at specified locations (the "Casino Proposal"). *Id.* at 775. The Casino Proposal would have added language requiring that "[a]ll [eight] of the casinos authorized by this section shall be granted liquor licenses issued by the state of Michigan. . . ." *Id.* at 790 (quotations omitted) (emphasis omitted). The petition circulated in support of the Casino Proposal failed, however, to republish Const 1963, art 4, § 40, which states that the "liquor control commission which . . . shall exercise *complete control* over the alcoholic beverage traffic within this state." Const 1963, art 4, § 40 (emphasis added); *Protect Our Jobs*, 492 Mich at 791.

The court in *Protect Our Jobs* held that the absolute language of Const 1963, art 4, § 40—conferring "complete control" on the liquor control commission—necessarily communicates exclusivity of control, and that "*any* infringement on that control abrogates that exclusivity; an amendment that contemplates anything less than complete control logically renders that power in § 40 inoperative." *Protect Our Jobs*, 492 Mich at 790-791. Because the proposed addition in the Casino Proposal would "nullify the complete control" of the liquor commission, the court held that republication was required. *Id.* at 791. It did not matter that the abrogation of the "complete control" was slight—the court explained that "[e]ven though the amendment affects only a small fraction of the power to control alcoholic beverage traffic, which power itself is only a portion of Const 1963, art 4, § 40, a provision of § 40 has been negated and, thus, abrogated, thereby requiring republication of the entire constitutional section." *Id.* at 791 n 32. The failure of the circulators of the Casino Proposal to republish Const 1963, art 4, § 40 as part of the circulated petition was thus a fatal violation of MCL 168.482(3), and the court prevented the entire Casino Proposal from reaching the 2012 general election ballot. *Id.* at 791.

The legal principles enunciated in *Protect Our Jobs* are controlling here.

### 3. The VNP Proposal petition failed to republish multiple provisions of the existing Constitution that would be abrogated if the Proposal is adopted.

The same fatal flaw that existed for the Casino Proposal in *Protect Our Jobs* is present in the petition that circulated the VNP Proposal, but multiple times over. That is, the VNP Proposal has failed to republish *several* sections of the existing Constitution even though absolute or exclusive provisions in these sections will be nullified by the Proposal's adoption. These include the following:

### a. Const 1963, art 6, § 13

Existing Const 1963, art 6, § 13 provides in relevant part as follows:

> **§ 13. Circuit courts; jurisdiction, writs, supervisory control over inferior courts.**
> Sec. 13. The circuit court *shall have original jurisdiction in all matters* not prohibited by law. . . . [Const 1963, art 6, § 13 (emphasis added).]

Conversely, article 4, § 6(19) of the VNP Proposal, if adopted, will provide, in relevant part:

> (19) THE SUPREME COURT, *IN THE EXERCISE OF ORIGINAL JURISDICTION*, SHALL DIRECT THE SECRETARY OF STATE OR THE COMMISSION TO PERFORM THEIR RESPECTIVE DUTIES, MAY REVIEW A CHALLENGE TO ANY PLAN ADOPTED BY THE COMMISSION, AND SHALL REMAND A PLAN TO THE COMMISSION FOR FURTHER ACTION IF THE PLAN FAILS TO COMPLY WITH THE REQUIREMENTS OF THIS CONSTITUTION, THE CONSTITUTION OF THE UNITED STATES OR SUPERSEDING FEDERAL LAW. [Ex. 1, VNP Proposal, art 4, § 6(19) (emphasis added).]

Like the provision conferring "complete control" over liquor licensing to the liquor control commission in *Protect Our Jobs*, Const 1963, art 6, § 13 confers original jurisdiction in "*all* matters not prohibited by law" on the circuit court and is exclusive and absolute. Const 1963, art 6, § 13 (emphasis added). The proposed amendment would divest the circuit court of its exclusive original jurisdiction, not by law[18] but by a constitutional amendment. Const 1963, art 6, § 13 cannot be harmonized with the VNP Proposal's conferring of original jurisdiction on the Supreme Court, and Const 1963, art 6, § 13 thus would be abrogated by the VNP Proposal.

[18] The phrase "prohibited by law" refers exclusively to prohibitions provided by the Legislature. See *People v Bulger*, 462 Mich 495, 509; 614 NW2d 103 (2000) ("[T]his Court has consistently held that the use of the phrase 'provided by law' in our constitution contemplates *legislative* action."), *abrogated on other grounds by Halbert v Michigan*, 545 US 605 (2005).

The VNP Proposal does not republish Const 1963, art 6, § 13, and thus does not comply with the requirements of Michigan law. See MCL 168.482(3).

**b. Const 1963, art 1, § 5**

Existing Const 1963, art 1, § 5 provides in relevant part as follows:

> **§ 5. Freedom of speech and of press.**
> Sec. 5. *Every person* may freely speak, write, express and publish his views on *all* subjects, being responsible for the abuse of such right. . . . [Const 1963, art 1, § 5 (emphasis added).]

Conversely, article 4, § 6(11) of the VNP Proposal, if adopted, will provide, in relevant part:

> (11) THE COMMISSION, ITS MEMBERS, STAFF, ATTORNEYS, AND CONSULTANTS *SHALL NOT DISCUSS REDISTRICTING MATTERS* WITH MEMBERS OF THE PUBLIC OUTSIDE OF AN OPEN MEETING OF THE COMMISSION, EXCEPT THAT A COMMISSIONER MAY COMMUNICATE ABOUT REDISTRICTING MATTERS WITH MEMBERS OF THE PUBLIC TO GAIN INFORMATION RELEVANT TO THE PERFORMANCE OF HIS OR HER DUTIES IF SUCH COMMUNICATION OCCURS (A) IN WRITING OR (B) AT A PREVIOUSLY PUBLICLY NOTICED FORUM OR TOWN HALL OPEN TO THE GENERAL PUBLIC. . . . [Ex. 1, VNP Proposal, art 4 § 6 (emphasis added).]

The existing rights conferred in Const 1963, art 1, § 5 are both exclusive and absolute—"every person" may speak on "all subjects." The proposed amendment, if approved, would restrict the commission, its staff, attorneys, and consultants[19] from discussing any "redistricting matters"—not merely commission activities, but even redistricting matters in other states or

[19] Governmental employees "do not forfeit their constitutionally protected free speech interest by virtue of accepting government employment." *Shirvell v Dep't of Attorney Gen*, 308 Mich App 702, 732; 866 NW2d 478 (2015). When and whether a public employee's speech is protected by the constitutional guarantee of free speech is subject to a content-specific balancing analysis, including whether the employee is speaking "as a citizen upon matters of public concern" or only on matters of personal interest, and whether the government can show sufficient justification for its restrictions related to its purposes as the employer. See *id.* at 733-736. The VNP Proposal would dispense with this framework, barring speech on all "redistricting matters" regardless of content or context.

appellate court or local redistricting not altered by the proposed constitutional amendment—outside of a public meeting, or in certain limited circumstances, in writing. The proposed restrictions on the liberty of speech would extend beyond to matters beyond Commission activities, and in any event, cannot be harmonized with and are thus incompatible with the existing protections for unrestricted speech conferred by Const 1963, art 1, § 5.

The VNP Proposal does not republish Const 1963, art 1, § 5, and thus does not comply with the requirements of Michigan law. See MCL 168.482(3).

**c. Const 1963, art 9, § 17**

Existing Const 1963, art 9, §17 provides in relevant part as follows:

> **§ 17 Payments from state treasury.**
> Sec. 17. *No* money shall be paid out of the state treasury *except* in pursuance of appropriations made by law. [Const 1963, art 9, § 17 (emphasis added).]

Conversely, article 4, § 6(5) of the VNP Proposal, if adopted, will provide, in relevant part:

> (5) . . . EACH COMMISSIONER *SHALL* RECEIVE COMPENSATION AT LEAST EQUAL TO 25 PERCENT OF THE GOVERNOR'S SALARY. THE STATE OF MICHIGAN *SHALL* INDEMNIFY COMMISSIONERS FOR COSTS INCURRED *IF THE LEGISLATURE DOES NOT APPROPRIATE SUFFICIENT FUNDS* TO COVER SUCH COSTS. [Ex. 1, VNP Proposal, art 4 § 6(5) (emphasis added).]

The existing constitutional provision affected (Const 1963, art 9, § 17) is both exclusive and absolute—"no money shall be paid" from the state treasury in the absence of an appropriation made by law. This provision is incompatible with the proposed requirement that the State of Michigan compensate and indemnify commissioners for costs incurred even in the absence of an appropriation. That incompatibility would render existing Const 1963, art 9, § 17 a nullity, and thus abrogate Const 1963, art 9, § 17.

The VNP Proposal does not republish Const 1963, art 9, § 17, and thus does not comply with the requirements of Michigan law. See MCL 168.482(3).

### d. Const 1963, art 11, § 1

Existing Const 1963, art 11, § 1 provides in relevant part as follows:

> **§ 1 Oath of Public Officers.**
> Sec. 1. All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ……. according to the best of my ability. *No other oath,* affirmation, or any religious test *shall be required as a qualification for any office or public trust.* [Const 1963, art 11, § 1 (emphasis added).]

Conversely, article 4, § 6(2) of the VNP Proposal, if adopted, will provide, in relevant part:

> (2) COMMISSIONERS SHALL BE SELECTED THROUGH THE FOLLOWING PROCESS:
>
> (A) THE SECRETARY OF STATE SHALL DO ALL OF THE FOLLOWING:
>
> ***
>
> (III) REQUIRE APPLICANTS TO *ATTEST UNDER OATH* THAT THEY MEET THE *QUALIFICATIONS* SET FORTH IN THIS SECTION; AND EITHER THAT THEY AFFILIATE WITH ONE OF THE TWO POLITICAL PARTIES WITH THE LARGEST REPRESENTATION IN THE LEGISLATURE (HEREINAFTER, "MAJOR PARTIES") AND IF SO, IDENTIFY THE PARTY WITH WHICH THEY AFFILIATE, OR THAT THEY DO NOT AFFILIATE WITH EITHER OF THE MAJOR PARTIES. . . . [Ex. 1, VNP Proposal, art 4, § 6(2) (emphasis added).]

The VNP Proposal would require any person applying to become a commissioner to attest under oath that he or she meets the qualifications for the office of commissioner. The existing provisions of Const 1963, art 11, § 1 are both exclusive and absolute—"*no other oath* shall be required" as a qualification of assuming office. The two provisions are incompatible.

The proposed oath requirement for persons seeking to qualify as a commissioner cannot be harmonized with the one-oath mandate of the existing Constitution. The adoption of the former would render the latter a nullity, and abrogate the existing oath provision.

The VNP Proposal does not republish Const 1963, art 11, § 1, and thus does not comply with the requirements of Michigan law.[20] See MCL 168.482(3).

**4. The failure to republish abrogated sections in the petition circulated by VNP precludes placement of the VNP Proposal on the 2018 general election ballot.**

Omission of any one of the above abrogated provisions of the existing Constitution is fatal to the VNP Proposal. A petition is invalid if it fails to republish even a slight abrogation of the Constitution's existing language. *Protect Our Jobs*, 492 Mich at 784, 791.

As with the Casino Proposal in *Protect Our Jobs*, this Court again should direct that the VNP Proposal was not properly circulated as required by MCL 168.482(3), and thus that it is incapable of being submitted to the voters. The Secretary should be directed to carry out that determination.

[20] Because of the sweeping nature of the VNP Proposal, other examples could be found. For example, the VNP Proposal would abrogate—without republishing—Const 1963, art 11, § 5, which section states that the Civil Service Commission shall have authority to regulate "all conditions of employment in the classified service." Const 1963, art 11, § 5. Conversely, the VNP Proposal states that "*no employer* shall discharge … any employee because of the employee's membership on the commission or attendance or scheduled attendance at any meeting of the commission." Ex. 1, art 4, §6(21). In the event a commission member is selected from among the employees in the classified service, the Civil Service Commission's exclusive authority over "all conditions of employment" will no longer be exclusive; it could not, for example, authorize disciplinary action against a state employee for repeatedly missing work to participate in the affairs of the redistricting commission.

## IV. CONCLUSION

The VNP Proposal is an attempt to make general revisions to the Michigan Constitution by amendment, which may not be done without holding a constitutional convention. Const 1963, art 12, § 3.

Further, the petition circulating the VNP Proposal failed to publish all altered and abrogated provisions of the existing Constitution as required by state law. MCL 168.482(3).

For both of these independent reasons, the VNP Proposal is not eligible for inclusion on the 2018 general election ballot. A writ of mandamus should issue directing the Secretary and Board to reject the Petition and further directing the Secretary and Board not to place the VNP Proposal on the ballot for the 2018 general election.

## V. RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

A. Determine, after plenary review, that the VNP Proposal is not ballot eligible and thereafter issue a writ of mandamus to the Secretary and Board directing them to reject the Petition and further directing them not to place the VNP Proposal on the ballot;

B. Grant exceptional issuance of this Court's judgment, pursuant to MCR 7.215(F)(2); and

C. Grant Plaintiffs such other and further relief as is equitable and just.

Respectfully submitted,

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