EXHIBIT B

LANCASTER & ASSOCIATES

MEMORANDUM

TO: Bureau of Elections
Sally Williams, Director
Melissa Malerman, Elections Specialist

FROM: James R. Lancaster JRL
Legal Counsel, Voters Not Politicians Ballot Committee ("VNPBC")

RE: Legal Analysis Explaining How Provisions Republished In VNPBC Proposed Constitutional Amendment Would Be Abrogated.

DATE: July 31, 2017

Thank you for your email of July 28, 2017, and for giving us the opportunity to provide to you our legal analysis explaining how we believe each of the 5 provisions republished in our petition would be abrogated by the Proposal, if adopted.

As we have previously discussed, the Michigan Supreme Court's decision in the 2012 *Protect Our Jobs* case has created some uncertainty as to when abrogation occurs, thus triggering the republication requirement. We welcome this opportunity to explain how we have analyzed this case, and applied it is drafting the VNPBC Proposal (the "Proposal")

For your convenience, I have attached as Exhibit A the latest version of the Proposal which incorporates all of the changes you have previously suggested. It has been modified to an 8.5" x 11" format for ease of copying.

Introduction

Our analysis begins with the most fundamental, bedrock principle of the Michigan Constitution:

ARTICLE I

DECLARATION OF RIGHTS

§ 1 Political power.

Sec. 1. All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

Phone: (517) 285-4737 lancaster-law@comcast.net
P.O. Box 10006
Lansing, Michigan 48901

In the Michigan Constitution of 1963, the People reserved to themselves the power to amend the Constitution. In this regard, Article XII, §2 provides, in relevant part:

ARTICLE XII

AMENDMENT AND REVISION

.....

§ 2 Amendment by petition and vote of electors.

Sec. 2. Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected....*Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.* The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Submission of proposal; publication.

Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. *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.* Copies of such publication shall be posted in each polling place and furnished to news media as provided by law. (Emphasis added)

Analysis of the Michigan Supreme Court's Decision in *Protect Our Jobs*

The primary focus of our analysis is the Michigan Supreme Court's decision in *Protect Our Jobs v. Board of State Canvassers, et. al., 492 Mich. 763, 822 N.W.2d 534 (2012).* However, we begin that analysis by considering the position taken by Michigan Attorney

General Bill Schuette in the case *Citizens For More Michigan Jobs and Robert J Cannon v. Secretary of State, Board of State Canvassers, and Director of Elections, Supreme Court File Number 145754.* This case was, of course, one of the four cases that were ultimately consolidated and decided in *Protect Our Jobs.*

Citizens For More Michigan Jobs involved a proposed constitutional amendment to establish 8 new casinos in the State. It included a mandate that each of these casinos receive a liquor license. The Attorney General argued that this proposal should not be placed on the ballot because it failed to republish Article IV, §40, which provides, in relevant part:

> Except as prohibited by this section, (t)he legislature may by law establish a liquor control commission which, subject to statutory limitations, *shall exercise complete control of the alcoholic beverage traffic within this state*, including the retail sales thereof. (Emphasis added)

The Attorney General's brief, states, in relevant part:

> The proposal's **conflict** with existing article 4, §40 is **stark**. With respect to the 8 new casinos the proposal authorizes, §40 is simply a nullity. No Liquor Control Commission investigation, no Commission quotas, and no Commission approval. The CFMMJ proposal abrogates the "complete control" over alcoholic beverage traffic that the commission has exercised for many years.
>
> Such effect is the antithesis of article 12, §2's purpose, as this Court recognized in *Massey [Massy v Secretary of State, 409 Mich 569; 297 NW2d 538(2004)]*: **"to definitively advise the electors as to the purpose of the proposed amendment and what provision of the constitutional law *(sic)* it modified or supplanted."** 457 Mich at 417. **It is one thing to create a constitutional right to a liquor license. It is entirely different to do so without disclosing to the electorate that such a right is inconsistent with the way the Michigan Constitution has regulated the grant of a liquor licenses since its passage.** (Emphasis added. Attorney General Brief at p. 5. A copy of the Brief is attached as Exhibit B.)

As you know, the Michigan Supreme Court ultimately agreed with the Attorney General's position, denying the Plaintiff's request for a writ of mandamus, which resulted in the casino proposal not appearing on the ballot.

Prior to *Protect Our Jobs*, an existing constitutional provision was "abrogated" if it rendered an existing provision a "nullity;" it essentially had to make the existing constitutional provision completely inoperative and of no effect such that it could not be harmonized with the existing power or authority.

Justice Zahra's opinion introduces a new, somewhat different concept of "abrogation:" i.e., where an amendment interferes with an otherwise exclusive power or authority it renders the existing constitutional provision "inoperative." This appears to be the rule even if the two provisions can arguably be harmonized. In this regard, the opinion states:

> 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.* Rather, when the existing provision would likely continue to exist as it did preamendment, although it might be affected or supplemented in some fashion by the proposed amendment, no abrogation occurs. *On the other hand, 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.* (Emphasis added) 492 Mich at 783.

In applying this reasoning to the casino proposal, Justice Zahra wrote:

> It is undisputed that part of the Liquor Control Commission's "*complete* control of the alcoholic beverage traffic within this state, including the retail sales thereof" entails the granting of liquor licenses. Furthermore, §40 expressly states that the commission's control is "complete." ***Because complete control necessarily communicates the exclusivity of control, any infringement on that control abrogates that exclusivity; an amendment that contemplates anything less than complete control logically renders that power in § 40 inoperative.*** Because the proposed amendment would abrogate article 4, § 40, republication of that section on the petition was necessary to comply with the republication requirement of MCL 168.482(3). The failure to do so is fatal to the proposed amendment, and we must therefore deny mandamus. (Emphasis added) 492 Mich at 790-1.

It is also interesting, and instructive to note Justice Marilyn Jean Kelly's dissent which criticized this result:

> This reasoning is flawed. If § 40 is read in its entirety, it becomes apparent that the "complete control" of the Liquor Control Commission (LCC) is neither complete nor exclusive. Rather, it is subject to limits that the Legislature chooses to place on it.
>
> If the Legislature may subject the LCC's control to limitations, then so may the people of this state. The people have an inherent and superior right to amend the Constitution and to alter the authority of the legislatively created LCC. Should the voters pass the proposed constitutional amendment, it would be controlling by its nature, irrespective of whatever authority the Legislature has bestowed on the LCC. Moreover, because the

> LCC's " complete control" is subject to limitation both by statute and by the people, a constitutional amendment affecting that control cannot render the language of § 40 a nullity. Therefore, the proposed amendment cannot abrogate it
>
> Clearly, constitutional language limits the control of the LCC over alcoholic-beverage traffic in the state. Even if one were to pretend that it does not, the Court must give effect to the intent of the people in adopting constitutional provisions. *Therefore, should one conclude that the proposed amendment, if adopted, would collide with article 4, § 40, the Court is obliged to seek a construction that harmonizes the two. And in this case, harmonization is perfectly possible.* (Emphasis added) 492 Mich at 794-5.

So, it appears that in order to determine whether a proposed constitutional amendment "abrogates" an existing provision, we must look at whether the existing provision entails a power or authority that is "exclusive" (like that of the Liquor Control Commission) with respect to the subject matter it addresses. Arguments that the existing power or authority could be "harmonized" with the proposed amendment would appear to be irrelevant.

In explaining this decision to my client, and other laypersons, I have borrowed a metaphor commonly used by law school professors in introductory property law courses, They conceptualize the complexities of property ownership as a "bundle of sticks," with each stick constituting one of the many potential uses of real property, including subsurface uses, surface uses, and uses above the property. An owner of real property is generally conceptualized as owning all of these "sticks." The recurring question in American law with respect to property rights is: to what extent government can "take away" one or more of these sticks by law (e.g., zoning regulations) before it is adjudged to be improper, or a "taking." Generally, the government can do a great deal by way of the regulation of property rights before it is gone too far.

Using this same metaphor to analyze *Protect Our Jobs,* Justice Zahra's opinion appears to stand for the proposition that where a proposed amendment impinges upon an "exclusive" power of some constitutionally created entity (i.e., where that entity holds all of the "sticks"), *taking away any one of those "sticks"* constitutes an abrogation.

We are also mindful of the admonition in Attorney General Schuette's brief, which I will paraphrase: where a proposed amendment is a "stark" change to the Constitution, "supplanting" an existing provision, and which is inconsistent with the manner in which power has been traditionally allocated in the Constitution, Article XII, §2 requires republication so that the public is "definitively advised" of this change. We believe each of the 5 sections republished in the Proposal are of this nature.

The Source of the Government's Power Regarding Redistricting

Examining the Government's authority over the establishment of state legislative or congressional districts, it is apparent that it does not arise from a specific grant of authority within the Constitution. Rather, it arises from the inherent authority granted to the Legislature (in Article IV, §1) and the Governor (in Article V, §1) to enact a law by means of a bill approved by the Legislature and signed into law by the Governor.[1] When that process has failed, the Judiciary has exercised its inherent and plenary power (in article VI, §1) to impose state legislative and Congressional districts. *e.g., In Re Apportionment of State Legislature – 1982, 413 Mich 149, 321 NW2d 585 (1982)*

The Michigan Constitution of 1963 attempted to remove this power from the Legislature and the Governor by placing it in an independent commission. *See,* existing sections of Michigan Constitution of 1963, Article IV, §§ 2, 3 and 6. These provisions were determined to be unconstitutional because they violated the U.S. Constitution's population equality requirement, as articulated in *Reynolds v. Sims,* and subsequent decisions. It was ultimately adjudged that the "weighted land area requirements" in Article IV, §§2-6 were not severable; therefore the provisions in their entirety are invalid. *In Re Apportionment of State Legislature – 1982, 413 Mich 96, 115, 321 NW2d 565 (1982).*

Again, because there is no valid existing constitutional provision that addresses the power redistricting, that power arises from the inherent power to grant to the three branches of government.

How The Constitutional Provisions Republished In The VNPBC Proposal Would Be Abrogated

The principal purpose of the Proposal is to completely take the power of redistricting away from the Legislature and the Governor, and place that power with the newly created Independent Citizens Redistricting Commission. The Proposal would also limit the role and discretion of the judiciary in reviewing and invalidating decisions made by this new Commission, and impose and affirmative duty to mandate appropriations for funding its operations.

Assuming that the Board of State Canvassers approves the petition as to form, and sufficient signatures are obtained to place this proposal on the ballot, it is anticipated that this Proposal will be advertised to the public as completely taking away from "politicians" (the

[1] Or, where vetoed by the Governor, that veto is overridden.

Legislature and the Governor) the power of redistricting, and placing it in the hands of "the People." The name of our ballot committee is obviously consistent with this theme: "Voters Not Politicians."

Our analysis below is three pronged, derived from our understanding of the rule enunciated in *Protect Our Jobs,* as articulated above:

- Does the Proposal impinge on an existing constitutional power or authority that is "exclusive?"

- Using the "bundle of sticks" metaphor, does the Proposal take away one of the "sticks" of the "bundle" that constitutes the "exclusive" power or authority, and

- Is the change that would occur a "stark" departure from the manner in which that power or authority that has traditionally been allocated in the Constitution, necessitating republication to assure that the voters are "definitively advised" of this "stark" change.

Article IV, §1:

This section of the Constitution states:

> "The legislative power of the State of Michigan is vested in a senate and a house of representatives."

This power is all-encompassing and exclusive. As stated in *Taxpayers of Michigan Against Casinos v State, 471 Mich 306, 685 NW2d 221 (2004):*

> The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself.

The power to enact legislation to create state legislative and congressional districts is an inherent power that arises from Article IV, §1.

Applying the *Protect Our Jobs* analysis, Article IV, §1 gives the Legislature *exclusive power or authority* over the enactment of legislation of any kind, and on any subject that is not prohibited by the Constitution.

The Proposal abrogates this broad and exclusive legislative authority in at least two ways. First, it completely deprives the Legislature of its role in enacting redistricting legislation. See, Proposal, Article IV, §6(22). Second, it impinges on the Legislature's discretion on appropriations, by mandating a minimum appropriation for the Commission's activities. See Proposal, Article IV, §6(5).

Using the "bundle of sticks" metaphor, Article IV, §1 vests with the Legislature all of the "sticks" that represent legislative power. The Proposal would take away at least two of these "sticks," (i.e., the power to enact legislation establishing legislative and congressional districts, and the traditional discretion with regard to appropriations) and therefore abrogates this power.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Legislature has traditionally been allocated in the Constitution, "supplanting" the power of the Legislature regarding redistricting. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change.

Article V, §1

This section of the Constitution states: "The executive power is vested in the governor."

Inherent in this power is the Governor's role in signing or vetoing legislation. This is how redistricting has occurred after the past two federal decennial censuses: though bills enacted by the Legislature and signed by the Governor. The Proposal would take away the Governor's role in this process.[2] Also, "commissions" established by law or under the constitution that have any executive powers, are deemed to be part of the Executive Branch. *Straus v. Governor, 459 Mich. 526, 592 N.W.2d 53 (1999).* The Proposal will establish the Commission in the Legislative Branch. It would be the first and only body within the Legislative Branch that has independent authority, not subject to legislative or executive oversight or approval.[3] Further, it

[2] We considered whether it would be necessary to republish Article IV, §33, which sets forth the Governor's power to approve or veto bills. We believe this is not necessary because the Proposal does not actually abrogate this power. Instead, it removes redistricting as a subject that can be governed through the process of the Legislature passing a bill and the Governor signing or vetoing it. We felt it might be misleading to the voters to republish Article IV, §33, because it might be interpreted as suggesting that the Proposal makes a more drastic change to the Constitution than is actually occurring. Nevertheless, the Proposal clearly usurps the Governor's role in the legislative process. *Blank v Department of Corrections, 462 Mich 10, 611 NW2d 530 (2000)* (Invaliding amendments to the Administrative Procedures Act creating a "legislative veto" of administrative rules as unconstitutionally usurping the Governor's role in the legislative process)

[3] All existing legislative bodies or offices have only advisory powers, or powers that are subject to legislative oversight or approval.

- Article IV, §12 – State Officers Compensation Commission. The Legislature may amend or disapprove its determination of salaries and expense allowances.
- Article IV, § 15 – Legislative Council. It provides only bill drafting, research and other services. It has no formal independent powers.

would vest with the Commission both legislative (creating legislative and congressional districts) and executive (power to file lawsuits, approving enactments creating legislative and congressional district that would have the force of law) powers.[4] This is a departure from existing constitutional paradigms.

Article V, §1 gives the Governor, *exclusively,* the executive power of the State. This includes the inherent power to approve legislation and to administer "commissions" created under the Constitution

Using the *Protect Our Jobs* analysis, the Proposal abrogates this broad and exclusive executive authority in at least two ways. First, it deprives the Governor of the traditional role in approving or vetoing legislation regarding redistricting. See, Proposal, language added to Article V, §2. Second, it impinges on the Governor's traditional authority over entities that have some executive power, and that they must be part of or within the Executive Branch.

Using the "bundle of sticks" metaphor, Article IV, §1 vests with the Governor all of the "sticks" that represent executive power. The Proposal would take away at least two of these "sticks," and therefore abrogates this power.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Governor has traditionally been allocated in the Constitution, "supplanting" the power of the Governor regarding redistricting. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change.

Article V, §4

This section of the Constitution states:

§ 4 Commissions or agencies for less than 2 years.

Sec. 4. Temporary commissions or agencies for special purposes with a life of no more than two years may be established by law and need not be allocated within a principal department.

- Article IV, § 53 – Auditor General. Appointed by the Legislature, and given the power to conduct audits. However, it has no authority, independent of the Legislature, to take action as a result of its audits.

[4] This vesting of a combination of both legislative and executive powers in the newly created Commission does not make the proposal constitutionally defective. The Michigan Supreme Court has previously ruled that, Article III, §2 (Separation of Powers), "has not been interpreted to mean that the branches must be kept wholly separate." In *Soap and Detergent Association v. Natural Resources Commission, 415Mich 728, 752; 330 NW2d 346 (1982)* the Court noted that the Governor's reorganization power is an example of a constitutionally appropriate limited delegation of legislative power to the executive.

The analysis of why this constitutional section must be republished differs from the prior two sections just discussed. This provision involves a combination of both legislative and executive power, and applies to a more limited subject manner. A temporary commission must be "established by law," which means it must be created through a legislative enactment.[5] *House Speaker v Governor, 443 Mich 560, 590, fn. 36; 506 NW2d 190 (1993)* (Temporary commissions under Article V, §4 require legislative implementation). Such commissions are treated as part of the executive, but do not need to be allocated to a principal department, as is otherwise required by Article V, §2.

While this power is not as broad and all-encompassing as the power granted to the Legislature in Article IV, §1 or to the Governor in Article V, §1, consistent with the rule stated in *Protect Our Jobs,* it is nevertheless a broad and *exclusive power or authority* granted jointly to the Legislature and the Governor to create temporary commissions that need not be assigned to a principal department, as otherwise required by Article V, §2. The power or authority extends to creating a commission *on any subject not specifically prohibited by the Constitution*.[6]

And this power is specifically abrogated by the Proposal. The Proposal would amend Article IV, §6 by adding a new part (22) which states:

> (22) NOTWITHSTANDING ANY OTHER PROVISION OF THIS CONSTITUTION, OR ANY PRIOR JUDICIAL DECISION, AS OF THE EFFECTIVE DATE OF THE CONSTITUTIONAL AMENDMENT ADDING THIS PROVISION, WHICH AMENDS ARTICLE IV, SECTIONS 2, 3 AND 6 AND ARTICLE V, SECTION 2, INCLUDING THIS PROVISION, FOR PURPOSES OF INTERPRETING THIS CONSTITUTIONAL AMENDMENT THE PEOPLE DECLARE THAT THE POWERS GRANTED TO THE COMMISSION ARE LEGISLATIVE FUNCTIONS NOT SUBJECT TO THE CONTROL OR APPROVAL OF THE LEGISLATURE, AND ARE EXCLUSIVELY RESERVED TO THE COMMISSION. THE COMMISSION, AND ALL OF ITS RESPONSIBILITIES, OPERATIONS, FUNCTIONS, CONTRACTORS, CONSULTANTS AND EMPLOYEES ARE NOT SUBJECT TO CHANGE, TRANSFER, REORGANIZATION, OR REASSIGNMENT, AND SHALL NOT BE ALTERED OR ABROGATED IN ANY MANNER WHATSOEVER, BY THE LEGISLATURE. **NO OTHER BODY SHALL BE ESTABLISHED BY LAW TO PERFORM FUNCTIONS THAT ARE THE SAME OR SIMILAR TO THOSE GRANTED TO THE COMMISSION IN THIS SECTION.** (Emphasis added)

Similarly, the Proposal would amend Article V, §2 to add the following:

> NOTWITHSTANDING ANY OTHER PROVISION OF THIS CONSTITUTION OR ANY PRIOR JUDICIAL DECISION, AS OF THE EFFECTIVE DATE OF THE

[5] In this manner, temporary commissions are like the Liquor Control Commission in that it must also be established by law.
[6] In this respect, the analysis of the abrogation that would occur of the Proposal is adopted differs from the analysis in *Protect Our Jobs.* It that case, the Court examined the abrogation

CONSTITUTIONAL AMENDMENT ADDING THIS PROVISION, WHICH AMENDS ARTICLE IV, SECTIONS 2, 3 AND 6 AND ARTICLE V, SECTION 2, INCLUDING THIS PROVISION, FOR PURPOSES OF INTERPRETING THIS CONSTITUTIONAL AMENDMENT **THE PEOPLE DECLARE THAT THE POWERS GRANTED TO INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR STATE AND CONGRESSIONAL DISTRICTS (HEREINAFTER, "COMMISSION") ARE LEGISLATIVE FUNCTIONS NOT SUBJECT TO THE CONTROL OR APPROVAL OF THE GOVERNOR, AND ARE EXCLUSIVELY RESERVED TO THE COMMISSION.** THE COMMISSION, AND ALL OF ITS RESPONSIBILITIES, OPERATIONS, FUNCTIONS, CONTRACTORS, CONSULTANTS AND EMPLOYEES ARE NOT SUBJECT TO CHANGE, TRANSFER, REORGANIZATION, OR REASSIGNMENT, AND SHALL NOT BE ALTERED OR ABROGATED IN ANY MANNER WHATSOEVER, BY THE GOVERNOR. **NO OTHER BODY SHALL BE ESTABLISHED BY LAW TO PERFORM FUNCTIONS THAT ARE THE SAME OR SIMILAR TO THOSE GRANTED TO THE COMMISSION IN ARTICLE IV, SECTION 6.** (Emphasis added)

The abrogation that would occur if the Proposal's amendments to Article IV, §6 and Article V, § 2 are adopted is arguably more drastic than the situation regarding the casino proposal addressed in *Protect Our Jobs*. In that case, the proposal merely took away some authority from a body that may be created by law under the Constitution. Once established, the Liquor Control Commission was constitutionally accorded "complete control" over liquor traffic in the State. But, it still resided within the discretion of the Legislature to create the MLCC. In contrast, the VNPBC Proposal would not allow the Legislature to create any commission with powers over redistricting. It would take away the exclusive authority granted by the Constitution to the Legislature to create a temporary commission, and take away the authority of the Governor to approve the legislation creating the commission, and further, deprive the Governor of any authority to control or approve of its actions.

Using the "bundle of sticks" metaphor, Article V, §4 vests jointly with the Legislature and the Governor all of the "sticks" that constitute the power to create temporary commissions that do not need to be assigned to a principal department (as otherwise required by Article V, §2) on any subject within their authority. The Governor and Legislature currently "hold" all of the "sticks" in this "bundle;" these "sticks" consist of every conceivable subject matter upon which the Legislature, with the concurrence of the Governor, could create a temporary commission. The Proposal would take away at least one of these "sticks," (i.e., the power to create a temporary commission with authority over redistricting), and, therefore abrogates this power.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Legislature and the Governor has traditionally been allocated in the Constitution regarding temporary commissions, "supplanting" the power of the Legislature and

Governor to create a temporary commission regarding redistricting. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change to the Constitution.

Article VI, §1

This section of the Constitution provides:

> Sec. 1. The judicial power of the state is *vested exclusively* in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house. (Emphasis added)

By its own terms, the judicial power resides *exclusively* with the judiciary. It is clearly a plenary power. As the Supreme Court stated in *Washington-Detroit Theater Co. v Moore, 249 Mich 673; 229 NW 618 (1930):*

> While the Legislature obtains legislative power and the *courts receive judicial power by grant in the state Constitution, the whole of such power reposing in the sovereignty is granted to those bodies except as it may be restricted in the same instrument.* There is no constitutional restriction on the power of the Legislature to recognize the complexity of modern affairs, and to provide for the settlement of controversies between citizens without the necessity of one committing an illegal act or wronging or threatening to wrong the other. *There is no constitutional expression of limitation upon the power of the court to decide such disputes.*[7]

The Proposal would abrogate this exclusive power in that it would grant to the Commission standing in certain actions; the Proposal, at Article IV, §6(6) states:

> (6) THE COMMISSION SHALL HAVE LEGAL STANDING TO PROSECUTE AN ACTION REGARDING THE ADEQUACY OF RESOURCES PROVIDED FOR THE OPERATION OF THE COMMISSION, AND TO DEFEND ANY ACTION REGARDING AN ADOPTED PLAN. THE COMMISSION SHALL INFORM THE LEGISLATURE IF THE COMMISSION DETERMINES THAT FUNDS OR OTHER RESOURCES PROVIDED FOR OPERATION OF THE COMMISSION ARE NOT ADEQUATE. THE LEGISLATURE SHALL PROVIDE ADEQUATE FUNDING TO ALLOW THE COMMISSION TO DEFEND ANY ACTION REGARDING AN ADOPTED PLAN.

[7] This case was cited more recently as still controlling authority as to the scope of power of the judiciary in *Lansing Schools Education Association v Lansing Board of Education, 487 Mich 349, 363; 792 NW2d 686 (2010).*

Standing is generally considered an issue that is within the inherent power of the judiciary.[8] Further, the judiciary has generally declined to order appropriations.[9] The Proposal would abrogate this exclusive authority of the judiciary.

Using the "bundle of sticks" metaphor, Article VI, §1 vests with the Judiciary all of the "sticks" that represent any conceivable aspect of judicial power including its prudential power to determine whether standing requirements have been met, and to decline to compel the Legislature to make an appropriation. The Proposal would take away at one or more of these "sticks," by depriving the judiciary of its discretion to determine whether the Commission has standing to prosecute an action and defend a plan adopted by the Commission and compel an appropriation for its operations. It would also require the judiciary to extend its "inherent power" to compel appropriations, by requiring it to adjudicate actions by the newly created Commission as to the adequacy of the resources provided to it by the Legislature. It therefore clearly abrogates the exclusive and plenary judicial power granted in Article VI, §1.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Judiciary has traditionally been understood in the Constitution regarding the Court's discretion on standing, and on mandatory appropriations. It clearly "supplants" the traditional discretion granted to the judiciary. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change to the Constitution.

Article VI, §4.

This section of the Constitution provides:

§ 4 General superintending control over courts; writs; appellate jurisdiction.

Sec. 4. The supreme court shall have general superintending control over all courts; *power to issue, hear and determine prerogative and remedial writs*; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge. (Emphasis added)

[8] Standing has been long considered a "prudential limit" imposed by courts that arises from their inherent powers, and is a matter of "discretion and not of law." *Lansing Schools Education Association, supra, 487 Mich at 355.*

[9] Generally, the judiciary will decline to compel the Legislature to make and appropriation. However, in *46th Circuit Trial Court v County of Crawford, 476 Mich 131; 719 NW2d 553 (2006),* the Supreme Court held that "In order for the judicial branch to carry out its constitutional responsibilities...the judiciary cannot be totally beholden to legislative determination regarding its budgets. While the people of this state have the right to appropriations and taxing decision being made by their elected representative in the legislative branch, they also have the right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities." 476 Mich at 143.

The traditional vehicle for challenging redistricting and apportionment schemes is with an application for a writ of mandamus. *LeRoux v Secretary of State, 465 Mich 594, 605; 640 NW2d 849 (2002).* Mandamus is properly categorized as a "prerogative writ". *O'Connell v Director of Elections, et. al., 316 Mich App 91, 100; 891 NW2d 240 (2016).* In the past, the Supreme Court has appointed and adopted a plan created by a special master, ordered the Secretary of State to publish the plan and hold legislative elections in accordance with its provisions. *In Re Apportionment of the State Legislature – 1992, Neff v Secretary of State, 439 Mich 251, 253; 483 NW2d 52(1992).*

The Proposal would limit the judiciary's power to issue prerogative and remedial writs, and the relief that could be accorded thereunder. Proposed Article IV, §6(19) states:

> (19) THE SUPREME COURT, IN THE EXERCISE OF ORIGINAL JURISDICTION, SHALL DIRECT THE SECRETARY OF STATE OR THECOMMISSION 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. IN NO EVENT SHALL ANY BODY, EXCEPT THE INDEPENDENT CITIZENS REDISTRICTING COMMISSION ACTING PURSUANT TO THIS SECTION, PROMULGATE AND ADOPT A REDISTRICTING PLAN OR PLANS FOR THIS STATE.

Using the "bundle of sticks" metaphor, Article VI, §4 vests with the Judiciary all of the "sticks" that represent exercise of judicial discretion in the granting of prerogative and remedial writs. The Proposal would take away at least one of these "sticks," i.e., the power to issue a writ of mandamus granting the remedy of appointing and adopting the plan prepared by a special master. Proposed Article IV, §6(22) takes away that discretion, and limits the Supreme Court's review to whether the adopted plan complies with applicable law. If it does not, the Court's remedy is limited to remanding the plan back to the Commission. It therefore clearly abrogates the exclusive and plenary judicial power granted in Article VI, §4.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Judiciary has traditionally been allocated in the Constitution regarding the Court's discretion on prerogative and remedial writs. It clearly "supplants" the traditional discretion granted to the judiciary. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change to the Constitution.

Conclusion

We hope that this memorandum addresses your questions and concerns regarding the VNPBC Proposal. If you have any questions, please do not hesitate to contact me.