STATE OF MICHIGAN

MICHIGAN COURT OF APPEALS

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

Case No. 343517

v.

SECRETARY OF STATE, and MICHIGAN BOARD OF STATE CANVASSERS,
Defendants/Cross Defendants,

And

VOTERS NOT POLITICIANS BALLOT COMMITTEE, d/b/a/ VOTERS NOT POLITICIANS, COUNT MI VOTE, d/b/a VOTERS NOT POLITICIANS, KATHRYN A. FAHEY, WILLIAM R. BOBIER and DAVIA C. DOWNEY
Intervening Defendants/Cross-Plaintiffs

_____/

PLAINTIFFS' COMBINED RESPONSE TO INTERVENING DEFENDANTS' BRIEF IN SUPPORT OF CROSS-CLAIM AND REPLY TO INTERVENING DEFENDANTS' OPPOSITION TO PLAINTIFFS' OPENING BRIEF

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

Plaintiffs rely on the Statement of Question Involved presented in their opening Brief.

As to the additional question presented by Intervening Defendant: "Should the prompt performance of Defendants' clear legal duties be enforced by this Court without further delay?" Plaintiffs state that Defendants—Secretary of State Ruth Johnson and the Board of State Canvassers—have no clear legal duty to take further action to place the VNP Proposal on the 2018 general election ballot, and, once ordered by the courts, will have a clear legal duty to prevent its submission.

As to the additional question presented by Intervening Defendant: "Is the statutory requirement of MCL 168.482(3) that initiative petitions for amendment of the Constitution list existing provisions that would be altered or abrogated by the proposed amendment unconstitutional?" Plaintiffs state that the answer is "no," and that the statute is valid.

I. INTRODUCTION

> **"[W]hen you have an initiated constitutional amendment, you have no forum for debate—at least no organized forum for debate. There is no way that an initiated amendment to the constitution can be submitted to a body like the legislature which can amend it and perfect it in the course of debate to improve its language to see the weaknesses of what is proposed, to bring it back into kilter, perhaps, with the other provisions of the constitution, and so forth. All of this is missing when a constitutional amendment is initiated. For that reason the use of the initiative should not be made easier." Official Record, Constitutional Convention 1961-62, p. 2463 (Convention Vice President, J. Edward Hutchinson).**

In this action, Plaintiffs—Citizens Protecting Michigan's Constitution, Jeanne Daunt, and Joseph Spyke—seek relief in the form of mandamus against the Defendants, Secretary of State Ruth Johnson ("Secretary") and the Board of State Canvassers ("Board"). The relief sought is an order directing Defendants to reject a petition that proposes to submit a ballot question at the 2018 general election. The proposal in turn, is sponsored and supported by the Intervening Defendants (collectively, "VNP").

The ballot question at issue proposes to amend the existing Constitution of 1963 ("Constitution"), among other things, to establish an ostensibly "independent" redistricting commission and to revise Michigan's longstanding, traditional redistricting criteria. (The proposal is hereafter referred to as the "VNP Proposal"). In their Cross-Claim, VNP seeks a writ of mandamus directing the opposite relief: that is, immediate certification of the petition by the Board even though, pursuant to MCL 168.477(1), the Board need not certify ballot questions until September 6, 2018.

Notwithstanding the arguments advanced in VNP's Brief in Opposition/in Support of their Cross Claim,[1] Plaintiffs necessarily prevail and are entitled to the relief sought because:

(1) The VNP Proposal would abrogate *Const 1963, art 1, § 5*, art 6, § 13, art 9, § 17, and art 11, § 1 and the petition, as circulated, failed to republish those abrogated sections as required by MCL 168.482(3); and

(2) The VNP Proposal would make changes of such size and significance that it constitutes a proposed "revision" rather than an "amendment," and, under the binding precedent of *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273; 761 NW2d 210 (2008), it is not susceptible to submission as an initiated amendment under Const 1963, art 2, § 12.

It is no surprise that the VNP Proposal abrogates multiple sections of the existing Constitution. It seeks to make wide-ranging changes that affect the "foundation power" of state government—i.e., the manner in which legislators are chosen. Not only would it depart from the mandatory, core redistricting criteria of following county lines, which has been part of Michigan's constitutional framework since 1835, but it would create a new commission of unelected laypersons subject to none of the ordinary checks and balances that apply to the existing devices of state government. VNP does not shy away from the fundamental change envisioned by the VNP Proposal. In VNP's own words:

> 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. [VNP Brief at Appendix B, p. 6.]

VNP argues that the statutory requirement in MCL 168.482(3)—that petitions republish abrogated sections of the existing constitution—is unconstitutional. That statutory requirement

[1] Adhering to the format and procedure used by Intervening Defendants, Plaintiffs here file a combined reply to VNP's Response in Opposition and response to VNP's Brief in Support of their Cross-Claim. The Court's May 11, 2018 scheduling order required that responses and reply briefs be filed by 1:00 p.m. on May 31.

has existed in its current form for almost 80 years. As multiple decisions of the Supreme Court have recognized, the petition republication requirement is one that is "invited" or "beckoned" by Const 1963, art 12, § 2, which specifies that the form of petitions is to be prescribed by law. The republication requirement is a matter of form—it makes no substantive limitation on the content constitutional proposals, and is wholly consistent with the Constitution's initiative provisions.

VNP further ignores that this Court is bound to apply the framework established in *Citizens* for determining whether a proposal constitutes a "revision" (requiring a constitutional convention) or an "amendment" (which may be submitted via initiative). This Court is required to apply *Citizens*, and under the quantitative/qualitative test established therein, the VNP Proposal is ineligible to appear on the ballot.

VNP's other arguments are similarly unavailing, and this Court should order Defendants to reject the VNP Proposal and to take no further action to place it on the 2018 general election ballot.

II. ARGUMENT

A. VNP fails to reconcile the language of the VNP Proposal with the sections of the existing constitution which the Proposal abrogates.

1. "Abrogation" is a narrowly defined term and its application is straightforward for proposals that comprise mere amendments.

It is plain that the petition used to circulate the VNP Proposal failed to republish the sections of the 1963 Constitution that the Proposal would abrogate. This failure was contrary to state law and the petition was thus defective. VNP's attempts to explain away these unpublished abrogations are meritless.

Section 482(3) of the Election Law requires that a petition circulating a proposed constitutional amendment republish those existing provisions of the 1963 Constitution that would

be abrogated if the proposal were adopted. MCL 168.482(3). The Michigan Supreme Court, in *Protect Our Jobs v Board of State Canvassers*, 492 Mich 763; 822 NW2d 534 (2012), explained that "abrogation" is a narrow concept. As in its previous decisions in *Massey*[2] and *Ferency*,[3] the Supreme Court in *Protect Our Jobs* acknowledged that requiring every *distant* effect or *indirect* consequence of a proposal to be republished in a petition would not be beneficial or in keeping with the purpose of the statutory republication requirement. 492 Mich at 779-780. And that is *not* the test Plaintiffs here seek to apply.

As explained in *Protect Our Jobs,* an abrogation exists if it is not possible "for the amendment to be harmonized with the existing provision when the two provisions are considered together." 492 Mich at 783. An abrogation is more likely to exist where the existing provision creates a mandatory requirement or uses exclusive language. *Id.* Even a small abrogation[4] must be republished—including an abrogation of "discrete subparts, sentences, clauses, or even single words" in the existing Constitution. See i*d.* at 284.

Given the narrow confines of the test, it becomes apparent *why* abrogated sections must be republished. An abrogation renders *existing* language of the Constitution a nullity—it changes the language as a practical matter, so that the Constitution can no longer be read as originally intended. See *Protect Our Jobs*, 482 Mich at 783.

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[2] `*Massey v Sec'y of State*, 457 Mich 410; 579 NW2d 862 (1998).

[3] *Ferency v Sec'y of State,* 409 Mich 569; 297 NW2d 544 (1980).

[4] In *Protect Our Jobs*, the relevant proposal's requirement that liquor licenses be issued to the eight casinos contemplated by the amendment—even where such licenses were but a minor part of the proposal—kept the proposal off the ballot because the existing constitution conferred "complete control" on the liquor control commission over liquor licenses. *Id.* at 790.

2. VNP's attempts to harmonize the VNP Proposal with abrogated sections of the existing Constitution are wholly inadequate.

Four provisions of the existing Constitution would be abrogated by and were not republished with the circulated VNP petition:

- Const 1963, art 11, § 1, concerning oaths and tests for public office;
- Const 1963, art 9, § 17, concerning payments of funds from the state Treasury; and
- Const 1963, art 1, § 5, concerning free speech;
- Const 1963, art 6, § 13, concerning the jurisdiction of circuit courts;

a) The VNP Proposal would establish political tests for office contrary to art 11, § 1.

The existing Oath Clause in Const 1963, art 11, § 1 provides that, apart from the oath as specified in that section, "*no* other oath, affirmation, or *any* religious test shall be required as a qualification for any office or public trust." (Emphasis added).

VNP asserts, without explanation, that their Proposal's imposition of qualifications on applicants for the job of commissioner (in proposed art 4, § 6(1)) are not really "qualifications" for office. They also assert that the oath imposed on applicants (by proposed art 4, § 6(2)), which requires that applicants swear that such qualifications are met, is not really an oath within the ambit of the Oath Clause. (VNP Brief, p 44.) Neither of these arguments is valid. Their final argument—that harmonization is possible because the oath in the Oath Clause requires upholding the Constitution, and the new oath, affirmations, and tests imposed by the VNP Proposal will, after adoption, be part of the Constitution—misses the point. The existing Oath Clause says "*no other* oath, affirmation, or any religious test" shall be required—the absolute language by necessity

excludes others (see Const 1963, art 11, § 1), and VNP was obligated to affirmatively state that it would be abrogated.

VNP ignores altogether the political test and oath imposed by their proposed art 4, § 6(2)(A)(iii). That is, the VNP Proposal *requires* that persons seeking to hold the office of redistricting commissioner must swear, under oath, that they affiliate with either the Republican Party, the Democrat Party, or that the applicant is non-affiliating. (See VNP Proposal, Ex. 1, art 4, § (6)(2)(A)(iii).)[5]

The existing Oath Clause is irreconcilable with the political affiliation test of the VNP Proposal. In the controlling case of *Harrington v Vaughn,* 211 Mich 395; 179 NW 283 (1920), the Supreme Court considered the validity of a statute requiring a candidate for office to file an affidavit stating that "he is a member of a certain political party, naming it, and that he will support the principles of that political party." *Id.* at 395-396. The Court held that requiring a candidate to, under oath,[6] affiliate with a party as a condition of candidacy "contravenes the constitutional

[5] An applicant to the commission who does not affirm their affiliating or non-affiliating status will have their application rejected and will be ineligible to sit on the commission. (See VNP Proposal, Ex. 1, art 4, § 6(2)(D)(i) (requiring Secretary of State to eliminate incomplete applications).) Indeed, the Secretary cannot select persons who refuse to, under oath, affirm their political affiliation. (VNP Proposal, Ex. 1, art 4, § 6(2)(D)(ii).)

[6] Const 1908, art 16, § 2 provided "[n]o other oath, declaration or test shall be required as a qualification for any office or public trust." In the 1962 Address to the People issued by the Constitutional Convention, the delegates explained that they intended "[n]o change from Sec. 2, article XVI, of the present constitution except for improvement of phraseology." See Michigan Constitutional Convention, *What the Proposed Constitution Means to You: A Report to the People of Michigan by Their Elected Delegates to the Constitutional Convention of 1961-62,* p. 94 (1962). See *People v Nutt,* 469 Mich 565, 574; 677 NW2d 1 (2004) ("[T]he Address to the People is certainly relevant as [an] aid[] in determining the intent of the ratifiers.").

provision" mandating "no other oath, declaration, or test" as a condition for holding office. *Id.* at 399.[7]

Like the impermissible statute in *Vaughan*, the VNP Proposal establishes a condition for the office of commissioner that persons affirmatively state, under oath, their political persuasion. Setting wholly aside that requiring subjective assessments from applicants as to their affiliation (when Michigan does not require voters to register with a party) is a fundamentally flawed method of assuring balance on the Commission, the VNP Proposal would abrogate the Oath Clause. The failure to republish is fatal.

b) The VNP Proposal would require payments from the State Treasury without appropriations, and thus abrogate Const 1963, art 9, § 17.

VNP's arguments that existing article 9, § 17 is not abrogated by the VNP Proposal are similarly without merit. (See VNP Br., p. 42.) The conflict, again, is between article 9, § 17's command that "no money shall be paid out of the state treasury except in pursuance of appropriations made by law," and VNP's proposed article 4, § 6(5), which would conversely require that "[t]he state of Michigan shall indemnify commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover such costs." (VNP Proposal, Ex. 1.)

VNP argues first that there is no abrogation because proposed art 4, § 5 requires that the Legislature appropriate funds for the commission's use, and thus "there will be no need to have

[7] In another decision, *Dapper v Smith*, 138 Mich 104; 101 NW 60 (1904), the Supreme Court held that a local act—requiring persons appearing on the ballot in Kent County to swear an oath that they desired to serve in office—also violated the Oath Clause. Noting that the Oath Clause "is not one designed for the benefit of the aspirant for public station alone," but "is in the interest of the electorate as well," the Court held that the local act impermissibly limited voters' choice and ability to nominate reluctant candidates for office. *Id.*

any payment of money out of the State Treasury without an appropriation." (VNP Br., p. 42.) This ignores that the VNP Proposal contemplates *by its very own terms* that the Legislature will not always make such appropriations—specifying that the state "*shall* indemnify" the commissioners for costs *not* covered by an appropriation. But further, proposed art 4, § 5 requires only that the Legislature make an appropriation "at an amount equal to not less than 25 percent of the general fund/general purpose budget for the secretary of state for that fiscal year." Even if the Legislature *routinely* appropriates such amount as contemplated, *nothing* in the VNP Proposal caps the commission's budget to that amount, or subjects the VNP commission's spending to *any* limitation by the other branches of government.

This leads to a potentially catastrophic situation:

- The redistricting commission will have an unlimited budget;
- The State must indemnify—i.e., reimburse[8]— commissioners; and
- Except for death, infirmity, resignation, or conviction for crimes involving dishonesty, Commissioners may only be removed by the vote of a supermajority of other commissioners. (See VNP Proposal, Ex 1, art 4, § 6(3)(E).)

Most crucially, that result is plainly at odds with article 9, § 17's requirement that payments from the State Treasury be made *only* pursuant to appropriations by the Legislature. The public—asked to sign the VNP petition—should have been made aware that the Proposal will nullify this important limitation. This abrogation could expose the State's assets to the unrestricted whims of the commission: a body that will be substantially answerless to the other branches of government *by design*.

[8] In common understanding, "indemnify" means "to make compensation to for incurred hurt, loss, or damage." "Indemnify" Merriam-Webster.com. Merriam-Webster, n.d. Web. (accessed May 26 2018).

VNP's final argument with respect to article 9, § 17 is also groundless. They argue that their proposed art 4, § 6(5) does not include any language suggesting "that a judicial decree to enforce [the 'shall indemnify'] obligation could require a payment from the State Treasury … without an appropriation…." (VNP Br., p. 43.) VNP suggests instead that an appropriation could be compelled by the courts—i.e., that their new provision "would create a constitutionally-based cause of action for indemnification in favor of the Commissioners which could also be asserted by means of a *Complaint for mandamus*." (*Id.* (emphasis added).) This is absurd: Michigan's courts are not empowered to order mandamus against the Legislature to compel the making of appropriations. *Musselman v Governor*, 448 Mich 503, 522; 533 NW2d 237 (1995)[9] (citing Const 1963, art 9, § 17, and holding that the Court "lacks the power to require the Legislature to appropriate funds.").[10]

The VNP Proposal makes an end-run around the appropriation process and commands the State Treasurer to rob from funds appropriated for other purposes to pay the indemnity. VNP's attempts to twist the words of the Proposal after the fact are ineffective. There is an abrogation of existing article 9, § 17, and republication was required in the petition.

[9] Reh'g on other grounds, 450 Mich 574 (1996), declined to follow on other grounds, *Studier v MPSERS*, 472 Mich 642 (2005). See also *Flynn v Truner,* 99 Mich 96; 57 NW 1092 (1894) (holding mandamus will not lie to compel the Auditor General to draw a warrant in excess of the appropriation for the particular purpose).

[10] VNP cites two decisions for the proposition that legislative appropriations "may be enforced by judicial decree," but neither decision comes even close to supporting VNP's asserted premise. (VNP Br, p. 43.) VNP first cites *Adair v Michigan*, 497 Mich 89; 860 NW2d 93 (2014)—a controversy that involved a *declaratory action* with respect to whether the Legislature had adopted an appropriate *formula* with respect to its implementation of Headlee mandates. VNP second cites *46th Circuit Trial Court v County of Crawford,* 476 Mich 131; 719 NW2d 553 (2006), concerning an action to compel funding from a *county*—not the Legislature. Neither case discussed Const 1963, art 9, § 17.

c) The Free Speech Clause in Const 1963, art 1, § 5 would be abrogated.

Obvious conflict exists between the Free Speech Clause of existing article 1, § 5 and the VNP Proposal's new article 4, § 11. The former provides that "*every* person may *freely* speak, write, express and publish his views on *all* subjects, being responsible for the abuse of that right." Const 1963, art 1, § 5 (emphasis added). The latter restricts the ability of commissioners, their lawyers, their consultants, and their staff from communicating on "redistricting matters" with members of the public, except in open meetings or in writing. (VNP Proposal, Ex. 1, art 4, § (6)(11).)

If the VNP Proposal is adopted, the Free Speech Clause will be abrogated in these ways:

- "*every* person" will no longer mean *every* person, but will exclude commissioners, their lawyers, their consultants, and their staff;
- "*freely*" will no longer mean "freely," but will reduce the mode of permissible communication to open meetings and writing; and
- "on *all* subjects" will no longer mean "on *all* subjects," but will exclude *all* redistricting matters. (This includes redistricting matters and issues that are not even before the commission.)

If the VNP Proposal is adopted, for the first time, as a matter of constitutional law—i.e., within the four corners of the document itself—there will be language restricting a public official from discussing his or her views on the very task given over to his or her command. This is neither in the public interest nor in keeping with the rights of those public officials. Public officials, like

other citizens, are "entitled to speak as they please on matters vital to them." *Wood v Georgia*, 370 US 357, 389 (1962).[11]

VNP claims this is "a very slight restriction upon the exercise of the limited right of free speech." It also argues that the restrictions of the VNP Proposal can be reconciled with the Free Speech Clause because the Clause already acknowledges that persons must be "responsible for abuse[12] of that right." (VNP Br., p. 41.) The first argument misses the controlling language of *Protect Our Jobs*: *any* abrogation, even a (purportedly) slight one, must be republished. See 492 Mich at 784, 790-791. VNP's second argument is tautological—i.e., because the VNP Proposal *says* the commissioners, their lawyers, staff and consultants may not discuss redistricting matters with the public, a violation of that edict will necessarily—in VNP's calculus—be an "abuse" of free speech rights.[13] By that same token, if the VNP Proposal instead said, e.g., that judges may only speak to the public on Wednesdays, or that the Governor's staff may only communicate with the public by e-mail, VNP's argument would be that any violation of *these* restrictions would *also* be tantamount to an "abuse" of free speech rights.

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[11] See also Op Atty Gen 1969, No. 4647, p. 87 (finding members of Michigan's board of education have protected constitutional right to express their views on controversial subjects in the manner of their choosing). "Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assembly." *Id.*

[12] The Free Speech Clause's reference to responsibility for "abuse" is most frequently invoked in *libel* and *defamation* contexts—far afield from the reconciliation attempted by VNP here. See, e.g., *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 191; 398 NW2d 245 (1986) (discussing abuse of free speech in context of defamation case).

[13] Whether or not a particular curtailment of free speech rights of public officials may satisfy the strict scrutiny standard applied to such restrictions (see generally *Widmar v Vincent*, 454 US 263, 269-270 (1981)) is not the question here at issue. Nor can such question be evaluated in the abstract.

Neither argument being helpful to VNP, it remains that the VNP Proposal was circulated on a petition that did not republish Const 1963, art 1, § 5, and was thus fatally defective.

d) The express and detailed vesting of original jurisdiction in the Supreme Court in the VNP Proposal necessarily precludes Circuit Court original jurisdiction, and thus abrogates Const 1963, art 6, § 13.

The VNP Proposal specifies that 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." (VNP Proposal, Ex. 1, art 4, § 6(19) (emphasis added).) The VNP Proposal thus plainly and expressly contemplates that the Supreme Court "shall" be the body that orders the three specified remedies "in the exercise of original jurisdiction." Existing Const 1963, art 6, § 13 conversely confers original jurisdiction on the circuit court "in *all* matters, not prohibited by law …." (Emphasis added).

VNP argues that proposed art 4, § 6(19) is not in conflict with existing Const 1963, art 6, § 13 because proposed art 4, § 6(19) never expressly says that the circuit court does not have *concurrent* original jurisdiction. But this attempt at harmonization twists the VNP Proposal too far. The expression of the multiple forms of relief that the Supreme Court "shall" provide and in the exercise of "original jurisdiction" necessarily divests the circuit court of original jurisdiction over those same matters. Stated otherwise, the Supreme Court "shall" afford those types of relief which means the circuit court may not.

In *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1992), the Michigan Supreme Court held that the Legislature's detailed statutes delineating procedures and powers over transfers of parental custody in the former Probate Code *necessarily* foreclosed circuit court jurisdiction over those

same matters. The *Bowie* Court made this determination despite the existence of Const 1963, art 6, § 13. The plain legislative intent of the Probate Code was that the probate courts were to handle such matters; the specification of procedures to be used by one court foreclosed—*by law* (and thus *consistent* with existing Const 1963, art 6, § 13)—jurisdiction in another. So too is it with the VNP Proposal's specification of remedies in proposed art 4, § 6(19). Since the latter change is not "by law" but by Constitutional decree, the VNP Proposal cannot be reconciled with existing Const 1963, art 6, § 13.

VNP's attempt at reconciliation is again unavailing. Failure to republish Const 1963, art 6, § 13 remains a fatal flaw that precludes the VNP Proposal from reaching the ballot. MCL 168.482(3); *Protect Our Jobs*, 492 Mich at 790-791.

3. VNP's substantial compliance discussion mischaracterizes binding precedent.

The republication requirement of section 483(2) of the Election Law is mandatory—"[i]f the proposal would … 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) (emphasis added). The Michigan Supreme Court has held that "shall" means "shall" in the Election Law: it has foreclosed a finding of "substantial compliance" for defective petitions under section 482, *including* those circulating constitutional amendments. *Stand Up for Democracy v Sec'y of State*, 492 Mich 588, 594, 601-602; 822 NW2d 159 (2012) (finding a "clear intent that petitions for … *constitutional amendments* strictly comply with the form and content requirements of the statute") (emphasis added); *Protect Our Jobs*, 492 Mich at 778 (holding republication requirement of section 482(3) "uses the mandatory language 'shall,'" and "[a]ccordingly, the principle articulated in *Stand Up* applies with equal force here ….")

Contrary to *Stand Up,* VNP asserts that substantial compliance with the mandatory republication requirement of section 482(3) should be deemed sufficient. (VNP Br. pp. 34-36.) VNP characterizes the foreclosure of substantial compliance for constitutional amendment petitions in *Stand Up* as dicta. (*Id.*, p. 37 and n. 28.) It is not.[14] And additional binding case law, addressed specifically to section 482(3), confirms that substantial compliance is not available. *Protect Our Jobs*, 492 Mich at 778. VNP failed to mention the latter.

VNP's substantial compliance arguments should be flatly rejected.

B. Section 482(3) of the Election Law is a valid enactment within the ambit of Const 1963, art 12, § 2.

1. Section 482(3) must be presumed constitutional.

The core of VNP's Brief is dedicated to their argument that a statutory requirement—one that has existed ***unchanged for nearly 80 years***[15]—is unconstitutional. (See VNP Br., pp. 21-38.) That is, VNP argues that the petition republication requirement in section 482(3) of the Election Law unconstitutionally infringes on the People's right of initiative. But in an attempt to convince this panel that it should invalidate long-standing state law, VNP omits key legislative and jurisprudential developments in the history of that provision. As set forth below, these developments show conclusively that the republication requirement is within the contemplation of Const 1963, art 12, § 2.

[14] Where a court intentionally "takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy," the court's analysis cannot be dicta. See *Detroit v Pub Utilities Comm*, 288 Mich 267, 299-300; 286 NW 368 (1939).

[15] See Ex 2, Tab B—Public Act 246 of 1941, at C.S. 6.685(12). As discussed further below, the language of former C.S. 6.685(12) was re-codified at MCL 168.482 as part of a 1955 consolidation of election laws in the current Election Law.

The standards applicable to this question are as follows: Statutes are presumed constitutional and courts are duty bound to construe them so. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003). The courts must exercise their power to declare law unconstitutional with extreme caution.[16] *Phillips v Mirae, Inc*, 470 Mich 416, 422; 685 NW2d 174 (2004). Every reasonable presumption must be indulged in favor of the validity of the act. *Id.*, 470 Mich at 423.

2. The republication requirement is plainly a "form" requirement.

As acknowledged by VNP, Const 1963, art 12, § 2 expressly states that a petition circulating a proposed constitutional initiative "shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." VNP contends that MCL 168.482(3)'s requirement (that petitions list provisions that would be altered or abrogated) does not qualify as a regulation of a petition's "form," and is, instead, "an attempt to establish a requirement of *substantive content*, as appropriately characterized by the Court's decision in *Ferency*."[17] (VNP Br., p. 30 (emphasis added).) This argument fails for multiple reasons.

Most crucially, section 482(3)'s republication requirement places no limitation on the *substance* of a ballot proposal. Section 482(3) requires that a petition include, where applicable, a *field* with the heading: "[p]rovisions of existing constitution altered or abrogated by the proposal if adopted." MCL 168.482(3). The statute makes no specific limitation on *what* then may be

[16] Pursuant to MCR 7.206(D)(1), an opening brief of a claimant must conform, as nearly as possible, to the requirements of MCR 7.212(C). Pursuant to `212(C), an appellant's brief in a matter where a statute is challenged as being unconstitutional must include, in the caption, an all-caps advisory placing the Court and the other parties on notice of such matter. VNP failed to include the required notice.

[17] *Ferency v Sec'y of State,* 409 Mich 569; 297 NW2d 544 (1980).

placed in that field. A proposed amendment may abrogate one or many provisions (as well as *any* provisions), of the Constitution—the content of the amendment remains fully within the purview of the proposal's drafter. Consistent with VNP's own definition of "form," section 482(3) directs merely the "the shape and structure" of the petition, "as distinguished from the" particular content "of which it is composed." (VNP Br., p. 32 (citing *Pinkston-Poling*, 227 FSupp3d at 852.)

Since section 482(3) describes the required form, but makes no limitation on the content, of a petition, it is plainly within the ambit of Const 1963, art 12, § 2's invitation to the Legislature to prescribe the "form" of petitions by law. That fact alone is decisive.

3. The petition republication requirement is nearly 80 years old; its history demonstrates that republication is a matter of *form* within the ambit of Const 1963, art 12, § 2.

Article 12, § 2 of the 1963 Constitution requires that the *ballot* republish existing sections of the Constitution that would be abrogated by a proposed constitutional amendment. Section 482(3) requires that a circulated *petition* do so as well. MCL 168.482(3).

Both requirements were drafted by the same Legislature. The *ballot* requirement was enacted as Proposal 1 of 1941, which was legislatively referred.[18] Two months after Proposal 1's adoption, the same Legislature adopted the *petition* requirement in Public Act 246 of that year. The statute read then almost exactly what it reads now: "If the proposal would … abrogate any existing provision … the petition should so state and the provisions to be altered or abrogated shall be inserted …." See former C.S. 6.685(12). The Legislature considered the republication to be a matter for "form," expressly denominating it to be one in the statute. *Id.*

[18] See Ex 2, an Appendix setting forth the history of the republication requirements in greater detail.

When the delegates met in 1961 to revise Michigan's Constitution, the petition republication requirement of section 482(3) had been Michigan law for 20 years. It was thus in the delegates' contemplation when they added the clause in Const 1963, art 12, § 2 stating that the "form" of petitions was to be "prescribed by law."[19]

This history shows dispositively that the petition republication requirement of section 482(3) was considered a matter of form by the Legislature when first enacted in 1941 and a permissible regulation by the Constitutional delegates in 1961 and 1962.[20] VNP's arguments ignore this history, and should thus be rejected.

4. The republication requirement is not an undue burden.

While section 482(3) does not restrict *what* sections may be abrogated, it does mandate, as a matter of form, that abrogated sections be republished. Abrogated provisions are as much a component of an amendment as language being added to the Constitution—if a petition drafter does not understand what is being abrogated in the existing Constitution, they do not understand their own proposal. This is not an "undue burden" given the importance of Michigan's Constitution to the functioning of its government.

[19] The delegates to the 1961-62 Convention well understood the importance of the petition process as a means of educating voters. Delegate Brown, speaking in favor of increasing the minimum number of required signatures, stated as follows: "All that we ask is that there be an informed electorate when a proposition is put on the ballot. The circulation of petitions better informs the electorate with respect to any candidate, better informs the electorate with respect to any issue than almost anything you can do in a campaign. When you go to people and ask for signatures, you are telling them what the proposition is. …." Official Record, Constitutional Convention, p 3200 (delegate Brown).

[20] Of further significance, is that the schedules to the 1963 Constitution required that the Attorney General review and recommend changes to existing laws required by changes made in the new Constitution. Const 1963, Schedule, § 1. No change was thereafter made to the petition republication requirement in MCL 168.482(3), which has remained in place to this day.

For a typical amendment—*i.e.,* a "mere correction of detail"[21]—it should not be difficult to identify abrogated sections. Only one of the four proposals in *Protect Our Jobs* failed to satisfy the abrogation requirement—and no petition since has been rejected on that basis.[22] The VNP Proposal, however, is not a "mere correction of detail." It spans some 7 pages of fine-print (8-point), single-spaced type, and includes statutory detail on numerous items concerning the operation of the proposed redistricting commission. As stated below, the VNP Proposal is not really an amendment but a revision, requiring a Constitutional Convention.[23] It is thus no surprise that the VNP Proposal abrogates a number of the sections of the existing Constitution. VNP's failure to identify those sections is fatal to the VNP Proposal's submission to the voters under MCL 168.482(3).

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[21] *Citizens,* 280 Mich App at 296.

[22] VNP references communications it had with Election Bureau staff in seeking voluntary, non-binding approval of the petition prior to circulation. (VNP Br., p. 39.) There is no statutory preliminary approval procedure, and these communications are moreover irrelevant to the issue of compliance with MCL 168.482(3) because the incorrect legal guidance or mistakes of state officials are not binding on courts. See, e.g., *De Lamiellure Trust v Dept' of Treasury*, 305 Mich App 282; 853 NW2d 708 (2014) (incorrect advice of by assessor could not estop collection of tax); see also *Krushew v Mietz*, 276 Mich 553, 558; 268 NW2d 736 (1936) ("[E]veryone is presumed to know the law, … and hence, had no right to rely on such representations or opinions and will not be permitted to say he was misled by them.") Conversely, the communications show that VNP's counsel did not argue that MCL 168.482(3) was unconstitutional in his submissions to the Board of Elections staff concerning VNP's understanding of abrogation republication requirements. (See VNP Br. at Ex. B.) Only now, after VNP realized that it failed to republish several abrogated provisions, does it argue that MCL 168.482(3) is unconstitutional.

[23] That process is meant, in part, to reconcile changes in the Constitution with its existing provisions. Official Record, Constitutional Convention, p. 2463 (Convention Vice President, J. Edward Hutchinson) (as quoted in the Introduction).

5. The Supreme Court has already implicitly rejected a constitutional attack on section 482(3); VNP mischaracterizes other precedent.

Though no court has expressly decided the constitutionality of section 482(3), there is language in Michigan Supreme Court decisions supporting its validity. In addition to calling the petition republication requirement "invited," (*Protect Our Jobs*, 492 Mich at 778) and "beckoned" (*Carman v Hare,* 384 Mich 443, 448; 185 NW2d 1 (1971)) by Const 1963, art 12, § 2, the Court in *Carman* implicitly rejected a constitutional attack on section 482(3) when it stated that Proposal C of 1970 should have been enjoined prior to its ultimate submission to the voters under section 482(3). A summary of these authorities—which VNP sorely mischaracterizes—is set forth in an Appendix at Exhibit 3.

The Appendix at Exhibit 3 also contains a summary of *Massey v Sec'y of* State, 457 Mich 410; 579 NW2d 862 (1998) and *Ferency v Sec'y of State,* 409 Mich 569; 297 NW2d 544 (1980). As set forth in the Appendix, there are three key points that VNP omits in their Brief with respect to these cases:

- First, *Massey,* like *Carman*, involved a *post-election* challenge. The relative burdens and available remedies in pre-election cases change dramatically once an election has occurred. See *Stand Up*, 492 Mich at 606-60; *Carman*, 384 Mich at 455.

- Second, when VNP cites these cases to suggest that petition defects arising under section 482(3) can be cured by "corrective action" pre-election (VNP Br., p. 35), VNP is fundamentally mischaracterizing these cases. The pre-election "corrective action" referenced was not a "cure" that would save the petition, but the courts' *enjoining submission of the question to the voters altogether*. 384 Mich at 455.

- Third, in 1986, the Supreme Court forcefully receded from the background principles in *Ferency* that are cited and discussed at length by VNP. See *Consumers Power Co v Att'y* Gen, 426 Mich 1; 392 NW2d 513 (1986). Those principles applied to the 1908 Constitution, and not the 1963 Constitution. 426 Mich at 9.

Finally, VNP's statement that the Court in *Ferency* "characterized" the republication requirement in any manner helpful to VNP's position is fundamentally misleading. (VNP Br., p. 30.) The *Ferency* Court forcefully *avoided* the constitutional question as concerned section 482(3). See 409 Mich at 593 ("Assuming, *arguendo*, that a new[24] requirement regarding substantive content is a regulation of form ….") To claim that the Court "characterized" section 482(3) as a regulation of substance is to *mischaracterize Ferency*.

For these reasons, in addition to those discussed above, this Court should reject VNP's constitutional arguments, and apply section 482(3) to reject submission of the VNP Proposal.

C. The VNP Proposal cannot be submitted to the voters as an initiated amendment.

1. *Citizens* is binding on this panel.

For the reasons set forth above, MCL 168.482(3)'s petition republication requirement is plainly constitutional and within the scope of permissible legislative action under Const 1963, art 12, § 2 (which invites the Legislature to prescribe the "form" of petitions). The Court, however, need not reach that issue *at all* if it adopts the claim set forth in Count I of Plaintiff's Complaint. That is, that the VNP Proposal is a revision rather than an amendment of the Constitution and as such, cannot be accomplished by an initiative (but requires a constitutional convention[25] instead).

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[24] The Court in *Ferency* was apparently not made aware that the republication had originally been adopted 40 years earlier.

[25] VNP suggests that the People's opportunity to convene a convention only comes once every 16 years. (VNP Br., p. 12.) While Const 1963, art 12, § 3 requires that the question of convening a convention be put to the voters once every 16 years, the Legislature can refer the question at any election under Const 1963, art 12, § 1. The People can also compel a convention at the time of their choosing by way of an initiated amendment. The People did so previously, in fact. After the 16-year convention question failed to pass in 1958, the People adopted what has been referred to as the "Gateway Amendment" in 1960, requiring a convention to be held even though the vote had failed to require one just two years earlier.

VNP has essentially conceded all with respect to this Count because it fails to address one irrefutable fact: this panel is bound to follow the framework and analysis set forth in *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273; 761 NW2d 210 (2008).

The unanimous *Citizens* decision was appealed to the Michigan Supreme Court. The Supreme Court did not reverse the Court of Appeals' ruling, but on a 6-1 vote, it upheld the result in keeping the Reform Michigan Government Now! (RMGN) Proposal off the 2008 general election ballot. 482 Mich 960 (2008). Under the Michigan Court Rules, a published opinion of the Court of Appeals is *controlling* on a subsequent Court of Appeals panel in future cases. MCR 7.215(C)(1). If a future panel disagrees with that precedent, it does not have the option to reverse that controlling case on its own. Reversal can only come from the Supreme Court or where a conflict panel is convened and overturns the prior decision. Until one of those two things happens, this panel *must* follow the test established in *Citizens*, and in particular, *must* analyze whether the VNP Proposal is an "amendment" or a "revision" under the qualitative and quantitative prongs identified by the *Citizens* decision. See *Tebo v Havlik*, 418 Mich 350, 362; 343 NW2d 181 (1984).

The Court of Appeals in *Citizens* plainly held that a "revision" of the Constitution under Const 1963, art 12, § 3, exists where a proposal makes change of such magnitude or significance that it works a "fundamental change" to the structure of state government. 280 Mich App at 296. Such revision can *only* be accomplished by constitutional convention. *Id.* An amendment under Const 1963, art 12, § 2, in contrast, is a "mere correction of detail." *Id.* The Court further held that the difference is to be analyzed under a two-pronged "qualitative" and "quantitative" framework. *Id.* at 299.

This Court must thus reject, on the basis of binding precedent, VNP's argument that Const 1963, art 12, §§ 2 and 3, do not impose restrictions on the scope or subject matter of an initiated

amendment. (VNP Br., pp. 9-11.) This Court is also required to reject, under binding precedent, VNP's argument that the word "revision" in Const 1963, art 12, § 3, refers to a "process" as opposed to a particular, characteristic and fundamental change. (VNP Br., pp. 12-15.) Finally, this Court is required to reject VNP's argument that the framework set forth in *Citizens* should be "limited to the facts of that highly unusual case." (VNP Br., p. 16.) Nothing in *Citizens* suggests that the revise/amend, qualitative/quantitative framework established therein was to be limited to only the RMGN Proposal there at issue.

The Court in *Citizens* further did not invent the framework it used for analyzing the RMGN Proposal out of whole cloth. Its decision was based on the Supreme Court's decision in *Kelly v Laing*, 259 Mich 212; 242 NW 891 (1932), which, the *Citizens* Court noted "stands for the proposition that there is a *qualitative* aspect to the meanings of the words 'amendment' and 'revision' when used to describe changes to 'fundamental law' such as the constitution." 280 Mich App at 224 (citing *Laing*, 259 Mich at 221-222). It also expressly relied on the Supreme Court's decision in *Pontiac Sch Dist v City of Pontiac*, 262 Mich 338; 247 NW 474 (1933), where the Court considered a post-election challenge to a constitutional amendment limiting property tax assessments. The *Citizens* Court explained:

> In *Laing* and *City of Pontiac*, our Supreme Court established the proper analysis for determining whether a proposal is a 'general revision' of, or merely an 'amendment' to, the constitution: the analysis should consider not only the *quantitative* nature of the proposed modification, but also the *qualitative* nature of the proposed modification. More specifically, the analysis does not turn solely on whether the proposal offers a wholly new constitution, but must take into account the degree to which the proposal interferes with, or modifies, the operation of government. … [280 Mich App at 298.]

In sum, this Court's analysis must proceed under the rubric established in *Citizens*. That analysis compels the conclusion that the VNP Proposal is not eligible for submission to the voters as an initiated amendment.

2. Plaintiffs in no way assert a single-object challenge.

VNP suggests at multiple points that *Citizens* does not preclude submission of the VNP Proposal to the voters because the Proposal "addresses the single subject and purpose of redistricting reform." (See VNP Br., p. 15, n 16; see also VNP Br., p. 10.)[26] They further protest that the mere complexity of a proposed change should not be a factor in assessing its ballot eligibility. This argument confuses a "single purpose" challenge with a challenge asserting that a particular proposal constitutes a "fundamental change." Plaintiffs here make the latter.

As recognized by the panel in *Citizens*, even a relatively simple or short proposal can impact the core structure of government and thus require a constitutional convention. The *Citizens* Court cited with approval, e.g., *Raven v Deukmejian*, 52 Cal3d 336, 342-343; 350-351; 801 P.2d 1077 (1990), in which the court precluded submission of a single-purpose, single-article proposed change that "sought to limit the rights of criminal defendants by mandating that California courts not offer greater protections than those offered by the United States Supreme Court's interpretation of the federal constitution." *Citizens,* 280 Mich App at 303. Under the qualitative prong, the fairly limited and straightforward proposal in *Raven* nonetheless constituted a revision because it made fundamental changes to the California judiciary; it thus was not a proper subject matter for a ballot proposal. *Id.;* see also *Amador Valley Joint Union High Sch Dist v State Bd of Equalization*, 22

[26] VNP cites *Graham v Miller*, 348 Mich 684; 84 NW2d 46 (1957), in which the Supreme Court held that there was no single-object limitation on amendments. As in *Massey* and *Carman*, *Graham* involved a post-election challenge to an adopted amendment.

Cal3d 208, 223; 583 P2d 1281 (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 also.").

The RMGN Proposal in *Citizens* was multifarious and far-reaching. It had multiple purposes and was longer than the VNP Proposal. But comparison with the RMGN Proposal is not the test. The holding of *Citizens* was not limited to the RMGN Proposal. The *Citizens* Court held that the RMGN Proposal "does not even approach the field of application for the amendment procedure." 280 Mich App at 305. Under both the *qualitative* and *quantitative* prongs, the VNP Proposal similarly does not even approach that field, and must be rejected.

3. Regardless of whether it has a single purpose, the VNP Proposal makes multiple fundamental changes to existing state government.

Despite VNP's protestations, the VNP Proposal makes multiple "fundamental" changes that go well beyond "mere corrections of detail." VNP asserts that the VNP Proposal will "affect *only* three of the Constitution's twelve articles." (VNP Br., p. 17 (emphasis added).) Setting aside that three of twelve is fully one quarter of the Constitution, the impacted articles—4, 5, and 6—are only the three articles that establish and govern the three branches of state government. The VNP Proposal's disruptions to the framework of state government have been described at some length in Plaintiffs' opening brief, but in concise review:

- The Proposal eliminates the ability of the courts to adopt a redistricting plan as a remedy even of last resort. (VNP Proposal, Ex 1, art 4, § 6(13).)
    - VNP calls this a "narrow limitation," (VNP Br., p. 19) but twice since 1963, where the Legislature was unable to draw a plan that would satisfy state and federal law in time for the first general election following a decennial census, the Michigan Supreme Court has had to draw the plan itself. See *In re Apportionment of State Legislature*-1982, 413 Mich 96; 321 NW2d 565 (1982); *In re Apportionment of State Legislature,* 439 Mich 251; 483 NW2d 52 (1992)1.

- The Proposal gives an unlimited budget, without the need for appropriation, to the commission and commissioners, requiring that the state "shall indemnify" each for losses incurred. (See VNP Proposal, Ex 1, art 4, § 6(5).)
    - VNP's own counsel characterized this as a "stark" departure from the Legislature's existing authority over appropriations. (See VNP Br. at Ex B, at p. 8.)
- The Proposal eliminates the Governor's veto power over adopted redistricting plans, and also eliminates the People's reserved referendum power over such plans. It removes core checks and balances underpinning the function of state government:
    - The Governor, Legislature, and Courts cannot remove commissioners;
    - The Governor, Legislature, and Courts cannot limit the budget of the commission; and
    - The Governor, Legislature, and Courts cannot draw plans themselves, even where the commission fails to do so in time to comply with federal law.
- The Proposal transfers redistricting power from *elected* officials in the Legislature, who will be accountable to the People at the ballot box, to *appointed* ones who will never stand for election under the plans they adopt.
- The Proposal requires officers to swear under oath that they affiliate with political parties (or conversely, that they do not)—something that has never been required for elective office in this State before.

Commissioners—who again, have an unlimited budget which the state *must* indemnify under the proposal—cannot be removed by the other branches. Pursuant to article 4, § 6(3) of the VNP Proposal, absent death, infirmity, voluntary resignation, or a commissioner doing something that disqualifies the commissioner *after-the-fact* of appointment under proposed article 4, § 6(1),[27] there are only two mechanisms for removal of a commissioner:

[27] E.g., post-appointment disqualification might arise due to the commissioner being the parent of a child who decides—unilaterally—to run for political office after the commissioner assumes office, or, e.g., disqualification might arise where the commissioner marries a long-time significant other who happens to be employed by a political office holder. (Compare VNP Proposal, Ex 1, art 4, § 6(3)(D), and § 6(1)(C).)

(1) Where the commissioner is convicted of a crime involving dishonesty, deceit, fraud, or a breach of the public trust arising out of their office; or

(2) Where a 10-vote supermajority of the other commissioners finds substantial neglect of duty, gross misconduct, or inability to discharge the duties of office and votes to remove the offending commissioner. [See VNP Proposal, Ex 1, art 4, § 6(3)(D).

But perhaps most fundamental—especially in the face of the elimination of checks and balances on the commission under the Proposal—is the VNP Proposal's concomitant elimination of *mandatory* redistricting criteria. The existing mandatory requirement that districts follow county, township, and municipal boundary lines to the extent possible has existed in some form in every Michigan Constitution since 1835. (Plaintiffs' Br., pp. 20-25.) District maps drawn by the Legislature and the Courts under the current Constitution are subject to these mandates, as well as the mandatory requirements that districts be compact and contiguous by land. See *In re Apportionment of Wayne County Bd of Commissioners—1982*, 413 Mich 224, 253; 321 NW2d 615 (1982). These mandates help to facilitate elections, to preserve local organizations, and to "limit[] the potential for gerrymandering." *In re Apportionment—1982,* 413 Mich at 133, n 20.

The abandonment of mandatory criteria, and placement of the redistricting task into the hands of an unelected commission, made up of persons with no required expertise, is absolutely a fundamental change that goes to the heart of government. The Court in *Citizens* called a change in redistricting methodology one that affected the "foundation power," of government. 280 Mich App at 306. The commission will choose the lines used to select the People's representatives—the body that establishes law—and will do so using a non-mandatory list of criteria that includes "communities of interest" and "political fairness." Nothing is more fundamental—or more likely to summon of necessity the careful study, deliberation, and refinement of a constitutional convention before submission to the voters for adoption—than this.

VNP makes no effort to address the fundamental nature of these changes in its Brief. The focus of their arguments is on a framework inconsistent with *Citizens* and on the fact that all of the many changes worked by the VNP Proposal relate back to efforts at remodeling the state's redistricting apparatus. That is not the test—their singular focus in briefing on a nonexistent "single object" challenge has resulted in their failure to answer the charge that the VNP Proposal would work a "fundamental change" to the Constitution. Under *Citizens*, the VNP Proposal is not susceptible to adoption as an amendment under Const 1963, art 12, § 2. This Court should order its rejection.

4. VNP failed to respond as to the application of the *quantitative* prong.

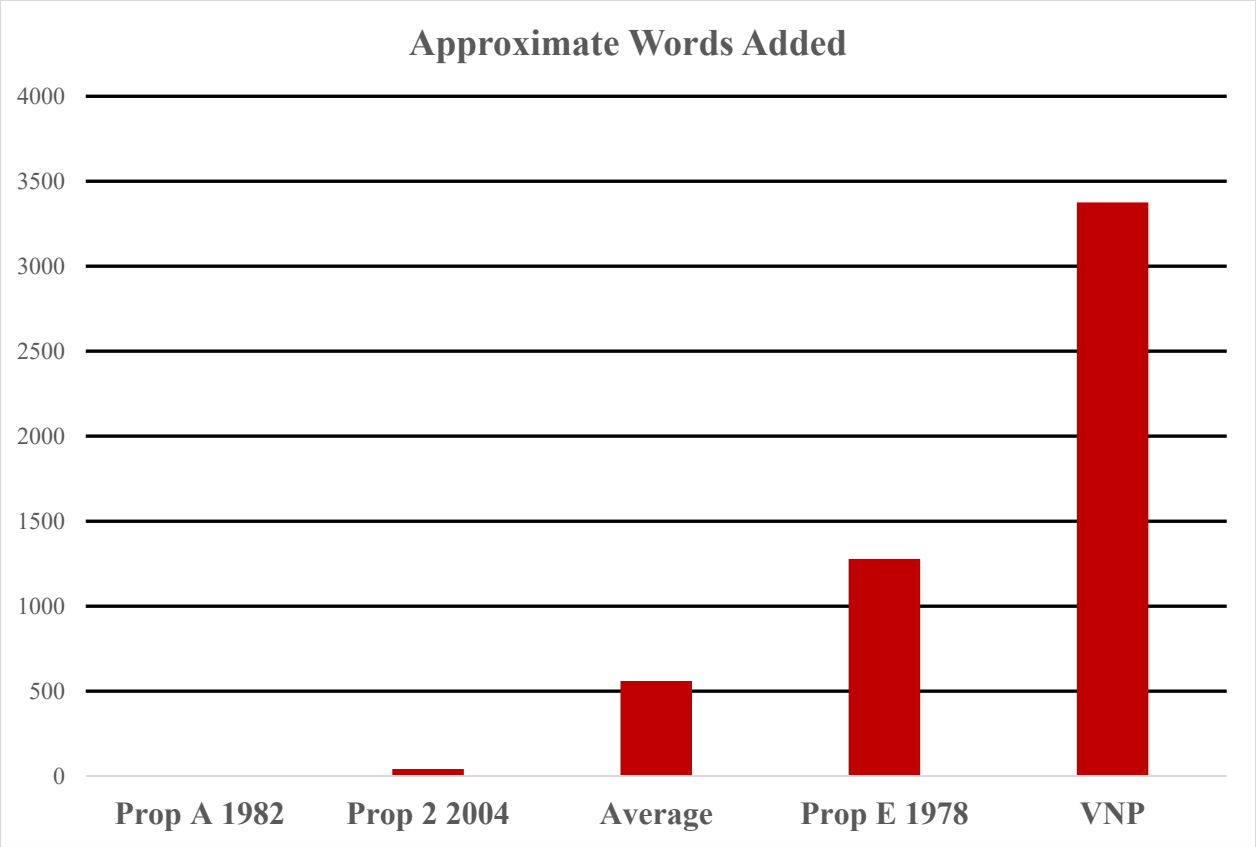
Because VNP fails to address the binding framework of *Citizens*, it also fails to address Plaintiffs' discussion of the VNP Proposal under the *quantitative* prong. Since VNP has adhered to the notion that *Citizens*' framework should not apply—since the VNP Proposal may not be *as bad* as the RMGN Proposal—Plaintiffs must repeat again: that is not the test.

The VNP Proposal changes three articles and eleven sections of the existing Constitution. It adds approximately 3,375 words and strikes approximately 1,459 words. If enacted, it would add more words to the Constitution—at once—than any other amendment previously adopted under the existing Constitution.

The following chart helps illustrate the unique size of the VNP Proposal. The five bars included respectively represent the approximate number of words added to the Constitution by the following:

- Proposal A of 1982, which amended Const 1963, art 4, § 11 to allow the Legislature to pass laws reforming its members' immunity from civil arrest and process;
- Proposal 2 of 2004—the Marriage Amendment—which added Const 1963, art 1, § 25, specifying what relationships can be recognized as a "marriage or similar union" for any purpose;

- The 559 words added by the *average* of all amendments adopted to the 1963 Constitution between 1963 and 2010 (see Plaintiffs' Br., p. 13, n 8);
- Proposal E of 1978—the "Headlee Amendment"—amending Const 1963, art 9, § 6, and adding new §§ 25-34; and
- The VNP Proposal itself.



Proposal E of 1978 is the largest one-time amendment to the 1963 Constitution made thus far, and added approximately 1,278 words. Unlike VNP—which amends three sections—Proposal E moreover made amendments to only a single article of the Constitution—article 9, concerning taxation. As shown above, VNP would add more than 260% of the content added by Proposal E.

VNP failed in its Brief to address the quantitative prong of *Citizens* in any meaningful way. It remains the case that the sheer size of the VNP Proposal disqualifies it from submission under the initiated amendment process. A proposal of its size may only be accomplished via convention under Const 1963, art 12, § 3.

III. CONCLUSION

From the nature of the arguments posed in VNP's Response/Brief in Support of their own Cross-Claim, it is apparent that *Plaintiffs'* request for mandamus is the one that should be granted. VNP hinges their opposition on an attempt to convince this Court not to follow the binding precedent of *Citizens* and *Protect Our Jobs*, and further, on a request to have this Court invalidate a statute that has been part of Michigan law for nearly 80 years.

VNP's attempts at reconciling what are plain abrogations of multiple sections of the existing Constitution are unavailing. The failure to republish those sections in the petition just as plainly violates MCL 168.482(3), which exists as an invited regulation of form under Const 1963, art 12, § 3. Similarly unavailing are VNP's citations of multiple *post-election* cases and attempts to characterize *Stand Up* and *Protect Our Jobs'* holdings as dicta.

Whether the purposes of the VNP Proposal are desirable or not is not the question here—nor is the question whether the flaws of the Proposal will cause it to collapse of its own weight should it be enacted. The questions here posed are merely: (1) is the Proposal too massive in scale or too significant in effect to be enacted without first being subjected to the refining forum of a constitutional convention? and (2) did the petition fail to comply with the mandatory republication requirement of MCL 168.482(3)? The answer to both questions is yes.

The Court should direct the Secretary and Board to reject the VNP Proposal; it should deny the relief sought in VNP's Cross-Claim.

Respectfully submitted,

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