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STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs-Appellants,

v.

SECRETARY OF STATE, and MICHIGAN BOARD OF STATE CANVASSERS,

Defendants/Cross-Defendants-Appellees,

and

VOTERS NOT POLITICIANS BALLOT COMMITTEE, d/b/a VOTERS NOT POLITICIANS, COUNT MI VOTE, a Michigan Non-Profit Corporation, d/b/a VOTERS NOT POLITICIANS, KATHRYN A. FAHEY, WILLIAM R. BOBIER and DAVIA C. DOWNEY,

Intervening Defendants/Cross-Plaintiffs-Appellees.
____/

Supreme Court Case No. _________
Court of Appeals Case No. 343517

PLAINTIFFS CITIZENS PROTECTING MICHIGAN'S CONSTITUTION, JOSEPH SPYKE AND JEANNE DAUNT'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

DECISION REQUESTED BY SEPTEMBER 6, 2018

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STATEMENT IDENTIFYING THE OPINION APPEALED AND DATE OF ENTRY

By published opinion and order dated June 7, 2018, the Michigan Court of Appeals denied the Complaint for Mandamus filed by Citizens Protecting Michigan's Constitution, Jeanne Daunt, and Joseph Spyke (collectively, "CPMC"). (**Exhibit 1**, 6/7/18 COA Op.) The Complaint for Mandamus sought an order directing the Defendants, Secretary of State Ruth Johnson ("Secretary") and the Michigan Board of State Canvassers ("Board") to reject and take no further action to place the Voters Not Politicians Ballot Proposal ("VNP Proposal") on the 2018 General Election ballot. The Court also granted a cross-claim for mandamus filed by Intervening Defendants, including Voters Not Politicians (collectively, "VNP"), directing the Secretary and Board to take all necessary measures to place the VNP Proposal on the 2018 General Election Ballot.

CPMC seeks leave to appeal from that decision. This Court has jurisdiction pursuant to MCR 7.303(B)(1).

CPMC seeks: 1) this Court's review of the decision of the Court of Appeals denying their Complaint for Mandamus; and 2) an order of mandamus from this Court, either by peremptory order or after plenary review, directing the Secretary of State and the Board of State Canvassers to reject and take no further action to place the VNP Proposal on the 2018 General Election Ballot.

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STATEMENT OF QUESTIONS PRESENTED

The VNP Proposal is a ballot question that, if adopted, would amend the Michigan Constitution by creating an "independent" redistricting commission and changing Michigan's traditional redistricting criteria. The Proposal would add more than 3,000 words and delete more than 1,000 words in the existing Constitution. It would moreover eliminate typical checks and balances that apply to the branches of government by giving the Commission an unlimited budget, providing for removal of commissioners only by other commissioners, and preventing the courts from drawing redistricting plans even as a last resort.

CPMC requested mandamus relief in an original action in the Court of Appeals directing the Secretary and Board to reject the VNP Proposal and to take no further action to place it on the 2018 General Election ballot. The VNP Proposal abrogated and failed to republish, as required by MCL 168.482(3), four sections of the Michigan Constitution. Further, the VNP Proposal is so massive and makes changes of such a fundamental nature that it cannot be accomplished as an initiated amendment, and instead requires a constitutional convention under Const 1963, art 2, § 3.

The Court of Appeals denied CPMC's Complaint for Mandamus. Instead, it issued a published opinion and order directing the Secretary and Board to take all necessary steps to place the VNP Proposal on the ballot.

I. The decision of the Court of Appeals panel was contrary to binding Supreme Court precedent. Further, this matter involves significant constitutional questions that go the core of our constitutional government. Should this Court grant leave to appeal?

The Court of Appeals did not answer this question.

CPMC answers: "Yes"

II. The Court of Appeals held that the VNP Proposal does not abrogate Const 1963, art 1, § 5, art 6, § 13, art 9, § 17, and art 11, § 1, and thus the petition circulating the Proposal did not violate MCL 168.482(3) by failing to republish those provisions. Where the Court of Appeals misapplied this Court's precedent concerning whether an abrogation has occurred, should this Court, upon review, reverse the decision of the Court of Appeals?

The Court of Appeals did not answer this question.

CPMC answers: "Yes"

III. Longstanding Michigan law precludes submission by an initiated amendment of changes that are too massive or too fundamental to the operation of state government. Such measures must be submitted to the voters only after a constitutional convention. The Court of Appeals panel misapplied this law in determining the VNP Proposal was susceptible to submission as an amendment. Upon review, should this Court reverse the decision of the Court of Appeals?

The Court of Appeals did not answer this question.

CPMC answers: "Yes"

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I. INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL

A. Introductory Matters

In this Application, Citizens Protecting Michigan's Constitution, Jeanne Daunt, and Joseph Spyke (collectively, "CPMC") seek review of a published decision of a panel of the Court of Appeals in which that Court denied CPMC's request for mandamus relief. CPMC ultimately seeks mandamus relief in the form of an order directing Defendants—Secretary of State Ruth Johnson ("Secretary") and the Board of State Canvassers ("Board")—to reject a petition that proposes to submit a ballot question at the 2018 General Election. The proposal, in turn, is supported and sponsored by the Intervening Defendants (collectively, "VNP").

The ballot question at issue proposes to amend the existing Constitution, among other things, to establish an "independent" redistricting commission and to revise Michigan's longstanding, traditional redistricting criteria. (The proposal hereafter is referred to as the "VNP Proposal.") While these two features are among the primary purposes of the VNP Proposal, the Proposal makes a multitude of other changes in service of these purposes that would fundamentally change the ordinary operation 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." (Appendix B to VNP May 22 Response Brief, p. 6.)

The VNP Proposal would abrogate four sections of the existing Constitution—art 1, § 5, art 6, § 13, art 9, § 17, and art 11, § 1. Under state law, these sections had to be republished with the petition circulated in support of the VNP Proposal. MCL 168.482(3). They were not.

The Court of Appeals panel below, *in a published decision*, erred in that it found that no abrogation would occur with respect to these four provisions if the VNP Proposal were to be

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adopted. It misapplied the test for abrogation as established by this Court in *Protect Our Jobs v Board of State Canvassers,* 492 Mich 763; 822 NW2d 534 (2012). The Court of Appeals panel focused on whether the changes to be made by the VNP Proposal were conceptually *possible*—but the controlling legal analysis to be applied assesses whether the changes nullify existing language such that the public should be told of the nullification in the petition. Because it applied the wrong test, the Court of Appeals panel reached the wrong conclusions.

Further, while abrogation is a narrow concept, even purportedly slight abrogations must be republished. The Court of Appeals panel did not follow this rule as established in *Protect Our Jobs. Id.* at 790-791.

The Court of Appeals panel also erred in that it found that the VNP Proposal was an appropriate initiated amendment rather than a revision that must be made by constitutional convention. Under longstanding Michigan law, an amendment is confined to a mere "correction of detail."[1] Amendments may not include sprawling compilations of changes; and amendments may not include fundamental changes to the operation of state government. The VNP Proposal does both. Changes of such magnitude can only be made by a constitutional convention under Const 1963, art 12, § 3

The VNP Proposal represents a massive change to our Constitution. If adopted, it would—by sheer volume of words—be more than two and a half times larger than any previous amendment made to the Constitution. More important, it would also make substantive fundamental changes to the Constitution—not only in the area of redistricting, but also in establishing a commission that

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[1] *Citizens Protecting Mich's Constitution v Sec'y of State ("Citizens")*, 280 Mich App 273, 296; 761 NW2d 210, aff'd in part, appeal denied in part by 482 Mich 960 (2008) (quotations omitted).

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is not subject to budget controls, laws, judicial remedies, or other checks and balances that exist between the branches in Michigan's representative democracy.

The Court of Appeals panel's decision to deny mandamus relief to CPMC was plain error. If left unaddressed by this Court, the panel's published decision will confound application of the legal principles to be applied in all future cases. It should be reversed, and the VNP Proposal should not be submitted to the voters in November.

B. Review should be granted.

This Court should grant review because the issues involved are of significant public interest and the case is one against the Secretary of State and Board of State Canvassers. See MCR 7.305(B)(2). The Court of Appeals panel, in a published decision, misapplied the controlling precedent of this Court and of the Court of Appeals. The questions at issue concern the application of this Court's jurisprudence on core questions concerning the manner in which constitutional amendments will be proposed going forward. They also include whether it is even possible under the Michigan Constitution for the changes in the VNP Proposal to be accomplished without the careful study and planning of a constitutional convention. The questions of this case include fundamental issues of: (i) who will pick our legislators and how; (ii) when and how our core governing document can be changed; and (iii) when and whether the public is to be made aware of the scope of changes to be enacted by proposed ballot initiatives when they are presented in a petition.

For these same reasons, this case involves legal principles of major significance to the state's jurisprudence. See MCR 7.305(B)(3). There are many at issue here, including the interpretation of a multitude of the provisions of the 1963 Constitution. The Court of Appeals panel adopted constructions of, for example, the right to free speech in Const 1963, art 1, § 5, or the Oath Clause in Const 1963, art 11, § 1, that diminish the protections of those constitutional

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provisions. Further, the VNP Proposal, if enacted, would limit this Court's authority and discretion on issues of major political significance, and require this Court to hear, as a matter of right (and as a trial court), a broad set of challenges to redistricting plans every ten years.

Finally, review should be granted because the decision of the Court of Appeals panel plainly conflicts with the Supreme Court's decision in *Protect Our Jobs*. See MCR 7.305(B)(5)(b). While this Court has held that even a small abrogation must be republished in a petition pursuant to MCL 168.482(3), the Court of Appeals panel decision departed forcefully from that holding, instead finding that purportedly minor and slight abrogations do not require republication.

Most important, if this Court refuses to grant leave and examine the decision of the Court of Appeals panel, the substantive constitutional issues raised herein may be foreclosed from further review if the VNP Proposal is placed on the ballot and approved by the voters. See generally *Carman v Hare,* 384 Mich 443; 185 NW2d 1 (1971).

II. CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Material Facts

1. Parties

Plaintiff-Appellant CPMC is a duly registered ballot question committee organized for, among other things, opposing the VNP Proposal. Plaintiff-Appellant Joseph Spyke is an Ingham County resident and voter who has been a paid employee of a political candidate within the last 6 years; he would thus be precluded from serving on the redistricting commission if the VNP Proposal is adopted. (See VNP Proposal, **Exhibit 2**, art 4, § 6(1)(B)(iv).) Plaintiff-Appellant Jeanne Daunt is a Genesee County resident and voter who will be aggrieved if the VNP Proposal is adopted because the Proposal would preclude her from serving on the redistricting commission merely because she is the parent of a person otherwise disqualified. (See VNP Proposal, Ex 2, art 4, § (6)(1)(C).)

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Defendant-Appellees are the Michigan Secretary of State Ruth Johnson and the Michigan Board of State Canvassers. The Secretary has overall responsibility for preparation of the ballot and submission of constitutional amendment initiatives to the voters. MCL 168.31(1)(f); MCL 168.471. The Board is responsible, among other things, for determining the sufficiency of signatures submitted in support of a petition to amend the Constitution. MCL 168.476(1).

Intervening Defendants are a ballot question committee and concerned electors who support the passage of the Voters Not Politicians Proposal.

2. Administrative History of VNP Proposal

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

CPMC sent a letter to the Secretary on April 18, 2018 advising of deficiencies in the petition used to circulate the VNP Proposal and of the VNP Proposal's ineligibility to appear on the ballot. (See **Exhibit 3**.) The Secretary did not respond.

CPMC also filed a protest with the Board, advising that it was seeking review in the courts of the threshold question of whether the VNP Proposal was eligible to appear on the ballot. The Board, which need not act to certify questions until September 6, 2018, has not certified the VNP Proposal to date. Simultaneously with filing this Application, CMPC has requested a stay to issue from this Court on further action by the Board and Secretary while this Court considers the matters at issue.

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3. The VNP Proposal

The VNP Proposal runs 7 pages of 8-point type text. (See Ex 2.) It would make multiple changes to the existing Constitution, but chief among these is the transfer of authority over the decennial task of apportionment of the districts used to elect members of the Michigan House, Senate, and U.S. Congressional delegation. Redistricting authority would be transferred from the Legislature, Governor, and Courts to a new (purportedly) independent redistricting commission made up of 13 electors. In place of the current constitutional mandatory redistricting criteria that district lines are to follow county and municipal borders, the VNP Proposal would substitute a list of new, non-binding criteria. After compliance with federal law and contiguity are considered, the next criterion for consideration by the commission is that "districts shall reflect the state's diverse population and communities of interest," which term is to include, but not be limited to, "populations that share cultural or historical characteristics or economic interests." (VNP Proposal, Ex 2, art 4, § 6(13)(C).)

Other elements of the VNP Proposal include, but are not limited to:

- **Commission Creation.** Establishment of the redistricting commission in the Legislature, though location in the Legislature is nominal only as: (i) the proposed commission will not be elected by the People or by members of the Legislature, (ii) its members will not be subject to removal or budget control by the Legislature, and (iii) the commissioners will be selected by and advised by the Secretary of State rather than the Legislature. (VNP Proposal, Ex 2, art 4, § 6(1), (2).)

- **Qualifications.** Establishment of qualifications for the commissioners, including that commissioners may not be candidates, officials, members of national, state, or local political parties, paid consultants or employees of officials or candidates, lobbyists, or unclassified state employees, or the family member of such a person, or have been an officeholder in the previous five years. (VNP Proposal, Ex 2, art 4, § 6(1).)

- **Selection by Secretary.** Delineation of a detailed selection process to be implemented by the Secretary of State to create the commission on a decennial basis, including that applicants to the commission must subscribe to application forms and swear under oath that they (as a matter of subjective assessment) affiliate with Democrats, Republicans, or consider themselves to be non-affiliating. The

Secretary is then to draw "randomly" from the pool of applicants four self-identifying Democrats, four self-identifying Republicans, and five self-identifying non-affiliating voters (which would ostensibly include members of the Green Party, Libertarians, Freedom Party, Socialists, as well as "moderate" voters who do not identify with any party) (VNP Proposal, Ex 2, art 4, § 6(2).)

  - **Pool Criteria to be set by Secretary.** The "random" selection by the Secretary, however, is subject to the requirement that the "Secretary . . . use accepted statistical weighting methods to ensure that the pools, as closely as possible, mirror the geographic and demographic makeup of the state." (As there are a multitude of demographic factors—*e.g.*, gender, sex, race, income, union membership, military service, age, disability, profession—the Secretary, a partisan-elected official, will have broad discretion as to fashioning the pool of applicants from which members will be drawn.) (*Id.*)

- **Removal process.** Absent death, resignation, infirmity, or failure to satisfy criteria listed in the VNP Proposal, commissioners may only be removed for conviction of a crime involving dishonesty related to their office, or after at least 10 of the other 12 commission members vote to expel the member. (VNP Proposal, Ex 2, art 4, § 6(3).)

- **Appropriation and Indemnification**. The Legislature will be required to appropriate an amount "equal to not less than 25 percent of the general fund/general purpose budget for the Secretary" for the fiscal year to support the redistricting commission's activities. If the amount appropriated is not enough to cover the commission's cost or the Legislature fails to make the appropriation, the state of Michigan "shall indemnify commissioners for costs incurred." (VNP Proposal, Ex 2, art 4, § 6(5).)

- **Public Meetings; No Other Public Communication**. The Commission must hold ten public meetings before beginning to draft plans, and an additional five meetings after it drafts any plan. The Commissioners, their staff, lawyers, and consultants "shall not discuss redistricting matters with members of the public outside of an open meeting of the commission," except that a commission member may communicate in writing to gain information relevant to the performance of his or her duties. (VNP Proposal, Ex 2, art 4, § 6(8)-(11).)

- **Establishment of Criteria**. In addition to the incomprehensible and undefined "communities of interest" criterion as noted above, the VNP Proposal would direct the commission to "abide by" the following criteria in order of priority (VNP Proposal, Ex 2, art 4, § 6(13)):

  - Districts shall not provide a "disproportionate advantage" to any political party, which is to be determined using "accepted measures of partisan fairness." (There are no such "accepted measures of partisan fairness" presently recognized by Michigan courts or the Supreme Court of the United States. Nor is it plain whether a district would be considered

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"disproportionate" if not balanced 50-50; or how voter models are to be selected, or applied, since Michigan voters do not register by party, and since voter trends and populations shift over time and from election to election).

  - Districts shall not "favor or disfavor" an incumbent elected official or candidate. (What that means is not plain. *E.g.*, preserving the core of an existing district in a new map could be seen as "favoring" an incumbent; but choosing the opposite could be seen as "disfavoring" an incumbent, meaning either choice would be in tension with the criteria.)

  - Districts shall "reflect consideration" of (but not necessarily follow as is currently required) county, city and township boundaries.

  - Districts shall be reasonably compact.

- **Nondiscretionary Supreme Court Original Jurisdiction**. The Supreme Court shall be required to review any and all challenges to plans adopted by the commission in every instance as a trial court, but will have no ability to order a final plan into place. (VNP Proposal, Ex 2, art 4, § 6(19).)

- **Employer Constraints**. Private and public employers of commission members may not discharge or retaliate against employees because of their membership on the commission or their attendance at any of the commission's meetings (which meetings are not limited in number). (VNP Proposal, Ex 2, art 4, § 6(21).)

- **No Legislative or Executive Branch Control**. The VNP Proposal states that the commission, its members, and staff are not subject to control or approval of the Legislature or the Executive Branch. (VNP Proposal, Ex 2, art 4, § 6(22), and art 5, § 2.) The Governor cannot remove commissioners, and cannot veto the commission's budgets. (*Id.*)

B. Proceedings at the Court of Appeals

CPMC filed its Complaint for Mandamus and initial Brief in Support with the Court of Appeals panel on April 25, 2018.

VNP moved to intervene on May 10, and the Court of Appeals panel granted the motion on May 11. Upon intervening, VNP filed a Cross-Claim against the Defendant Board and Secretary seeking a writ of mandamus directing the Board and Secretary to place the VNP Proposal on the 2018 General Election ballot.

Pursuant to MCR 7.206(D)(2), in the ordinary course, parties have 21 days to file responses to briefs filed in support of complaints for mandamus. MCR 7.206(D)(4) also provides that a court may peremptorily deny relief, grant relief, or order the parties to proceed to a full hearing with additional briefing.

Though the statutory deadline in this case is not until September 6, 2018—and the courts have authority to extend that deadline if necessary—the Court of Appeals panel *sua sponte* expedited its consideration of CPMC's Complaint and VNP's Cross-Claim. On May 11, the Court of Appeals panel ordered that all answers to the Complaint and Cross-Claim were due May 22, that VNP's Brief in Support of its Cross-Claim was due May 22, and that CPMC would then have 9 days—until 1:00 p.m. on May 31—to file a response. Though both CPMC and VNP requested oral argument, the Court of Appeals denied that request, stating it would peremptorily decide the motions on the initial briefs alone.

On May 17, CPMC filed a motion requesting additional time to file a response, in part, because VNP's Cross-Claim stated that VNP intended to raise a new issue in its May 22 brief: *i.e.*, the constitutionality of MCL 168.482(3)'s petition republication requirement. CPMC also sought oral argument. On May 18, the panel denied CPMC's motion for additional time, and again refused oral argument.

On May 31, CPMC filed a combined response to VNP's May 22 opening brief and a reply to VNP's May 22 response to CPMC's opening brief. VNP also filed a reply.

One week later, on June 7, 2018, the Court of Appeals panel issued a *per curiam* opinion and order for publication, giving the order immediate effect pursuant to MCR 7.215(F)(2).

In the opinion, the Court of Appeals panel rejected VNP's argument that the petition republication requirement of MCL 168.482(3) was unconstitutional. (6/7/18 COA Op, Ex 1, p. 21 n 51.) It also rejected VNP's argument that substantial compliance with the requirement was

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sufficient (in the face of binding precedent to the contrary in *Protect Our Jobs*.) The opinion and order nonetheless denied CPMC's request for mandamus and granted VNP's cross-claim for mandamus, directing the Board and Secretary to take "all necessary measures to place the proposal on the November 2018 general election ballot." (*Id.* at p. 28.)

III. STANDARD OF REVIEW

This Court reviews for abuse of a discretion a court's decision whether to grant or deny mandamus. *Stand Up for Democracy v Sec'y of State*, 492 Mich 588, 598; 822 NW2d 159 (2012).

The courts are obliged to make the threshold determination of whether an initiative petition meets the constitutional prerequisites for acceptance on the ballot. *Citizens*, 280 Mich App at 283, 291. Once the courts make such a determination, the acts of the Secretary and Board regarding the petition are ministerial in nature, and thus the proper subject of a writ of mandamus. *Id.* at 291-292.

IV. ARGUMENT

A. The Court of Appeals misapplied *Protect Our Jobs*

1. Section 482(3) of the Election Law requires republication of abrogated provisions.

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. See MCL 168.482(3). The petition republication requirement has been Michigan law since 1941.[2] The republication requirement is mandatory—substantial compliance with the requirement will not suffice. *Protect Our Jobs*, 492 Mich at 778 (citing *Stand Up*, 492 Mich at 594).

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[2] See former C.S. 6.685(12), enacted in Public Act 246 of 1941; re-codified at MCL 168.482 in 1955.

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Abrogated provisions are as much a component of a proposed amendment as language being added to the Constitution by a proposal—if petition drafters do not understand what is being abrogated in the existing Constitution, they do not understand their own proposal. In *Carman v Hare*, the Supreme Court explained that the petition republication requirement in Section 482(3) of the Election Law was designed "to inform the Petition-signer, should he sign, of" the effect "an initiated proposal will have on an existing constitutional provision (or provisions) should the proposal receive electoral approval." *Id.* at 454. The Court called this method of dissemination "wholesome and desirable."[3] *Id.*

In *Protect Our Jobs,* the Michigan Supreme Court explained that "abrogation" is a narrow concept. It does not encompass every *distant* or *indirect* consequence of a proposal. *Id.* at 779-780. Instead, 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." *Id.* at 783. That being said, an abrogation is more likely to exist where the existing provision creates a mandatory requirement or uses absolute or exclusive language. *Id.* at 783. Even a small abrogation must be republished—including an abrogation of "discrete subparts, sentences, clauses, or even, potentially, single words" in the existing Constitution. *Id.* at 784.

This latter rule is well-illustrated in *Protect Our Jobs*. The proposal at issue there would have amended the Constitution to authorize eight new casinos in Michigan (the "Casino

[3] The delegates to the 1961-62 Constitutional 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. . . ." 2 Official Record, Constitutional Convention 1961, p. 3200 (Delegate Brown).

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Proposal"). Amongst the multiple changes meant to facilitate the establishment of the casinos was an ancillary requirement that each of the eight casinos receive liquor licenses. *Id.* at 790. Because the existing Constitution confers "*complete* control" on the liquor control commission over liquor licenses (in Const 1963, art 4, § 40), and because such language was absolute, even the *minor* encroachment of constitutionally granting eight liquor licenses was enough to require republication. *Id.* at 790-791. The Court explained that "*any* infringement on that control abrogates that exclusivity; an amendment that contemplates *anything* less than complete control logically renders that power in § 40 inoperative." *Id.* (second emphasis added).

The principle is thus plain: this Court precluded the *entire* Casino Proposal from reaching the ballot because of the abrogation of a single word in the Constitution (*i.e.*, "*complete*"). It made no difference that the liquor control commission would continue to have "complete control" over *all other* liquor licenses in the state. The inquiry ended once this Court determined that an absolute or exclusive piece of language was infringed by a restriction on the liquor control commission.

2. The VNP Proposal would abrogate multiple sections of the existing Constitution.

The same fatal flaw that existed for the Casino Proposal in *Protect Our Jobs* is present in the petition that circulated the VNP Proposal, but multiple times over. That is, four provisions of the existing Constitution would be abrogated by the VNP Proposal and were not republished with the circulated VNP petition:

- Const 1963, art 9, § 17, concerning payments of funds from the state Treasury and requiring appropriations;
- Const 1963, art 11, § 1, restricting all oaths and tests for public office except for the single oath specified;
- Const 1963, art 1, § 5, concerning free speech; and
- Const 1963, art 6, § 13, conferring original jurisdiction on the circuit courts.

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a) The VNP Proposal requires payment of state money without an appropriation, abrogating Const 1963, art 9, § 17, which the petition did not republish.

Article 9, § 17 of the 1963 Constitution commands that "[*n*]*o* money shall be paid out of the state treasury *except* in pursuance of appropriations made *by law*." Const 1963, art 9, § 17 (emphasis added). "By law," refers only to laws adopted by the legislature.[4] Like the "*complete* control" language of Const 1963, art 4, § 40 that was held to be abrogated in *Protect Our Jobs,* the limitation in Const 1963, art 9, § 17 is absolute and mandatory—*i.e.*, "[*n*]*o* money *shall*" be paid without an appropriation.

The VNP Proposal, in art 4, § 6(5), 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 2, art 4 § 6(5) (emphasis added).) While the VNP Proposal requires that the Legislature appropriate 25% of the Secretary's annual budget to pay the costs of the commission, the "shall indemnify" language of proposed art 4, § 6(5) requires the State to pay amounts in *excess* of such an appropriation if the commission's budget exceeds that amount.

The two provisions are plainly irreconcilable under the definition of abrogation in *Protect Our Jobs*. Because Const 1963, art 9, § 17 was not republished with the VNP Proposal petition, the petition violated Section 482(3) of the Election Law, and the VNP Proposal cannot be permitted to reach the ballot.

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

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(1) The Court of Appeals panel ignored the plain language of the VNP Proposal.

VNP argued below with respect to the abrogation of Const 1963, art 9, § 17, that its Proposal did not really mean what it said. That is, the VNP Proposal contemplates, by its very own terms, that the indemnification will occur "*if the legislature does not appropriate* sufficient funds to cover such costs." (VNP Proposal, Ex 2, art 4, § 6(5) (emphasis added).) VNP argued instead that, when the Proposal says that the State would have to indemnify commissioners even "if the legislature does not appropriate sufficient funds," what it really meant was that the Legislature would, in every instance, have to appropriate sufficient funds. And if the Legislature did not, VNP asserted, the *courts* could make it do so by way of a "constitutionally created" cause of action—*i.e.*, that courts could by mandamus require the Legislature to make an appropriation. (VNP May 22 Response Brief, p. 43.) Under this twisted reading of their own proposal, VNP suggested that no indemnification would be necessary without an appropriation. (*Id.*)

Incredibly, though this "cause of action" theory is *not* what the VNP Proposal says *on its face*, the Court of Appeals panel adopted VNP's argument. (6/7/18 COA Op, Ex 1, pp. 25-26.)

Most noteworthy, this portion of the panel's decision contravenes well-settled law that 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)[5] (citing Const 1963, art 9, § 17 and holding that the Court "lacks the power to require the Legislature to appropriate funds"). The Court of Appeals panel stated that it need not settle that issue. (6/7/18

[5] Reh'g on other grounds, 450 Mich 574; 545 NW2d 346 (1996), declined to follow on other grounds, *Studier v Mich Pub Sch Emps Ret Bd*, 472 Mich 642; 698 NW2d 350 (2005). See also *Flynn v Truner*, 99 Mich 96, 97-98; 57 NW 1092 (1894) (holding mandamus will not lie to compel the Auditor General to draw a warrant in excess of the appropriation even for the particular purpose of the appropriation.)

COA Op, Ex 1, p. 26.) But it *is* settled, and CPMC cited ample authority in its Brief before the Court for that principle.

The panel below made an additional error when it asserted that the VNP Proposal could survive as an independent *constitutional* appropriation. The panel cited *Civil Service Commission of Michigan v Auditor General*, 302 Mich 673, 679; 5 NW2d 536 (1942) for the proposition that there can be a "constitutional appropriation apart from any action by the legislature." (6/7/18 COA Op, Ex 1, p. 26.) The panel failed to study the entire case.

The initial appropriation at issue in *Civil Service Commission* arose under a constitutional directive that the *Legislature* appropriate 1% of the aggregate state service annual payroll to pay for the civil service commission's operations—not an automatic indemnification provision like that in the VNP Proposal. The Court further was addressing a question of whether the civil service commission's setting of rates of payment could operate as an automatic appropriation without the need for legislative action. The Court held that it could not. *Id.* at 679-680. In discussing the possibility of an automatic *constitutional* appropriation, this Court looked to several other state constitutions where, *e.g.*, a certain public officer was stated to receive "an annual salary of two thousand five hundred dollars" or "four thousand dollars per annum." *Id.*. The Court in *Civil Service Commission* stated that for there to be a *constitutional* appropriation, the constitutional provision must "name[] a definite sum." *Id.* at 679.

The VNP Proposal includes no definite sum, and places no upward limit on the amount of expenses the State "shall indemnify" on the commissioners' behalf. It requires indemnification of *any* amount incurred by a commissioner that is *not* covered by a legislative appropriation—it is thus wholly unlike the examples given in *Civil Service Commission*.

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In *Civil Service Commission,* immediately after the material cited by the Court of Appeals panel is further analysis that bears directly on the issue here—but which was not cited or recognized by panel:

> "The principle contended for is contrary to the genius of republican government. Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the Legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system. This supreme prerogative of the Legislature, called in question by Charles I, was the issue upon which Parliament went to war with the King, with the result that ultimately the absolute control of Parliament over the public treasury was forever vindicated as a fundamental principle of the British Constitution. The American commonwealths have fallen heirs to this great principle, and the prerogative in question passes to their Legislatures without restriction or diminution, except as provided by their Constitutions, by the simple grant of the legislative power." [*Civil Serv Comm'n*, 302 Mich at 682-683 (quoting *State v Emerson*, 8 A2d 154, 156 (Del 1939)).]

The Court went on:

> "This historical and constitutional division of the powers of government forbids the extension, otherwise than by explicit language or necessary implication, of the powers of one department to another."
>
> We further said that if there is any ambiguity, the doubt should be resolved in favor of the traditional separation of governmental powers. . . . To set up, even in effect, a fourth department of government contravenes . . . the Constitution. . . . [*Id.* at 683-684 (quoting *Wood v State Admin Bd*, 255 Mich 220, 224; 238 NW 16 (1931)).]

Not only do the principles delineated in *Civil Service Commission confirm* that requiring indemnification without legislative action is contrary to the purpose of Const 1963, art 9, § 17, but they explain why the change would be fundamentally disruptive to the core functioning of state government—a principle to which CPMC will return below.

Because Const 1963, art 9, § 17 will be abrogated by the automatic VNP Proposal indemnification of commissioners (the state "shall indemnify") in the absence of an appropriation, republication was required in the petition. The petition was defective under MCL 168.482(3), and thus the petition must be rejected.

b) The VNP Proposal establishes a political test for office, contrary to the existing Oath Clause; the petition failed to republish this section.

The Oath Clause in Michigan's Constitution—Const 1963, art 11, § 1—provides that, apart from the specific oath set forth in that section, "[*n*]*o other* oath, affirmation or any religious test shall be required as a qualification for any office or public trust." Const 1963, art 11, § 1 (emphasis added).

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

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

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The oath and affirmation that persons subjectively[6] deem themselves to affiliate with Republicans, Democrats, or consider themselves to be non-affiliating (*e.g.*, as a Green Party member, Libertarian Party member, or "independent voter") are prerequisites under the VNP Proposal to applicants ultimately sitting on the commission. *An applicant 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 2, art 4, § 6(2)(D)(i).) Indeed, the Secretary cannot select persons who refuse to, under oath, affirm their political affiliation. (*Id.* at art 4, § 6(2)(D)(i), (ii).)

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 party." *Id.* at 395. This Court held that requiring a candidate, under oath,[7] to affiliate with a party as a condition of candidacy "contravenes the constitutional provision" mandating "no other oath, declaration, or test" as a condition for holding office. *Id.* at 396, 399.

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[6] Michigan does not require or even allow voters to register with the State as Republicans, Democrats, or otherwise.

[7] *Harrington* was construing Const 1908, art 16, § 2, which provided that "[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.")

The VNP Proposal petition did not republish the Oath Clause; this defect was fatal under Section 482(3) of the Election Law.

(1) The Court of Appeals panel misapplied *Harrington* and ignored *Dapper*.

The Court of Appeals panel believed *Harrington* to be distinguishable on the basis that "[i]n ruling that the oath was unconstitutional, the Court cited with approval the Attorney General's reasoning that the candidate would be bound by an oath other than the constitutional oath of office." (6/7/18 COA Op, Ex 1, p. 27 (citing *Harrington*, 211 Mich at 397).) The panel stated "the same is not true here, as the oath required by the VNP Proposal relates only to the information on the application and does not bind a candidate once he or she becomes a commissioner." (*Id.*)

The Court of Appeals panel wholly misstated the holding in *Harrington*. Immediately below the referenced reasoning of the Attorney General in *Harrington*, the Supreme Court expressly *rejected* the notion that its holding was limited only to those tests that would continue to apply to a candidate once the candidate took office. The *Harrington* Court stated:

> Where is the logic of saying that, when elected, the officer cannot be subjected to any test oath other than the constitutional oath of office, but before he can be a candidate he must subject himself to a different test oath, or he cannot be a candidate, and is therefore in practical effect, barred from holding the office? [*Harrington*, 211 Mich at 397.]

The Court in *Harrington* next cited, and stated that it was constrained to follow, *Dapper v Smith*, 138 Mich 104; 101 NW 60 (1904). In *Dapper*, the Supreme Court held that an act requiring persons appearing on the ballot to swear an oath merely that the person *desired* to serve in office *also* violated the Oath Clause. *Id.* at 105-106. 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

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well," the Court held that the act impermissibly limited voters' choice and ability to nominate reluctant candidates for office. *Id.*

CPMC cited and discussed *Dapper* in its Response Brief (CPMC May 31 Response Brief, p. 7 n 7). The Court of Appeals panel here ignored *Dapper*. The plain language of *Harrington* and *Dapper,* however, show unequivocally that the basis used by the panel to distinguish *Harrington* was meritless. The Oath Clause is not limited to only oaths or affirmations that apply *during* the official's term of office, but oaths, affirmations, and political tests that apply as a *condition* of being nominated for office as well (and thus including the one in the VNP Proposal).

(2) The Court of Appeals panel overlooked plain language in Supreme Court precedent rejecting its attempt to distinguish *Harrington*.

The panel below cited to *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 465, 510; 242 NW2d 3 (1976) for the precept that the political oath and affirmation required of VNP commissioners (*i.e.*, that they satisfy the Proposal's criteria to be on the commission) are "akin to the affidavits required to file a nominating petition under MCL 168.558" (which concern financial reporting requirements). (6/7/18 COA Op, Ex 1, p. 27.) This is a remarkable oversight by the Court of Appeals panel with respect to the political test imposed by the VNP Proposal on those seeking the position of commissioner. The following quote from the *Advisory Opinion*—which the Court of Appeals panel failed to identify in its decision—demonstrates the fundamental error as to the panel's analysis on this point:

> The oath, affirmation or religious test provision contained in art. 11, s 1 was designed to protect a right which the citizens of our state and nation hold most dear: freedom of belief. While the government may legitimately impose restrictions upon the expression of one's beliefs, it is wholly without power to compel or require a citizen to adopt a belief. Cases involving 'loyalty oaths' fall within that category.

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> Essentially, in both *Dapper* . . . and *Harrington* . . . , the Court upheld the right of belief of the citizen in the face of the government attempt to force the citizen to make a decision. In *Harrington*, the Court held that *the government could not force a political candidate to choose a political philosophy*. In *Dapper*, the potential candidate *could not even be forced to decide if he wanted to be a candidate*. . . . The financial disclosure requirements are not analogous. [*Advisory Opinion*, 396 Mich at 510 (emphasis added).]

There is simply no basis for the panel's conclusion that the political test imposed by the VNP Proposal—*i.e.*, requiring applicants to state their political affiliation as a condition for being selected—is not in direct tension with the Oath Clause. Nor, after studying the 1975 *Advisory Opinion*, can there be any support for the panel's attempt at distinguishing *Harrington* on the basis that the oath in that case continued to apply after the candidate took office.

The Court of Appeals panel simply and unquestionably came to the wrong result. The abrogation is clear and unequivocal, and republication was required. Because the VNP Proposal petition did not republish the Oath Clause, it was defective under MCL 168.482(3), and rejection of the proposal for appearing on the ballot is required.

c) The Free Speech Clause would be abrogated by the VNP Proposal's restriction on the speech of commissioners and their staff.

There is an obvious and irreconcilable conflict between art 1, § 5 of the existing Constitution and art 4, § 11 of the VNP Proposal. The former provides that "[*e*]*very* person may *freely* speak, write, express and publish his views on *all* subjects, being responsible for the abuse of such right." Const 1963, art 1, § 5 (emphasis added). The latter restricts 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 2, art 4, § 6(11).)

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

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- "[*e*]*very* person" will no longer mean *every* person, but will exclude commissioners, their lawyers, their consultants, and their staff;

- "*freely*" will no longer mean "freely," and instead commissioners, lawyers, consultants, and staff will be limited to communications in open meetings and writing;

- "on *all* subjects" will no longer mean "on *all* subjects," but will exclude all redistricting matters (including redistricting matters that are not even before the commission).

The Court of Appeals panel here remarkably held that a limitation on the manner and scope of the speech of *some* persons on *some* topics did not abrogate the absolute language of Const 1963, art 1, § 5:

> Const 1963, art 1, § 5 would remain *fully* operative. Section 6(11) of the VNP Proposal does not restrict *all speech, but does place limits on matters related to official commission work*. Commissioners would retain their right to speak freely, but when speaking on official business, they would be restricted to doing so in an open meeting, in writing, or at a publicly noticed public forum. [(6/7/18 COA Op, Ex 1, p. 25 (emphasis added).)]

This is nonsensical. If all persons cannot speak freely on all matters, but are limited in the manner they can speak, there is an obvious and plain abrogation of the absolute language of art 1, § 5. The Court of Appeals panel may consider this abrogation slight. But, any abrogation, even a slight one, *must* be republished. See *Protect Our Jobs*, 492 Mich at 784, 790-791. In *Protect Our Jobs*, the issuance of eight liquor licenses was enough. *Id.* So too must it be with the curtailment of the manner of speech of commissioners, their staff, and consultants under the VNP Proposal.

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(1) The Court of Appeals panel's adoption of VNP's "abuse" argument answered the wrong question—it did not address whether abrogation occurred, but made improper public policy assessments.

The panel below stated: "[CPMC] argue[s] that the restrictions on the liberty of speech would extend to matters beyond commission matters and they suggest that the restrictions are neither in the public interest nor in keeping with the rights of the public officials. We reject these policy arguments, as the issue before this Court is the alleged abrogation of existing constitutional provisions, not whether the VNP Proposal promotes sound social policy." (6/7/18/ COA Op, Ex 1, p. 25.)

This is an ironic criticism, because the Court of Appeals adopted VNP's argument below that the restriction at issue could be reconciled with art 1, § 5 because the Free Speech Clause states that persons shall be responsible for the "abuse of that right."[8] Public officials, like other citizens, are "entitled to speak as they please on matters vital to them." *Wood v Georgia*, 370 US 375, 389; 82 S Ct 1364; 8 L Ed 2d 569 (1962).[9] In finding that a redistricting commissioner's speech could be restricted under the "abuse" language in the Free Speech Clause, the Panel itself engaged in an analysis on *public policy* grounds rather than with respect to whether an abrogation occurred.

[8] The Free Speech Clause's reference to responsibility for "abuse" is most frequently invoked in *libel* and *defamation* contexts—far afield from the reconciliation applied by the Court of Appeals here. See, e.g., *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 191-192; 398 NW2d 245 (1986) (discussing abuse of free speech in context of defamation case).

[9] See also OAG, 1969, No. 4647, p. 87 (September 29, 1969) (finding members of Michigan Board of Education have protected constitutional right to express their views on controversial subjects in the manner of their choosing).

Regardless, the "abuse" argument is purely tautological—*i.e.*, in the panel's formulation, because the VNP Proposal *says* the commissioners may not discuss redistricting matters, a violation of that edict will necessarily be an abuse of the right once the VNP Proposal is enacted. By that same token, it would not matter what the restriction is—if a constitutional proposal added a restriction (*e.g.*, that judges shall not speak on Wednesdays), it would be an "abuse" to violate it.

The Court of Appeals misapplied *Protect Our Jobs*, and ignored the plain abrogation of Const 1963, art 1, § 5. Because the VNP Proposal petition did not republish an abrogated section of the Constitution as required by MCL 168.482(3), it was defective.

d) The creation of exclusive jurisdiction over redistricting matters in the Supreme Court was a plain abrogation of Const 1963, art 6, § 13.

The VNP Proposal provides 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 2, art 4, § 6(19)). 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." Const 1963, art 6, § 13 (emphasis added). As noted above, "by law" means by legislation.[10]

[10] *Bulger*, 462 Mich at 509.

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The Court of Appeals panel highlighted the "by law" language, but misapplied it. It stated that the "by law" language "illustrates that the framers intended that the circuit courts' jurisdiction would have exceptions." (6/7/18 COA Op, Ex 1, p. 24.) It ignored that those exceptions *must be legislative in nature*, and cannot be conferred by a Constitutional amendment without a resulting abrogation. This is yet another instance of the panel answering the wrong question—*i.e.*, the question is not whether reposing original jurisdiction in another court is *possible* (*e.g.*, by law), but whether the People must be made aware of a change to the absolute grant of original jurisdiction to the circuit court circuit if made via a proposed constitutional amendment. They must be, and they were not. See MCL 168.482(3).

The Court of Appeals panel also *yet again* ignored the abrogation framework of *Protect Our Jobs*, where the mere granting of eight liquor licenses was sufficient to keep the Casino Proposal off the ballot. The Court of Appeals panel instead concluded that since only *one type* of case—*i.e.*, redistricting cases—will be removed from circuit courts' jurisdiction "[i]n all *other* respects, Const 1963, art 6, § 13 remains unaffected." (6/7/18 COA Op, Ex 1, p. 24 (emphasis added).) An abrogation in only *one respect* was apparently not enough for the Court of Appeals panel to identify an abrogation—a plain misapplication of *Protect Our Jobs*. The Court of Appeals panel went on: "The existing constitutional provision has not been eviscerated. No abrogation therefore would occur because the existing provision would neither be negated nor rendered wholly inoperative." (6/7/18 COA Op, Ex 1, p. 24.)

Existing Const 1963, art 6, § 13 specifies that the circuit court shall have original jurisdiction in "*all* matters," not just some. This is absolute language. Since the Court of Appeals panel concluded that "the circuit court will not have jurisdiction over the proposal" under the VNP Proposal, it was also compelled to reach the conclusion that an abrogation occurred. (See 6/7/18 COA Op, Ex 1, p. 24.) It did not, and the panel's decision should be reversed.

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B. The Court of Appeals should be reversed.

As shown above, the Court of Appeals panel repeatedly asked and answered the wrong question. The abrogation analysis is not concerned with whether a particular change is *possible*, but whether the change, when made, would nullify existing language requiring notification to the People. Under *Protect Our Jobs*, even minor infringements on absolute or mandatory language require republication. The panel plainly did not apply this test.

The Court of Appeals panel seems to have exercised inappropriate solicitude for the VNP Proposal's drafters. It states, *e.g.*, that "VNP should not be penalized for including specific details within its proposal, particularly where many of the proposed additions are merely operational details." (6/7/18 COA Op, Ex 1, p. 20.) This sensibility is contrary to the purpose of the republication requirement—republication is not a punishment, but a measure designed to assure that the public understands how their core governing document is being altered. Further, many of the "operational details" the panel referenced are actually major changes to the normal operation of state government, of which the public must be made aware.

The VNP Proposal's abrogation of the appropriation requirement in Const 1963, art 9, § 17, for example, leads to a potentially catastrophic situation:

- The redistricting commission will have an unlimited budget;
- The State must indemnify—*i.e.*, reimburse—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 2, art 4, § 6(3).)

The abrogation of Const 1963, art 9, § 17 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 (and even the citizens since the VNP Proposal precludes challenges by referendum or

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initiative) *by design*. Whether or not this is good policy is not the question—but unquestionably, the public should be made aware that this important restriction is being abrogated.

For a typical amendment—*i.e.,* a mere "correction of detail"[11]—it should not be difficult to identify abrogated sections. 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 massive statutory detail[12] on numerous items concerning the operation of the proposed redistricting commission. In including such detail, the Proposal's drafters abrogated multiple sections, and thus its drafters were required to republish those multiple sections with the petition. MCL 168.482(3).

This Court should reverse the Court of Appeals panel decision and should also order rejection of the VNP petition by the Secretary and Board.

C. The Court of Appeals misapplied *Citizens, Laing, and Pontiac* in holding the VNP Proposal was not a revision and could be submitted as an initiated amendment.

1. The Constitution creates a clear distinction between an initiated "amendment" and a "revision."

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

The Constitution provides three methods by which its words may be changed:

- The Legislature may propose an "amendment" and present it to the electors. Const 1963, art 12, § 1;
- An "amendment" may be proposed by petition and approved by vote of the electors. Const 1963, art 12, § 2; or

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

[12] As discussed further below, the VNP Proposal is not really an amendment but a revision, requiring a Constitutional Convention. It is thus no surprise that the VNP Proposal abrogates a number of the sections of the existing Constitution.

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- A “revision” of the Constitution may be made through a constitutional convention, with subsequent approval by the voters of a new constitution or changes referred by the convention. Const 1963, art 12, § 3.

An initiated amendment under Const 1963, art 12, § 2 stands apart from the other two methods in one important regard: it is not drafted by the People’s representatives in the Legislature or in a constitutional convention, but by private interests. There is no official forum by which an initiative must be refined before it is submitted to the voters, and apart from a 100-word statement of purpose and the circulation of a petition, there are no formal means to educate voters as to its effect on the structures of government. As Convention Vice President Hutchinson explained on the floor of the 1961-1962 Convention:

> When you have an initiative 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. [2 Official Record, Constitutional Convention 1961, p. 2463 (Convention Vice President, J. Edward Hutchinson).]

With study and debate, fundamental changes can be ironed out and fit within the framework of the existing Constitution in a purposeful manner. Conventions also have the added benefit of disseminating information to the People concerning proposed, fundamental changes. That is, conventions are empowered to “explain and disseminate information about the proposed” revision to the public. Const 1963, art 12, § 3. For example, lengthy “Addresses to the People” were published for both the 1908 and 1963 Conventions. Voters do not have the benefit of similar official explanatory materials when considering whether to ratify an initiated amendment. They only have the petition itself to assess what changes are being made to their constitution. And this

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fact underscores why constitutional provisions being abrogated must be republished in the petition the People are asked to sign and support.

The language of Michigan's Constitution supports the concept that an "amendment" should thus be only a short correction with a narrow purpose. Const 1963, art 12, § 2 uses the word "amendment" in the singular ten times; it requires that each "ballot . . . contain a statement of the *purpose* of the proposed amendment." Const 1963, art 12, § 2 (emphasis added). State law similarly confirms that an "amendment" is to be limited in scope. Unlike revisions proposed by constitutional conventions, the purpose of a constitutional *amendment*, under state law, must be susceptible to summarization in 100 words. See Const 1963, art 12, § 2; MCL 168.32(2).[13]

2. The Constitution does not allow fundamental changes to occur by way of initiated amendments.

It is plain under longstanding Michigan law that what may be achieved by an "amendment" under Const 1963, art 12, § 2, is different from what may be achieved by a "revision" under Const 1963, art 12, § 3. Most recently, the Court of Appeals in *Citizens* plainly held that a "revision" under Const 1963, art 12, § 3, exists where a proposal makes a change of such magnitude or significance that it would work a "fundamental change" to the structure of state government. 280

[13] The VNP Proposal makes a multitude of changes—albeit ones that are purportedly in support of the primary goal of establishing an independent redistricting commission. Nonetheless, knowledge of this multitude of ancillary changes—many of which are fundamentally disruptive to the structure of state government—is essential for voters' to understand the consequences of their approval. Summary of these changes is not feasible in 100 words in a way that will apprise the voters of the considerable effects of the VNP Proposal as described above. In *Citizens*, three justices of the Michigan Supreme Court would have kept the sprawling proposal there at issue from the ballot on the *independent* basis that it was not susceptible to summary in 100 words. See 482 Mich at 960 (Cavanagh, Weaver, and Markman, JJ., concurring.) These justices noted that the 100 word requirement in Const 1963, art 12, § 2 "establishes a clear limitation on the scope of constitutional amendments under § 2." *Id.* The VNP Proposal is similarly not susceptible to summary in 100 words in any manner that would meaningfully apprise voters of its purposes other than at such a high level of abstraction that the summary essentially would be meaningless.

Mich App at 296 (quotations omitted). 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.* (quotations omitted)

The *Citizens* Court applied a two-prong qualitative/quantitative test in assessing whether the proposal before it was susceptible to submission as an initiated amendment, or would require a convention. There at issue was the "Reform Michigan Government Now!" Proposal (the "RMGN Proposal"), which would have amended 4 articles and 24 sections of the existing Constitution. *Id*. at 305. Given the quantity of words that would be changed as well as the fundamental nature of the multiple changes in the RMGN Proposal, the *Citizens* Court ordered that the RMGN Proposal be prevented from reaching the ballot. *Id.* at 305-308.

The Court in *Citizens* did not invent the framework it used for analyzing the RMGN Proposal. Its decision was based on this 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 297 (citing *Laing*, 259 Mich at 217, 221-222). It also expressly relied on the Supreme Court's decision in *Pontiac School District 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

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with, or modifies, the operation of government. [*Citizens*, 280 Mich App at 298.]

3. The Court of Appeals panel failed to meaningfully assess the qualitative prong because it incorrectly assumed that multiple changes in service of a single goal could not be a revision.

The panel here claimed that it proceeded to review the VNP Proposal while mindful that the holding in *Citizens* was not "to prevent the citizens from voting on a proposal simply because that proposal is allegedly too complex or too confusing." (6/7/18 COA Op, Ex 1, p. 17 (quotations omitted).) That is not the test CPMC set forth below or advocates here. Nor does CPMC make any kind of "single object" challenge. Because the Court of Appeals panel mistakenly framed the issue and CPMC's argument in this fashion, it missed the fact that the key question is not whether a change is complex, but whether the change is *fundamental*.

As acknowledged by *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 335, 342-343; 350-51; 801 P2d 1077 (1990), in which the court precluded submission of a single-purpose, single-article proposed constitutional amendment[14] 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 would have made fundamental changes to the California judiciary; it thus was

[14] Like the Michigan Constitution, the California Constitution differentiates between "amendments," which may be submitted by initiative petitions pursuant to Cal Const, art XVIII, § 3, and "revisions," which may only be accomplished by calling a constitutional convention pursuant to Cal Const, art XVIII, § 2.

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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 Cal 3d 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.").

a) The VNP Proposal makes multiple fundamental changes.

The VNP Proposal makes multiple "fundamental" changes that go well beyond "mere corrections of detail." In seeking to establish an "independent" commission, the proposal has departed from the checks and balances that apply to the three branches in a constitutional democracy. By design, the VNP Proposal seeks to insulate the commission from any meaningful limitation on its power, and each such change is thus a *fundamental* one:

- **No final judicial remedy.** The Proposal eliminates the ability of the courts to adopt a redistricting plan as a remedy even of last resort. (VNP Proposal, Ex 2, art 4, § 6(19)). Michigan's courts have routinely been engaged in the drafting and implementation of redistricting plans—the Supreme Court twice has drawn the redistricting plans used in Michigan in the last 40 years. See *In re Apportionment of State Legislature-1982*, 413 Mich 96; 321 NW2d 565 (1982); *In re Apportionment of State Legislature-1992*, 439 Mich 251; 483 NW2d 52 (1992).

- **Unlimited budget.** The Proposal gives an unlimited budget, without the need for an appropriation, to the commission and commissioners, requiring that the state "shall indemnify" each for losses incurred. (See VNP Proposal, Ex 2, art 4, § 6(5).) The Governor, Legislature, and Courts cannot limit the budget of the commission.

- **No removal.** The Governor, Legislature, and Courts cannot remove commissioners. Pursuant to art 4, § 6(3) of the VNP Proposal, absent death, infirmity, voluntary resignation, or a commissioner doing something that disqualifies a commissioner *after-the-fact* of appointment under proposed art 4, § 6(1), there are only two mechanisms for removal of a commissioner:

    - 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

    - 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 2, art 4, § 6(3)(D).]

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- **Unelected officials.** 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.

- **Political tests.** 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. (VNP Proposal, Ex 2, art 4, § 6(2)(A)(iii).)

- **No initiated laws.** The Proposal also eliminates the People's right to propose, enact, and reject redistricting plans under Const 1963, art 2, § 9 (as the power of initiated laws extends only to "laws which the legislature may enact").

The Court of Appeals panel contrasted the VNP Proposal with the RMGN Proposal on the basis that the RMGN Proposal "would have reorganized the operation of the whole state government," concluding that "[t]his case therefore is quickly distinguishable from the much broader RMGN proposal." (6/7/18 COA Op, Ex 1, p. 17.) But this conclusion missed the number of fundamental changes the VNP Proposal works in service of its goal of commission independence—*i.e.*, the VNP Proposal *does* depart from the core underpinning of state government in a number of ways, creating a novel, unchecked entity wholly unlike anything that has come before. Merely concluding that VNP may not be as far reaching as RMGN in the fundamental changes it would make is not a sufficient legal analysis of the "amendment or revision" question under Michigan precedent.

Just because the VNP Proposal's changes are in furtherance of a larger goal of reforming redistricting in Michigan does not mean that they are not multifarious or fundamental in nature. No other body in Michigan government operates in the way the VNP Commission will operate. The members of no other body are as insulated from removal, budgeting limitations, or the electorate. The autonomous boards of the University of Michigan and Michigan State University, for example, are made up of trustees and directors who are elected by the public; university budgets are subject to legislative appropriation. The members of this Court are subject to statewide election

and the courts are subject to state law. The VNP Commission, in contrast, stands alone. Though nominally part of the "Legislature" under the Proposal, the VNP commission exists outside of existing state government. Only the Secretary—a single, partisan-elected official—has any control over the selection of the commission. The commission further blends authorities that presently exist[15] in the legislative, judicial, and executive branches as a sort of "superagency," but again, without the normal checks and balances that apply to those branches.

b) The departure from mandatory redistricting criteria is a fundamental change and will disrupt the operation of state government.

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 elimination of mandatory redistricting criteria. The VNP Proposal disrupts the very means by which the People's representatives are chosen—nothing is more fundamental to the entire legislative process.[16] In *Citizens*, the Court of Appeals referred to authority over the means of redistricting as affecting the "'foundation power' of government." *Citizens*, 280 Mich App at 306. The Court explained, in

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[15] The creation of a new, independent agency—standing fully outside of the control of the governor or the legislature—is further contrary to one of the primary policy goals of the 1961-62 Constitutional Convention which was the reduction of autonomous state agencies. By the late 1950s, the number of government agencies and questions over the location of executive control had grown unwieldy, and there was little central control over many of them. The executive branch, e.g., contained some 120 agencies, many of which exercised unsupervised control. Following a 1959 cash crisis and payless payday, the delegates to the Convention proposed new measures for the streamlining of government by reducing such agencies to no more than 20 and for assuring centralized oversight. See *House Speaker v Governor,* 443 Mich 560, 562-563; 506 NW2d 190 (1993). The VNP Proposal reverses these fundamental policy reforms made in the 1963 Constitution. It creates a new fiefdom with no ability of the voters to reign in its powers by ordinary political means.

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

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evaluating the portion of the RMGN Proposal that would have created a materially similar commission to that proposed here:

> [T]he proposal strips the Legislature of any authority to propose and enact a legislative redistricting plan. It abrogates a portion of the judicial [sic, legislative] power by giving a new executive branch redistricting commission authority to conduct legislative redistricting. It then removes from the judicial branch the power of judicial review over the new commission's actions. We agree with the Attorney General that the proposal affects the "foundation power" of government by "wresting from" the legislative branch and the judicial branch any authority over redistricting and consolidating that power in the executive branch, albeit in a new independent agency with plenary authority over redistricting. [*Citizens*, 280 Mich App at 306.]

The Court of Appeals panel here, paradoxically, held that "the public policy issues raised by the proposal's non-adherence to the county framework are not the province of this branch of government at this stage of the initiative petition process." (6/7/18 COA Op, Ex 1, p. 20.) In characterizing and avoiding a "public policy" question, the Court avoided the real question before it as well—*i.e.*, whether the change VNP proposed is a "fundamental" one.

(1) Mandatory criteria are essential to assure orderly and fair redistricting.

When the Supreme Court invalidated the redistricting commission established by current Const 1963, art 4, § 6 in 1982, it did so on the basis that just *one* of the mandatory criteria specified—*i.e.*, a weighted land area/population formula—had been invalidated by federal law. See *In re Apportionment of State Legislature—1982*, 413 Mich 96, 109; 321 NW2d 565 (1982) (citing *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964)). In finding the functioning of the commission itself to be non-severable from the unconstitutional criterion, the Court stated as follows:

> The invalidity here declared goes to the heart of the political process in a constitutional democracy. . . .

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> A constitutional democracy cannot exist . . . without a legislature that represents the people, freely and popularly elected in accordance with a process on which they have agreed. . . .
>
> The Legislature has the ultimate authority to make the laws by which the people are governed. *Any change in the means by which the members of the Legislature are chosen is a fundamental matter*.
>
> ***
>
> Some voters might view with favor an apportionment commission that is governed by neutral principles, known in advance, and which redistricts and reapportions the state *in a largely mechanical manner* with little partisan maneuvering.
>
> ***
>
> The notion that the people of this state confided to an apportionment commission without apportionment rules absolute discretion to reapportion the Legislature and thereby reallocate political power in this state limited only by human ingenuity and by no federal constitutional standard that a computer cannot circumvent is unthinkable. [*Id.* at 136-139 (emphasis added).]

In short, binding criteria are essential to the orderly operation of redistricting, and to *avoiding* gerrymandering and thus to avoiding the development of an unfair partisan advantage. This is especially so if redistricting is done by an unelected administrative agency such as the one that would be created by the VNP Proposal. District maps drawn by the Legislature and the Courts under the current Constitution are subject to the mandate that district lines follow county lines and the lines of political subdivisions, as well as the mandatory requirements that districts be compact and contiguous by land. See *In re Apportionment of Wayne Cnty Bd of Comm'rs—1982*, 413 Mich 224, 253; 321 NW2d 615 (1982).

These criteria are moreover as old as the State itself. See *In re Apportionment of State Legislature-1982*, 413 Mich at 129-130 n 18. "Michigan's adherence to the principle that county and township lines should be preserved in the creation of election districts *dates back to the formation of the Northwest Territory on July 13, 1787,* and has been voiced in every Michigan

constitution adopted since that date." *Id.* (citing, *inter alia*, Northwest Ordinance 1787, § 9; Const 1835, art 4, § 4; Const 1835, art 4, § 6; Const 1850, art 4, § 2; Const 1850, art 4, § 3; Const 1908, art 5, § 2; Const 1908, art 5, § 3) (emphasis added).

The framers of the current 1963 Constitution also emphasized the primary importance of following county and municipal lines. *Id.* at 131 n 19. When the Supreme Court adopted the integrity of county and municipal lines as the Court's *own* primary goal for drafting the 1982 apportionment plan, it explained, quoting delegate W. F. Hanna, the benefits of following county and municipal lines, including minimizing the potential for gerrymandering:

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

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

If the VNP Proposal is adopted, the commission need not follow (but merely must "consider") county or township lines. Compactness and following boundary lines of political subdivisions will be subordinated to consideration of "communities of interest" and "political fairness," which are no standards at all, but instead, subjective measures that will free the commission to draw whatever district plans it chooses. Because district lines will not follow local unit lines, local clerks preparing ballots will have to deal with districts that cross multiple jurisdictions, and print a wide variety of ballots for voters who, though they reside in the same city, fall into multiple House, Senate, or Congressional districts. While this is a policy issue in

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one sense, it is also a factor in assessing how *fundamental* and *disruptive* to the existing operation of state government the VNP Proposal's changes will be.

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. In 1982, this Court said the apportionment commission created by the 1963 Constitution could not be allowed to operate without the detailed apportionment rules that had become unconstitutional under federal law. Like that commission, the citizens redistricting commission that would be created by the VNP Proposal would be allowed to operate without binding apportionment criteria, thus duplicating the situation described by this Court as "unthinkable." 413 Mich at 136-139.

The Court in *Citizens*, as noted, called a change in redistricting methodology one that affected the "foundation power" of government. *Citizens*, 280 Mich App at 306; see also *In re Apportionment of State Legislature*—1982, 413 Mich at 136-137 ("Any change in the means by which members of the Legislature are chosen is a fundamental matter.") Nothing is more fundamental—or more likely to summon the necessity of the careful study, deliberation, and refinement of a constitutional convention before submission to the voters for adoption—than this.

(2) The Court of Appeals panel committed a key error in discussing *Citizens*.

As set forth above, the VNP Proposal at multiple points prohibits legislative control over the commission. Not only does the Legislature have no say in the commission's budget, but the Legislature cannot remove commissioners and has no say in how commissioners are chosen. (See VNP Proposal, Ex 2, art 4, § 6(22).)

In addressing the quotation noted above from *Citizens*, in which the panel remarked that the establishment of a redistricting commission under the RMGN Proposal "affects the 'foundation

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power' of government" and "'wrest[s] from' the legislative branch and the judicial branch any authority over redistricting," the Court of Appeals panel here made a key error. (6/7/18, COA Op, Ex 1, pp. 18-19 (quotations omitted).) It stated that the VNP Proposal "does not wrest complete power from the legislative branch . . . where the legislature retains power to veto potential commission members." (6/7/18 COA Op, Ex 1, pp. 19.)

There is no legislative veto over commission members in the VNP Proposal. Under proposed art 4, § 6(2)(E) of the VNP Proposal, the majority and minority leaders in each legislative chamber may "strike" up to five applicants from the Secretary's chosen pool of 200 applicants. This has the effect of reducing the applicant pool by 10%—but this is by no means a "veto" of a proposed commissioner by the legislature.

For the Court of Appeals panel to characterize the five "strikes" from the pool of 200 as being a "veto"—especially one that maintains meaningful legislative control over the commission—reveals that the panel misunderstood the VNP Proposal. Mistakenly believing there to be a "veto" over proposed members may well have led the Court of Appeals to the wrong conclusion—especially since it led the Court to distinguish VNP's redistricting commission from that contained in the RMGN Proposal based on the greater size of the latter. Legally, the two are materially the same—and both plainly affect the "foundation power" of government.

The panel also erred in characterizing the VNP Commission as being a slightly modified replication of the commission created in Const 1963, art 4, § 6 that was held unconstitutional by this Court. (In so saying, the panel did not appear to understand that this Court had held it unconstitutional or why this Court had done so.) The differences are too great to call the new commission a mere modification of the old. For just three salient examples:

- The old commission members were appointed *by the state parties*, assuring some semblance of partisan balance. The new commission will be made up based on subjective assessments of applicants as to whether they "affiliate" with a party or

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not, and based on the "demographic" factors selected by the partisan-elected Secretary of State who will choose all of the members of the new commission. This assures no partisan balance, especially since Michigan does not require or allow voters to register as belonging to a political party, and since "non-affiliating" voters may include, e.g., members of the Green Party, Libertarian Party, Socialist Party, or other third parties.

- The old commission had mandatory and formulaic criteria that limited its discretion in drawing maps. The fact that one of those was held to be unconstitutional was why this Court struck down the entirety: there were no longer complete mandatory criteria. *In re Apportionment of State Legislature—1982,* 413 Mich at 136-139. The new commission—other than federal law—has only a nebulous list of criteria, commencing with "communities of interest" and "political fairness," which are not binding standards in any formulation.

- The old commission was subject to legislative control with respect to its budget. It was not insulated from the other three branches to nearly the degree of the new commission in the VNP Proposal.

Because the Court of Appeals panel did not focus on these key changes in its analysis, and instead considered the VNP Proposal's commission to be a continuation of the old, it failed to apply the correct standard under the *qualitative* prong. The question again is not whether the proposed changes are *possible*, but whether they are *fundamental,* and whether they affect the core structures of Michigan's government. The VNP Proposal plainly does, and just as plainly requires refinement and study at a convention before submission to the voters.

c) The change to the role of the Courts in redistricting is another fundamental change that should be studied by a convention.

The removal of authority of this Court to draw redistricting plans is another fundamental change that will disrupt the structure and operation of government under the existing Constitution. As noted above, this Court has had to adopt plans following legislative impasses on redistricting in two of the four census cycles since 1980.

The VNP Proposal compels this Court, in an original action, to "review a challenge to any plan adopted by the commission," but removes the possibility that this Court can afford final relief

on its own, since "[i]n no event shall any body, except the . . . commission . . . , promulgate and adopt a redistricting plan or plans for this state." (VNP Proposal, Ex 2, art 4, § 6(19).) Because this Court must entertain, by right, every challenge to commission plans and cannot draw a map itself, the Court can be assured that, in every decennial cycle, it will have to entertain a multitude of original suits while acting as a trial court. The Court may direct commissioners again and again to draft replacement plans in the same cycle, and where the commission fails, this Court still may not act, even as a remedy, to create a plan.

When the commission reaches an impasse, fails to act, or repeatedly acts in a manner inconsistent with the state or federal law, Federal courts, of necessity, will end up drawing state maps. *Growe v. Emison*, 507 US 25, 36-37; 113 S Ct 1075; 122 L Ed 2d 388 (1993) ("[T]he District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries."). This paralysis, and the resulting intervention by Federal courts, is another fundamental change.

A convention of delegates, studying the issue and refining the purposes of a commission, may have seen the danger in depriving this Court of an ultimate remedy with respect to redistricting. Changes of this nature should not be susceptible to submission to the voters as initiated amendments for this reason.

4. The quantitative prong shows that the VNP Proposal is not a proper subject for an amendment.

In any framing, the VNP Proposal is massive. It would impact all three branches of government, changing the articles governing the legislative judicial, and executive branches, repealing or altering 11 existing sections. While the VNP proposal does not add new sections, it inserts fully 22 new *subsections* in Const 1963, art 4, § 6.

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It would further change approximately 4,834 words in the Constitution—more words than comprise the entire length of the United States Constitution as originally ratified,[17] and more than 25% of the Michigan Constitution of 1963 as originally ratified.[18] 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' COA Brief in Support., 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.

[17] The United States Constitution as originally ratified (i.e., without counting subsequent amendments), was 4,543 words.

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

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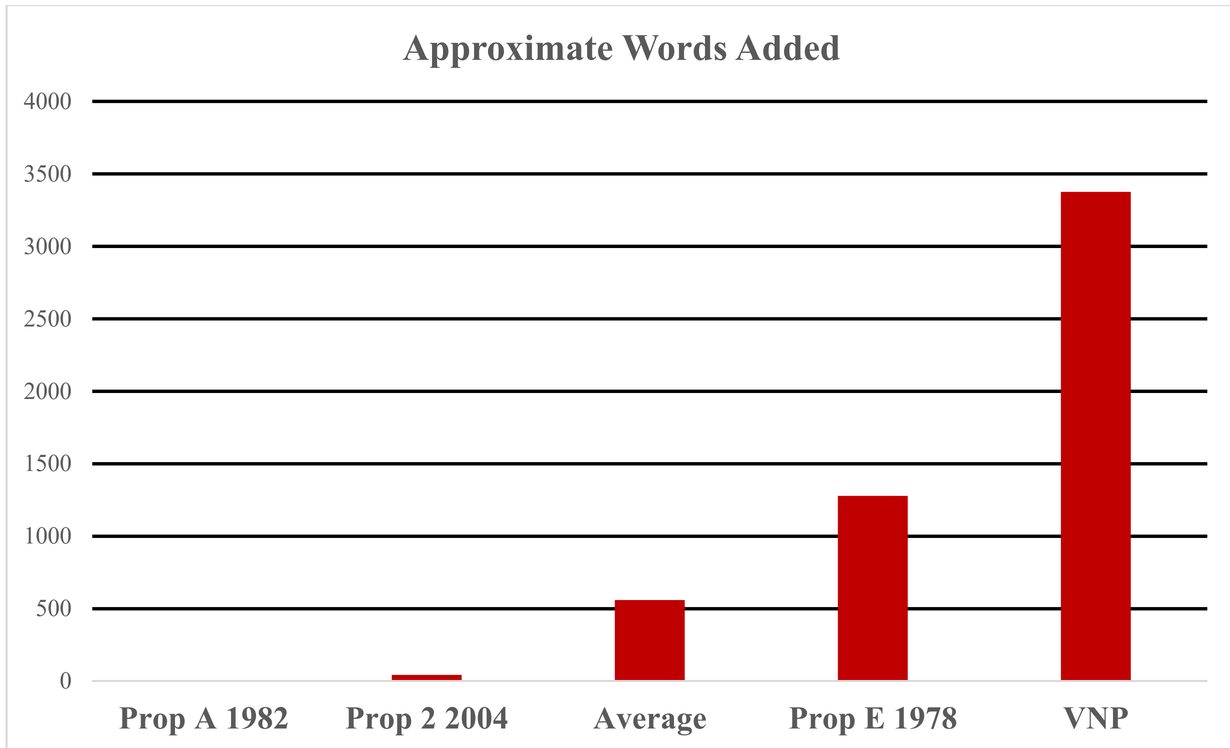

Proposal E of 1978 is the largest one-time amendment to the 1963 Constitution made thus far, and added approximately 1,278 words. Unlike VNP—which amends three sections—Proposal E moreover made amendments to only a single article of the Constitution—article 9, concerning taxation. As shown above, VNP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

The VNP Proposal is in a class all its own. The Court of Appeals dedicated but a single paragraph to addressing the quantitative prong, concluding only that "VNP should not be penalized for including specific details." (6/7/18 COA Op, Ex 1 p. 20.) That is not the test of the quantitative prong. The question is whether the size of the proposal is so great—its volume so massive—that the proposal exceeds the scope of being a mere "correction of detail." *Citizens*, 280 Mich App at 296.

The quantitative prong plainly establishes VNP's ineligibility for submission as an initiated amendment. The Court of Appeals did not seek to balance the quantitative and qualitative factors at all—given VNP's unprecedented size, it should not have been hard for it exceed the qualitative

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portion of the test. The Court of Appeals should be reversed, and CPMC's request for mandamus should be granted.

V. RELIEF REQUESTED

Plaintiffs-Appellants CPMC respectfully request that this Court:

A. Peremptorily reverse the decision of the Court of Appeals and issue a writ of mandamus directing the Secretary and Board to reject the VNP Proposal and to take no further action to place it on the 2018 General Election ballot;

B. Alternatively, grant the application for leave to appeal and thereafter issue a writ of mandamus directing the Secretary and Board to reject the VNP Proposal and to take no further action to place it on the 2018 General Election ballot;

C. Grant such other relief as equity requires.

Respectfully submitted,

DICKINSON WRIGHT PLLC

Dated: June 11, 2018

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