STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs-Appellants,

v

Supreme Court No. 157925

Court of Appeals No. 343517

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 CORP., D/B/A VOTERS NOT POLITICIANS, KATHRYN A. FAHEY, WILLIAM R. BOBIER, AND DAVIA C. DOWNEY,

Intervening Defendants/Cross- Plaintiffs-Appellees.
_____/

BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF VOTERS NOT POLITICIANS

Mark Granzotto (P31492)
2684 11 Mile Rd Ste. 100
Berkley, MI 48072-3050
(248) 546-4649
mg@granzottolaw.com

Paul M. Smith
Jacob H. Kenswil
Campaign Legal Center
1411 K Street NW,
Ste. 1400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org
jkenswil@campaignlegal.org

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities **Page(s)**

INTEREST OF AMICUS CURIAE

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization that works to protect and strengthen the U.S. democratic process across all levels of government by informing public policy and participating in state and federal litigation throughout the nation regarding voting rights. CLC has served as counsel or amicus curiae in numerous voting rights and redistricting cases at the state and federal levels. CLC works to ensure that all eligible voters, particularly those from traditionally underrepresented or underserved communities, have the opportunity and information they need to exercise their right to vote. CLC has a demonstrated interest in voting rights and redistricting law.

ARGUMENT

As Voters Not Politicians ("VNP") correctly argues in its brief, this ballot initiative is a properly submitted amendment to the Constitution of Michigan. This brief does not repeat those arguments. Rather, it seeks to place them in the context of the ongoing threat of partisan gerrymandering to the democratic process, and the fact that the use of an independent body with specific redistricting criteria can all but guarantee that fair maps will be produced.

The recent explosion of gerrymandering wells from the same spring as many changes in our society: rapidly evolving information technology combined with the highest rates of political polarization in a generation. While map drawers formerly relied on pen, paper, and political intuition in any attempt to draw a partisan gerrymander, they now have at their beck and call real-time mapping programs that display all the characteristics of districts as they draw them. Map drawers use this technology to see the proportion of people by race, income, age, and voting history. Most importantly, using voting returns from past elections, they can see what the districts' partisan performance will be. In an age when voters rarely change their minds on which party they support, the predicted partisan performance of these districts tends to remain throughout the following decade, resulting in not only extreme, but also durable gerrymanders.

Technological innovation and increased polarization have, after the last round of redistricting, resulted in the most biased maps in American history. But even this high-tech approach will probably soon seem outmoded. Political operatives collect

massive troves of data on every voter in the nation, computer mapping is becoming procedural (such that computers can create thousands of random maps in a matter of minutes), and computer scientists are constantly creating new ways for computers to learn and solve problems on their own. Computers are able to automatically generate near-perfect gerrymanders quickly and efficiently.

There is a way out. Contrary to Plaintiffs' assertions, there are accepted measures of partisan fairness. Courts have accepted these measures, and groups around the country are making these measures a part of their proposals for independent redistricting commissions. VNP's proposal similarly asks that a commission use such measures. Use of an independent commission, such as the one proposed, which employs the latest innovation to ensure fairness rather than to further political ends, is a simple, sensible, and democratic way out of this morass.

I. Changes in technology are increasing the threat of partisan gerrymandering.

Until recently, partisan gerrymandering was relatively unsophisticated; districts had to be created by hand, with paper maps and protractors. David Daley, Ratf***ked: The True Story Behind the Secret Plan to Steal America's Democracy 51–60 (2016). To draw conclusions about the partisan effect of a particular districting plan, map drawers had to review electoral results and demographic data manually, allowing for only rough predictions about potential outcomes. *Id.*

Today, map drawers have at their fingertips a wealth of data that allows them to predict the performance of a particular districting plan with pinpoint accuracy, all

accessible and manipulable with only a few keystrokes at a computer. Using sophisticated mapping software, complex statistical models, and algorithms that allow for the rapid creation of multiple district plans tailored to particular criteria, patterns, and desired outcomes, map drawers can determine with confidence how a particular plan will perform for the duration of an entire decennial redistricting period. *Id.*; *see also Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment) ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months.").

These technological advances allow map-drawers to target voters with surgical precision. *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). By drilling down to "smaller and more complicated geographic units," and analyzing the voters who live in those units on the basis of their demographics, voting history, and party affiliation, redistricting professionals are able to move individual voters into and out of districts in order to achieve partisan ends. *See* Royce Crocker, Cong. Research Serv., R42831, Congressional Redistricting: An Overview 2 (2012). Unlike the blunt instruments used to gerrymander districts in the past, today's map-drawers are armed with precision scalpels, allowing them to delicately transplant voters from one district to another to maximize their political gain.

The results of some of the most extreme partisan gerrymanders from the current redistricting cycle demonstrate the success with which map drawers are able to predict the electoral outcomes of a particular districting plan. After its 2011

congressional plan was struck down as a racial gerrymander in 2016, the Republican-controlled North Carolina Legislature was ordered to redraw its congressional districts for that year's elections. The legislators in charge of the redistricting process explicitly set out to draw a map that maximized their political advantage, with ten Republican controlled and three Democratic-controlled districts. See *Common Cause v. Rucho*, 240 F. Supp. 3d 376, 380 (M.D.N.C. 2017). As a result, and precisely as predicted by the proponents of the map, North Carolina elected ten Republican and three Democratic congressional representatives in November 2016. *Id.*

In 2011, the Republican-controlled legislature in Wisconsin adopted a state assembly district plan drawn to maximize Republican political advantage. The political operatives who drew the map predicted that with an expected vote share of only 48.6%, the map would elect Republicans to 59 out of 99 assembly seats. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 898 (W.D. Wis. 2016). In 2012, Republicans succeeded in winning nearly 61% of the seats with 48.6% of the vote share, and when their vote share improved to 52% in 2014, their seat share increased to nearly 64%. *Id.* In other words, Republicans controlled almost two-thirds of the seats, despite the fact that Democrats had won almost 50% of the votes. *Id.* When the Wisconsin map was challenged as a partisan gerrymander, the court found that "[i]t [was] clear that the drafters got what they intended to get." *Id.* The success of these gerrymanders, created by the advanced technological methods described above, demonstrates the effectiveness of drawing district lines to ensure partisan advantage. At both the state legislative and congressional levels, the plans now in effect have exhibited the worst

asymmetries in modern times. *See Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan gerrymanders on record."); Anthony J. McGann *et al.*, Gerrymandering in America 4-5, 97-98 (2016).

This problem is only likely to get worse. Computer technology increases its brute strength at an ever increasing rate. *See* M. Mitchell Waldrop, *The Chips Are Down for Moore's Law*, Nature (Feb. 9, 2016), https://www.nature.com/news/the-chips-are-down-for-moore-s-law-1.19338 (discussing Moore's Law, the observation that for the past 50 years computer speeds have doubled about every two years). Further, new forms of gerrymandering are being created. Traditionally, gerrymandering is done through a process of cracking and packing —that is, breaking up a party's voters between many districts in which they lose by slim margins and packing the remainder into a few safe seats. John N. Friedman and Richard T. Holden propose, however, that instead of the traditional approach, map drawers match voters with varying degrees of partisanship intensity and likelihood of voting against each other to perfectly cancel each other out, while adding just a bare minimum of partisans into a district to maintain control. John N. Friedman & Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, But Never Crack*, 98 Am. Econ. Rev. 113, 115 (2008). This form of gerrymandering requires a far higher degree of information on voters, but its proponents claim that given this information, it is mathematically provable that this form of gerrymandering will maximize partisan advantage. *Id.*

Fortunately for prospective gerrymanderers, this information is being gathered. Political actors have long had the incentive to find and analyze information on prospective voters for use in their political operations. Large vendors have been creating individual profiles, collecting not just information on voting history and partisan affiliation, but also from commercial sources on everything from credit scores and buying habits to news consumed and websites visited. *See* David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. Econ. Persp. 51 (2014); Chris Evans, *It's the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age*, 13 Minn. J.L., Sci. & Tech. 867, 883–888 (2012). These data sets "may be the largest concentration of unregulated personal information in the U.S. today." Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 Wis. L. Rev. 861, 881 (2014). Gerrymanderers can take advantage of these profiles using the same complex data analytic and machine learning techniques advertisers use to create a very accurate picture of whether and for whom a citizen will vote . Further, unlike voting information used in prior rounds of gerrymandering that was only available at precinct level, this information regards each individual voter and can be tied to their home address. This will allow maps to be drawn with pinpoint precision.

The combination of this data and the increasing power of computers will soon make the last round of computer-aided maps seem quaint. Computer programs have already been devised to automatically produce and analyze hundreds or thousands of maps that follow states' prescribed limits. *See* Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. 1 (2017) (using computers to

generate 200 plans comporting with redistricting rules to analyze Wisconsin's State House map); Expert Report of Jowei Chen, League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282 (Pa. 2018) (No. 261 MD 2017) (using computers to generate 1,000 plans comporting with redistricting rules to analyze Pennsylvania's congressional map). Programs of this type could be used, along with the detailed personal data, to create high granularity maps that are focused on eking out the highest degree of partisan advantage with the greatest degree of certainty. Machine learning may allow computers to automatically iterate on these plans, continually bettering them until the plans are as close to a perfect gerrymander as possible. *See* Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 Geo. L.J. 1147, 1156-57 (2017). As Justice Kagan said in her concurrence in *Gill v. Whitford*:

> Yes, partisan gerrymandering goes back to the Republic's earliest days; and yes, American democracy has survived. But technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like). . . . The technology will only get better, so the 2020 cycle will only get worse.

138 S. Ct. at 1941 (citations omitted).

II. There are accepted measures of partisan fairness.

In an attempt to deal with this morass of partisan advantage, VNP has proposed an independent commission that would be removed from political control and influence. This is the first line of defense from biased, antidemocratic maps. To make sure that the commission does its job properly, the initiative also proposes

(along with a number of other redistricting standards such as compactness and contiguity) that the map not "provide a disproportionate advantage to any political party." VNP Proposal art. IV, § 6(13)(D). In order to do so, the initiative says that the commission must check its work using "accepted measures of partisan fairness." *Id.*

In the court below, Plaintiffs stated that courts have not accepted any measures of partisan fairness. Plaintiffs' Complaint for Mandamus at 8. This is simply not true. Plaintiffs have now narrowed this claim, stating that the Michigan courts and United States Supreme Court have not recognized any accepted measures of partisan fairness. Plaintiffs/Appellants' Emergency Application for Leave to Appeal at 7. While accurate, it is beside the point. There are currently widely accepted and previously applied measures of partisan fairness and the people of Michigan are well within their rights to mandate their use.

These measures, innovated over the last few decades, can quantify the degree of partisan gerrymandering in a plan. Consider this: nobody contests the idea that map drawers have the ability to gerrymander a map—that is, by applying certain techniques, they may bias the outcome of elections. One can see this bias where, under the range of conceivable elections under a given plan, that plan will produce more seats for the favored party and fewer for the disfavored party than a neutral plan would. A plan may be considered politically neutral if it exhibits partisan symmetry—that is, voters from the two parties are treated similarly with respect to their conversion of votes into legislative seats (*e.g.*, if Republicans receive 60% of the

seats with 55% of the vote and Democrats would also receive 60% of seats with 55% of the vote, we would describe this map as exhibiting partisan symmetry).

This value is not abstract but can be quantified with precision according to a variety of metrics (discussed below). These measures have been accepted in social sciences, by courts, and are currently being implemented by other ballot initiative campaigns around the country.

A. Social scientists have developed generally accepted measures of partisan fairness.

"Social scientists have long recognized *partisan symmetry* as the appropriate way to define partisan fairness in the American system of plurality-based elections, and for many years such a view has been virtually a consensus position of the scholarly community." Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC v. Perry, 6 Election L.J. 2, 6 (2007) (footnote omitted). "This standard is widely accepted by scholars as providing a measure of partisan fairness in electoral systems." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 466 (2006) (Stevens, J., concurring in part and dissenting in part). Though there are different measures of partisan symmetry, they are mathematically linked to one another—that is, they can be transformed one into the other under certain conditions. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric*, 70 Stan. L. Rev. 1503, 1510 (2018). Three measures of partisan symmetry that have gained wide acceptance

and use are discussed below. They are: partisan bias, the efficiency gap, and the mean-median difference.

i. Partisan Bias

Partisan bias was the first of these measures to be created. *See* Edward R. Tufte, *The Relationship Between Seats and Votes in Two–Party Systems*, 67 Am. Pol. Sci. Rev. 540, 542–543 (1973) (creating the measure). It has been built upon by a wide variety of scholars since. *See LULAC*, 548 U.S. at 466 (2006) (Stevens, J., concurring in part and dissenting in part) (collecting scholarship).

This test asks how an election would turn out if the statewide vote were split at 50-50. In order to analyze such a scenario, one adjusts the results of a real election (usually using a uniform partisan swing) so that the vote total is split evenly. Andrew Gelman & Gary King, *Estimating the Electoral Consequences of Legislative Redistricting*, 85 J. Am. Stat. Ass'n. 274, 276 (1990). In this model, one assumes that each district will swing the same number of percentage points towards the losing party. Say, for instance, Republicans lost to Democrats 47-53. In order to see how each party faired in the hypothetical, an analyst would shift each district three percentage points to make the statewide total 50-50. Thus, a 40-60 district becomes a 43-57 district and a 49-51 district becomes a 52-48 district. This, of course, means that some districts change hands in this hypothetical (such as the latter district in the example), but some do not (such as the former). The analyst then tallies up how many districts each party wins under this hypothetical where each has 50% of the vote. Under a perfectly fair map, each party would receive 50% of the seats. Any

divergence from this shows some degree of bias. To obtain a comparable number, one subtracts the percentage of seats won by one party from that won by the other. For instance, if Democrats in the hypothetical scenario won five of eight seats, they would have 62.5% of the seats to Republicans' 37.5%. The partisan bias would therefore be 25% in favor of Democrats.

ii. Efficiency Gap

The efficiency gap is also a measure of partisan symmetry, but does not rely on hypothetical elections. It is rooted in the insight that partisan gerrymandering always occurs in one of two ways: the packing of a party's voters into a few districts in which their preferred candidates win by overwhelming margins, or the cracking of a party's voters among many districts in which their preferred candidates lose by relatively narrow margins. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 834 (2015). Both packing and cracking produce what political scientists refer to as "wasted votes" because these votes do not contribute to a candidate's victory. *Id.* Wasted votes are defined, in the case of cracking, as votes cast for the losing candidate and, in the case of packing, as surplus votes cast for the winning candidate, above the 50%+1 threshold needed for victory. *Id.* Comparison of the two parties' wasted votes shows which party's voters were allocated more efficiently (*i.e.*, suffered less packing and cracking), and gives us the efficiency gap.

This measure can be calculated with precision. First, each party's "wasted votes" are calculated. Wasted votes are any vote for a losing candidate or any vote in

excess of 50%+1 for a winning candidate. The wasted votes for one party are then subtracted from those of the other and divided by the total votes. A simple example, involving four districts with ten voters each, follows in the figures below:

Vote Totals

	Democrats	Republicans
District 1	4	6
District 2	1	9
District 3	6	4
District 4	7	3

Wasted Votes

	Democrats	Republicans
District 1	4	0
District 2	1	3
District 3	0	4
District 4	1	3
TOTAL	6	10

Once we have the total wasted votes for each party (shown in the last row of the rightward figure), we then calculate the parties' relative wasted votes by subtracting, $6 - 10 = -4$. We then calculate the efficiency gap by dividing the relative number of wasted votes by the total votes, $EG = -4/40 = -10\%$. There is therefore, in this example, a 10% efficiency gap in favor of Democrats.

iii. Mean-Median Difference

The mean-median difference has over 100 years of history as a measure of skew. *See* Karl Pearson, *Contributions to the Mathematical Theory of Evolution—II: Skew Variation in Homogeneous Material*, 186 Phil. Transactions of Royal Soc'y of London 343, 374–76 (1895). More recently, several scholars have shown how it may

be used as a simple test for partisan symmetry. *See* Jonathan Krasno *et al.*, *Can Gerrymanders Be Measured? An Examination of Wisconsin's State Assembly* (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783144; Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stan. L. Rev. 1263, 1304 (2016). This measure is easy to compute. First, one takes the mean average of the votes in each district. *Id.* at 1304. Then one takes the median (*i.e.*, middle) value of votes from the districts. *Id.* Then one subtracts the median from the mean. *Id.* That gives the mean-median difference. *Id.*

It may not be clear at first how this shows skew. If a party's vote share is 55% but it gets 49% in the median district, what does this imply? In half of the districts, the party had below 49% vote share and in the other half, above. In other words, as the vote share overall is 55%, at least in half of the districts, the party in question performed worse than average. This is, by its nature, an effect of the district lines. The only way to make more than half of the districts perform worse than the average is to make the party in question lose by slim margins in a number of districts and/or put their voters into just a few safe districts: cracking and packing.

iv. These measures are not mutually exclusive and may be used in concert.

The existence of a variety of metrics is not a weakness, but a strength. In fact, several metrics can coexist and bolster each other, as evidenced by their use in many areas of election law, such as measurement of racial polarization and geographic compactness of districts. *See* Stephanopoulos & M. McGhee, *The Measure of a Metric*,

supra at 1510. In fact, use of the aforementioned metrics together to evaluate a map is a sensible strategy; they are not mutually exclusive and can be combined to build a more comprehensive picture of the effect of a particular map. Bernard Grofman argues convincingly for the combined use of these measures, as they are complementary and well established within the literature, capturing a similar, agreed-upon concept. Bernard Grofman, *Crafting a Judicially Manageable Standard for Partisan Gerrymandering*, 17 Election L.J. 117, 125-26 (2018). This makes sense as those charged with determining the effect of a particular map will have multiple tools to check their conclusions. As Grofman says:

> That there are multiple metrics available is a feature, not a flaw, reflecting the cumulative process of building scientific knowledge. The metrics are fundamentally complementary. Some are more complex in their calculations than others, but they all seek to measure the same thing: the magnitude of the disparate burden (if any) that a challenged map imposes on a political party and its supporters.

Id. at 126 (footnote omitted).

B. Courts have accepted measures of partisan fairness.

The social scientific tenet that maps should treat parties symmetrically—by enabling them to translate their popular support into legislative representation with approximately equal ease—was first presented to the United States Supreme Court in *LULAC*. A majority of the Justices expressed interest in the idea. *See LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.) (not "discounting its utility in redistricting planning and litigation"); *id.* at 468 n.9 (Stevens, J., concurring in part and dissenting in part) (labeling it a "helpful (though certainly not talismanic) tool"); *id.* at 483

(Souter, J., concurring in part and dissenting in part) (noting "the utility of a criterion of symmetry as a test"); *id.* at 492 (Breyer, J., concurring in part and dissenting in part).

Since then, two federal three-judge courts in two different states have used these standards as part of constitutional tests which ultimately lead to rulings that two different partisan gerrymanders were unconstitutional. In *Whitford v. Gill*,[1] the court looked in particular to the efficiency gap. 218 F. Supp. 3d at 903. The court found that the efficiency gap was "relatively simple" to calculate. *Id.* It artfully described the way efficiency gap calculated the degree of bias of the map: "an EG in Party A's favor means it carried less electoral dead weight; its votes were, statistically, more necessary to the victories of its candidates, and, consequently, it secured a greater proportion of the legislative seats than it would have secured had Party A and Party B wasted votes at the same rate." *Id.* at 904. Most importantly, it found that the efficiency gap provided good evidence of the effect of partisan gerrymandering. *See id.* at 909. Ultimately, it ruled that the map was an unconstitutional partisan gerrymander. *Id.* at 930.

The court also looked to uniform swing analysis. *Id.* at 898. This analysis, similar to partisan bias, uses hypothetical vote outcomes by shifting the real vote in

[1] This case was appealed to the Supreme Court, which ruled on it in June. *Gill v. Whitford*, 138 S. Ct. 1916, 585 U. S. ____ (2018). The Court remanded the case so that plaintiffs could make new showings on the issue of standing. *Id.* at 1934. The Court has not yet ruled on any issue regarding partisan symmetry in this case. *Id.* ("We express no view on the merits of the plaintiffs' case.").

each district by a given increment, and checks to see how the outcome would have been in a number of different scenarios. *Id.* In other words, the uniform swing analysis asks: what would have happened if Republicans got an extra percentage point of the vote in each district? What about two? And so on. In that manner, one can compare the vote share each of the parties may need to receive a particular portion of the seats (or vice versa). For instance, in Wisconsin, Republicans only needed to get 48% of the vote to win a majority of seats, but Democrats would need more than 54% of the vote to get the same proportion of seats. *Id.* at 899. The court found that this evidence showed the harmful effect of the partisan gerrymander. *Id.* at 901.

In *Common Cause v. Rucho*, a three-judge court once again used measures of partisan symmetry as part of a test of partisan gerrymandering. 279 F. Supp. 3d 587, 668 (M.D.N.C. 2018). The court found the efficiency gap to be persuasive evidence of partisan gerrymandering. *Id.* at 661. The court found that the efficiency gap comported with the nature of single-member district elections and did not measure proportional representation, but rather whether parties were able to translate votes into seats on an equal footing. *Id.* at 662. Importantly, the court also found that the efficiency gap could be used *prospectively* to test the degree of symmetry of proposed maps using simulations based on earlier elections. *Id.* at 664. It found that the efficiency gap in these simulated outcomes comported well with the actual outcomes under real election conditions. *Id.* The court also looked to the partisan bias and mean-median difference, as described above, and determined that these two

measures, along with the efficiency gap, "provide strong evidence" of the degree of partisan fairness or unfairness. *See id.* at 666. The court held that North Carolina's congressional map was unconstitutional, based in part on this evidence. *Id.* at 690.

The Pennsylvania Supreme Court also noted the usefulness of measures of partisan asymmetry. In *League of Women Voters v. Commonwealth*, it found that Pennsylvania's congressional map was an unconstitutional partisan gerrymander. 178 A.3d 737, 821 (Pa. 2018). The court's determination concerning this particular map relied primarily on traditional redistricting principles, but it warned that with increasing technological sophistication, mapmakers may be able to create districts that comport with these principles but still result in a partisan gerrymander. *Id.* at 817. It warned that it would still be a violation of the Pennsylvania Constitution to "unfairly dilute the power of a particular group's vote." *Id.* It then cited the efficiency gap, implying that this may be a way to show such dilution. *Id.* Further, the map that the Pennsylvania Supreme Court ultimately adopted had far better scores on measures of partisan symmetry. Nicholas O. Stephanopoulos, *The Pennsylvania Remedy*, Election L. Blog (Feb. 19, 2018), https://electionlawblog.org/?p=97606.

C. Similar proposals in other states contain similar language.

Several states that are considering or have considered independent redistricting commissions in the past few years have included language similar to that in the VNP Proposal. In Illinois, ballot initiatives in 2016 and 2014 included a bar on using political data except to ensure fairness or other prescribed redistricting principles. Illinois Independent Redistricting Amendment, Chi. Tonight,

https://chicagotonight.wttw.com/sites/default/files/article/file-attachments/New%20Illinois%20Fair%20Map%20Amendment%20Proposal.pdf; *Illinois Independent Redistricting Amendment (2014), Constitutional Text Changes*, Ballotpedia, https://ballotpedia.org/Illinois_Independent_Redistricting_Amendment_(2014),_constitutional_text_changes. This year, three more states have proposed ballot initiatives with language similar to that at issue. In Utah, voters are proposing that their commission use "the best available data and scientific and statistical methods, including measures of partisan symmetry" to assess the fairness of its maps. Utahans for Responsive Government Better Boundaries Redistricting Initiative Application 6 (July 19, 2017), https://elections.utah.gov/Media/Default/2018%20Election/Initiatives/Better%20Boundaries%20Application.pdf. In Colorado, the ballot initiative mandates that districts be as competitive as possible and not be designed to benefit either party. *See* S. Con. Res. 18-004, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018), § 44.3(3)(a) & (4)(a). In Missouri, the initiative proposes that districts be designed to promote partisan fairness where partisan fairness means "that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency." Missouri Petition at 2, https://www.sos.mo.gov/CMSImages/Elections/Petitions/2018-015.pdf. It does so by codifying use of the efficiency gap, using predicted outcomes based on results in previous recent races for Governor and U.S. Senate and President. *Id.*

This is a sensible way for a state to run its elections. The ballot initiative simply asks that, rather than contorting maps for political ends, the Commission

draw its map with an eye towards fairness. It asks that the Commission use a bit of social science to check its work. This social science is broadly accepted and has been well used. Voters are well within their rights to choose whether to enact such a sensible measure.

CONCLUSION

Technology threatens to allow the party that drew a legislature's map to reliably extend its control over the state through the next round of redistricting. Then, when the next round occurs, this party can just adjust the maps using the same techniques and consolidate power until the following round, and so on. Allowing this to go forward threatens the very core of democratic governance.

There is a way out. Here, through proper means, the people of Michigan are asking to be allowed to vote on whether to remove redistricting from the partisan political process and deliver it to an independent body. They simply ask that this independent body be fair and check its work. This is a sensible and proper course to overcome this threat.

For these reasons, the decision below should be affirmed.

Respectfully submitted,

/s/ Mark Granzotto
Mark Granzotto (P31492)
2684 11 Mile Rd Ste. 100
Berkley, MI 48072-3050
(248) 546-4649
mg@granzottolaw.com

Paul M. Smith
Jacob H. Kenswil
Campaign Legal Center
1411 K Street NW,
Ste. 1400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org
jkenswil@campaignlegal.org