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

Intervening Defendants/Cross-Plaintiffs-Appellees.

Supreme Court No. 157925

Court of Appeals No. 343517

BRIEF OF AMICUS FAIR LINES AMERICA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST AND POSITION OF AMICUS CURIAE

Fair Lines America is a nonprofit, nonpartisan organization that provides education in the fields of demography, political science, geographic information systems, and legal studies. Fair Lines America supports fair and legal redistricting through comprehensive data gathering, processing, and deployment; dissemination of relevant news and information; and strategic investments in redistricting-related reforms and litigation. Fair Lines America's interest in this case arises out of the fact that the proposed initiative is illegal and dangerously unaccountable.

The proposal at issue cannot be legally approved as an initiated amendment because it represents a *revision* rather than an *amendment* of Michigan's Constitution and therefore requires a Constitutional Convention. Michigan's Constitution expressly provides for a process of *amendment* of the Constitution for changes that are limited in scope, size, and effect, while providing for a process of *revision* of the Constitution for broader and more fundamental changes. The proposal at issue fundamentally alters the state's system of checks and balances and effectively creates a fourth branch of government with no political accountability. This represents a substantial change to the governance of Michigan and therefore is properly classified as a revision to the Constitution rather than an amendment.

In addition to Michigan, other jurisdictions have long recognized the need for limitations on ballot measures in order to preserve the distinction between revisions and amendments, to ensure that ballot measures do not exceed their scope, and to prevent tactics normally present in legislative proposals such as "logrolling." These limitations are all relevant to the proposal here. Further, if allowed to proceed, the proposal at issue would set a dangerous precedent that could allow for almost any government function to be shifted outside the usual system of checks and balances of the traditional three branches of government on almost any subject matter or governmental function. This cannot be what the framers of Michigan's Constitution intended.

Accordingly, Fair Lines America supports Plaintiffs-Appellants requested relief and respectfully request that the Court order the Secretary of State and the Board to invalidate the proposed initiative.

INTRODUCTION

The restraint against consolidation of government power through a system of checks and balances is perhaps the most essential principle of American democracy and American constitutional government. The division of power among the legislative, executive, and judicial branches has long served to ensure that political power is neither unduly concentrated nor immune from constraints. States have long upheld the need to preserve

checks and balances in their own parochial systems of government and Michigan is no exception. Michigan's Constitution expressly provides for checks and balances as well as a process for amendment and revision of its Constitution.

The Voters Not Politicians ("VNP") proposal essentially creates a fourth branch of government – in this instance a commission – that usurps legislative and executive power, is immune from judicial review, and is outside any meaningful political accountability. Such a sweeping change is clearly a revision to the constitution and not appropriate for this kind of ballot measure. Further, such a proposal is inconsistent with the limiting and accountability principles applied by other jurisdictions.

ARGUMENT

I. The VNP Proposal Creates An Unaccountable And Unchecked Commission That May Only Be Created Through Constitutional Convention.

Michigan's Constitution, like those of other states, provides that "the powers of government are divided among three branches: legislative, executive, and judicial." Const 1963, art 3, § 2. Michigan's courts have recognized the fundamental nature of this separation of powers, saying "[o]ur government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution. . . . This division is

accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others." *Sutherland v Governor*, 29 Mich 320, 324 (1874). Indeed, "the constitutional principle of separation of powers . . . forms the fundamental framework of our system of government." *O'Donnell v State Farm Mutual Auto Ins Co,* 404 Mich 524, 541-42; 273 NW2d 829 (1979).

The VNP redistricting proposal completely violates this fundamental principle by creating a governmental entity that arrogates power vested in each of the recognized branches without the consent of those branches, effectively creating a quasi-fourth branch of government. Specifically, the new governmental entity exercises exclusive control over redistricting, usurps the power to appropriate funds, and is almost completely unaccountable—all without consent or reviewability by the legislative, executive, and judicial branches. The commission is judge, jury and executioner.

First, the VNP proposal takes nearly the entirety of the redistricting process, which is recognized as a "legislative function," *Ariz State Legis v Ariz Indep Redistricting Comm'n,* ___ US ___; 135 S Ct 2652, 2668; 192 LEd2d 704 (2015), and vests it in the redistricting commission. *See* VNP Proposal, art 4 § 22 ("the power granted to the commission are legislative functions . . . exclusively reserved to the commission."). The proposal transfers redistricting authority from the people's elected representatives in the Legislature, who

are accountable to voters at the ballot box, and gives it to appointed, unelected, randomly selected and almost completely unaccountable new governmental entity administered by Commissioners essentially selected at random.

Next, the proposal diminishes and usurps the legislature's authority to exercise control over state money through the appropriations process. Specifically, the proposal permits this new governmental entity to set its own budget and even requires the Treasury to indemnify Commissioners for costs incurred if the legislature does not appropriate funds to cover those costs. VNP Proposal, art 4 § 5. This completely seizes the legislature's power of the purse. In the same way, the proposal also usurps executive power by denying the executive the authority to sign or veto appropriations, limit the new governmental entity's budget, and exercise any role whatsoever in the governmental entity's activities.

Finally, the governmental entity created by the proposal is politically and legally unaccountable. In addition to being unelected and chosen essentially at random, the proposal provides that neither the Governor, Legislature, nor Courts can remove Commissioners. Absent death, a Commissioner can be removed only under two extraordinary and limited circumstances: conviction of a crime involving dishonesty related to their office, or after at least ten Commissioners vote to expel the member. VNP

Proposal, Ex 2, art 4 § 6(3). The proposal even reduces the ability of the *judiciary* to review a redistricting plan and altogether prohibits it from ordering a final plan into place. VNP Proposal, Ex 2, art 4 § 6(19). Michigan's courts have long played an important role in redistricting – with this Court being involved in the drafting of redistricting plans at least twice over the past forty years. *In re Apportionment of Mich Legis,* 387 Mich 442; 197 NW2d 249 (1972). This impunity further consolidates power in the new governmental entity and takes core functions away from the three existing branches of government.

The creation of a governmental entity that has virtually no meaningful check on its power and is immune from budgetary constraints, political accountability, and judicial review is not only dangerous but also represents a sweeping change to the governance of the state that is likely to lead to further consolidation of power in other newly conceived governmental entities. If this VNP proposal is permitted as an amendment, nothing would stop a ballot measure next year from creating an independent "tsar" to enforce the state's environmental laws who is insulated from judicial review, or create a taxpayer advocate whose role is to review and lower tax determinations and whose decisions could not be reviewed by the judiciary and whose budget could not be limited by the Legislature.

Under VNP's proposal, the redistricting commission would have *all* legislative and executive power over redistricting, as well as a substantial portion of the judicial power. The proposal essentially creates a fourth branch of government and sets a dangerous precedent for future ballot measures.

A. Such A Sweeping Change Constitutes A Constitutional Revision Not Amendment, And Is Not Appropriate As A Ballot Measure.

The VNP proposal is a sweeping change to the Constitution that requires a revision through Constitutional Convention, rather than an amendment requiring only an initiated amendment. Michigan law makes clear that the voters have reserved the authority to modify the Constitution, which requires "strict adherence to the methods and approaches included in the constitution itself." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 276; 761 NW2d 210 (2008) aff'd 482 Mich 960. Article 12 of Michigan's Constitution spells out the different methods by which changes can be made to the Constitution. Const 1963, art 12, §§ 2, 3. These procedures distinguish between an "amendment" and a "revision.". *Id.* at 277. Limited changes to the Constitution may be made by submitting a petition that proposes an "amendment." 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.

The distinction in the terms "amendment" and "revision" as well as the different procedures for effectuating them clearly demonstrate that the drafters intended these words to mean different things. *See People v Alger,* 323 Mich 523, 528; 35 NW2d 669 (1949) ("the difference in language used in prescribing the vote required for amendments and for revision undoubtedly was purposely made."); *See also Citizens*, *supra* at 294. Longstanding precedent details the difference: a "revision" 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. *Citizens, supra* at 296. Such a revision may only be accomplished by a Constitutional convention. An amendment, however, is a "correction of detail." *Id.* In *Kelly v Laing*, 259 Mich 212, 217; 242 NW 891 (1932) this Court further explained that "there is an essential difference" between the two words – "revision . . . implies a re-examination of the whole law and a redraft without obligation to maintain the form, scheme, or structure of the old." *Id.* Amendment, on the other hand, "implies continuance of the general plan and purport of the law, with corrections to better accomplish its purpose." *Id.* Essentially, revision suggests a fundamental change, while amendment is a correction of detail.

Moreover, in *Laing* and in *Sch Dist of City of Pontiac v City of Pontiac,* 262 Mich 338, 345; 247 NW 787 (1933) this Court established that the analysis that must be applied to distinguish the two is quantitative and

qualitative in nature. "The analysis does not turn solely on whether the proposal offers a wholly new Constitution, but must take into account the degree to which the proposal interferes with, or modifies, the operation of government." Here, the proposal clearly modifies the operation of government by creating a completely independent, quasi-fourth branch of government that is insulated from judicial review and completely upends an essential government function – a fundamental change that can only be considered a general revision of the Constitution. To ignore this distinction would be to "ignore the framers' intentional differentiation in terms and procedure." *Citizens, supra* at 273.

B. Other States Have Instituted Political And Judicial Checks On Redistricting Commissions.

By granting Plaintiffs-Appellants' requested relief and prohibiting the VNP Proposal from appearing on the ballot, this Court will not only be following Michigan law, but will also be following the same principles applied by sister jurisdictions. This is because many other states have recognized the problems that independent commissions pose to checks and balances and have placed limitations on the commissions to alleviate those concerns.

Arizona is well-known for its independent redistricting commission; however that commission operates under far greater accountability than the proposed commission. Arizona's independent redistricting commission was

established by ballot initiative in 2000. That initiative provided that the state's judicial branch, specifically the judicial nominating commission, appoint members to the redistricting commission. ARS Const art IV, Pt 2 § 1. Once on the redistricting commission, members may be removed by the governor, with the concurrence of two-thirds of the senate, for "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." *Id*. This is a much lower bar than provided for in the current VNP proposal. Further, nothing in that initiative inhibited judicial review. Accordingly, the ballot initiative establishing Arizona's independent redistricting commission provided for, and still provides, much more accountability and reviewability than the current proposal.

The California Citizens Redistricting Commission is California's independent redistricting commission adopted by ballot initiative in 2008 and it similarly has greater checks and balances accountability than the VNP's proposal. For example, the State Auditor accepts applications for commission members, disqualifies potential members during the application process in accordance with certain enumerated criteria, and eventually chooses the final applicant pool. Cali 2008 Prop 11. Because the State Auditor in California is appointed by the Governor and approved by the Joint Legislative Audit Committee, both elected, this process provides political accountability over the selection of the commission. Further, nothing in Proposition 11 inhibits

judicial review of the commission's decisions. Accordingly, VNP's proposed commission provides for less accountability and reviewability than California's Citizens Redistricting Commission, and should be prohibited from coming to fruition.

The Washington Redistricting Commission was adopted as a Constitutional amendment via a Senate Joint Resolution and provides greater checks and balances than VNP's proposal. Not only does the fact that the commission was adopted legislatively mean that the legislature itself consented to the delegation of legislative authority to the commission, but also Commissioners are selected by the legislative leadership—with the exception of one commissioner who is selected by the other commissioners. Wash Const art II, § 43(2). Further, the commission submits any plans to the state legislature, which may amend it. Wash Const art. II, § 43(7); Rev Code Wash § 44.05.100. There is nothing inhibiting judicial review of commission decisions. Accordingly, Washington represents yet another example of a state that created a redistricting commission with political and judicial accountability, unlike the VNP's proposal.

II. States Have Generally Recognized Important Structural And Substantive Limitations On Ballot Measures In Order To Ensure Clarity Of Information On The Ballot And To Protect The Integrity Of The Constitution.

This Court is hardly alone in its longstanding recognition of the distinction between revision and amendment and need for other limitations on ballot measures such as a "single subject" rule. Other jurisdictions have also recognized the importance of protecting the integrity of their Constitutions through structural and substantive limitations on the scope of ballot measures.

In *Hooker v State Bd of Elections,* 2016 Ill 121077 (2016) the court invalidated a redistricting initiative petition because it was not limited to structural and procedural subjects as required by that state's constitution. *Id.* at ¶ 1. Underscoring the potential for a dangerous precedent to be set, the Supreme Court of Illinois found that because the proposal was not limited to structural and procedural subjects then "almost any substantive issue can be cast in the form of an amendment to the structure and procedure of the legislative article by using the same scenario." *Id.* at ¶ 41 (citing *Chicago Bar Ass'n v State Board of Elections,* 137 Ill 2d 394, 403 (1990)). Furthermore, the Court added that "even when concerned citizens legitimately attempt to exercise their constitutional right to seek changes in their state government through ballot initiatives, this court is constrained by the expressed intent of the framers of our constitution to review the propriety of only the specific provisions in the proposal before it." *Id.* at ¶ 47.

Other states have also ruled that where an initiative petition constitutes a revision and not an amendment, the proposal cannot be properly placed on the ballot as a ballot measure. *See e.g. McFadden v Jordan,* 32 Cal 2d 330, 331 (1948) (proposed initiative could not properly be submitted to electorate unless first agreed upon by constitutional convention where it is so broad that, if such a measure became law, a substantial revision of the present state constitution would be affected); *Raven v Deukmejian*, 52 Cal 3d 336 (Cali 1990) (California could not enforce a section of an initiative because its effect amounted to a constitutional revision beyond the scope of the initiative process).

In addition protecting the integrity of the state constitutional revision process, other states' courts have also recognized the need to limit the scope of ballot measures via a "single-subject rule," to ensure clarity of information on the ballot and prevent the practice of "logrolling."[1] Where ballot measures will disrupt more than one government function or subject, courts have consistently found that they violate principles of fairness because voters are forced to vote on the provision as a whole, though they may only approve or disapprove of one portion of the initiative.

[1] "Logrolling" is defined as the "practice of including in one statute or constitutional amendment more than one proposition, inducing voters to vote for all, notwithstanding they might not have voted for all if amendments or statutes had been submitted separately." Black's Law Dictionary 942 (6th ed 1990).

The Florida Supreme Court in *Fine v Firestone*, 448 So 2d 984 (1984) found that "opportunity for input in the drafting of a proposal is not present under the initiative process and this is one of the reasons the initiative process is restricted to single-subject changes in the state constitution." *Id.* at 987. "This requirement avoids voters having to accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." *Id. See also Advisory Opinion to the Ag Re Amendment to Bar Gov't from Treating People Differently Based on Race in Pub Educ*, 778 So 2d 888 (Fla 2000) (identifiable changes in functions of different levels and branches of government were sufficient to warrant invalidation of initiative petition under the single subject rule); *State ex rel Loontjer v Gale,* 288 Neb 973 (Neb 2014) (striking down a proposed ballot measure that contained multiple topics and which violated Nebraska's separate-vote provision which requires that voters be able to vote on each amendment separately); *Taxpayer Prot Alliance v Arizonans Against Unfair Tax Schemes*, 199 Ariz 180 (Ariz 2001) (ballot initiative requiring disclosure of whether candidates for federal office have signed a pledge to eliminate federal income taxes was distinct from the other sections of the proposition, eliminating the state income tax and requiring public proposals to increase state revenues, and therefore violated the state's single-subject requirement.); *In re Initiative Petition No 382*, 2006 OK 45 (Okla 2006) (initiative petition concerning eminent domain

issues and zoning law violated the single subject rule and was unconstitutional).

The VNP Proposal is similar to proposals in many other jurisdictions which have properly found that the integrity of the state Constitution must be protected when a revision is disguised as a ballot proposal amendment that makes significant changes to the State's governmental structure. Michigan law is clear that the proper process for a revision is a Constitutional Convention, and this Court is similarly situated to the supreme courts of its sister jurisdictions in recognizing this distinction. The VNP Proposal deals with more than one subject insofar as it would change the functions of all three branches of government, create a brand new government entity, and transfer control of the redistricting process writ-large to that new entity without the application of traditional checks and balances. Such wholesale changes deny voters the ability to have meaningful input into the proposal and are forced to choose whether to vote for multiple topics in one proposal.

CONCLUSION

Regardless of the political debate surrounding redistricting, the VNP proposal would make sweeping changes to the structure of Michigan's government by violating fundamental principles of separation of powers and usurping powers reserved to the legislative and executive branches of

government. If permitted on the ballot, the proposal would set a precedent that could have implications for other government authority and legitimacy, as noted above with the hypotheticals of the environmental "tsar" or the taxpayer advocate. Because these changes are so significant, the proposal is best characterized as a "revision" and not an amendment to the Constitution, and may only be executed through the procedure set forth in Article 12, § 3.

By granting Plaintiffs-Appellants requested relief and directing the Secretary of State and Board of Canvassers to reject the VNP petition, this Court would be aligned with many of its sister courts that have rightly recognized substantive and structural limitations on the use of ballot proposals to effect sweeping and complicated changes to the structure and form of government. Michigan voters deserve to have their interests in separation of powers and a government with checks and balances protected. Accordingly, this Court should grant the application for leave to appeal.

Respectfully submitted,

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