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 AMICI SENATOR CARL LEVIN, GOVERNOR ARNOLD SCHWARZENEGGER, AND COMMON CAUSE IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

Carl Levin served as United States senator representing Michigan from 1979 to 2015. As a leader in Congress, Sen. Levin witnessed firsthand how partisan gerrymandering undermines bipartisan cooperation that is essential to addressing vital issues of national interest. Sen. Levin believes that allowing one political party controlling a legislature to draw district lines increases the public's cynicism about democratic institutions. He has endorsed the Voters Not Politicians ballot initiative and sees nonpartisan redistricting as essential to restoring public confidence in the political process by giving Michiganders a voice in assuring their fair representation.

Arnold Schwarzenegger served as the Governor of California from 2003 to 2011. In 2008 and 2010, he successfully advocated for two ballot initiatives that established non-partisan redistricting commissions for California that resemble the commission the Voters Not Politicians initiative would create in Michigan. These reforms have ended decades of partisan gerrymanders to the benefit of California's political system. In 2012, he helped found the Schwarzenegger Institute for State and Global Policy at the Sol Price School of Public Policy, University of Southern California.

Common Cause was founded by John Gardner in 1970 as a nonpartisan "citizens lobby" whose primary mission is to protect and defend the democratic process and make government accountable and responsive to the interests of ordinary people, and not merely to those of special interests. Common Cause is one of the Nation's leading democracy organizations and currently has over 1.1 million members nationwide and local chapters in 35 states. Partisan gerrymanders, whether carried out by Democrats or Republicans, have long been an issue of particular concern to Common Cause. Common Cause was a leading proponent of the California ballot initiatives that led to the creation of California's independent redistricting commission that ended partisan gerrymandering of that state's legislative and congressional districts. Common Cause also

organized and led the coalitions that secured passage of the ballot initiatives that resulted in the creation of the Arizona Independent Redistricting Commission and the passage of an amendment to the Florida constitution prohibiting partisan gerrymandering, and the passage of two Ohio measures to create constitutional requirements for bipartisan fairness and a tie-breaking bipartisan commission. Further, Common Cause is the lead plaintiff in the challenge to the congressional gerrymander in North Carolina pending on remand from the Supreme Court in *Common Cause et al. v. Rucho et al.,* 1:16-CV-1026 (M.D.N.C.).

Amici oppose Plaintiffs' application for leave to appeal and oppose the issuance of a writ of mandamus that would keep the Voters Not Politicians' proposal off the ballot in the coming elections. The hundreds of thousands of Michigan residents who have supported its placement on the ballot deserve to have their voices heard.

INTRODUCTION

Voters should choose their elected officials, not the other way around. That simple principle animates a growing chorus of diverse voices in opposition to partisan gerrymandering, which the Supreme Court has defined as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). This case presents "an endeavor by [Michigan] voters to address [that] problem." *Id.*

That endeavor, like similar efforts across the country to address this seemingly intractable problem, now faces opposition of its own. Determined to retain the state legislature's control over the redistricting process rather than restore the sovereign role of the people in determining their representatives, Plaintiffs seek a writ of mandamus to preclude Voters Not Politicians' ("VNP") proposal from even appearing on the ballot. This Court should reject that request for what it is—an attempt to ensure that the status quo remains in place in Michigan for yet another decade-long redistricting cycle. The parties have amply briefed the underlying issues of Michigan law relevant to this case. Amici write separately to present the Court with additional background as to (1) the nature and scope of the problem of partisan gerrymandering and (2) the ongoing need for—and propriety of—innovative, state-specific solutions like the VNP proposal at issue here.

At their core, "[p]artisan gerrymanders, . . . [are incompatible] with democratic principles." *Id.* (alteration in original) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.*, at 316 (Kennedy, J., concurring in judgment)). The VNP proposal gives Michigan voters the opportunity to restore those principles by the exercise of their sovereign power. As this Court has stated, "[t]he power to redistrict and reapportion the Legislature

remains with the people" even though "[t]he people . . . can only exercise that power, as a practical matter, by amending the constitution." *In re Apportionment of State Legislature--1982*, 413 Mich 96, 137–40 (1982). The opportunity to do just that is all the VNP proposal seeks, and this Court should not issue a writ of mandamus to deny the voters of Michigan that right.

ARGUMENT

I. This Problem Demands A Solution.

It should be beyond dispute that the goal of redistricting is to establish "fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964). States are required by Article I, section 2 of the Constitution to reapportion congressional districts after each decennial census to equalize their populations. *Wesberry v. Sanders*, 376 U.S. 1 (1964). In practice, however, this requirement now yields a pernicious consequence. Both political parties have used the reapportionment process as an opportunity and an excuse to gerrymander congressional and state legislative district lines to gain a partisan political advantage and lock in their hold on political power. Indeed, partisan gerrymandering has become so common that state legislators "have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring).

That reality runs counter to the plainest of constitutional guarantees. "[N]o right [is] more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. __, 134 S. Ct. 1434, 1440-41 (2014). Other constitutional rights, even the most basic, "are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17. As the United States Supreme Court has stated, quoting Alexander Hamilton, "[t]he true principle of a republic is, that the people should choose whom they please to govern them."

Powell v. McCormack, 395 U.S. 486, 540-41 (1969) (quoting 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876)).

Absent state-level innovation like the VNP Proposal, that core principle is under attack from legislators and mapmakers across the country who use an increasingly sophisticated set of tools to draw district lines for partisan gain. Even thirty years ago, "[a]dvances in computer technology achieved since the doctrine [of one person, one vote] was announced ha[d] drastically reduced its deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters." *Davis v. Bandemer*, 478 U.S. 109, 168 n.5 (1986) (Powell, J., concurring). Justice Powell's warning has proved prescient. Where nothing limits them, state legislatures (again, under the control of either party) have only become more adept at crafting congressional districts to preordain electoral outcomes. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 411–13 (2006).

Of course, these nefarious tactics have given rise to substantial litigation, principally in the federal courts. Challengers have been increasingly successful in lower courts across the country, but the United States Supreme Court has yet to set a clear standard for evaluating these claims. The Supreme Court recently passed on the opportunity to review the merits of a successful challenge to Wisconsin's state assembly districts, holding that the plaintiffs had failed to establish standing and remanding the case to the district court. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). Demonstrating that gerrymandering affects both political parties, the same day the Supreme Court affirmed the denial of a preliminary injunction in a challenge to a Democratic gerrymander of a congressional district in Maryland. *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). And the Supreme Court vacated and remanded a successful challenge to North Carolina's present congressional plan for reconsideration in light of its opinion in *Gill*.

Rucho v. Common Cause, No. 17-1295, 2018 WL 1335403, at *1 (U.S. June 25, 2018). Each of these cases will proceed in the lower courts and none of the Supreme Court's recent decisions forecloses those claims. While the law may remain in dispute, the facts do not. Each of these three challenges involved undeniably extreme efforts by the political party in control (Republicans and Democrats alike) to maximize its political power at the expense of voters whose views it disfavored.

Amicus Common Cause is the lead plaintiff in the North Carolina case, and the facts of that admitted partisan gerrymander are recounted in detail in the district court's opinion invalidating that plan. *See Common Cause et al. v. Rucho et al.*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). As but a few salient examples, the legislative architects of the plan: (1) enshrined an explicit partisan goal of 10 Republican and 3 Democratic seats in the Adopted Criteria that would govern the plan; (2) "proposed that the Committee draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [they] did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats"; and (3) "further explained the rationale behind the Partisan Advantage criterion" as the belief that "electing Republicans is better than electing Democrats." *Id.* at 604-05 (alterations adopted). That explicit, brazen gerrymander of North Carolina's congressional districts went into effect for the 2016 election and will remain in place this year.

As the North Carolina case makes clear, many state legislators now operate on the assumption that the goal of redistricting is to gain maximum partisan advantage for the political party that controls the redistricting process. The harms this inflicts on our Republic are myriad and well-documented. The value of an individual's vote is diminished, along with electoral participation and trust in the system. As a result, the competitiveness of elections occurs only in

primary elections, encouraging and rewarding the more extreme candidates. That political polarization contributes to the gridlock and rabid partisanship that defines the status quo.

While the United States Supreme Court has yet to rein in the practice, litigants have seen recent success in state court challenges. In February of this year, the Pennsylvania Supreme Court struck down Pennsylvania's congressional plan as violating the Free and Equal Elections Clause of the Pennsylvania Constitution. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018).

II. This Solution Addresses The Problem—As It Already Has In Other States.

Amici remain hopeful that federal and state courts across the country will act to ensure that voters nationwide are guaranteed "fair and effective representation." *Reynolds*, 377 U.S. at 565. In the meantime, however, state-level avenues for meaningful political reform of the redistricting process remain necessary. A number of states have—through the initiative process—undertaken that reform as a reflection of the will of the people. The VNP proposal is merely the latest of these efforts.

As the Supreme Court acknowledged in affirming the constitutionality of the Arizona Independent Redistricting Commission against an Elections Clause challenge, "[s]everal other States, as a means to curtail partisan gerrymandering, have also provided for the participation of commissions in redistricting." *AIRC*, 135 S. Ct. at 2662. Some of these "have given nonpartisan or bipartisan commissions binding authority over redistricting" while others "have given commissions an auxiliary role, advising the legislatures on redistricting, or serving as a 'backup' in the event the State's representative body fails to complete redistricting." *Id.* As to the use of the initiative process to achieve such reform, the Supreme Court held that there is "no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking." *Id.* at 2668.

More than that, the Supreme Court noted that "[t]he importance of direct democracy as a means to control election regulations extends beyond the particular statutes and constitutional provisions installed by the people . . . The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures." *Id.* at 2677. For the people to assert such influence over the legislature, however, the path of direct democracy must be available via the initiative. "The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have 'an habitual recollection of their dependence on the people.'" *Id.* (quoting The Federalist No. 57, at 350 (J. Madison)). The habitual recollection of such dependence is lost where legislators come to depend upon themselves to insulate themselves from political accountability.

California's experience provides further evidence of the power of the initiative process as a means of gerrymandering reform. With the strong support of amici Governor Schwarzenegger and Common Cause, California voters exercised their legislative power of initiative to create California's Citizens Redistricting Commission and then empowered the Commission to draw congressional and state district lines, defying fierce opposition from legislative and congressional Democrats. *See Vandermost v. Bowen*, 269 P.3d 446 (Cal. 2012) (discussing staged ratification of reform process). In a state where the political consequences of decennial redistricting had been a battleground for decades, it was the initiative process that finally restored the primacy of the voters in the redistricting process.

Nor are California and Arizona alone in reforming the broken system of legislators drawing district lines for partisan advantage. Florida voters—by ballot initiative—passed a constitutional amendment that prohibited the Florida legislature from favoring or disfavoring a political party or incumbent when drawing congressional maps. *See Brown v. Sec'y of Fla.*, 668

F.3d 1271, 1272-73 (11th Cir. 2012) (explaining and upholding that amendment). And additional States have adopted a variety of schemes to offset the influence of legislators in the redistricting process. For example, Idaho and Washington use citizen commissions with final authority to draw congressional districts, while Hawaii and New Jersey use commissions to draw districts that may include politicians but must include partisan balance. Ohioans approved redistricting protections for General Assembly in 2015 and U.S. House in 2018 that will require bipartisan agreement on maps to make it difficult for one party to dominate the process. Still other States use backup commissions to draw maps if legislators cannot agree on a redistricting plan by a certain date. Still others utilize advisory commissions to assist legislators with the redistricting process. This includes the Iowa model, in which nonpartisan legislative staff draw districts with the advice of a citizen advisory commission. Iowa legislators can approve or reject maps but cannot amend or adjust them. *See* Justin Levitt, *Who Draws The Lines?,* All About Redistricting, Loyola Law School, http:// redistricting.lls.edu/who.php (last visited Jul. 2, 2018).

The principle is clear: States around the country—as in all areas of public policy—are experimenting with ways to reform a long-broken process, the brokenness of which has become steadily more apparent with each redistricting cycle. This is entirely consistent with their role in the federal system. The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *AIRC,* 135 S. Ct. at 2673. (quoting *Oregon v. Ice,* 555 U.S. 160, 171 (2009)); *see* also *United States v. Lopez,* 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

Moreover, there is tremendous momentum for reform at the state level. As voters become more attuned to the problem of gerrymandering, they are more likely to demand

solutions. Before California passed Proposition 11 by 1% in 2008, several earlier attempts at reform had failed. But by 2010, when California voters chose to expand that reform to Congressional districts, Proposition 20 passed by 22 points. And just this year, Ohio voters passed their reform proposal by 49 points. Voters all over the country are waking up to the issue of partisan gerrymandering and demanding change. The VNP Proposal offers Michigan voters that opportunity. They should not be denied that right.

CONCLUSION AND RELIEF REQUESTED

Here, as the parties have fully briefed, Michigan has devised a process for amendment of the Michigan Constitution via initiative. The VNP Proposal merely seeks to use that settled tool to present Michigan voters with a choice over who will be responsible for exercising the legislative function of drawing Michigan's districts. Hundreds of thousands of Michigan voters have expressed their desire to make their voice heard on this issue. The VNP Proposal gives Michigan's voters that option without dictating the outcome. The alternative, by contrast, settles the issue in favor of the status quo. Should this Court take Plaintiffs' appeal and issue a writ of mandamus as requested, the sole beneficiaries of that ruling would be incumbent partisans who anticipate they will be able to draw another decade's worth of self-serving maps in the next redistricting cycle.

Moreover, Plaintiffs here seek to achieve that result by judicial decree. Whatever sympathies this Court may have with the United States Supreme Court's difficulties in adjudicating partisan gerrymandering claims, they apply here only in reverse. Plaintiffs ask this Court to adopt a novel legal rule that would bar even the availability of a directly democratic result: the success or failure of the VNP Proposal before the people of Michigan on the ballot this November.

As the weight of the issue requires, and as the wisdom of States around the country

engaged in similar reform shows, this Court should deny Plaintiffs' application for leave to appeal and allow the political process of proposed redistricting reform in Michigan to run its course.

This 3rd day of July, 2018.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that on **July 3, 2018**, a copy of the foregoing document was served upon the attorneys of record of all parties in the above cause by using the TrueFiling system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

/s/ Amy Zielinski
Amy Zielinski