

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

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

Plaintiffs,

v

**SECRETARY OF STATE and MICHIGAN
BOARD OF STATE CANVASSERS,**

Defendants,

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.

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**ANSWER AND AFFIRMATIVE DEFENSES OF
INTERVENING DEFENDANTS TO PLAINTIFFS'
COMPLAINT FOR MANDAMUS**

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**ANSWER OF INTERVENING DEFENDANTS
TO PLAINTIFFS' COMPLAINT FOR MANDAMUS**

Now Come Intervening Defendants Voters Not Politicians Ballot Committee d/b/a Voters Not Politicians and Count MI Vote d/b/a Voters Not Politicians (collectively “Voters Not Politicians” or “VNP”), Kathryn A. Fahey, William R. Bobier and Davia C. Downey, by their undersigned legal counsel, answering Plaintiffs’ Complaint for Mandamus as follows:

1. The Intervening Defendants admit the allegations set forth in Paragraph 1.
2. The Intervening Defendants admit the allegations set forth in Paragraph 2.
3. In response to Paragraph 3, the Intervening Defendants acknowledge that the Plaintiffs are opposed to VNP’s ballot proposal. Intervening Defendants neither admit nor deny the remaining allegations set forth in Paragraph 3, having insufficient personal knowledge to either admit or deny the same, but shall leave Plaintiffs to their proofs.

4. In response to Paragraph 4, the Intervening Defendants acknowledge that if approved by the voters, VNP’s ballot proposal would delete, add to, or amend a total of eleven sections spread between three articles of the 1963 Constitution. Intervening Defendants deny that the proposed amendment would “effect sweeping changes to all three branches of state government as well as the electoral process itself.”

5. In response to Paragraph 5, the Intervening Defendants deny that VNP’s proposal has multiple purposes, as all of its provisions have been conceived and designed to accomplish a single overall purpose – to remedy the widely-perceived abuses associated with partisan “gerrymandering” of state legislative and congressional election districts by the establishment of a new politically-balanced Independent Citizens Redistricting Commission having sole and exclusive authority to develop and establish redistricting plans with corresponding election district

maps for state Senate districts, state House of Representatives districts, and Michigan's congressional districts. Plaintiff's remaining allegations concerning the details of VNP's proposal require no further response, as the proposal, a copy of which has been submitted with Plaintiffs' Complaint for Mandamus, speaks for itself.

6. In response to Paragraph 6, the Intervening Defendants acknowledge that, if approved by the voters, VNP's proposed constitutional amendment would supersede the current statutory redistricting provisions, and require that redistricting be performed by an Independent Citizens Redistricting Commission, subject to limited judicial review.

7. In response to Paragraph 7, the Intervening Defendants acknowledge that, if approved by the voters, VNP's proposed constitutional amendment would supersede the current statutory redistricting provisions and require that redistricting be performed by an Independent Citizens Redistricting Commission in accordance with the criteria specified therein, all of which are set forth in VNP's proposal, which speaks for itself.

8. In response to Paragraph 8, the Intervening Defendants acknowledge that VNP's proposed constitutional amendment would amend provisions in three articles of the Constitution, affecting all three branches of government in varying degrees, but deny Plaintiff's assertion that this would upset "the framework by which the People's representatives are chosen." If approved by the voters, VNP's proposed constitutional amendment would supersede the current statutory redistricting provisions and require that redistricting be performed by an Independent Citizens Redistricting Commission in accordance with the criteria specified therein, all of which are set forth in VNP's proposal, which speaks for itself.

9. The Intervening Defendants deny, as untrue, the allegations set forth in Paragraph 9.

10. In response to Paragraph 10, the Intervening Defendants acknowledge that Plaintiffs seek a writ of mandamus providing the direction specified, for the reasons stated therein. In further response, Intervening Defendants affirmatively state that the specified grounds for issuance of the requested writ of mandamus are without merit, for the reasons to be discussed in Intervening Defendants' brief in opposition to Plaintiffs' Complaint for Mandamus.

PARTIES

11. The Intervening Defendants neither admit nor deny the allegations set forth in Paragraph 11, having insufficient personal knowledge to either admit or deny the same, but shall leave Plaintiffs to their proofs.

12. The Intervening Defendants neither admit nor deny the allegations set forth in Paragraph 12, having insufficient personal knowledge to either admit or deny the same, but shall leave Plaintiffs to their proofs.

13. The Intervening Defendants neither admit nor deny the allegations set forth in Paragraph 13, having insufficient personal knowledge to either admit or deny the same, but shall leave Plaintiffs to their proofs.

14. The Intervening Defendants admit the allegations set forth in Paragraph 14.

15. The Intervening Defendants admit the allegations set forth in Paragraph 15.

JURISDICTION

16. The Intervening Defendants admit the allegations set forth in Paragraph 16.

ADMINISTRATIVE HISTORY

17. The Intervening Defendants admit the allegation set forth in Paragraph 17.

18. The Intervening Defendants admit the allegations set forth in Paragraph 18, and in further response, affirmatively state that petitions containing more than 425,000 signatures were filed with the Secretary of State in support of VNP's proposal on December 18, 2017.

19. The Intervening Defendants admit the allegation set forth in Paragraph 19.

20. The Intervening Defendants admit the allegations set forth in Paragraph 20.

21. In response to Paragraph 21, the Intervening Defendants agree that the Board of State Canvassers is not empowered to review substantive issues concerning the sufficiency of language included in a petition, and acknowledge that the Plaintiff Citizens Protecting Michigan's Constitution filed a *pro forma* challenge to VNP's proposal with the Board on April 26, 2018, raising the same issues which have been raised in this Court in Plaintiffs' Complaint for Mandamus.

22. The Intervening Defendants admit the allegations set forth in Paragraph 22.

23. The Intervening Defendants neither admit nor deny the allegations set forth in Paragraph 23, having insufficient personal knowledge to either admit or deny the same, but shall leave Plaintiffs to their proofs.

COUNT I – MANDAMUS

INELIGIBILITY OF GENERAL REVISION FOR INITIATIVE PROCESS

24. Intervening Defendants incorporate their responses to Paragraphs 1 through 23, as if fully set forth herein.

25. In response to Paragraph 25, the Intervening Defendants acknowledge that Const 1963, art 12, § 2 addresses the People's reserved right to propose amendments of the Constitution by voter initiative and specifies procedures for the exercise of that right, and that Const 1963, art

12, § 3 addresses the separate and unrelated procedure for convening a constitutional convention for a “general revision” of the Constitution. Those provisions speak for themselves.

26. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 26. Intervening Defendants acknowledge that Const 1963, art 12, § 3 provides a separate procedure for convening a constitutional convention for the purpose of a “general revision” of the Constitution. The holding of the Court of Appeals in the cited decision is that, in light of that separate provision, a “general revision” of the Constitution cannot be proposed by means of a voter-initiated petition. In further response, the Intervening Defendants affirmatively state that VNP’s proposed constitutional amendment does not constitute a revision of the Constitution, general or otherwise, and has been properly proposed by means of a voter-initiated petition under Const 1963, art 12, § 2.

27. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 27, as the representation of the law asserted therein is contrary to binding decisions of the Supreme Court recognizing the principle that a proposed amendment may modify multiple sections if it has one general object or purpose and all of the proposed changes are germane to the accomplishment of that purpose.

28. In response to Paragraph 28, the Intervening Defendants acknowledge that the cited decision employed the referenced qualitative/quantitative test to determine whether the petition at issue in that case proposed an “amendment” or a “general revision” of the Constitution. In further response, the Intervening Defendants note that the Supreme Court affirmed only the result ordered in that decision without approving the rationale for this Court’s decision, and contend that the test employed in this Court’s decision cannot be applied without consideration of the binding decisions of the Supreme Court recognizing that a proposed amendment may modify multiple sections if it

has one general object or purpose and all of the proposed changes are germane to the accomplishment of that purpose.

29. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 29.

30. Paragraph 30 requires no response, as VNP's proposal, a copy of which has been submitted with Plaintiffs' Complaint for Mandamus, speaks for itself.

31. In response to Paragraph 31, the Intervening Defendants deny Plaintiffs' claim that VNP's proposal would make "fundamental changes to the structures of state government as they exist in the current Constitution." The cited provisions of VNP's proposal require no response, as they speak for themselves. The legal conclusions and arguments set forth in the various sub-paragraphs of Paragraph 31 require no response, and will be addressed in the Intervening Defendants' Brief in Opposition to Plaintiffs' Complaint for Mandamus. Although not required to respond to legal conclusions and arguments included in those sub-paragraphs, the Intervening Defendants shall provide the following answers to the allegations made therein:

a. In response to Paragraph 31.a., the Intervening Defendants acknowledge that VNP's proposal calls for the creation of an Independent Citizens Redistricting Commission for State Legislative and Congressional Districts (the "Commission") as a permanent Commission in the legislative branch – a Commission which would have exclusive authority to develop and establish redistricting plans, with corresponding election district maps, for state Senate districts, state House of Representatives districts, and Michigan's congressional districts, subject to limited judicial review.

b. The Intervening Defendants admit the allegation set forth in Paragraph 31.b.

c. In response to Paragraph 31.c., the Intervening Defendants acknowledge that the Proposed Const 1963, art 4, § 6 (5) would require the Legislature to appropriate money to compensate the Commissioners and pay for the operation of the Commission as specified therein, and directs that the State shall indemnify the Commissioners for costs incurred if the Legislature should fail to discharge its constitutionally mandated duty to appropriate money to pay those costs. The Intervening Defendants deny that this obligation to provide indemnification is contrary to Const 1963, art 7, § 17, as the proposed amendment does not propose an obligation to pay money out of the state Treasury without an appropriation.

d. In response to Paragraph 31.d., the Intervening Defendants acknowledge that VNP's proposal precludes legislative oversight, that it prescribes duties to be performed by the Secretary of State in relation to the selection of the Commission's members, and that it would require the Secretary to perform additional duties to assist the Commission in the performance of its prescribed duties. The specifics are set forth in VNP's proposal, which speaks for itself. The speculation that the Commissioners "will be susceptible to the influence of the partisan-elected Secretary of State" is irrelevant, and requires no response.

e. In response to Paragraph 31.e., the Intervening Defendants deny Plaintiffs' claim that "Commission members are accountable to no one but themselves", as they would be subject to removal, as specified in the proposed Const 1963, art 4, § 6 (3). Intervening Defendants acknowledge that the Commissioners would not be subject to removal by the Governor, but note that Const 1963, art 5, § 10 does not

confer authority upon the Governor to remove elected or appointed officers in the legislative branch. Intervening Defendants acknowledge that the Commission members would not be subject to discipline by the Civil Service Commission, but note that members of boards and commissions are not part of the classified civil service.

f. In response to Paragraph 31.f., the Intervening Defendants deny Plaintiffs' claim that the Governor would be "stripped" of all budgeting control over the Commission. Although the proposal imposes a duty upon the Legislature to appropriate money to pay for the Commission's expenses, it does not purport to limit the Governor's authority to disapprove specific appropriations. Intervening Defendants acknowledge that the Governor would not be empowered to reduce expenditures for the Commission under Const 1963, art 5, § 20, but note that the Governor would not have authority to do so in any event, as that provision states that, [t]he governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes."

g. The Intervening Defendants admit the allegation set forth in Paragraph 31.g.

h. The Intervening Defendants admit the allegation set forth in Paragraph 31.h.

i. In response to Paragraph 31.i., the Intervening Defendants acknowledge that Const 1963, art 4, § 6 would allow limited review of the Commission's operations and redistricting plans by the Supreme Court, but would not allow the Court to exercise the legislative function of fashioning and promulgating its own

plan. The proposed Const 1963, art 4, § 6 (19) would provide that the Supreme Court, in the exercise of its original jurisdiction, “shall direct the Secretary of State and the Commission to perform their respective duties”; that the Court “may review a challenge to any plan adopted by the Commission”; and that the Court “shall remand a plan to the Commission for further action” if the plan fails to comply with state or federal constitutional requirements or superseding federal law. The proposed Subsection (19) would also provide, however, that, “[i]n no event shall any body, except the Independent Citizens Redistricting Commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.”

j. In response to Paragraph 31.j., the Intervening Defendants acknowledge that VNP’s proposal would alter the existing constitutional provisions governing redistricting of state legislative districts in Article IV and supersede the existing statutory provisions governing redistricting of state legislative and congressional districts, all of which speak for themselves. In further response, the Intervening Defendants note that the proposed Const 1963, art 4, § 6 (13) would require that districts reflect consideration of county, city and township boundaries.

k. In response to Paragraph 31.j., the Intervening Defendants acknowledge that VNP’s proposal would alter the existing constitutional provisions governing redistricting of state legislative districts in Article IV and supersede the existing statutory provisions governing redistricting of state legislative and congressional districts, all of which speak for themselves. In further response, the Intervening

Defendants note that the proposed Const 1963, art 4, § 6 (13) states that, “Districts shall be reasonably compact.”

l. In response to Paragraph 31.l., the Intervening Defendants acknowledge that VNP’s proposal would alter the existing constitutional provisions governing redistricting of state legislative districts in Article IV and supersede the existing statutory provisions governing redistricting of state legislative and congressional districts, all of which speak for themselves. Plaintiffs’ argumentative assertions and characterizations require no response.

m. In response to Paragraph 31.m., the Intervening Defendants deny, as untrue, Plaintiffs’ argumentative claim that the criteria provided in VNP’s proposal “may be impossible or nearly impossible to implement.” Further response to Plaintiffs’ argumentative assertions and characterizations is not required.

n. In response to Paragraph 31.n., the Intervening Defendants acknowledge that a specific redistricting plan adopted by the Commission would not be subject to referendum or repeal by initiated law, as those options apply only to legislation or measures that the Legislature would be empowered to enact. The reserved right of the people to further amend the constitution by voter initiative pursuant to Const 1963, art 12, § 2 would not be affected.

32. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph

32.

33. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 33.

34. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 34.

35. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 35, as the Secretary and the Board have no duty to reject the Petition.

36. In response to Paragraph 36, the Intervening Defendants acknowledge that Plaintiffs have no “other” remedy, as there is no proper basis for issuance of a writ of mandamus, or any other remedy, for the claims asserted in their Complaint for Mandamus.

COUNT II – MANDAMUS

FAILURE TO REPUBLISH ABROGATED SECTIONS

37. Intervening Defendants incorporate their responses to Paragraphs 1 through 36, as if fully set forth herein.

38. In response to Paragraph 38, the Intervening Defendants acknowledge that MCL 168.482(3) includes the directive stated therein. In further response, the Intervening Defendants affirmatively state that enforcement of this purely statutory requirement by rejection of VNP’s proposal would be unconstitutional as an impermissible curtailment or undue burdening of the people’s reserved right to propose amendment of the Constitution by voter initiative pursuant to Const 1963, art 12, § 2.

39. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 39, for the reasons stated in response to Paragraph 38.

40. The Intervening Defendants deny, as untrue, the allegations set forth in Paragraph 40. Although not required to respond to legal conclusions and arguments included in the various sub-paragraphs, the Intervening Defendants shall provide the following answers to the allegations made therein:

a. The Intervening Defendants deny, as untrue, the allegations set forth in Paragraph 40.a. In further response, the Intervening Defendants note that Const 1963, art 6, § 13 does not purport to confer any exclusive jurisdiction upon the circuit courts, and although the proposed amendment would confer original jurisdiction upon the Supreme Court to address matters related to redistricting and the Commission's performance of its duties, the proposal contains no language purporting to make that jurisdiction exclusive.

b. The Intervening Defendants deny, as untrue, the allegations set forth in Paragraph 40.b. In further response, the Intervening Defendants affirmatively note that the right to speak, write and publish on all subjects conferred under Const 1963, art 1, § 5, is not absolute, as its language specifically provides that every person is responsible for abuse of that right. Const 1963, art 1, § 5 may be harmonized with the proposed amendment because the more specific provision of the proposed Const 1963, art 4, § 6 (11), imposes a slight restriction upon the exercise of that right to facilitate the Commission's proper and effective performance of its duty to ensure that its proceedings are undertaken in the open in order to ensure that the development of its redistricting plans will not be controlled by partisan political interests. If a Commissioner or a member of the Commission's staff violates this

specific constitutional directive, it may properly be said that he or she has abused the right conferred under Const 1963, art 1, § 5.

c. The Intervening Defendants deny, as untrue, the allegations set forth in Paragraph 40.c. In further response, the Intervening Defendants affirmatively note that the proposed amendment would provide a mandatory constitutional directive that the Legislature appropriate funds sufficient to compensate the Commissioners and to enable the Commission to carry out its functions, operations and activities, and that the appropriation made for these purposes be not less than the amount specified – 25 percent of the General Fund/ General Purpose Budget for the Secretary of State for each fiscal year when the Commission is performing its duties. Thus, if the Legislature complies with that constitutional obligation, as the Court should assume it will, there will be no need to have any payment of money out of the State Treasury without an appropriation.

If the Legislature should disregard its constitutional obligation to provide the required funding at the specified level, the Commission would have standing to enforce the Legislature's fulfillment of that obligation under the proposed Const 1963, art 4, § 6 (6) by means of a Complaint for Mandamus to enforce the performance of the Legislature's clear constitutionally-based duty.

The Intervening Defendants acknowledge that the proposed Const 1963, art 4, § 6 requires the State of Michigan to indemnify the Commissioners for costs incurred if the Legislature does not appropriate sufficient funds to cover such costs in violation of its constitutionally prescribed duty to do so. This provision would create a constitutionally-based cause of action for indemnification in favor of the

Commissioners which could be asserted by means of a Complaint for Mandamus, but the proposed amendment does not include any language directing that a judgment in their favor would be paid out of the state Treasury without an appropriation. Thus, a judgment in favor of the Commissioners would stand on the same footing as any other judgment against the state, the enforcement of which is dependent upon an appropriation of money to pay it.

d. The Intervening Defendants deny, as untrue, the allegations set forth in Paragraph 40.d. In further response, the Intervening Defendants affirmatively note that the oath of office required for public officers under Const 1963, art 11, § 1 requires public officers to swear or affirm that they will support the Constitution of this state. The requirements for qualification of Commissioners under the proposed Const 1963, art 4, § (6)(1) would be constitutionally-based, and the oath required by the proposed Const 1963, art 4, § (6)(2)(iii) is nothing more than a sworn or affirmed confirmation that the constitutional qualifications are met with respect to each candidate proposed for selection to serve as a Commissioner. The proposed amendment can be harmonized with Const 1963, art 11, § 1 because the oath required by the proposed Const 1963, art 4, § (6)(2)(iii) does not impose any requirement beyond the requirements imposed by the proposed Const 1963, art 4, § (6)(1), and thus, it cannot be construed as a pledge that is in any way inconsistent with, or beyond the scope of the officer's duty to uphold the state Constitution, as pledged by the oath of office required under Const 1963, art 11, § 1.

41. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 41.
42. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 42.
43. The Intervening Defendants deny, as untrue, the allegation set forth in Paragraph 43.
44. In response to Paragraph 44, the Intervening Defendants acknowledge that Plaintiffs have no “other” remedy, as there is no proper basis for issuance of a writ of mandamus, or any other remedy, for the claims asserted in their Complaint for Mandamus.

RELIEF REQUESTED

WHEREFORE, the Intervening Defendants respectfully request that this Honorable Court:

- A. Deny Plaintiffs’ Complaint for Mandamus;
- B. Enter its Order pursuant to MCR 7.216(A)(7) and (9), directing the Secretary of State and the Board of State Canvassers to comply with all of their statutory duties concerning certification, approval and placement of the ballot proposal at issue on the 2018 General Election ballot without delay, and requiring timely and complete reporting of actions taken for the required performance of those duties.
- C. Grant immediate effect of the Court’s Judgment pursuant to MCR 7.215(F)(2).
- D. Retain jurisdiction of this matter to permit further proceedings to secure prompt enforcement of the Court’s Judgment.
- E. Grant the Intervening Defendants such additional or different relief as is equitable and just.

Respectfully submitted,

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Dated: May 10, 2018

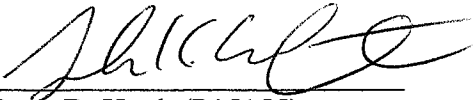
**INTERVENING DEFENDANTS' AFFIRMATIVE DEFENSES
TO PLAINTIFFS' COMPLAINT FOR MANDAMUS**

Now Come Intervening Defendants Voters Not Politicians Ballot Committee d/b/a Voters Not Politicians and Count MI Vote d/b/a Voters Not Politicians (collectively "Voters Not Politicians" or "VNP"), Kathryn A. Fahey, William R. Bobier and Davia C. Downey, by their undersigned legal counsel, listing the following Affirmative Defenses to Plaintiff's Complaint for Mandamus:

1. Plaintiffs have failed to state a cause of action for which relief may be granted.
2. Plaintiffs have failed to establish, and cannot establish, the existence of a clear legal duty which may be enforced by issuance of a writ of mandamus.
3. The statutory requirement of MCL 168.482(3) that a petition proposing amendment of the Constitution list and publish all existing constitutional provisions that would be altered or abrogated by the proposed amendment is unconstitutional.
4. Enforcement of the aforementioned statutory requirement of MCL 168.482(3) would be unconstitutional, as an impermissible curtailment or undue burdening of the people's reserved right to propose amendments of the Constitution by voter initiative pursuant to Const 1963, art 12, § 2.
5. Plaintiffs' Complaint for Mandamus is barred by the doctrine of Laches.

Respectfully submitted,

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