STATE OF MICHIGAN
IN THE SUPREME COURT

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

v

SECRETARY OF STATE and **MICHIGAN BOARD OF STATE CANVASSERS**,
Defendants / Cross-Defendants – Appellees,

and

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

Supreme Court
No. 157925

Court of Appeals
No. 343517

INTERVENING DEFENDANTS / CROSS-PLAINTIFFS – APPELLEES' ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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INTERVENING DEFENDANTS / CROSS-PLAINTIFFS – APPELLEES' ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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The Plaintiffs – Appellants contend the answer should be "No."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "Yes."

II. IS EXCLUSION OF THE PROPOSAL AT ISSUE FROM THE BALLOT REQUIRED IF THE COURT SHOULD DETERMINE THAT ONE OR MORE OF THE ALLEGED VIOLATIONS OF MCL 168.482(3) HAS BEEN ESTABLISHED?

The Court of Appeals did not address this question.

The Plaintiffs – Appellants contend the answer should be "Yes."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "No."

III. IS THE STATUTORY REPUBLICATION REQUIREMENT OF MCL 168.482(3) UNCONSTITUTIONAL?

The Court of Appeals did not address this question.

The Plaintiffs – Appellants have contended that the answer should be "No."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "Yes."

IV. WOULD EXCLUSION OF THE PROPOSAL AT ISSUE FROM THE BALLOT FOR THE ALLEGED VIOLATION OF MCL 168.482(3) BE UNCONSTITUTIONAL, AS AN IMPERMISSIBLE CURTAILMENT OR BURDENING OF THE PEOPLE'S RESERVED RIGHT TO PROPOSE AMENDMENT OF THE CONSTITUTION BY VOTER INITIATIVE, WHEN ANOTHER SUFFICIENT BUT LESS RESTRICTIVE REMEDY IS AVAILABLE?

The Court of Appeals has not addressed this question.

The Plaintiffs – Appellants have contended that the answer should be "No."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "Yes."

V. HAS THE BALLOT PROPOSAL AT ISSUE BEEN PROPERLY PRESENTED AS A VOTER-INITIATED PROPOSAL FOR AMENDMENT OF THE CONSTITUTION PURSUANT TO CONST 1963, ART 12, § 2?

The Court of Appeals has answered this question "Yes."

The Plaintiffs – Appellants contend the answer should be "No."

The Intervening Defendants/ Cross-Plaintiffs contend the answer is "Yes."

INTRODUCTION

The ballot proposal sponsored by Intervening Defendant Voters Not Politicians ("VNP") was born of a powerful frustration arising from a long and widely-held belief that vast numbers of our citizens have been denied fair representation in the state legislature and the U.S. Congress by the current system of redistricting, which allows the dominant political party to seize and perpetuate an unfair advantage by diminishing the value of votes cast by members of the opposing party.

The Plaintiffs – Appellants are individuals and a ballot question committee formed by people who are opposed to the substance of that proposal for the reasons stated at length in their Application for Leave to Appeal. Under our system of laws, the Plaintiffs are absolutely entitled to hold and express their opinions, and to advocate that they should be adopted by others. But by their present request for a writ of mandamus, Plaintiffs have ventured a step too far, revealing their apparent belief that opposing viewpoints of others should not be valued as highly as their own, and suggesting that the people of Michigan should therefore be denied the opportunity to exercise their constitutionally-reserved right to vote for or against the proposal at issue. Our Court of Appeals has properly declined Plaintiffs' invitation to deny the people that fundamental right, and thus, the Plaintiffs have renewed their plea before this Court.

VNP prays that this Court will decline that invitation as well. For all of the reasons discussed in greater detail *infra,* VNP contends that the Court of Appeals has properly rejected the claims now presented in Plaintiffs' Application for Leave to Appeal, that further review of those claims by this Court is therefore unnecessary, and that Plaintiffs' Application should therefore be denied.

The Court of Appeals carefully reviewed Plaintiffs' contrived claims of abrogation and correctly determined that VNP's proposal would not abrogate any of the existing constitutional provisions identified in Plaintiffs' filings. It also correctly determined that VNP's proposal was appropriately presented as a proposed amendment of the Constitution pursuant to Const 1963, art 12, § 2. The Court of Appeals reached the correct result based upon sound legal reasoning, and has appropriately directed the Secretary of State and the Board of State Canvassers to take all necessary steps to place VNP's proposal on this year's general election ballot.[1] This being the case, there is no basis for any finding that the Court of Appeals' Judgment was erroneous, much less an abuse of its judicial discretion. The interests of justice would therefore be best served by a denial of leave to appeal.

If this Court should find that additional review of this matter is warranted and ultimately conclude that VNP's petition would abrogate one or more of the specified constitutional provisions if adopted, there will be other important questions for the Court to resolve. It will be necessary, in that event, to consider whether the alleged violation of MCL 168.482(3) requires the exclusion of VNP's proposal from the ballot, as Plaintiffs have suggested, or whether the violation could be more appropriately remedied by a directive to Defendant Secretary of State to include the omitted provision or provisions when discharging her constitutionally-required duty to publish other provisions which would be abrogated by the amendment if approved.

If the Court should find that exclusion of VNP's proposal from the ballot would be the necessary remedy for a violation of § 482(3) , it will be necessary for the Court to consider

[1] The Board of Canvassers certified VNP's proposal for submission on the ballot in compliance with the Court of Appeals' Judgment during its meeting of June 20, 2018.

important questions of first impression concerning the constitutionality of that provision – specifically, whether its republication requirement can be sustained as a proper regulation of petition "form" within the scope of the Legislature's limited authority to implement the self-executing provisions of Const 1963, art 12, § 2, and if so, whether enforcement of that provision by exclusion of VNP's proposal from the ballot would be unconstitutional, as an unnecessary and undue curtailment or burdening of Intervening Defendants' constitutional right to propose amendment of the Constitution by voter initiative.

And if the Court should find it necessary to consider Plaintiffs' exaggerated claim that VNP's petition has proposed a "general revision" of the Constitution which can only be accomplished by means of a constitutional convention, the Court should also consider whether it should adopt the arbitrary and unreliable quantitative/qualitative test adopted in *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273; 761 NW2d 210 (2008), *result affirmed,* 482 Mich 960; 755 NW2d 157 (2008).

These questions have been preserved and discussed in the proceedings below, but the Court of Appeals did not address all of them, having concluded, it may be assumed, that the questions left unanswered were questions more appropriately reserved for this Court. The Intervening Defendants are confident that if further review is found to be necessary, the correct resolution of these important questions should leave the final conclusion and result unchanged – that the people's constitutionally-guaranteed right to vote for or against VNP's proposal must be respected and facilitated.

COUNTER-STATEMENT OF FACTS

Plaintiffs' "Concise Statement of Material Proceedings and Facts" is improperly argumentative, especially with respect to the content of VNP's proposal, which of course speaks

for itself. Intervening Defendants cannot improve upon the very detailed and objective summary of the pertinent facts, including the summaries of VNP's proposal and the existing constitutional provisions, provided in the Court of Appeals' Opinion, so they will not burden the Court with an attempt to do so. Discussion of the pertinent facts will instead be included in the body of the Legal Arguments, *infra*, to the extent that such discussion may be required to fully inform the Court.

LEGAL ARGUMENTS

I. THE STANDARDS OF REVIEW.

The standards for adjudication of a request for mandamus have been accurately summarized in the Court of Appeals' Opinion, and the Plaintiffs have correctly acknowledged that a court's decision to grant or deny a writ of mandamus is reviewed for abuse of discretion. *Stand up for Democracy v Secretary of State,* 492 Mich 588, 598; 822 NW2d 159 (2012). Questions of law addressed in relation to a grant or denial of mandamus, including questions of constitutional and statutory construction, are reviewed *de novo. Studier v Michigan Public School Employee Retirement Board,* 472 Mich 642, 649; 698 NW2d 350 (2005); *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 487, 491-492; 688 NW2d 538 (2004).

II. THE RULES OF CONSTITUTIONAL CONSTRUCTION.

It is well settled that the primary objective in interpreting a constitutional provision is to determine the "common understanding" of the people – "the text's original meaning to the ratifiers, the people, at the time of ratification." *Studier v Michigan Public School Employees' Retirement Board, supra,* 472 Mich at 652. Courts typically discern the common understanding of constitutional text by applying each term's plain meaning at the time of ratification, but if the constitution employs technical or legal terms of art, those terms are construed in their

technical, legal sense. *Id.* To determine the meaning of constitutional language, it is also appropriate to consult dictionary definitions. *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273, 295; 761 NW2d 210 (2008), *affirmed as to result,* 482 Mich 960 (2008).

The decisions have recognized two additional rules of construction relevant to the questions presented in this matter – that judicial interpretations of prior constitutional provisions and the meaning of specific terms intended by the drafters are also relevant to interpretation of constitutional language. In *Boards of County Road Commissioners v Board of State Canvassers,* 391 Mich 666; 218 NW2d 144 (1974), this Court noted that:

> "Where a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new or revised constitution, or amendment, it will be presumed to have been retained with a knowledge of the previous construction, and courts will feel bound to adhere to it." 391 Mich at 675.

And in *Beach Grove Investment Company v Civil Rights Commission,* 380 Mich 405; 157 NW2d 213 (1968), the Court explained the difference between "prescribed by law" and "provided by law" as used in the 1963 Constitution by reference to the drafters' explanation:

> " . . . The Committee on Style and Drafting of the Constitutional Convention of 1961 made a distinction in the use of the words "prescribed by law" and the words "provided by law." Where "provided by law" is used, it is intended that the legislature shall do the entire job of implementation. Where only the details were left to the legislature and not the over-all planning, the Committee used the words "prescribed by law." See Official Record, Constitutional Convention of 1961, pp 2673, 2674." 380 Mich at 418-419.

III. THE COURT OF APPEALS PROPERLY FOUND THAT THE PROPOSED CONSTITUTIONAL AMENDMENT AT ISSUE WOULD NOT ABROGATE ANY EXISTING CONSTITUTIONAL PROVISIONS.

Plaintiffs' effort to exclude VNP's proposal from the ballot has been based, in large part, upon their claim that the petition failed to comply with MCL 168.482(3), which provides, in pertinent part, that:

> "If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted, preceded by the words: 'Provisions of existing constitution altered or abrogated by the proposal if adopted.'"

The Court of Appeals has appropriately concluded that this claim is "without merit."

A. THE STATUTORY REPUBLICATION REQUIREMENT.

This Court has examined this statutory requirement, often referred to as the "republication requirement" of § 482(3), and in both *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980), and *Protect Our Jobs v Board of State Canvassers,* 492 Mich 763, 772; 822 NW2d 534 (2012), has ruled that it should not be necessary for the sponsor of a petition proposing a constitutional amendment to obtain a judicial determination prior to circulating its petition that it has correctly identified and republished all sections of the Constitution that would be abrogated by the proposal. In *Ferency*, this Court appropriately characterized the republication requirement as "a new requirement regarding substantive content," but assumed for the sake of its discussion that it was a "regulation of form," while cautioning that the burden imposed by that requirement cannot unduly restrict the people's free exercise of their constitutionally guaranteed right to seek amendment of the constitution by initiative petition:

> "***Assuming arguendo that a new requirement regarding substantive content is a regulation of form***, and assuming that the legislature can impose minimal burdens to keep the process fair, open and informed, the burden imposed cannot unduly restrict the exercise of the right." 409 Mich at 593 (Emphasis added)

The *Ferency* Court also properly recognized that the language of Const 1963, art 12, § 2 does not require that a petition specify the existing provisions that would be altered or abrogated by the proposed amendment beyond its directive that the petition "shall be in the form . . . as prescribed by law."[2] This Court also appropriately recognized that the constitutional language imposes that obligation upon the state alone, while the obligation is imposed upon petitioners indirectly by MCL 168.482(3). 409 Mich 592-593. After stating these guiding principles and others which will be discussed below in relation to the constitutionality of § 482(3), the *Ferency* Court expressed its conclusion that correctly interpreting the Constitution to identify all provisions affected by a proposed amendment is too onerous a burden to place upon the right of popular amendment, and cannot be justified as a means of educating persons signing petitions:

> "***Correctly interpreting the constitution to identify all provisions affected by a proposed amendment is too onerous a burden to place upon the right of popular amendment. Nor can it be justified as a means of educating persons signing petitions.*** A petitioner faced with the prospect of having his or her entire petition drive nullified by the failure to list a constitutional provision will, out of caution, err on the side of inclusion. Petitions will become a maze of constitutional provisions, if indeed petitioners will not simply attach copies of the entire constitution to their petitions. The provisions expressly being amended may be lost among those less directly affected. Few people will understand, without extensive explanation, how or how much a particular listed provision is being altered." 409 Mich at 595-596 (Emphasis added)

Having expressed these concerns, the *Ferency* Court held that it is only where the proposed amendment would directly "alter or abrogate" specific provisions of the existing

[2] It is important to note, in this regard, that inclusion of this information in petitions proposing constitutional amendments was included as an element of required substantive content in the 1908 Constitution as originally adopted, but this requirement was eliminated by an amendment of Const 1908, art 17, § 2, approved by the voters in 1913. A copy of Const 1963, art 12, § 2 is submitted herewith as Appendix "A." Copies of Const 1908, art 17, § 2 as originally adopted, and as subsequently amended in 1913 and 1941, are submitted herewith as Appendices "B," "C" and "D," respectively.

Constitution that those provisions must be noted in petitions, and explained, consistent with its prior decision in *School District of the City of Pontiac v City of Pontiac,* 262 Mich 338; 247 NW 474 (1933),[3] that an existing constitutional provision is deemed to be abrogated if the proposed amendment would render it wholly inoperative. There is no abrogation if the existing provision will remain operative, although there may be a need thereafter to construe that provision in conjunction with the amending provisions. 409 Mich at 596-597.

Thus, having proceeded based upon its briefly-stated assumption ***arguendo*** that the statutory requirement to list provisions that would be abrogated by the proposed amendment is a matter of petition "form," subject to legislative regulation, the *Ferency* Court appears to have also assumed that the requirement was constitutional to the extent of requiring the petitioner to list provisions that would be "altered or abrogated," as defined in the Court's Opinion. But in so ruling, the Court also expressed its recognition that adoption of a more expansive definition of "alter or abrogate" for this purpose would effectively require a petitioner to secure a judicial determination in advance, and found that this was not intended by the Legislature. 409 Mich at 597-598.

B. THE PROPOSED CONSTITUTIONAL AMENDMENT WOULD NOT ABROGATE EXISTING CONSTITUTIONAL PROVISIONS.

In *Protect Our Jobs*, this Court addressed questions of alleged abrogation in four separate matters, including a proposal to authorize construction of eight new casinos on

[3] In *School District of the City of Pontiac,* which addressed a post-election challenge to the validity of a constitutional amendment adopted in 1932 under the provisions of the 1908 Constitution as amended in 1913, the Court rejected the plaintiff's argument that the amendment should be invalidated because the Secretary of State had failed to properly discharge his constitutional obligation to publish all of the existing constitutional provisions that would be altered or abrogated by the proposed amendment, if adopted. Under the 1908 Constitution, as amended, there was no constitutional requirement for the petition to identify those provisions, and the statutory provision requiring petitions to do so was enacted later.

specified parcels of real property. In deciding those matters, the Court reaffirmed the standards previously set forth in *City of Pontiac* and *Ferency,* and provided additional clarification of the meaning of the constitutional and statutory language. The Court prefaced its discussion by emphasizing that it sought to avoid any construction which would require a petition circulator to secure a judicial determination of which provisions of the existing Constitution a proposed amendment would alter or abrogate, and repeating its previously expressed observation that, "the ordinary elector, not being a constitutional lawyer, would be confused rather than helped by a publication of all the other constitutional provisions which were or might be directly or only remotely, and possibly only contingently, affected by the proposed amendment." 492 Mich at 781.

The Court went on to hold, consistent with its prior decisions, that: 1) the republication requirement is only triggered by a change that would essentially eviscerate an existing provision; 2) an existing provision of the Constitution is abrogated and must therefore be republished if it is rendered "wholly inoperative"; 3) An existing provision is rendered wholly inoperative if the proposed amendment would render it a nullity or if it would be impossible for the amendment to be harmonized with the existing provision; 4) an existing provision is not rendered wholly inoperative if it can be reasonably construed in a manner consistent with the new provision; and 5) there is no abrogation when the existing provision would likely continue to exist as it did, although it might be affected or supplemented in some fashion by the proposed amendment. 492 Mich at 782-783.

As the Court of Appeals Opinion in this case has noted, the Plaintiffs have suggested an unduly narrow and restrictive interpretation of this Court's decision in *Protect Our Jobs* – an interpretation which does not withstand scrutiny when it is seen that the Court's decision in that

case is most significant for its reinforcement of the flexible principles established in its prior decisions. The clarification regarding the republication requirement provided in *Protect Our Jobs* was that an existing constitutional provision that uses nonexclusive or non-absolute language is less likely to be rendered inoperative simply because a proposed new provision introduces in some manner a change to the existing provision; and that an abrogation may be found when a discrete portion of the existing provision, including, in some cases, a single phrase or word, would be rendered "wholly inoperative" and the conflicting provisions cannot be harmonized. 492 Mich at 783-784.

The proposal excluded from the ballot in *Protect Our Jobs* involved an abrogation based upon a single word – the reference to the Liquor Control Commission's ***complete*** control of alcoholic beverage traffic conferred by Const 1963, art 4, § 40. This Court concluded that where the proposed amendment (that would have required that the eight proposed casinos ***shall*** be granted liquor licenses) would have nullified an entire sentence in the Constitution (that had conferred complete control of alcoholic beverage traffic) by eliminating the exclusivity of control, it constituted an abrogation. It was not unreasonable to conclude, in that case, that entirely negating the significance of that single word ***did*** render a portion of the existing provision "wholly inoperative" and a "nullity," allowing no possibility for harmonization of the conflicting provisions. Therefore, it came as no surprise that the Court found an abrogation with respect to that proposal. No such inconsistency can be found with respect to VNP's proposal.

1. THE PROPOSED AMENDMENT WOULD NOT ABROGATE ANY PART OF CONST 1963, ART 9, § 17.

Plaintiffs have alleged that the language of the proposed Const 1963, art 4, § 6 (5) requiring compensation and indemnification of Commissioners would abrogate the directive of Const 1963, art 9, § 17, that, "No money shall be paid out of the state treasury except in

pursuance of appropriations made by law." This claim is without merit, as the proposal does not produce an incompatibility rendering Const 1963, art 9, § 17 a "nullity," as Plaintiffs have erroneously asserted.

The Court of Appeals correctly rejected this argument:

> "In examining the Appropriations Clause from the 1908 Constitution, our Supreme Court recognized that 'the weight of authority' held that the clause did not restrict appropriations to enactments from the Legislature, but also afforded "a constitutional appropriation apart from any action by the legislature." Civil Service Comm v Auditor General, 302 Mich 673, 679; 5 NW2d 536 (1942). But even so, the VNP Proposal accounts for the legislative appropriation, as it provides for a cause of action if the Legislature does not appropriate the funds—thereby indicating that the money is to come from the Legislature via an appropriation." *Slip Op. at p. 26.*

VNP's proposed Const 1963, art 4, § 6 (5) 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.[4] The provisions of the proposed Const 1963, art 4, § 6, including the duty of the Legislature to appropriate the required funding, would be self-executing.[5] Thus, if the Legislature complies with its constitutional obligation, as the Court

[4] It is noteworthy that the proposed language imposing this obligation is very similar to the existing provision in Const 1963, art 4, § 6: "The legislature shall appropriate funds to enable the commission to carry out its activities." It is also similar to the Legislature's obligation to appropriate funding for operation of the Civil Service Commission included in Const 1963, art 11, § 5. The Court should also note that, although the proposed Const 1963, art 4, § 6 (5) would require funding of the Commission at the minimum level specified, it would also require the Commission to return to the State Treasury all unexpended funds within 6 months after the end of each fiscal year as does Const 1963, art 11, §5.

[5] *See*, Proposed Const 1964, art 4, § 6 (20).

should assume it will, there will never be a need for any payment of additional money from the State Treasury. In the unlikely event that the Legislature should disregard its constitutional obligation to provide the required funding, the Commission would then have standing to enforce this obligation.[6] The Legislature is not free to disregard its constitutionally-prescribed duty to provide necessary funding for the required operations of a constitutionally-established entity. *See, e.g., Adair v Michigan,* 497 Mich 89; 860 NW2d 93 (2014) (addressing enforcement of the Legislature's obligation to appropriate sufficient funding to satisfy its obligation under the Headlee Amendment); *46th Circuit Trial Court v County of Crawford*, 476 Mich 131; 719 NW2d 553 (2006) (addressing enforcement of funding unit's obligation to appropriate funds for trial court operations).[7]

But although the proposed Const 1963, art 4, § 6 (6) would provide a means for seeking enforcement of the Legislature's obligation to appropriate the required funding by judicial action, it does ***not*** include any language stating or implying that a judicial decree to enforce that obligation could require a payment from the State Treasury to satisfy that obligation without an appropriation of the required funds. Similarly, the proposed Const 1963, art 4, § 6 (5) would require 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

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[6] It is anticipated that if enforcement action were required, a request would be made for a declaratory judgment to establish the obligation to provide the required funding and determine the amount required. A writ of mandamus could then be issued to direct the Legislature to appropriate the amount determined pursuant to MCR 2.605(F).

[7] Plaintiffs have cited *Musselman v Governor,* 448 Mich 503; 533 NW2d 237 (1995) as support for their argument that the Legislature cannot be compelled to appropriate money by writ of mandamus. Their reliance upon that decision is misplaced because the provision at issue in that case – Const 1963, art 9, § 24 – did not include any self-executing directive for the Legislature to appropriate money, as VNP's proposal does, and the Court's finding that no relief could be granted in that matter was also based on the fact that there were no previously-appropriated but unencumbered funds from which a judgment could be paid. 448 Mich at 521-524.

constitutionally-prescribed duty to do so. This provision would create a constitutionally-based cause of action for indemnification in favor of the Commissioners. This is no different than any other claim against the state for a money judgment.

The provisions of the proposed amendment and the existing Const 1963, art 9, § 17 can be easily construed and harmonized to mean that a judgment against the Legislature would stand on the same footing as any other money judgment against the state, which cannot be paid unless the Legislature makes a specific appropriation to cover it, or there is previously-appropriated unencumbered funding from which the judgment may be paid, as discussed in MCL 600.6458(2). As the Court of Appeals has correctly noted, it is not necessary to now determine how a judicial decree to enforce payment of the constitutionally-required funding might be enforced against the Legislature in the face of a refusal to comply; the only question is whether VNP's proposed amendment would replace, render wholly inoperative, or eviscerate the appropriations clause. The Court of Appeals has properly determined that it would not.

This Court's decision in *Protect Our Jobs* instructs that evaluation of whether an existing provision would be abrogated by a proposed amendment requires a comparison of the language of the existing provision with the language of the proposed amendment, and a determination as to whether the proposed amendment would render all or a part of the existing provision inoperative, or a "nullity," incapable of being harmonized with the new language. It is therefore appropriate to ask: Where, in the proposed amendment, is the language commanding that the Treasury Department pay money out of the State Treasury without an appropriation? As the Court of Appeals correctly recognized, there is none. Plaintiffs' objection might have had some merit if the proposal included language requiring, for example, that the Treasury make payment upon presentation of a warrant for payment issued by the

Commission's Chairperson or Secretary, but the proposal does not include this or any similar directive. So, there is no inconsistency between the existing and proposed language. Plaintiffs are really suggesting that an abrogation should be found based upon their own ***assumption*** that the constitutional directive to appropriate and indemnify would require the Treasury Department to make payment without any appropriation, but that is not what the proposal says. And in the absence of any such specific directive, there is no basis for finding an abrogation.

2. THE PROPOSED AMENDMENT WOULD NOT ABROGATE ANY PART OF CONST 1963, ART 11, § 1.

Plaintiffs have alleged that the language of the proposed Const 1963, art 4, § 6 (2)(a)(iii) requiring applicants for employment as Commissioners to attest under oath that they meet the specified qualifications for that employment somehow abrogates the language of Const 1963, art 11, § 1, providing that, "No other oath, or any religious test shall be required as a qualification for any office or public trust." As the Court of Appeals correctly concluded, this claim is meritless:

> "Plaintiffs maintain that the existing provision requires only one oath, and the new provision would render the existing provision a nullity. The affirmation in proposed § 6(2)(a)(ii) is not an oath of office, but is merely an affirmation that the applicant satisfies the commissioner qualifications, which are enumerated in a separate section, § 6(1). This position finds support in Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich 465, 510: 242 NW2d 3 (1976), where our Supreme Court ruled that an oath regarding financial disclosure was akin to the affidavits required to file a nominating petition under MCL 168.558." *Slip Op. at p. 27.*

The Court of Appeals properly cited this Court's decision in *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 455, 510; 242 NW2d 3 (1976), as support for its finding that, like the required financial disclosures at issue in that case, the affirmation required by VNP's proposal is akin to the affidavit of identity required for filing of a nominating petition under MCL 168.558. It is well established that affirmations of this character do not violate the

constitutional prohibition against requirement of additional oaths or tests for public office. In *Tedrow v McNary*, 270 Mich 322; 258 NW 868 (1935), this Court held that a statutory requirement to file an affidavit establishing qualifications to hold office did not run afoul of the identical "no other oath" provision of Const 1908, art 16, § 2, where the required affidavit did not require any statement in any way affecting the candidate's rights as a citizen, or his religious or political affiliations. 270 Mich at 334-335.

The proposed amendment can also be harmonized with Const 1963, art 11, § 1, because the affirmation required by the proposed Const 1963, art 4, § 6 (2)(iii) does not impose any requirement beyond the requirements established 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 a prospective Commissioner's duty to uphold the state Constitution and to faithfully discharge the duties of the office, as pledged by the oath of office required under Const 1963, art 11, § 1. This being the case, there is no basis for Plaintiffs' suggestion that the proposed amendment will render any part of Const 1963, art 11, § 1 inoperative, or a "nullity."

In the Court of Appeals, Plaintiffs argued that the affirmation required by VNP's proposal ran afoul of Const 1963, art 11, § 1 because it improperly imposes a political test for employment as a Commissioner – a claim first asserted in their Reply Brief – and they have now renewed that objection in their presentation to this Court. This argument is also meritless.

The essential purpose of Const 1963, art 11, § 1 and the similar provisions of Michigan's prior Constitutions has been to prevent the requirement of any political or religious tests as qualifications for public office. Thus, the "no other oath" provision has been included to prevent attempts to require a pledge of adherence to any political or religious belief or any promise to provide any performance beyond that required by the constitutional oath of office.

It was never intended to preclude application of legitimate qualifications for public employment. *See, Attorney General v The Board of Councilmen of the City of Detroit*, 58 Mich 213, 217-218; 24 NW 887 (1885). Also, decisions of this Court have held that appointment to public bodies may be based, in part, upon consideration of political affiliation in cases where the requirement in question is designed to ensure representation of diverse political interests, and does not exclude persons of any particular political persuasion from participation. *See, e.g., Attorney General ex rel. Connolly v Reading*, 268 Mich 224; 256 NW 432 (1934); *Attorney General ex rel. Fuller v Parsell,* 99 Mich 381; 58 NW 335 (1894).

VNP's proposal does not establish any political test for employment as a Commissioner as Plaintiffs have claimed, nor does it exclude anyone, of any political persuasion, from eligibility for service as such. The purpose of the proposal is to assure that the Commission will be comprised of persons having the desired diversity of political viewpoints, and thus, cannot be dominated by any single political party. To ensure that the Commission will be comprised of persons having the desired diversity of political viewpoints, and thus, cannot be dominated by any single political party, the proposal would require that prospective Commissioners be chosen from three separate pools of candidates, two of which would be made up of persons affiliating with each of the two major political parties, and the third being made up of persons who do not affiliate with either of those parties. Thus, it may be seen that all otherwise qualified persons may apply and be considered for selection to serve as a Commissioner.

VNP's proposal also includes provisions that would exclude certain persons, including current and former political office holders, candidates for elected political office, lobbyists and employees of the Legislature, whose circumstances present a potential for partisan political

influence. Exclusion of those persons cannot be characterized as a political test.[8] It is, instead, an additional measure appropriately designed to ensure that the Commission will be free of partisan political influence, and is therefore squarely within the scope of qualifications which may be required to ensure a balanced representation of political interests.

These provisions, included as legitimate qualifications for employment as Commissioners, do not run afoul of Const 1963, art 11, § 1 or this Court's precedents approving provisions designed to promote desirable political balance.[9] As the Court of Appeals correctly noted in this case:

> "In contrast, the oath in Harrington v Secretary of State, 211 Mich 395, 396; 179 NW2d 283 (1920), cited by plaintiffs, required the candidate to swear in part that he would "support the principles of [the] political party of which he is a member if nominated and elected." That loyalty oath was to cover the entire term of office, even after election, and for so long as he or she remained in office. In ruling that the oath was unconstitutional, the Court cited with approval the Attorney General's reasoning that the candidate would be bound by an oath other than the constitutional oath of office. Id. at 397. The same is not true here, as the oath required by the VNP Proposal relates only to the information on the application and does not bind a candidate once he or she becomes a commissioner." *Slip Op. at p. 27.*

The Court of Appeals correctly decided this issue. This Court does not need to review this conclusion.

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[8] Const 1963, art 4, § 6 currently provides: "No officers or employees of the federal, state or local governments, excepting notaries public and members of the armed forces, shall be eligible for membership on the commission. Members of the commission shall not be eligible for election to the legislature until two years after the apportionment in which they participated becomes effective."

[9] The Court should note, in this regard, that our present Constitution includes similar provisions designed to ensure balanced representation of political interests and freedom from partisan political influence. These may be found in the existing provisions of Const 1963, art 4, § 6, regarding qualifications for, and appointment of members of the Commission on Legislative Apportionment created by that section, and by the language of Const 1963, art 2, § 7, providing that "[a] majority of any board of canvassers shall not be composed of members of the same political party."

3. THE PROPOSED AMENDMENT WOULD NOT ABROGATE ANY PART OF CONST 1963, ART 1, § 5.

Plaintiffs have alleged that the language of the proposed Const 1963, art 4, § 6 (11) restricting the ability of the Commission's members and its staff, attorneys and consultants to discuss redistricting matters with members of the public outside of an open public meeting of the Commission would abrogate the language of Const 1963, art 1, § 5, providing that, "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of that right." This claim is without merit because the plain language of Const 1963, art 1, § 5 clearly states that the right to speak, write and publish on all subjects guaranteed by that provision is not absolute, as its language specifically provides that every person is responsible for abuse of that right.

Plaintiffs have acknowledged that speech of government employees is subject to regulation by their citation of *Shirvell v Department of Attorney General,* 308 Mich 702; 866 NW2d 478 (2015), which noted that, "while an employee does not forfeit his or her free speech interests by virtue of holding government employment, 'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general'" and that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." 308 Mich App at 732-733, quoting *Pickering v Board of Education,* 391 US 563, 568; 88 S Ct 1731; 20 L Ed 2d 811 (1968) and *Garcetti v Ceballos,* 547 US 410, 418; 126 S Ct 1951; 164 L Ed 2d 689 (2006).[10]

[10] The right of private citizens to speak as they choose can also be restricted in some circumstances to serve important public interests. *See, e.g., Grievance Administrator v Fieger,* 476 Mich 231; 719 NW2d 123 (2007).

Const 1963, art 1, § 5 can easily be harmonized with the proposed amendment because the more specific provision of the proposed Const 1963, art 4, § 6 (11), imposes a very slight restriction upon the exercise of the ***limited*** right of free speech conferred under Const 1963, art 1, § 5 to facilitate the Commission's proper and effective performance of its duty to see that its proceedings are undertaken in the open in order to maintain public confidence and ensure that the development of its redistricting plans will not be controlled by partisan political interests. If a Commissioner, staff member, counsel or consultant 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, which does not extend to protect that abuse. The Court of Appeals has properly held that this minor restriction cannot be considered an abrogation. The free speech guarantee will continue as before, and will in no sense be rendered inoperative or a nullity.

4. THE PROPOSED AMENDMENT WOULD NOT ABROGATE ANY PART OF CONST 1963, ART 6, § 13.

Plaintiffs have alleged that the language of the proposed Const 1963, art 4, § 6 (19) conferring original jurisdiction upon this Court for limited review of the Commission's actions would abrogate the language of Const 1963, art 6, § 13 conferring original jurisdiction upon the circuit courts in all matters not prohibited by law.[11] This claim is without merit for the simple reason that Const 1963, art 6, § 13 does ***not*** purport to confer any ***exclusive*** jurisdiction upon the circuit courts as Plaintiffs incorrectly alleged in the proceedings below, and although the proposed amendment would confer original jurisdiction upon this Court to address matters related to redistricting and the Commission's performance of its duties – jurisdiction similar to

[11] Const 1963, art 4, § 6 currently provides: "Upon application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction shall direct the secretary of state or commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution."

that which the Court already has and routinely exercises with respect to redistricting matters – the proposal contains no language purporting to make that jurisdiction exclusive. Accordingly, there is no basis for a finding that VNP's proposal would abrogate Const 1963, art 6, § 13 if approved by the voters.

Again, it is appropriate to ask: Where is the language creating the irreconcilable inconsistency? And again, the answer is that there is none. Even if VNP's proposal ***did*** purport to make the original jurisdiction conferred upon this Court exclusive, the Court of Appeals has correctly found that the provision of Const 1963, art 6, § 13 conferring original jurisdiction upon the circuit courts allows for exceptions, as it specifically states that their original jurisdiction extends to "all matters not prohibited by law." The Court of Appeals has also correctly noted that the original jurisdiction of the circuit courts may be denied or assigned to another court by constitution or statute.[12] Plaintiffs' argument that an exception can only be provided by statute is soundly refuted by the authorities cited in the Court of Appeals' Opinion, and is not supported by this Court's inapposite decision in *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000), holding that the language of Const 1963, art 1, § 20 regarding appointment of appellate counsel in criminal cases "as provided by law" required appointment only as provided by statute, and thus, the Court could not require appointment of counsel by court rule pursuant to its rulemaking authority in the absence of legislative action.

The Court of Appeals correctly decided this issue. This Court does not need to review this conclusion.

[12] MCL 600.605 provides that, "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." Thus, an exception to circuit court jurisdiction authorized by constitutional amendment is also an exception authorized by statute.

IV. EXCLUSION OF THE PROPOSAL AT ISSUE FROM THE BALLOT IS NOT A NECESSARY OR APPROPRIATE REMEDY FOR THE ALLEGED VIOLATIONS OF MCL 168.482(3).

Plaintiffs have asserted that the appropriate remedy for the alleged noncompliance with MCL 168.482(3) is to exclude VNP's proposal from the general election ballot. VNP contends that this remedy is an impermissibly extreme measure in light of the abundant case law discussed below with respect to the constitutionality of § 482(3). This case law has consistently emphasized that the people's reserved right to propose constitutional amendments by initiative should be facilitated rather than restricted. *Ferency,* 409 Mich at 602. Imposition of that remedy would be wholly unwarranted and unreasonable because enforcement of the statutory requirement in this manner would constitute an impermissible curtailment or undue burdening of VNP's right to propose constitutional amendments by voter initiative.

In *Ferency, supra,* this Court ultimately concluded that the sponsor of the proposed amendment had not failed to list any existing constitutional provisions that would be altered or abrogated, and thus, the Court did not consider what the appropriate remedy should have been for the alleged error, if established. In his concurring Opinion, Justice Williams included an enlightening discussion of the difference between the obligation imposed upon a petition sponsor under MCL 168.482, and the publication requirement imposed upon the state election officials by the language of Const 1963, art 12, § 2. Justice Williams agreed that the petition sponsor had properly listed the existing constitutional provisions that would be altered or abrogated to the extent required by MCL 168.482(3), but felt that there were provisions, not identified in the petition, that the Secretary of State should have been required to publish for the electorate in fulfillment of ***the Secretary's constitutional*** duty.

Justice Williams opined that, although the statute used the same terminology, referring to provisions "altered or abrogated," the constitutional publication requirement imposed a more

stringent duty upon the state election officials with respect to the identification of those provisions for the required publication than the duty imposed by statute upon petition circulators, who in many cases are less sophisticated than the agents of the State and have fewer legal resources at their disposal for making that determination. Having noted that difference, he suggested that a deficiency in the petition could be cured by a proper fulfillment of the Secretary of State's duty of publication – a duty which could be aided by a pre-election judicial determination as to which, if any, provisions would be altered or abrogated by the proposed amendment. 409 Mich at 612-624.

Justice Williams' sensible recognition of the difference between the duties imposed upon petition sponsors and the duty required of our state election officials harmonized the constitutional and statutory provisions, consistent with the case law emphasizing that they should be liberally construed and applied to facilitate, rather than obstruct, the free exercise of the people's right to propose constitutional amendments by voter initiative. And consistent with that recognition, Justice Williams' concurrence provided a convincing argument that the Court may properly grant as a remedy an order directing the Secretary of State to publish in the constitutionally required publication any existing provisions that would be abrogated, but were not published by the petition sponsor in their petition. 409 Mich at 637.

Other decisions of this Court have suggested that a failure to identify provisions to be altered or abrogated may be remedied by corrective action directed by judicial decree before the election. *See, Massey v Secretary of State,* 457 Mich 410, 414-415; 579 NW2d 862 (1998) (recognizing the Court's authority to require corrective action by election officials when a challenge is brought before an election); *Carman v Secretary of State,* 384 Mich 443, 454; 185 NW2d 1 (1971) (noting that the purpose of MCL 168.482 was served by the Secretary of State's

proper publication of the existing provision that would be abrogated). In *Carman,* the Court noted, as a matter of "constitutional substance rather than form," that the purpose served by the constitutional requirement is of greater importance than the purpose served by the statutory requirement. 384 Mich at 454-455.

This Court has remedies, other than nullifying the over 390,000 valid signatures that Voters Not Politicians has obtained (as verified by the Bureau of Elections, and now certified by the Board of State Canvassers). This Court should not nullify these voters' desire to have the VNP proposal appear on the ballot.

V. THE STATUTORY REPUBLICATION REQUIREMENT OF MCL 168.482(3) IS UNCONSTITUTIONAL.

Plaintiffs' claim that VNP's proposal must be excluded from the ballot for failure to comply with the republication requirement of MCL 168.482(3) is without merit. But there is another more basic reason to reject Plaintiffs' challenge. If this Court finds a violation of this statute and concludes the violation must be remedied by exclusion of VNP's proposal from the ballot, the constitutionality of MCL 168.482(3) must be considered. VNP contends that the statutory republication requirement of § 482(3) is unconstitutional because the enactment of that requirement is beyond the limited scope of the Legislature's authority to prescribe the form of petitions and regulate their signing and manner of circulation conferred by Const 1963, art 12, § 2.

MCL 168.482, and other provisions of the Michigan Election Law, establish statutory requirements for voter petitions, including petitions proposing initiated laws and amendments of the state Constitution. For the most part, those provisions have served to provide necessary details concerning the form, signing and manner of circulating petitions, which have been addressed by the Legislature in response to the directives of the Constitution. When properly

enacted for implementation of the self-executing constitutional provisions governing voter initiatives, those statutory enactments are constitutional and may be applied in furtherance of that purpose *if* their application does not curtail or impose undue burdens upon the free exercise of the people's reserved right to propose laws and constitutional amendments by voter initiative. But a statutory regulation is unconstitutional, and cannot be enforced, if it imposes requirements beyond the scope of the authorization conferred by the constitutional language or its application curtails or unduly burdens the people's free exercise of the reserved right.

A. THE GOVERNING PROVISIONS OF ARTICLE 12, § 2.

Const 1963, art 12, § 2 includes three provisions relevant to the discussion of this issue. The first of these is the language which specifies the required substantive content of petitions proposing amendment of the constitution. That language specifies only one item of required substantive content – the requirement that, "***Every petition shall include the full text of the proposed amendment***." The second confers authority upon the Legislature to prescribe statutory regulations regarding the form of petitions and the manner of their signing and circulation, and states that petitions shall be prepared, signed and circulated in compliance with those regulations: "***Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law***." The third provision relevant to this issue requires the state election officials to publish the proposed amendment and existing provisions of the constitution that would be altered or abrogated thereby, and to include a 100-word statement of the purpose of the proposed amendment on the ballot.

B. THE GUIDING PRINCIPLES

It has always been an important principle of Michigan's jurisprudence that our courts consistently protect the right of ***the people*** to amend the Constitution by initiative petition while enforcing safeguards that ***the people*** have placed on the exercise of that right. Thus, although

the people's right to initiate constitutional amendments must be exercised in accordance with restrictions imposed by the constitutional language, their right to do so cannot be interfered with by the Legislature, the courts, or officers charged with performance of related duties. These time-honored principles were recently reaffirmed by this Court in *Protect Our Jobs*:

> "Within our Constitution, the people have allocated certain portions of their inherent powers to the branches of government. But the people have also reserved certain powers to themselves. Among these powers is the right to amend the Constitution by petition and popular vote. This Court has consistently protected the right of the people to amend their Constitution in this way, while enforcing constitutional and statutory safeguards that the people placed on the exercise of that right. Nearly one century ago we recognized that
>
> > ***"[o]f the right of qualified voters of the State to propose amendments to the Constitution by petition it may be said, generally, that it can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises.*** But the right is to be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution."
>
> 492 Mich at 772, quoting *Scott v Secretary of State,* 202 Mich 629, 643; 168 NW 709 (1918). (Emphasis added)

The expressions and reaffirmation of these principles have been consistent with other judicial pronouncements emphasizing that the constitutional provisions reserving the people's rights of initiative and referendum should be liberally construed to facilitate, rather than restrict, the free exercise of those rights, and that doubts concerning the meaning of implementing legislation should be resolved in favor of the people's exercise of their rights. *Ferency, supra,* 409 Mich at 590-591. The *Ferency* Court emphasized that its decision was consistent with a long line of cases in which Michigan courts have actively protected and enhanced the initiative and referendum power, noting that, "(C)onstitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed" and "their exercise should be facilitated rather than restricted." 409 Mich at 602.

The provisions of Const 1963, art 12, § 2 reserving the right of the people to propose amendments of the state Constitution were derived from Const 1908, art 17, § 2. The decisions of this Court have recognized that each of those provisions was intended to be self-executing. In *Ferency,* which addressed pre-election challenges to the proposed "Tisch tax cut amendment," this Court held that Const 1963, art 12, § 2 is self-executing, and thus, does not depend upon statutory implementation, citing its prior holding in *Hamilton v Secretary of State,* 227 Mich 111, 115, 124-125; 198 NW 843 (1924), that the prior provisions of Const 1908, art 17, § 2, were self-executing, and noting that the analogous provisions governing voter-initiated legislation in Const 1963, art 2, § 9 had also been found to be self-executing in *Wolverine Golf Club v Secretary of State,* 384 Mich 461; 185 NW2d 392 (1971), in spite of that provision's language directing that "the legislature shall implement the provisions of this section." *Id.,* 409 Mich at 591, fn 9.

The *Ferency* Court's holding that Const 1963, art 12, § 2 is self-executing is also consistent with comments found in the constitutional convention record explaining that, although some of the legislation-like detail contained in the 1908 Constitution was being eliminated, enough detail was retained to ensure that the right to propose amendments by initiative would be self-executing, and thus, the right of the people to propose amendments by initiative petition could not be defeated by the Legislature's failure to enact legislation required for implementation of that right. *See,* Constitutional Convention Record, pp. 2459-2460 and 2468-2469, cited by the Supreme Court in *Ferency,* 409 Mich at 591, fn 9.[13]

[13] Copies of the pages of the Constitutional Convention Record cited in *Ferency* are submitted herewith as Appendix "E," with the pertinent discussion highlighted.

Although the Legislature may enact supplementary legislation to facilitate the implementation of a self-executing constitutional right reserved to the people, it may not impose additional requirements that curtail or unduly burden the free exercise of the guaranteed right. This Court emphasized this rule with respect to voter-initiated petitions for amendment of the constitution in *Ferency,* citing its prior consistent holdings in *Wolverine Golf Club v Secretary of State, supra,* and *Hamilton v Secretary of State, supra.* 409 Mich at 589-592. *See also, Soutar v St. Clair County Election Commission*, 334 Mich 258; 54 NW2d 425 (1952).

C. THE STATUTORY REPUBLICATION REQUIREMENT OF MCL 168.482(3) DOES NOT FALL WITHIN THE SCOPE OF THE LEGISLATURE'S CONSTITUTIONAL AUTHORITY TO PRESCRIBE THE FORM OF INITIATIVE PETITIONS FOR AMENDMENT OF THE CONSTITUTION.

Because the requirement to list constitutional provisions that would be altered or abrogated in an initiative petition is purely statutory, if an abrogation is found by this Court, it must determine whether this statute is within the scope of the Legislature's authority to regulate the form of petitions conferred by the language of Const 1963, art 12, § 2, and if so, whether enforcement of that requirement by exclusion of VNP's proposal from the ballot constitutes an impermissible curtailment or burdening of the people's constitutional right to propose constitutional amendments by voter initiative.

This Court's Opinion in *Ferency* assumed that this "new requirement regarding substantive content" was a regulation of "form," and therefore within the scope of the Legislature's constitutional authority to prescribe the form of initiative petitions. 409 Mich at 593. But this Court's Opinion was based upon that assumption, ***arguendo,*** and without analysis or citation of supporting authority. VNP contends that the *Ferency* Court's unexplained

assumption that this requirement was a matter of mere "form" is mere *dicta,*[14] and therefore not binding as authority in this matter under the doctrine of *stare decisis*. It has often been noted that *stare decisis* does not require adherence to prior judicial pronouncements of principles assumed, but not squarely addressed or decided. *See e.g., Brecht v Abrahamson,* 507 US 619, 630-631; 113 S Ct 1710, 1718; 123 L Ed 2d 353 (1993).

VNP contends that the statutory republication requirement does not qualify as regulation of petition "form" authorized by Const 1963, art 12, § 2. Its enactment was, instead, an attempt to establish a requirement of ***substantive content***, as appropriately characterized by the Court's decision in *Ferency.* This is apparent for several reasons.

First, it is highly significant that this requirement, expressed in the same language, was included as a required element of petition content in the 1908 Constitution, as originally adopted.[15] However, this requirement was eliminated by the amendment of Const 1908, art 17, § 2, adopted in 1913. (Appendix "C") It was not included in the amendment of that provision adopted in 1941 (Appendix "D"), or in the general revision of the constitution in 1963.[16] The convention delegates who crafted the current provisions of Const 1963, art 12, § 2 were aware of the prior constitutional provisions. This is persuasive evidence that they, and thus the people, did not intend to impose a requirement that would require proponents of constitutional

[14] The *Ferency* Court may have made this assumption without analysis due to a lack of sufficient time for proper consideration. The Court's Opinion reveals that the application for leave to appeal in that matter was not filed until September 1980. This Court appears to have made the same assumption, without further discussion or analysis, in *Protect Our Jobs,* under similar time constraints.

[15] As originally adopted, Const 1908, art 17, § 2 (Appendix "B") provided, in pertinent part, that "All petitions shall contain the full text of any proposed amendment, together with any existing provisions of the constitution which would be altered or abrogated thereby."

[16] See, Const 1963, art 12, § 2. (Appendix "A")

amendments to identify all existing provisions of the Constitution that would be abrogated by their proposal.

Second, requiring that petition sponsors list any existing provisions of the Constitution that would be altered or abrogated cannot be considered a matter of mere "form," as that term has been commonly understood. The reported decisions have often recognized and addressed the qualitative distinction between matters of form and matters of substance. *See e.g., Ahrenberg Mechanical Contracting, Inc.* 451 Mich 74; 545 NW2d 4 (1996) (addressing approval of a judgment "as to substance and form."); *Karr v Michigan Educational Employees Mutual Insurance Co.,* 228 Mich App 111; 576 NW2d 728 (1998); *Pinkston-Poling v Advia Credit Union,* 227 F Supp 3d 848 (WD Mich 2016) (addressing form and substance of statutory notice.) *See also, Stand up for Democracy v Secretary of State,* 492 Mich 588, 601-602; 822 NW2d 159 (2012) (discussing "form and content requirements" of MCL 168.482.)

The commonly understood difference between form and substance is correctly explained in Black's Law Dictionary (Fifth Ed, 1979):

> "In contradistinction to "substance," "form" means the legal or technical manner or order to be observed in legal instruments or juridical proceedings, or in the construction of legal documents or processes. Antithesis of 'substance.' "

In *Pinkston-Poling, supra,* the court explained the difference, citing the *Black's* definition and another dictionary definition of "form" as "the shape and structure of something as distinguished from the material of which it is composed." 227 F Supp 3d at 852.

A listing of existing provisions that would be altered or amended by a proposed amendment is not a matter of mere shape, structure or format of an initiative petition. As this Court noted in *Ferency,* identification of those provisions ***is an exercise requiring legal analysis by those with sufficient expertise – an exercise which the Court has itself found difficult, and which, in Ferency, yielded widely differing conclusions***. 409 Mich at 595-596.

The list of provisions ultimately determined by that exercise of legal judgment is clearly a matter of substantive content, as opposed to mere form.

Indeed, it appears that this important distinction has been properly recognized by the Board of Canvassers, as evidenced by its preliminary approval of VNP's petition subject to the caveat that its approval did not extend to the question of "[w]hether the petition properly characterizes those provisions of the Constitution that are altered or abrogated by the proposal if adopted." This has also been recognized by the Plaintiffs, as evidenced by their acknowledgement that the Board of State Canvassers is not "empowered to review substantive issues concerning the sufficiency of language included in a petition." (Complaint for Mandamus, ¶ 21)

All of these circumstances point with compelling force to the conclusion that enactment of the republication requirement of MCL 168.482(3) was not within the scope of the authority granted to the Legislature by Const 1963, art 12, § 2, and was therefore an unconstitutional infringement of the people's reserved right to propose amendment of the Constitution. In the Court of Appeals, the Plaintiffs answered this criticism by citing the familiar "presumption of constitutionality," arguing that § 482(3) must be found constitutional because it has been on the books in substantially the same form since 1941. This argument is not persuasive. The presumption of constitutionality cannot save a statute when its unconstitutionality is clearly established, nor can a statute be saved by mere longevity if its original enactment was beyond the Legislature's authority.[17] If this Court should find that one or more of the existing sections

[17] In the Court of Appeals, the Plaintiffs emphasized that the predecessor of § 482 was originally enacted in 1941 by the same legislature that had previously proposed the amendment of Const 1908, art 17, § 2 approved by the voters in the spring of that year. Although this is true, it is not a matter of any significance since the Constitutional amendment adopted by the vote of the ***people*** in 1941 did not confer any authority upon the Legislature to regulate this, or any other

of the Constitution would be abrogated by the VNP proposal, the constitutionality of § 482(3) – an important question of first impression – must be addressed. Plaintiffs should not be allowed to avoid the issue by their suggestion that the Court should continue to apply it without meaningful evaluation of its validity.

Plaintiffs' response in the Court of Appeals also featured an argument that this Court had "forcefully receded from the background principles in *Ferency* that are cited and discussed at length by VNP," citing this Court's decision in *Consumers Power Company v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986) as authority for that proposition. (Plaintiffs' Reply Brief, p. 19) That argument is unsupported because this Court's decision in that case examined the constitutionality of a statutory requirement related to the signing and circulation of petitions – a subject which the Legislature ***has*** been specifically authorized to regulate by the governing terms of Const 1963, art 12, § 2. The republication requirement of § 482(3) is a different, ***substantive***, requirement that cannot be defended as a regulation of the manner of signing or circulation. Plaintiffs have incorrectly characterized it as a regulation of petition ***form***, which is not correct, and if considered by this Court, must be rejected.

matters of substantive petition content. And in any event, the validity of the republication requirement of the present statute must be evaluated in light of the authority conferred by the provisions of our present Constitution.

VI. EXCLUSION OF THE PROPOSAL AT ISSUE FROM THE BALLOT BASED UPON THE ALLEGED VIOLATION OF MCL 168.482(3) WOULD BE UNCONSTITUTIONAL, AS AN IMPERMISSIBLE CURTAILMENT OR BURDENING OF THE PEOPLE'S RESERVED RIGHT TO PROPOSE AMENDMENT OF THE CONSTITUTION BY VOTER INITIATIVE, WHEN ANOTHER SUFFICIENT BUT LESS RESTRICTIVE REMEDY IS AVAILABLE.

Even if it is found that the regulation of substantive content imposed under § 482(3) can properly pass as a legitimate regulation of "form" falling within the scope of the Legislature's authority conferred under Const 1963, art 12, § 2, VNP contends that a strict enforcement of the statute's republication requirement by exclusion of its proposal from the ballot would be unconstitutional, as an undue and unreasonable burden upon VNP's and the people's constitutional right to propose amendment of the Constitution. The imposition of that extreme remedy – the only remedy sought by the Plaintiffs in this action – would be wholly unreasonable and unnecessary, inconsistent with the abuse of discretion standard applicable to the Court of Appeals Opinion and Order in this case, and therefore unconstitutional. Any deficiency in the statutorily required listing identified by this Court's decision in this matter can, and should, be remedied by the proper performance of the State's constitutionally imposed obligation to publish the proposed amendment with the existing provisions that would be altered or abrogated thereby, after certification of the proposal for the ballot.

VNP anticipates that Plaintiffs will criticize its suggestion of this reasonable alternative remedy by claiming that substantial compliance with MCL 168.482(3) cannot suffice, and thus, exclusion of the proposal from the ballot is the only appropriate remedy for any violation of its provisions in light of this Court's decision in *Stand up for Democracy v Secretary of State, supra*. In that case, the Court considered whether a referendum petition filed pursuant to Const 1963, art 2, § 9, should be excluded from the ballot based upon a technical objection that the

heading of the petition had not been printed in 14-point type, as MCL 168.482(2) requires. Although the Court ultimately concluded that the referendum should be certified for the ballot because compliance with the type-size requirement was established, a majority of the Justices also opined that substantial compliance with that requirement could not be considered sufficient in light of the statute's mandatory direction that 14-point type "shall" be used. In support of that pronouncement, those Justices disavowed the doctrine of substantial compliance which had been frequently applied by prior appellate decisions adjudicating challenges based upon alleged failure to comply with statutory petition requirements.

Reliance upon *Stand up for Democracy* as authority for an argument that strict compliance with MCL 168.482(3) should be required in this matter is inappropriate because this Court's decision in that case did not consider whether substantial compliance with statutory requirements can be considered sufficient for certification in cases involving a voter-initiated petition for amendment of the Constitution under Const 1963, art 12, § 2. Thus, the majority's conclusion that strict compliance was required is not binding as authority in this case.[18] The decision in *Stand up for Democracy* addressed a referendum petition filed under Const 1963, art 2, § 9, and the majority concluded that "the doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification." 492 Mich at 594, 608.

The distinction is important because the language of Const 1963 art 2, § 9 (Appendix "F") is substantially different. That provision specifically states that the power of referendum "***must be invoked in the manner prescribed by law***. . " Thus, the majority in *Stand up for*

[18] Indeed, it can be suggested that the majority's finding that strict compliance was required should not be considered binding authority at all because, having found actual compliance with the statutory requirement, the discussion of whether substantial compliance could have sufficed was not necessary to the Court's holding that the requested writ of mandamus should be granted, as noted by the dissenting Justices. 492 Mich at 633-634.

Democracy might have reasonably concluded that the applicable ***constitutional*** language mandated adherence to every aspect of the statutory requirements set forth in MCL 168.482 which, by its terms, mandated compliance with the technical type-size requirement stated therein. But a different evaluation is required here, where the constitutional language governing initiative petitions to amend the Constitution merely allows the Legislature to prescribe the "form" of petitions, and has not declared that the right to seek amendment of the Constitution by initiative petition "must be invoked in the manner prescribed by law."

Because *Stand up for Democracy* did not address the application of statutory requirements in relation to a voter-initiated petition to amend the Constitution, the Court's Opinion did not consider whether the strict compliance rule would impose an unconstitutional burden upon the free exercise of a petition sponsor's constitutionally guaranteed right to seek amendment of the Constitution by voter-initiated petition. This constitutional question is important, and should therefore be addressed in this case if a statutory violation is found. It will be essential to do so in that event because it is clear, in light of the authorities previously discussed, that blind adherence to a requirement of strict compliance would be inappropriate where, as here, the statute in question imposes requirements in addition to those required by a self-executing constitutional provision, and enforcement of those requirements would curtail or impose an undue burden upon the free exercise of the constitutionally guaranteed right. Even if the statutory republication requirement is considered a regulation of "form" authorized by Const 1963, art 12, § 2, strict enforcement of that requirement by exclusion of VNP's proposal from the ballot when another less intrusive remedy would suffice would be an unconstitutional curtailment or undue burdening of VNP's constitutional right to propose constitutional amendments by voter initiative.

VNP respectfully suggests, therefore, that in the event that this Court finds that the VNP proposal violates §482(3), it should re-examine the requirement of strict compliance endorsed by the majority in *Stand up for Democracy,* and that upon reconsideration, the Court should restore the time-honored doctrine of substantial compliance or limit the strict compliance requirement of *Stand up for Democracy* to cases involving referendum petitions filed pursuant to the dissimilar provisions of Const 1963, art 2, § 9.

Application of the doctrine of substantial compliance in cases of proposed constitutional amendments would serve two laudable purposes. It would safeguard the free exercise of the people's reserved right to propose amendment of the Constitution by voter initiative while also ameliorating the potential for unfair prejudice resulting from strict enforcement of statutory technicalities. The potential for unfair application of MCL 168.482(3) is illustrated by what has occurred in relation to the proposal at issue in this case. When VNP submitted its petition for "as to form" approval to the Board of Canvassers, it proposed republishing five sections of the Constitution which it believed would be abrogated. As the Court of Appeals has noted, the Elections Bureau staff refused to recommend approval because they believed that the VNP Proposal did not abrogate any existing section of the Constitution. It was not until VNP altered those five sections, adding the prefatory language "EXCEPT TO THE EXTENT LIMITED OR ABROGATED BY…" (thus altering them, and not republishing them as being abrogated) that the Bureau staff would agree to recommend approval of the form of VNP's petition.[19]

From this, it may be seen that the Elections Bureau, the state agency responsible for interpreting the Michigan Election Law, believed that the VNP petition, as initially submitted,

[19] *See*, e-mail correspondence and memoranda submitted herewith as Appendices "G," "H" and "I."

did not abrogate any existing sections of the Constitution. VNP, believing that its proposal would abrogate five sections of the Constitution, amended its petition accordingly to avoid the Elections Bureau's objections. Now, Plaintiffs allege that there are four additional sections of the Constitution that are abrogated.[20] This kind of uncertainty as to whether an existing section of the Constitution would be abrogated by a proposed amendment is precisely the sort of situation that this Court has said it wished to avoid in *Ferency* and *Protect Our Jobs*. It seems certain that if this legitimate concern is not heeded, every future sponsor of an initiative petition to amend the Constitution will, out of an abundance of caution, propose adding to any section of the Constitution that it might conceivably affect, a provision stating: "EXCEPT TO THE EXTENT LIMITED OR ABROGATED BY..." simply to avoid a potential abrogation challenge.

VII. THE BALLOT PROPOSAL AT ISSUE HAS BEEN PROPERLY PRESENTED AS A VOTER-INITIATED PROPOSAL FOR AMENDMENT OF THE CONSTITUTION PURSUANT TO CONST 1963, ART 12, § 2, AND THUS, CONSIDERATION OF VNP'S PROPOSAL NEED NOT BE RESERVED UNTIL THE NEXT CONSTITUTIONAL CONVENTION.

Plaintiffs have asserted that VNP's proposal to amend the Constitution cannot be approved for submission to the voters because it impermissibly addresses multiple purposes, and have also argued that the proposed changes would constitute a general revision of the Constitution which can only be accomplished by means of a constitutional convention convened

[20] It is noteworthy that Plaintiffs did not raise their claims of potential abrogation until the filing of their Complaint for Mandamus in the Court of Appeals on April 25, 2018. Plaintiffs knew the content of VNP's petition when the Board of State Canvassers granted its preliminary approval in August of 2017, and knew, or should have known, that VNP had filed its petition with more than 425,000 supporting signatures on December 18, 2017. If the potential abrogation was as clear as Plaintiffs have now claimed, it is a fair question to ask why it took them so long to raise their objection.

pursuant to prior approval of the voters under Const 1963, art 12, § 3. The Court of Appeals has properly found these claims meritless.

A. THE CONSTITUTIONAL PROCEDURE TO AMEND THE CONSTITUTION BY VOTER INITIATIVE DOES NOT IMPOSE ANY RESTRICTION UPON THE COMPLEXITY, SUBJECT MATTER OR SCOPE OF A PROPOSED AMENDMENT.

The language of Const 1963, art 12, § 2 does not impose or suggest any limitation upon the permissible subject matter or scope of a proposed constitutional amendment presented by voter initiative petition pursuant to that section, nor is any such limitation imposed or suggested by the language of Const 1963, art 12, § 3, addressing the calling of a constitutional convention.[21] The only relevant limitations which have been imposed by this Court have been its pronouncements that an amendment may alter multiple sections as long as the changes are germane to a single overall subject or purpose, and the practical limitation imposed by the constitutional requirement to summarize the proposed amendment in no more than 100 words.

VNP contends that it would be inappropriate for the Court to read limitations of subject matter or scope into either provision. The few reported decisions challenging the scope of voter-initiated constitutional amendments are consistent with the principle that limitations may not be read into the constitutional language. In *City of Jackson v Commissioner of Revenue,* 316 Mich 694; 26 NW2d 569 (1947), decided under the similar provisions of the 1908 Constitution, this Court considered a claim that the constitutional amendment at issue was the product of an improper attempt to initiate legislation "under the guise of an amendment to the constitution." In rejecting that argument, the Court emphasized that the Constitution did not include any language limiting the scope of a proposed constitutional amendment with respect to matters which could also be addressed by legislation, and noted that any line of demarcation between

[21] Copies of Const 1963, art 12, §§ 2 and 3 are submitted herewith as Appendices "A" and "J."

legislation and constitutional amendment was "too indefinite to require that an arbitrary decision be made in advance of submitting the question to the voters." 316 Mich at 709-710.

In *Graham v Miller,* 348 Mich 684; 84 NW2d 46 (1957), also governed by the similar provisions of the 1908 Constitution, the Court rejected a challenge to a constitutional amendment which argued that the amendment was invalid because it covered more than one purpose, and was therefore improperly submitted to the electors as a single question on the ballot. In so ruling, the Court noted that one of the cases cited in support of the challenge was based upon provisions of the Home Rule Act, which specifically limited proposed amendments to one subject, but emphasized that there was "no comparable provision in the Michigan Constitution limiting the subject matter of a constitutional amendment or prohibiting the inclusion in one amendment of proposals for more than one purpose." 348 Mich at 691-692.

The decisions have also recognized the related principle that a proposed amendment may include alterations of multiple sections when the changes are germane to the accomplishment of a single overall purpose. Having found no constitutional basis for the challenge raised in *Graham*, the Court went on to conclude that the objection was without merit in any event, because the amendment in question was adopted in furtherance of a single purpose, and its provisions were germane to the accomplishment of that overall purpose. 348 Mich at 692-693.

In *Kelly v Laing,* 259 Mich 212; 242 NW2d 891 (1932), the Court found that a multifarious collection of proposed amendments to the Bay City Charter proposing substantial changes in several unrelated aspects of the City government was not in a proper form for submission to the voters where the petition at issue proposed a separate vote on each of the 13 sections involved, but explained that a proposed "amendment" may modify multiple sections if

all of the proposed changes are germane to the purpose of the amendment, and that all proposals pertaining to the same subject and directed to the same purpose should be treated as one amendment and voted on as such, although they contemplate changes to more than one section. 259 Mich at 215-216. *See also, People v Stimer,* 248 Mich 272, 287; 226 NW 899 (1929) ("The word "amendment" is clearly susceptible to a construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject.")

The holdings of these decisions continue to apply with equal force today because there has been no change in the substance of the pertinent constitutional language with respect to this issue. The governing language of Const 1963, art 12, § 2 does not impose or suggest any limitation upon the permissible subject matter or scope of a proposed constitutional amendment presented by voter initiative petition pursuant to that section, nor is any such limitation imposed by any other constitutional provision.[22] VNP contends that it would be improper to read any such limitations into the clear language of our Constitution by judicial interpretation.

B. ARTICLE 12, § 3 DOES NOT LIMIT THE PERMISSIBLE SUBJECT MATTER OR SCOPE OF A CONSTITUTIONAL AMENDMENT PROPOSED UNDER ARTICLE 12, § 2.

There is also no basis in the constitutional language for the Plaintiffs' suggestion that the scope of constitutional amendments proposed under Const 1963, art 12, § 2 is limited by the provisions of Const 1963, art 12, § 3, addressing the calling of a constitutional convention for a "general revision" of the Constitution.

[22] For comparison, VNP would direct the Court's attention to Article 2, § 8(d) of California's Constitution, which provides that, "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

1. THE SIGNIFICANT DIFFERENCES IN PURPOSE AND TERMINOLOGY.

There are a number of points that the Court should consider when evaluating this issue. First, it is important to recognize the essential differences between the purpose and operation of the separate procedures for amendment of the Constitution provided under Const 1963, art 12, §§ 2 and 3. Const 1963, art 12, § 2 reserves the right of the people to amend the Constitution by voter initiative. Const 1963, art 12, § 3 provides the people with an alternative means for amendment of the Constitution by allowing them an opportunity to convene a constitutional convention for a "general revision" of the Constitution. There are significant differences between these alternatives. The right of the people to propose amendments of the Constitution *directly* by voter initiative under Const 1963, art 12, § 2 may be invoked at any time a need is perceived. Their opportunity to convene a *convention* to consider a general revision of the Constitution under Const 1963, art 12, § 3 comes once every 16 years.

To properly understand the differences, it is also important to note and properly apply the different definitions of "amendment" and "revision." This requires an awareness that there is more than one commonly understood definition of "amendment" ***and*** "revision," and thus, there are commonly understood differences between the general concepts of "amendment" and "revision" which depend upon the context in which the terms are used. Although "amendment" can refer to a process of amending, its use in each of these constitutional provisions refers to a proposed or accomplished alteration or addition to the existing constitutional language.[23]

[23] The Merriam Webster's Collegiate Dictionary, Tenth Ed. (1996), defines "amendment" as "the process of amending by parliamentary or constitutional procedure" and "an alteration proposed or effected by this process."

A reference to "revision" has two accepted meanings as well; depending upon the context, it may refer to a document which has been revised, or to a process of revision.[24] The language of Const 1963, art 12, § 3 embraces the second of those meanings – the process of revision. It establishes a mandatory procedure for securing a vote of the electorate as to whether a constitutional convention should be convened to implement the process of revision – a procedure which operates automatically by virtue of the constitutional mandate to present the question to the voters every 16 years. If the electorate votes in favor, a convention will be convened, with delegates subsequently chosen by election. It is then up to the convention, through the deliberation and votes of its elected delegates, to create a new Constitution or amend the old one.

The character of Const 1963, art 12, § 3 as an establishment of an alternative ***procedure*** is illustrated by the fact that, although a constitutional convention convened for "general revision" of the existing Constitution will usually draft a new one, it is not required to produce a new Constitution or even a substantial revision of the old one. The language of Const 1963, art 12, § 3, and explanations offered in the constitutional convention debates confirm the intent of the drafters, and thus the people, that a revision authorized pursuant to that provision could effect a wholesale rewrite producing an entirely new Constitution, or be limited to one or more amendments of the existing Constitution.[25]

[24] The Merriam Webster's Collegiate Dictionary, Tenth Ed. (1996), defines "revision" as "an act of revising" and "a result of revising."

[25] During the discussion of the proposed Article 12, § 3 on the Order of Second Reading, Subcommittee Chair Habermehl explained that, once convened pursuant to the vote of the people, a convention would be free to change as much or as little as it chooses, and could therefore elect to propose only one, or a few amendments, while leaving the basic document unchanged. (Constitutional Convention Record, p. 3007, submitted herewith as Appendix "K")

There is a stark contrast between the procedure for convening a constitutional convention outlined in Const 1963, art 12, § 3 and the much simpler and very different procedure for voter-initiated amendment of the Constitution set forth in Const 1963, art 12, § 2. The provisions of Const 1963, art 12, § 3 provide a means to initiate a ***process of general revision*** – a process which may produce any number of suggestions for changes which will then be subject to refinement, debate, deliberation, and ultimately, approval by the people. The proposal of an amendment under Const 1963, art 12, § 2 does not initiate a "***process of amending***" in any similar sense. It offers a specific alteration and/or addition to the Constitution proposed by a sponsoring individual or entity, set forth in the required petition and later on the ballot, which must be approved or disapproved by an up or down vote of the electorate.

The language of Const 1963, art 12, § 3 providing its alternative process for amendment contains no content suggesting an intent to limit the subject matter or scope of amendments proposed under Const 1963, art 12, § 2. The Court should note, by comparison, that substantive limitations ***have*** been placed upon the permissible scope of initiated laws proposed by voter initiative under Const 1963, art 2, § 9 (Appendix "F") by its language specifying that, "[t]he power of initiative extends only to laws which the legislature may enact under this constitution." By virtue of that limitation, the right of the people to propose laws by initiative is subject to all of the limitations of the legislative power set forth in Article 4. Those limitations include: 1) the limitation of Const 1963, art 4, § 24, that, "[n]o law shall embrace more than one object, which shall be expressed in its title"; 2) the limitation of Const 1963, art 4, § 25, that, "[n]o law shall be revised, altered or amended by reference to its title only"; and 3) the limitation of Const 1963, art 4, § 36, that, "[n]o general revision of the law shall be made."

The last of those limitations makes it clear that the people's right to propose legislation under Const 1963, art 2, § 9 does not extend so far as to permit a general revision of the statutory law by voter initiative. No such limitation is found in the language of Const 1963, art 12, § 2. The drafters of the 1963 Constitution knew how to limit the scope of the reserved right of initiative, as evidenced by the limitation of that right built into Const 1963, art 2, § 9. The absence of any such limitation in Const 1963, art 12, § 2 should be seen as a clear indication that no such restriction was intended.

2. THE COURT SHOULD DECLINE TO ADOPT THE TEST APPLIED IN *CITIZEN PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE*, 280 MICH APP 273; 761 NW2d 210 (2008) OR LIMIT ITS APPLICATION TO THE HIGHLY UNUSUAL FACTS OF THAT CASE.

Plaintiffs' argument that the proposed changes would amount to a general revision of the Constitution has been based primarily upon the Court of Appeals' decision in *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273; 761 NW2d 210 (2008), *result affirmed,* 482 Mich 960; 755 NW2d 157 (2008), which held that the staggeringly diverse and voluminous Reform Michigan Government Now! ("RMGN") proposal could not be included on the ballot as a voter-initiated proposal because it would have amounted to a general revision of the Constitution.[26] In finding an impermissible attempt at revision in that case, the Court opined that, for purposes of Const 1963, art 12, §§ 2 and 3, there is a legally significant distinction between a revision and an amendment which depends upon both the

[26] The RMGN proposal was much broader in scope than the proposal now at issue. Unlike VNP's proposal, which addresses the single subject and purpose of redistricting reform, the RMGN proposal addressed several distinct and unrelated subjects, proposing modification of 24 existing sections and the addition of 4 new sections in 4 different articles of the Constitution. To illustrate the extraordinary breadth of the proposal and the diversity of the RMGN proposal's subject matter, the Court's Opinion in *Citizens Protecting Michigan's Constitution* included a non-exhaustive list of 29 proposed changes, too extensive for reproduction here. 280 Mich App at 279-281, 305.

quantitative and the qualitative nature of the proposed changes. The Court explained that, in evaluating those criteria, "the determination depends on, not only the number of proposed changes or whether a wholly new constitution is being offered, but on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government." 280 Mich App 304-305. The Court was careful to emphasize, however, that its decision was ***not*** intended "to prevent the citizens from voting on a proposal simply because that proposal is allegedly too complex or confusing." *Id.* at 276.[27]

For the reasons previously discussed, VNP contends that there is no proper basis for recognition of a legally significant distinction between an amendment and a revision of the Constitution in the application of Const 1963, art 12, § 2, and that the Court should therefore decline to adopt the arbitrary and unreliable qualitative/quantitative test employed in *Citizens Protecting Michigan's Constitution* to define the permissible scope of a proposed constitutional amendment, or alternatively, that the use of that test – borrowed primarily from decisions of other states and injected into our own constitutional provisions by interpretation – should be limited to the facts of that highly unusual case involving a blatantly multifarious proposal.[28]

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[27] Upon further review of the RMGN proposal, this Court affirmed the result reached by the Court of Appeals without endorsing the legal rationale for its holding, based upon its own sensible determination that it would have been impossible to summarize the purpose of the RMGN proposal in 100 words, as Const 1963, art 12, § 2 requires. *Citizens Protecting Michigan's Constitution v Secretary of State,* 482 Mich 960-964; 755 NW2d 157 (2008).

[28] The Court of Appeals' Opinion in *Citizens Protecting Michigan's Constitution* suggests that the rationale for its adoption of the qualitative/quantitative standard was flawed by a failure to recognize that, as used in Const 1963, art 12, § 2, the term "amendment" does not contemplate a "process of amending," as the Court appears to have assumed. 280 Mich App at 295. By equating an "amendment" proposed or adopted pursuant to Const 1963, art 12, § 2 with a ***process*** similar to the process of "general revision" initiated under Const 1963, art 12, § 3, the Court of Appeals improperly injected the concept of "revision" into its interpretation of Const 1963, art 12, § 2, where it has no proper application.

VNP respectfully suggests that this would be the sensible course, and especially so, in light of this Court's unwillingness to endorse the legal rationale for that decision.

C. VNP'S PROPOSED CONSTITUTIONAL AMENDMENT IS NOT A GENERAL REVISION OF THE CONSTITUTION AS DEFINED BY THE COURT OF APPEALS' DECISION IN *CITIZENS PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE.*

Even if it is assumed, *arguendo,* that the test employed in *Citizens Protecting Michigan's Constitution* could be considered an appropriate measure of the difference between an amendment and a "general revision," application of that test cannot justify exclusion of VNP's proposal from the November 2018 General Election ballot. VNP's proposal cannot be legitimately called an attempted "general revision" by application of that standard or any other.

The proposal at issue in *Citizens Protecting Michigan's Constitution* was far more extensive and complex than VNP's proposed amendment, and it was a simple matter for the Court to conclude that the proposal was indeed multifarious, as it addressed a broad variety of unrelated subjects. VNP's proposal is dramatically different because all of its provisions ***have*** been conceived and designed to accomplish a single overall purpose – to remedy the widely-

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The distinction between "revision" and "amendment" of the Constitution made in *Citizens Protecting Michigan's Constitution* is also unsatisfactory because the nebulous comparison of the qualitative and quantitative nature of changes proposed by that decision provides no clear standards capable of delivering consistent results. Thus, applying that standard in any but the most extreme cases – like the RMGN proposal considered in that case – can be expected to yield widely differing conclusions, and this level of uncertainty cannot be tolerated when suspension of the people's right to propose constitutional amendments by voter initiative is proposed. Plaintiffs have complained that VNP's proposal amends too many sections and contains too many words. How many are too many? The constitutional language provides no answer. Plaintiffs have also argued that an amendment must be limited to a "mere correction of detail" but they overlook the prior decisions of this Court holding that an amendment may properly include several sections if all of the proposed changes are germane to a single overall purpose, and they seem to have forgotten that several voter-initiated constitutional amendments have brought about extensive and important changes. These have included the Headlee Amendment, the Proposal A Property Tax Amendment, the Crime Victims Rights Amendment and the Natural Resources Trust Fund Amendment, to name a few.

perceived abuses associated with partisan "gerrymandering" of state legislative and congressional election districts by the establishment of a new politically-balanced Independent Citizens Commission having sole and exclusive authority to develop and establish redistricting plans. All of the proposed changes, which affect only three of the Constitution's twelve articles, are germane to the accomplishment of that single purpose.

The proposed amendments to the Legislative Article would establish the new Citizens Commission as a permanent Commission in the legislative branch, replacing the existing constitutional provisions regarding apportionment of the state Senate and House of Representatives districts.[29] Those proposed additions would provide for the establishment and funding of the Commission and define and facilitate the performance of its duties. They would also provide for selection of the Commission's politically-diverse members by use of a methodology designed to ensure that the redistricting process could no longer be controlled by one political party; define the role of the Secretary of State in the selection of the Commission's members; prescribe the performance of the Commission's duties, including the criteria to be

[29] It is important to note, in this regard, that the new provisions proposed by VNP's ballot proposal are similar to the existing provisions Const 1963, art 4, § 6 insofar as they provide for apportionment of the state Senate and House of Representatives districts by a politically-balanced Commission. As the Court of Appeals has discussed, the constitutionally prescribed Commission on Legislative Apportionment has not been utilized for apportionment of Michigan's Senate and House of Representatives districts since 1972, because this Court's decision in *In re Apportionment of State Legislature*, 413 Mich 96; 321 NW2d 565 (1982) held that the constitutionally prescribed use of weighted land area/population formulae violated the Equal Protection Clause of the U.S. Constitution, and that the invalid provisions were not severable. More recently, the Legislature has had the responsibility for performing the periodic reapportionment of election districts for the Michigan Senate and House of Representatives, subject to review and independent action by the Supreme Court, pursuant to 1996 PA 436, MCL 4.261 *et seq.*, as amended. The reapportionment of Michigan's congressional election districts has been performed in similar fashion pursuant to the provisions of 1999 PA 221, MCL 3.61, *et seq.* and 1992 PA 222, MCL 3.71, *et seq.*

considered and applied in its development of the redistricting plans; and prescribe the procedures for the adoption and implementation of those plans.

As amended by VNP's proposal, Const 1963, art 4, § 6 would include provisions designed to ensure the independence of the new Commission, declaring that the powers granted to the Commission would be considered legislative functions, exclusively reserved to the Commission, but not subject to the control or approval of the Legislature. Thus, although VNP's proposal would shift the Legislature's present authority to perform the redistricting function to an independent Commission similar to the Commission prescribed by the existing language of Const 1963, art 4, § 6, and prohibit any legislative interference with the Commission's performance of that function, it would not suspend or erode any other part of the legislative power conferred under Article 4.

As amended by VNP's proposal, Const 1963, art 4, § 6 would also allow limited review by this Court. The new subsection 6 (19) addressing that issue is also quite similar to the existing provisions of Const 1963, art 4, § 6 and the subsequently enacted legislation. The Court's role and authority with respect to the redistricting process would be the same as its current role and authority under the existing language of Const 1963, art 4, § 6, MCL 1996 PA 463 and 1999 PA 222, except that it would not be allowed the authority to order the adoption of its own preferred redistricting plan, as currently provided in Const 1963, art 4, § 6, and presently allowed by MCL 3.74 and MCL 4.264.

VNP's proposal would effect minor amendments to three sections of the Executive Article to ensure the continuity and independence of the Commission. The changes would add new language, similar to the language included in the proposed Const 1963, art 4, § 6, declaring that the powers granted to the Commission would be considered legislative functions,

exclusively reserved to the Commission and not subject to the control or approval of the Governor. The proposal would also amend Const 1963, art 5, § 4, addressing the establishment of temporary commissions or agencies, to recognize the proposed establishment of the Independent Citizens Redistricting Commission as a permanent Commission. No other modification or erosion of the executive power has been proposed.

VNP's proposal would amend the Judicial Article to impose a narrow limitation of the Supreme Court's authority to exercise superintending control; to issue, hear and determine prerogative and remedial writs; and to exercise appellate jurisdiction by the addition of new language specifying that the Court may exercise that authority except to the extent that its authority is limited or abrogated by Const 1963, art 4, § 6 or Const 1963, art 5, § 2. Thus, this Court would be empowered to adjudicate redistricting disputes as it has in the past, but would no longer be empowered to "promulgate and adopt a redistricting plan or plans for this state." No other limitation of this Court's jurisdiction or authority has been proposed.

VNP's proposal has been drafted and presented to serve a single narrow purpose – to remedy the abuses associated with partisan gerrymandering of state legislative and Congressional districts. It does not propose any broad-reaching fundamental change in the form or function of our state government, as Plaintiffs have suggested,[30] and there is no basis whatsoever for a finding that the changes proposed for the accomplishment of VNP's single

[30] In the Court of Appeals, Plaintiffs quoted this Court's decision in *In re Apportionment of State Legislature*, 413 Mich 96; 321 NW2d 565 (1982) out of context to suggest that any change in the means by which members of the Legislature are chosen is a "fundamental matter" which must therefore be regarded as a revision. The quoted statement offered in support of that suggestion was made in reference to the Court's conclusion that the existing constitutional provisions for redistricting by the Commission on Legislative Apportionment could not be utilized and that the invalid provisions were not severable because it could not be assumed that the people would have voted to approve use of the constitutional redistricting process without them.

narrow purpose are so extensive or disruptive as to qualify as a "general revision" of the Constitution. All of the proposed changes are germane to the accomplishment of the proposal's single purpose, and thus, there is no basis for a finding that they cannot be properly proposed as an amendment of the Constitution pursuant to Const 1963, art 12, § 2.

It may be acknowledged that VNP's proposal would supersede the existing constitutional and statutory provisions governing redistricting of state legislative and congressional districts, and that the Plaintiffs do not favor the substance of the proposed changes, but this does not provide any legitimate support for Plaintiffs' claim that the proposed changes can only be effected by a constitutional convention. Nor is there any legitimate basis for Plaintiffs' speculation that VNP's proposal cannot be summarized in 100-words. The constitutionally-required 100-word summary is a summary of the purpose of the proposed amendment.[31] The decisions addressing that requirement have recognized that it does not require an itemization of detail in light of the 100-word limitation.[32] *See*, *Massey v Secretary of State,* 457 Mich 410, 414-415; 579 NW2d 862 (1998); *City of Jackson v Commissioner of Revenue,* 316 Mich 694, 709; 26 NW2d 569 (1947); *Citizens for Protection of Marriage v Board of State Canvassers.* 263 Mich App 487, 494; 688 NW2d 538 (2004). As the Court of

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[31] Const 1963, art 12, § 2 requires that a ballot containing a proposal for amendment of the Constitution contain "shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words" which "shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment." The same requirement expressed in the same language has been set forth in MCL 168.32(2), which provides that the 100-word summary shall be prepared by the Director of Elections with the approval of the Board of Canvassers.

[32] The requirement that the ballot include a 100-word summary of a proposed constitutional amendment was added to Const 1908, art 17, § 2 by the amendment adopted in 1941 (Appendix "D") and was subsequently incorporated into Const 1963, art 12, § 2. During the constitutional convention of 1962, Delegate Durst explained the purpose of the requirement, noting that a 100-word summary was necessary for use on voting machines, the use of which had become widespread. (Constitutional Convention Record, p. 2467, submitted herewith as Appendix "L")

Appeals has correctly noted, Plaintiffs' speculation that VNP's proposal cannot be summarized in 100 words is premature, and is not ripe for judicial evaluation for two reasons. First, the Director of Elections has not yet prepared the 100-word summary for this proposal or expressed any inability to do so. Second, bearing in mind that it is a summary of the *purpose* of the proposed amendment that is required, and that this does not require a specification of detail, it does not appear, as it did with respect to the RMGN proposal, that there is likely to be any difficulty in crafting the 100-word summary of purpose.[33]

RELIEF

WHEREFORE, the Intervening Defendants / Cross-Plaintiffs – Appellees respectfully request that Plaintiffs – Appellants' Application for Leave to Appeal be denied.

Respectfully submitted,

FRASER TREBILCOCK DAVIS & DUNLAP. P.C.

By: _____

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Dated: June 22, 2018

[33] To illustrate the fact that the predicted impossibility is imagined, examples of 100-word summaries that could be used for this proposal are submitted herewith as Appendix "M."

EXHIBIT A

STATE CONSTITUTION (EXCERPT)
CONSTITUTION OF MICHIGAN OF 1963

§ 2 Amendment by petition and vote of electors.

Sec. 2.

Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail.

History: Const. 1963, Art. XII, § 2, Eff. Jan. 1, 1964
Former Constitution: See Const. 1908, Art. XVII, §§ 2, 3.

EXHIBIT B

FULL TEXT OF THE GENERAL REVISION

OF THE

Constitution of the State of Michigan,

WITH THE EXPLANATIONS OF PROPOSED CHANGES AND THE REASONS THEREFOR.

PREAMBLE.

We, the people of the state of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish this constitution.

The present constitution has the following preamble: "The People of the State of Michigan do ordain this constitution." The change was made to give recognition in the constitution to the Supreme Being. Similar recognition is found in the constitutions of forty-two of our sister states.

ARTICLE I.

BOUNDARIES AND SEAT OF GOVERNMENT.

Section 1. The state of Michigan consists of and has jurisdiction over the territory embraced within the following boundaries, to wit: Commencing at a point on the eastern boundary line of the state of Indiana, where a direct line drawn from the southern extremity of Lake Michigan to the most northerly cape of Maumee Bay shall intersect the same—said point being the northwest *point* of the state of Ohio, as established by act of Congress, entitled "An act to establish the northern boundary line of the state of Ohio, and to provide for the admission of the state of Michigan into the Union upon the conditions therein expressed," approved June fifteenth, eighteen hundred thirty-six; thence with the said boundary line of the state of Ohio, until it intersects the boundary line between the United States and Canada in Lake Erie; thence with the said boundary line between the United States and Canada through the Detroit River, Lake Huron and Lake Superior to a point where the said line last touches Lake Superior; thence in a

constitution, except for the purpose of changing the phraseology.

Section 9. Aliens, who are or who may hereafter become bona fide residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens.

No change is made from Sec. 13, Art. XVIII of the present constitution.

Section 10. No lease or grant of agricultural land for agricultural purposes for a longer period than twelve years, reserving any rent or service of any kind, shall be valid.

No change is made from Sec. 12, Art. XVIII of the present constitution, except the addition of the words "for agricultural purposes" to make the section more clear and definite.

ARTICLE XVII.

AMENDMENT AND REVISION.

Section 1. Any amendment or amendments to this constitution may be proposed in the senate or house of representatives. If the same shall be agreed to by two-thirds of the members elected to each house, such amendment or amendments shall be entered on the journals, respectively, with the yeas and nays taken thereon; and the same shall be submitted to the electors at the next spring or autumn election thereafter, as the legislature shall direct; and, if a majority of electors qualified to vote for members of the legislature voting thereon shall ratify and approve such amendment or amendments, the same shall become part of the constitution.

No change from Sec. 1, Art. XX, of the present constitution.

Section 2. Amendments may also be proposed to this constitution by petition of the qualified electors of this state but no proposed amendment shall be submitted to the electors unless the number of petitioners therefor shall exceed twenty per cent of the total number of electors voting for secretary of state at the preceding election of such officer. All petitions shall contain the full text of any proposed amendment, together with any existing provisions of the constitution which would be altered or abrogated thereby. Such petitions shall be signed at the regular registration or election places at a regular registration or election under the supervision of the officials thereof, who shall verify the genuineness of the signatures and certify the fact that the signers are registered electors of the respective townships and cities in which they reside, and shall forthwith forward the petition to the secretary of state. All petitions for amendments filed with the secretary of state shall be certified by that officer to the legislature at the opening of its next regular session; and, when such petitions for any one proposed

amendment shall be signed by not less than the required number of petitioners, he shall also submit the proposed amendment to the electors at the first regular election thereafter, unless the legislature in joint convention shall disapprove of the proposed amendment by a majority vote of the members elected. The legislature may, by a like vote, submit an alternative or a substitute proposal on the same subject. The action of the legislature shall be entered on the journal of each house, with the yeas and nays taken thereon. But no amendment to this section may be proposed in the manner herein prescribed.

If a majority of the electors qualified to vote for members of the legislature voting thereon shall ratify and approve any such amendment or amendments, the same shall become a part of the constitution: Provided, That for any amendment proposed under this section, the affirmative vote shall be not less than one-third of the highest number of votes cast at the said election for any office. In case alternative proposed amendments on the same subject are submitted at the same election, the vote shall be for one of such alternatives or against such proposed amendments as a whole. If the affirmative vote for one proposed amendment is the required majority of all the votes cast for and against such proposed amendments, it shall become a part of the constitution. If the total affirmative vote for such alternative proposed amendments is the required majority of all the votes for and against them, but no one proposed amendment receives such majority, then the proposed amendment which receives the largest number of affirmative votes shall be submitted at the next regular election, and if it then receives the required majority of all the votes cast thereon it shall become a part of the constitution. The legislature shall enact appropriate laws to carry out the provisions of this section.

Section 3. All proposed amendments to the constitution submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted at each registration and election place. Proposed amendments shall also be printed in full on a ballot or ballots separate from the ballot containing the names of nominees for public office.

These sections represent a compromise between those who desired no change in the manner of amending the constitution provided by Sec. 1, Art. XX of the existing constitution (Sec. 1 of this article), and those who favored the initiative method of amendment by the people without the proposed amendment being first submitted to the legislature. The resulting compromise, embodied in the foregoing sections, provides a new method of amending the constitution.. Whenever the required number of electors petition for an amendment to the constitution it becomes the duty of the secretary of state, upon filing of such petition in his office, to certify the same to the legislature at the opening of the next regular session. The secretary of state must, also, submit the amendment to the electors at the first regular election thereafter, unless the legislature in joint session shall disapprove of the proposed amendment by a majority vote of the members elected to each house. A method is thus provided whereby the language, scope and purpose of the

proposed amendment will be scrutinized and discussed by a deliberative body, and its terms made to harmonize with other provisions in the constitution. The convention realized the far-reaching effect that each amendment to the constitution may have beyond the immediate purpose intended by it, and it was deemed essential in so important a matter as changing the fundamental law of the state that the very greatest care should be required in both the form and substance of amendments to it. Such care is secured by requiring the amendments proposed to pass the scrutiny of the legislature. In this manner the purpose and terms, as well as the legal effect, of such amendments will become the subject of popular discussion; in other words, the utmost publicity is secured.

It is generally conceded that the effect of this provision will be the submission to a vote of the electors of practically all amendments petitioned for. The legislature may change the phraseology and harmonize the provisions of the amendment with those portions of the constitution not intended to be affected by it, before submitting it to the electors. No one doubts the response of the legislature, in normal times, to a petition containing twenty per cent of the electors specified. It is foreseen that in seasons of great stress, disturbance and excitement, a petition might be presented designed to serve a temporary or unjust purpose. In such an event the time required under this section for consideration of such petition by the legislature will afford opportunity for normal conditions to return, and if, after due deliberation by the legislature, a majority of that body deem it unwise or improper to submit the amendment to the electors, the power to do so is conferred. The consideration was potent with the convention that public opinion is subject to sudden fluctuations; that the cherished policies of one year may be discarded the next upon fuller information and maturer thought. Living as we are under "a government of laws and not of men" the wisdom of preserving the stability of our fundamental laws was most persuasive with the convention.

Section 4. At the general election to be held in the year nineteen hundred twenty-six, in each sixteenth year thereafter and at such other times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors qualified to vote for members of the legislature. In case a majority of such electors voting at such election shall decide in favor of a convention for such purpose, at the next biennial spring election the electors of each senatorial district of the state as then organized shall elect three delegates. The delegates so elected shall convene at the state capitol on the first Tuesday in September next succeeding such election, and shall continue their sessions until the business of the convention shall be completed. A majority of the delegates elected shall constitute a quorum for the transaction of business. The convention shall choose its own officers, determine the rules of its proceedings and judge of the qualifications, elections and returns of its members. In case of a vacancy by

Exhibit C

AMENDMENTS TO THE CONSTITUTION.

Amendment to the constitution relative to the amendment of the charters of cities and villages, proposed by the second extra session of the legislature of nineteen hundred twelve, and ratified by the people at the November election of nineteen hundred twelve.

ARTICLE EIGHT.

SEC. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this State.

Amendment to the constitution relative to the recall of elective officers, proposed by the legislature of nineteen hundred thirteen, and ratified by the people at the April election of nineteen hundred thirteen.

ARTICLE THREE.

SEC. 8. Laws shall be passed to preserve the purity of elections and guard against abuses of the elective franchise, and to provide for the recall of all elective officers, except judges of courts of record and courts of like jurisdiction upon petition of twenty-five per centum of the number of electors who voted at the preceding election for the office of Governor in their respective electoral districts.

Amendment to the constitution relative to the initiative and referendum upon legislative matters, proposed by the legislature of nineteen hundred thirteen, and ratified by the people at the April election of nineteen hundred thirteen.

ARTICLE FIVE.

SECTION 1. The legislative power of the State of Michigan is vested in a senate and house of representatives; but the people reserve to them-

Amendment to the constitution relative to the initiative and referendum on constitutional amendments, proposed by the legislature of nineteen hundred thirteen, and ratified by the people at the April election of nineteen hundred thirteen.

ARTICLE SEVENTEEN.

SEC. 2. Amendments may also be proposed to this constitution by petition of the qualified voters of this State. Every such petition shall include the full text of the amendment so proposed and be signed by not less than ten per cent of the legal voters of the State. Initiative petitions proposing an amendment to this constitution shall be filed with the Secretary of State at least four months before the election at which such proposed amendment is to be voted upon. Upon receipt of such petition by the Secretary of State, he shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors, and if the same has been so signed, the proposed amendment shall be submitted to the electors at the next regular election at which any State officer is to be elected. Any constitutional amendment initiated by the people as herein provided, shall take effect and become a part of the constitution if the same shall be approved by a majority of the electors voting thereon and not otherwise. Every amendment shall take effect thirty days after the election at which it is approved. The total number of votes cast for Governor at the regular election last preceding the filing of any petition proposing an amendment to the constitution, shall be the basis upon which the number of legal voters necessary to sign such a petition shall be computed. The Secretary of State shall submit all proposed amendments to the constitution initiated by the people for adoption or rejection in compliance herewith. The petition shall consist of sheets in such form and having printed or written at the top thereof such heading as shall be designated or prescribed by the Secretary of State. Such petition shall be signed by qualified voters in person only, with the residence address of such persons and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached the affidavit of the elector circulating the same, stating that each signature thereto is the genuine signature of the person signing the same, and that to the best knowledge and belief of the affiant each person signing the petition was at the time of signing a qualified elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine, and that the persons signing the same are qualified electors. The text of all amendments to be submitted shall be published as constitutional amendments are now required to be published.

Exhibit D

AMENDMENTS TO THE CONSTITUTION.

Proposal No. 2.

Amendment to the constitution "to establish a new system of civil service for state employment", proposed by initiative petition, and ratified by the people at the general election, November 5, 1940.

ARTICLE VI.

Sec. 22. The state civil service shall consist of all positions in the state service except those filled by popular election, heads of departments, members of boards and commissions, employees of courts of record, of the legislature, of the higher educational institutions recognized by the state constitution, all persons in the military and naval forces of the state, and not to exceed two other exempt positions for each elected administrative officer, and each department, board and commission.

There is hereby created a non-salaried civil service commission to consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for eight-year, overlapping terms, the four original appointments to be for two, four, six and eight years respectively. This commission shall supersede all existing state personnel agencies and succeed to their appropriations, records, supplies, equipment, and other property.

The commission shall classify all positions in the state civil service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the state civil service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the state civil service. No person shall be appointed to or promoted in the state civil service who has not been certified as so qualified for such appointment or promotion by the commission. No removals from or demotions in the state civil service shall be made for partisan, racial, or religious considerations.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the state civil service and who shall be responsible to and selected by the commission after open competitive examination.

To enable the commission to execute these powers, the legislature shall appropriate for the six months' period ending June 30, 1941, a sum not less than one-half of one per cent, and for each and every subsequent fiscal year, a sum not less than one per cent, of the aggregate annual payroll of the state service for the preceding fiscal year as certified to by the commission.

After August 1, 1941, no payment for personal services shall be made or authorized until the provisions of this amendment have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.

This amendment shall take effect on the first day of January following the approval thereof.

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Proposal No. 1.

Amendment to the constitution relative to "circulating, etc., constitutional amendment petitions", proposed by joint resolution, and ratified by the people at the biennial spring election, April 7, 1941.

ARTICLE XVII.

Sec. 2. Amendments may also be proposed to this constitution by petition of the qualified and registered electors of this state. Every such petition shall include the full text of the amendment so proposed, and be signed by qualified and registered electors of the state equal in number to not less than 10 per centum of the total vote cast for all candidates for governor at the last preceding general election, at which a governor was elected. Petitions of qualified and registered electors proposing an amendment to this constitution shall be filed with the secretary of state or such other person or persons hereafter authorized by law to receive same at least 4 months before the election at which such proposed amendment is to be voted upon. The legislature may prescribe penalties for causing or aiding and abetting in causing any fictitious or forged name to be affixed to any petition, or for knowingly causing petitions bearing fictitious or forged names to be circulated. Upon receipt of said petition the secretary of state or other person or persons hereafter authorized by law shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified and registered electors, and may, in determining the validity thereof, cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which said petitions were circulated, for properly determining the authenticity of such signatures. If the secretary of state or other person or persons hereafter authorized by law to receive and canvass same determines the petition is legal and in proper form and has been signed by the required number of qualified and registered electors, the proposed amendment shall be submitted to the electors at the next regular election at which any state officer is to be elected. An official declaration of the sufficiency or insufficiency of the petition shall be made by the secretary of state or such other person or persons as shall hereafter be authorized at least 2 months prior to such election. Any constitutional amendment initiated by the people as herein provided, shall take effect and become a part of the constitution if the same shall be approved by the number of qualified electors required in section 1 hereof for the approval of amendments proposed by the legislature, and not otherwise. Every amendment shall take effect 30 days after the election at which it is approved. The secretary of state or such other person or persons as may be hereafter authorized by law shall submit all proposed amendments to the constitution initiated by the people for adoption or rejection in compliance herewith. The petition shall consist of sheets in such form and having printed or written at the top thereof such heading as shall be designated or prescribed by the secretary of state, or such other person or persons hereafter authorized by law to receive, canvass and check the same. Such petition shall be signed by qualified and registered electors in person only with the residence address of such persons, showing street names and also residence numbers in cities and villages having street numbers, and the date of signing the same. To each of such petitions, which may consist of 1 or more sheets, shall be attached the affidavit of the qualified and registered elector circulating the same, who shall be required to identify himself by affixing his address below his signature, stating that each signature thereto was signed in the presence of such qualified and registered elector and is the genuine signature of the person signing the same, and that to the best knowledge and belief of the affiant each person signing the petition was at the time of signing a qualified and registered elector.

Sec. 3. All proposed amendments to the constitution and other questions to be submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted in each polling place. The purpose of any such proposed amendment or question shall be designated on the ballots for submission to the electors in not more than 100 words, exclusive of caption. Such designation and caption shall be prepared by the secretary of state or by such other authority as shall be hereafter designated by law within 10 days after the filing of any proposal and shall consist of a true and impartial statement of the purpose of the amendment or question in such language as shall create no prejudice for or against such proposal.

Proposal No. 2.

Amendment to the constitution relative to "circulating initiative legislative and referendum petitions", proposed by joint resolution, and ratified by the people at the biennial spring election, April 7, 1941.

ARTICLE V.

Section 1. The legislative power of the state of Michigan is vested in a senate and house of representatives; but the people reserve to themselves the power to propose legislative measures, resolutions and laws; to enact or reject the same at the polls independently of the legislature; and to approve or reject at the polls any act passed by the legislature, except acts making appropriations for state institutions and to meet deficiencies in state funds. The first power reserved by the people is the initiative. Qualified and registered electors of the state equal in number to at least 8 per cent of the total vote cast for all candidates for governor, at the last preceding general election at which a governor was elected, shall be required to propose any measure by petition: Provided, That no law shall be enacted by the initiative that could not under this constitution be enacted by the legislature. Initiative petitions shall set forth in full the proposed measure, and shall be filed with the secretary of state or such other person or persons as may hereafter be authorized by law to receive same not less than 10 days before the commencement of any session of the legislature. Every petition shall be certified to as herein provided as having been signed by the required number of qualified and registered electors of the state. Upon receipt of any initiative petition, the secretary of state or such other person or persons hereafter authorized by law shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified and registered electors, and may, in determining the validity thereof, cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which said petitions were circulated, for properly determining the authenticity of such signatures. If the same has been so signed, the secretary of state or other person or persons hereafter authorized by law to receive and canvass same, determines that the petition is legal and in proper form and has been signed by the required number of qualified and registered electors, such petition shall be transmitted to the legislature as soon as it convenes and organizes. The law proposed by such petition shall be either enacted or rejected by the legislature without change or amendment within 40 days from the time such petition is received by the legislature.

If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided. If any law so petitioned for be rejected, or if no action is taken upon it by the legislature within said 40 days, the secretary of state or such other person or persons hereafter authorized by law shall submit such proposed law to the people for approval

Exhibit E

secretary of state or such other person or persons as shall hereafter be authorized at least 2 months prior to such election. Any constitutional amendment initiated by the people as herein provided, shall take effect and become a part of the constitution if the same shall be approved by the number of qualified electors required in section 1 hereof for the approval of amendments proposed by the legislature, and not otherwise. Every amendment shall take effect 30 days after the election at which it is approved. The secretary of state or such other person or persons as may be hereafter authorized by law shall submit all proposed amendments to the constitution initiated by the people for adoption or rejection in compliance herewith. The petition shall consist of sheets in such form and having printed or written at the top thereof such heading as shall be designated or prescribed by the secretary of state, or such other person or persons hereafter authorized by law to receive, canvass and check the same. Such petition shall be signed by qualified and registered electors in person only with the residence address of such persons, showing street names and also residence numbers in cities and villages having street numbers, and the date of signing the same. To each of such petitions, which may consist of 1 or more sheets, shall be attached the affidavit of the qualified and registered elector circulating the same, who shall be required to identify himself by affixing his address below his signature, stating that each signature thereto was signed in the presence of such qualified and registered elector and is the genuine signature of the person signing the same, and that to the best knowledge and belief of the affiant each person signing the petition was at the time of signing a qualified and registered elector.] OR 300,000 SUCH REGISTERED ELECTORS, WHICHEVER SHALL BE LESS. SUCH PETITIONS SHALL BE FILED WITH SUCH PERSON AUTHORIZED BY LAW TO RECEIVE THE SAME, AT LEAST 120 DAYS BEFORE THE ELECTION AT WHICH SUCH PROPOSED AMENDMENT IS TO BE VOTED UPON. ANY SUCH PETITION SHALL BE IN SUCH FORM, AND SHALL BE SIGNED AND CIRCULATED IN SUCH MANNER AS SHALL BE PROVIDED BY LAW. UPON RECEIPT OF ANY SUCH PETITION, THE PERSON AUTHORIZED BY LAW TO RECEIVE SUCH PETITION, SHALL DETERMINE, AS PROVIDED BY LAW, THE VALIDITY AND SUFFICIENCY OF THE SIGNATURES ON SUCH PETITION, AND MAKE AN OFFICIAL ANNOUNCEMENT OF SUCH DETERMINATION AT LEAST 60 DAYS PRIOR TO THE ELECTION AT WHICH SAID PROPOSED AMENDMENT IS TO BE VOTED UPON.

Sec. b. [All proposed amendments to the constitution and other questions to be submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted in each polling place. The purpose of any such proposed amendment or question shall be designated on the ballots for submission to the electors in not more than 100 words, exclusive of caption. Such designation and caption shall be prepared by the secretary of state or by such other authority as shall be hereafter designated by law within 10 days after the filing of any proposal and shall consist of a true and impartial statement of the purpose of the amendment or question in such language as shall create no prejudice for or against such proposal] ANY AMENDMENT PROPOSED BY SUCH PETITION SHALL BE SUBMITTED TO THE ELECTORS AT THE NEXT ELECTION AT WHICH ANY STATE OFFICER IS TO BE ELECTED, PROVIDING THAT SUCH ELECTION IS HELD MORE THAN 120 DAYS AFTER THE FILING OF SUCH PETITION. SUCH PROPOSED AMENDMENT SHALL BE PUBLISHED IN FULL, TOGETHER WITH ANY EXISTING PROVISIONS OF THE CONSTITUTION WHICH WOULD BE ALTERED OR ABROGATED THEREBY AND TOGETHER WITH THE QUESTION AS IT SHALL APPEAR ON THE BALLOT USED IN SUCH ELECTION, AND A COPY OF SUCH PUBLICATION SHALL BE POSTED IN EACH POLLING PLACE, AND SHALL BE FURNISHED TO NEWS MEDIA AS PROVIDED BY LAW. THE BALLOT TO BE USED IN SUCH ELECTION SHALL CONTAIN A STATEMENT OF THE PURPOSE OF SUCH PROPOSED AMENDMENT, EXPRESSED IN NOT MORE THAN 100 WORDS, EXCLUSIVE OF CAPTION. SUCH STATEMENT OF PURPOSE AND CAPTION SHALL BE PREPARED BY THE PERSON AUTHORIZED BY LAW SO TO DO, AND SHALL CONSIST OF A TRUE AND IMPARTIAL STATEMENT OF THE PURPOSE OF THE AMENDMENT IN SUCH LANGUAGE AS SHALL CREATE NO PREJUDICE FOR OR AGAINST SUCH PROPOSED AMENDMENT. IF SUCH PROPOSED AMENDMENT APPEARING ON THE BALLOT SHALL BE APPROVED BY A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION, THE PROPOSED AMENDMENT SHALL BECOME A PART OF THE CONSTITUTION, AND SHALL ABROGATE OR AMEND EXISTING PROVISIONS OF THE CONSTITUTION 45 DAYS AFTER THE DATE OF THE ELECTION AT WHICH SUCH AMENDMENT WAS APPROVED.

Mr. Erickson, chairman of the committee on miscellaneous provisions and schedule, submits the following reasons in support of Committee Proposal 65:

History: The 1908 convention provided for an indirect initiative, which was subject to veto by the legislature. This initiative required signatures of not less than 20 per cent of the electors voting for governor.

The present section 2 was added by an amendment proposed in the legislature in 1913 and approved by referendum in April, 1913. Further amendments were made, again by a proposal of the legislature, which were approved by referendum April 7, 1941.

Section 3 was added to the constitution by amendment proposed by the legislature in 1917 and approved by referendum in November, 1918. It was further amended by legislative proposal in 1941.

Committee recommendations: The committte has undertaken a rather extensive rewriting of these sections 2 and 3, with the aim of eliminating matters which we were convinced were statutory detail, and with the aim of rearranging these 2 sections into what we believed is a more logical sequence. In this new draft, we tried to include in the first section, section a, all provisions concerning the initiative petitions, and have tried to include in the next section, section b, all necessary provisions relating to the submission of such amendment to the electors.

It is admitted that these 2 proposed sections still include many provisions that ordinarily would be part of an election code or statute. The committee, however, felt that this method of constitutional revision should be spelled out in some detail because of the nature of these sections. Section 1 of this article provides a method of constitutional revision that the legislature can use, and, as a matter of fact, most constitutional revision amendments have been proposed by the legislature. These proposed sections, sections a and b, then, would ordinarily be used only where the legislature has failed or refused to act. For that reason, the committee felt that essential detail ought not be left to the legislature to enact.

The committee believes that these proposed sections do not substantially affect the ease or difficulty of proposing constitutional changes. A minimum of 300,000 signatures has been inserted, as an alternative to the requirement that initiatory petitions be signed by 10 per cent of the total vote for governor, which figure was approximately 360,000 in the 1960 election. This seemed desirable to the committee to provide for possible rapid increase or decrease in the population of the state. A great increase in population could result in a situation where the sheer bulk of

Explanation—Matter within [ ] is stricken, matter in capitals is new.

petitions signed by 10 per cent of the electors could pose serious problems. The committee felt that it was sufficiently difficult to get 300,000 signatures so that hasty revision of the constitution would not result.

The first section, section a, was adopted by the full committee by a vote of 9 to 1, and the second section, section b, was adopted by the committee by a vote of 10 to 2.

CHAIRMAN YEAGER: The Chair will recognize Mr. Erickson. The Chair would like to inquire, do you want to take section a by paragraphs, Mr. Erickson, or as a total?

MR. ERICKSON: Let's take it as a total, because this all ties together.

CHAIRMAN YEAGER: You are recognized, then.

MR. ERICKSON: The Constitutional convention of 1907 and '08 had 3 subjects that took up most of its time: they were wine, women and initiative, (laughter) and the constitutional convention did not do anything on any of those 3 subjects — (laughter) liquor was not included and the vote for women was let go by for a later date, and so was initiative.

Even today Michigan is only 1 of 14 states that permits the citizens to amend its constitution, and after the other constitution it was not until 1913, by joint resolution of the legislature, that people voted to have this in. Mr. Habermehl has asked that I yield the floor to Delegate Durst for the presentation of this interesting subject.

CHAIRMAN YEAGER: Mr. Durst is recognized.

MR. DURST: Thank you, Mr. Erickson. Mr. Chairman and members of the committee, after what happened to Mr. Habermehl I am a little apprehensive but I shall proceed nevertheless.

The proposal that has just been read by the secretary eliminates a great deal of material that was previously in the constitution. We have tried to include the bare skeleton of the provision in order to still keep it self executing without providing all the varied material as to how names are to be set forth and all of this type of thing which is presently provided for in the statutes of this state. It was the opinion of the committee that in the event the legislature refused to act to provide the things that are called for here by this constitution that in one way or another it would still be possible to get an amendment on the ballot with the amount of material which is still left, which is still greatly statutory in nature. But since this is a provision in derogation of the power of the legislature, so to speak, it seemed desirable that it be self executing in nature, and that is why there is still a great deal of material here but far less than there was before.

As far as I know, there is not too much conflict with elimination of this material. However, there is one very substantive change here which has occasioned some conflict of opinion and a split in opinion, and that is the provision that provides that the petitions either be signed by 10 per cent of the total vote cast of all candidates for governor in the last preceding general election in which a governor was elected or 300,000 such registered electors, whichever shall be less. Now the net effect of this provision is to place a ceiling on the number of signatures that are necessary to place a constitutional amendment on the ballot.

Now I think it is desirable here to review just a little history of this provision. As Mr. Erickson has pointed out, it was not included in the constitution of 1908 but was added by amendment and placed on the ballot by the legislature in the year 1913. Now it is significant to note that the 10 per cent figure at that time and for many years prior thereto had averaged around 40,000. In the year 1898, 421,000 people voted in this state, making a requirement of approximately 42,000 signatures. In 1902, it was 402,000 or 40,000 signatures. In 1906, 373,000, so there was a drop to 37,000 signatures required. In 1910, 383,000, the requirement, 38,000. So this was the history and these figures go back to about this level even prior to this time. This was the history which the legislature had before it when it proposed this amendment with the 10 per cent figure in it in 1912. Now what has happened since?

There has been a very, very slow rise in the requirement up till very recent years: in 1920, a presidential year, a little over 1 million people voted in this state, meaning that you would need 105,000 signatures to put an amendment on the ballot. In 1930, a nonpresidential year, only 850,000 people voted, so there was a drop of 250,000 and only 85,000 signatures were needed. In 1940, another presidential year, the vote count rose to 2,030,000, so 203,000 signatures were needed. And in 1950, a nonpresidential year, 1,819,000 people voted, so 187,000 signatures were needed. In 1958, just 4 years ago, 2,312,000 people voted for governor, so 231,000 signatures were needed. And in the 2 year span to 1960, the vote count increased in this state by almost 1 million, to 3,281,536 people, so that you now would need, to put a constitutional amendment on the ballot today — if you were to try it, you would have to collect 328,153 signatures on the petition in order to put the amendment on the ballot. As you can readily see this is quite an increase from the 40,000 which the legislature experienced for a great number of years prior to the time this amendment was adopted to what we have today.

Now it is the contention of the committee that as this figure rises — and it is conceivable that it will rise quite a bit more in the years to come as the percentage of people voting increases, as well as the population increases — what you do in effect is erode the very right that is created by this particular section. I say that because as the figure gets larger, you make it virtually impossible for anyone else to use this particular provision except a large, well organized organization. Now I don't think there is any doubt that no matter how high this figure gets — even if you have to get millions of signatures in the state of Michigan — that the UAW-CIO would be able to put an amendment on the ballot if they so desired. Sure, it may cost them a little more. It may take a little more time and a little more effort, but they can do it. By the same token, Mr. Powell's organization, the farm bureau, if it really wants to put an amendment on the ballot has got the membership and also, I presume, the money — that I am not so sure of — but at least they have the facilities to put an amendment on the ballot if they really want to. I suppose there are other organizations that are similarly well organized. Probably the school groups, if they had an amendment they were particularly interested in, would be able to organize the manpower and the funds to put that particular amendment on the ballot. But I submit that the great bulk of the rest of the people in this state, who belong to none of these well organized organizations, would not be able to significantly participate in a drive to put an amendment on the ballot when this figure gets so high that it becomes too costly. Now I am concerned about this because I do not belong to either one of the large organizations I mentioned — as a former member of the teamsters union they probably wouldn't let me in the UAW-CIO — and when they see the "young radical" badge that Mr. Brake gave me, they probably wouldn't let me in the the farm bureau back home either. (laughter)

Now I know a little bit — not a great deal — about the difficulty of putting an amendment on the ballot. I participated back in my home area in a drive to fluoridate the water supply, and I know how long it took to go out and get 30 signatures on a petition, because everybody wanted to know everything about it before they signed — and I don't blame them for that — but it was virtually impossible if you went out at 6:00 o'clock at night and got done at 10:00 to get more than 30 signatures, and most people hardly got more than 10 or 15. It is a time consuming, very difficult job. And as the issue gets more complex, of course, it gets more difficult. Now I think we only need to look at the drive that was put on to enable the calling of this convention to see how difficult this situation is. I participated in that drive as a member of the junior chamber of commerce and I know Mrs. Judd participated and perhaps some others did as members of other organizations. And I say this without consulting with members of the league of women voters here: that I am convinced that the league of women voters and

for that reason, it should reflect more of a general, all over policy rather than a policy of one particular area.

Now as to the 3/5 provision: this is the matter I wish to speak to at this point. I would like to remind the members of this committee that a constitution contains in it some items that are not contained in laws, and there are some very definite differences between a law and a constitution. First of all, a law imposes the will of the state upon the individual. It imposes the will of the majority upon each individual within the state. A constitution does not have the same function. It has a contrary function. It protects against the imposition of the will of the state upon the individual. In other words, a law imposes the will; a constitution protects against the imposition of the will.

Now it should be remembered that, for instance, article II of our constitution contains the declaration of rights, and this declaration of rights sets out in written form certain specific, named items which are protection for the individual against the imposition of the will of the state. In other words, the constitution is the boundary line from which the legislature may not stray in the imposing of the will of the majority or the will of the state upon the individual. And I would like to liken a constitution to a football field. The constitution is actually the boundary line of a football field and once you go outside those boundary lines, the constitution provides that the game must stop and the legislature must get back inside those boundary lines. Now what is actually proposed when you say that a majority may change the boundary lines is to say that one team when they go outside the bounds may change those boundary lines so that they will be within those boundary lines. And I submit that this is not fair, that this is not a proper way to handle those boundary lines.

You have here, actually, 2 different basic concepts: you have some people who believe, as was so expressed, that the general will should always control. Other people feel that the majority should be checked and that the state should not be able to impose its will upon any minority group. Those of you who are lawyers would not, I believe, allow any client of yours to enter into a corporation which would allow a majority to change the constitution of that particular corporation. You would want some added guarantee to your client who would become a member of that corporation, and one of those guarantees which is always in a constitution of a corporation or the bylaws of a corporation is to provide that the constitution may be changed by something more than a simple majority. It is usually a 3/4 or a 3/5 or some other type of a majority more than a simple majority.

I would like to make this one further comment in closing: it appears as though those people who favor a simple majority are favoring the concept that was once expressed back in old English times, that the king could do no wrong. What they are saying at the present time is that the majority can do no wrong. In other words, they are saying that we have a divine right of the multitude to control. I say, when we are dealing with something as fundamental as a constitution, which is a protection against the imposition of the will of the state, that we should be very careful in the allowance of those particular guarantees to be changed because the constitution is a compact with the people. It represents not only what the position of the people is for the present day but also for the future, for those yet unborn children. I feel that it is very necessary to make it more difficult to change and alter the basic law and constitution of the state. I would urge the adoption of this substitute.

CHAIRMAN YEAGER: The Chair will recognize Mr. Habermehl.

MR. HABERMEHL: Mr. Chairman, I believe the committee will have to oppose the substitute as offered. I find some of Mr. Brown's ideas rather interesting myself and had they been submitted in some other form than an entire substitute I think they might be given more serious consideration. I think Mr. Brown has overlooked, however, that this is, by its very nature, a self executing proposal. This assumes that the legislature has failed or—thanks to our action in the past proposal—has been unable to act in this field and some other method must be provided for amendment of the constitution. For that reason the detail that is contained in it is essential. We have tried to limit it. You will note from the proposal that we have been able to eliminate 2 full pages of detail from this section, leaving only such items there as would make the proposal self executing. It cannot be subject to the failure of the legislature to act, as the Brown-Boothby substitute would have it. If the legislature did not act in this field, initiative would be useless. The committee, therefore, must oppose the substitute.

CHAIRMAN YEAGER: The Chair will recognize Mr. Marshall.

MR. MARSHALL: Mr. Chairman and fellow delegates, I rise to oppose the Brown-Boothby substitute and I would point out just a few simple figures as to what this actually means.

I will take Mr. Boothby's own county of Berrien county with a population of slightly less than 150,000 or approximately 150,000. They could produce, could register 20 per cent of the total signatures out of this 150,000. There are 25 counties in the state with less than 30,000 people. They could produce up as high as, could get signatures of—take a county with 70 per cent—might register 70 per cent or 80 per cent of the total registered voters in that county. This would mean, also, that out of the total required, 4 counties, which have well over a majority or approximately 60 per cent of the total state population, would only be able to produce 120,000 signatures based upon the last gubernatorial election. The county of Wayne, based upon the Brown-Boothby substitute, would be restricted to 30,000, only contributing 30,000 signatures and this would be less, slightly less than 1 per cent. This is completely and totally—I had not intended to speak on it, frankly. I want to point these figures out, but I had not intended to speak because I thought it was so ridiculous that the delegates probably would not give much consideration to it anyway.

I think everyone is well aware of what the substitute means, what it is intended to do, that it would practically make it impossible for — you could conceivably have a minority, an extreme minority of the population in a large percentage of the thinly populated counties who would have complete and absolute control over whether or not there would be any constitutional amendments submitted to the people. I oppose the Brown-Boothby substitute.

CHAIRMAN YEAGER: The Chair recognizes Dr. Nord.

MR. NORD: Mr. Chairman, I believe also, along with Mr. Marshall, that this substitute is not entitled to a great deal of discussion, but I take the floor for one reason, and that is because there is one point which I believe is well taken and I would like to isolate that from the others if I can. There is one point the proponents of the substitute have made which I think is a good point, but I do not think it is good enough standing with the rest of the amendment to be able to support the amendment. Mr. Boothby made the point that I refer to and that is, as I understood him to say, that the constitution ought to protect the minority from the majority. Particularly that is so with respect to the bill of rights and, therefore, the majority ought not to be able to change the bill of rights; it ought to take more than a majority to change the bill of rights. I agree with that myself. I think that point is absolutely correct. I think it is dangerous for the majority to be able to change the bill of rights; that is to say, to change it in the sense of removing the rights of minorities or individuals. And on that point, if that were the only point here, I would certainly go along with the amendment. In fact, I personally think that 2/3 is the right amount of the people to change, to derogate from rights guaranteed in the bill of rights. But, unfortunately, that is not the amendment that is before us. It has a great many other features each of which, I believe, previous speakers have pointed out to be quite unsatisfactory.

For example, the one about the counties has been discussed. I think it is clear that that is wrong. As to the fact that they have reduced the amount of language, I think that is completely a fallacy. This is not a matter for the legislature or legislative detail; this is supposed to be self executing. Without laboring the point as to the rest of the substitute, I believe that too many things have been put together and although there may be one thing, as I see it, that is good, there are too many

things that are bad in it. If the sponsors of the substitute wish to submit at this time or later, possibly, each one of the ideas in a separate package they might be able to get some of them through, but as it stands now I agree with many of the previous speakers that the substitute just cannot be supported as is.

CHAIRMAN YEAGER: The question is still on the Brown-Boothby substitute. The Chair recognizes Mr. Garry Brown.

MR. G. E. BROWN: Mr. Chairman, members of the committee, at the outset I would like to point out—in derogation of what Mr. Habermehl has said that this is not a self executing provision—I want to direct your attention to the comparable language in the provision of the constitution relative to recall. If you can say that this is not self executing in providing the right of recall, then you are probably correct in saying that the present language, the language in the substitute, is not self implementing.

I would only remind the people that when you provide that an amendment may be initiated by the people, this is a constitutional directive upon the petitioning of a certain number. If the legislature fails to implement it, there is nothing to stop that number of people from circulating petitions, signing them, and filing them with the secretary of state, and I will challenge anyone to say that mandamus action will not apply. So it is self implementing. Further, I appreciate the support of Dr. Nord with respect to the final paragraph. I thought that probably he might support the idea of taking out the legislative language, since I think that he would agree as a matter of constitutional interpretation that the first paragraph does make it self executing and only implementation is provided in the second paragraph.

I would also like to point out that there is not—at least this proponent of this substitute does not hold a great brief for the 10 per cent provision. If that is too limitive, conceivably 20 per cent would be better. But I think the point is that we should make sure that these petitions to put an amendment on the ballot to amend the fundamental law of the state should not come from a single county. They could very well come from Kalamazoo county or maybe Kent county or some other county, but the point is that at least 3 or 4 counties, or 5 or 6 counties should have some knowledge of the matter before it is actually put on the ballot through the circulating of petitions. This is a good way to campaign. It gives the proponents of the measure a chance to get out and to circulate on behalf of their proposition and, at the same time, it informs the electorate where they are circulating the petitions.

With respect to the matter of the 3/5 vote, I would only remind the delegates here that in order to amend the federal constitution it takes a 3/4 ratification of the states, and I would further remind the delegates here that in many states there are certain issues which may not be subject to the initiative or the initiated amendment and that, therefore, when you are permitting all provisions of the constitution to be subject to initiating amendment that a 3/5 vote is not too difficult a provision.

CHAIRMAN YEAGER: The Chair will recognize the last speaker on his list, Mr. Hodges.

MR. HODGES: Mr. Chairman, we have seen various attempts through the legislative apportionment to gerrymander this state but now we seem to be getting some "garrybrowning" in terms of the question of petitions, and I think that gerrymandering or "garrybrowning" is all the same; that it is unjust and, therefore, we should defeat the substitute.

CHAIRMAN YEAGER: The question is on the Brown-Boothby substitute. As many as are in favor will say aye. As many opposed will say no.

The substitute is not adopted. The secretary will read the next amendment.

SECRETARY CHASE: Messrs. Rush, Hutchinson, J. B. Richards, Rood and Powell offer the following amendment:

1. Amend page 4, line 19, after "voting" by striking out "on the question" and inserting "in the election"; so the language will read:

If such proposed amendment appearing on the ballot shall be approved by a majority of the electors voting in the election, the proposed amendment shall become a part of the constitution. . . .

CHAIRMAN YEAGER: The Chair will recognize Mr. Rush on his amendment.

MR. RUSH: Mr. Chairman, fellow delegates, when I proposed a similar provision, it was pertaining to an amendment that would be instituted by the legislature, by a 2/3 vote of the legislature. Now we are talking about an amendment that might be proposed by initiatory methods. We do not have in this case the protection of the 2/3 vote of the legislature. I would point out to you that the constitution could be amended by a 51 per cent vote. This is indeed making it rather easy to amend our constitution, and I do not think that we should adopt a proposal or put in our constitution a provision that would make it so easy to amend the constitution. In this case it will make it much more difficult to amend the constitution and I think that this amendment should be given serious consideration.

CHAIRMAN YEAGER: The Chair will recognize Mr. Durst.

MR. DURST: Mr. Chairman, I will yield to Mr. Hutchinson, one of the proponents of the amendment, if he desires to speak.

MR. HUTCHINSON: Mr. Chairman, I am not—it doesn't make any difference to me. I will be very happy to wait my turn. However—

CHAIRMAN YEAGER: You may proceed, Mr. Hutchinson.

MR. HUTCHINSON: Mr. Chairman, I was happy to lend my name to the support of this amendment because of the fact that here, again, is a situation where—and I agree with Mr. Nord in this—I believe conscientiously that constitutions are for the protection of minorities and that simple majorities of people voting upon questions and so on and a very small percentage of the electorate initiating questions without the benefit of the debate of any forum is something that should be made difficult. Consequently, I think that in the case of an initiated constitutional amendment, one that is initiated by petition, that it would be wise to require a greater percentage of the electorate to approve such an amendment than would be required to approve a constitutional amendment submitted by the legislature, the legislature submitting a constitutional amendment to be adopted by a majority of the people voting on the question; but I think that if there is to be an initiated petition, then we should require a greater percentage of the vote to carry it.

While that was a feature of Mr. Brown's amendment, which you have just defeated, this puts the same problem to you but in a different form and one which I hope that you will adopt because we, after all, are interested in protecting minorities in constitutions and we do not want to make it possible for a simple majority to trample over the constitutional rights of the individual citizens of this state, namely, the minority.

CHAIRMAN YEAGER: Mr. Durst.

MR. DURST: Mr. Chairman and members of the committee, on behalf of the committee on miscellaneous provisions and schedule, I feel that I must oppose the amendment which is on the wall. We did not particularly discuss or vote on this issue, in regard to this provision, but we did, in Committee Proposal 66, discuss the same question. The committee almost unanimously disapproved an amendment of this type.

Mr. Hutchinson brings up the question of protecting minorities and certainly this is a laudable ambition and certainly should be considered. However, in this regard, I think we should keep one thing in mind; that is this: at least in the past—I am going to make a rash generalization—there has been a sizable group of the electorate in this state which votes no on anything. I know some of them in my district. They are naturally suspicious—perhaps with justification—but anyway, there is a general lethargy on the part of the people that must be overcome before any constitutional amendment is approved, and to point this up I think it is important to review just once again that of the 34 amendments proposed to this constitution, the one of 1908, by initiative, only 10 of them have obtained the approval of the people.

Mr. Brown was using the argument a few minutes ago that this was a good point for making the unusual majority,

Exhibit F

STATE CONSTITUTION (EXCERPT)
CONSTITUTION OF MICHIGAN OF 1963

§ 9 Initiative and referendum; limitations; appropriations; petitions.

Sec. 9.

The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.

If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.

Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature. Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. If two or more measures approved by the electors at the same election conflict, that receiving the highest affirmative vote shall prevail.

The legislature shall implement the provisions of this section.

History: Const. 1963, Art. II, § 9, Eff. Jan. 1, 1964
Constitutionality: A law proposed by initiative petition which is enacted by the Legislature without change or amendment within forty days of its reception takes effect ninety days after the end of the session in which it was enacted unless two-thirds of the members of each house of the Legislature vote to give it immediate effect. Frey v Department of

Management and Budget, 429 Mich 315; 414 NW2d 873 (1987).
Former Constitution: See Const. 1908, Art. V, § 1.

Exhibit G

Malerman, Melissa (MDOS) <malermanm@michigan.gov> 7/28/2017 12:21 PM

RE: Voters Not Politicians

To James Lancaster <lancaster-law@comcast.net> Copy Katie Fahey <katiefahey2@gmail.com> • Williams, Sally (MDOS) <williamss1@michigan.gov> • Bourbonais, Lori (MDOS) <bourbonaisl@michigan.gov>

Jim,

We have questions regarding the reasons why the following provisions are listed as abrogated by the Voters Not Politicians proposal: Art. IV §1, Art. V §§1 and 4, Art. VI §§1 and 4. It is not clear to us, in view of the Supreme Court's decision in *Protect Our Jobs v Board of State Canvassers*, 492 Mich 763 (2012), how republishing these provisions squares with the Court's guidance that:

> "[W]hen the existing provision would likely continue to exist as it did preamendment, although it might be affected or supplemented in some fashion by the proposed amendment, no abrogation occurs. On the other hand, a proposed amendment more likely renders an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to such a provision would tend to negate the specifically conferred constitutional requirement." Id. at 783.
>
> "4. When the existing language would not be altered or abrogated, but the proposed amendment would only have an effect on the existing language, and the new and existing provisions can be harmoniously construed, republication of the existing provision is not required. 5. When the existing language would not be altered or abrogated, but the proposed amendment would only have an effect on the existing language, thereby requiring that the new and existing provisions be interpreted together, republication of the existing provision is not required." Id. at 792.

We are asking you to provide a written legal analysis explaining how each of the 5 abrogated provisions identified on your petition would be abrogated by the proposal if adopted. (Note, we are **not** asking for an explanation of the altered provisions.) This will inform our decision-making as we decide whether or not to recommend that the Board approve your petition as to form. A copy of your written explanation will be provided to Board members so that they may have the benefit of understanding your position prior to the meeting.

-Melissa

Exhibit H

LANCASTER & ASSOCIATES

MEMORANDUM

TO: Bureau of Elections
Sally Williams, Director
Melissa Malerman, Elections Specialist

FROM: James R. Lancaster JRL
Legal Counsel, Voters Not Politicians Ballot Committee ("VNPBC")

RE: Legal Analysis Explaining How Provisions Republished In VNPBC Proposed Constitutional Amendment Would Be Abrogated.

DATE: July 31, 2017

Thank you for your email of July 28, 2017, and for giving us the opportunity to provide to you our legal analysis explaining how we believe each of the 5 provisions republished in our petition would be abrogated by the Proposal, if adopted.

As we have previously discussed, the Michigan Supreme Court's decision in the 2012 *Protect Our Jobs* case has created some uncertainty as to when abrogation occurs, thus triggering the republication requirement. We welcome this opportunity to explain how we have analyzed this case, and applied it is drafting the VNPBC Proposal (the "Proposal")

For your convenience, I have attached as Exhibit A the latest version of the Proposal which incorporates all of the changes you have previously suggested. It has been modified to an 8.5" x 11" format for ease of copying.

Introduction

Our analysis begins with the most fundamental, bedrock principle of the Michigan Constitution:

ARTICLE I

DECLARATION OF RIGHTS

§ 1 Political power.

Sec. 1. All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

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P.O. Box 10006
Lansing, Michigan 48901

In the Michigan Constitution of 1963, the People reserved to themselves the power to amend the Constitution. In this regard, Article XII, §2 provides, in relevant part:

ARTICLE XII

AMENDMENT AND REVISION

.....

§ 2 Amendment by petition and vote of electors.

Sec. 2. Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected....*Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.* The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Submission of proposal; publication.

Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. *Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law.* Copies of such publication shall be posted in each polling place and furnished to news media as provided by law. (Emphasis added)

Analysis of the Michigan Supreme Court's Decision in *Protect Our Jobs*

The primary focus of our analysis is the Michigan Supreme Court's decision in *Protect Our Jobs v. Board of State Canvassers, et. al., 492 Mich. 763, 822 N.W.2d 534 (2012).* However, we begin that analysis by considering the position taken by Michigan Attorney

General Bill Schuette in the case *Citizens For More Michigan Jobs and Robert J Cannon v. Secretary of State, Board of State Canvassers, and Director of Elections, Supreme Court File Number 145754.* This case was, of course, one of the four cases that were ultimately consolidated and decided in *Protect Our Jobs.*

Citizens For More Michigan Jobs involved a proposed constitutional amendment to establish 8 new casinos in the State. It included a mandate that each of these casinos receive a liquor license. The Attorney General argued that this proposal should not be placed on the ballot because it failed to republish Article IV, §40, which provides, in relevant part:

> Except as prohibited by this section, (t)he legislature may by law establish a liquor control commission which, subject to statutory limitations, *shall exercise complete control of the alcoholic beverage traffic within this state*, including the retail sales thereof. (Emphasis added)

The Attorney General's brief, states, in relevant part:

> The proposal's **conflict** with existing article 4, §40 is **stark**. With respect to the 8 new casinos the proposal authorizes, §40 is simply a nullity. No Liquor Control Commission investigation, no Commission quotas, and no Commission approval. The CFMMJ proposal abrogates the "complete control" over alcoholic beverage traffic that the commission has exercised for many years.
>
> Such effect is the antithesis of article 12, §2's purpose, as this Court recognized in *Massey [Massy v Secretary of State, 409 Mich 569; 297 NW2d 538(2004)]*: **"to definitively advise the electors as to the purpose of the proposed amendment and what provision of the constitutional law *(sic)* it modified or supplanted."** 457 Mich at 417. **It is one thing to create a constitutional right to a liquor license. It is entirely different to do so without disclosing to the electorate that such a right is inconsistent with the way the Michigan Constitution has regulated the grant of a liquor licenses since its passage.** (Emphasis added. Attorney General Brief at p. 5. A copy of the Brief is attached as Exhibit B.)

As you know, the Michigan Supreme Court ultimately agreed with the Attorney General's position, denying the Plaintiff's request for a writ of mandamus, which resulted in the casino proposal not appearing on the ballot.

Prior to *Protect Our Jobs*, an existing constitutional provision was "abrogated" if it rendered an existing provision a "nullity;" it essentially had to make the existing constitutional provision completely inoperative and of no effect such that it could not be harmonized with the existing power or authority.

Justice Zahra's opinion introduces a new, somewhat different concept of "abrogation:" i.e., where an amendment interferes with an otherwise exclusive power or authority it renders the existing constitutional provision "inoperative." This appears to be the rule even if the two provisions can arguably be harmonized. In this regard, the opinion states:

> Determining whether the existing and new provisions can be harmonized requires careful consideration of the actual language used in both the existing provision and the proposed amendment. *An existing provision that uses nonexclusive or nonabsolute language is less likely to be rendered inoperative simply because a proposed new provision introduces in some manner a change to the existing provision.* Rather, when the existing provision would likely continue to exist as it did preamendment, although it might be affected or supplemented in some fashion by the proposed amendment, no abrogation occurs. *On the other hand, a proposed amendment more likely renders an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an exclusive power or authority because any change to such a provision would tend to negate the specifically conferred constitutional requirement.* (Emphasis added) 492 Mich at 783.

In applying this reasoning to the casino proposal, Justice Zahra wrote:

> It is undisputed that part of the Liquor Control Commission's "*complete* control of the alcoholic beverage traffic within this state, including the retail sales thereof" entails the granting of liquor licenses. Furthermore, §40 expressly states that the commission's control is "complete." ***Because complete control necessarily communicates the exclusivity of control, any infringement on that control abrogates that exclusivity; an amendment that contemplates anything less than complete control logically renders that power in § 40 inoperative.*** Because the proposed amendment would abrogate article 4, § 40, republication of that section on the petition was necessary to comply with the republication requirement of MCL 168.482(3). The failure to do so is fatal to the proposed amendment, and we must therefore deny mandamus. (Emphasis added) 492 Mich at 790-1.

It is also interesting, and instructive to note Justice Marilyn Jean Kelly's dissent which criticized this result:

> This reasoning is flawed. If § 40 is read in its entirety, it becomes apparent that the "complete control" of the Liquor Control Commission (LCC) is neither complete nor exclusive. Rather, it is subject to limits that the Legislature chooses to place on it.
>
> If the Legislature may subject the LCC's control to limitations, then so may the people of this state. The people have an inherent and superior right to amend the Constitution and to alter the authority of the legislatively created LCC. Should the voters pass the proposed constitutional amendment, it would be controlling by its nature, irrespective of whatever authority the Legislature has bestowed on the LCC. Moreover, because the

> LCC's " complete control" is subject to limitation both by statute and by the people, a constitutional amendment affecting that control cannot render the language of § 40 a nullity. Therefore, the proposed amendment cannot abrogate it
>
> Clearly, constitutional language limits the control of the LCC over alcoholic-beverage traffic in the state. Even if one were to pretend that it does not, the Court must give effect to the intent of the people in adopting constitutional provisions. *Therefore, should one conclude that the proposed amendment, if adopted, would collide with article 4, § 40, the Court is obliged to seek a construction that harmonizes the two. And in this case, harmonization is perfectly possible.* (Emphasis added) 492 Mich at 794-5.

So, it appears that in order to determine whether a proposed constitutional amendment "abrogates" an existing provision, we must look at whether the existing provision entails a power or authority that is "exclusive" (like that of the Liquor Control Commission) with respect to the subject matter it addresses. Arguments that the existing power or authority could be "harmonized" with the proposed amendment would appear to be irrelevant.

In explaining this decision to my client, and other laypersons, I have borrowed a metaphor commonly used by law school professors in introductory property law courses, They conceptualize the complexities of property ownership as a "bundle of sticks," with each stick constituting one of the many potential uses of real property, including subsurface uses, surface uses, and uses above the property. An owner of real property is generally conceptualized as owning all of these "sticks." The recurring question in American law with respect to property rights is: to what extent government can "take away" one or more of these sticks by law (e.g., zoning regulations) before it is adjudged to be improper, or a "taking." Generally, the government can do a great deal by way of the regulation of property rights before it is gone too far.

Using this same metaphor to analyze *Protect Our Jobs,* Justice Zahra's opinion appears to stand for the proposition that where a proposed amendment impinges upon an "exclusive" power of some constitutionally created entity (i.e., where that entity holds all of the "sticks"), *taking away any one of those "sticks"* constitutes an abrogation.

We are also mindful of the admonition in Attorney General Schuette's brief, which I will paraphrase: where a proposed amendment is a "stark" change to the Constitution, "supplanting" an existing provision, and which is inconsistent with the manner in which power has been traditionally allocated in the Constitution, Article XII, §2 requires republication so that the public is "definitively advised" of this change. We believe each of the 5 sections republished in the Proposal are of this nature.

The Source of the Government's Power Regarding Redistricting

Examining the Government's authority over the establishment of state legislative or congressional districts, it is apparent that it does not arise from a specific grant of authority within the Constitution. Rather, it arises from the inherent authority granted to the Legislature (in Article IV, §1) and the Governor (in Article V, §1) to enact a law by means of a bill approved by the Legislature and signed into law by the Governor.[1] When that process has failed, the Judiciary has exercised its inherent and plenary power (in article VI, §1) to impose state legislative and Congressional districts. *e.g., In Re Apportionment of State Legislature – 1982, 413 Mich 149, 321 NW2d 585 (1982)*

The Michigan Constitution of 1963 attempted to remove this power from the Legislature and the Governor by placing it in an independent commission. *See,* existing sections of Michigan Constitution of 1963, Article IV, §§ 2, 3 and 6. These provisions were determined to be unconstitutional because they violated the U.S. Constitution's population equality requirement, as articulated in *Reynolds v. Sims,* and subsequent decisions. It was ultimately adjudged that the "weighted land area requirements" in Article IV, §§2-6 were not severable; therefore the provisions in their entirety are invalid. *In Re Apportionment of State Legislature – 1982, 413 Mich 96, 115, 321 NW2d 565 (1982).*

Again, because there is no valid existing constitutional provision that addresses the power redistricting, that power arises from the inherent power to grant to the three branches of government.

How The Constitutional Provisions Republished In The VNPBC Proposal Would Be Abrogated

The principal purpose of the Proposal is to completely take the power of redistricting away from the Legislature and the Governor, and place that power with the newly created Independent Citizens Redistricting Commission. The Proposal would also limit the role and discretion of the judiciary in reviewing and invalidating decisions made by this new Commission, and impose and affirmative duty to mandate appropriations for funding its operations.

Assuming that the Board of State Canvassers approves the petition as to form, and sufficient signatures are obtained to place this proposal on the ballot, it is anticipated that this Proposal will be advertised to the public as completely taking away from "politicians" (the

[1] Or, where vetoed by the Governor, that veto is overridden.

Legislature and the Governor) the power of redistricting, and placing it in the hands of "the People." The name of our ballot committee is obviously consistent with this theme: "Voters Not Politicians."

Our analysis below is three pronged, derived from our understanding of the rule enunciated in *Protect Our Jobs,* as articulated above:

- Does the Proposal impinge on an existing constitutional power or authority that is "exclusive?"

- Using the "bundle of sticks" metaphor, does the Proposal take away one of the "sticks" of the "bundle" that constitutes the "exclusive" power or authority, and

- Is the change that would occur a "stark" departure from the manner in which that power or authority that has traditionally been allocated in the Constitution, necessitating republication to assure that the voters are "definitively advised" of this "stark" change.

Article IV, §1:

This section of the Constitution states:

> "The legislative power of the State of Michigan is vested in a senate and a house of representatives."

This power is all-encompassing and exclusive. As stated in *Taxpayers of Michigan Against Casinos v State, 471 Mich 306, 685 NW2d 221 (2004):*

> The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself.

The power to enact legislation to create state legislative and congressional districts is an inherent power that arises from Article IV, §1.

Applying the *Protect Our Jobs* analysis, Article IV, §1 gives the Legislature *exclusive power or authority* over the enactment of legislation of any kind, and on any subject that is not prohibited by the Constitution.

The Proposal abrogates this broad and exclusive legislative authority in at least two ways. First, it completely deprives the Legislature of its role in enacting redistricting legislation. See, Proposal, Article IV, §6(22). Second, it impinges on the Legislature's discretion on appropriations, by mandating a minimum appropriation for the Commission's activities. See Proposal, Article IV, §6(5).

Using the "bundle of sticks" metaphor, Article IV, §1 vests with the Legislature all of the "sticks" that represent legislative power. The Proposal would take away at least two of these "sticks," (i.e., the power to enact legislation establishing legislative and congressional districts, and the traditional discretion with regard to appropriations) and therefore abrogates this power.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Legislature has traditionally been allocated in the Constitution, "supplanting" the power of the Legislature regarding redistricting. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change.

Article V, §1

This section of the Constitution states: "The executive power is vested in the governor."

Inherent in this power is the Governor's role in signing or vetoing legislation. This is how redistricting has occurred after the past two federal decennial censuses: though bills enacted by the Legislature and signed by the Governor. The Proposal would take away the Governor's role in this process.[2] Also, "commissions" established by law or under the constitution that have any executive powers, are deemed to be part of the Executive Branch. *Straus v. Governor, 459 Mich. 526, 592 N.W.2d 53 (1999).* The Proposal will establish the Commission in the Legislative Branch. It would be the first and only body within the Legislative Branch that has independent authority, not subject to legislative or executive oversight or approval.[3] Further, it

[2] We considered whether it would be necessary to republish Article IV, §33, which sets forth the Governor's power to approve or veto bills. We believe this is not necessary because the Proposal does not actually abrogate this power. Instead, it removes redistricting as a subject that can be governed through the process of the Legislature passing a bill and the Governor signing or vetoing it. We felt it might be misleading to the voters to republish Article IV, §33, because it might be interpreted as suggesting that the Proposal makes a more drastic change to the Constitution than is actually occurring. Nevertheless, the Proposal clearly usurps the Governor's role in the legislative process. *Blank v Department of Corrections, 462 Mich 10, 611 NW2d 530 (2000)* (Invaliding amendments to the Administrative Procedures Act creating a "legislative veto" of administrative rules as unconstitutionally usurping the Governor's role in the legislative process)

[3] All existing legislative bodies or offices have only advisory powers, or powers that are subject to legislative oversight or approval.

- Article IV, §12 – State Officers Compensation Commission. The Legislature may amend or disapprove its determination of salaries and expense allowances.
- Article IV, § 15 – Legislative Council. It provides only bill drafting, research and other services. It has no formal independent powers.

would vest with the Commission both legislative (creating legislative and congressional districts) and executive (power to file lawsuits, approving enactments creating legislative and congressional district that would have the force of law) powers.[4] This is a departure from existing constitutional paradigms.

Article V, §1 gives the Governor, *exclusively,* the executive power of the State. This includes the inherent power to approve legislation and to administer "commissions" created under the Constitution

Using the *Protect Our Jobs* analysis, the Proposal abrogates this broad and exclusive executive authority in at least two ways. First, it deprives the Governor of the traditional role in approving or vetoing legislation regarding redistricting. See, Proposal, language added to Article V, §2. Second, it impinges on the Governor's traditional authority over entities that have some executive power, and that they must be part of or within the Executive Branch.

Using the "bundle of sticks" metaphor, Article IV, §1 vests with the Governor all of the "sticks" that represent executive power. The Proposal would take away at least two of these "sticks," and therefore abrogates this power.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Governor has traditionally been allocated in the Constitution, "supplanting" the power of the Governor regarding redistricting. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change.

Article V, §4

This section of the Constitution states:

§ 4 Commissions or agencies for less than 2 years.

Sec. 4. Temporary commissions or agencies for special purposes with a life of no more than two years may be established by law and need not be allocated within a principal department.

- Article IV, § 53 – Auditor General. Appointed by the Legislature, and given the power to conduct audits. However, it has no authority, independent of the Legislature, to take action as a result of its audits.

[4] This vesting of a combination of both legislative and executive powers in the newly created Commission does not make the proposal constitutionally defective. The Michigan Supreme Court has previously ruled that, Article III, §2 (Separation of Powers), "has not been interpreted to mean that the branches must be kept wholly separate." In *Soap and Detergent Association v. Natural Resources Commission, 415Mich 728, 752; 330 NW2d 346 (1982)* the Court noted that the Governor's reorganization power is an example of a constitutionally appropriate limited delegation of legislative power to the executive.

The analysis of why this constitutional section must be republished differs from the prior two sections just discussed. This provision involves a combination of both legislative and executive power, and applies to a more limited subject manner. A temporary commission must be "established by law," which means it must be created through a legislative enactment.[5] *House Speaker v Governor, 443 Mich 560, 590, fn. 36; 506 NW2d 190 (1993)* (Temporary commissions under Article V, §4 require legislative implementation). Such commissions are treated as part of the executive, but do not need to be allocated to a principal department, as is otherwise required by Article V, §2.

While this power is not as broad and all-encompassing as the power granted to the Legislature in Article IV, §1 or to the Governor in Article V, §1, consistent with the rule stated in *Protect Our Jobs,* it is nevertheless a broad and *exclusive power or authority* granted jointly to the Legislature and the Governor to create temporary commissions that need not be assigned to a principal department, as otherwise required by Article V, §2. The power or authority extends to creating a commission *on any subject not specifically prohibited by the Constitution*.[6]

And this power is specifically abrogated by the Proposal. The Proposal would amend Article IV, §6 by adding a new part (22) which states:

> (22) NOTWITHSTANDING ANY OTHER PROVISION OF THIS CONSTITUTION, OR ANY PRIOR JUDICIAL DECISION, AS OF THE EFFECTIVE DATE OF THE CONSTITUTIONAL AMENDMENT ADDING THIS PROVISION, WHICH AMENDS ARTICLE IV, SECTIONS 2, 3 AND 6 AND ARTICLE V, SECTION 2, INCLUDING THIS PROVISION, FOR PURPOSES OF INTERPRETING THIS CONSTITUTIONAL AMENDMENT THE PEOPLE DECLARE THAT THE POWERS GRANTED TO THE COMMISSION ARE LEGISLATIVE FUNCTIONS NOT SUBJECT TO THE CONTROL OR APPROVAL OF THE LEGISLATURE, AND ARE EXCLUSIVELY RESERVED TO THE COMMISSION. THE COMMISSION, AND ALL OF ITS RESPONSIBILITIES, OPERATIONS, FUNCTIONS, CONTRACTORS, CONSULTANTS AND EMPLOYEES ARE NOT SUBJECT TO CHANGE, TRANSFER, REORGANIZATION, OR REASSIGNMENT, AND SHALL NOT BE ALTERED OR ABROGATED IN ANY MANNER WHATSOEVER, BY THE LEGISLATURE. **NO OTHER BODY SHALL BE ESTABLISHED BY LAW TO PERFORM FUNCTIONS THAT ARE THE SAME OR SIMILAR TO THOSE GRANTED TO THE COMMISSION IN THIS SECTION.** (Emphasis added)

Similarly, the Proposal would amend Article V, §2 to add the following:

> NOTWITHSTANDING ANY OTHER PROVISION OF THIS CONSTITUTION OR ANY PRIOR JUDICIAL DECISION, AS OF THE EFFECTIVE DATE OF THE

[5] In this manner, temporary commissions are like the Liquor Control Commission in that it must also be established by law.
[6] In this respect, the analysis of the abrogation that would occur of the Proposal is adopted differs from the analysis in *Protect Our Jobs.* It that case, the Court examined the abrogation

> CONSTITUTIONAL AMENDMENT ADDING THIS PROVISION, WHICH AMENDS ARTICLE IV, SECTIONS 2, 3 AND 6 AND ARTICLE V, SECTION 2, INCLUDING THIS PROVISION, FOR PURPOSES OF INTERPRETING THIS CONSTITUTIONAL AMENDMENT **THE PEOPLE DECLARE THAT THE POWERS GRANTED TO INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR STATE AND CONGRESSIONAL DISTRICTS (HEREINAFTER, "COMMISSION") ARE LEGISLATIVE FUNCTIONS NOT SUBJECT TO THE CONTROL OR APPROVAL OF THE GOVERNOR, AND ARE EXCLUSIVELY RESERVED TO THE COMMISSION.** THE COMMISSION, AND ALL OF ITS RESPONSIBILITIES, OPERATIONS, FUNCTIONS, CONTRACTORS, CONSULTANTS AND EMPLOYEES ARE NOT SUBJECT TO CHANGE, TRANSFER, REORGANIZATION, OR REASSIGNMENT, AND SHALL NOT BE ALTERED OR ABROGATED IN ANY MANNER WHATSOEVER, BY THE GOVERNOR. **NO OTHER BODY SHALL BE ESTABLISHED BY LAW TO PERFORM FUNCTIONS THAT ARE THE SAME OR SIMILAR TO THOSE GRANTED TO THE COMMISSION IN ARTICLE IV, SECTION 6.** (Emphasis added)

The abrogation that would occur if the Proposal's amendments to Article IV, §6 and Article V, § 2 are adopted is arguably more drastic than the situation regarding the casino proposal addressed in *Protect Our Jobs*. In that case, the proposal merely took away some authority from a body that may be created by law under the Constitution. Once established, the Liquor Control Commission was constitutionally accorded "complete control" over liquor traffic in the State. But, it still resided within the discretion of the Legislature to create the MLCC. In contrast, the VNPBC Proposal would not allow the Legislature to create any commission with powers over redistricting. It would take away the exclusive authority granted by the Constitution to the Legislature to create a temporary commission, and take away the authority of the Governor to approve the legislation creating the commission, and further, deprive the Governor of any authority to control or approve of its actions.

Using the "bundle of sticks" metaphor, Article V, §4 vests jointly with the Legislature and the Governor all of the "sticks" that constitute the power to create temporary commissions that do not need to be assigned to a principal department (as otherwise required by Article V, §2) on any subject within their authority. The Governor and Legislature currently "hold" all of the "sticks" in this "bundle;" these "sticks" consist of every conceivable subject matter upon which the Legislature, with the concurrence of the Governor, could create a temporary commission. The Proposal would take away at least one of these "sticks," (i.e., the power to create a temporary commission with authority over redistricting), and, therefore abrogates this power.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Legislature and the Governor has traditionally been allocated in the Constitution regarding temporary commissions, "supplanting" the power of the Legislature and

Governor to create a temporary commission regarding redistricting. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change to the Constitution.

Article VI, §1

This section of the Constitution provides:

> Sec. 1. The judicial power of the state is *vested exclusively* in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house. (Emphasis added)

By its own terms, the judicial power resides *exclusively* with the judiciary. It is clearly a plenary power. As the Supreme Court stated in *Washington-Detroit Theater Co. v Moore, 249 Mich 673; 229 NW 618 (1930):*

> While the Legislature obtains legislative power and the *courts receive judicial power by grant in the state Constitution, the whole of such power reposing in the sovereignty is granted to those bodies except as it may be restricted in the same instrument.* There is no constitutional restriction on the power of the Legislature to recognize the complexity of modern affairs, and to provide for the settlement of controversies between citizens without the necessity of one committing an illegal act or wronging or threatening to wrong the other. *There is no constitutional expression of limitation upon the power of the court to decide such disputes.*[7]

The Proposal would abrogate this exclusive power in that it would grant to the Commission standing in certain actions; the Proposal, at Article IV, §6(6) states:

> (6) THE COMMISSION SHALL HAVE LEGAL STANDING TO PROSECUTE AN ACTION REGARDING THE ADEQUACY OF RESOURCES PROVIDED FOR THE OPERATION OF THE COMMISSION, AND TO DEFEND ANY ACTION REGARDING AN ADOPTED PLAN. THE COMMISSION SHALL INFORM THE LEGISLATURE IF THE COMMISSION DETERMINES THAT FUNDS OR OTHER RESOURCES PROVIDED FOR OPERATION OF THE COMMISSION ARE NOT ADEQUATE. THE LEGISLATURE SHALL PROVIDE ADEQUATE FUNDING TO ALLOW THE COMMISSION TO DEFEND ANY ACTION REGARDING AN ADOPTED PLAN.

[7] This case was cited more recently as still controlling authority as to the scope of power of the judiciary in *Lansing Schools Education Association v Lansing Board of Education, 487 Mich 349, 363; 792 NW2d 686 (2010).*

Standing is generally considered an issue that is within the inherent power of the judiciary.[8] Further, the judiciary has generally declined to order appropriations.[9] The Proposal would abrogate this exclusive authority of the judiciary.

Using the "bundle of sticks" metaphor, Article VI, §1 vests with the Judiciary all of the "sticks" that represent any conceivable aspect of judicial power including its prudential power to determine whether standing requirements have been met, and to decline to compel the Legislature to make an appropriation. The Proposal would take away at one or more of these "sticks," by depriving the judiciary of its discretion to determine whether the Commission has standing to prosecute an action and defend a plan adopted by the Commission and compel an appropriation for its operations. It would also require the judiciary to extend its "inherent power" to compel appropriations, by requiring it to adjudicate actions by the newly created Commission as to the adequacy of the resources provided to it by the Legislature. It therefore clearly abrogates the exclusive and plenary judicial power granted in Article VI, §1.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Judiciary has traditionally been understood in the Constitution regarding the Court's discretion on standing, and on mandatory appropriations. It clearly "supplants" the traditional discretion granted to the judiciary. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change to the Constitution.

Article VI, §4.

This section of the Constitution provides:

§ 4 General superintending control over courts; writs; appellate jurisdiction.

Sec. 4. The supreme court shall have general superintending control over all courts; *power to issue, hear and determine prerogative and remedial writs*; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge. (Emphasis added)

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[8] Standing has been long considered a "prudential limit" imposed by courts that arises from their inherent powers, and is a matter of "discretion and not of law." *Lansing Schools Education Association, supra, 487 Mich at 355.*

[9] Generally, the judiciary will decline to compel the Legislature to make and appropriation. However, in *46th Circuit Trial Court v County of Crawford, 476 Mich 131; 719 NW2d 553 (2006),* the Supreme Court held that "In order for the judicial branch to carry out its constitutional responsibilities...the judiciary cannot be totally beholden to legislative determination regarding its budgets. While the people of this state have the right to appropriations and taxing decision being made by their elected representative in the legislative branch, they also have the right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities." 476 Mich at 143.

The traditional vehicle for challenging redistricting and apportionment schemes is with an application for a writ of mandamus. *LeRoux v Secretary of State, 465 Mich 594, 605; 640 NW2d 849 (2002).* Mandamus is properly categorized as a "prerogative writ". *O'Connell v Director of Elections, et. al., 316 Mich App 91, 100; 891 NW2d 240 (2016).* In the past, the Supreme Court has appointed and adopted a plan created by a special master, ordered the Secretary of State to publish the plan and hold legislative elections in accordance with its provisions. *In Re Apportionment of the State Legislature – 1992, Neff v Secretary of State, 439 Mich 251, 253; 483 NW2d 52(1992).*

The Proposal would limit the judiciary's power to issue prerogative and remedial writs, and the relief that could be accorded thereunder. Proposed Article IV, §6(19) states:

> (19) THE SUPREME COURT, IN THE EXERCISE OF ORIGINAL JURISDICTION, SHALL DIRECT THE SECRETARY OF STATE OR THECOMMISSION TO PERFORM THEIR RESPECTIVE DUTIES, MAY REVIEW A CHALLENGE TO ANY PLAN ADOPTED BY THE COMMISSION, AND SHALL REMAND A PLAN TO THE COMMISSION FOR FURTHER ACTION IF THE PLAN FAILS TO COMPLY WITH THE REQUIREMENTS OF THIS CONSTITUTION, THE CONSTITUTION OF THE UNITED STATES OR SUPERSEDING FEDERAL LAW. IN 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.

Using the "bundle of sticks" metaphor, Article VI, §4 vests with the Judiciary all of the "sticks" that represent exercise of judicial discretion in the granting of prerogative and remedial writs. The Proposal would take away at least one of these "sticks," i.e., the power to issue a writ of mandamus granting the remedy of appointing and adopting the plan prepared by a special master. Proposed Article IV, §6(22) takes away that discretion, and limits the Supreme Court's review to whether the adopted plan complies with applicable law. If it does not, the Court's remedy is limited to remanding the plan back to the Commission. It therefore clearly abrogates the exclusive and plenary judicial power granted in Article VI, §4.

This Proposal, if adopted would represent a "stark" departure from the manner in which the power or authority of the Judiciary has traditionally been allocated in the Constitution regarding the Court's discretion on prerogative and remedial writs. It clearly "supplants" the traditional discretion granted to the judiciary. Therefore, we believe republication is necessary to assure that the voters are "definitively advised" of this "stark" change to the Constitution.

Conclusion

We hope that this memorandum addresses your questions and concerns regarding the VNPBC Proposal. If you have any questions, please do not hesitate to contact me.

Exhibit I

LANCASTER & ASSOCIATES

MEMORANDUM

TO: Bureau of Elections
Sally Williams, Director
Melissa Malerman, Elections Specialist

FROM: James R. Lancaster
Legal Counsel, Voters Not Politicians Ballot Committee ("VNPBC")

RE: Revisions to Proposal in Response to The Bureau's Comments at Our Meeting on Thursday August 3, 2017

DATE: August 9, 2017

Thank you for the time you spent with us last week to discuss our July 31, 2017 memorandum, and the issues that it addresses. I appreciated that we were able to have a frank and candid conversation about the issues raised by the VNPBC proposed constitutional amendment.

Based on that conversation, it is our understanding you view the *Protect Our Jobs* decision somewhat differently than we do.

One area disagreement was with respect to whether the sections we proposed to only republish (but not alter) truly constitute an "exclusive" power or authority. For example, it is our understanding that you believe that Article IV, §1, does not constitute in "exclusive" grant of "legislative" power or authority to the Legislature. You indicated that this was based on the fact that the Constitution currently allocates certain "legislative" powers to other branches (e.g., administrative rulemaking power). Though we did not discuss this at length, I assume that you would take the same position with respect to Article V, §1. Our concern with this analysis is that it seems similar to the argument made by Justice Kelly's in her dissent in *Protect Our Jobs.*

You also expressed the disagreement with the "bundle of sticks" metaphor that I used in describing Justice Zahra's majority opinion. In my July 31 memorandum, I asserted that we believe that with respect to an "exclusive" power or authority, a constitutional amendment that takes away any one of the "sticks" from the "bundle" that constitutes that power, causes it to be abrogated. As, you described at the meeting, you believe that the entire "bundle of sticks" must be "burned for abrogation to occur. We agree with this analysis with respect to existing constitutional provisions addressing a power or authority that is not "exclusive." However, again, we believe the sections republished in our last proposal constitute the kind of "exclusive" power or authority contemplated by the majority opinion in *Protect Our Jobs*.

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We also discussed the existing language in Article VI, §1, which grants "judicial power," "exclusively," to the judiciary. You suggested that because this section contains the word "exclusively," republication might be necessary. Our understanding of your position it that, possibly, a textual analysis is the correct manner to determine whether a power or authority is "exclusive." Our concern is that the language of the majority opinion in *Protect Our Jobs* does not lend itself to an analysis limited to a plain reading of the text.

Notwithstanding our discussion, and the differing opinions we exchanged, I believe we all agreed that the *Protect Our Jobs* decision creates uncertainty as to how to determine when an existing constitutional provision is abrogated by a proposed amendment. We gathered from your comments that this is why you indicated that if VNPBC chose to proceed with its previous proposal, the Bureau would present it to the Board with no recommendation. It is our further understanding that the Attorney General's office would not provide an opinion in writing; rather, it would only respond to questions posed by Board members at the meeting.

This obviously created a problem for us. The whole point of this "as to form" approval process is to provide certainty to both the proponents of a petition, and the voters who sign it, that the signatures gathered will not disregarded because of a technical flaw in the form of the petition. As the Bureau has stated in the past, it considers the abrogation issue to be part of the form of the petition. We appreciate and respect this position.

Taking into account your comments, we believe we have a solution that we hope will result in a recommendation by the Elections Bureau and the Office of the Attorney General that the Board approve our petition "as to form."

At the beginning of each of the existing constitutional provisions that we previously only republished (due our belief that they would be abrogated), we have added the following language:

> "EXCEPT TO THE EXTENT LIMITED OR ABROGATED BY ARTICLE IV, §6 OR ARTICLE V, §2….."

We believe that this language serves two purposes, both of which should allow both the Bureau and the Attorney General to recommend approval, without directly opining on the appropriate interpretation of *Protect Our Jobs*.

First, by expressly altering the language in the existing provisions we had previously proposed only republishing, an analysis of the abrogation issue, is unnecessary. The analysis in *Protect Our Jobs* supports this conclusion.

Second, the language satisfies the other concern expressed in our July 31 memorandum: to definitively advise voters that our proposal would involve a "stark" departure from the

manner in which the power or authority over redistricting has traditionally been allocated in the Constitution. Though it does not appear that the holding in *Protect Our Jobs* depended upon this issue, it is an issue that we nevertheless take very seriously.

We believe that the provisions found in our proposal at Article IV, §6(22) and the language added to Article V, §2, represent a significant change in the manner which political power is distributed within the Constitution. Creating a "commission" that is not subject to the oversight or authority of the executive branch is a new and significantly different concept not previously found within the 1963 Constitution. Further, though this commission would be housed within the legislative branch, its actions are not subject to approval or oversight by the Legislature. This is another new concept. We believe that republication of the five existing sections of the Constitution, which we previously only proposed to republish (but not alter), is necessary to adequately inform the voters of the significance of the change being proposed to the Constitution.

It is our hope that you find that the latest, and ***final***, version of our proposal, which expressly alters these provisions, will cause the Bureau and the Attorney General to recommend that the Board approve our petition "as to form."

Once again, we appreciate the time, attention, and assistance that you have given to Voters Not Politicians Ballot Committee. If you have any questions, please do not hesitate to contact me.

Exhibit J

STATE CONSTITUTION (EXCERPT)
CONSTITUTION OF MICHIGAN OF 1963

§ 3 General revision of constitution; submission of question, convention delegates and meeting.

Sec. 3.

At the general election to be held in the year 1978, and in each 16th year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state. If a majority of the electors voting on the question decide in favor of a convention for such purpose, at an election to be held not later than six months after the proposal was certified as approved, the electors of each representative district as then organized shall elect one delegate and the electors of each senatorial district as then organized shall elect one delegate at a partisan election. The delegates so elected shall convene at the seat of government on the first Tuesday in October next succeeding such election or at an earlier date if provided by law.

The convention shall choose its own officers, determine the rules of its proceedings and judge the qualifications, elections and returns of its members. To fill a vacancy in the office of any delegate, the governor shall appoint a qualified resident of the same district who shall be a member of the same party as the delegate vacating the office. The convention shall have power to appoint such officers, employees and assistants as it deems necessary and to fix their compensation; to provide for the printing and distribution of its documents, journals and proceedings; to explain and disseminate information about the proposed constitution and to complete the business of the convention in an orderly manner. Each delegate shall receive for his services compensation provided by law.

No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to and serving in the convention, with the names and vote of those voting entered in the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner and at the time provided by such convention not less than 90 days after final adjournment of the convention. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon the constitution or amendments shall take effect as provided by the convention.

History: Const. 1963, Art. XII, § 3, Eff. Jan. 1, 1964
Former Constitution: See Const. 1908, Art. XVII, § 4.

EXHIBIT K

that this convention or any convention has to finally adjourn before it may submit to the people anything. It seems to me as though one of our experiences has been the convention not being able to reconvene itself after the decision of the people. Suppose the people should turn down its work. Shouldn't the convention be able to stay in session, and if the people turn down the work, be able to reconvene and perhaps make some changes which would be acceptable rather than to waste the whole effort such as this provision of final adjournment entails? Did you give any thought to that?

PRESIDENT NISBET: Mr. Habermehl.

MR. HABERMEHL: Mr. President, Delegate Hutchinson, I am afraid the specific question of whether or not we ought to stay in session was not brought up in committee. We did provide that they must finally adjourn at least 90 days before the election is to be held. We have provided that in line 10 on page 2. And in answer to the question as to whether or not they ought to be able to stay in session and make changes in case the people don't accept the whole document, it was not discussed in committee and would be, of course, a major policy decision.

MR. HUTCHINSON: Thank you, Mr. Habermehl. I just wondered if maybe that was of such importance, really, to be given further consideration on the floor, though I have no amendment along those lines.

The next question I would like to ask of Mr. Habermehl is whether the committee gave any consideration to the fact that hereafter, the general election at which this question is to be submitted would always come in the fall, in November, and that by the machinery here set out, the convention actually will not be meeting until 11 months after the people have called for a convention. Wouldn't it be possible to set this convention meeting ahead of October after they call it in the previous November? All you require is 4 months for the election procedure.

PRESIDENT NISBET: Mr. Habermehl.

MR. HABERMEHL: Mr. President, Delegate Hutchinson, yes, that is correct. We did consider it in committee. We considered it in first reading here. There must be 4 months after the November election on the call of the convention, of course, to permit time for the election of delegates, so that after that time, or any time after March of the succeeding year, the convention could convene. The problem then came in trying to find a date at which all segments of our society would be happy. The farmers, of course, don't want it during their busy season. The resort people don't want it during their busy season, and about the best that we could come up with that seemed to be acceptable to most people was a date in the late fall. It allows just about 13 months, less the 90 days that we provided between the convention's adjournment and the election, so it allows 10 months for the convention to do its work, which seemed to be ample time.

The real rationale for the October date in the old convention was due to the fact that the election was held in the spring at the biennial spring election, so actually the date that could be picked in this proposal could be any time from about April 1 to October, but there I suggest that we could get into a real hassle if we tried now to pick a different date. Different areas of the state would be opposed to different dates.

MR. HUTCHINSON: Thank you, Mr. Habermehl. Those 2 questions arose in my mind immediately, and they are simply indicative, at least in my mind, of the problem that we run into when we try, in the constitution, to write out all of this detail of machinery.

I propose to vote against this proposal because I believe that our best course of action would have been to have written into the new constitution a provision quite similar to the provisions in the 1850 constitution which would leave to the legislature in the future the task of writing out all of these details in a way that will fit the situation to the times. I think we are shortsighted here in writing into this constitution this detail of machinery, and I think that when another constitutional convention is called, it will probably be just as embarrassed by this machinery as we were by the machinery which bound us, simply because it is not possible for us here to look into the future 30 years or 40 years or 50 years and divine what the situation at that time will be. I, for that reason, propose to vote against this proposal.

PRESIDENT NISBET: Mr. Bentley.

MR. BENTLEY: Mr. President, I had a couple of questions that I was going to ask Mr. Habermehl. One of the questions has already been somewhat anticipated by Mr. Hutchinson. I agree that it is quite ridiculous to hold a general election in November for the purpose of deciding whether or not the constitution is to be revised, to have the election of delegates not later than the following March, and then to have the delegates wait nearly 7 months until they shall convene in convention. I appreciate the opposition that might be expected to arise from different parts of the state if the date of the convention were held earlier than October. But I think it is a very poor policy to have such a long time lapse between the election of delegates and the summoning of the convention itself.

I do have another question that I want to yield to Mr. Habermehl for an answer to, and that is the following: after the convention has adjourned, I understand the question of popular approval has to be held in not less than 90 days. Does that mean that there is to be a special election for the purpose of approving the new constitution?

PRESIDENT NISBET: Mr. Habermehl.

MR. HABERMEHL: Mr. President, Delegate Bentley, it isn't to be held, Delegate Bentley, 90 days after final adjournment, but simply not less than 90 days. The 90 day provision was put in there just to insure that there would be adequate time to disseminate information about the proposed constitution.

MR. BENTLEY: Do I understand then, Mr. President, that the convention itself can decide whether or not the proposed new document is to be approved in a general or in a special election? That is entirely a matter within the discretion of the convention?

MR. HABERMEHL: That is correct. They would make the decision as to when it would be submitted and whether it would be at a general or special election.

MR. BENTLEY: One more question, Mr. President: do I understand this convention also has the power to completely rewrite a new constitution or to provide a series of amendments to the existing document?

MR. HABERMEHL: The language used, Mr. President, Delegate Bentley, is precisely the same in that connection as the present constitution. The question voted upon by the electorate is whether or not a convention for the question of a general revision of the constitution shall be had, and I think it has been generally interpreted that the convention is free to amend the constitution, to submit an entirely new document—do as it pleases, in other words.

MR. BENTLEY: Mr. President, one final question along that line: although the voters have approved the idea of a general revision of the constitution, the convention, if it so saw fit, could make as few as a single amendment and then dismiss itself and go home?

MR. HABERMEHL: Mr. President, Delegate Bentley, yes, I believe so. I believe on page 2 we spell it out, line 4, "No proposed constitution or amendment adopted by such convention shall be submitted," and so forth. And on line 8, "Any proposed constitution or amendments adopted by such convention shall be submitted," and so forth.

MR. BENTLEY: The point I am making, Mr. President, is, although the voters would have expressed themselves as being in favor of a general revision of the constitution, the convention, if it so saw fit, could, for all intents and purposes, disregard the idea of a general revision and merely confine itself to a single amendment or a few amendments and leave the basic document unchanged, in spite of the previous expression on the part of the majority of electors; is that correct?

MR. HABERMEHL: Mr. President, Delegate Bentley, I believe that is within the power of any constitutional convention, and I believe it should remain in the power of any constitutional convention. They are sovereign, autonomous bodies.

MR. BENTLEY: Thank you.

EXHIBIT L

cided by a 51 per cent vote. While there may be some occasions for having more than a majority vote to take a particular action, it would seem to me when the people vote on this type of thing a simple 50 plus 1 percentage vote should be adequate. I therefore urge the defeat of the substitute and support of the majority.

CHAIRMAN YEAGER: On the Brown-Boothby substitute, the Chair will recognize Mr. Durst — for what purpose does the gentleman rise?

MR. G. E. BROWN: Mr. Downs yielded to me, Mr. Chairman.

CHAIRMAN YEAGER: All right. Proceed, Mr. Brown.

MR. G. E. BROWN: I would like to answer Mr. Downs. I trust that he is not suggesting that we would be writing a constitutional provision for only Wayne county but that this constitutional provision would apply to the whole state. I think that the suggestion he has made that because there are more people in Wayne county that, therefore, their votes should count more or that we should have a special rule for Wayne county, is completely without philosophical basis. The whole purpose of requiring that you get not more than 10 per cent coming from any one county is that this is a statewide provision, that it will have statewide effect, and that there should be more than a self starter in one county insofar as any provision is concerned that is going to become part of our basic and fundamental law.

I note that Mr. Downs did not criticize the fact that we required gubernatorial signatures to nominate a governor to come not only from Wayne county or that Wayne county should be able to have more than somebody else, but for some reason he decides that this is bad so far as a constitutional provision is concerned but it is not bad with respect to an elective officer that we elect every 2 years — in the past, at least.

CHAIRMAN YEAGER: Mr. Downs, you retain the floor.

MR. DOWNS: Thank you. I did not mean to get into a long winded debate with my good friend, Delegate Brown. I would suggest that for him to show that he is not picking on the good citizens from Wayne county, instead of 10 per cent he use the figure 3/100 of 1 per cent. That happens to be the population of the smallest county in the state of Michigan, and if we could say that no more than 3/100 of 1 per cent of the petitions could come from any one county, that would show that we were not simply confining ourselves to Wayne.

But, frankly, I feel that the delegates here are satisfied that on the matter of petition people should be allowed to circulate those in the areas where people are and get a total number of signatures. I have no desire to further discuss this. When the matter of gubernatorial signatures, which is largely statutory, and other matters come up I would be glad to debate them. As far as I am concerned, the subject is closed and I yield the floor.

CHAIRMAN YEAGER: The Chair will recognize Mr. Durst.

MR. DURST: Mr. Chairman and members of the committee, I would like first to point out that all of the material, new material, contained in Mr. Brown's and Mr. Boothby's substitute was considered and given serious consideration by the committee on miscellaneous provisions and schedule.

Now as to the first substantive change they make, the 10 per cent, I think the committee was generally in favor of the idea that perhaps it might be desirable to have some limitation in here that all petitions could not come from the same county. We discussed several different alternatives, one of which was to say that no county could provide more signatures than its per cent of the state's population or something of that sort. But on further reflection it was the committee's opinion that no serious attempt to amend the constitution would ever be made with all the signatures obtained or even the major fraction of them out of line with population obtained from one county. And I think upon serious reflection, it must be realized that any particular amendment in order to proceed must have some statewide support. I think it would be very difficult if just the citizens of Wayne county wanted some change and all the signatures came from Wayne county. They would find themselves some very serious opposition outstate. It would behoove the supporters of an amendment to go outstate and get as many signatures as they could in support of their proposition.

So, on reflection of the committee, it was felt that it was unnecessary to provide any such provision. Wayne county, having a major portion of the state's population, of course, would normally account for a major portion of the signatures on any amendment or in any petition drive. But it was felt that they would also be almost compelled to go outstate to get support there. So that is why that particular provision was not put into the proposal presented to the committee of the whole.

Now Mr. Brown has done some shortening here on our proposal. It is difficult to analyze in a short time whether or not his provision is better than ours. However, there were some things included in ours which the committee felt very strongly should be there. One was the provision that you could not submit the amendment to the voters in less than 120 days prior to the time the petitions were filed. The reason for this is because it was felt there should be some time for the people to become educated and to discuss and to think about the proposition they were voting on before it was tossed at them. And I think the committee was pretty unanimously in favor of at least including this 120 day provision which Mr. Brown's and Mr. Boothby's substitute eliminates.

We also include the requirement that the announcement of determination of the validity of the petitions had to be made 60 days prior to the time the amendment was to be voted upon. This was put in there mainly at the urging of Mr. Leppien, who has had some considerable experience, as a county clerk, in arranging the ballots and getting ready to submit these propositions to the people, and there was at least one instance when, I believe—if my memory serves me right—the thing was certified 13 days prior to the time of the election which presented an almost insurmountable obstacle for the election officials. This 60 days was to take care of that.

Now Mr. Brown completely eliminates those provisions and he eliminates almost all of what is contained on page 4 of the proposal, and here are some things which the committee also thought should be included for a good, self executing provision: one was that the state was required to publish the proposal along with setting forth the material that it was expected to delete or change and that this publication be listed in the polling places. There was considerable discussion that we should go further and require even the preparation of a pro and con pamphlet in order to educate the people. This was decided to be impractical and what is included here was thought to be a minimum that was necessary, that at least it should be set forth clearly and concisely and placed in the polling places and presented to the news media so there would be an opportunity for the people of this state to be thoroughly advised upon the amendment they are voting on.

Also contained in the language which Mr. Brown eliminates is the requirement that the proposed amendment be expressed in not more than 100 words and setting out some requirements for that 100 words. Since it is necessary on voting machines which are largely in use in this state today to use a 100 word caption, we felt that this was a very, very necessary part of the amendment and that there be some constitutional direction here.

Now as to the 3/5 provision, I do not know that this was seriously discussed in our committee. The committee was very much in favor—at least it voted in favor of retaining the majority provision which is in the present constitution. On the whole I would think that Mr. Brown's and Mr. Boothby's substitute is inadequate from the committee's point of view and should be rejected.

CHAIRMAN YEAGER: The Chair recognizes one of the proponents, Mr. Boothby.

MR. BOOTHBY: Mr. Chairman, ladies and gentlemen of the committee, I rise to support the Brown-Boothby substitute. The requirement as to the 10 per cent, not more than 10 per cent in one county, has been covered, I think, very well by Mr. Brown. I would add this: that a law generally affects not a complete state but, generally speaking, only a part of the state or a part of the whole. The constitution affects the whole and,

Exhibit M

A PROPOSAL TO AMEND THE MICHIGAN CONSTITUTION TO CREATE AN INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR ESTABLISHMENT AND ADOPTION OF REDISTRICTING PLANS FOR MICHIGAN'S CONGRESSIONAL AND STATE LEGISLATIVE ELECTION DISTRICTS

This proposal would:

- Transfer authority to draw Congressional and Legislative districts to an independent Citizens Commission.
- Require that the Commission be politically balanced, without current and former lobbyists, partisan elected officials or partisan candidates for elected office.
- Require all Commission meetings and records to be open and public.
- Require compact election districts of equal population that satisfy the Voting Rights Act and prevent unfair advantage to any political party, elected official or candidate.
- Require approval of election districts by a majority vote, supported by two commissioners affiliated with each of the major political parties and two unaffiliated members.

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This proposal would:

- Create a politically balanced Independent Citizens Redistricting Commission to draw Congressional and Legislative election districts in public meetings, replacing existing laws authorizing the Legislature to draw those election districts.

- Require random selection of Commission members from separate pools of applicants affiliated with the two major political parties and a third pool of applicants not affiliated with either of those parties.

- Exclude specified persons subject to potential for partisan political influence from membership on the Commission.

- Establish requirements for drawing election districts, including compliance with federal law and avoidance of any disproportionate advantage to any political party, elected official or candidate.

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This proposal would:

- Create a politically balanced Independent Citizens Redistricting Commission to draw Congressional and Legislative election districts, in public meetings and subject to limited review by the Supreme Court, replacing laws authorizing the Legislature to draw those districts.

- Require that the Commission's members be selected by a procedure designed to ensure that the Commission cannot be dominated by members of one political party.

- Exclude specified persons potentially subject to partisan political influence from membership on the Commission.

- Establish requirements for drawing election districts, including compliance with federal law and avoidance of any disproportionate advantage to any political party, elected official or candidate.

A PROPOSAL TO AMEND THE MICHIGAN CONSTITUTION TO CREATE AN INDEPENDENT CITIZENS REDISTRICTING COMMISSION FOR ESTABLISHMENT AND ADOPTION OF REDISTRICTING PLANS FOR MICHIGAN'S CONGRESSIONAL AND STATE LEGISLATIVE ELECTION DISTRICTS

This proposal would:

- Create an Independent Citizens Redistricting Commission to draw Congressional and Legislative districts.
- Require all commission meetings be held in public.
- Prohibit current and former partisan elected officials, lobbyists, party officers, and their employees from serving on the commission.
- Districts could not be drawn to favor any candidate or party, but would be required to comply with the federal Voting Rights Act, be compact, contiguous and of equal population and reflect county, city, and township boundaries.
- Repeal current laws authorizing the Legislature to draw Congressional and State Legislative district boundaries.