

STATE OF MICHIGAN
MICHIGAN COURT OF APPEALS

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

Case No. 343517

v.

SECRETARY OF STATE, and
MICHIGAN BOARD OF
STATE CANVASSERS,
Defendants/Cross Defendants,

**PLAINTIFFS' ANSWER AND
AFFIRMATIVE DEFENSES TO
INTERVENING DEFENDANTS /
CROSS PLAINTIFFS' CROSS-CLAIM**

And

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

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**PLAINTIFFS' ANSWER AND AFFIRMATIVE DEFENSES TO INTERVENING
DEFENDANTS / CROSS PLAINTIFFS' CROSS-CLAIM**

Plaintiffs, Citizens Protecting Michigan's Constitution, Joseph Spyke, and Jeanne Daunt ("Plaintiffs"), through counsel, state, by like-numbered paragraphs, as follows for their Answer and Affirmative Defenses to the Cross-Claim filed by Intervening Defendants / Cross Plaintiffs Voters Not Politicians Ballot Committee d/b/a Voters Not Politicians and Count MI Vote d/b/a/ Voters Not Politicians, Kathryn A. Fahey, William R. Bobier, and Davia C. Downey (collectively, "Cross Claimants"):¹

PARTIES

1. Intervening Defendant / Cross-Plaintiff Voters Not Politicians Ballot Committee is a ballot question committee which was registered with the Michigan Secretary of State as such in accordance with the Michigan Campaign Finance Act, MCL 169.201, *et seq.*, on February 22, 2017. (Affidavit of Kathryn A. Fahey – Exhibit A – ¶ 4)

RESPONSE: Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

2. Intervening Defendant / Cross-Plaintiff Count MI Vote is a Michigan non-profit corporation which was subsequently formed and incorporated for the purpose of operating the previously-organized Voters Not Politicians Ballot Committee under the assumed names "Voters Not Politicians" and "Voters Not Politicians Ballot Committee." For ease of reference, the

¹ MCR 7.206(D)(1) states that an original action is initiated in the Court of Appeals by the filing of *both* a complaint and a supporting brief. Intervening Defendants did not file an initial supporting brief with their cross-claim and have advised the Court in their May 10, 2018 Motion for Intervention that they intend to so on May 22, 2018. The Court's May 11, 2018 Order requires that answers to the cross-claim be filed as of the same date. Plaintiffs thus reserve the ability to respond and will respond separately to Cross-Claimants' supporting brief once filed.

aforementioned Intervening Defendant / Cross-Plaintiff entities shall be referred to collectively herein as “Voters Not Politicians” or “VNP.” (Fahey Affidavit – Exhibit A -- ¶ 4)

RESPONSE: Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

3. VNP is the sponsor of the voter-initiated ballot proposal at issue in this litigation. The purpose of VNP’s proposal is to create an Independent Citizens Redistricting Commission for State Legislative and Congressional Districts (the “Commission”) as a permanent Commission in the legislative branch – a Commission which would have exclusive authority to develop and establish redistricting plans, with corresponding election district maps, for state Senate districts, state House of Representative districts, and Michigan’s congressional districts. This has been proposed and actively supported by VNP’s organizers and volunteers as a desired means to remedy the widely-perceived abuses associated with partisan “gerrymandering” of state legislative and congressional election districts by the establishment of new constitutionally-mandated procedures designed to ensure that the redistricting process can no longer be dominated by one political party. (Fahey Affidavit – Exhibit A -- ¶ 7.)

RESPONSE: Plaintiffs deny as untrue VNP’s allegation that there are or have been “abuses associated with partisan gerrymandering of state legislative and congressional election districts,” and further deny as untrue the allegation that the VNP proposal is “designed to ensure that the redistricting process can no longer be dominated by one political party.” Among other defects, the VNP Proposal relies on applicants to the Commission to affirm whether they “affiliate” with a political party or consider themselves to be “non-affiliating,” ostensibly as a measure designed to promote that each party as well as independent voters will be represented on the Commission, but: (1) the State of Michigan does not require voters to register with a particular

party, (2) party affiliation is a matter of subjective view and, e.g., a person may consider themselves non-affiliating even where such person consistently votes for a party's candidates, and (3) political views of a person may change over time or vary from issue to issue. The commissioners moreover are to be chosen "in a manner" "that as closely as possible, mirror[s] the ... demographic makeup of the state." See VNP Proposal, art VI, § 6(2)(D)(ii). Because there are hundreds if not thousands of demographic characteristics and only 13 commission members, however, the Secretary (a partisan-elected official) in any given cycle may rely on demographics that will best suit the Secretary's political preference for selecting a commission made up of only 13 commission members. The reliance on individuals to subjectively report their affiliation, reliance on the Secretary to choose demographic factors for selecting the commission, and other defects, in no way "ensure that the redistricting process can no longer be dominated by one political party." As to Cross Claimants' description of the proposal's purpose, Plaintiffs deny as untrue that the petition has any purpose inconsistent with the language of the petition itself, but as to the purported purpose intended by Cross Claimants, Plaintiffs are without sufficient knowledge and leave Cross Claimants to their proofs. As to the remaining allegations of this paragraph, Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

4. Intervening Defendant / Cross-Plaintiff Kathryn A. Fahey is a qualified elector of the State of Michigan, registered to vote in Gaines Township, within Kent County. She is the founder of the Voters Not Politicians Ballot Committee, was an incorporator of Count MI Vote and a signer of VNP's petition, and currently serves as the Ballot Committee's Treasurer. As an organizer and supporter of VNP's voter-initiated proposal for amendment of the Constitution, she has a strong interest in having an opportunity to vote in favor of that proposal and will be aggrieved

if she is prevented from doing so without just and legally sufficient cause. (Fahey Affidavit – Exhibit A – ¶¶ 3, 5, 6, 8, 13.)

RESPONSE: Plaintiffs deny as untrue any implication that the issues raised by their Complaint for Mandamus do not present a just and legally sufficient cause for the rejection of the VNP Proposal. As to the remaining allegations of this paragraph, Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

5. Intervening Defendant / Cross-Plaintiff William R. Bobier is a former member of the Michigan House of Representatives. He is a qualified elector of the State of Michigan, registered to vote in Ferry Township, within Oceana County. Mr. Bobier signed VNP’s petition and is a supporter of the Voters Not Politicians ballot proposal. As such, he has a strong interest in being able to vote in favor of that proposal, and will be aggrieved if he is prevented from doing so without just and legally sufficient cause. (Bobier Affidavit – Exhibit B – ¶¶ 3, 6-7)

RESPONSE: Plaintiffs admit that William R. Bobier is a former member of the Michigan House of Representatives. Plaintiffs deny as untrue any implication that the issues raised by their Complaint for Mandamus do not present a just and legally sufficient cause for the rejection of the VNP Proposal. As to the remaining allegations of this paragraph, Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

6. Intervening Defendant / Cross-Plaintiff Davia C. Downey is a qualified elector of the State of Michigan, registered to vote in the City of East Lansing, within Ingham County. Ms. Downey signed VNP’s petition and is a supporter of the Voters Not Politicians ballot proposal. As such, she has a strong interest in being able to vote in favor of that proposal, and will be

aggrieved if she is prevented from doing so without just and legally sufficient cause. (Downey Affidavit – Exhibit C – ¶¶ 3, 6-7.)

RESPONSE: Plaintiffs deny as untrue any implication that the issues raised by their Complaint for Mandamus do not present a just and legally sufficient cause for the rejection of the VNP Proposal. As to the remaining allegations of this paragraph, Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

7. Defendant / Cross-Defendant Secretary of State is Michigan’s chief election officer. MCL 168.21. As such, the Secretary is the official with whom a petition proposing a constitutional amendment must be filed, and has overall responsibility for preparation of the ballot and the submission of ballot questions, including the responsibility to certify the constitutionally required statement of the purpose for designation on the ballot to each County Clerk, together with the form in which proposed constitutional amendments or other special questions shall be printed on the ballot. Const 1963, art 12, § 2; MCL 168.32(2); MCL 168.471; MCL 168.480.

RESPONSE: Plaintiffs admit that the Secretary is Michigan’s chief election officer. As to the remaining allegations of this paragraph—which describe the duties of the Secretary under various statutes and the Michigan Constitution—Plaintiffs aver the language of the cited constitutional authorities speaks for itself, and Plaintiffs deny any allegation inconsistent with those authorities.

8. Defendant / Cross-Defendant Board of State Canvassers is a state Board, established under Const 1963, art 2, § 7, which has statutory responsibility for canvassing voter-initiated petitions for amendment of the Constitution to determine the sufficiency of the required technical form of the petitions proposing such amendments and the sufficiency of the signatures

submitted in support. MCL 168.476; MCL 168.477. The Board also has responsibility for approving the constitutionally-required 100-word statement of purpose prepared for inclusion on the ballot by the Secretary of State's Bureau of Elections. MCL 168.32(2).

RESPONSE: As to the allegations of this paragraph—which describe the duties of the Board under various statutes and the Michigan Constitution—Plaintiffs aver the language of the cited constitutional authorities speaks for itself and deny any allegation inconsistent with those authorities.

JURISDICTION

9. This Court has jurisdiction of Plaintiffs' Complaint for Mandamus pursuant to MCL 600.4401, MCR 7.203(C)(2) and MCR 7.206(B). The Court has jurisdiction of Intervening Defendants' Cross-Claim pursuant to those provisions and MCR 2.203(D) and (E).

RESPONSE: Plaintiffs admit that this Court has jurisdiction over their Complaint. Plaintiffs deny that this Court has jurisdiction over the Cross-Complaint as Cross-Claimants did not file a supporting brief as required by MCR 7.206(D)(1) and further should have originated a separate action instead of a cross-claim.

ADMINISTRATIVE HISTORY

10. VNP's initiative petition for the ballot proposal at issue was filed with the Secretary of State as required by MCL 168.471 on June 28, 2017, and VNP sought preliminary approval of the form of the petition by the Board of State Canvassers. After consultations with Bureau of Election staff and revision of the proposal originally submitted, the Board of State Canvassers approved the form of VNP's petition during its meeting held on August 17, 2017. (Fahey Affidavit – Exhibit A -- ¶ 8, and meeting minutes attached thereto as Exhibit 1.)

RESPONSE: Plaintiffs state that there is no such thing as “preliminary” approval by the Board; such notion has no basis in statute or law and any statements by the Board at the August 17, 2017 meeting provide no substitute for the Board’s subsequent certification review under MCL 168.477. There is an informal, nonbinding advisory process only. Plaintiffs further emphasize that the meeting minutes of the August 17, 2017 meeting of the Board of State Canvassers expressly provide that “the Board’s approval does not extend to: (1) The substance of the proposal which appears on the petition; or (2) The substance of the summary of the proposal which appears on the signature side of the petition; or (3) The manner in which the proposal language is affixed to the petition; or (4) Whether the petition properly characterizes those provisions of the Constitution that are altered or abrogated by the proposal if adopted.” As to the remaining allegations of this paragraph, Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

11. Upon receiving the Board of State Canvassers’ preliminary approval of its petition, VNP immediately began the process of collecting the required voter signatures. Under the applicable statutory provisions, VNP was required to collect a minimum of 315,654 valid signatures within 180 days. On December 18, 2017, VNP filed petitions containing more than 425,000 signatures with the Secretary of State Bureau of Elections. (Fahey Affidavit – Exhibit A -- ¶ 9, and Bureau of Elections’ receipt for petitions attached thereto as Exhibit 2)

RESPONSE: As to the allegations of this paragraph, Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

12. On April 12, 2018, the Board of State Canvassers made a sample of the petition signatures available for public inspection and issued a Notice establishing a deadline of April 26,

2018, for submission of challenges to the sufficiency of the petition signatures. (Fahey Affidavit – Exhibit A – ¶ 10, and Notice attached thereto as Exhibit 3).

RESPONSE: Plaintiffs deny as untrue any implication or allegation that is inconsistent with the scope of protest in the Notice issued by the Board of State Canvassers. Plaintiffs admit the remaining allegations of this paragraph.

13. The Plaintiffs’ Complaint for Mandamus in this case was filed on April 25, 2018.

RESPONSE: Plaintiffs admit this allegation.

14. On April 26, 2018, Plaintiff Citizens Protecting Michigan’s Constitution (“CPMC”) filed a Challenge with the Board of State Canvassers which raised the same issues raised in its Complaint for Mandamus while acknowledging that the subject matter of its challenge was within the jurisdiction of the courts. That challenge did not raise any challenge to the validity or sufficiency of the petition signatures or any issues regarding the form of VNP’s petition beyond the issues raised in CPMC’s Complaint for Mandamus. (Fahey Affidavit – Exhibit A -- ¶ 12, and CPMC Challenge attached thereto as Exhibit 4.)

RESPONSE: Plaintiffs deny any allegation or implication of this paragraph that is inconsistent with their filed Complaint for Mandamus or Brief in Support, or with their Challenge filed with the Board of State Canvassers, a copy of which is attached to the Fahey Affidavit filed with the Cross-Claim as Exhibit 4 of that Affidavit. Plaintiffs deny as untrue any allegation inconsistent with the content of that Challenge.

15. Upon information and belief, no other challenges to the sufficiency of VNP’s petition or the signatures filed in support have been filed with the Board of State Canvassers, before or after the expiration of the April 26, 2018 deadline for the filing of such challenges.

RESPONSE: As to the allegations of this paragraph, Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs.

16. On May 3, 2018, VNP's General Counsel James Lancaster delivered a letter to the Chairperson of the Board of State Canvassers requesting that the Board convene a meeting and certify VNP's voter-initiated proposal for inclusion on the 2018 General Election ballot as soon as possible. A copy of that letter is attached as Exhibit D. In support of that request, Attorney Lancaster cited the expiration of the April 26, 2018 deadline for filing of challenges to VNP's petition signatures with no other challenges having been filed, and the preliminary findings of the Bureau of Elections, consistent with the findings of VNP's independent political consultant, that analysis of the signature sample had revealed an abundantly sufficient number of valid signatures.

RESPONSE: As to the allegations of this paragraph, Plaintiffs neither admit nor deny these allegations as they are without sufficient knowledge, and leave Cross Claimants to their proofs. Plaintiffs note, however, that the Board of State Canvassers had not, as of May 3, 2018, received any final staff report concerning the validity of the signatures submitted in support of the Voters Not Politicians Petition, and that the Board of State Canvassers upon information and belief typically awaits the final report of staff before deciding upon certification questions. Further, Plaintiffs note that the Board is not required to act to certify ballot question initiative petitions until September 6, 2018. MCL 168.477(1).

17. The Board of State Canvassers has not responded to the request made in Attorney Lancaster's Letter of May 3, 2018. The Board has scheduled a meeting for May 10, 2018, but consideration of matters concerning VNP's ballot proposal has not been included in the agenda for that meeting, a copy of which is attached as Exhibit E.

RESPONSE: Plaintiffs admit that the Board scheduled a meeting for May 10, 2018 and did not at that meeting include consideration of matters concerning VNP's ballot proposal. Plaintiffs note, however, that the Board of State Canvassers had not, as of the filing of the Cross Claim, received any final staff report concerning the validity of the signatures submitted in support of the Voters Not Politicians Petition, and that the Board of State Canvassers upon information and belief typically awaits the final report of staff before deciding upon certification questions. Further, Plaintiffs note that the Board is not required to act to certify ballot question initiative petitions until September 6, 2018. MCL 168.477(1). As to the remaining allegation of this paragraph, Plaintiffs lack sufficient knowledge to admit or deny, and leave Cross Claimants to their proofs.

COUNT I – MANDAMUS

18. The Intervening Defendants / Cross-Plaintiffs re-allege and incorporate all of the allegations made in Paragraphs 1 through 17, as if fully set forth herein.

RESPONSE: Plaintiffs incorporate their prior responses.

19. The Board of State Canvassers has a clear legal duty to certify a voter-initiated ballot proposal for inclusion on the ballot if: 1) The proposal has been supported by a sufficient number of valid petition signatures; 2) There has been no allegation, supported by sufficient proof, that the number of valid signatures submitted in support of the proposal is insufficient, and 3) There is no allegation supported by sufficient proof, that the technical form of the ballot proposal petition or the manner of its circulation or signing did not satisfy the validly enacted statutory requirements governing the technical form or the manner of signing or circulation of petitions.

RESPONSE: Plaintiffs deny as untrue the allegations of this paragraph. Plaintiffs in particular state that other conditions may impose upon the Board and the Secretary a duty to reject

an initiative petition and decline to certify a petition. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 291 (2008) (“[O]ur order would enforce a duty on the part of the Board and the Secretary to reject the RMGN initiative petition in light of *our* ‘threshold determination’ that it does not meet the constitutional prerequisites for acceptance.”) (emphasis in original).

20. The Board of State Canvassers has a clear legal duty to certify a voter-initiated ballot proposal for inclusion on the ballot if it has provided its preliminary approval of the form of the ballot proposal petition and a sufficient number of valid signatures has been collected in compliance with the statutory requirements governing the circulation and filing of the petitions filed in support of the proposal. *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 486, 492-493; 688 NW2d 538 (2004).

RESPONSE: Plaintiffs deny as untrue the allegations of this paragraph. Plaintiffs in particular state that other conditions may impose upon the Board and the Secretary a duty to reject an initiative petition and decline to certify a petition. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 291 (2008) (“[O]ur order would enforce a duty on the part of the Board and the Secretary to reject the RMGN initiative petition in light of *our* ‘threshold determination’ that it does not meet the constitutional prerequisites for acceptance.”) (emphasis in original). Plaintiffs also note that the Board has not yet received a final staff report concerning the sufficiency of signatures, and need not act to certify petitions until September 6, 2018. MCL 168.477(1).

21. The Board of State Canvassers has a clear legal duty to approve the constitutionally-required 100-word summary of purpose of a proposed constitutional amendment prepared by the

Bureau of Elections pursuant to MCL 168.32(2) if the summary complies with the applicable constitutional and statutory requirements.

RESPONSE: Plaintiffs deny any allegation or implication of this paragraph that is inconsistent with MCL 168.32(2). Plaintiffs also deny the implication that the Board of Canvassers has an existing clear legal duty to approve a summary with respect to the VNP Petition, as that Petition has not been certified, and other conditions may prevent the certification of the VNP Petition.

22. The Secretary of State has a clear legal duty to satisfy its aforementioned constitutional and statutory responsibilities for preparation of the ballot and submission of ballot questions, including the responsibility to certify the constitutionally required statement of the purpose for designation on ballot to each County Clerk, together with the form in which proposed constitutional amendments or other special questions shall be printed on the ballot.

RESPONSE: Plaintiffs deny any allegation or implication of this paragraph that is inconsistent with the above-cited authorities governing the actions of the Secretary of State. Plaintiffs also deny the implication that the Secretary has an existing clear legal duty to take action with respect to approval or certification of the VNP Petition or an associated statement, as that Petition has not been certified, and other conditions may prevent the certification of the VNP Petition.

23. Plaintiffs' Complaint for Mandamus has presented claims alleging that VNP's proposal cannot be submitted to the voters because it constitutes a "general revision" of the Constitution which can only be accomplished by a constitutional convention convened pursuant to Const 1963, art 12, ¶ 3, and because the ballot proposal petition failed to list and republish

existing sections of the Constitution that would be abrogated by the amendment if adopted by the voters.

RESPONSE: Plaintiffs admit these allegations.

24. Plaintiffs' Complaint for Mandamus and supporting Brief have appropriately acknowledged that the Board of State Canvassers does not have jurisdiction to address the issues raised in Plaintiffs' Complaint for Mandamus. (Complaint for Mandamus, ¶ 21; Brief in Support of Complaint for Mandamus, p. 5.) Plaintiff[s'] Complaint for Mandamus also informed the Court that they would be filing a *pro forma* protest setting forth the arguments made in Count II of their Complaint with the Board of State Canvassers before the expiration of the challenge period on April 26, 2018, "out of an abundance of caution in the event this Court disagrees." (Complaint for Mandamus, ¶ 21.)

RESPONSE: Plaintiffs deny any allegation or implication of this paragraph that is inconsistent with their filed Complaint for Mandamus or Brief in Support, but admit that the above-quoted material otherwise appears in their Complaint and Brief.

25. The Challenge filed by Plaintiff CPMC with the Board of State Canvassers on April 26, 2018, raised the same issues raised in its Complaint for Mandamus while acknowledging that the subject matter of its challenge was within the jurisdiction of the courts and stating that its Challenge was being filed "as a precautionary measure in the event that a court determines otherwise." (Challenge – Exhibit 4 of Fahey Affidavit (Exhibit A) pp. 2-3) That challenge did not raise any challenge to the validity or sufficiency of the petition signatures or any issues regarding the form of VNP's petition beyond the issues raised in CPMC's Complaint for Mandamus.

RESPONSE: Plaintiffs deny any allegation or implication of this paragraph that is inconsistent with their filed Complaint for Mandamus or Brief in Support, or with their Challenge filed with the Board of State Canvassers, a copy of which is attached to the Fahey Affidavit filed with the Cross-Claim as Exhibit 4 of that Affidavit. Plaintiffs otherwise admit that the above-quoted language appears in such Challenge.

26. The Intervening Defendants / Cross-Plaintiffs agree that the issues raised in Plaintiffs Complaint for Mandamus and Plaintiff CPMC's Challenge filed with the Board of State Canvassers are within the jurisdiction of the courts, and that the Board of State Canvassers does not have jurisdiction to consider those issues.

RESPONSE: Plaintiffs do not dispute that Cross Claimants hold the stated position; Plaintiffs note, however, that CPMC's Challenge filed at the Board of State Canvassers requested that "the Board take no further action on the VNP Proposal at this time, and await a determination from the Court of Appeals with respect to its complaint for mandamus." (See Fahey Affidavit attached as Exhibit A to VNP's Cross Claim, at Exhibit 4.) CPMC further stated in its Challenge that while CPMC believes the subject matter of its challenge to be within the jurisdiction of Michigan's courts, it filed its Board Challenge "in the event that a court determines otherwise." (See *id.*) Though VNP apparently does not dispute this Court's jurisdiction over this matter, the Court has not yet addressed this question. Plaintiffs further note that, regardless of jurisdiction over issues concerning constitutional or republication requirements, the Board will have a clear legal duty to reject the VNP Petition once this Court directs the Board to do so. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 291 (2008).

27. Mandamus is the appropriate remedy for a party seeking to compel action by election officials.

RESPONSE: Plaintiffs admit this allegation.

28. The Secretary of State and the Board of State Canvassers have a clear legal duty to promptly and faithfully perform the legal duties discussed in Paragraphs 19 through 22.

RESPONSE: Plaintiffs deny this allegation as untrue. As noted above, the Board need not act on certification of ballot questions until September 6, 2018. MCL 168.477(1). Further, the existence of a legal duty to accept or reject the VNP petition is contingent on the decision of this Court as to the satisfaction of the constitutional and statutory requirements described by Plaintiffs in their Complaint for Mandamus. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 291 (2008).

29. The Intervening Defendants / Cross-Plaintiffs have a clear legal right to the prompt performance of the clear legal duties discussed in Paragraphs 19 through 22.

RESPONSE: Plaintiffs deny this allegation as untrue. As noted above, the Board need not act on certification of ballot questions until September 6, 2018. MCL 168.477(1). Further, the existence of a legal duty to accept or reject the VNP petition is contingent on the decision of this Court as to the satisfaction of the constitutional and statutory requirements described by Plaintiffs in their Complaint for Mandamus. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 291 (2008).

30. The performance of the clear legal duties discussed in Paragraphs 19 through 22 is ministerial, requiring no exercise of discretion.

RESPONSE: Plaintiffs deny the existence of a clear legal duty to immediately certify the VNP proposal, and thus deny the allegation as untrue. As noted above, the Board need not act on certification of ballot questions until September 6, 2018. MCL 168.477(1). Further, the existence of a legal duty to accept or reject the VNP petition is contingent on the decision of this Court as to

the satisfaction of the constitutional and statutory requirements described by Plaintiffs in their Complaint for Mandamus. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 291 (2008).

31. The Intervening Defendants / Cross-Plaintiffs have filed this Cross-claim to ensure that the clear legal duties discussed in Paragraphs 19 through 22 will be promptly performed if this Court rejects Plaintiffs' legal challenges and denies their request for a writ of mandamus. To serve that important purpose, the interests of justice would be best served by the issuance of an Order granting a writ of mandamus against Defendants Secretary of State and Board of State Canvassers requiring their performance of those clear legal duties without delay if this Court rejects Plaintiffs' legal challenges and denies their request for a writ of mandamus. Actions taken by the Secretary of State and the Board of State Canvassers in compliance with that Order would, of course, be subject to modification by the Michigan Supreme Court.

RESPONSE: Plaintiffs deny as untrue the existence of a clear legal duty of the nature set forth in this paragraph. Plaintiffs are without sufficient knowledge as to Cross Claimants' purpose with respect to filing their cross-claim, and leave Cross Claimants to their proofs. Plaintiffs deny as untrue that a writ of mandamus directing the Board and Secretary to act would be in the "interests of justice." Plaintiffs admit that an order of this Court relative to the Board of State Canvassers or Secretary of State would be subject to modification by the Michigan Supreme Court.

32. There is no other available legal remedy that can sufficiently assure the timely performance of the clear legal duties discussed in Paragraphs 19 through 22 in light of the impending deadline for certification of VNP's proposal for the ballot which could eliminate or unfairly limit the opportunity to pursue enforcement action to require the performance of those

duties if the certification of the proposal for the ballot or the preparation and approval of the required 100-word summary are delayed until final adjudication of Plaintiffs' claims.

RESPONSE: Plaintiffs deny as untrue the existence of a clear legal duty of the nature set forth in this paragraph. Plaintiffs state further that the board certification deadline is not until September 6, 2018 and there is no present risk that final adjudication of Plaintiffs' claims will not occur prior to that date. See MCL 168.477(1).

WHEREFORE, Plaintiffs respectfully request that this Court:

- (1) Grant the relief requested in Plaintiffs' Complaint for Mandamus, and issue a writ of mandamus directing the Defendant Board of State Canvassers and Secretary of State to reject the VNP Petition and to take no further action to place the proposal included in the VNP Petition on the 2018 General Election ballot;
- (2) Dismiss the Cross-Claims; and
- (3) Grant Plaintiffs further relief as deemed equitable or just.

Respectfully submitted,

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Dated May 22, 2018

AFFIRMATIVE DEFENSES

For their affirmative defenses to the Cross-Claim, Plaintiffs, through counsel state as follows:

1. Cross Claimants have failed to state a cause of action for which relief may be granted.
2. There is no clear legal duty to act such that mandamus may issue against the Board or Secretary.
3. The VNP Petition sets forth a proposal that, due to both its size and the scope of its effect on the fundamental framework of state government, is not susceptible to submission to the voters as an amendment and can only be accomplished by a constitutional convention. See Const 1963, art 2, §§ 2, 3.
4. The VNP Petition failed to comply with the republication requirements of MCL 168.482(3), as it failed to republish multiple sections of the existing constitution abrogated by the proposal contained in the petition.
5. The Cross Claim is procedurally improper as it should have been filed as a separate action. MCR 7.206(D)(1) further requires that to perfect a claim in an original action, a supporting brief must be filed at the time of filing the Complaint.
6. Cross Claimants have failed to exhaust administrative remedies, and the Board of State Canvassers has not yet taken any action to suggest that, in the event the courts reject Plaintiffs' Complaint for Mandamus or otherwise, it will not certify the VNP Petition consistent with the September 6, 2018 deadline established by statute.
7. Plaintiffs reserve the right to add additional affirmative defenses as they become known.

Respectfully submitted,

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Dated May 22, 2018