Case No. WD82110

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IN THE WESTERN DISTRICT, MISSOURI COURT OF APPEALS

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

PAUL RITTER et. al.,
Respondents / Cross-Appellants,

v.

MISSOURI SECRETARY OF STATE, et. al.,
Appellants / Cross-Respondents

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# BRIEF OF *AMICI CURIAE* COMMON CAUSE, STATE SENATOR ROB SCHAAF, FORMER STATE SENATOR JIM LEMBKE, AND FORMER STATE SENATOR BOB JOHNSON IN SUPPORT OF APPELLANTS / CROSS-RESPONDENTS

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APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY,
AT JEFFERSON CITY, MISSOURI, NINETEENTH JUDICIAL CIRCUIT
HONORABLE DANIEL R. GREEN, JUDGE

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## INTEREST OF THE AMICI CURIAE

Common Cause was founded by John Gardner in 1970 as a nonpartisan "citizens lobby" whose primary mission is to protect and defend the democratic process and make government accountable and responsive to the interests of ordinary people, and not merely to those of special interests. Common Cause is one of the Nation's leading democracy organizations and currently has over 1.1 million members nationwide and local chapters in 35 states. Common Cause has been a leading advocate of campaign finance and disclosure laws that seek to limit the dominating and corrupting influence of large political contributions and expenditures on political campaigns and governmental policies, as well as laws that seek to prevent former government officials from immediately joining the private sector industries that they had just regulated. Common Cause is also a leading organization challenging the practice of partisan gerrymandering. Common Cause is the lead plaintiff in the challenge to the congressional gerrymander in North Carolina pending on remand from the United States Supreme Court in *Common Cause et al. v. Rucho et al.*, 1:16-CV-1026 (M.D.N.C.).

Common Cause opposes Plaintiffs' petition for relief under Section 116.200, RSMO, and for other declaratory and injunctive relief, which would prevent the proposed ballot initiative "Clean Missouri" from reaching Missouri voters in the coming elections. Missouri residents who have supported its placement on the ballot deserve to have their voices heard on the initiative which seek to allow voters to elect their own legislators without undue influence from partisan or other special interest groups.

Common Cause is joined in this in brief by the following current and former elected officials who share in the goal of protecting and defending the democratic process:  State Senator Rob Schaaf; Former State Senator Jim Lembke; and Former State Senator Bob Johnson.

## CONSENT OF PARTIES

Intervenors-Defendants Sean Soendker Nicholson and Clean Missouri have consented to the filing of this brief; however, counsel for Plaintiffs-Respondents / Cross-Appellants, Paul Ritter and Daniel P. Mehan, were not contacted for consent. A motion for leave to file an amici brief pursuant to Rule 84.05(f)(3) has been filed simultaneously with this brief.

## **JURISDICTIONAL STATEMENT**

The amici adopt Intervenors-Defendants' jurisdictional statement.

## STATEMENT OF FACTS

The amici adopt Intervenors-Defendants' Statement of Facts.

## POINTS RELIED ON

**I. THE TRIAL COURT ERRED IN FINDING THAT THE CLEAN MISSOURI BALLOT INITIATIVE CONTAINS MORE THAN ONE SUBJECT BECAUSE THE BALLOT INITIATIVE CONTAINS ONLY ONE SUBJECT, IN THAT THE PROPOSED AMENDMENTS ARE ALL PROPERLY CONNECTED TO THE PURPOSE OF PROVIDING FAIR AND EFFECTIVE LEGISLATIVE REPRESENTATION FOR ALL CITIZENS.**

*Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)

*Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015)

*Benisek v. Lamone*, 138 S. Ct. 1942 (2018)

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2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)

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Article III, Missouri Constitution

Justin Levitt, Who Draws The Lines?, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/who.php (last visited Sept. 15, 2018)

Article I, Section 2 of the United States Constitution

## ARGUMENT

**I. THE TRIAL COURT ERRED IN FINDING THAT THE CLEAN MISSOURI BALLOT INITIATIVE CONTAINS MORE THAN ONE SUBJECT, BECAUSE THE BALLOT INITIATIVE CONTAINS ONLY ONE SUBJECT, IN THAT THE PROPOSED AMENDMENTS ARE ALL PROPERLY CONNECTED TO THE PURPOSE OF PROVIDING FAIR AND EFFECTIVE LEGISLATIVE REPRESENTATION FOR ALL CITIZENS.**

The will of the voters should determine who legislates and what influences legislative decisions. The Clean Missouri initiative seeks to enact this fundamental principle through a reform of the Missouri state legislature to ensure that the democratic process and their votes are unfettered by improper influences. The voters of Missouri rather than the courts should decide the fate of this important initiative.

There are many ways that partisan or special interest groups can threaten the ability of voters to choose their own legislators and keep them accountable. One of the most dangerous of these is partisan gerrymandering. The Supreme Court has recognized that partisan gerrymandering, which is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," is incompatible with democratic principles. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (citations omitted). The Supreme Court has similarly recognized that large campaign contributions may improperly influence the

political process since "candidates may make corrupt bargains to gain the money needed to win election," and "voters…may lose faith that their representatives will serve the public's interest." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 777 (2011). While the Clean Missouri initiative addresses a number of different threats to the democratic accountability, all serve the central purpose of ensuring that the Missouri legislature remains answerable to the voters.

The democracy-reinforcing provisions of the Clean Missouri initiative are extremely important. The Clean Missouri ballot initiative appropriately provides Missouri voters the opportunity to adopt these crucial measures through the exercise of their sovereign power. The ballot initiative process is "a powerful tool of direct democracy," allowing "those who have no access to or influence with elected representatives…[to] take their cause directly to the people." *Hill v. Ashcroft*, 526 S.W.3d 299, 314 (Mo. Ct. App. 2017) (citations omitted); *see also Cuyahoga Falls v. Buckeye Comm. Hope Found.*, 123 S. Ct. 1389, 1395 (2003) (the ballot initiative, like the election of public officials, is a "basic instrument of democratic government"). Missouri voters should be given this opportunity to exercise direct democracy for comprehensive reform of the Missouri legislature.

Article III, § 50 of the Missouri Constitution provides in part that "[p]etitions for constitutional amendments shall not contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject." The Clean Missouri ballot initiative amends one article of the Missouri

Constitution, namely Article III, concerning the "Legislative Department." The new constitutional provisions proposed in the Clean Missouri initiative similarly concern the subject matter of Article III of the Missouri Constitution. The Clean Missouri initiative is therefore a proper ballot initiative that should be presented to the voters. The Clean Missouri initiative, if enacted by the voters, would improve democratic accountability of the legislature in very important ways.

### A. Partisan Gerrymandering Do Not Provide Fair And Effective Legislative Representation For All Citizens

One of the most important provisions of the Clean Missouri initiative is its effort to limit partisan gerrymandering. Article I, Section 2 of the United States Constitution requires states to reapportion congressional districts after each decennial census to equalize their populations. *Wesberry v. Sanders*, 376 U.S. 1 (1964). The objective of such redistricting is to "establish fair and effective representation for *all* citizens," *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)) (emphasis added), not merely for the supporters of the party in power. However, political parties have misused this reapportionment process.

Political parties in control of state legislatures have long used the reapportionment process as an opportunity and an excuse to gerrymander district lines to gain a partisan political advantage and lock in their hold on political power. Thirty years ago, Justice Powell recognized that the "[a]dvances in computer technology achieved since the doctrine [of one person, one vote] was announced ha[d] drastically reduced [the

doctrine's] deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters." *Davis v. Bandemer*, 478 U.S. 109, 168 n.5 (1986) (Powell, J., concurring). Indeed, without any limits, state legislatures (under the control of either party) have only become more adept at crafting congressional districts to preordain electoral outcomes, *see, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 411-13 (2006), and "have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections,'" *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring).

In fact, many state legislatures enact blatant partisan gerrymanders, operating on the assumption that the *goal* of redistricting is to gain maximum partisan advantage for the political party that controls the redistricting process. For example, in *Common Cause et al. v. Rucho et al.*, the legislative architects of the plan: (1) enshrined an explicit partisan goal of 10 Republican and 3 Democratic seats in the Adopted Criteria that would govern the plan; (2) "proposed that the Committee draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [they] did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats"; and (3) "further explained the rationale behind the Partisan Advantage criterion" as the belief that "electing Republicans is better than electing Democrats." 279 F. Supp. 3d 587, 604-05 (M.D.N.C. 2018) (alterations adopted). That explicit, brazen gerrymander of North Carolina's congressional districts went into effect for the 2016 election and will remain in place this year.

The harms that such partisan gerrymanders inflict on our Republic are myriad and well-documented. Partisan gerrymanders diminish the value of an individual's vote, along with electoral participation and trust in the system. As a result, the competitiveness of elections occurs only in primary elections, encouraging and rewarding the more extreme candidates, and leading to political polarization which contributes to the gridlock and rabid partisanship that defines the *status quo*. In this way, partisan gerrymanders attack the most fundamental constitutional guarantees: "the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014). As the Supreme Court has stated, quoting Alexander Hamilton, "[t]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). Other constitutional rights, even the most basic, "are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17.

These nefarious consequences have given rise to substantial litigation, and lower courts across the country have held in favor of the challengers to partisan gerrymanders. For example, the Pennsylvania Supreme Court recently struck down Pennsylvania's congressional plan as violating the Free and Equal Elections Clause of the Pennsylvania Constitution. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018). However, the Supreme Court has not yet set a clear standard for

evaluating challenges to partisan gerrymanders[1], and thus, state-level avenues for meaningful political reform of the redistricting process remain all the more necessary. A number of states have—through the initiative process—undertaken that reform as a reflection of the will of the people. The Clean Missouri ballot initiative is the latest of these efforts.

[1] The Supreme Court recently passed on the opportunity to review the merits of a successful challenge to Wisconsin's state assembly districts, holding that the plaintiffs had failed to establish standing and remanding the case to the district court. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). Demonstrating that gerrymandering affects both political parties, the same day the Supreme Court affirmed the denial of a preliminary injunction in a challenge to a Democratic gerrymander of a congressional district in Maryland. *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). And the Supreme Court vacated and remanded a successful challenge to North Carolina's present congressional plan for reconsideration in light of its opinion in *Gill*. *Rucho v. Common Cause*, No. 17-1295, 2018 WL 1335403, at *1 (U.S. June 25, 2018). Each of these cases will proceed in the lower courts and none of the Supreme Court's recent decisions forecloses those claims. While the law may remain in dispute, the facts do not. Each of these three challenges involved undeniably extreme efforts by the political party in control (Republicans and Democrats alike) to maximize its political power at the expense of voters whose views it disfavored.

### B. Clean Missouri Addresses the Problem of Partisan Gerrymanders for the Purpose of Providing Fair and Effective Legislative Representation for All Citizens

The Clean Missouri ballot initiative proposes the establishment of a non-partisan state demographer tasked with reapportioning the districts pursuant to proposed non-partisan methods. Similar measures have been used in several states to curtail partisan gerrymandering. *AIRC*, 135 S. Ct. at 2662. Some states "have given nonpartisan or bipartisan commissions binding authority over redistricting" while others "have given commissions an auxiliary role, advising the legislatures on redistricting, or serving as a 'backup' in the event the State's representative body fails to complete redistricting." *Id.*

The Supreme Court has sanctioned the use of the initiative process to achieve such reform. *Id.* at 2668. Specifically, the Supreme Court held that there is "no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking." *Id*. The Supreme Court further noted that "[t]he importance of direct democracy as a means to control election regulations extends beyond the particular statutes and constitutional provisions installed by the people . . . The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures." *Id.* at 2677. For the people to assert such influence over the legislature, however, the path of direct democracy must be available via the ballot initiative. *Id.* ("The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have 'an

habitual recollection of their dependence on the people.'") (quoting The Federalist No. 57, at 350 (J. Madison)).

Missouri courts are likewise cognizant of the importance of the use of direct democracy through ballot initiatives in giving voice those who have no access to or influence over elected representatives. *See Hill*, 526 S.W.3d at 314. The initiative process is viewed as so important that "[w]hen courts are called upon to intervene in the initiative process, they must act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course." *Missourians to Protect Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. 1990).

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

Other States have also adopted a variety of schemes to offset the influence of legislators in the redistricting process. For example, Idaho and Washington use citizen commissions with final authority to draw congressional districts, while Hawaii and New Jersey use commissions to draw districts that may include politicians but must include partisan balance. Ohioans approved redistricting protections for General Assembly in 2015 and U.S. House in 2018 that will require bipartisan agreement on maps to make it difficult for one party to dominate the process. Still other States use backup commissions to draw maps if legislators cannot agree on a redistricting plan by a certain date or utilize advisory commissions to assist legislators with the redistricting process. For example, in Iowa, nonpartisan legislative staff draws districts with the advice of a citizen advisory commission. Iowa legislators can approve or reject maps but cannot amend or adjust them. *See* Justin Levitt, Who Draws The Lines?, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/who.php (last visited Sept. 15, 2018).

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

States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”).

There is also tremendous momentum for reform at the state level. As voters become more attuned to the problem of gerrymandering, they are more likely to demand solutions. Before California passed Proposition 11 by 1% in 2008, several earlier attempts at reform had failed. But by 2010, when California voters chose to expand that reform to Congressional districts, Proposition 20 passed by 22 points. And just this year, Ohio voters passed their reform proposal by 49 points. Voters all over the country are waking up to the issue of partisan gerrymandering and demanding change. The Clean Missouri ballot initiative offers Missouri voters that opportunity. They should not be denied that right.

### C. Campaign Contribution Limits, Lobbying Restrictions, And Transparency Requirements Are All Properly Connected To The Purpose Of Providing Fair And Effective Legislative Representation For All Citizens

Clean Missouri also seeks, *inter alia*, to reform the Missouri state legislature’s practices concerning campaign contributions, lobbying, gift-giving, fundraising, and lack of transparency. All of these measures seek to accomplish the same goal as the proposed reform to redistricting: to ensure that the elected legislature is a fair and effective representation for *all* citizens, and that it remains accountable to the electorate. The Supreme Court has acknowledged, for example, that allowing outsized

influence of certain interest groups through large campaign contributions may improperly influence the political process. *Ariz. Free Enter. Club's Freedom Club PAC*, 564 U.S. at 777. The revolving-door lobbyists have also been recognized by other courts as weakening the democratic process since former public officials could have undue influence over their former colleagues in public office. *See e.g. Forti v. New York State Ethics Comm.*, 75 N.Y.2d 596, 555 N.Y.S.2d 235, 237-38, 554 N.E.2d 876 (Ct. App. 1990); *Diluglio v. R.I. Ethics Comm'n*, C.A. No. 85-4556, 1996 R.I. Super. LEXIS 32, at *12 (Super. Ct. Feb. 14, 1996). Federal and many other state governments have already enacted revolving-door statutes to curtail this problem. *See* 18 U.S.C. § 207 (setting forth federal revolving-door statute); Hochman, *Post-Employment Lobbying Restrictions on the Legislative Branch of Government: A Minimalist Approach to Regulating Ethics in Government*, 65 Wash. L. Rev. 883, 890 (1990) (collecting revolving-door state statutes).

In seeking to ensure that the Missouri state legislature is selected by its residents and remain accountable to them, Missouri residents have turned to the ballot initiative process, seeking to circumvent the partisan and special interest influence on the legislature who would no doubt object to the disturbance in the *status quo*. As Missouri courts have recognized, the ballot initiative is a powerful and important tool of direct democracy where real reform can be made according to the wishes of the citizens. *See Hill*, 526 S.W.3d at 314; *Missourians to Protect Initiative Process*, 799 S.W.2d at 827. Clean Missouri affords Missouri residents the opportunity to vote on such comprehensive reform of the state legislature.

## CONCLUSION

Here, as the parties have fully briefed, Missouri has devised a process for amendment of the Missouri Constitution via initiative. The Clean Missouri ballot initiative seeks to use that important mechanism to present Missouri voters the opportunity to ensure democratic process in legislative elections, and to keep legislators accountable to their electorate without dictating any outcome. These reforms are extremely important and the voters of Missouri should be permitted to decide whether to enact them.

Dated: September 15, 2018

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