STATE OF MICHIGAN

MICHIGAN SUPREME COURT

In re Request for Advisory Opinion Regarding
2018 PA 368 and 2018 PA 369,

Supreme Court Case Nos 159160 and
159201

_____/

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THE MICHIGAN RESTAURANT AND LODGING ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF REQUEST FOR AN ADVISORY OPINION ON THE CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369

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STATEMENT OF BASIS OF JURISDICTION

The Michigan Constitution authorizes "either house of the legislature to request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const 1963, art 3, § 8. Both the Michigan Senate and Michigan House of Representatives have timely requested an advisory opinion from this Court on the constitutionality of 2018 PA 368 and 2018 PA 369, which laws will take effect on March 29, 2019. This Court therefore has jurisdiction pursuant to Const 1963, art 3, § 8 and MCR 7.303(B)(3).

Pursuant to MCR 7.308(B)(2), an interested party may file an amicus curiae brief on motion granted by this Court. The MRLA is filing a Motion for Leave to file an Amicus Curiae Brief contemporaneous with the filing of this Proposed Amicus Curiae Brief.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE MICHIGAN LEGISLATURE'S REQUEST FOR AN ADVISORY OPINION IN THIS MATTER?

Michigan Legislature answers: YES

Michigan Restaurant and Lodging Association answers: YES

II. WHETHER CONST 1963, ART 2, § 9 PERMITS THE LEGISLATURE TO ENACT AN INITIATIVE PETITION INTO LAW AND THEN SUBSEQUENTLY AMEND THAT LAW DURING THE SAME LEGISLATIVE SESSION?

Michigan Legislature answers: YES

Michigan Restaurant and Lodging Association answers: YES

III. WHETHER 2018 PA 368 AND 2018 PA 369 WERE ENACTED IN ACCORDANCE WITH CONST 1963, ART 2, § 9?

Michigan Legislature answers: YES

Michigan Restaurant and Lodging Association answers: YES

INTRODUCTION

The Michigan Restaurant & Lodging Association ("MRLA") represents the food service and lodging industries throughout Michigan. Its 5,000 members include restaurants, food service distributors, hotels, motels, resorts and other businesses associated with the industry. Its mission is to educate, assist and represent its members' interests and to promote and protect the expansive hospitality industry in Michigan.

With more than 16,000 locations statewide and nearly $18 billion in sales in 2018, the restaurant industry is fundamentally important to Michigan's overall economy. Restaurants also employ approximately 450,000 Michiganders, of which there are over 125,000 restaurant servers that rely on voluntary tips as the primary source of their income. As such, the MRLA and its members are uniquely impacted by the legislation at issue, 2018 PA 368, the Improved Workforce Opportunity Wage Act. While tipped restaurant workers earned an average hourly wage of $17 per hour in 2017, according to a professional industry survey commissioned by the MRLA, the initiated act as originally proposed and enacted by the Michigan Legislature would have eliminated the tipped minimum wage. Inevitably, this would have negatively impacted the tipping culture in Michigan as it has in the few states that operate without a separate tipped minimum wage. As a point of reference, Michigan's tipped restaurant workers earn more total income (cash wage plus tips) than the tipped restaurant workers in six of the seven states that currently operate without a separate, lower wage for tipped employees. In addition, restaurants operate with notoriously thin profit margins, averaging 3-5% before the payment of taxes. Absent the amendments set forth in 2018 PA 368, the new law would unquestionably have forced many restaurants to lay off workers, increase prices, and in some cases close their doors entirely.

Given the significant impact this legislation has on the hospitality industry, the MRLA strongly supports the Legislature's request for an advisory opinion. Employers need certainty with

respect to the wages and benefits they are required to pay their employees. Dramatic increases in the minimum wage and elimination of the tip credit would have a devastating impact on this industry, directly affecting the thousands of restaurants and lodging establishments in Michigan and their hundreds of thousands of employees. Months if not longer of protracted litigation on fundamental issues of pay rates and benefits, particularly with respect to tipped employees, would be crippling for this industry.

STATEMENT OF FACTS

On May 21, 2018, Michigan One Fair Wage ("MOFW"), a ballot question committee formed to amend Michigan's minimum wage laws, filed an initiative petition with the Secretary of State purporting to have collected 373,507 signatures. The MOFW petition proposed the "Improved Workforce Opportunity Wage Act," an obvious amendment to the "Workforce Opportunity Wage Act," which was enacted by the Legislature in 2014. 2014 PA 138; MCL 408.411 et seq. The MOFW petition sought to increase the minimum wage for the next four years, change the method for calculating the minimum wage thereafter, and eliminate over a period of years the tip credit for waiters and waitresses and others in the service industry by requiring employers to instead pay them the standard minimum wage.

On August 27, 2018, following certification by the Board of State Canvassers, the Secretary of State filed with the Michigan Legislature the MOFW petition, as was required by the Michigan Constitution. Const 1963, art 2, § 9. On September 5, 2018, within the 40 days permitted by the Constitution, the Michigan Legislature voted to enact the Improved Workforce Opportunity Wage Act, which was later assigned 2018 PA 337. Because 2018 PA 337 was not given immediate effect, it was not scheduled to take effect until March 29, 2019.

On May 29, 2018, a group called MI Time To Care ("MTTC"), a ballot question committee, filed an initiative petition with the Secretary of State purporting to have collected more

than 380,000 signatures. The MTTC petition proposed enactment of a new law called the Earned Sick Time Act, which would mandate one hour of sick time for every 30 hours worked. On July 30, 2018, following certification by the Board of State Canvassers, the Secretary of State filed with the Michigan Legislature the MTTC petition, as was required by the Michigan Constitution. Const 1963, art 2, § 9.

On September 5, 2018, within the 40 days permitted by the Constitution, the Michigan Legislature voted to enact the Earned Sick Time Act, which was later assigned 2018 PA 338. 2018 PA 338 was likewise not given immediate effect and therefore was not scheduled to take effect until March 29, 2019.

Multiple groups and interested parties shared their serious concerns about these initiated acts with the Legislature, and explained how detrimental these changes would be from an economic standpoint. The restaurants were able to demonstrate how devastating these laws, in particular the Improved Workforce Opportunity Wage Act, would have on their industry, with mass layoffs, automation of certain functions and/or elimination of tipped employees, major increases in prices charged customers and closures being just some of the inevitable consequences. Tipped workers also complained, because they had intentionally chosen to work in the service industry and receive a majority of their income from tips, knowing that they would receive more than the minimum wage.[1]

After receiving this feedback from interested stakeholders, the Legislature began considering amendments to the new laws, eventually introducing 2018 SB 1171 and 2018 SB 1175

[1] Indeed, in Maine, a group affiliated with the sponsor of the MOFW petition sponsored a virtually identical initiative, which was unwittingly adopted by the voters in 2016. Once people realized that the proposal eliminated the tip credit, and understood the devastating impact it had on the service industry, the Legislature reinstated the tip credit approximately 7 months later.

on November 8, 2018. The sponsors of the initiative petitions objected to the Legislature's consideration of any amendments, claiming to do so would be unconstitutional. The only apparent support for this assertion was a conclusory statement contained within a 1964 opinion of former Attorney General Frank Kelley.[2] Presumably in an effort to resolve any public uncertainty, then Senate Majority Leader Arlan Meekhof requested a formal opinion from Attorney General Bill Schuette regarding the question. On December 3, 2018, Attorney General Schuette formally responded to the request, opining after thorough discussion "that article 2, § 9 of the Michigan Constitution does not prohibit the Legislature from amending a legislatively enacted initiated law during the same legislative session in which the Legislature enacted the initiated law." OAG, 2018, No. 7,306, p 1, at 5 (December 3, 2018).

Shortly thereafter, on December 4, 2018, the Michigan Legislature passed 2018 SB 1171 and 2018 SB 1175, which were subsequently approved by the Governor and assigned 2018 PA 368 (amending the Improved Workforce Opportunity Wage Act) and 2018 PA 369 (amending the Earned Sick Time Act). Neither of the amendatory bills were given immediate effect, so they will take effect on March 29, 2019. The amendments to the Earned Sick Time Act retained the requirement that sick leave accrue based on hours worked, but changed the accrual rate to every 35 hours and exempted small businesses with less than 50 employees. The amendments to the Improved Workforce Opportunity Wage Act increased the minimum wage over a longer period of time than originally proposed and reinstated the tip credit.

On February 13, 2019, a new request for a formal opinion was submitted to Attorney General Dana Nessel regarding the authority of the Legislature to amend a legislatively enacted initiated law within the same legislative session in which the Legislature enacted the initiated law.

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[2] OAG, 1964, No. 4,303, p 309, at 311 (March 16, 1964).

This new request focuses on precisely the same issue squarely addressed by Attorney General Schuette in December 2018, and appears to be seeking a contrary opinion.

On February 20, 2019, recognizing the necessity for employers and employees in this state to have certainty with respect to pay and benefits as well as the time sensitivities at issue, the Michigan House of Representatives and the Michigan Senate each passed a Resolution to seek an advisory opinion from this Court to resolve this important constitutional question.[3]

The MRLA files this amicus curiae brief in support of the Legislature's request for an advisory opinion from this Court. The hospitality industry has made the necessary adjustments to comport with the changes set forth in 2018 PA 368 and 2018 PA 369 with respect to pay and benefits for its employees. If Attorney General Nessel issues an opinion contrary to that issued by Attorney General Schuette in December, the MRLA's members will be placed in an untenable position. Do they abide by the law as written, not knowing whether the State will pursue wage and hour enforcement action or whether their employees will file civil cases against them for doing so? Or do they attempt to make the sudden shift to the previously enacted law, even if it would be financially crippling, requiring layoffs and other grave measures, knowing that such opinion may very well be overturned by the courts? The MRLA submits that a decision by this Honorable Court is urgently needed in order to provide clarity and certainty to these employers and employees now, rather than subject them to a precarious legal and financial future for an indefinite period of time as the issue works its way through the courts.

[3] Senate Resolution 16 of 2019 and House Resolution 25 of 2019.

ARGUMENT

I. This Court Should Exercise Its Discretion To Grant The Michigan Legislature's Request For An Advisory Opinion.

The Michigan Constitution of 1963 grants this Court the authority to issue an advisory opinion on important questions of law as to the constitutionality of legislation that has yet to go into effect. More specifically, it provides: "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const 1963, art 3, § 8. The Legislature's request for an advisory opinion is timely and unquestionably concerns "important questions of law" upon a "solemn occasion."

The requirement that the request concern "important questions of law" requires the party making the request to "particularize any claims of unconstitutionality" on which the party wishes the Court to speak. *In re Request for Advisory Opinion, Enrolled House Bill No 5250 (Being 1975 PA 227)*, 395 Mich 148, 149; 235 NW2d 321 (1975); *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 53; 228 NW2d 772 (1975). "A request stated too broadly cannot be considered." *In re Request for Advisory Opinion, Enrolled House Bill No 5250*, 395 Mich at 149.

The Michigan Legislature's request for an advisory opinion is specific to the question whether a law proposed by initiative and enacted by the Legislature pursuant to Const 1963, art 2, § 9 can be amended within the same legislative session in which the initiated law was enacted. The request poses one question, which can be answered based on one section of the Constitution, easily satisfying this requirement. Moreover, the answer to this question is not only relevant to PA 368 and PA 369, but also all future laws that are proposed by initiative.

Thus, the sole remaining question is whether this constitutes a "solemn occasion" for purposes of Const 1963, art 3, § 8. Given the immediate impact a decision by this Court would

have on virtually every employer and thousands of employees in this state, there is clearly a serious and urgent need for an advisory opinion.

Employers have been operating under the assumption that 2018 PA 368 and 2018 PA 369 are the current state of the law and are prepared for those changes to go into effect on March 29, 2019. In the event a contrary Attorney General opinion is issued prior to that date, chaos will most certainly ensue, because neither employers nor employees will know what law applies to their wages and benefits. This lack of certainty would not only expose employers to potential legal and enforcement actions, but also significant financial uncertainty with respect to the viability of their businesses going forward. This is particularly true for the hospitality industry, given the high number of tipped and minimum wage employees.

This advisory opinion request asks this Court to circumvent unnecessary litigation and delay and resolve promptly a dispute that fundamentally affects employers and employees throughout this state. The MRLA therefore strongly urges this Honorable Court to exercise its discretion to grant the Michigan Legislature's request for an advisory opinion.

II. The Michigan Constitution of 1963, art 2, § 9 Does Not Prohibit The Legislature From Enacting An Initiative Petition Into Law And Then Later Amending That Law Within The Same Legislative Session.

As set forth in the Michigan Legislature's Brief in Support of Request for Advisory Opinion on the Constitutionality of 2018 PA 368 and 2018 PA 369, the text of Const 1963, art 2, § 9 imposes no constraint, temporal or otherwise, on the Legislature's ability to amend an initiated law that it enacts. The Legislature is therefore free to amend such law during the same session in which it is enacted. This interpretation is conclusively supported by the Official Record of the Constitutional Convention, which can serve as an aid in determining the intent of the ratifiers and the "common understanding" at that time. *People v Nutt*, 469 Mich 574; 677 NW2d 1 (2004).

Indeed, while discussing whether the Legislature should be provided the ability to amend or repeal an initiated law adopted by the people, which had not been permitted in the 1908 Constitution, the delegates expressly distinguished between initiated laws enacted by the Legislature versus those adopted by the people. Specifically, the delegates explained that if enacted by the Legislature, the Legislature retained full control over such enactment, as follows:

> Mr. Kuhn: Well, not exactly. I'll try to explain this a little bit, Mr. Wanger. *If the legislature sees fit to adopt the petition of the initiative as being sent out, if the legislature in their wisdom feel it looks like it is going to be good, and they adopt it in toto, then they have full control. They can amend it and do anything they see fit.* But if they do not, and then you start an initiative petition and it goes through and is adopted by the people without the legislature doing it, then they are precluded from disturbing it. 2 Official Record, Constitutional Convention 1961, pp 2394-2395 (emphasis added).

The delegates expressed no concern whatsoever about the Legislature assuming full control of a initiated proposal that it chose to enact, including the right to amend, repeal, or otherwise do whatever the Legislature so chose, consistent with its authority for any other legislative enactment. The delegates did, however, have reservations about the lack of the Legislature's ability to ever amend or repeal an initiative *approved by the people*. The delegates agreed that the Legislature should have the ability to amend such a law, subject to some limitation. Debates ensued as to whether a supermajority requirement should be imposed or a period of delay during which such a proposal could not be amended or repealed. The proposed delay on when the Legislature could amend such a law was in fact expressly rejected in favor of the three-fourths vote requirement, as follows:

> Mr. Kuhn: [W]ould [the delegate] include in his proposed amendment something to the effect of this being done in a subsequent legislative session….?"
>
> Mr. Hutchinson: [W]e [the committee] thought that this ¾ vote requirement would be a sufficient safeguard and that the time

> element would become very secondary. In fact,…[Delegate Downs] didn't know whether the time element would work out very well.
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> ****
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> Mr. Downs: I think the ¾ vote is a reasonable requirement. I prefer it a little bit to the time concept. I think it is a little better way to handle the problem.

Id. at 2396.

The history of Const 1963, art 2, § 9 therefore clearly reinforces the already readily apparent conclusion based on its clear text that the Legislature retains full control of a legislatively enacted initiative, meaning it can amend or repeal such law at any time with a majority vote, including during the same session. The drafters deliberately treated initiated laws passed by the people differently by imposing a supermajority vote requirement for amendments, yet expressly rejected the notion of a time delay before such amendments could occur. The fact that this concept was both discussed and declined further demonstrates that the delegates understood that to impose a delay on when the Legislature could amend an initiated law required language stating so, because in its absence, no such delay would apply. Indeed, the only circumstance under which the delegates saw fit to impose a time delay was for a referendum. These decisions are all clearly reflected in the text of Const 1963, art 2, § 9, and were upheld by the people when they voted to ratify the 1963 Constitution.

In addition to being supported by the plain text of the Constitution and historical records, the conclusion that the Legislature is free to amend an initiated law during the same session in which it is adopted is consistent with well settled judicial precedent that laws proposed by initiative are subject to the same constitutional requirements as laws initiated by the Legislature unless otherwise provided in Const 1963, art 2, § 9. In *Frey v Dir of Dep't of Soc Servs*, 162 Mich App 586; 413 NW2d 54, aff'd sub nom *Frey v Dep't of Mgmt & Budget*, 429 Mich 315; 414 NW2d

873 (1987), the Court of Appeals addressed whether the two-thirds vote requirement for giving legislation immediate effect under Const 1963, art 4, § 27 applied to an initiated law enacted by the Legislature pursuant to Const 1963, art 2, § 9, even when the petition itself provided it was to be given immediate effect. The Court of Appeals flatly rejected the notion that the language of the petition preempted application of Const 1963, art 4, § 27, because laws proposed by initiative are on "equal footing" with laws proposed by the Legislature. The Court explained its decision as follows:

> Acceptance of defendants' position would place laws proposed by the initiative on a superior, not equal, footing with legislative acts not proposed by the people. Since everything that emerges from the Legislature is legislation, all legislative acts must be on equal footing. Stated in other language, once it is conceded that it is necessary to refer to Article 4 in order to determine the effective date of initiated legislation that does not refer to an effective date, it becomes immediately apparent that the wall that is said to exist between article 2 and article 4 does not exist. *Id.* at 600.

On appeal, this Court likewise easily disposed of the argument that Article 4 did not apply to Article 2, or that it only applied as to the procedural requirements: "[W]e have never adopted the distinction proposed by defendant and intervening defendants. We expressly reject that distinction." 429 Mich at 324. After thoroughly examining judicial precedent and the dialogue of the constitutional conventions, this Court concluded that absent a specific exception, Article 4 applied to Article 2 and, specifically, Const 1963, art 4, § 27 applied to initiated laws enacted by the Legislature. *Id*. at 335 ("The common understanding of this provision is that it applies to initiated laws enacted by the Legislature because it does not provide an exception for initiated laws enacted by the Legislature.")

In sum, it is well settled that an initiated law enacted by the Legislature is on equal footing with legislation enacted in the normal course. Because it is indisputable that Article 4 does not prohibit the Legislature from amending non-initiated legislation that it enacts during that same

session, and because there is no exception carved out in Const 1963, art 2, § 9, judicial precedent dictates that an initiated law enacted by the Legislature may be similarly amended during the same session in which it was originally enacted.

The Legislature enacted the proposed initiatives without change within 40 days as permitted by Const 1963, art 2, § 9. The Legislature then passed amendments to both legislatively enacted laws by a majority vote, which is also permitted by the Constitution. Because there is no temporal limitation restraining the Legislature's unquestioned authority to amend legislatively enacted initiatives, 2018 PA 368 and 2018 PA 369 were both enacted in accordance with Const 1963, art 2, § 9.

CONCLUSION

For all of the reasons outlined herein, the MRLA respectfully requests that this Honorable Court:

1. Grant the Michigan Legislature's Request for an Advisory Opinion;
2. Issue an Opinion holding that Const 1963, art 2, § 9 permits the Michigan Legislature to enact an initiative petition into law and then subsequently amend that law during the same legislative session;
3. Issue an Opinion holding that 2018 PA 368 and 2018 PA 369 were enacted in accordance with Const 1963, art 2, § 9; and
4. Such other relief that this Court deems equitable and just.

Respectfully submitted,
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Dated: March 13, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2019, I electronically filed the above document with the Clerk of the Court using the ECF system, through which notification of such filing was sent to all attorneys of record in this matter.

/s/ Diane Pohl