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 COALITION'S AMICUS CURIAE BRIEF IN SUPPORT OF THE MICHIGAN LEGISLATURE'S 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 the Michigan House of Representatives 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).

STATEMENT OF QUESTIONS PRESENTED

I. Should this Court exercise its discretion to grant the Michigan Legislature's request to issue an advisory opinion in this matter?

The Coalition's answer: Yes

II. Does Article 2, Section 9 of the Constitution of the State of Michigan of 1963 permit the Legislature to enact an initiative petition into law and then subsequently amend that law during the same legislative session?

The Coalition's answer: Yes

III. Were Public Act 368 of 2018 and Public Act 369 of 2018 enacted in accordance with Article 2, Section 9 of the Constitution of the State of Michigan of 1963?

The Coalition's answer: Yes

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INTRODUCTION

The question presented in this matter is well settled by precedential decisions applying the clear language of Const 1963, art 2, § 9, and therefore is not one which this Court would ordinarily review. However, due to the confusion attempted by those who would undermine the legislative process and the Legislature's adoption of 2018 PA 368 and 2018 PA 369 (the "Acts" or the "amendments"), the Small Business for a Better Michigan Coalition (the "Coalition") respectfully requests the Court to grant the legislative resolutions,[1] consider the question and affirm that the Michigan Constitution allows the Legislature to amend an initiated law at the same session in which it was adopted. The Coalition submits this *amicus curiae* brief in support of the Legislature's request.[2]

Public Acts 337 and 338 of 2018 were initiated by petition and enacted by the Legislature under the procedures of Article 2, Section 9 of the Michigan Constitution. They address, respectively, the standard minimum wage (see 2018 PA 337, § 4; MCL 408.934.new), and paid sick leave to be provided by some employers to their employees (see 2018 PA 338, § 3; MCL 408.963.new). Public Act 368 of 2018, amended the minimum wage law. See, 2018 PA 368, § 4; MCL 408.934.amended. Similarly, Public Act 369 of 2018 amended the paid leave law. The Acts become effective on March 29, 2019, ninety-one days after adjournment of the 2018 regular

[1] The Michigan House and Senate each adopted a resolution on February 20, 2019, authorizing a request for an advisory opinion. See Ex. A, 2019 HR 25; Ex. B, 2019 SR 16. The House's request was entered on the Court's docket on February 22, 2019 (Case No. 159160), and the Senate's request was entered on the Court's docket on March 1, 2019 (Case No. 159201).

[2] The Michigan Constitution authorizes "[e]ither house of the legislature or the governor" 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.

legislative session. Const 1963, art 4, § 27; *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 318; 414 NW2d 873 (1987).

If the Legislature may enact a law posed by initiative and amend it during the same legislative session, then 2018 PA 368 and 2018 PA 369 were constitutionally enacted and the Legislature's amendments to the minimum wage and paid leave laws will prevail over the language of the initiative petitions. Based on this Court's precedents and other legal authority, Attorney General Schuette correctly opined that the Legislature acted within its power when it amended the initiated laws during the same session they were enacted. As recognized by the Attorney General, the Michigan Constitution acts not as a grant of power to the Legislature, but as a limitation on its inherent authority. *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 327; 685 NW2d 221 (2004). If the Constitution does not limit or prohibit an action of the Legislature, then the Legislature has plenary power to exercise its authority. Here, Article 2, Section 9 of the Constitution does not prohibit the Legislature from amending an initiated law that it enacted during the same session, so the Legislature has acted properly.

Although the answer to the question is clear, the proponents of the laws as initiated are attempting to use the "court of public opinion" as well as other methods to cast doubt on the Legislature's enactment of the amendments thereby presenting an issue that is appropriate for the Court's consideration.[3]

For example, although Attorney General Bill Schuette affirmed the legality of the amendments' enactment in December 2018, (see OAG, 2017-2018, No. 7306 (December 3, 2018))

[3] See e.g., LeBlanc, *Lawmaker wants AG opinion on weakening of sick leave, minimum wage initiatives*, The Detroit News (Feb. 13, 2019) https://www.detroitnews.com/story/news/local/michigan/2019/02/13/ag-opinion-amended-sick-leave-minimum-wage-initiatives/2860394002/ (accessed March 10, 2019).

a new request for a formal opinion was submitted to Attorney General Dana Nessel on February 13, 2019, seeking a contrary opinion on the identical issue. The new request's unfounded basis is a claim that Opinion No. 7306 "poses serious threats to the constitutional power of initiative reserved to the people." Ex. C, Chang, Letter Requesting Formal Opinion from A.G. Nessel (Feb. 13, 2019).

An advisory opinion from this Court is needed to: (1) bring certainty to employers and employees seeking to enter into and continue existing employer–employee relationships confirming that the Legislature's properly enacted amendments govern; and (2) to confirm that the Legislature may enact and subsequently amend an initiated law during the same legislative session, consistent with the Michigan Constitution.

STATEMENT OF FACTS

I. The Coalition Members

The Coalition is comprised of Michigan Manufacturers Association, Michigan Restaurant and Lodging Association, National Federation of Independent Business, Small Business Association of Michigan, Michigan Chamber of Commerce, Associated Builders and Contractors, Grand Rapids Area Chamber, Homebuilders Association of Michigan, Lansing Regional Chamber of Commerce, Mackinac Center for Public Policy, Michigan Farm Bureau, Michigan Retailers Association, West Michigan Policy Forum and the Freedom Fund.

The Michigan Manufacturers Association: The MMA is the state's leading advocate solely dedicated to the interests of Michigan manufacturers consisting of almost 17,000 members from small manufacturers to the world's largest and most well-known corporations. Michigan manufacturers employ 631,500 people and produce $93.5 billion in total manufacturing output. The MMA, and its members have a direct interest in this matter since the court's decision will

impact the terms and conditions under which its member employers will be required to operate. The MMA also has an interest in maintaining the integrity of the legislative process.

Michigan Restaurant and Lodging Association: The Michigan Restaurant and Lodging Association is the leader in Michigan's Hospitality Industry representing hundreds of restaurants and lodging facilities employing nearly 600,000 and generating $40 billion in statewide revenue. The Michigan Restaurant and Lodging Association and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. The Association also has an interest in maintaining the integrity of the legislative process.

NFIB Michigan—National Federation of Independent Businesses: The NFIB is the leading small business advocate in Michigan and is also a national organization with representation in all 50 state capitols on behalf of hundreds of thousands of small and independently owned businesses. NFIB and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. NFIB also has an interest in maintaining the integrity of the legislative process.

Small Business Association of Michigan (SBAM): SBAM is the Premier Organization for Michigan's small business owners with over 26,000 diverse members from every industry, spread across all 83 of Michigan's counties. SBAM and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. SBAM also has an interest in maintaining the integrity of the legislative process.

Michigan Chamber of Commerce: The Michigan Chamber is the leading voice of business in Michigan. The Chamber advocates for job providers in the legislative and legal forums

and represents approximately 6,000 employers, trade associations, and local chambers of commerce of all sizes and types in every county of the state. The Chamber's member firms employ over 1 million Michiganders. The Chamber and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. The Chamber also has an interest in maintaining the integrity of the legislative process.

Associated Builders and Contractors of Michigan: ABC is a statewide trade association representing commercial and industrial construction entities. The ABC members develop people, and its employer members work safely, ethically, profitably and for the betterment of the communities in which ABC and its members work. ABC and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. ABC also has an interest in maintaining the integrity of the legislative process.

Grand Rapids Area Chamber: The Grand Rapids Chamber promotes West Michigan businesses to create a dynamic, thriving, and prosperous West Michigan for all. The Grand Rapids Area Chamber and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. The Chamber also has an interest in maintaining the integrity of the legislative process.

Home Builders Association of Michigan: The Home Builders Association of Michigan is the largest association representing construction in the state. Its members develop and build single family and multifamily homes throughout Michigan. One of its primary goals is to provide the opportunity for all Michigan residents to own or rent affordable housing. To promote this goal and others, the Association seeks to oppose laws and court decisions which delay, restrict or

otherwise impede the ability of the Association's members to construct affordable housing in Michigan.

Michigan Retailers Association: The Michigan Retailers Association is the voice of Michigan's retail industry which provides more than 870,000 jobs to Michigan workers through its 5,000 businesses and over 15,000 stores and websites. The Retailers Association and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. The Retailers Association also has an interest in maintaining the integrity of the legislative process.

Lansing Regional Chamber of Commerce: The Lansing Chamber serves as the voice of Lansing businesses on issues and policies that impact the business community and economic climate of the Greater Lansing region. The Lansing Chamber and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. The Chamber also has an interest in maintaining the integrity of the legislative process.

Mackinac Center for Public Policy: The Mackinac Center is a nonprofit institute that advances the principles of free markets and government. The Mackinac Center challenges government overreach and advocates for free-market approaches to public policy. The Mackinac Center has a direct interest in this matter because the case deals with employer-employee relations, will impact public policy and involves the constitutionality of the legislative process.

Michigan Farm Bureau: The Michigan Farm Bureau, established in 1919, is the voice of agriculture in Michigan representing over 42,000 farm families. It provides every Farm Bureau member the opportunity to participate regarding issues pertinent to the agricultural industry. The Farm Bureau and its members have a direct interest in this matter since the court's decision will

impact the terms and conditions under which its member employers will be required to operate. The Farm Bureau also has an interest in maintaining the integrity of the legislative process.

West Michigan Policy Forum: The West Michigan Policy Forum advocates throughout Michigan for pro-business policy reform, works with various partners to build a strong Michigan job base through other chambers of commerce, business leader groups, organizations and associations. The West Michigan Policy Forum and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member employers will be required to operate. The Forum also has an interest in maintaining the integrity of the legislative process.

Michigan Freedom Fund: The Michigan Freedom Fund is a nonprofit Michigan organization that advocates for free markets, a competitive business environment and individual rights. It also seeks to protect the rights of families and job providers. The Freedom Fund and its members have a direct interest in this matter since the court's decision will impact the terms and conditions under which its member job providers will be required to operate. The Freedom Fund also has an interest in maintaining the integrity of the legislative process.

II. Procedural History Of The Acts

The Coalition incorporates the Statement of Facts presented by the Michigan Legislature in its Brief in Support of its Request for an Advisory Opinion on the Constitutionality of 2018 PA 368 and 2018 PA 369 (filed in Case Nos. 159160 and 159201 for the House and Senate, respectively, on March 5, 2019) herein by reference.

ARGUMENT

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

Article 3, Section 8 of the Michigan Constitution provides that "[e]ither 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." This Court may or may not issue such an advisory opinion, in its discretion. *Id.*; MCR 7.303(B)(3). Here, the Court should issue an advisory opinion for the benefit of all employers and employees in Michigan to dispel any uncertainty sown by the proponents of the initiatives as to which minimum wage and paid leave provisions are operative.

Although the legal resolution of the issue is clearly dictated by the plain language of the Constitution, the issue has far more reaching implications than the legal analysis would indicate. For example, serious questions have been raised by some legislators regarding legislative authority—even though these questions lack merit. See, e.g., Statements of Sens. Colbeck, Hertel, and Ananich, Senate Journal No. 64, pp 1640-42.

The Coalition is also uniquely implicated by the Legislature's request for an advisory opinion because the laws at issue are wage and benefit laws that directly impact businesses as employers. As Justice Markman noted in the context of a request for an advisory opinion on the constitutionality of Michigan's right-to-work laws, "proponents and opponents agree [that such employment laws] . . . have a substantial effect upon both employees and employers, public and private, and upon the economy, throughout this state . . . ." *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348 & 2012 PA 349*, 493 Mich 1016, 1017; 829 NW2d 872 (2013) (MARKMAN, J., dissenting) (calling for the Court to "grant without further delay the Governor's request . . . for an advisory opinion," rather than additional consideration of and briefing on the request). Here, as there, the issuance of an advisory opinion would:

> [C]onstitute a reasonable exercise of the constitutional authority of this Court; . . . affirm this Court's role as the ultimate arbiter of

> Michigan law; . . . facilitate [] orderly implementation [of the laws]; . . . minimize the possibility of protracted litigation concerning the validity of the [] laws; and . . . demonstrate comity by this Court with a coordinate branch of state government.

Id. The Court should exercise its discretion to issue an advisory opinion on this "important question of law" on this "solemn occasion." Const 1963, art 3, § 8.

II. Article 2, Section 9 Of The Michigan Constitution Permits The Legislature To Enact An Initiative Petition And Subsequently Amend That Law During The Same Legislative Session.

The Coalition agrees with the December 2018 opinion of Attorney General Schuette, which concludes that Article 2, Section 9 of the Michigan Constitution permits the Legislature to enact a law proposed by the people through the initiative process and subsequently amend that law during the same session. See OAG, 2017-2018, No. 7306 (December 3, 2018).

Article 2, Section 9 provides in pertinent part:

> 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. . . . 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.
> . . .
>
> 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.
>
> . . . 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.

Const 1963, art 2, § 9.

A. Article 2, Section 9 must be interpreted according to its plain language.

To interpret a provision of the Michigan Constitution, the Court determines the provision's original meaning as understood by the people who ratified it. E.g., *Mich United Conservation Clubs v Sec'y of State*, 464 Mich 359, 373; 630 NW2d 297 (2001) (CORRIGAN, C.J., concurring) ("Our primary goal in construing a constitutional provision—in marked contrast to a statute or other texts—is to give effect to the intent of the people of the state of Michigan who ratified the constitution, by applying the rule of 'common understanding.'"); *People v Bulger*, 462 Mich 495, 507; 614 NW2d 103 (2000) ("In construing our constitution, this Court's object is to give effect to the intent of the people adopting it. Hence, the primary source for ascertaining its meaning is to examine its plain meaning as understood by its ratifiers at the time of its adoption." (quotation marks and citation omitted)). This Court undertakes to find the "common understanding" of a constitutional provision, which "is essentially a search for the original meaning attributed to the words of the constitution by those who ratified it." *Mich United Conservation Clubs*, 464 Mich at 374 (CORRIGAN, C.J., concurring). While "[t]his rule of construction acknowledges the possibility that a provision of the constitution may rationally bear multiple meanings, [it] is concerned with

ascertaining and giving effect only to the construction, consistent with the language, that the ratifiers intended." *Id.* at 374-75. The interpretational exercise is to objectively examine the ratifiers' common understanding, "not to impose on the constitutional text . . . the meaning we as judges would prefer, or even the meaning the people of Michigan today would prefer, but to search for contextual clues about what meaning the people who ratified the text in 1963 gave to it." *Id.* at 375. Therefore, the analysis begins with "an examination of the precise language used in art 2, § 9 of our 1963 Constitution." *Id.*; see also *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 335; 414 NW2d 873 (1987) ("This interpretation is also in accordance with the 'common understanding rule' [by which we] are limited to the language of the constitution when interpreting its provisions.").

B. Article 2, Section 9 does not place any limitations on the authority of the Legislature to amend an initiated law enacted by the Legislature.

The plain language of Article 2, Section 9, provides the following procedures: (1) a law may be proposed to the Legislature for enactment by gathering a certain number of signatures on a petition; (2) once the initiated law is submitted, the Legislature must either enact or reject it "without change or amendment within 40 session days . . . ."; (3) if the Legislature enacts the proposed law, it is subject to referendum, like any other law enacted by the Legislature; (4) if the proposed law is not enacted, the law is submitted to the people on the ballot for a vote during the next general election; and (5) if a law initiated by the people is either enacted by the Legislature or adopted by the people, then it is not subject to the governor's veto power. Const 1963, art 2, § 9. The plain language of article 2, section 9 does not place any limits on whether or when the Legislature may amend a law that was proposed by the people and enacted by the Legislature. *Id.*

As noted, the Michigan Constitution is a limitation on the plenary authority of the Legislature and that the Legislature has power to perform any act not prohibited by the Michigan

or U.S. Constitutions. *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 327; 685 NW2d 221 (2004) (citing *Attorney Gen ex rel O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW2d 550 (1936)). This Court has explained:

> Unlike the federal constitution, our Constitution is not a grant of power to the legislature but is a limitation upon its powers. Therefore, the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States. This has been discussed by this Court in the past by analogizing our Legislature to the English Parliament. See *Young v City of Ann Arbor*, 267 Mich. 241, 243; 255 NW 579 (1934), in which this Court stated:
>
> > A different rule of construction applies to the Constitution of the United States than to the Constitution of a State. The Federal government is one of delegated powers, and all powers not delegated are reserved to the States or to the people. When the validity of an act of congress is challenged as unconstitutional, it is necessary to determine whether the power to enact it has been expressly or impliedly delegated to congress. 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.

Taxpayers of Mich, 471 Mich 306, 327-328; 685 NW2d 221 (2004). Because the Michigan Constitution establishes negative *limits* on legislative power (by restraining or taking away certain authority), rather than delegating only explicitly granted powers, the Legislature may do all that it is not prohibited from doing. In the context of Article 2, section 9, then, the Legislature may amend—by simple majority vote and within the same session—an initiated law that it enacted within 40 session days after receiving a certified initiative proposal because the Michigan Constitution does not prohibit such amendments.

1. Article 2, Section 9 does not require a popular vote or approval of three-fourths of each legislative house to amend an initiated law enacted by the Legislature.

In contrast to the Legislature's unlimited ability to amend an initiated law that it adopted and enacted (which will be explored more fully in the next section), if the Legislature rejects an initiated law that is subsequently enacted by the people at the polls, then that law may not be repealed or amended unless: (a) the electors vote to repeal or amend the law; or (b) three-fourths of the members of each house of the Legislature vote to repeal or amend it. Const 1963, art 2, § 9. The popular vote or legislative supermajority requirement applies only to "law[s] adopted by the people at the polls under the initiative provisions of [Article 2, Section 9]," however. The requirement does not apply to initiated laws proposed by the people and *enacted by the Legislature* within 40 session days. *Id.*; see also OAG, 2017-2018, No. 7306 ("Here, however, the Legislature enacted the initiated laws and the three-fourths vote requirement does not apply."). It is uncontested that the Legislature may amend an initiated law that it enacted with a simple majority vote. OAG, 2017-2018, No. 7306 (A.G. Bill Schuette) ("[T]he Legislature may amend the initiated laws it enacted by a majority vote of the members elected to and serving in each house of the Legislature."); OAG, 1975-1976, No. 4932, p 240 (A.G. Frank J. Kelley) (January 15, 1976) ("If a measure proposed by initiative petition is enacted by the legislature within 40 session days without change or amendment, the legislature can amend or repeal such a measure by majority votes in each house . . . ."). As Attorney General Frank Kelley indicated in his 1976 opinion on this matter, "had the drafters of the Constitution intended . . . [to] require extraordinary majorities in each house, explicit language to that effect would have been utilized." *Id.* Kelley "interpret[ed] the absence of such language as signifying intent that such laws be adopted by [simple] majorities . . . ." *Id.*

The same rule of interpretation applies to Article 2, Section 9 as to whether the Legislature may amend an initiated law enacted by the Legislature during the same legislative session: If the

drafters and ratifiers of the Constitution had intended to require the Legislature to amend such legislation only in subsequent sessions, explicit language to that effect would have been included. As noted above, this Court's primary goal in interpreting the Michigan Constitution is to "give effect to the intent of the people of the state of Michigan who ratified the constitution, by applying the rule of 'common understanding,'" which requires an examination of the precise language used and, correspondingly, an examination of the language *not* used. *Mich United Conservation Clubs v Sec'y of State*, 464 Mich 359 at 373 (CORRIGAN, C.J., concurring).

2. Article 2, Section 9 does not limit when the Legislature may amend an initiated law enacted by the Legislature.

Article 2, Section 9 does not limit when the Legislature may amend initiated laws that it enacts, but it does limit when the Legislature may amend "[l]aws approved by the people under the referendum provision." Const 1963, art 2, § 9. Laws approved by referendum "may be amended by the legislature *at any subsequent session thereof*." *Id.* (emphasis added). A law approved by referendum has been approved twice: once by the Legislature when enacted and once by the people at the polls when presented for potential rejection. *Id.* The Constitution protects such twice-approved laws by providing for amendment only in subsequent legislative sessions. *Id.* That protection does not extend to laws initiated by the people and enacted by the Legislature, however, because similar explicit language limiting when the Legislature may amend such laws does not appear in Article 2, Section 9. Kelley's rule of interpretation—that the explicit language used by the drafters of the Constitution, as well as the absence of certain language, signifies their intent (OAG, 1975-1976, No. 4932, at 240)—applies in this situation: Here, the provision clearly states that laws approved after a referendum may only be amended at a subsequent legislative session, but the same is not said of initiated laws enacted by the Legislature. Thus, the intent behind the absence of a similar limitation is clear: Because Article 2, Section 9 does not explicitly

state that the Legislature must wait until a subsequent legislative session to amend an initiated law that it enacted, the limitation does not exist. Therefore, the Legislature may amend such a law during the same session.

Although Attorney General Frank Kelley once issued an opinion to the contrary, finding that an "initiative petition enacted into law by the legislature in response to initiative petitions [is] subject to amendment by the legislature at a subsequent legislative session," and that "the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session without violation of the spirit and letter of Article II, Sec. 9 of the Michigan Constitution of 1963," that opinion did not analyze the issue in any depth or provide rationale in support of the conclusion. OAG, 1963-1964, No. 4303, p 309, at 311 (March 6, 1964). As discussed above, the language of Article 2, Section 9 does not limit the Legislature to amendments only during a subsequent legislative session, although such a limitation is explicitly provided for laws approved by the people through the referendum process.

Looking to Kelley's opinion on whether a simple or supermajority is needed to amend initiated laws enacted by the Legislature, a different rule emerges: For a limitation to apply to the Legislature's authority to amend a law, the limitation must be explicitly stated in the Constitution rather than implied from its spirit, particularly where a similar limitation is expressed elsewhere but absent from the relevant provision. Compare OAG, 1963-1964, No. 4303, p 309, at 311 with OAG, 1975-1976, No. 4932, p 240. Because the appropriate method for interpreting the Michigan Constitution is to objectively examine the ratifiers' common understanding of the language used, "not to impose on the constitutional text . . . the meaning we as judges would prefer, or even the meaning the people of Michigan today would prefer," *Mich United Conservation Clubs v Sec'y of State*, 464 Mich at 375 (CORRIGAN, C.J., concurring), the fact that Article 2, Section 9 does not

limit the Legislature to amending a legislatively enacted initiated law only during a *subsequent* legislative session conclusively demonstrates that the Legislature may so amend during *any* legislative session. For these reasons, Kelley's 1964 opinion (which lacked citation to any authority) is not persuasive. See also OAG, 2017-2018, No. 7306 (stating that the "language of the Constitution and subsequent decisions by the Michigan courts . . . cast doubt on the validity of [Kelley's] conclusion").

C. Laws initiated by petition and enacted by the Legislature have the same stature as laws enacted solely through the legislative process and, therefore, may also be amended during the same legislative session.

As examined above, the Constitution does not prohibit the Legislature from amending any act, including one proposed by initiative petition, at the same session at which it was adopted. This conclusion is supported by this Court's previous holding that all duly enacted laws, whether initiated by petition, enacted by the Legislature, or adopted at a general election, have the same stature, unless the Constitution provides otherwise; that is, no special protection is afforded to laws initiated or enacted by the people.[4] *In re Proposals D & H*, 417 Mich 409, 421-422; 339 NW2d 848 (1983). In *In re Proposals D & H*, this Court rejected the contention that a law enacted by the people through an initiative petition and ballot vote is on a "higher plane" than a law enacted by the Legislature subject to the people's approval by referendum. *Id.* (finding that the Constitution does not "afford[] a 'higher plane' to measures adopted under the initiative provisions of art 2, § 9"). The Court based its holding in part on the "principle that all constitutional provisions enjoy equal dignity." *Id.* at 421 (citing *People v Blachura*, 390 Mich 326, 333; 212 NW2d 182 (1973)).

[4] The two exceptions explicitly provided for in Article 2, Section 9 are: (1) the popular vote or three-fourths legislative majority requirement to amend or repeal an initiated law enacted by the people at the polls; and (2) the subsequent legislative session requirement to amend a law approved after a referendum vote by the people at the polls.

The Court found that an initiated law enacted under Article 2, Section 9 was on equal footing with a law enacted by the Legislature and conditioned on voter approval under Article 3, Section 34.

Here, the same can be said of the Improved Workforce Opportunity Wage Act (2018 PA 337) and the Earned Sick Time Act (2018 PA 338), both of which were initiated laws and enacted by the Legislature under Article 2, Section 9, and any other law that is introduced as a bill and enacted by the Legislature under Article 4 of the Michigan Constitution: Such initiated laws are on equal footing with laws introduced as bills in the Legislature. Because they are on equal footing—because no special protections are afforded to initiated laws unless explicitly stated in the Constitution—they are on equal footing and laws initiated by the people under Article 2, Section 9 are subject to amendment during the same legislative session just like laws introduced by legislators. See, e.g., *Detroit United R v Barnes Paper Co*, 172 Mich 586, 588-89; 138 NW 211 (1912) (holding that when the Legislature enacts two conflicting laws during the same session, "the section stand[s] as last amended"); see also 2018 SB 1162 and 2018 SB 1094, which both amended MCL 437.1517a and were both enacted during December 2018.

Other cases have recognized that an initiated law is subject to the same constitutional requirements as a legislatively introduced bill. For example, in *Frey v Department of Management & Budget*, 429 Mich 315, 335 (1987), this Court held that, despite language in the initiative petition stating that the law would take immediate effect, the law could not take immediate effect without approval of two-thirds of each legislative house, as required by Article 4, Section 27 of the Michigan Constitution. This is because all procedural provisions of Article 4 of the Constitution, which establish constitutional limits on "the legislative power of the State of Michigan . . . vested in a senate and a house of representatives" (Const 1963, art 4, § 1), "apply to the Legislature when it votes to enact an initiated law" under Article 2, Section 9. *Id.* at 337. Similarly, in *Leininger v*

Secretary of State, 316 Mich 644, 648-649 (1947), this Court held that the title–object clause, currently found in Article 4, Section 24, applies equally to initiated laws and laws introduced by the Legislature.[5] These cases make clear that the constitutional limitations of Article 4 apply to initiated laws as well as to laws introduced and enacted by the Legislature, and that laws enacted through different constitutional processes "enjoy equal dignity." *In re Proposals D & H*, 417 Mich at 421. Because it is also the case that no part of Article 2, Section 9 or Article 4 prohibits the Legislature from amending a legislatively introduced law during the session that it was enacted, initiated laws may also be amended during the same session.

III. Public Acts 368 And 369 Of 2018 Were Enacted In Accordance With Article 2, Section 9 Of The Michigan Constitution And Must Be Presumed To Be Constitutional.

The Legislature enacted the Improved Workforce Opportunity Wage Act (2018 PA 337) and Earned Sick Time Act (2018 PA 338) without change and within 40 session days of receipt of the certified initiative petition, as provided by Article 2, Section 9. Then, during the same session, the Legislature enacted Public Acts 368 and 369 of 2018 by majority votes, which amended the initiated minimum wage and medical leave acts, respectively. Public Acts 368 and 369 were enacted in accordance with Article 2, Section 9 of the Michigan Constitution because that section does not prohibit amendment of an initiated law enacted by the Legislature during the same session.

As this Court well knows, laws enacted by the Legislature are presumed to be constitutional unless clearly demonstrated to be unconstitutional:

> [T]his Court is obligated to uphold all laws that do not infringe the state or federal Constitutions and invalidate only those laws that do so infringe. We do not render judgments on the wisdom, fairness, or prudence of legislative enactments. See *Mayor of Lansing v Mich. PSC*, 470 Mich. 154, 161; 680 N.W.2d 840 (2004). Legislation is

[5] The title–object clause states, "No law shall embrace more than one object, which shall be expressed in its title." Const 1963, art 4, §24.

> presumed to be constitutional absent a clear showing to the contrary. *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992).

AFT Mich v State, 497 Mich 197, 214; 866 NW2d 782 (2015); see also *People v Collins*, 3 Mich 343, 348-349 (1854) ("It is never to be forgotten that the presumption is always in favor of the validity of the law, and it is only when manifest assumption of authority and clear incompatibility between the constitution and the law appears, that the judicial power can refuse to execute it."). Because the plain language of Article 2, Section 9 of the Michigan Constitution does not prohibit enacting and amending an initiated law during the same session, 2018 PA 368 and 2018 PA 369 cannot be clearly shown to be unconstitutional and thus the legislation must be presumed to be constitutional.

CONCLUSION

For the foregoing reasons, the Coalition supports the Michigan Legislature's requests for an advisory opinion from this Court and respectfully requests that it issue an advisory opinion holding that Article 2, Section 9 does not prohibit the Legislature from enacting an initiated law and subsequently amending it during the same legislative session and that 2018 PA 368 and 2018 PA 369 were enacted in accordance with Article 2, Section 9.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Dated: March 13, 2019

/s/ Gary P. Gordon

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THIS RESOLUTION IS OFFERED TO COMPLY WITH ARTICLE III, SECTION 8 OF THE *CONSTITUTION OF THE STATE OF MICHIGAN OF 1963*

Rep. Cole offered the following resolution:

House Resolution No. 25.

A resolution to request an opinion of the Supreme Court of the state of Michigan pursuant to Article III, Section 8 of the *Constitution of the State of Michigan of 1963*.

Whereas, On July 30, 2018, the Department of State submitted to the Michigan Legislature a legislative initiative petition, an initiation of legislation to enact the "Earned Sick Time Act," for consideration under Article II, Section 9 of the *Constitution of the State of Michigan of 1963*; and

Whereas, On August 27, 2018, the Department of State submitted to the Michigan Legislature a legislative initiative petition, an initiation of legislation to enact the "Improved Workforce Opportunity Wage Act," for consideration under Article II, Section 9 of the *Constitution of the State of Michigan of 1963*; and

Whereas, On September 5, 2018, the Senate and House of Representatives adopted the legislative initiative petition to enact into law the "Improved Workforce Opportunity Wage Act," which was subsequently assigned Public Act 337 of 2018, and will not take effect until March 29, 2019; and

Whereas, On September 5, 2018, the Senate and House of Representatives adopted the legislative initiative petition to enact into law the "Earned Sick Time Act," which was subsequently assigned Public Act 338 of 2018, and will not take effect until March 29, 2019; and

Whereas, On November 8, 2018, Senate Bill No. 1171 was introduced to amend the "Improved Workforce Opportunity Wage Act" created under Public Act 337 of 2018; and

Whereas, On November 8, 2018, Senate Bill No. 1175 was introduced to amend the "Earned Sick Time Act" created under Public Act 338 of 2018; and

Whereas, Senate Bill No. 1171 and Senate Bill No. 1175 of the 2018 Regular Session of the Legislature were signed into law by Governor Rick Snyder on December 13, 2018, as Public Act 368 of 2018 and Public Act 369 of 2018, respectively, and will not take effect until March 29, 2019; and

Whereas, On February 13, 2019, a request for a formal opinion was submitted to the Attorney General regarding the constitutionality of Public Act 368 of 2018 and Public Act 369 of 2018, which amended legislative initiative petitions enacted by the Legislature during the same legislative session; and

Whereas, The House of Representatives has determined that important questions of law exist with respect to the constitutionality of Public Act 368 of 2018 and Public Act 369 of 2018; and

Whereas, Article III, Section 8 of the *Constitution of the State of Michigan of 1963* states:

> 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.

; now, therefore, be it

Resolved by the House of Representatives, That the House of Representatives requests the Supreme Court of the state of Michigan issue an opinion, pursuant to Article III, Section 8 of

the *Constitution of the State of Michigan of 1963*, on the following important questions of law pertaining to Public Act 368 of 2018 and Public Act 369 of 2018:

1. Does Article II, Section 9 of the *Constitution of the State of Michigan of 1963* permit the Legislature to enact an initiative petition into law and then subsequently amend that law during the same legislative session?

2. Were Public Act 368 of 2018 and Public Act 369 of 2018 enacted in accordance with Article II, Section 9 of *the Constitution of the State of Michigan of 1963*?

; and be it further

Resolved, That the Speaker is authorized to engage counsel in furtherance of this request for an opinion from the Supreme Court of the state of Michigan and take all necessary steps incidental thereto; and be it further

Resolved, That copies of this resolution be transmitted to the Supreme Court of the state of Michigan.

SR16, As Adopted by Senate, February 20, 2019

Senators MacGregor and Daley offered the following resolution:

Senate Resolution No. 16.

A resolution to request an opinion of the Supreme Court of the state of Michigan pursuant to Article III, Section 8 of the *Constitution of the State of Michigan of 1963*.

Whereas, On July 30, 2018, the Department of State submitted to the Michigan Legislature a legislative initiative petition, an initiation of legislation to enact the "Earned Sick Time Act," for consideration under Article II, Section 9 of the *Constitution of the State of Michigan of 1963*; and

Whereas, On August 27, 2018, the Department of State submitted to the Michigan Legislature a legislative initiative petition, an initiation of legislation to enact the "Improved Workforce Opportunity Wage Act," for consideration under Article II, Section 9 of the *Constitution of the State of Michigan of 1963*; and

Whereas, On September 5, 2018, the Senate and House of Representatives adopted the legislative initiative petition to enact into law the "Improved Workforce Opportunity Wage Act," which was subsequently assigned Public Act 337 of 2018, and will not take effect until March 29, 2019; and

Whereas, On September 5, 2018, the Senate and House of Representatives adopted the legislative initiative petition to enact into law the "Earned Sick Time Act," which was subsequently assigned Public Act 338 of 2018, and will not take effect until March 29, 2019; and

Whereas, On November 8, 2018, Senate Bill No. 1171 was introduced to amend the "Improved Workforce Opportunity Wage Act" created under Public Act 337 of 2018; and

Whereas, On November 8, 2018, Senate Bill No. 1175 was introduced to amend the "Earned Sick Time Act" created under Public Act 338 of 2018; and

Whereas, Senate Bill No. 1171 and Senate Bill No. 1175 of the 2018 Regular Session of the Legislature were signed into law by Governor Rick Snyder on December 13, 2018, as Public Act 368 of 2018 and Public Act 369 of 2018, respectively, and will not take effect until March 29, 2019; and

Whereas, On February 13, 2019, a request for a formal opinion was submitted to the Attorney General regarding the constitutionality of Public Act 368 of 2018 and Public Act 369 of 2018, which amended legislative initiative petitions enacted by the Legislature during the same legislative session; and

Whereas, The Senate has determined that important questions of law exist with respect to the constitutionality of Public Act 368 of 2018 and Public Act 369 of 2018; and

Whereas, Article III, Section 8 of the *Constitution of the State of Michigan of 1963* states:

> 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.

; now, therefore, be it

Resolved by the Senate, That the Senate requests the Supreme Court of the state of Michigan issue an opinion, pursuant to Article III, Section 8 of the *Constitution of the State of Michigan of 1963*, on the following important questions of law pertaining to Public Act 368 of 2018 and Public Act 369 of 2018:

1. Does Article II, Section 9 of the *Constitution of the State of Michigan of 1963* permit the Legislature to enact an initiative petition into law and then subsequently amend that law during the same legislative session?

2. Were Public Act 368 of 2018 and Public Act 369 of 2018 enacted in accordance with Article II, Section 9 of *the Constitution of the State of Michigan of 1963*?

; and be it further

Resolved, That the Senate Majority Leader is authorized to engage counsel in furtherance of this request for an opinion from the Supreme Court of the state of Michigan and take all necessary steps incidental thereto; and be it further

Resolved, That copies of this resolution be transmitted to the Supreme Court of the state of Michigan.

EXHIBIT C

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THE SENATE
STATE OF MICHIGAN

February 13, 2019

State of Michigan
The Honorable Dana Nessel, Attorney General
Attn: Opinion Department
G. Mennen Williams Building
P.O. Box 30212
Lansing, MI 48909

RE: Request for Formal Opinion

Dear Attorney General Nessel:

I write today regarding Former Attorney General Schuette's Opinion No. 7306 regarding the legislative enactment and amendment of laws proposed by initiative petition. Opinion No. 7306 interprets Article II, Section 9 of the Michigan Constitution of 1963 in a manner that poses serious threats to the constitutional power of initiative reserved to the people.

This issue has received widespread attention over the last year due to the legislative enactment and amendment of laws proposed by initiative petition. One proposal sought to create a new Michigan minimum wage law. The other proposal sought to provide employees with the ability to earn paid sick time. In May 2018, organizers filed nearly 400,000 signatures in support of each proposal. After review, the Board of State Canvassers certified both proposals for the November 2018 general election ballot.

However, upon receipt by the Legislature, majority leadership implemented a plan to enact both proposals to keep them off the ballot and then amend them during the "Lame Duck" session after the election. The Legislature enacted Public Acts 337 and 338 of 2018, and then, in the same legislative session, significantly amended the laws resulting in enactment of Public Acts 368 and 369 of 2018. The net effect of these amendments was the elimination of the ability for many employees to earn paid sick time, and substantial and sweeping changes to the minimum wage law proposed by initiative petition. These laws are set to take effect in March 2019, and many questions have been raised regarding the constitutionality of the action taken by the Legislature in enacting and amending the laws.

Under Article II, Section 9, the people have reserved to themselves the ability to enact laws using ballot initiatives. Specifically, Article II, Section 9 provides in part:

> "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."

The plain language of this clause contains both a mandate and a prohibition. It mandates that if the Legislature takes action, it either enact or reject an initiative petition; and, further, it prohibits the Legislature from changing or amending an initiative petition. Alternatively, the Legislature can reject an initiative petition and propose a different measure on the same subject, in which case the initiated proposal and the legislative proposal both go on the ballot. In any event, the plain language of Article II, Section 9 prohibits the exact legislative action at issue here – the enactment and amendment of a law proposed by initiative petition in the same legislative session.

In direct contravention of this plain reading, in Opinion No. 7306, Former Attorney General Schuette concluded that "nothing in Article II, Section 9 limits the Legislature's ability to substantively amend a legislatively enacted initiated law, or from doing so during the same legislative session in which the initiated law was enacted." This conclusion is contrary to the plain language of Article II, Section 9, fails to give effect to every word and phrase in Article II, Section 9, and is inconsistent with the spirit and structure of the constitutional provision.

Indeed, the plain language of Article II, Section 9 expressly limits the Legislature's ability to amend a legislatively enacted initiated law by stating that a "law proposed by initiative petition shall either be enacted or rejected by the legislature **without change or** amendment." (Emphasis added). Former Attorney General Schuette's conclusion that a law proposed by initiative petition may be enacted and amended by the Legislature in the same legislative session disregards the prohibition on such action in the plain language of Article II, Section 9.

In Opinion No. 4303, Former Attorney General Frank Kelley determined that "it is [] clear that the legislature in enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session without violation of the spirit and letter of Article II, Sec. 9 of the Michigan Constitution of 1963." Opinion No. 4303 correctly construed the powers of the Legislature conferred by Article II, Section 9, and properly preserves the powers of the people regarding laws proposed by initiative petition.

Since Former Attorney General Kelley's opinion, there has been no amendment of this section or other change in law that would warrant a deviation from the Kelley opinion.

With the aforementioned in mind, I ask for your formal opinion as to the following questions:

1) Does Article II, Section 9 of the Michigan Constitution of 1963 prohibit the Legislature from enacting a voter-initiated law and subsequently amending it at the same legislative session?

2) Were Public Acts 337 and 338 of 2018 enacted and amended in the same legislative session in violation of Article II, Section 9 of the Michigan Constitution of 1963?

Thank you in advance for your assistance with this request. Please do not hesitate to contact my office if you have questions or need more information. If you are unwilling or unable to issue an opinion in response to my request, I humbly ask that you please provide, in detail, the reason or reasons for your denial.

Sincerely,

Stephanie Chang
Michigan State Senator, 1st District