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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MICHIGAN ONE FAIR WAGE, MICHIGAN TIME TO CARE, NATIONAL EMPLOYMENT LAW PROJECT AND MICHIGAN STATE AFL-CIO AMICI CURIAE BRIEF REGARDING THE MICHIGAN LEGISLATURE'S REQUEST FOR AN ADVISORY OPINION ON THE CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

PUBLIC ACTS

CONSTITUTIONAL PROVISIONS

RULES

ATTORNEY GENERAL OPINIONS

OTHER AUTHORITIES

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction over the request for an advisory opinion by the Michigan House of Representatives and the Michigan Senate pursuant to Const 1963, Article 3, § 8, MCR 7.303(B)(3) and MCR 7.308(B).

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?

Amici Curiae MOFW, MTTC, NELP and AFL-CIO Answer: Yes

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

Amici Curiae MOFW, MTTC, NELP and AFL-CIO Answer: No

III. Where for the first time in the history of the 1963 Constitution, the Legislature has usurped the people's reserved right of initiative with an "adopt and amend" scheme, were Public Act 368 of 2018 and Public Act 369 of 2018 enacted in accordance with Article 2, § 9 of the Michigan Constitution of 1963?

Amici Curiae MOFW, MTTC, NELP and AFL-CIO Answer: No

INTRODUCTION

For the first time in the history of the Michigan Constitution of 1963 the Michigan Legislature in 2018 usurped the people's reserved constitutional right of initiative by brazenly adopting two statutory initiative proposals, whose petitions had been signed by over 750,000 registered voters and which had been certified for the ballot. The Legislature passed the proposals not because it agreed with them, but for the exclusive purpose of gutting them with amendments in its lame duck session, thereby depriving the people of the opportunity to vote on them.

If permitted by the Court this unprecedented "adopt and amend" scheme heralds the end of the people's 110 year-old constitutional right of statutory initiative in Michigan. During that time this Court has been the people of Michigan's last line of defense against legislative attacks on their constitutional rights to direct democracy. The people of Michigan now once again turn to this Court to protect their constitutional rights as the Court has consistently done over that century.

Based on the text of Article 2, § 9, the Constitutional Convention Record and Address to the People, this Court's precedents, and other authorities, this Court should advise that the Legislature violated Article 2, § 9 of the Michigan Constitution.

STATEMENT OF FACTS

In the fall of 2017, Michigan One Fair Wage (MOFW) began circulating statutory initiative petitions to create a new Michigan minimum wage law which would, among other things, increase the minimum wage in steps to $12 per hour for all employees by January 1, 2022; increase the subminimum wage for tipped employees in steps to $12 per hour by January 1, 2024; and annually adjust the minimum wage thereafter for inflation.

In late 2017, Michigan Time To Care (MTTC) began circulating statutory initiative petitions to create a new Michigan Earned Sick Time Act (MESTA) which would, among other things, allow all employees to earn 1 hour of paid sick time for every 30 hours worked to use for personal or family health needs; set annual caps on employee usage at 72 hours at large employers and 40 hours at small employers; and provide for a variety of enforcement mechanisms.

On May 21, 2018, MOFW timely filed 373,507 signatures with the Bureau of Elections (BOE). After review, the BOE concluded that there were at least 283,553 valid signatures, sufficient to certify the proposal for the 2018 general election ballot. However, the Board of Canvassers (BOC) deadlocked 2-2 on certifying the proposal. MOFW appealed and the Court of Appeals ordered the BOC to certify the proposal. *Michigan Opportunity v. Board of State Canvassers,* Ct App No 344619 (Order of August 22, 2018), *lv denied,* S Ct No 158303 (Order of December 5, 2018). The BOC certified the proposal for the ballot as ordered.

On May 29, 2018 MTTC timely filed 377,560 signatures with the BOE. After review, the BOE concluded that there were at least 271,088 valid signatures, sufficient to certify the proposal for the 2018 general election ballot. The BOC certified the proposal.

Upon receipt of both proposals by the Legislature, its leadership publicly announced that the Legislature would adopt the proposals in order to keep them off the 2018 ballot and amend them during the lame duck session. *See, e g,* Gray, *Michigan's OK of minimum wage hike, paid sick leave has a big catch*, Detroit Free Press (September 7, 2018). The MOFW proposal was adopted as 2018 PA 337 and the MTTC proposal was adopted as 2018 PA 338, both scheduled to take effect 90 days after the Legislature adjourned sine die.

During the lame duck session, the Legislature passed and the Governor signed 2018 PA 368 significantly amending PA 337 in these among other ways: delaying the minimum wage increase to $12 per hour from 2022 until 2030, essentially no increase at all after inflation; continuing the subminimum wage for tipped employees; and deleting the inflationary adjustment.

Similarly, during the lame duck session, the Legislature enacted and the Governor signed 2018 PA 369 significantly amending PA 338 in these among other ways: restricting eligibility so that hundreds of thousands, if not millions, of employees would be excluded from coverage under the MESTA (renamed the Paid Medical Leave Act); substantially reducing the permitted uses of sick time; and drastically cutting the amount of sick time which can be earned and used by employees. PA's 368 and 369 are scheduled to take effect on March 29, 2019.

This Brief refers to the Legislature's scheme of adopting an initiated law and then amending it during the same legislative session as "adopt and amend."

ARGUMENT

I. The Michigan Legislature's Request For An Advisory Opinion.

Amici Curiae MOFW, MTTC, NELP and AFL-CIO support the request.

II. Article 2, § 9 of The Michigan Constitution of 1963 Prohibits The Legislature From Enacting An Initiative Petition Into Law And Then Amending That Law During The Same Legislative Session.

The Legislature's "adopt and amend" scheme violates the text of Article 2, § 9; the intent of the drafters of that section and the voters who adopted it; decades of Michigan Supreme Court decisions protecting the people's reserved constitutional rights of initiative and referendum from legislative evasion; and a contemporaneous Opinion by Attorney General Frank Kelley as well as over 50 years of legislative acquiescence in that Opinion. 2018 PA's 368 and 369 are unconstitutional.

A. A Plain Reading of The Constitutional Text Demonstrates That The Legislature May Not Amend An Initiated Law In The Same Legislative Session In Which It Was Adopted.

All constitutional "analysis, of course, must begin with an examination of the precise language used in . . . [the] 1963 Constitution," *Michigan United Conservation Clubs v. Secretary of State (After Remand),* 464 Mich 359, 375; 630 NW2d 297 (2001) (Corrigan, J, concurring), and every constitutional provision "must be interpreted in the light of the document as a whole," *Lapeer County Clerk v. Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003).

In examining the text, the paramount rule of constitutional interpretation "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *People v. Tanner,* 496 Mich 199, 223; 853 NW2d 653 (2014). Further, when applying this principle of constitutional interpretation, "the people are understood to have accepted the words" used in a constitutional provision "in the sense most obvious to the common understanding." *Id.* at 224. As often cited, Justice Cooley described this rule:

> A constitution is made for the people and by the people. ***The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.*** "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, ***the intent to be arrived at is that of the people,*** and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, ***but rather that they have accepted them in the sense most obvious to the common understanding***, and ratified the instrument in the belief that that was the sense designed to be conveyed."[*Federated Publication, Inc v. Michigan State Univ Bd of Trustees*, 460 Mich 75, 85, 594 NW2d 491 (1999), quoting 1 Cooley, Constitutional Limitations (6th ed), p 81 (emphasis added).]

Michigan United Conservation Clubs, supra, 464 Mich at 374. The "common understanding" principle of constitutional interpretation, therefore, "is essentially a search for the original meaning attributed" to constitutional provisions by the people who ratified and at the time it was ratified. *Id.*

Based on these principles the constitutional analysis here must begin with an examination of the Michigan Constitution "as a whole."

Under Article 1, § 1 "[a]ll political power is inherent in the people." It is not the Legislature, the Executive, or Judiciary in which political power naturally or inherently resides – the branches of Michigan government only have such powers as the people expressly grant them in the State Constitution. In Article 4, § 1 of the Michigan Constitution the people have granted the "legislative power of the State of Michigan" to "a senate and a house of representatives."

However, the Legislature has <u>not</u> been granted plenary legislative power by the people in Article 4 because, among other provisions in the State Constitution, in Article 2, § 9 the people have reserved to themselves exclusively the lawmaking powers of initiative and referendum:

> 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.

(emphasis added). Thus the legislative power the people granted to the Legislature in Article 4 has been limited by Article 2, § 9 when it comes to initiatives. This creates a conflict between a Legislature jealous of its lawmaking power and naturally eager to encroach on the right of initiative, and the people's reserved right of initiative. This Court has long been the people's guardian in that separation of powers conflict.

This Court has repeatedly recognized and protected the people of Michigan as the fountainhead of all political power particularly when the people wield that power directly through the initiative. *See, e g, Citizens Protecting Michigan's Constitution v. Secretary of State,* 503 Mich 42, 59; 921 NW2d 247 (2018), *quoting Blank v Dep't of Corrections,* 462 Mich 103, 150; 611 NW2d 221 (2000) (Markman, J, concurring) (protecting the right of the people to directly amend the State Constitution by initiative petition); *see also, e g, Taxpayers of Michigan Against Casinos v. Michigan,* 471 Mich 306, 327; 685 NW2d 221 (2004) (Legislature's power to legislate can be "prohibited . . . by the people through the Constitution of the State").

Under Michigan's constitutional structure then, the question here is that given that the people have limited the Legislature's legislative power in the area of initiatives what, if any, legislative powers have been expressly granted to the Legislature by Article 2, § 9?[1]

[1] Most state constitutions give the Legislature no role at all in the initiative process. *See, e g,* National Conference of State Legislatures, www.ncsl.org/research/elections-and-campaigns/the-indirect-initiative. Thus, no Legislature has any inherent "right" to any role whatsoever in the initiative process, only the role, if any, the people give it in the State Constitution under the conditions the people impose.

Thus properly framed that question is answered by the clear text of Article 2, § 9. After the Legislature receives an initiated petition during a legislative session, the people have granted it a 40-day temporal window during that legislative session in which it can exercise one of three options: first, it can enact the proposed law without any change or amendment; second, it can reject the proposed law, in which case the proposed law is submitted to the people for a vote at the next general election; or third, it can propose a different law on same subject, in which case both proposals are submitted to the people for a vote at the next general election. These three options granted by the people to the Legislature with respect to initiative petitions and the 40-day session window during which they can be used are expressly stated in the constitutional text:

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

Const 1963, Article 2, § 9.

The maxim *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) can be applied to assist in interpreting the Michigan Constitution. *See, e g, Carton v. Secretary of State,* 151 Mich 337, 341-42; 115 NW 429 (1908); OAG, 2011-2012, No 7268, p 4 (August 9, 2012). Under that well-established maxim, the Legislature does not have the power to adopt a proposal inside the 40-day session window and then amend it outside

that window during the same legislative session because that power is not among those expressly granted to the Legislature by the people in Article 2, § 9. The Legislature is clearly restricted to 3 options to be exercised only within a 40-day session window; it is not authorized by the people to do anything else in that legislative session. *See also* OAG, 1975-1976, No 4932, p 240 (January 15, 1976) (the explicit language of Article 2, § 9 or the absence thereof controls its interpretation).

The conclusion that "adopt and amend" is not available to the Legislature is reinforced by the wording of the first sentence quoted above:

> Any law proposed by initiative petition shall either be enacted or rejected by the legislature without change or amendment within 40 days from the time such petition is received by the legislature.

(emphasis added). It is a fundamental principle of statutory construction, which generally applies to the construction of the constitution, *see Detroit Bd. of Ed. v. Superintendent of Public Instruction,* 319 Mich 436; 29 NW2d 902 (1947); *Council 23, AFSCME v. Wayne Co. Civil Service Comm.,* 32 Mich App 243; 188 NW2d 206 (1971), that every word should be given meaning, and no word should be treated as surplusage or rendered nugatory if at all possible. *State Bar of Michigan v. Galloway,* 422 Mich 188; 369 NW2d 839 (1985); *Soap & Detergent Ass'n v. Natural Resources Comm.,* 415 Mich 728; 330 NW2d 346 (1982); *Swift v. Kent Co.*, 171 Mich App 390; 429 NW2d 605 (1988). Therefore, "change" and "amendment" must have distinct, not identical, meanings. According to dictionaries, "amendment" is defined as, among other things, "the process of altering or amending a law." *See, e g,* "amendment." Merriam-Webster.com. 2019. https://www.merriam-webster.com (22 March 2019). Thus the use of that term precludes the Legislature from altering a legislatively enacted initiative, a "law," during the same legislative session.

This interpretation of Article 2, § 9 does not leave the Legislature without options if it opposes or prefers an alternative to the initiated proposal. It can exercise the third option in Article 2, § 9 and place a countermeasure on the ballot for the people to consider together with the proposal. The Legislature can also use Article 4, § 34 to propose a countermeasure to the voters as well. *See In re Proposals D & H,* 417 Mich 409; 339 NW2d 848 (1983). The Legislature used that option in 1982, again in 1996 with Proposals D and G, and could have used it here. The Legislature has ample constitutional alternatives to its unconstitutional "adopt and amend" scheme, it knows how to use them, and it has used them to successfully defeat proposals it dislikes.

B. The Record of the 1961-62 Constitutional Convention Supports The Conclusion That the Constitutional Text Precludes "Adopt and Amend."

While not controlling, Constitutional Convention debates and the Address to the People are relevant, may be "highly valuable," and can help "discover the 'common understanding'" of the constitutional text. *Tanner, supra,* 496 Mich at 226 n 20.

There is nothing in the Constitutional Convention Record which demonstrates that the delegates intended to give the Legislature another option beyond the three expressly provided for in the Constitution, be it "adopt and amend" or any other. To the contrary Delegate Downs succinctly summarized the Legislature's only three options when considering laws proposed by initiative:

> And it does then give the legislature a chance to review what was done; either adopt it, do nothing, or provide an alternative in case the legislature, after hearings, can work out a better proposal.

2 Official Record, Constitutional Convention 1961, p 2394. The Address to the People confirms this interpretation:

> In this section is language which provides that the legislature must act upon initiative proposals within 40 session days, but may propose counter measures to the people.

Id., Address to the People, p 21.

A statement by Delegate Kuhn in the Constitutional Convention Record has been cited to argue that the delegates intended to allow the Legislature to "adopt and amend." His statement does not do so because it has been taken out of context. Delegate Kuhn's cited statement was in response to a question about what happens to an initiated law **after it is adopted by the people** in comparison to a referendum. He was not addressing the Legislature's ability to "adopt and amend" an initiated law during the same legislative session. The exchange goes as follows:

> MR. WANGER: Yes. A brief question for Mr. Kuhn, Mr. Chairman. Mr. Kuhn, isn't there another difference between initiative and referendum, namely: that referendum cannot result in having a statute on the books which it takes a popular vote to repeal? Whereas, the initiative, if the initiated statute is adopted, means that the people, in order to make any change in that statute, have to vote; and the legislature cannot vote to change it.
>
> 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 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, p 2395.

In fact, later in the Constitutional Convention Record Delegate Kuhn demonstrates his concern for safeguarding the people's reserved initiative power during colloquy about the danger of adding language allowing the Legislature to "instantly" amend an initiated law adopted by the people at the polls:

> MR. KUHN: I was wondering if the gentleman would include in his proposed amendment something to the effect of this being done in a subsequent legislative

> session; so we wouldn't have to worry about amending it instantly, like it provides down below in a few sentences. If we could perfect something like that, I don't think the committee would have any objection.

Id. at 2396.

The response in the Record reflects the delegates' inclusion of the three-fourths vote requirement to prevent the Legislature from immediately or easily undoing an initiated law adopted by the people at the polls. Such a safeguard was not needed for the language regarding an initiated law adopted by the Legislature because the delegates had already limited the Legislature's options to the three set forth in the text.

Even if Delegate Kuhn's remarks are found to be supportive of an "adopt and amend" option, which they are not, the opinion of one delegate is not controlling and cannot be used to contradict the express language of Article 2, § 9. *See Tanner*, *supra,* 496 Mich at 226-27.

Thus, there is nothing in the Constitutional Convention Record which would even suggest that the delegates gave the Legislature an "adopt and amend" option beyond the three options and 40-day session window expressly provided for in the Constitution. Instead, that Record supports the conclusion that the three options found in the text are the only options and can only be exercised during the prescribed window.

C. Michigan Supreme Court Decisions Protect the Peoples' Reserved Direct Democracy Powers and Prevent Emasculation of the Initiative Process Through "Adopt and Amend."

Not only does the Legislature's "adopt and amend" scheme violate the text of Article 2, § 9, the intent of the drafters of § 9 as expressed in the Record of the 1961-62 Constitutional Convention and Address to the People, and the intent of the voters who adopted it, but it also transgresses decades of Michigan Supreme Court precedent which zealously guards the direct democracy provisions of the Michigan Constitution against legislative encroachment.

Just a few years after the 1963 Constitution was adopted this Court was asked to construe the referendum provision of Article 2, § 9 to permit a legislative scheme similar to that employed here. The Court described the scheme it was asked to authorize: in order to avoid a referendum on a controversial law exempting Michigan from daylight savings time, the Legislature could simply serially "adopt and repeal" that law in the spring and fall of every year thus preventing citizens from ever submitting referendum petitions on the law. *See Michigan Farm Bureau v. Secretary of State,* 379 Mich 387, 394-95; 151 NW2d 797 (1967) (*per curiam*). This Court emphatically rejected the legislative "adopt and repeal" scheme. *Id.* In so doing it held that there is "an overriding rule of constitutional construction" with regard to specific powers expressly reserved by the people for themselves in Article 2, § 9. *Id* at 393. That rule requires these powers to "be saved…as against conceivable if not likely evasion or parry by the legislature." *Id.* This Court elaborated that it would not allow the Legislature to "thwart" or "emasculate" those powers or "permit outright legislative defeat, not just hindrance, of the people's reserved" powers. *Id.* at 394-95.

There is no material difference between the "adopt and repeal" scheme to defeat the people's reserved right of referendum categorically rejected in *Farm Bureau* and the "adopt and amend" scheme employed by the Legislature here to defeat the people's reserved right of statutory initiative. Both would effectively destroy the people's reserved rights at which they are aimed because "adopt and amend" can not only be used to gut initiatives as occurred here, but to essentially repeal them entirely. The *Farm Bureau* Court's "overriding rule of constitutional construction" applies equally to statutory initiatives because statutory initiative and referendum both are reservations of power to the people which are vulnerable to "evasion or parry by the legislature." *Farm Bureau, supra,* 379 Mich at 393. As in *Farm Bureau* the

Legislature's "adopt and amend" scheme here would allow the Legislature to "thwart," "emasculate," and "outright . . . defeat" the right of initiative by adopting every initiated law with which it is presented and then proceed to amend it in the same legislative session to obliterate its original purpose as was done with 2018 PA's 368 and 369. "Adopt and amend" means the end of the people's reserved power of statutory initiative and it should be rejected based on the well-established holding and principles of *Farm Bureau.*

Not only does the "adopt and amend" scheme run afoul of the seminal *Farm Bureau* case it also contravenes this Court's decisions which built on it. Shortly after *Farm Bureau* this Court in *Kuhn v. Department of Treasury*, 384 Mich 378; 183 NW2d 796 (1971) declared that "under a system of government based on grants of power from the people, constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed" and that the language of Article 2, § 9 cannot be "stretched" to deny the people their reserved right of referendum. *Id.* at 385-86, *citing Farm Bureau*. So, too, here. It is an unconstitutional "stretch" to read "adopt and amend" into the clear text of Article 2, § 9 and in defiance of the Constitutional Convention Record.

This Court has continued to rely upon the holding and fundamental principles of *Farm Bureau. See, e g, In re Proposals D & H, supra,* 417 Mich at 421 (in a statutory initiative case the Court is "guided by the fundamental rule of constitutional construction which requires this Court to construe every clause or section of a constitution consistent with its words or sense so *as to protect and guard its purposes*.") (emphasis added) (*citing Farm Bureau)*; *Woodland v. Michigan Citizens Lobby*, 423 Mich 188, 215; 378 NW2d 337 (1985) ("Article 2, § 9 is a reservation of legislative authority which serves as a limitation on powers of the Legislature.

This reservation of power is *constitutionally protected from government infringement once invoked*.") (emphasis added).

In its most recent case on the direct democracy provisions of the Michigan Constitution, this Court protected the people's reserved right to amend the Constitution by petition in *Citizens Protecting Michigan's Constitution v. Secretary of State*, *supra*. While *Citizens* involved a petition for a constitutional amendment under Article 12, § 2 and not an initiative petition under Article 2, § 9, this Court's rebuke of any official interference in constitutional powers reserved for the people demonstrates that it still adheres to the principles of *Farm Bureau* and its progeny:

> While the right to propose amendments by initiative must be done according to constitutional requirements, we have observed that "it may be said, generally, that [the right] can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises."

Citizens Protecting Michigan's Constitution v. Secretary of State, *supra,* 503 Mich at 63. The Court explained that the reservation of initiative power by the people, "along with other tools of direct democracy, 'reflected the popular distrust of the Legislative branch of our state government.'" *Id.* at 62-63*, citing Woodland,* 423 Mich at 218. That distrust means that constant judicial vigilance is required to prevent the Legislature, the natural enemy of the people's initiative lawmaking power, from "thwarting" or "outright . . . defeat[ing]" that power, *Farm Bureau*, *supra,* 379 Mich at 394-95.

The Legislature's "adopt and amend" scheme thus violates decades of Michigan Supreme Court decisions protecting the people's reserved constitutional rights of referendum, statutory initiative, and constitutional amendment initiative by allowing the Legislature to "thwart," "emasculate," and "outright . . . defeat" the right of statutory initiative.

D. The Contemporaneous Opinion of Attorney General Frank Kelley Precludes "Adopt and Amend."

In 1964, Attorney General Frank Kelley issued Opinion No. 4303 in response to a number of questions from then-State Senator William Milliken regarding initiative petitions under Article 2, § 9. *See* OAG, 1963-1964, No. 4303 (March 6, 1964). That opinion was issued shortly after the ratification of the 1963 Constitution and was a contemporaneous construction of the new Constitution. Therefore, it is entitled to weight in determining the proper construction of the initiative provisions of Article 2, § 9. *See, e g, Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 470; 208 NW2d 469 (1973) (contemporaneous judicial interpretation "better reflect[s] the meaning" of constitutional language); *Smith v. Auditor General*, 165 Mich 140, 144; 130 NW 557 (1911) (contemporaneous legislative construction of the Constitution entitled to weight in constitutional interpretation).

In Opinion No. 4303, the Attorney General found that the plain language of the Constitution was "clear" that an initiative petition enacted into law by the Legislature is subject to amendment *only* at a subsequent legislative session, and not in the same legislative session "without violation of the spirit and letter of Article II, § 9 of the Michigan Constitution of 1963." *Id.* at 311 (Question 3).

For 54 years the Legislature has followed and acquiesced in Opinion No. 4303, and did not, until 2018 PA's 368 and 369, violate its stricture against "adopt and amend." That legislative conduct also weighs in favor of the interpretation that Article 2, § 9 does not allow "adopt and amend." *See, e g, Menton v. Cook*, 147 Mich 540, 543; 111 NW 94 (1907). As demonstrated by the text of Article 2, § 9 and the Constitution Convention Record, Opinion

No. 4303 was correct in 1964 and remains correct today. Its conclusions have only been reinforced by decades of legislative acquiescence and Michigan Supreme Court precedent interpreting the direct democracy provisions of the Michigan Constitution.

E. The Legal Arguments of the Legislature and *Amici* Restaurant and Lodging Association, and Small Business Coalition Are Fundamentally Flawed.

The Michigan Legislature and *Amici Curiae* Michigan Restaurant and Lodging Association, and Small Business for a Better Michigan Coalition (hereinafter collectively, "the Legislature") make a handful of arguments in support of the unprecedented "adopt and amend" scheme.

All are flawed.

Their principal argument is that Article 2, § 9 doesn't "bar the Legislature from amending an initiated law during the same session in which it was initially enacted." *See* Legislature Brief at 8, 10-11 (Article 2, § 9 "imposes only two restraints on the Legislature").

That argument improperly turns the Michigan constitutional structure on its head. As detailed *supra* under the Michigan Constitution the issue here is whether the people granted the Legislature the power to "adopt and amend" during the same legislative session in Article 2, § 9, not whether Article 2, § 9 bars or restrains such a tactic. That is because Article 2, § 9 expressly reserves the power of initiative to the people, carving it out from the Legislature's powers, and it thus takes an affirmative grant from the people's power of initiative to the Legislature before the Legislature can act on an initiative. While the Legislature has broad authority to legislate – including to "adopt and amend" a non-initiated law in the same session – under Article 4, its power to legislate is curtailed under Article 2, § 9. That curtailed power does not include the power to "adopt and amend" during the same legislative session because

the people in Article 2, § 9 granted the Legislature only the power to exercise one of three options during a 40-day session window.

Not only does the Legislature's argument invert the constitutional structure, but it also proves too much. If, as the Legislature argues, it can do anything regarding an initiated proposal which is not expressly prohibited, why does Article 2, § 9 list the three options at all? If, as the Legislature claims, it already has those three options – adopt, reject, or reject and propose an alternative – because they are nowhere expressly prohibited there would no need to list them in Article 2, § 9. It only makes sense to list those three options if they are intended to be limited grants of legislative power to the Legislature from the people's reserved power of initiative.

Building on the faulty foundation of their constitutional structure argument the legislature next asserts that Article 2, § 9 imposes no "temporal constraint" on when the Legislature can amend an initiated law it enacted. *See* Legislature Brief at 10, 13-16. Again, this argument misapprehends the constitutional structure. The issue is not whether Article 2, § 9 has any "temporal constraints" but whether it allows the Legislature to "adopt and amend" at any time during the legislative session. It does not. This argument also ignores the plain text of Article 2, § 9 which contains a temporal constraint – the Legislature can only act on the three options it is given during the 40 session days following the receipt of the initiated petition. It has no time window to do anything else during that legislative session.

In further support of its defective argument the Legislature attempts to use the identical treatment of an initiative enacted by the Legislature and one enacted by the people when it comes to gubernatorial vetoes as a basis to justify "adopt and amend." *See* Legislature Brief at

14. The gubernatorial veto power, or lack thereof, sheds no light on whether the Legislature has the power to "adopt and amend."

The Legislature also makes much of the fact that Article 2, § 9 allows amendments of a referred law approved by the people at a "subsequent session" of the Legislature, inferring that somehow gives the Legislature *carte blanche* to "adopt and amend" an initiated law it enacted at any time. *Id.* at 15-16. This reasoning disregards the intent of the drafters and voters who ratified the 1963 Constitution. It was unnecessary for the initiative language to include the "subsequent session" amending language with regard to initiated petitions because Article 2, § 9 already clearly detailed the *only* options available to the Legislature: enact the law, reject the law, or propose a different law on the same subject. These options are not available for referendum so Article 2, § 9 had to make it clear that the Legislature's only amending option on a referendum occurs in a "subsequent session."

The Legislature also seeks succor in the Constitutional Convention Record. *See* Legislature Brief at 18-20. But the Brief's reliance on the statements of Delegate Kuhn is misplaced because they do not support "adopt and amend" as demonstrated supra. In fact, the Constitutional Convention Record is clear that "adopt and amend" is not a legislative option.

Finally, the Legislature's Brief simply ignores decades of Michigan Supreme Court decisions detailed supra all of which undercut any argument for "adopt and amend." The Brief fails to even mention *Farm Bureau* let alone analyze it.

Instead, the Brief (at 20-22) argues that a handful of decisions require the application of Article 4 to Art. 2, § 9. However, all those cases did was fill some gaps as to petition requirements in Article 2, § 9 by analogy to § 4. They did not hold that the Legislature's Article 4 legislative power applied under Article 2, § 9. *See Leininger v. Alger*, 316 Mich 644; 26

NW2d 348 (1947) (the initiative petition form failed to have the required title); *Automobile Club of Michigan Committee for Lower Rates Now v. Secretary of State* (On Remand), 195 Mich App 613; 491 NW2d 269 (1992) (initiative petition form must comply with republication requirement). The Legislature relies most heavily on a single case involving only the narrow question of whether the two-thirds vote requirement for immediate effect found in Article 4, § 27 of the Constitution applies to an initiated law enacted by the Legislature pursuant to Article 2, § 9, *Frey v. Director of the Dep't of Social Services*, 429 Mich 315; 414 NW2d 873 (1987). *Frey* stands only for the proposition that "when an initiated law is enacted by the Legislature, it is subject to Article 4, § 27." *Id.* at 338. The holding does not go as far as the Legislature's Brief argues.

Likewise, *Frey* acknowledged that its analysis is "limited to the language of the constitution when interpreting its provisions." *Frey*, 429 Mich at 335. The language the Court in *Frey* was charged with interpreting is a "general restriction" in Article 4, § 27 "that 'no act' passed by the Legislature may take immediate effect unless passed by a two-thirds vote of each house." *Id*. Unlike the "general" language in Article 4, § 27 at issue in *Frey*, Article 2, § 9 does not contain general language, it provides three specific and express options for the Legislature to use within a defined 40-day session window, options that do not include "adopt and amend."

For all of these reasons *Frey* is not relevant here. It does not answer the question of whether an initiated petition can be amended in the same legislative session as it was adopted.

CONCLUSION

For the reasons stated, the Legislature's enactment of 2018 PA's 368 and 369, amending initiated laws 2018 PA's 337 and 338, respectively, which had been adopted by the

Legislature in the same legislative session, violated Article 2, § 9 of the Michigan Constitution of 1963.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 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/ Mark Brewer