STATE OF MICHIGAN

MICHIGAN SUPREME COURT

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

Supreme Court Case Nos 159160 and
159201

_____/

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THE MICHIGAN LEGISLATURE'S REPLY BRIEF IN SUPPORT OF ITS REQUEST FOR AN ADVISORY OPINION ON THE CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369

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INTRODUCTION

On March 22, 2019, Michigan One Fair Wage ("MOFW"), Michigan Time To Care ("MTTC"), National Employment Law Project ("NELP"), and Michigan State AFL-CIO ("AFL-CIO") (collectively referred to as "Amici Curiae") filed a Joint Amici Curiae Brief in Response to the Michigan Legislature's Request for an Advisory Opinion on the constitutionality of 2018 PA 368 and 2018 PA 369. Amici Curiae support the Michigan Legislature's Request for an Advisory Opinion but, as expected, claim that 2018 PA 368 and 2018 PA 369 are unconstitutional. Specifically, based on a remarkably misleading and incomplete interpretation of Const 1963, art 2, § 9, and despite the clear language of this section of the Constitution and compelling support from the Constitutional Convention debates to the contrary, Amici Curiae argue that the Legislature cannot amend an initiated law within the same session in which it is enacted. To accept Amici Curiae's conclusory legal theory, however, would require this Court to misread one paragraph of Const 1963, art 2, § 9, while simultaneously disregarding other paragraphs of that same section and ignoring Michigan's constitutional structure.

As set forth in detail in the Michigan Legislature's principal brief, Amici Curiae's arguments are directly contrary to the language, history and judicial precedent of Const 1963, art 2, § 9. The Michigan Legislature will not, however, repeat those arguments here, but rather will limit this Reply to the specific arguments raised by Amici Curiae.

The narrow issue before this Court remains whether Const 1963, art 2, § 9 prohibits the Legislature from enacting an initiative petition into law and then subsequently amending that law within the same legislative session. Despite Amici Curiae's creative attempts to portray this issue as more nuanced than presented in the Michigan Legislature's principal brief, it is not a complicated analysis. Indeed, the very straightforward question posed to this Court has a very

straightforward answer, one that can be easily discerned by a simple review of the text of Const 1963, art 2, § 9.

I. A plain reading of the text of the Constitution clearly demonstrates that the Legislature may amend a law initially proposed by initiative at any time following enactment.

Amici Curiae curiously make precisely the same argument as the Michigan Legislature, namely that a plain reading of the Constitution provides a clear answer to the question posed to this Court. Amici Curiae focus on only part of Const 1963, art 2, § 9 to argue that because the Legislature had to initially *enact* the proposed law within 40 session days "without change or amendment" it therefore somehow follows that the Legislature could not thereafter amend that enacted law, at least within the same session. A plain reading of even just the paragraphs upon which Amici Curiae rely quickly reveal the fallacy of this interpretation. Const 1963, art 2, § 9 provides in pertinent 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.
>
> **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. [Emphasis added].

Amici Curiae contend that Const 1963, art 2, § 9 limits the Legislature to one of three options when it is presented with a proposed initiative, all of which must be exercised within 40 days. First, the Legislature can enact the law without change within 40 days. Second, the

Legislature can reject the proposal and it will go to the people for a vote. Third, the Legislature may propose a counter-measure, which may go to the voters simultaneous with the initiated proposal. The Legislature completely agrees with Amici Curiae that the Legislature has these three delineated options under the Constitution.

Where there is a parting of the ways, however, is when Amici Curiae then concludes without explanation that once the 40-day period is over the Legislature is barred from taking any action, at least during the same session, with respect to an initiated proposal that is enacted. This argument is completely nonsensical on a plain reading of even these limited parts of Const 1963, art 2, § 9. First of all, it is important to remember that the initiative is merely a proposed law, one that is first proposed to the Legislature. The people have no right to have that law enacted by the Legislature or adopted by the people, it is merely a right to make a proposal—a proposal made by, in this case, 8% of the electorate. Second, the Legislature in this instance did enact the initiatives as written, without change or amendment, within the 40 session days as permitted by paragraph 3 of Const 1963, art 2, § 9. Meaning, the entire next paragraph, which is titled "**Legislative rejection of initiated measure**; different measure; submission to people" and begins "If the law so proposed is **not enacted by the legislature within the 40 days**,..."(emphasis added), is completely inapplicable. Yes, the Legislature could have chosen to reject the proposed initiatives, could have proposed counter measures and all of them could have been presented to the people for a vote. That is not what happened, however. The Legislature, as is its clear and unequivocal right under the Constitution, enacted the initiatives as written without change or amendment within 40 days. Amici Curiae's continued focus on what else can happen during those initial 40 session days had the Legislature chosen to reject the proposals is therefore completely irrelevant to the issue before this Court.

Amici Curiae nonetheless argue that because the Legislature is authorized to enact the initiative "without change or amendment" within 40 days it is somehow limited as to what it can do after that initial enactment. Indeed, without any reasonable rationale or justification, Amici Curiae make the giant leap that because the Legislature is limited to "3 options to be exercised only within a 40-day session window; **it is not authorized to do anything else in that legislative session**." Joint Amici Curiae Brief at 8 (emphasis added). Where, however, does the Constitution say anything to even remotely support such a conclusion? Not surprisingly, Amici Curiae fail to direct the Court to anything that would even arguably do so, because it clearly does not exist.

Rather, while their theory is not entirely clear, Amici Curiae appear to be arguing either that 1) because the Legislature is limited as to what it can do within the 40-day period it is somehow forever limited, or 2) because the Constitution fails to specifically provide that the Legislature can amend an initiated law that it enacts, it must not be allowed to do so. The fallacy of the first contention is self-evident and has already been discussed above. The second argument, however, also makes no sense. Under that logic, the Legislature could never amend an initiated law that it enacts, whether it be within the same session, the next session or a session 30 years later, because it is not directly addressed in that section of the Constitution. Amici Curiae are not claiming, however, that the Legislature can never amend a legislatively enacted initiative, just that it must wait to do so under some imaginary restriction that finds no basis in the constitutional text.

This argument also conveniently mischaracterizes Michigan's constitutional order. Again, unlike the federal government whose limited powers are specifically enumerated, "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." *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 327; 685 NW2d 221 (2004). To that end, Amici Curiae completely ignore the

paragraph of Const 1963, art 2, § 9, titled "Initiative or referendum law; effective date, veto, amendment and repeal" which specifically addresses the amendment of initiated laws:

> 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. Const 1963, art 2, § 9, paragraph 5.

Read plainly, this paragraph imposes only two restraints on the Legislature's ability to amend an initiated law and neither applies to the present question. First, in the case of a *referendum*, a law approved *by the people* can only be amended at a "subsequent session." Second, in the case of an *initiated law* that is submitted to and adopted *by the people*, unless the measure provides otherwise, it may only be amended by vote of three-fourths of the members of each chamber. In addition to the former being exclusive to a referendum, both restraints are unambiguously limited to laws that are approved or adopted by the people. Consequently, neither restraint applies to an *initiated law* that is enacted *by the Legislature*. In fact, the only language in Const 1963, art 2, § 9 addressing a law that is both proposed by initiative and enacted by the Legislature merely states that it "shall be subject to referendum" and "shall [not] be subject to the veto power of the governor."

Const 1963, art 2, § 9 therefore does not impose any temporal limitations or requirements of delay for laws initiated by the people, let alone initiated laws enacted by the Legislature. Under basic principles of constitutional construction and textual analysis, that omission must be viewed as an intentional decision by the ratifiers, because such a delay is expressly imposed on laws approved by referendum. This conclusion is most logical given that once the Legislature enacts an initiative, it is on the same plane as any other legislative enactment, subject to the same requirements for any other legislative amendment, including those set forth in Article 4. *Frey v*

Dir of Dep't of Soc Servs, 162 Mich App 586; 413 NW2d 54, aff'd sub nom *Frey v Dep't of Mgmt & Budget*, 429 Mich 315 (1987).

It is therefore patently clear upon a simple review of Const 1963, art 2, § 9 that the Legislature can amend or repeal a law that is approved through the initiative process. The only difference is that for laws enacted by the Legislature, only a majority vote is required to do so, whereas for laws adopted by the people at the polls, the supermajority requirement applies. It is likewise clear that there is no temporal limitation imposed on when an initiative can be amended by the Legislature, whether it be legislatively enacted or adopted by the people at the polls. Rather, the only temporal limitation applies to laws adopted by referendum, which is not a circumstance applicable to the laws currently at issue before this Court.

II. This textual interpretation of the Constitution is unequivocally supported by the history of initiatives in Michigan and the Constitutional Convention of 1961.

Amici Curiae seek to find support for their novel theories of constitutional interpretation from the Constitutional Convention by citing out of context certain discussions by the delegates and primarily disregarding the discussions directly on point. As discussed in great detail in the Legislature's principal brief, the history of Const 1963, art 2, § 9 unequivocally supports the conclusion that the Legislature may amend an initiated law at any time and will not be repeated here. Despite Amici Curiae's limited efforts to argue otherwise, the Constitutional Convention unquestionably offers compelling support for the interpretation proffered by the Legislature.

Amici Curiae quote Delegate Downs discussing the three options the Legislature has when it is presented with a proposed initiative as somehow supportive of their contention that the Legislature has a limited ability to amend an initiated law post-enactment. Joint Amici Curiae Brief at 9. This statement was made in the context of encouraging the reduction of the number of signatures for initiatives from 8% to 5% (which was rejected), not in the context of amendments,

which are later addressed in detail by Delegate Kuhn (and set forth in the Michigan Legislature's principal brief at 16-19). Regardless, the concept of what the Legislature's initial options are with respect to a proposed initiative is not in question and therefore this statement is simply of no value in analyzing the question presently before this Court.

Interestingly, Amici Curiae then quote a discussion by Delegates Wanger and Kuhn that is in complete support of the already apparent conclusion that for a legislatively enacted initiative the Legislature retains "full control. They can amend it and do anything they see fit." Joint Amici Curiae Brief at 10. The later discussion regarding a proposed temporal limitation on when the Legislature can amend an initiated law adopted by the people, which was rejected in favor of a super-majority requirement, was discussed at length in the Michigan Legislature's Principal Brief. Amici Curiae claim that there was no proposal for a similar temporal limitation on legislatively enacted initiatives, because the Legislature was already limited to the three initial options it has within the 40-day period. As discussed previously, Amici Curiae are mixing apples and oranges. The "three options" they keep referring to clearly apply to the Legislature's options within the initial 40-day period when first presented with a proposed initiative and have absolutely no relevance to when a legislatively enacted initiative may *subsequently* be amended.[1]

For obvious reasons, Amici Curiae conclude with the statement that delegate statements are not controlling and cannot be used to contradict the three options that the Legislature has under Const 1963, art 2, § 9 when a proposed initiative is first presented to the Legislature. This once

[1] The discussions at the Constitutional Convention were specific to initiatives adopted by the people because under the prior Constitution while initiatives legislatively enacted could be amended at any time with a majority vote, initiatives adopted by the people could never be amended. The delegates determined that a change was necessary to permit amendments to initiatives adopted by the people, but with certain limitations not applicable to legislatively enacted initiatives, which were and continue to be on a level playing field as a law enacted in the ordinary course.

again misses the point, and focuses on language that is not even in dispute in an obvious attempt to distract the Court from the overwhelming support the Constitutional Convention provides for the conclusion that an initiated law can be amended at any time, including within the same session.

III. The Legislature's ability to amend an initiated law is completely in accord with the right of initiative.

Laws enacted by the Legislature through the initiative process are in equal not superior footing to laws enacted in the ordinary course. *Frey*, 162 Mich App at 600; *In re Proposals D & H*, 417 Mich 409, 422; 339 NW2d 848 (1983). Despite this clear precedent, Amici Curiae argue that this Court must provide greater protections to the laws at issue simply because they were proposed through the initiative process.

In furtherance of their novel theory, Amici Curiae point to *Mich Farm Bureau v Hare*, 379 Mich 387; 151 NW2d 797 (1967), which interpreted Const 1963, art 2, § 9 with respect to when a referendum petition can be filed. Specifically, that section of the Constitution provides that a referendum petition may be filed "within 90 days following the final adjournment of the legislative session at which the law was enacted." The question posed was whether a referendum petition could *only* be filed within 90 days following the final adjournment or "not later than" such date. This Court concluded that it meant the latter because to hold otherwise would mean that every law the Legislature passed and gave immediate effect to outside that 90-day window could essentially be rendered referendum proof, permitting "outright legislative defeat, not just hindrance, of the people's reserved right to test, by referendary process…" *Id.* at 394.

In contrast, here, the Legislature's actions were precisely in accord with the initiative process as contemplated by the framers of Const 1963, art 2, § 9. The Legislature was presented with a proposed law initiated by 8% of the electorate, which it enacted without change or amendment within the 40 days it is permitted to do so by the Constitution. Thereafter, following

the deliberative process, the Legislature decided to amend those laws.[2] Indeed, Amici Curiae concede that the Legislature can amend an initiated law, they just seek to impose an imaginary requirement that it cannot do so until the next legislative session, presumably because they believe they can persuade this Governor to veto such changes, precisely the type of political gamesmanship this Court consistently and appropriately seeks to avoid.

This Court in *Mich Farm Bureau* was careful to limit its holding to the situation where the right of referendum was completely taken away, not just when it was negatively impacted by the acts of the Legislature, recognizing that the Legislature remained free to enact legislation, even on the same subject as the law subject to a referendum. *Id*. at 396. Likewise, in *Reynolds v Bureau of State Lottery*, 240 Mich App 84; 610 NW2d 597 (2000), the question raised was whether the Legislature could enact essentially the same law that was suspended pursuant to the referendum process. The Court of Appeals, relying on the decision of this Court in *Mich Farm Bureau* and the Arizona case cited favorably therein,[3] concluded that the referendum petition had no effect except with respect to the particular measure referred, meaning the Legislature was "in full possession of all other ordinary constitutional powers." *Id*. at 96. The Court noted the constitutional provision that permitted the Legislature to amend a law approved by referendum at "any subsequent session thereof." Const 1963, art 2, § 9. "[I]t would be illogical to conclude that, while the Legislature could reenact the provisions of 1994 PA 118 after the voters had registered their rejection of that legislation at the polls, it was not authorized to do so before the election took

[2] In fact, under the Constitution, the Legislature was within its rights to completely repeal the two laws at issue in their entirety but instead chose to make amendments to address its concerns.

[3] *McBride v Kerby*, 32 Ariz 515; 260 P 435 (1927), overruled in part on other grounds by *Adams v Bolin*, 74 Ariz 269 (1952).

place." *Id*. at 99. Finally, the Court noted its decision "properly balances the people's right to a referendum with the political process that necessarily surrounds any public policy debate." *Id*. at 101.

Mich Farm Bureau is simply inapposite. Just because Amici Curiae do not like the amendments passed by the Legislature does not mean they are unconstitutional. Amici Curiae could have exercised their referendum right and chose not to do so and they are always free to pursue an initiative to amend the Constitution if they do not like what it says.

CONCLUSION

For the reasons set forth in its principal brief and herein, the Michigan Legislature respectfully requests that this Honorable Court grant the relief requested in its principal brief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2019, I electronically filed the above document with the Clerk of the Court using the ECF system, through which notification of such filing was sent to all attorneys of record in this matter.

/s/ Diane Pohl