

STATE OF MICHIGAN
MICHIGAN SUPREME COURT

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

Supreme Court Case Nos.
159160 and 159201

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***AMICI CURIAE* BRIEF OF MICHIGAN ONE FAIR WAGE AND MICHIGAN
TIME TO CARE REGARDING THE MICHIGAN LEGISLATURE'S REQUEST
FOR AN ADVISORY OPINION ON THE
CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369**

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

INDEX OF AUTHORITIES..... iv

STATEMENT OF BASIS OF JURISDICTION viii

STATEMENT OF QUESTIONS PRESENTED..... ix

INTRODUCTION 1

STATEMENT OF FACTS 3

ARGUMENT 4

 I. The Michigan Legislature’s Request For An Advisory Opinion..... 4

 II. The Rules of Constitutional Analysis..... 5

 III. 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..... 7

 A. The Text of Article 2, § 9 Does Not Permit The Legislature to “Adopt and Amend.”..... 7

 1. Justice Cooley on the People’s Sovereign Right to Exercise Legislative Power..... 7

 2. The Text of Article 2, § 9 Limits Legislative Power and Grants The Legislative Only Three Express Options Regarding Statutory Initiatives..... 9

 3. Once Triggered, the Ban on “Adopt and Amend” Remains In Effect for the Balance of the Legislative Session..... 12

 4. A Legislative Veto in the Initiative Process Was Removed Long Ago From the Text of the Michigan Constitution..... 13

 5. Article 2, § 9 is Self-Executing Precluding Legislative Obstruction of Its Operation..... 14

 6. The Absence of the Phrases “Protected by Law” or Even “Prescribed by Law” Further Demonstrates Very Limited Legislative Authority Under Article 2, § 9..... 14

7. Article 2, § 8 is Instructive on the Limited Legislative Powers Under Article 2, § 915

8. The Legislature Has Several Constitutional Options for Proposals it Opposes.....15

B. The Voters Who Adopted The 1963 Constitution Did Not Have a “Common Understanding” That it Allowed “Adopt and Amend”17

1. The 1908 Michigan Constitution.....17

2. The 1913 Constitutional Amendment Creating Statutory Initiative18

3. The 1941 Constitutional Amendment.....23

4. The 1961-62 Constitutional Convention.....23

5. The Campaign to Adopt the 1963 Constitution.....26

6. Contemporaneous Construction of the 1963 Constitution And Legislative Acquiescence Weigh Against “Adopt and Amend”28

7. Conclusion: The Voters had No “Common Understanding” That Article 2, § 9 Permitted “Adopt and Amend”29

C. Michigan Supreme Court Decisions Protect the Peoples’ Reserved Direct Democracy Powers and Prevent Thwarting of the Initiative Process Through “Adopt and Amend.”.....29

D. The Legal Arguments of the Legislature, Restaurant and Lodging Association, Small Business Coalition, and the Attorney General Are Fundamentally Flawed.....33

1. The Legislature Does Not Have Plenary Power in the Initiative Sphere Only the Power Granted by the People.....33

2. The Comment of One Delegate in the Constitutional Convention Record Does Not Support “Adopt and Amend”35

3. The Case Law Cited by the Legislature is Inapposite and Its Effort to Distinguish *Farm Bureau* Unpersuasive37

CONCLUSION AND RELIEF SOUGHT.....39

INDEX OF AUTHORITIES**CASES**

<i>Advisory Opinion re Constitutionality of 1972 PA 294</i> , 389 Mich 441; 208 NW2d 469 (1973)...	28, 30
<i>Automobile Club of Michigan Committee for Lower Rates Now v Secretary of State (On Remand)</i> , 195 Mich App 613; 491 NW2d 269 (1992).....	38
<i>Beach Grove Investment Company v Civil Rights Commission</i> , 380 Mich 405; 157 NW2d 213 (1968).....	6, 14, 15
<i>Blank v Dep't of Corrections</i> , 462 Mich 103; 611 NW2d 530 (2000).....	11, 34
<i>Carton v Secretary of State</i> , 151 Mich 337; 115 NW 429 (1908).....	11
<i>Citizens Protecting Michigan's Constitution v Secretary of State</i> , 503 Mich 42; 921 NW2d 247 (2018).....	6, 9, 13, 32
<i>Detroit Board of Education v Superintendent of Public Instruction</i> , 319 Mich 436; 29 NW2d 902 (1947).....	12
<i>Eastlake v Forest City Enterprise, Inc.</i> , 426 US 668; 96 SCt 2358; 49 LEd2d 132 (1976).....	9
<i>Federated Publications, Inc v Michigan State University Board of Trustees</i> , 460 Mich 75; 594 NW2d 491 (1999).....	5
<i>Fieger v US Attorney General</i> , 542 F3d 1111 (CA6, 2008).....	37
<i>Frey v. Director of the Dep't of Social Services</i> , 429 Mich 315; 414 NW2d 873 (1987).....	38
<i>Hamilton v Secretary of State</i> , 227 Mich 111; 198 NW 843 (1924).....	18, 32
<i>In re Proposals D & H</i> , 417 Mich 409; 339 NW2d 848 (1983).....	16, 31
<i>Kuhn v Department of Treasury</i> , 384 Mich 378; 183 NW2d 796 (1971).....	31
<i>Lapeer County Clerk v Lapeer Circuit Court</i> , 469 Mich 146; 665 NW2d 452 (2003).....	5, 7
<i>Leininger v Alger</i> , 316 Mich 644; 26 NW2d 348 (1947).....	38
<i>Menton v Cook</i> , 147 Mich 540; 111 NW 94 (1907).....	29
<i>Michigan Farm Bureau v Secretary of State</i> , 379 Mich 387; 151 NW2d 797 (1967) (<i>per curiam</i>).....	6, 30-32, 37
<i>Michigan Opportunity v Board of State Canvassers</i> , Ct App No 344619 (Order of August 22, 2018), <i>lv denied</i> , S Ct No 158303 (Order of December 5, 2018).....	3

Michigan United Conservation Clubs v Secretary of State 464 Mich 359; 630 NW2d 297 (2001).....5

People v Tanner, 496 Mich 199; 853 NW2d 653 (2014).....5

Smith v Auditor General, 165 Mich 140; 130 NW 557 (1911).....28

State Bar of Michigan v Galloway, 422 Mich 188; 369 NW2d 839 (1985).....12

Taxpayers of Michigan Against Casinos v Michigan, 471 Mich 306; 685 NW2d 221 (2004).....8

University of Michigan Regents v Michigan, 395 Mich 52; 235 NW2d 1 (1975).....37

Wolverine Golf Club v Secretary of State, 24 Mich App 711; 180 NW2d 820 (1970),
aff'd, 384 Mich 461; 185 NW2d 392 (1971).....14, 15, 16

Woodland v Michigan Citizens Lobby, 423 Mich 188; 378 NW2d 337 (1985)9, 14, 15, 31, 32

Young v City of Ann Arbor, 267 Mich 241; 255 NW2d 579 (1934)).....8

PUBLIC ACTS

1987 PA 59.....22

2006 PA 325.....22

2014 PA 281.....22

2018 PA 337.....4

2018 PA 338.....4

2018 PA 368.....*passim*

2018 PA 369.....*passim*

CONSTITUTIONAL PROVISIONS

Const 1908, Article 5, § 1.....21

Const 1908, Article 5, § 38.....18

Const 1908, Article 17, § 2.....13, 18

Const 1963, Article 1, § 1.....8

Const 1963, Article 2, § 8.....15

Const 1963, Article 2, § 9.....*passim*

Const 1963, Article 3, § 8.....viii

Const 1963, Article 4, § 1.....8

Const 1963, Article 4, § 13.....12

Const 1963, Article 4, § 24.....12

Const 1963, Article 4, § 25.....12

Const 1963, Article 4, § 27.....38

Const 1963, Article 4, § 34.....16

Const 1963, Article 12, § 232

COURT RULES

MCR 7.303(B)(3).....viii

MCR 7.308(B).....viii

ATTORNEY GENERAL OPINIONS

OAG, 1963-1964, No 4303 (March 6, 1964).....28, 29

OAG, 1975-1976, No 4932 (January 15, 1976).....11

OAG, 2011-2012, No 7268 (August 9, 2012).....11

OTHER AUTHORITIES

Address to the People, Const 1908.....13

Address to the People, Const 1963.....1, 13, 24-26

Citizens Research Council of Michigan, *Amending the Michigan Constitution: Trends and Issues* (March, 2010).....17-18

Citizens Research Council of Michigan, *A Comparative Analysis of the Michigan Constitution, Volume I (Article V)* (October, 1961).....13, 23

Citizens Research Council of Michigan, *An Analysis of the Proposed Constitution* (No 2, 1962).....27-28

1913 Concurrent Resolution No 4.....20

Cooley Constitutional Limitations (1868).....7-9, 28

1 Cooley, Constitutional Limitations (6th ed).....5

Dunbar and May, <i>Michigan, A History of the Wolverine State</i> (3d ed 1995).....	18, 20
Ellett, <i>The Government of Michigan</i> (Allyn and Bacon, 1936).....	16
Ford, <i>Direct Legislation and Recall</i> , 43 <i>Annals of the American Academy of Political and Social Science</i> (1912).....	18-19
Galbreath, <i>Provisions for State-Wide Initiative and Referendum</i> , 43 <i>Annals of the American Academy of Political and Social Science</i> 81 (1912).....	21, 22
Gray, <i>Michigan’s OK of minimum wage hike, paid sick leave has a big catch</i> , <i>Detroit Free Press</i> (September 7, 2018).....	4
1913 House Journal.....	19-20
2018 House Journal.....	1
McHargue, <i>Direct Government in Michigan: Initiative, Referendum, Recall, Amendment, and Revision in the Michigan Constitution</i> (1961).....	18, 23
Merriam-Webster.com. 2019 https://www.merriam-webster.com (22 March 2019) “Amendment”	12
1939 Michigan Manual.....	21
1999-2000 Michigan Manual.....	20
Michigan Secretary of State, <i>Michigan Initiatives and Referenda</i>	29
Munro, <i>The Initiative, Referendum and Recall</i> (1913).....	18
National Conference of State Legislatures www.ncls.org/research/elections-andcampaigns/the-indirect-initiative	10
2 Official Record, Constitutional Convention 1961.....	22, 23, 24, 26, 25-37
1 Proceedings and Debates of the Constitutional Convention of the State of Michigan 1907-08.....	17
1913 Senate Journal.....	20
Stern, <i>California Should Return to the Indirect Initiative</i> , 44 <i>Loyola of Los Angeles L Rev</i> 672 (2011).....	22

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 and MTTC answer: Yes

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

Amici Curiae MOFW and MTTC 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 and MTTC answer: No

INTRODUCTION

“As a constitutional conservative, I do not believe the Michigan Constitution grants the Legislature the ability to amend a citizens’ initiative in this manner.”

-State Representative Jeff Yaroch (District 33), 2018 House Journal 2351, 2361 (Dec. 4, 2018) (explaining his no vote on SB’s 1171 and 1175, *enacted as* 2018 PA’s 368 and 369)

“[T]he Legislature was within its rights to completely repeal the two laws at issue in their entirety [if it] chose to”

- Legislature’s Reply Brief at 9 n 2

For the first time in the 105 years that Michigan citizens have had the constitutional right to initiate laws, the Michigan Legislature in 2018 usurped that right by adopting two statutory initiative 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. The Legislature also asserts that it had the power to repeal those laws if it chose.

If permitted by the Court this unprecedented “adopt and amend or repeal” scheme heralds the end of the people’s century-old constitutional right of statutory initiative in Michigan because future legislatures will simply “adopt and amend or repeal” any proposal they dislike. During the past century this Court has been the people of Michigan’s last line of defense against repeated 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, its history since 1913 including the 1961-62 Constitutional Convention Record and Address to the People, this Court’s precedents, and other

authorities, this Court should opine that the Legislature violated Article 2, § 9 of the Michigan Constitution when it enacted 2018 PA's 368 and 369.¹

¹ Counsel for MOFW and MTTC is the sole author of this entire brief which was funded entirely by MOFW and MTTC. Neither undersigned counsel nor any other party or *amici curiae* made a monetary contribution to fund the preparation or submission of this brief.

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 took 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 and MTTC support the request.

II. THE RULES OF CONSTITUTIONAL ANALYSIS.

This Court has established several rules governing state constitutional analysis.

First, all constitutional “analysis, of course, must begin with an examination of the precise language used in art 2, § 9 of our 1963 Constitution.” *Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359, 375; 630 NW2d 297 (2001) (Corrigan, CJ, concurring). 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). 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 and to have ‘ratified the instrument in the belief that that was the sense designed to be conveyed.’” *Id* at 224 (citation omitted). 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 Publications, Inc v Michigan State University Board of Trustees, 460 Mich 75, 85; 594 NW2d 491 (1999) (*quoting* 1 Cooley, *Constitutional Limitations*, at 81 (6th ed)) (emphasis added).

As part of this textual analysis, every constitutional provision “must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another.” *Lapeer Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). In constitutional textual analysis, this Court also has followed the 1963 Constitution’s drafters’

definitions of “prescribed by law” and “provided by law” in the constitutional text:

The committee on style and drafting of the constitutional convention of 1961 made a distinction in the use of the words “prescribed by law” and the words “provided by law.” Where “provided by law” is used, it is intended that the legislature shall do the entire job of implementation. Where only the details were left to the legislature and not the over-all planning, the committee used the words “prescribed by law.” See Official Record, Constitutional Convention of 1961, pp 2673, 2674.

Beach Grove Investment Company v Civil Rights Commission, 380 Mich 405, 418-19; 157 NW2d 213 (1968).

Second, in addition to the text, the history of a constitutional provision, the circumstances of its adoption, and its purpose all may be used to ascertain the common understanding of the voters who adopted it. *See, e g, Citizens Protecting Michigan’s Constitution v Secretary of State*, 503 Mich 42, 62, 75-83, 100-03 & nn 33, 73, 76, 78, 86, 98, 101, 177, 187, 192; 921 NW2d 247 (2018) (consulting treatises, records of the 1907-08 and 1961-62 Constitutional Conventions, 1913 constitutional amendments, and history books).

Finally, there is a special rule of constitutional interpretation when it involves the powers reserved by the people in Article 2, § 9. In *Michigan Farm Bureau v Secretary of State*, 379 Mich 387; 151 NW2d 797 (1967) (*per curiam*), this Court held that there is “an overriding rule of constitutional construction” with regard to the powers reserved to the people in Article 2, § 9. *Id* at 393. That rule requires these powers to “be saved if possible 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.

The application of these rules leads to but one conclusion in this case: nothing in the constitutional text authorizes the Legislature to adopt an initiative proposal and then amend it in

the same legislative session; nothing in the history of this Article 2, § 9 indicates that the voters in 1963 had a “common understanding” that “adopt and amend” was permitted; and the “adopt and amend” scheme is precisely the type of legislative “thwarting” of direct democracy this Court barred in *Farm Bureau*.

III. 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 “common understanding” of voters who adopted it; and decades of this Court’s decisions protecting the people’s reserved constitutional rights of initiative and referendum from legislative evasion. 2018 PA’s 368 and 369 are unconstitutional.

A. The Text of Article 2, §9 Does Not Permit The Legislature to “Adopt and Amend.”

Based on the rules of constitutional interpretation, the analysis begins with a thorough examination of the text of the Michigan Constitution “as a whole” without “nullify[ing] or impair[ing]” any provision. *Lapeer Clerk, supra*, 469 Mich at 156. That examination reveals an extremely limited role for the Legislature in the initiative process, with great care taken by the drafters to tightly cabin the legislative role in several textual ways. The constitutional text is replete with safeguards against legislative subversion of statutory initiatives and it does not countenance “adopt and amend.”

1. Justice Cooley on the People’s Sovereign Right to Exercise Legislative Power.

Long before the Michigan Constitution was amended to expressly reserve the right of statutory initiative to the people, its foundation was established in fundamental principles enunciated by Justice Thomas Cooley in his seminal treatise. He recognized that it is the people

who are sovereign and state legislatures created by the people only have those powers granted by the people:

The American Legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people; and the legislatures which they have created are only to discharge a trust of which they have been made a depository, but with well-defined restrictions.

Cooley, Constitutional Limitations, at 87 (1868).

This principle underlies the text of Article 1, § 1 of the Michigan Constitution that “[a]ll political power is inherent in the people.” Thus 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 State Constitution from the people’s sovereign power.

The people of Michigan have granted the legislative power to the State Legislature. *See* Mich Const 1963, art 4, § 1. However, as this Court long has recognized consistent with Justice Cooley’s analysis, the Legislature’s power to legislate also can be “prohibited. . . by the people through the Constitution of the State.” *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 327; 685 NW2d 221 (2004) (*citing Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW2d 579 (1934)). The power the people give to the Legislature in the text of the State Constitution can also be taken away by the people in the text of the State Constitution.

Justice Cooley’s treatise went on to identify one of the ways in which the people can withdraw the legislative power from a legislature – by voting directly on laws themselves:

The authority of the people is exercised through *elections*, by means of which they select and appoint the legislative, executive, and judicial officers, to whom shall be entrusted the powers of government. *In some cases also they pass upon other questions specially submitted to them, and adopt or reject a measure according as a majority vote for or against it.* It is obviously impossible that the people should consider, mature, and adopt

their own laws; but when a law has been perfected, or *when it is deemed desirable to take the expression of public sentiment upon any one question, the ordinary machinery of elections is adequate to the end, and the expression is easily and without confusion obtained by submitting the law for an affirmative or negative vote.*

Cooley, *supra*, at 598 (emphasis added). The people of Michigan have asserted their historic prerogative to make laws themselves in derogation of the legislative power.

2. The Text of Article 2, § 9 Limits Legislative Power and Grants the Legislature Only Three Express Options Regarding Statutory Initiatives.

The sovereign power of the people of Michigan to vote directly on laws themselves described by Justice Cooley has been exercised in the text of Article 2, § 9:

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). As this Court has recognized, the legislative power the people granted to the Legislature in Article 4, § 1 has been withdrawn by the people in Article 2, § 9 when they reserved the initiative power to themselves. *See Citizens Protecting Michigan's Constitution, supra*, 503 Mich at 59 & n 18 (“the people of Michigan have also reserved the power to propose and enact statutes by initiative”); *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 the powers of the legislature. This reservation of power is constitutionally protected from government infringement once invoked. . .”).

The United States Supreme Court has likewise acknowledged the fundamental right of the people to reserve legislative power. As Chief Justice Burger wrote:

Under our constitutional assumptions, all power derives from the people who can delegate it to representative instruments which they create. *See, e.g.*, The Federalist No. 39 (J. Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.

Eastlake v Forest City Enterprises, Inc, 426 US 668, 672; 96 SCt 2358; 49 LEd2d 132 (1976) (citing authority).

Under Michigan's constitutional structure then, the question here is that given that the people have denied the Legislature any legislative power in the area of initiatives in the first sentence of Article 2, § 9, what, if any, legislative powers have been expressly granted back to the Legislature by the subsequent text of Article 2, § 9?

There are two types of initiative procedures: direct, under which a proposal goes directly to the ballot after satisfying the necessary signature and other requirements, and indirect in which the proposal is presented to the Legislature before going to the ballot. Most state constitutions which provide for statutory initiative give the legislature no role at all in the initiative process. *See, e g*, National Conference of State Legislatures, www.ncls.org/research/elections-andcampaigns/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. The people of Michigan have chosen indirect initiative in their Constitution but have given the Legislature a very limited role in the process.

Under Michigan's indirect initiative process, the Legislature receives an initiated petition after it has been certified for the ballot. The people have granted the Legislature a 40 session-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 and the proposal does not reach the ballot. 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. 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, art 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) (citing authority); OAG, 2011-2012, No 7268, at 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 by the constitutional text to three 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 Blank v Department of Corrections*, 462 Mich 103, 142 & n 14; 611 NW2d 530 (2000) (Markman, J, concurring) (when the voters of Michigan through the Constitution make a limited grant of authority to the Legislature, “the Legislature may do what is specifically set forth . . . and no more . . . [L]anguage couched in an affirmative grant can also reasonably imply a restriction.”) (emphasis original); OAG, 1975-1976, No 4932, at 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 text 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.

Art 2, § 9 (emphasis added). It is a fundamental principle of statutory construction, which generally can be applied to the construction of the Constitution, *see, e g, Detroit Board of Education v Superintendent of Public Instruction*, 319 Mich 436, 447; 29 NW2d 902 (1947), 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, 196; 369 NW2d 839 (1985). 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>* (March 22, 2019). Thus the use of that term precludes the Legislature from altering a legislatively enacted initiative, a “law,” during the same legislative session.

The text of Article 2, § 9 does not grant the Legislature the power to “adopt and amend.”

3. Once Triggered, the Ban on “Adopt and Amend” Remains in Effect for the Balance of the Legislative Session.

The Legislature operates on an annual regular session basis, *see, e g, art 4, § 13*, and the constitutional rules governing its legislative activities are in effect all session long. *See, e g, art 4, § 24* (title object requirements for all bills); § 25 (republication requirement for all bills). Therefore, the ban on “adopt and amend” – a constitutional rule governing legislative activities – is also in effect all session long for an initiated proposal once it is triggered by the presentation of an initiative

petition to the Legislature.

4. A Legislative Veto in the Initiative Process Was Removed Long Ago From the Text of the Michigan Constitution.

If the Legislature can “adopt and amend” a proposal in the same session because that is within its legislative power it can also “adopt and repeal” a proposal. The Legislature here has so asserted. *See* Reply Brief at 9 n 2. “Adopt and repeal” is nothing more than a legislative veto of an initiative. However, the legislative veto in the initiative process was long ago removed from in the text of the Michigan Constitution.

In Article 17, § 2 of the 1908 Constitution as ratified, the Legislature had the extraordinary power to block or veto a voter–initiated constitutional amendment from being voted on:

Amendments may also be proposed to this constitution by petition of the qualified electors of this state . . . All petitions for amendments filed with the secretary of state shall be certified by that officer to the legislature at the opening of its next regular session; and, when such petitions for any one proposed amendment shall be signed by not less than the required number of petitioners, he shall also submit the proposed amendment to the electors at the first regular election thereafter, *unless the legislature in joint convention shall disapprove of the proposed amendment by a majority vote of the members elected.*

(emphasis added); *see* Address to the People, Const 1908 art 17, §§ 2 and 3, at 64. This power of the Legislature to veto a constitutional amendment was removed by a 1913 constitutional amendment. *See* Const 1908 art 17, § 2 (as amended in 1913). No legislative veto in any aspect of the Michigan initiative process has existed since. *See* Citizens Research Council of Michigan, *A Comparative Analysis of the Michigan Constitution, Volume I (Article V)* at v-5 (October, 1961) (stating that there was no legislative veto of a statutory initiative under the 1908 Constitution).

Allowing the Legislature to “adopt and amend or repeal” will resurrect the legislative veto rejected by the people over 100 years ago and not allowed since. *Compare* *Citizens Protecting Michigan’s Constitution, supra*, 503 Mich at 73 (“in light of [the removal of legislative veto over

constitutional amendments in 1913], we should be wary of finding atextual limitations on voter-initiated amendments”). Reading into Article 2, § 9 legislative authority to “adopt and amend or repeal” would be just such an improper “atextual limitation” on the people’s power of statutory initiative.

5. Article 2, § 9 is Self-Executing Precluding Legislative Obstruction of Its Operation.

Yet another textual means by which the drafters who crafted Article 2, § 9 and the voters who approved it demonstrated their desire to limit the legislative role was by making it self-executing.

After a lengthy recital of the history and purposes of Article 2, § 9 the Court of Appeals in *Wolverine Golf Club v Secretary of State*, 24 Mich App 711; 180 NW2d 820 (1970), *aff’d*, 384 Mich 461; 185 NW2d 392 (1971), concluded that it was self-executing to protect it from “legislative encroachment”:

We view the term “self-executing” to be more than an after-the-fact description of the operative effect of the constitutional provision. *It is a term intended to cloak the provision with the necessary characteristics to render its express provisions free from legislative encroachment.* And this is so irrespective of the implementing provision contained therein.

Id at 728-29 (emphasis added). This Court has since reaffirmed that Article 2, § 9 is self-executing. *See Woodland, supra*, 423 Mich at 213. This is yet another textual demonstration that the Legislature may not “encroach” on the people’s power of initiative by going beyond its “express provisions” here, the three express options it has for handling an initiative proposal.

6. The Absence of the Phrases “Protected by Law” or Even “Prescribed by Law” Further Demonstrate Very Limited Legislative Authority Under Article 2, § 9.

As observed by this Court in *Beach Grove Investment Company, supra*, the term “provided by law” when used in the 1963 Constitution empowers the Legislature to completely implement a constitutional provision while the phrase “prescribed by law” gives the Legislature a more limited

implementation role. 380 Mich at 418-19.

Notable here is that *neither phrase* is found in Article 2, § 9 again signaling a very circumscribed role for the Legislature in the initiative process. That role is defined quite narrowly by the last sentence of § 9 allowing for “implementation” by the Legislature, a subordinate role given the strict reading it was given in *Wolverine Golf Club, supra*, and *Woodland, supra*.

7. Article 2, § 8 is Instructive on the Limited Legislative Powers Under Article 2, § 9.

As demonstrated above the drafters of Article 2, § 9 and its 1913 predecessor used every textual opportunity – by inclusion and omission of text – to firmly circumscribe the power of the Legislature in the initiative sphere to three options.

To illustrate the extent of that circumscription, a comparison to the text of the other direct democracy provision of the Michigan Constitution – Article 2, § 8 on recall – is illuminating:

Laws shall be enacted to provide for the recall of all elective officers except judges of courts of record upon petition of electors equal in number to 25 percent of the number of persons voting in the last preceding election for the office of governor in the electoral district of the officer sought to be recalled. The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question.

That’s it – a single short paragraph with only three broad substantive requirements – judges are excluded, a petition signature requirement is set, and the reasons for a recall are outside judicial power. Everything else shall be “provide[d] for” by the Legislature giving it “the entire job of implementation.” *Beach Grove Investment Company, supra*, 380 Mich at 418-19.

The text of Article 2, § 8 and its broad empowerment of the Legislature vividly demonstrates the confined role of the Legislature in Article 2, § 9.

8. The Legislature Has Several Constitutional Options for Proposals It Opposes.

This textual interpretation of Article 2, § 9 which forbids “adopt and amend” does not leave

the Legislature or opponents of an initiated proposal without options if the Legislature opposes or prefers an alternative to the proposal. There are at least four such options in the text of the Constitution.

First, the Legislature can place a countermeasure on the ballot for the people to consider together with the proposal as allowed in Article 2, § 9. 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 and again in 1996 with Proposals D and G, and could have used it here. Third, members of the Legislature and other opponents of the proposal can work to defeat it at the polls. Finally, Article 2, § 9 allows a referendum to be undertaken over an initiated law adopted by the Legislature. *See, e g, Wolverine Golf Club, supra*, 24 Mich App at 717 (1948 initiative adopted by Legislature subjected to referendum); Ellett, *The Government of Michigan* 22 (Allyn and Bacon, 1936) (“The referendum is a balance for the initiative. In this way forced legislation started by an active minority can be checked.”).

A hostile Legislature and other opponents of an initiated proposal thus have ample constitutional alternatives to the unconstitutional shortcut of “adopt and amend.” The Legislature knows how to use them and the Legislature has used them to successfully defeat proposals it dislikes. What the alternatives have in common is that they *all involve the use of direct democracy*.

That is further evidence that the drafters of Article 2, § 9 did not create any *legislative* mechanism which could be used to sabotage the initiative process – if the Legislature opposes an initiative proposal it is required by the State Constitution to fight on equal footing with its proponents - before the voters of Michigan. The proper constitutional path for the Legislature here was to place the bills which became PA’s 368 and 369 on the ballot alongside the initiated proposals *for the voters to decide* whether they preferred the original proposals or those alternatives. Fearful of the voters – fearful of the Legislature’s own sovereign – the Legislature instead chose to

unconstitutionally bypass the voters. That cannot stand.

B. The Voters Who Adopted The 1963 Constitution Did Not Have a “Common Understanding” That It Allowed “Adopt and Amend.”

There is no evidence in the text or history of Article 2, § 9 that the voters in 1963 had any idea let alone a “common understanding” that it included “adopt and amend” as the history of that provision reveals.

1. The 1908 Michigan Constitution.

Neither the 1835 or 1850 Constitution had a statutory initiative procedure. But Michigan was not immune to the national unrest in the late 19th and early 20th Centuries over unresponsive and corrupt state legislatures. As one delegate to the 1907 Constitutional Convention put it:

The trouble is not with the representative government, it is with this eternal mis-representative government . . .

1 Proceedings and Debates of the Constitutional Convention of the State of Michigan 1907-08 at 590 (remarks of Delegate Pratt).

This sentiment had deep roots:

National Roots

Associated with the Progressive Movement, the roots of the voter initiative in United States are found in the 1880s and 1890s when dissatisfaction with close relationships between legislative bodies and various interests, including railroads and utilities, and frustration in achieving legislative support for proposed reforms led *a number of citizens to form organizations aimed at promoting a means of circumventing those elected bodies to achieve legislative goals. The means chosen was the voter initiative*, which, together with the referendum and recall, was expected to give citizens the tools to hold their elected representatives to account.

In 1898, South Dakota became the first state to amend its constitution to provide for the initiative and the referendum. Four years later, Oregon did the same thing and, over the following decade, 13 more states, including Michigan, followed suit.

Early Michigan Experience

...

Movement in Michigan toward adoption of the initiative began in the mid-1890s with the formation of the Direct Legislation Club, which, with the support of Detroit mayor and later Michigan governor, Hazen S. Pingree, pushed for the voter initiative to facilitate adoption of a reform agenda. Their efforts did not meet with success until adoption of the 1908 Constitution, which contained a provision for the initiative that was, however, so restrictive that ever using it was doubtful.

Citizens Research Council of Michigan, *Amending the Michigan Constitution: Trends and Issues* 2 (March, 2010) (emphasis added); *see also* McHargue, *Direct Government in Michigan: Initiative, Referendum, Recall, Amendment, and Revision in the Michigan Constitution* at 21-22 (Constitutional Convention Preparatory Commission, 1961); *Hamilton v Secretary of State*, 227 Mich 111, 130; 198 NW 843 (1924). The initiative procedure referred to in the CRC report allowed only the Legislature to place issues or constitutional amendments on the ballot; it was not statutory initiative by citizen petition. *See* Const 1908, art 5, § 38 (as ratified); art 17, § 2 (as ratified); McHargue, *supra*, at 22; Dunbar and May, *Michigan, A History of the Wolverine State* 446 (3d ed 1995).

2. The 1913 Constitutional Amendment Creating Statutory Initiative.

Not satisfied with the 1908 Constitution, reform efforts to amend it to include statutory initiative by petition began after its adoption. *See* McHargue, *supra*, at 22-23. A scholar of this era observed:

There has been no more striking phenomenon in the development of American political institutions during the last ten years than the rise to prominence in public discussion, and consequently to recognition upon the statute book, of those so termed newer weapons of democracy – the initiative [and the] referendum

Munro, *The Initiative, Referendum and Recall* (1913). Another contemporary scholar put it more bluntly:

The American people despise legislatures, not because they are averse to

representative government, but because legislatures are in fact despicable.

Ford, *Direct Legislation and Recall*, 43 *Annals of the American Academy of Political and Social Science* 65, 72 (1912).

In Michigan 1912 witnessed the election of a reform Governor and reform Legislature whose priorities included amending the 1908 Constitution to provide for statutory initiative by petition. In his January 2, 1913 Message to the Legislature, new Governor Woodbridge Ferris referenced the popular pressure for reform and he endorsed statutory initiative and referendum by petition among other reform proposals. The hostility to the legislative process was palpable in his Message:

We are entering upon a new era of statecraft. A general awakening is in process of evolution. The people are coming to feel with force the time borrowed quotation, “A Government of the people, by the people and for the people . . .” Most of the measures that I shall recommend have commanded the attention of the people for at least a decade

...

INITIATIVE AND REFERENDUM

In order that the people may rule it is essential that they be given the proper tools to work with so that they may attain their own salvation. *The most important of these measures is the initiative and referendum.* This system has been adopted by nearly one third of the states in the union, but in one half of these the system is ineffective because of some “joker” inserted in the amendment. A constitutional amendment should be submitted providing for the initiative and referendum. Of all the states, Oregon has had the initiative and referendum the longest. It has been in operation there for over ten years and during that time the people have initiated or referred over one hundred measures by popular vote. The percentage of petition signers is reasonable and the amendment is self-executing. I suggest that it be adopted without any substantial change. Its operation after a series of years has been so satisfactory, that after ten years the people voted down the attempt to repeal it by an overwhelming majority.

1913 House Journal at 26-27 (emphasis added). Of the many reform proposals he urged that day, Governor Ferris placed initiative in the top five. *See id* at 35.

Resolutions placing a constitutional amendment creating statutory initiative on the ballot quickly were introduced, amended, debated, and received final passage in March, 1913 as Concurrent Resolution No. 4. *See, e g*, 1913 Senate Journal at 812-18; 833-40; Dunbar and May, *supra*, at 452; 1999-2000 Michigan Manual at 16.

That proposed constitutional amendment was to Article 5 of the 1908 Constitution, the legislative article, and it stated in relevant part:

SECTION 1. The legislative power of the State of Michigan is vested in a senate and house of representatives; *but the people reserve to themselves the power to propose legislative measures, resolutions and laws; to enact or reject the same at the polls independently of the legislature; and to approve or reject at the polls any act passed by the legislature, except acts making appropriations for State institutions and to meet deficiencies in State funds. The first power reserved by the people is the initiative.* At least eight per cent of the legal voters of the State shall be required to propose any measure by petition: *Provided*, That no law shall be enacted by the initiative that could not under this constitution be enacted by the legislature. Initiative petitions shall set forth in the full proposed measure, and shall be filed with the Secretary of State not less than ten days before the commencement of any session of the legislature. Every petition shall be certified to as herein provided as having been signed by qualified electors of the State equal number to eight percent of the total vote cast for all candidates for governor at the last preceding general election, at which a Governor was elected. Upon receipt of any initiative petition, the Secretary of State shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors, and if the same has been so signed, the Secretary of State shall transmit such petition to the legislature as soon as it convenes and organizes. *The law proposed by such petition shall be either enacted or rejected by the legislature without change or amendment within forty 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 any law so petitioned for be rejected, or if no action is taken upon it by the legislature within said forty days, the Secretary of State shall submit such proposed law to the people for approval or rejection at the next ensuing 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 or nay vote upon separate roll calls, and in any such event both measures shall be submitted by the Secretary of State to the electors for approval or rejection at the next ensuing general election.*

1913 Concurrent Resolution No. 4 (emphasis added). The amendment was adopted in an April 7, 1913 statewide vote by 219,057 to 152,388, a margin of nearly 60% to 40%. *See* 1939 Michigan Manual at 55.

In this amendment the people limited the legislative power of the Legislature when they expressly

reserve[d] to themselves the power to propose legislative measures, resolutions and laws; [and] to enact or reject the same at the polls independently of the legislature; . . . The . . . power reserved by the people is the initiative.

1908 Const art 5, § 1 (as amended). From the reservation of their power of initiative, the people expressly granted *back* to the Legislature only 3 options in regard to an initiative. After the Legislature received an initiative petition during a legislative session, the people granted it a 40-day temporal window 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. 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. *See id.*

In developing this amendment, Michigan was the beneficiary of the experience with statutory initiative and referendum in 11 states beginning with South Dakota in 1898. *See* Galbreath, *Provisions for State-Wide Initiative and Referendum*, 43 *Annals of the American Academy of Political and Social Science* 81, 86-106 (1912) (summarizing developments from 1898 to 1912). Many elements in the amendment were similar to Oregon as Governor Ferris urged but with the indirect method of initiative from California included.

A contemporary description of California's indirect initiative says nothing about a legislature's ability to "adopt and amend:"

When a proposed law is submitted through the indirect initiative to the legislature, that body may enact it without change. If this is not done the proposed law must be submitted to the electors, but the legislature may submit at the same election a competing measure of similar character.

Galbreath, *supra*, at 106. Allowing the Legislature to have a limited role in the initiative process created several benefits for the Michigan reformers and the voters, benefits not available through the direct initiative process which had no legislative role:

1. An initiative could become law sooner and without the cost or risk of an election campaign;
2. It provides legislative feedback to the proponents;
3. Legislative consideration educates the public through committee hearings and staff analysis; and
4. It creates two opportunities for the initiative to be enacted – by a legislative vote or by a vote of the people.

See 2 Official Record, Constitutional Convention 1961-62 at 2394 (remarks of Delegate Downs) (Michigan’s indirect initiative “give[s] the legislature a chance to review what was done,” including holding hearings); *id* at 2395 (remarks of Delegate Kuhn) (the Legislature has the opportunity to adopt a proposal which “looks like it is going to be good”); Stern, *California Should Return to the Indirect Initiative*, 44 Loyola of Los Angeles L Rev 671, 680 (2011) (discussing the benefits of indirect initiative).²

Thus, the limited role for the Legislature in the initiative process was intended to *assist* a proposal’s supporters and the voters, *not* open the door to legislative sabotage as occurred here. Until 2018, the process worked as intended. Proponents of several petitions since 1963 have had their petitions enacted by the Legislature without same session amendment giving them quicker and less costly success than an election campaign would have entailed, exactly what the voters and the original reformers and drafters of the indirect initiative process intended in 1913. *See, e.g.*, 1987 PA 59; 2006 PA 325; 2014 PA 281.

No voter voting on the 1913 constitutional amendment would have had any inkling let alone

² Although it was a pioneer of indirect initiative California repealed it in 1966.

a “common understanding” that it allowed “adopt and amend.” Allowing such legislative evasion would have been completely contrary to the reform sentiment of the era and the purposes of indirect initiative.

3. The 1941 Constitutional Amendment.

In 1941, this section of the 1908 Constitution was amended to allow election officials additional authority to review the petition process for accuracy, but there were no substantive changes relevant here. *See* Citizens Research Council of Michigan, *A Comparative Analysis of the Michigan Constitution, Volume I (Article V)* at v-4 to -5 (October, 1961). McHargue, *supra*, at 23-24.

4. The 1961-62 Constitutional Convention.

In preparation for the 1961-62 Constitutional Convention reports were prepared on the entire 1908 Constitution. *See, e g, id.* In none of those reports was there any reference to the Legislature being able to “adopt and amend” in the same legislative session. The reports consistently referred to only the 3 legislative actions described: adopt the proposal, reject it, or reject it and submit an alternative for the ballot. *See, e g, id* at v-5, *McHargue, supra*, at 19.

The Constitutional Convention Record does not demonstrate that the delegates intended to give the Legislature another option beyond the three expressly provided for in the 1908 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 1961-62, at 2394. Delegate Kuhn agreed with

Delegate Downs’ interpretation:

[W]hat are the rights of the legislature after the people start this petition and have the 10 percent [sic]³ of the people who voted for governor? They must accept it within 40 days and accept it in toto, or they must place it on the ballot.

³ Delegate Kuhn misspoke. Statutory initiative has an 8 percent signature requirement.

Id. 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.

Address to the People, id at 3367.

The Constitutional Convention Record does not demonstrate that the delegates gave the Legislature an “adopt and amend” option beyond the three options during the 40-day window expressly provided in the 1908 Constitution. Instead, a review of the entire 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. *See also* Part III.D.2., *infra* (responding to the Legislature’s counter-argument here based on a single remark by Delegate Kuhn).

The 1961-62 Constitutional Convention’s Address to the People also reaffirmed that the delegates made no substantive change from the 1913 Constitution relevant here – they only eliminated language of a statutory nature and moved the initiative and referendum provision from the legislative article to the elections article at Article 2, § 9:

ADDRESS TO THE PEOPLE

EXPLANATORY NOTE

Words printed in *italics* in the revised or new sections of the document indicate the insertion of new matter. The use of stars, thus ***, indicates the omission of words contained in the present constitution.

...

“Article II ELECTIONS

...

Initiative and referendum

Sec. 9. *** 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.* *** *The power of*

*referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. *** 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.*****

*No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the ** electors voting thereon at the next general election.*

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. *****

*Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. ** 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. *****

The legislature shall implement the provisions of this section.”

This is a revision of Sec. 1, Article V, of the present constitution

eliminating much language of a purely statutory character. The new wording specifically reserves the initiative and referendum powers to the people, limits them as noted, and requires signatures equal to at least eight percent of the electors last voting for governor for initiative petitions and at least five percent for referendum petitions.

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

No laws initiated or adopted by the people can be vetoed; and no law initiated and adopted by them can be amended or repealed except by a vote of the people unless otherwise provided in the initiative measure, or by three-fourths of the members in each house of the legislature. Laws adopted under the referendum provision can be amended or repealed by the legislature at any subsequent session.

Matters of legislative detail contained in the present section of the constitution are left to the legislature. The language makes it clear, however, that this section is self-executing and the legislature cannot thwart the popular will by refusing to act.

...

“Article IV LEGISLATIVE BRANCH

Legislative power, where vested.

Sec. 1. The legislative power of the State of Michigan is vested in a senate and a house of representatives. ****”

No change from the first clause of Sec. 1, Article V, of the present constitution. The remaining language of the existing section is revised and transferred to Article II (Elections) since it relates to the initiative and referendum.

Address To the People at 12, 17, 20-21, 24, reprinted in 2 Official Record, Constitutional Convention 1961-62 at 3363, 3365, 3367, 3369; see also 2 Official Record, Constitutional Convention 1961-62 at 2392 (similarly describing the changes).

5. The Campaign to Adopt the 1963 Constitution.

After the Convention concluded, explanatory materials were published to aid voters in

understanding the proposed Constitution. Those materials made clear that while some changes were made to the initiative power including some “new features,” there was no mention of an existing or a new legislative power to “adopt and amend”:

ELECTIONS

Many of the provisions on elections were altered by the convention in framing the proposed constitution. The provisions for the popular initiative by petition for statutes and for popular referendum by petition on laws enacted by the legislature were transferred from the legislative article to the elections article.

...

Major Changes

6. Changes are made in the initiative and referendum for statutes: detail deleted; amendment of initiated laws by a three-fourths vote of legislature allowed; law given immediate effect made subject to referendum.

...

Initiative and Referendum for Statutes

The provisions on the popular initiative by petition for laws and on popular referendum by petition for laws enacted by the legislature were shifted from the legislative article in the present constitution to the elections article in the proposed constitution. Much of the procedural and other detail was deleted, but the provisions remain self-executing.

The number of signers required for an initiatory petition remains eight percent - and for a referendum petition five percent – of the total number of votes for governor at the preceding general election. Use of the referendum with respect to appropriation acts continues to be prohibited. The provisions on the referendum may be invoked against an act given immediate effect which would then be suspended until approved or rejected by the voters.

An initiated measure remains immune from the governor’s veto. An initiated law cannot be amended or repealed except by a vote of the electors unless otherwise provided in that law, or by three-fourths vote of the members elected to and serving in each house of the legislature. Such amendment or repeal by the three fourths legislative vote is a new feature. The legislature continues to be permitted to amend any law approved by the people under the referendum procedure.

Citizens Research Council of Michigan, *An Analysis of the Proposed Constitution* at 4, 6 (No 2, December 17, 1962).

Consistent with the constitutional text since 1913 and all of the materials explaining the meaning of that text, there is no mention whatsoever of a legislative power to “adopt and amend” in any of the public records before, during, or after the 1961-62 Constitutional Convention. There is no evidence the voters who voted on the initiative provisions of the proposed 1963 Constitution had the “common understanding” that the Legislature had the extraordinary power to “adopt and amend” a proposal in the same legislative session.

6. Contemporaneous Construction of the 1963 Constitution and Legislative Acquiescence Weigh Against “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); Cooley, *supra*, at 67 (“a practical construction, which has been acquiesced in for a considerable period” has “a plausibility and force which it is not easy to resist”).

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 not subject

to amendment 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). The Attorney General’s Opinion was correct for the legal reasons detailed in Part III.A., *supra*.

For 54 years the Legislature followed and acquiesced in Opinion No. 4303 and did not violate its stricture against “adopt and amend” despite many opportunities to do so, During that period there were 7 statutory initiative proposals which the Legislature adopted without amendment during the same session. There were 14 statutory initiative proposals which the Legislature could have “adopted and amended” but instead took no action, meaning they went to the voters including 2 proposals which had legislative counter-proposals. *See* https://www.michigan.gov/documents/sos/Initia_Ref_Under_Consti_12-08_339399_7.pdf. 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).

7. Conclusion: The Voters had No “Common Understanding” That Article 2, § 9 Permitted “Adopt and Amend.”

Nothing in the text or history of Article 2, § 9 and its predecessors, its purposes, or the circumstances of its adoption and implementation demonstrates that the voters who ratified the 1963 Constitution could possibly have had a “common understanding” that the Legislature could “adopt and amend” an initiated law in the same legislative session.

C. Michigan Supreme Court Decisions Protect the Peoples’ Reserved Direct Democracy Powers and Prevent Thwarting 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 history of that section dating to 1913, and the “common understanding” of the voters who adopted it in 1913 and 1963, 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. In that contemporaneous construction of the Constitution, *see, e.g., Advisory Opinion, supra*, this Court described the scheme it was asked to allow: 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 by refusing to interpret Article 2, § 9 to allow it. *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 repeal them entirely. Indeed, in its Reply Brief the Legislature asserted that it would have been “within its rights to completely repeal” 2018 PA’s 337 and 338. *See* Reply Brief at 9 n 2.

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 or repeal” scheme here would allow the Legislature to “thwart,” and “outright . . . defeat,” *id* at 394-95, the right of initiative by adopting every initiated law with which it is presented and then proceed to repeal or 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 or repeal” 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 *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 “stretch[ed]” 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 its history.

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, supra*, 423 Mich at 215 (“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.”

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 & n 33. 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 beginning with the authoritative *Farm Bureau* case by allowing the Legislature to “thwart,” and “outright . . . defeat” the right of statutory initiative.

D. The Legal Arguments of the Legislature, Restaurant and Lodging Association, Small Business Coalition, and the Attorney General Are Fundamentally Flawed.

The Michigan Legislature, Michigan Restaurant and Lodging Association and Small Business for a Better Michigan Coalition, and the portion of the Attorney General’s office briefing this side of the legal issues (hereinafter collectively, “the Legislature”) make a handful of arguments in support of the unprecedented “adopt and amend” scheme.

All are flawed.⁴

1. The Legislature Does Not Have Plenary Power in the Initiative Sphere Only the Power Granted By the People.

Their principal argument (on the “dispositive question”) 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 (Article 2, § 9 “imposes only two restraints on the Legislature”), 13 (focusing on “limitations on the Legislature”).

That argument improperly turns the Michigan constitutional structure on its head by ignoring the very first sentence of Article 2, § 9 in which the “people reserve to themselves” the lawmaking power, thereby limiting the Legislature’s role. As detailed *supra* under the Michigan Constitution the issue here is whether the people *granted* to the Legislature from their reserved initiative power the authority to “adopt and amend” during the same legislative session, 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 under Article 4 – including to

⁴ All of the briefs make the same arguments so references here are to the Legislature’s briefs. The Legislature did not file a brief as allowed by this Court’s April 3, 2019 Order so all references are to the briefs it filed in March.

“adopt and amend” a non-initiated law in the same session – its power to legislate is sharply limited 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. As Justice Markman stated in *Blank, supra*, when the Michigan Constitution makes a limited grant of authority to the Legislature, “the Legislature may do what is specifically set forth . . . *and no more . . .*” 462 Mich at 142 (Markman, J, concurring) (emphasis original).

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.”

In its search for limits on the legislative power rather than the proper search for grants of legislative power, 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, somehow inferring that gives the Legislature *carte blanche* to “adopt and amend” an initiated law it enacted at any time. *Id* at 15-16. This illogical leap disregards the intent of the drafters and voters who ratified the 1963 Constitution. First, 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 in the current session: 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 for a referred law occurs in a “subsequent session.” Moreover, the inclusion of language expressly allowing a referred law to be amended at a subsequent session was also intended to ensure that such laws were not placed on the “higher plane” accorded laws adopted by the people in the preceding sentence under which such laws require a note of the people or a three-fourths majority vote of the Legislature to be amended.

2. The Comment of One Delegate in the Constitutional Convention Record Does Not Support “Adopt and Amend.”

The Legislature also seeks succor in the Constitutional Convention Record. *See* Legislature Brief at 18-20. It seizes upon a single statement by Delegate Kuhn in the Constitutional Convention Record to argue that the delegates intended to allow the Legislature to “adopt and amend.” His statement does not do so for several reasons.

First, it has been taken out of context. Delegate Kuhn’s cited statement was in response to a question from Delegate Wanger about what happens to an initiated law after it is adopted by the people in comparison to a referendum. Kuhn was not asked and was not addressing the Legislature’s ability to “adopt and amend” an initiated law during the same legislative session. The entire exchange is 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 1961-62, at 2395. Not only is Kuhn's remark about "full control" and amending taken out of context but it is not clear what time frame he was even referring to – same session, next session, or some other time period?

Moreover, later in the Constitutional Convention Record Delegate Kuhn demonstrates 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.

Second, even if Delegate Kuhn's remark is found to be supportive of an "adopt and amend" option, which it is not, the statement of one delegate is not controlling and cannot be

used to contradict the express language of Article 2, § 9. As this Court stated in *University of Michigan Regents v Michigan*, 395 Mich 52, 59; 235 NW2d 1 (1975):

The debates must be placed in perspective. They are individual expressions of concept as the speakers perceive them (or make an effort to explain them). Although, they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures.

There is a final reason not to credit Delegate Kuhn for an expansive interpretation of the Legislature's role in Article 2, § 9. The Convention Record indicates that he personally was not a supporter of the right of initiative:

We want to make it tough. It should not be easy. The people should not be writing laws. That's what we have a senate and house of representative for.

2 Official Record, Constitutional Convention 1961-62, at 2394. Just as dissenting legislators do not determine the meaning of a law, *see, e g, Fieger v US Attorney General*, 542 F3d 1111, 1119 (CA6, 2008), so, too, should a single skeptic of the people's constitutional right of initiative not determine the meaning of Article 2, § 9.

3. The Case Law Cited by the Legislature is Inapposite and Its Effort to Distinguish *Farm Bureau* Unpersuasive.

In its Reply Brief (at 8-10) the Legislature tries to distinguish *Farm Bureau*, *supra*, desperate to avoid its unquestioned injunction that the power of the people under Article 2, § 9 must "be saved as against conceivable if not likely evasion or parry by the Legislature." The Legislature does not dispute *Farm Bureau*'s holding or that it remains a valid precedent of this Court which has been relied upon for decades. And, with the Legislature's assertion that it can "adopt and repeal," *see* Reply Brief at 9 n 2, *Farm Bureau* cannot be distinguished on any principled basis. Its holding applies here and prohibits "adopt and amend or repeal."

The principal legislative brief (at 20-22) argues that a handful of decisions require the

application of Article 4 to Article 2, § 9. However, all those cases did was fill some gaps as to petition requirements in Article 2, § 9 by analogy to Article 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 have a title and 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 sheds no light on the question of whether an initiated petition can be amended in the same legislative session as it was adopted.

CONCLUSION AND RELIEF SOUGHT

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. The Court should so opine.

Respectfully submitted,

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