STATE OF MICHIGAN
MICHIGAN SUPREME COURT

In re Requests for Advisory Opinion Regarding 2018 PA 368 and 2018 PA 369	Supreme Court Nos. 159160, 159201

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BRIEF OF REP. CHRISTINE GREIG, REP. YOUSEF RABHI, AND 60 OTHER MEMBERS OF THE HOUSE AND SENATE OPPOSING THE CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369

ORAL ARGUMENT REQUESTED

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JURISDICTION

Because the Michigan House and the Michigan Senate timely requested an advisory opinion on the constitutionality of 2018 PA 368 and 2018 PA 369, this Court has jurisdiction pursuant to Const 1963, art 3, § 8 and MCR 7.303(B)(3).

QUESTIONS PRESENTED

In its April 3, 2019, order, this Court invited "the House of Representatives and the Senate, and any member of either chamber, to file briefs" on the questions listed below. This brief is filed on behalf of 62 members of the House and Senate who believe that the lame-duck Legislature violated the Constitution when it enacted 2018 PA 368 and 2018 PA 369. (The legislators joining this brief are listed in the Appendix.)

The questions presented are:

1. Whether the Court should exercise its discretion to grant the requests to issue an advisory opinion in this matter?

   Our answer: Yes.

2. Whether art 2, § 9 of the Michigan Constitution permits the Legislature to enact an initiative petition into law and then amend that law during the same legislative session?

   Our answer: No.

3. Whether 2018 PA 368 and 2018 PA 369 were enacted in accordance with article 2, § 9 of the Michigan Constitution?

   Our answer: No.

CONSTITUTIONAL PROVISIONS INVOLVED

Const 1963, art 2, § 9 provides:

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.

INTRODUCTION

The defenders of PA 368 and 369 purport to rely on the Constitution's "plain language," "plain text," or "plain meaning." *E.g.*, AG May 15 Br 2, 15, 26, 28, 30; Legislature Mar 27 Br 2, 3, 5; Legislature Mar 5 Br 11, 12, 13, 14, 15, 20. But their repeated invocations of these and similar phrases cannot obscure one key fact: They cannot point to a ***single provision of the Constitution*** that purports to permit the Legislature to adopt a voter-initiated statute into law and then, in the same session, eviscerate it by amendment. Instead, they are forced to rely on constitutional silence—the absence of any provision explicitly forbidding the action challenged here. As *Amici* One Fair Wage *et al.* have demonstrated, that argument disregards the strongest interpretation of the constitutional text. See Michigan One Fair Wage Mar 22 Br 7-8. But even if one treats the Constitution as silent on the matter, the defenders' argument fails.

This case deals with a power the people of Michigan explicitly reserved to themselves in the Constitution—the power to propose and enact laws through the initiative. As this Court recently recognized, the people reserved this power specifically because they distrusted the Legislature. *Citizens Protecting Michigan's Constitution v. Sec'y of State*, 503 Mich 42, 62–63; 921 NW2d 247, 254 (2018). For that reason, this Court has established that the constitutional powers of direct democracy should be interpreted in a way that prevents "conceivable if not likely evasion or parry by the legislature." *Michigan Farm Bureau v. Sec'y of State*, 379 Mich 387, 393; 151 NW2d 797, 800 (1967) (*per curiam*). See also *Ferency v. Sec'y of*

State, 409 Mich 569, 601; 297 NW2d 544, 557 (1980) ("This Court has a tradition of jealously guarding against legislative and administrative encroachment on the people's right to propose laws and constitutional amendments through the petition process."); *Kuhn v. Dep't of Treasury*, 384 Mich 378, 385; 183 NW2d 796, 799 (1971) ("[U]nder 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.").

In the face of the bedrock principle that the people's power of direct democracy must be preserved, the argument pressed by the defenders of PA 368 and 369 cannot succeed. By enacting a voter-proposed initiative into law, and then adopting amendments gutting that same initiative during the same session, the Legislature "evad[ed] or parr[ied]" the people's reserved power in a way that was not merely "conceivable" or "likely." Cf. *Michigan Farm Bureau*, 379 Mich at 393. The evasion was clear and present. Constitutional silence is insufficient to support an action that does such violence to the constitutional structure. And silence is the most the defenders of the adopt-and-amend scheme can show.

This Court should accordingly issue the requested advisory opinion and conclude that 2018 PA 368 and 2018 PA 369 are unconstitutional.

FACTS

In September 2018, the Legislature voted to adopt two statutes that had been proposed by initiative petition. The first, 2018 PA 337 (the Improved Workforce Opportunity Wage Act), eliminated the subminimum wage for tipped workers, raised

the minimum wage to $12 per hour by 2022, and indexed the minimum wage to inflation thereafter. The second, 2018 PA 338 (the Earned Sick Time Act), entitled workers to earn an hour of paid sick time for every 30 hours they worked. Because the Legislature voted to adopt these initiatives within 40 session days after it received their petitions, they became law without the Governor's signature and were removed from the November 2018 ballot. Const 1963, art 2, § 9.

When the Legislature voted to adopt the two initiatives into law, numerous reports suggested that the majority party's plan was to remove them from the ballot and then declaw them during the lame-duck session following the election. See, *e.g.*, Kathleen Gray, *Michigan's OK of Minimum Wage Hike, Paid Sick Leave Has a Big Catch*, Detroit Free Press, Sept 7, 2018; Jonathan Oosting & Beth LeBlanc, *Michigan GOP Lawmakers Adopt Minimum Wage, Sick Leave Plans with Aim to Amend*, Detroit News, Sept 5, 2018; Lindsay VanHulle, *Michigan Legislature Passes Minimum Wage, Paid Sick Leave Bills to Avert Ballot*, Bridge, Sept 5, 2018.

And that is exactly what happened. During the lame-duck session, the Legislature adopted 2018 PA 368, which amended the Improved Workforce Opportunity Wage Act, and 2018 PA 369, which amended the Earned Sick Time Act. These amendments effectively gutted the initiatives adopted in September. Where Public Act 337 provided for a minimum wage that increased to $12.00 by January 1, 2022, Public Act 368 pushes back the schedule so that the minimum wage does not reach that level until 2030 at the earliest. See MCL 408.934(1)(q). Where Public Act 337 eliminated the subminimum wage for tipped workers by 2024, Public Act 368

continues the subminimum wage indefinitely. See MCL 408.934d. And where Public Act 337 indexed the minimum wage to inflation after it reached the $12.00 level, Public Act 368 eliminates any inflation adjustment. As for the sick time initiative, Public Act 369 makes the following changes from Public Act 338: The new law significantly cuts back on the amount of paid leave an employee may accrue (from 72 to 40 hours per year), see MCL 408.963; it excludes large categories of workers from the benefits of the statute, see MCL 408.962(e); it excludes employers with fewer than 50 employees (the original initiative applied to any employer with at least one employee), see MCL 408.962(f); and it reduces the circumstances in which an employee can use paid leave under the statute, see MCL 408.964.

ARGUMENT

I. The Court Should Grant the Requests to Issue an Advisory Opinion

As the many briefs filed in this matter attest, this is a "solemn occasion[]" presenting "important questions of law." Const 1963, art 3, § 8. As we show below, the questions are important, because the people's reservation of the initiative power was a key pillar of the Constitution, and the adopt-and-amend scheme threatens to render that power impotent. And there is a "serious and unusual urgent need" for this Court to answer the questions, 1 Official Record, Constitutional Convention 1961, p 1543, because workers and employers throughout the state need to know their rights and responsibilities and plan their affairs. The delay and uncertainty inherent in waiting for case-by-case litigation will impose substantial costs on Michigan businesses at the same time as it denies workers the protections they rightfully obtained through the initiative process.

II. Because Article II, Section 9 Does Not Permit the Legislature to Enact an Initiative Petition Into Law and Then Amend it During the Same Legislative Session, 2018 PA 368 and 369 are Unconstitutional

A. Constitutional Silence or Ambiguity Does Not Permit the Legislature to Undermine the People's Reserved Powers of Direct Democracy

"Our Constitution is clear that '[a]ll political power is inherent in the people.'" *Citizens Protecting Michigan's Constitution*, 503 Mich at 59, quoting Const 1963, art 1, § 1. It was the people, and not the legislature, who adopted the Constitution. As a result, the Constitution must be interpreted according to the "common understanding" of the people. *Id.* at 61 (internal quotation marks omitted). Relying on the words of Justice Cooley, this Court has repeatedly underscored that it is the

people's understanding, and not some obscure legal meaning, that controls the interpretation of the document:

> 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.

E.g., *id.* at 61, quoting 1 Cooley, *Constitutional Limitations* (6th ed), p 81 (internal quotation marks and citations omitted). Thus, the Court has explained that interpretation of the Constitution does not turn on "metaphysical or logical subtleties" or "the exercise of philosophical acuteness or judicial research." *Michigan Farm Bureau*, 379 Mich at 391, quoting 1 Story, *Constitution* (5th ed), § 451, p 345 (internal quotation marks omitted). It instead turns on the "common sense" that the people should be expected to bring to their understanding of the charter that creates the fundamental structure of our state's government. *Id.*, quoting 1 Story, *supra*, § 451, p 345 (internal quotation marks omitted).

A key pillar of the Constitution is its reservation to the people of the powers of direct democracy. The Constitution's provisions for initiative, referendum, and constitutional amendment were born out of the electorate's "sheer desperation" at the Legislature's lack of responsiveness. *Woodland v. Michigan Citizens Lobby*, 423 Mich 188, 218; 378 NW2d 337, 350 (1985) (internal quotation marks omitted). The people added these tools of direct democracy to the Constitution because they believed that

the Legislature would periodically become captured by special interests and cease to represent the popular will. As one of the delegates to the 1907-1908 Constitutional Convention explained, with specific reference to the provision for voter-initiated constitutional amendments, "[t]he 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 1907-1908, p 590 (statement of Delegate Frank Pratt), quoted in *Citizens Protecting Michigan's Constitution*, 503 Mich at 63 n 33. Direct democracy, he argued, would force "the legislature to sometimes pay some attention to the voice of the people." *Id.*

A similar understanding motivated the adoption of initiative and referendum powers in state constitutions across the Nation. See, *e.g.*, Theodore Roosevelt, *Nationalism and Popular Rule*, *in* The Initiative, Referendum, and Recall 52, 62 (William Bennett Munro, ed., 1913) (describing the "movement in favor of" the initiative and referendum as "largely due to the failure of the representative bodies really to represent the people"); Woodrow Wilson, *The Issues of Reform*, *in* The Initiative, Referendum, and Recall, *supra*, at 69, 87-88 (describing the initiative and referendum as "a means of bringing our representatives back to the consciousness that what they are bound in duty and in mere policy to do is to represent the sovereign people whom they profess to serve and not the private interests which creep into their counsels by way of machine orders and committee conferences"); *Carter v. Lehi City*, 269 P3d 141, 149 (Utah 2012) (explaining that "[t]he thrust of the initiative movement" was that "[o]nly by wielding the legislative power could the people govern

themselves in a democracy unfettered by the distortions of representative legislatures").

The common understanding of the constitutional initiative power, then, is that it serves as "a gun-behind-the-door to be taken up on those occasions when the legislature itself does not respond to popular demands"—as "a last resort for the people when the Legislature fails to act on issues which so inflame the citizenry on a grass-roots level." *Woodland*, 423 Mich at 217-218 (internal quotation marks omitted). Because the initiative power was specifically "intended as a threat to the Legislature," *id.* at 218, it would be inconsistent with that understanding to permit the Legislature to use ingenious devices to evade it.

Accordingly, this Court has refused to read constitutional silence or ambiguity to permit the Legislature to undermine the people's reserved powers of direct democracy. In *Kuhn*, *supra*, this Court held that the power of referendum extended to the Michigan Income Tax Act of 1967, 1967 PA 281. The Court reached that conclusion even though (1) the Constitution specifically exempts "acts . . . to meet deficiencies in state funds" from the power of referendum, Const 1963, art 2, § 9; and (2) the Legislature specifically stated, in the text of the Income Tax Act, that the statute was enacted for the purpose of meeting deficiencies in state funds. See *Kuhn*, 384 Mich at 382-383. The state acknowledged that no deficiency existed at the time the Legislature enacted the statute, but it argued that the law was necessary to avoid deficiencies that would arise in the future. See *id.* at 383.

Although the Constitution is silent as to *when* a deficiency must arise to exempt a statute from the power of referendum, the Court concluded that Article 2, Section 9's "deficiency in state funds" language must be read to apply "only to such deficiencies as exist at the time of passage of the Act in question." *Kuhn*, 384 Mich at 385. Even if a future deficiency is "virtually or actually certain to occur as a result of present appropriations," the Court concluded, a law designed to meet that deficiency could not evade the referendum power. *Id.* at 384. A contrary result would "allow revenue statutes to avoid the possibility of referendum by reference to anticipated deficiencies, resulting from future, simultaneous or even previous appropriations." *Id.* at 386 (footnote omitted). Allowing such a result would be inconsistent with the principle 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." *Id.* at 385.

The Court applied the same principle in *Michigan Farm Bureau*, *supra*. There, the Legislature adopted a law, with immediate effect, exempting Michigan from daylight savings time. When a group of concerned citizens filed a referendum petition to challenge that law shortly after its enactment, its defenders objected that a referendum would not be in order until after the conclusion of the legislative session. The defenders of the statute relied on Const 1963, art 2, § 9, which provides that the referendum power must be invoked "within 90 days following the final adjournment of the legislative session at which the law was enacted." Because the referendum

petition was not filed "within" that 90-day period, they argued that it could not be certified for the ballot. See *Michigan Farm Bureau*, 379 Mich at 391-392.

The Court rejected that argument. The Court found the issue "not without difficulty." *Id.* at 393. But it concluded that the Constitution was best read as permitting people to file a referendum petition at any time before the end of the 90-day period following the legislative session—even if the petition was not filed within that period. See *id.* at 393-395. The Court relied on the "overriding rule of constitutional construction which requires that the commonly understood referral process, forming as it does a specific power the people themselves have expressly reserved, be saved if possible as against conceivable if not likely evasion or parry by the legislature." *Id.* at 393. If a referendum petition was not in order until after the end of the session, the Court explained, the legislature could perpetually evade the people's power to demand a vote on laws exempting the state from daylight savings time: "the legislature would stand free to avoid effective referral of this and future legislative exemptions . . . simply by repealing Act No. 6 next November, then by enacting another immediate effect act of exemption next spring and then by another repealer in the late fall, and so on through the years." *Id.* at 395. Because such a construction would permit "more or less regular thwart of the referral process, at will of the legislature," the Court felt compelled to reject it. *Id.*

B. The Enactment of 2018 PA 368 and 369 Impermissibly Evaded the People's Reserved Power of Initiative

Under the basic principles set forth above, Public Acts 368 and 369 are unconstitutional. Those statutes substantially rolled back the voter initiatives that

the legislature adopted in September 2018. See pp 3-4, *supra*. There is ample reason to believe that this was the plan all along. Contemporaneous news accounts suggest that when majority-party legislators enacted the two initiatives into law in September, they intended to go back during the lame-duck session—after the prospect that they would be held accountable at the November election for their votes had passed—and adopt new statutes declawing the initiatives. See p 3, *supra*. These news reports suggest that majority-party legislators sought, by enacting the initiatives into law, to deprive the people of the opportunity to vote on those propositions.

But this Court need not find that the Legislature actually intended to evade the people's constitutional power of initiative. Cf. *Kuhn*, 384 Mich at 383 ("We will not concern ourselves with the legislators' motives for inserting the language regarding deficiencies in the Act."). It is enough that the procedure followed by the Legislature provides a ready tool for evading and undermining that power. That is the lesson of *Kuhn* and *Michigan Farm Bureau*.

Thus, when the Court held in *Kuhn* that a statute could not "avoid the possibility of referendum by reference to anticipated deficiencies" in state funds, *id.* at 386, the Court expressly ***refused to conclude*** that the Legislature had engaged in "devious attempt to avoid the people's constitutional power of referendum," *id.* at 383. Rather, it reached its result because such a broad exclusion from the referendum power would be inconsistent with the "liberal[] constru[ction]" owed to "constitutional provisions by which the people reserve to themselves a direct legislative voice." *Id.*

at 385. And when the Court in *Michigan Farm Bureau* permitted referendum petitions to be filed before the 90-day period following the adjournment of the legislature, it did not conclude that the Legislature ***actually*** had sought to make its actions referendum-proof by enacting the daylight savings measure each spring and then repealing it each fall. The Court could not have reached that conclusion, because the Legislature had enacted the measure only once, just four months before the Court's decision. Rather, the Court allowed the early filing of referendum petitions because a contrary reading "***would permit***" the Legislature to defeat the referendum power—a result that would be inconsistent with the rule that the people's powers of direct democracy must "be saved if possible as against ***conceivable if not likely evasion or parry*** by the legislature." *Michigan Farm Bureau*, 379 Mich at 393-394 (emphasis added).

This is an even stronger case for protection of the people's power of direct democracy than were *Kuhn* and *Michigan Farm Bureau*. For one thing, the opponents of the referendum petitions in those cases could at least point to some constitutional text that purported to support their position. Indeed, the most plausible reading of the text seemed to cut against the referendum proponents: It is not at all obvious from the text that a petition filed before the beginning of a 90-day period is filed "within" 90 days, *Michigan Farm Bureau*, 379 Mich at 391-392; and a law passed to meet a future deficiency in state funds seems to be one adopted "to meet deficiencies in state funds," *Kuhn*, 384 Mich at 384-386. Here, in contrast to those

cases, the defenders of adopt-and-amend cannot point to ***any*** constitutional text that purports to authorize that scheme.

Moreover, the adopt-and-amend scheme poses an even greater risk to the people's powers of direct democracy than did the stratagems this Court rejected in *Kuhn* and *Michigan Farm Bureau*. By adopting an initiative into law and thus taking it off the ballot, then proceeding to amend or repeal it in a lame-duck session after the election, the Legislature can ensure that the people never have an opportunity to vote on the proposition and that it never goes into effect. It can thus completely subvert the people's initiative power.

The people added the initiative power to the Constitution precisely to keep the Legislature from acting in this way. As this Court has explained, "The initiative found its birth in the fact that political parties repeatedly made promises to the electorate both in and out of their platforms to favor and pass certain legislation for which there was a popular demand." *Woodland*, 423 Mich at 218 (internal quotation marks omitted). But "[a]s soon as election was over," these "promises were forgotten, and no effort was made to redeem them." *Id.* (internal quotation marks omitted). By adding the initiative power, the electorate "took matters into its own hands" and gave itself a tool to secure enactment of popular statutes in the face of an unaccountable Legislature's intransigence. *Id.* (internal quotation marks omitted).

When the Legislature adopts an initiative, it is making a "promise[] to the electorate" that the measure will become law. Cf. *id.* That is why a voter-initiated measure enacted by the Legislature is removed from the ballot, and it is also why the

Legislature must enact such a measure "without change or amendment." Const 1963, art 2, § 9. If the Legislature does not enact the voter-initiated measure exactly as proposed, the plain constitutional text demands that the people have an opportunity to vote on that measure. It would subvert this process to permit the Legislature to purport to enact a measure, thus depriving the people of their chance to vote on it, and then to return to the measure and gut it "[a]s soon as election [is] over." Cf. *Woodland*, 423 Mich at 218.

It is particularly notable that, until the fall of 2018, no Legislature had ever employed the adopt-and-amend scheme—a fact that puts the lie to the Department of Attorney General's speculation that the scheme might be necessary to respond to unanticipated consequences of initiatives with immediate effect. Cf. AG May 15 Br 27. Indeed, an opinion issued by Attorney General Kelley shortly after the adoption of the 1963 Constitution forcefully stated that "the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session without violation of the spirit and letter of Article II, Sec. 9 of the Michigan Constitution of 1963." OAG, 1963-1964, No. 4303 (Mar. 6, 1964). For more than 50 years, the legislature appeared to tacitly endorse that understanding of constitutional limits. Cf. *Smith v. Auditor Gen*, 165 Mich 140, 144; 130 NW 557, 558 (1911) (settled legislative construction is relevant to interpreting Constitution). But PA 368 and 369 mark a sharp departure from that settled practice. "Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent'

for [legislative] action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 US 519, 549 (2012) (opinion of Roberts, C.J.), quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 561 US 477, 505 (2010) (internal quotation marks omitted). By turning its back on more than half a century's unbroken practice, and undermining the people's power of initiative, the Legislature violated the Constitution.

C. The Interpretive Principles on Which the Defenders of PA 368 and 369 Rely Cannot Justify the Lame-Duck Legislature's Action

Because the unprecedented adopt-and-amend scheme provides a ready means for the Legislature to evade the people's reserved initiative power, it could not be valid absent constitutional text explicitly authorizing it. After all, the "common understanding," *Citizens Protecting Michigan's Constitution*, 503 Mich at 61, of the Constitution's direct democracy provisions is that they provide a meaningful check on an unresponsive legislature. See *id.* at 62-63 & n 33. If the Legislature is to be enabled to put the people's initiative power at naught, that extraordinary result should appear in the text of the Constitution. It should not merely emerge from the interpretive gymnastics in which "lawyers and legislators" might engage. *Kuhn*, 384 Mich at 384.

Strikingly, the defenders of PA 368 and 369 ***cannot point to a single provision*** of the Constitution that explicitly empowers the Legislature to enact an initiative into law and then adopt amendments gutting it during the same session. They cannot even point to the sort of generic language that appears in the constitutions of other states and that expressly preserves the power of the

legislatures in those states to adopt "any measure" following enactment of an initiative. Cf. *In re Senate Resolution No. 4*, 54 Colo 262, 270; 130 P 333, 336 (1913) ("[D]oes this provision prevent the General Assembly from repealing an initiated act, or one which has been referred? We think not, for it expressly provides: 'This section shall not be construed to deprive the General Assembly of the right to enact any measure.' This language is broad and comprehensive."); *State ex rel. Halliburton v. Roach*, 230 Mo 408; 130 SW 689, 693 (1910) (similar constitutional langugae); *Granger v. City of Tulsa*, 174 Okla 565; 51 P2d 567, 568–69 (1935) (similar constitutional language). Instead, they rely on ***inferences*** they draw from three background ***interpretive principles*** that they believe apply here. None is sufficient.

1. The Expressio Unius *Maxim Does Not Support the Adopt-and-Amend Scheme*

First, the defenders of PA 368 and 369 rely on the *expressio unius* maxim. Because the Constitution expressly provides that the Legislature may amend a law approved by ***referendum*** "at any subsequent session," Const 1963, art 2, § 9, and it provides that a law "***adopted by the people at the polls*** under the initiative provisions" cannot be amended without a three-fourths supermajority, *id.* (emphasis added), the defenders infer that the Constitution imposes no restrictions on when or how the Legislature may amend a voter-initiated law that the legislature itself enacted. AG May 15 Br 19-24; Legislature Mar 5 Br 13-16. But this Court has cautioned that "the maxim *expressio unius est exclusio alterius* cannot be strictly applied when construing provisions of a state constitution." *Frey v. Dep't of Mgmt. & Budget*, 429 Mich 315, 337; 414 NW2d 873, 882 (1987).

The people cannot be expected to search for negative inferences to be drawn from the Constitution—particularly where those negative inferences would undermine a fundamental power that the people have reserved to themselves. This Court has noted that "the Legislature 'does not, one might say, hide elephants in mouseholes.'" *People v. Arnold*, 502 Mich 438, 480; 918 NW2d 164, 184 (2018), quoting *Whitman v. American Trucking Ass'ns*, 531 US 457, 468 (2001). The people are entitled to expect no less of the Constitutional Convention. Absent constitutional text authorizing the adopt-and-amend scheme, the people cannot be understood to have inferred that the hard-won power of initiative nonetheless silently granted the Legislature the tools to render that power a nullity. To embrace such an inference would be to adopt the very sorts of "dark and abstruse meanings" that Justice Cooley's "common understanding" principle warns against. *Citizens Protecting Michigan's Constitution*, 503 Mich at 59, quoting 1 Cooley, *supra*, p 81 (internal quotation marks and citations omitted).

Even if the Court were to apply the *expressio unius* maxim, it would not aid the defenders of the lame-duck Legislature's action. As *Amici* Michigan One Fair Wage *et al.* point out, a fair application of *expressio unius* demonstrates that the Legislature ***does not*** have the power to adopt and amend an initiative petition in the same session. See Michigan One Fair Wage Mar 22 Br 7-8. Article 2, Section 9 of the 1963 Constitution gives the Legislature three options during the session in which it receives an initiative petition: "first, it can enact the proposed law without any change or amendment; second, it can reject the proposed law, in which case the

proposed law is submitted to the people for a vote at the next general election; or third, it can propose a different law on [the] same subject, in which case both proposals are submitted to the people for a vote at the next general election." Michigan One Fair Wage Mar 22 Br 7. Because these options do not include the option to adopt an initiative into law and then amend it during the same session, the purported adopt-and-amend power is foreclosed by the *expressio unius* maxim. Particularly because the adopt-and-amend scheme "would permit the Legislature to do indirectly what it could not do directly without a vote of the people," *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 70; 340 NW2d 817, 827 (1983)—prevent voter-initiated legislation from ever becoming law—this Court cannot infer the power to employ such a scheme from constitutional silence.

2. The Supposed "Equal Footing" Principle Does Not Support the Adopt-and-Amend Scheme

Second, the defenders of PA 368 and 369 rely on the proposition that "laws proposed by initiative are on 'equal footing' with laws proposed by the Legislature." Legislature Mar 5 Br 21; AG May 15 Br 22. The "equal footing" language does not appear in the Constitution, and this Court has not employed it in cases involving voter-initiated laws. The Court of Appeals did use that language to discuss such a law in *Frey v. Dir of Dep't of Soc Servs*, 162 Mich App 586, 600; 413 NW2d 54, 61, aff'd sub nom *Frey v. Dep't of Mgmt & Budget*, 429 Mich 315; 414 NW2d 873 (1987). But neither the Court of Appeals nor this Court in *Frey* held that laws proposed by initiative are on equal footing ***for all purposes*** with those proposed by the Legislature. Nor have any of this Court's other cases so held. Those cases held only

that laws proposed by initiative are subject to the same ***constitutional limitations*** as are other laws. See *Frey*, 162 Mich App at 602 (holding that the two-thirds vote requirement for bills with immediate effect, Const 1963, art. 4, § 27, applies to voter-initiated laws, because "the people are prohibited from initiating legislation which cannot be adopted by the Legislature"). See also *Leininger v. Alger*, 316 Mich 644, 648; 26 NW2d 348, 351 (1947) (holding that the Constitution's Title-Object Clause applies to initiatives, because "no law shall be enacted by the initiative that could not, under the constitution, be enacted by the legislature"). Cf. *In re Proposals D&H*, 417 Mich 409, 422; 339 NW2d 848, 853-54 (1983) (holding that the "notion of a 'higher plane' for initiative measures" did not give a voter-initiated law precedence over a legislatively-initiated one, where (a) the people voted on both measures, and (b) the legislatively-initiated law was approved "by almost 60% of the voters" while the voter-initiated law received only "a bare majority" of votes). Nothing in these decisions purports to hold that the Legislature can change voter-initiated laws in the same ways that it can change laws it initiates itself. As we have shown, if the Legislature could adopt initiatives into law and then amend them in the same session, it would have the ability to evade the people's initiative power entirely.

In *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich at 66, this Court did use the "equal footing" language. Crucially, however, that case did not involve voter-initiated legislation. Rather, the Court advised that a law ***initiated by the Legislature*** but subsequently approved at a referendum could be freely changed by a subsequent Legislature. The Court explained that the Legislature had the power

"to amend legislation ***approved*** by the voters in a statewide election without a further submission to the voters in another statewide election." *Id* at 67 (emphasis added). That is a far cry from what the Legislature has done here, which prevented the people from ever casting ballots on a voter-initiated measure—and which provides a ready means for evading the power of initiative.

The defenders of PA 368 and 369 point to the acknowledged power of the Legislature to enact an initiative into law and then, ***in a later legislative session***, make amendments to it. AG May 15 Br 28. But that is fundamentally different from what the legislative majority did here. When the Legislature adopts an initiative petition, removes it from the November ballot, then amends or repeals it during the lame-duck session, it deprives the people of the chance either to vote on the initiative or to elect representatives who will protect the initiative. When the Legislature must wait for a new session before amending a voter-initiated law, the proponents of the initiative can make the defense of that initiative an issue in the election campaign. Crucially, that means that legislators who vote to adopt an initiative into law cannot at the time be sure that, following the election, they will have the votes to accomplish the "amend" portion of the adopt-and-amend scheme. Cf. *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich at 67 n 24 (noting the safeguard when legislators were elected on the same ballot on which the voters approved the measure the Legislature now wishes to amend). Amendment of a voter-initiated but legislatively-enacted law in a subsequent session thus does not threaten to eviscerate

the people's power of direct democracy in the way that adopting an initiative and amending it in the same session does.

Along similar lines, defenders of the adopt-and-amend scheme rely on two brief passages from a single discussion in the Constitutional Convention. In those passages, Delegate Richard Kuhn explained his view that the Constitution gave the Legislature an incentive to enact voter-initiated proposals into law, rather than allowing them to get to the ballot. If the Legislature enacts an initiative into law itself, he said, it could "keep control of the matter." 2 Official Record, Constitutional Convention 1961, Page 2394. Later, Delegate Kuhn elaborated: "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 control. They can amend it and do anything they see fit." *Id.* at 2395.

These statements from a single delegate do not establish the constitutionality of the adopt-and-amend scheme. For one thing, this Court has made clear that "constitutional convention debates" are relevant only "to a lesser degree" in determining the common understanding of the Constitution. *UAW v. Green*, 498 Mich 282, 288; 870 NW2d 867 (2015). For another, nothing in Delegate Kuhn's statement purports to address *when* the Legislature may amend a voter-initiated proposition that it chose to enact into law. For all that appears, Kuhn was discussing the Legislature's acknowledged power to amend such a law in a subsequent session—a power that Attorney General Kelley expressly approved in his nearly contemporaneous opinion. OAG No 4303, *supra*. Nowhere does Kuhn say that the

Legislature would have the power to adopt a voter initiative into law, remove it from the ballot, and then return to gut it in the lame-duck session. As we have shown, *that* power is one that Attorney General Kelley specifically rejected, one that no Legislature sought to exercise before 2018—and, crucially, one that could eviscerate the people's reserved power of initiative. Kuhn's general statement cannot save the specific adopt-and-amend practice that the Legislature employed in enacting PA 368 and 369.

3. The Principle that "the Legislative Authority of the State" Can Do Anything Not Specifically Prohibited by the Constitution Cannot Answer a Question About the Allocation of Legislative Authority Between the Legislature and the People

Ultimately, the defenders of PA 368 and 369 argue that the Legislature may do anything not explicitly barred by constitutional text. For example, the Department of Attorney General invokes what it calls "the background principle that the Legislature may act unless constrained by the constitution." AG May 15 Br 24. See also Legislature Mar 5 Br 8. But there is no "background principle" that gives the Legislature precedence over the people in the case of constitutional silence. Rather, this Court has held that "***the legislative authority of the state*** can do anything which it is not prohibited from doing" by the Constitution. *E.g.*, *Coalition of State Emp Unions v. State*, 498 Mich 312, 331-32; 870 NW2d 275, 286 (2015) (internal quotation marks omitted; emphasis added). As this Court has also explained, however, Article 2, Section 9's power of initiative is a "reservation of legislative authority by the people, which reserves to the people the right to 'legislate.'" *Woodland*, 423 Mich at 214.

The question here is not whether "the legislative authority of the state" may be exercised in the face of constitutional silence—the subject of the cases on which the defenders of PA 368 and 369 rely. Rather, the question is whether the Constitution may be read to permit the Legislature to intrude on the people's reservation of "legislative authority" in Article 2, Section 9. To resolve that question by adopting a presumption in favor of the Legislature would be to disregard the fundamental nature of the Constitution's direct democracy provisions. See pp 5-15, *supra*. As we showed above, this Court has not adopted such a presumption. To the contrary, it has expressly refused to interpret constitutional silence or ambiguity in a way that would permit "conceivable if not likely evasion or parry" of the people's reserved legislative power. *Michigan Farm Bureau*, 379 Mich at 393. Under this Court's established approach, PA 368 and 369 are unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should: (a) grant the requested advisory opinion; (b) conclude that Const 1963, art 2, sec 9 does not permit the Legislature to enact an initiative petition into law and then amend that law during the same legislative session; and (c) conclude that 2018 PA 368 and 2018 PA 369 were not enacted in accordance with Const 1963, art 2, sec 9.

Respectfully submitted.

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Dated: June 19, 2019

APPENDIX
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Rep. Julie Brixie
Rep. Wendell Byrd
Rep. Sara Cambensy
Rep. Darrin Camilleri
Rep. Brenda Carter
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Rep. John Chirkun
Rep. Cara A. Clemente
Rep. Kevin Coleman
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