

STATE OF MICHIGAN
MICHIGAN SUPREME COURT

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

Supreme Court Case Nos.
159160 and 159201

A BETTER BALANCE, MOTHERING JUSTICE, ARAB COMMUNITY CENTER FOR ECONOMIC AND SOCIAL SERVICES (ACCESS), AMERICAN FEDERATION OF TEACHERS MICHIGAN (AFT MICHIGAN), CLEAN WATER ACTION, DETROIT JEWS FOR JUSTICE (DJJ), THE ECONOMIC JUSTICE ALLIANCE OF MICHIGAN (EJAM), FAMILY VALUES @ WORK (FV@W), METROPOLITAN ORGANIZING STRATEGY ENABLING STRENGTH (MOSES), MICHIGAN ECONOMIC JUSTICE ACTION FUND (MEJAF), MICHIGAN LIBERATION, PROGRESS MICHIGAN, SEXUAL ASSAULT SERVICES FOR HOLISTIC HEALING AND AWARENESS CENTER (SASHA CENTER), SOUTHEAST MICHIGAN JOBS WITH JUSTICE AND WE THE PEOPLE MICHIGAN *AMICI CURIAE* BRIEF REGARDING THE MICHIGAN LEGISLATURE'S REQUEST FOR AN ADVISORY OPINION ON THE CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369

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STATEMENT OF BASIS OF JURISDICTION

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

STATEMENT OF QUESTIONS PRESENTED

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

Amici curiae A Better Balance, Mothering Justice, et al Answer: Yes

2. 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 A Better Balance, Mothering Justice, et al Answer: No

3. Were 2018 PA 368 and 2018 PA 369 enacted in accordance with article 2, § 9 of the Michigan Constitution of 1963?

Amici curiae A Better Balance, Mothering Justice, et al Answer: No

STATEMENT OF INTEREST¹

A Better Balance (ABB) is a national legal advocacy organization with offices in New York, NY and Nashville, TN dedicated to promoting fairness in the workplace and helping workers meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, public education and technical assistance to state and local campaigns, ABB is committed to helping workers care for their families without risking their economic security. ABB has drafted model paid sick days legislation that has been used and adapted in the 50 jurisdictions that have enacted paid sick days laws, including Michigan. ABB has served as co-counsel or filed amicus briefs in litigation challenging paid sick days legislation in Wisconsin, Massachusetts, and Arizona, cases which affirmed the right of states and localities to enact paid sick days laws that improve the health and welfare of workers and their loved ones.

Mothering Justice is an organization built by mothers to help other mothers, which is committed to providing workers with earned paid sick time. Mothering Justice successfully led the charge on the ground in Michigan to garner attention and signatures for the Michigan Earned Sick Time Act ballot initiative before it was adopted by the Michigan legislature, spending hundreds of hours of volunteer time and years of work. Mothering Justice has collaborated with several community leaders such as Economic Justice Alliance of Michigan (EJAM), Family Values at Work (FV@W), and Progress Michigan to amplify the voices of the everyday working citizens and has canvassed in three major counties in Michigan—Macomb, Oakland, and Wayne Counties—hearing countless stories from people suffering with bills accrued from payless sick days. Mothering Justice submits this *amicus* brief because it believes that the earned sick time

¹ A Better Balance, attorneys for *amici*, authored this brief in whole. Neither A Better Balance nor any other party made any monetary contribution intended to fund the preparation or submission of this brief.

ballot initiative circulated in September was not only sound and helpful policy, but the desire of hundreds of thousands of petition signers.

The following thirteen state and local community based organizations are committed to securing economic justice for Michigan workers:

Arab Community Center for Economic and Social Services (ACCESS): ACCESS strives to enable and empower individuals, families and communities to lead informed, productive and culturally sensitive lives. As a nonprofit model of excellence, ACCESS honors its Arab American heritage through community-building and service to all those in need, of every heritage. ACCESS is a strong advocate for cultural and social entrepreneurship imbued with the values of community service, healthy lifestyles, education and philanthropy.

American Federation of Teachers Michigan (AFT Michigan): AFT Michigan is a union of 35,000 educators working in K-12 and intermediate school districts, community colleges, and universities across the state. AFT Michigan believes that communities are stronger together than as individuals and looks forward to the day when all educators are empowered as members of strong and inclusive unions.

Clean Water Action: Clean Water Action is dedicated to protecting our environment, health, economic well-being and community quality of life. Clean Water Action organizes strong grassroots groups and coalitions, and campaigns to elect environmental candidates and to solve environmental and community problems.

Detroit Jews for Justice (DJJ): DJJ supports the rights and leadership of people of color, low-income workers, the unemployed, women, LGBTQI, immigrants, and others struggling against systemic oppression. DJJ draws strength from Jewish tradition, thought and culture to sustain its work.

The Economic Justice Alliance of Michigan (EJAM): EJAM is a long-term collaboration of community organizations aiming to build the power and impact of low-income and working-class communities across the state. Together, EJAM works to advance social and racial equity to improve economic conditions for all people in Michigan.

Family Values @ Work (FV@W): FV@W is a national leader in advocating for paid family leave and paid sick days in the United States of America. FV@W helps state coalitions educate the public and policymakers about the importance of universal access to earned sick leave and family medical leave insurance, while emphasizing the particular urgency of this issue for low-wage families and children and the ways it overlaps with racial and gender inequities.

Metropolitan Organizing Strategy Enabling Strength (MOSES): MOSES is a community organizing nonprofit serving residents of Detroit, Michigan and its surrounding metropolitan region. MOSES supports the development of strong grassroots leaders, and facilitates campaigns to address social justice issues.

Michigan Economic Justice Action Fund (MEJAF): MEJAF is a social welfare organization that conducts get-out-the-vote campaigns and engages in voter outreach to advance social and racial equity to improve economic conditions for all people in Michigan.

Michigan Liberation: Michigan Liberation is a statewide organization dedicated to the leadership development of community members and creation of effective campaigns to advance racial, gender, economic and environmental justice in Michigan.

Progress Michigan: Progress Michigan is a communications team and media hub that strives to provide a strong credible voice that holds public officials and government accountable and assists in the promotion of progressive ideas.

Sexual Assault Services for Holistic Healing And Awareness Center (SASHA

Center): SASHA Center is a sexual assault service, prevention and educational agency which is designed to provide educational/support groups to survivors of sexual assault. SASHA Center has a focus on activism to provide opportunities for engagement within the community via rallies, marches, and open forum activities to bring attention to the negative impact of sexual assault.

Southeast Michigan Jobs with Justice: Jobs with Justice is leading the fight for workers' rights and an economy that benefits everyone. Jobs with Justice is the only nonprofit of its kind: leading strategic campaigns and shaping the public discourse on every front to build power for working people and is committed to working nationally and locally, on the ground and online and winning real change for workers by combining innovative communications strategies and solid research and policy advocacy with grassroots action and mobilization.

We the People Michigan: We the People in Michigan recognize that today, many working families across our state are struggling: they lack access to jobs with decent wages and benefits; they worry about having an adequate education and healthcare system for our families; and some of them can't even get safe, clean, affordable drinking water. We the People Michigan believe that we all deserve a decent life, and that means that We the People must come together so our families and communities can thrive. We the People embrace our shared belonging and demand prosperity for everyone.

INTRODUCTION

The Michigan Constitution reserves the power of initiative to the people under Art. 2, § 9 and grants the Legislature limited, specific options adjacent to this constitutionally-protected power of the people. As the Constitution makes explicit, and as this Court has reaffirmed, none of those limited legislative options is to pass and then radically alter a validly proposed initiative. Against this constitutional backdrop, in 2018 the people of Michigan initiated by petition the Michigan Earned Sick Time Act (MESTA). In response, the Legislature adopted MESTA, thus keeping it off the ballot so that the voters of the State of Michigan did not have a chance to consider or vote on it. Then, during the immediately following lame duck session, the Legislature enacted PA 369, a measure amending MESTA by significantly limiting the applicability and scope of rights contained in the original initiative proposal it had adopted and depriving nearly two million workers who would have been covered under the original law of sick time. Because PA 369 functionally gutted the validly proposed initiative, the Legislature violated the Michigan Constitution by acting beyond the enumerated grants of power of Art. 2, § 9.

Amici submit this brief to outline just how the changes made by the lame duck legislature after adopting the ballot initiative as proposed make the resulting law ineffective. By dramatically decreasing the number of employees covered by the law and the permissible uses of paid sick time, the Legislature seeks to undermine the central purposes of MESTA: providing economic security to Michigan workers who need to take time off to care for their health or that of their loved ones; and ensuring workers can seek preventative care and recover from short-term sicknesses, which in turn forestalls more serious illness and reduces the spread of contagion. *Amici* contend that this gutting of MESTA is an impermissible attempt by the Legislature to

prevent the people of Michigan from exercising their constitutional initiative power and deciding whether or not they want the myriad benefits of a robust paid sick leave law.

STATEMENT OF FACTS

In Fall 2017, Michigan One Fair Wage & Michigan Time to Care began to circulate initiative petitions to raise Michigan’s minimum wage to \$12 and to establish an Earned Sick Time Act. Both initiative petitions garnered enough signatures to make it to the 2018 general election ballot. Under Michigan law, once a petition receives enough signatures, the Legislature can either adopt the proposals as written or send the initiative to the ballot. The Legislature opted to adopt the initiatives, but publicly announced that they did so in order to significantly amend them during the lame duck session that would follow the 2018 election. *See, e.g.*, Lindsay VanHulle, *Michigan Legislature Passes Minimum Wage, Paid Sick Leave Bills to Avert Ballot*, Bridge Michigan (Sept. 5, 2018), <https://www.bridgemi.com/public-sector/michigan-legislature-passes-minimum-wage-paid-sick-leave-bills-avert-ballot>.

The Legislature indeed amended the initiatives during the lame duck session. The minimum wage increase was delayed by eight years, a subminimum wage for tipped employees was re-inserted into the law, and the new minimum wage was no longer tied to inflation. The paid sick leave initiative was also amended to decrease the number of covered employees by around 1.8 million workers, reduce the permissible uses of sick time, and cut the amount of sick time that could be earned, among other things.

On February 20, 2019 the Michigan House of Representatives and Michigan Senate asked this Court to resolve the issue of whether this “adopt and amend” scheme comports with article 2, § 9 of the Michigan Constitution of 1963.

ARGUMENT

I. **The Legislature Cannot Thwart the Power of Initiative Reserved Exclusively to the People by Article 2 Section 9 of the State Constitution.**

The Michigan Constitution vests the ultimate legislative power in the people under Art. 1, § 1 (“All political power is inherent in the people”). The Michigan Constitution also explicitly reserves to the people the lawmaking powers of initiative and referendum, stating in Art. 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.”

This Court has recognized and reaffirmed Michigan’s explicit commitment to preserving the democratic power of the people to, *inter alia*, enact law through the initiative and referendum processes. *See, e.g., Citizens Protecting Michigan’s Constitution v. Secretary of State*, 503 Mich 42, n.18; 921 NW2d 247, n.18 (2018) (“Michigan is one of the leading states when it comes to direct democracy reforms. In addition to retaining the right to amend the Constitution by direct initiative, the people of Michigan have also reserved the power to propose and enact statutes by initiative . . . to reject statutes by referendum . . . and to recall elected officials . . .”) (internal citations omitted).

At the same time, this Court has recognized that the people of Michigan, under the State Constitution, may limit the elected Legislature’s power. *See, e.g., Taxpayers of Michigan Against Casinos v. State*, 471 Mich 306, 327; 685 NW2d 221, 231 (2004) (noting that “the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State”) (internal quotations omitted). This power of limitation naturally extends to the Legislature’s role in the initiative process, as articulated in Art. 2, § 9. *See Woodland v. Michigan Citizens Lobby*, 423 Mich 188, 214-15; 378 NW2d 337, 348-49 (1985)

(“The initiative provision set forth in Art. 2, § 9 . . . serves as an express limitation on the authority of the Legislature. . . Art. 2, § 9, is a reservation of legislative authority which serves as a limitation on the powers of the Legislature.”). Indeed, the text of Art. 2, § 9 explicitly outlines this limited role of the Legislature in the initiative process:

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.

With these provisions, the Michigan Constitution clearly defines and limits the Legislature’s options for responding to a validly initiated petition: The Legislature may (1) enact the initiative without change or amendment within 40 days; (2) reject the initiative within 40 days, following which the initiative will be put to a referendum; or (3) propose within 40 days a different measure “upon the same subject,” following which both the legislative proposal and the original initiative will be put to referendum. Because the people have reserved the right to initiative under Art. 2, § 9 section, and because the people have the power to limit the Legislature’s power by constitutional provision, these enumerated processes are the only processes available to the Legislature to act upon the initiative. *See Carton v. Secretary of State*, 151 Mich 337, 341; 115 NW 429, 431 (1908) (establishing that the *expressio unius est exclusio alterius* rule of interpretation applies to constitutional interpretation such that any affirmative grant of power in the Michigan Constitution prohibits alternative, unstated implied grants of power). Since its earliest interpretations of the power contemplated by Art. 2, § 9, this Court has

repeated and affirmed the fact that these are the *only* options for a Legislature to take in response to a validly initiated petition.

In *Michigan Farm Bureau v. Secretary of State*, 379 Mich 387; 151 NW2d 797 (1967), this Court evaluated the constitutionality of a legislative course of action similar to that at issue here. In *Michigan Farm Bureau*, the Legislature planned to head off, in perpetuity, democratic referenda on a daylight savings time law by annually adopting and repealing the law. *Id.* at 391-93, 395. This Court held unambiguously that allowing such a scheme would “permit outright legislative defeat, not just hindrance, of the people’s reserved” power of lawmaking through the initiative process. *Id.* at 394-95. The Court’s constitutional construction in reaching this enduring conclusion rested simply upon acknowledging “a specific power the people themselves have expressly reserved” in Art. 2, § 9, *id.* at 393, to “be saved if possible as against conceivable if not likely evasion or parry by the legislature.” *Id.* This Court has used and expanded upon the analysis in the *Michigan Farm Bureau* decision by “liberally” construing the relevant provisions of Art. 2, § 9 to protect the people’s reserved right to make law through the initiative and referendum processes. *See Kuhn v. Department of Treasury*, 384 Mich 378, 385-86; 183 NW2d 796, 799 (1971) (“ . . . 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.”); *Woodland*, 423 Mich at 215 (“[Art. 2, § 9’s] reservation of power is constitutionally protected from government infringement once invoked . . .”); *Citizens Protecting Michigan’s Constitution v. Secretary of State*, 503 Mich at 63 (holding that the right of initiative concerning constitutional amendments “can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises”).

Thus, the people of Michigan have constitutionally reserved to themselves the power to make law by initiative, and this Court has protected this right from legislative infringement. The Michigan Constitution specifies, and this Court has affirmed, that the Legislature's power in response to a validly initiated petition is limited specifically to three categorical options. The Legislature did not follow any of these options, but rather acted impermissibly by passing a qualified initiative with the explicit intent—immediately acted upon by the Legislature in the lame duck session—of drastically weakening it, denying Michigan voters the opportunity to accept or reject the original ballot initiative. For this reason, the Court should advise that the Legislature's action enacting PA 369 violated the Michigan Constitution.

II. The Legislature's Amendments to MESTA Undermine the Worker Protection and Public Health Purposes of the Law.

The Legislature's amendments to MESTA significantly changed the scope of the law, severely undermining its twin purposes: to grant workers in Michigan the opportunity to earn sick time to care for themselves and their loved ones without having to compromise their economic security; and to protect the public health by preventing the spread of communicable disease. By dramatically reducing the number of workers covered, restricting the purposes for which time could be taken and assuming compliance when an employer gives paid leave of any kind, the Legislature's amendments totally deprived nearly two million Michigan families of the benefits of this law at the same time it made it less likely that marginalized and low-income workers could receive the benefits of MESTA. At the same time, by reducing the number of workers covered, the legislature also decreased the law's ability to create wider public health benefits.

a. The Legislature’s Amendments to MESTA Are Not Mere Tweaks; They Dramatically Reduce the Number of Workers Covered Under the Law and the Permissible Uses of Paid Sick Leave.

The Michigan Legislature made many far-reaching amendments to MESTA that served only to reduce the number of covered workers and permissible uses of paid sick leave:

- *Excluding Employers with Fewer than 50 Employees:* The amended version of MESTA does not cover workers employed at a business with fewer than 50 employees. PA 369 §2(f). The original ballot initiative and originally enacted law had no business size exclusion. MESTA Ballot Initiative § 2(g).
- *Excluding Certain Kinds of Employees:* The amended version of MESTA does not cover any worker who is: exempt from overtime; covered by a collective bargaining agreement and not employed by a public agency; or who is defined as a “variable hourly employee” under federal law 26 C.F.R. 54.4980H-1. *Compare* PA 369 §§ 2(e)(i); (ii); (xi) *with* MESTA Ballot Initiative § 2(f).
- *Excluding Part-Time and Temporary Workers:* The amended version of MESTA does not cover employees who work on average fewer than 25 hours per week during the preceding year, or employees who work for fewer than 25 weeks per year for the same employer. PA 369 §§ 2(e)(x); (xii). The original ballot initiative covered all employees (except those who work for the federal government), including part-time and temporary employees, who would have accrued paid sick time based on hours worked. MESTA Ballot Initiative § 2(f).
- *Chosen Family:* The amended version of MESTA removed important relationships from the law’s definition of family. Under the Legislature’s amendments, workers cannot care for a domestic partner, an important relationship that was recognized in the proposed

initiative. *Compare* PA 369 § 2(g)(iii) *with* MESTA Ballot Initiative § 2(h)(iii). The Legislature’s amendment also removed the ability for workers to care for close loved ones, who are equivalent to family, but may not share a biological or legal relationship with the employee (such as an aunt who raised the employee, a best friend who is like a sibling and lives with the worker, etc.); coverage of these important family relationships, removed by the Legislature but included in the original ballot initiative, has been incorporated into 12 paid sick time laws and is derived from federal law pertaining to federal employees’ right to paid sick leave. *Compare* PA 369 §2(g) *with* MESTA Ballot Initiative § 2(h).

- *Assumption of Compliance if 40 hours of Paid Leave*: Under the original ballot initiative and prior law, an employer could satisfy their paid sick leave requirements if they provided “any paid leave, that may be used for the same purposes and under the same conditions provided in this act and that is accrued in total at a rate equal to or greater than the rate” provided in the law. MESTA Ballot Initiative § 3(5). This provision protected employer’s paid time off policies but *only* if those policies allowed use for sick time as prescribed by the statute. The amended version of MESTA eliminated the provisos about “use for the same purposes and under the same conditions” and instead created a rebuttable presumption that an employer is in compliance with the law as long as 40 hours of paid leave of any kind is provided. PA 369 § 3(3). Many employer policies with respect to paid leave prohibit its use to care for unexpected illnesses, restrict use to only personal leave and not family care, require more stringent notice and documentation requirements that would make it impossible to use the time when suddenly ill, and include other restrictions that would not have been allowed under the proposed ballot

initiative and would make the time unusable for sick leave purposes. A presumption this large effectively invalidates any sick leave requirement for any employer who provides 40 hours of leave of any kind. The fact that it is a “presumption” is no help because most workers will not be in a position to challenge the employer’s use of his or her policy.

All of these changes significantly decreased the number of workers entitled to earn paid sick leave and allowed many employers to evade the legal requirements in the ballot initiative; as a result, these amendments contravened one of the main purposes of the original ballot initiative, which was to establish a new minimum floor of paid sick leave for Michigan workers, including the low-income and marginalized workers who are currently the least likely to have access to it.

Indeed, the Institute for Women’s Policy Research (IWPR) estimates that the amendments that limit the application of the law to employers with over 50 employees and that exclude part-time and temporary workers will exclude about 37% of the Michigan workforce that would have been covered under the original ballot initiative. IWPR, *The Impact of Exemptions on Worker Coverage Under Michigan’s Paid Sick Leave Law* (Dec. 14, 2018), Attachment A. Given that Michigan has a workforce of 4.8 million people excluding those who work for the federal government, that means that around 1.8 million workers who would have been covered under the original ballot initiative would not be under the amended version. See Bureau of Labor Statistics, *Economy at a Glance: Michigan*, <https://www.bls.gov/eag/eag.mi.htm> (last visited Jun. 18, 2019); *Federal Employees By State*, Governing, <https://www.governing.com/gov-data/federal-employees-workforce-numbers-by-state.html> (last visited Jun. 18, 2019).

Furthermore, the workers who the Legislature carved out of MESTA include many of the workers who need paid sick time the most. Extrapolating from national data on access to paid

sick time, IWPR estimates that the amended version of MESTA will not apply to approximately 62 percent of workers that currently do not have explicit paid sick days policies at work. IWPR, *The Impact of Exemptions on Worker Coverage Under Michigan's Paid Sick Leave Law* (Dec. 14, 2018), Attachment A. These numbers do not even take into account the number of workers who would be affected by the other amendments made to the original paid sick leave ballot initiative, such as the narrowed family definition. Finally, under the presumption that employers are in compliance with the amended MESTA if they provide 40 hours of any kind of paid leave, an overwhelming majority of employers will be considered in compliance with the law even if the leave provided cannot be used in the same way that leave accrued under MESTA could;² workers who want to challenge this presumption will face challenges to doing so, including financial barriers, trouble accessing information maintained by the employer, and possible retaliation.

It is vital to note that these amendments will deeply affect Michigan workers. Without the broad coverage envisioned in the original ballot initiative, workers in Michigan will continue to face the unenviable choice of whether to take time off to care for their own health and that of their loved ones, or go to work to avoid the economic uncertainty that comes with giving up a paycheck.

b. The Benefits of Paid Sick Leave, Which Have Been Amply Demonstrated and Documented, Rely on Widespread Coverage.

² National data indicates that 79% of workers employed by employers with 50-99 workers and 91% of employees at businesses with 100 or more employees have access to some form of paid leave. Bureau of Labor Statistics, *Paid Leave Benefits: March 2018; Table 46: Paid Leave Combinations*, available at <https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table46a.pdf>. Although this is national data, there is no reason to believe that Michigan's workforce differs appreciably.

The original version of MESTA, if approved by Michigan voters, would have provided a modest amount of paid sick leave to most workers in the state. This element of widespread coverage is essential to the success of a paid sick leave scheme. In the words of one Michigan worker, Kelly G. Lathrop:

My son has sickle cell anemia. In 2004 he became very ill with acute chest syndrome and was sent to the ICU and connected to a respirator for two weeks. I was fortunate enough to be there with him every day, by his side as he went through blood transfusions.

What would I have done if I couldn't be by his side? I was one of the lucky moms who could earn paid sick time--I honestly didn't even know at the time that so many working moms don't get the same benefit.

I'll never forget how many small children I saw at the hospital by themselves. Not only did this seem unfair to those kids and their caregivers, but I noticed the nurses had to focus on childcare instead of just health care. That's just not right, we have to stand up for kids and families and ensure everyone has access to earn paid sick time at work.

Moreover, while access to paid sick leave is certainly important for the workers who are able to take advantage of it to take care of themselves or their loved ones, widespread access to paid sick leave also has important public health benefits that simply cannot be realized under the amended version of MESTA, which leaves out thousands, if not millions, of workers and their families. The removal of so many workers from the law's protections greatly diminishes the ballot initiative's public health benefits and transforms one of the law's major purposes; such significant substantive changes are outside of the Legislature's permissible responses to a qualified ballot initiative.

Paid sick leave has been shown to reduce recovery time, promote the use of regular medical providers rather than hospital emergency departments, and reduce the likelihood of people spreading illness to other members of the workforce and to the public. Vicki Lovell, *Paid Sick Days Improve Public Health by Reducing the Spread of Disease*, Institute for Women's

Policy Research (Feb. 2006), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B250.pdf>. Paid sick leave also reduces health care expenditures by promoting access to primary and preventive care. Nationally, providing all workers with paid sick leave would result in \$1.1 billion in annual savings in hospital emergency department costs, including more than \$500 million in savings to publicly funded health insurance programs such as Medicare, Medicaid, and SCHIP. Kevin Miller et al, *Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits*, Institute for Women's Policy Research, at iii & 14-15 (Nov. 2011), <http://www.iwpr.org/publications/pubs/paid-sick-days-and-health-cost-savings-from-reduced-emergency-department-visits>.

Access to paid sick leave also decreases the likelihood that a worker will put off needed care, and can increase the rates of preventive care among workers and their children. *Id.* at 14-15 (Tables 5 & 6). A study by the Centers for Disease Control and Prevention found that workers who have access to paid sick leave are significantly more likely to undergo routine cancer screenings and to visit a doctor or obtain other medical care. Lucy A. Peipins, *The Lack of Paid Sick Leave as a Barrier to Cancer Screening and Medical Care-Seeking: Results from the National Health Interview Survey*, BMC Public Health (2012), <http://www.biomedcentral.com/content/pdf/1471-2458-12-520.pdf>. Women workers with paid sick leave are more likely to receive mammograms and Pap tests at suggested intervals, and adult workers with paid sick leave are more likely to undergo a colonoscopy or sigmoidoscopy. *Id.* The study concludes that the lack of paid sick leave appears to be a potential barrier to obtaining cancer screenings and preventive medical care. *Id.*

Paid sick leave also reduces contagion. Workers in jobs with high levels of public contact, such as restaurant workers and child care workers, are very unlikely to have paid sick

leave. Rachel O'Connor et al, *Paid Sick Days Access Varies by Race/Ethnicity, Sexual Orientation and Job Characteristics*, Institute for Women's Policy Research (July 2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B337.pdf>. As a result, these workers may have no choice but to go to work when they are ill, thereby increasing the risk of passing illnesses on to co-workers and customers while also jeopardizing their own health. Human Impact Partners, *A Health Impact Assessment of the Healthy Families Act of 2009* (June 11, 2009), available at http://go.nationalpartnership.org/site/DocServer/WF_PSD_HFA_HealthImpactAssessment_HIA_090611.pdf?docID=5101. Overall, people without paid sick leave are 1.5 times more likely than people with paid sick leave to go to work with a contagious illness like the flu. Tom W. Smith and Jibum Kim, *Paid Sick Days: Attitudes and Experiences*, National Opinion Research Center at the University of Chicago (June 2010), available at <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-attitudes-and-experiences.pdf>. A peer-reviewed epidemiological study found that in the previous year, nearly one in five food service workers had come to work vomiting or with diarrhea, creating dangerous health conditions. Steven Sumner et al, *Factors Associated with Food Workers Working While Experiencing Vomiting or Diarrhea*, *Journal of Food Protection*, 74(2) (2011), http://www.cdc.gov/nceh/ehs/ehsnet/Docs/JFP_ill_food_workers.pdf. The largest national survey of U.S. restaurant workers found that nearly two-thirds of restaurant waitstaff and cooks have come to work sick. Restaurant Opportunities Centers United, *Serving While Sick: High Risks & Low Benefits for the Nation's Restaurant Workforce, and Their Impact on the Consumer* (Sept. 30, 2010), http://rocunited.org/wp-content/uploads/2013/04/reports_serving-while-sick_full.pdf.

The availability of paid sick leave makes everyone healthier. For example, in the event of a disease outbreak that presents a threat to public health, government officials request that sick workers stay home and keep sick children home from school or child care to prevent the spread of illness, and to safeguard workplace productivity. U.S. Occupational Safety and Health Administration, *OSHA Fact Sheet: What Employers Can Do to Protect Workers from Pandemic Influenza*, <http://www.osha.gov/Publications/employers-protect-workers-flu-factsheet.html>. However, when workers lack paid sick leave, they may be unable to comply. During the height of the H1N1 (flu) pandemic, workers with lower rates of access to paid sick leave were more likely than those with higher rates of access to paid sick leave to go to work sick, and as a result, the pandemic lasted longer in their workplaces as the virus spread from co-worker to co-worker. Robert Drago and Kevin Miller, *Sick at Work, Infected Employees in the Workplace During the H1N1 Pandemic*, Institute for Women's Policy Research (Jan. 2010), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B284.pdf>. One study estimates that lack of workplace policies such as paid sick leave was responsible for five million cases of influenza-like illness during the pandemic. Supriya Kumar, Sandra Crouse Quinn, Kevin H. Kim, Laura H. Daniel & Vicki S. Freimuth, *The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-Like Illness During the 2009 H1N1 Pandemic*, 102 Am. J. Pub. Health 134, 139 (2012). As flu seasons get worse—this year's was the longest in ten years—the importance of paid sick leave will only increase. See Mike Stobbe, *Two-Wave U.S. Flu Season Is Now the Longest in a Decade*, The Detroit News (April 19, 2019), <https://www.detroitnews.com/story/life/wellness/2019/04/19/flu-season/39366927/>. In Michigan, one researcher specializing in respiratory illnesses noted that “[he did]n’t remember a season like

this;” the medical director of Oakland County’s Health Division called this year’s flu season, in which one child in the state has died, “horrendous.” *Id.*

Paid sick leave also prevents accidents. A study by researchers from the National Institute for Occupational Safety and Health at the Centers for Disease Control and Prevention found that workers with access to paid sick leave were 28 percent less likely than workers without access to paid sick leave to be injured on the job. Abay Asfaw et al, *Paid Sick Leave and Nonfatal Occupational Injuries*, American Journal of Public Health (Sept. 2012), available at <http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2011.300482>. The strongest connection between access to paid sick leave and a lower incidence of occupational injuries occurs in high-risk sectors and occupations. *Id.*

Paid sick leave allows parents to provide care for their sick children as well. Parental care makes children’s recovery faster and can prevent future health problems. Jody Heymann, *The Widening Gap: Why America’s Working Families Are in Jeopardy—and What Can Be Done About It* (Basic Books 2001). Parents without paid sick leave are nearly twice as likely as parents with paid sick leave to send a sick child to school or daycare and 2.6 times as likely to report taking their child or a family member to a hospital emergency room because they were unable to take time off work during their regular work hours. *Paid Sick Days: Attitudes and Experiences; Key findings from the 2010 NORC/Public Welfare Foundation national survey on Paid Sick Days*, Nat’l P’ship for Women & Families, <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-attitudes-and-experiences-presentation.pdf>.

A paid sick leave scheme that covers only a fraction of the state’s workers—like the amended version of MESTA—cannot come close to providing the same public health benefits as one that applies to all employees. To give just one example, if a part-time restaurant worker is

not given the chance to earn paid sick leave, he or she is far more likely to go to work while sick, spreading contagion and leading to more severe infectious disease outbreaks. Looking at the sheer number of workers who would lack paid sick leave under the amended version of MESTA, it is clear that the amendments made by the Legislature cannot be considered mere tweaks to the law. Rather, they undermine the entire purpose of the original ballot initiative, robbing Michiganders of their constitutionally-protected initiative power to vote on a more robust paid sick leave law that would have provide broader coverage and significantly stronger rights to workers. If the Court allows the Legislature’s amendments to MESTA to stand, Michigan voters will not have the chance to decide whether they want to take advantage of the myriad benefits that a comprehensive paid sick leave law would bring.

III. Claims That the Amendments to MESTA Are Necessary to Foster a Healthy Business Community Are Unfounded.

One of the main reasons given by legislators who sought to adopt and amend MESTA was that the original ballot initiative would harm the business community. *See Lindsay VanHulle, Snyder Signs Bills that Weaken Michigan Minimum Wage, Sick Leave Laws*, Bridge Michigan (Dec. 14, 2018), <https://www.bridgemi.com/public-sector/snyder-signs-bills-weaken-michigan-minimum-wage-sick-leave-laws>. This claim is unfounded. Studies of paid sick leave laws have shown no negative consequences for businesses. In fact, many studies have shown that paid sick leave requirements benefit businesses and the economy by reducing employee turnover and putting “high road” businesses that want to provide those benefits on a more even footing with other employers.

In San Francisco, which has the oldest paid sick leave ordinance in the country—it was passed by ballot initiative in 2006—the impacts of a comprehensive paid sick leave requirement

have been well-documented. All evidence examined since the law took effect shows that there have been no adverse effects on San Francisco business, and that job growth in the city has been as strong or better than in adjoining counties. *See, e.g.,* Vicky Lovell & Kevin Miller, *Job Growth Strong with Paid Sick Days*, Institute for Women’s Policy Research (Oct. 2008), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/B264.pdf>. Kevin Westlye of the Golden Gate Restaurant Association told the San Francisco Chronicle, “[s]ick leave is one issue where people just looked at adjusting their policies and moved on. It hasn’t been a big issue.” Ilana DeBare, *S.F. Sick Leave Law Celebrates 1 Year*, San Francisco Chronicle (Feb. 6, 2008), <https://www.sfgate.com/business/article/S-F-sick-leave-law-celebrates-1-year-3229376.php>.

Studies in New York City following implementation of its paid sick leave law also showed steady job growth in the year after the law went into effect. On the law’s first anniversary, the city released a report touting its successful implementation and noting that since the law went into effect, “the city has had steady job growth and the lowest unemployment in six years.” New York City Department of Consumer Affairs, *NYC’s Paid Sick Leave Law: First Year Milestones*, at 4 (June 2015), <http://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeaveLaw-FirstYearMilestones.pdf>. The city further reported, “New York City’s economy has thrived since the enactment of PSL [paid sick leave]. Between January 2014 and January 2015, a period that covers the law’s implementation, economic indicators were a cause for celebration, not concern as many had predicted.” *Id.* at 6.

A 2016 report published by the Center for Economic and Policy Research and the Murphy Institute of the City University of New York also showed that New York City’s paid

sick leave law has worked well for business. An overwhelming 98% of employers surveyed by the authors reported no known cases of abuse of paid sick leave. Eileen Appelbaum & Ruth Milkman, *No Big Deal: The Impact of New York City's Paid Sick Days Law on Employers*, Center for Economic Policy Research and the Murphy Institute of the City University of New York, at 4 (Sept. 2016), available at <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf>. As one restaurant owner put it, the misuse he feared prior to the law's passage "didn't happen. No one has taken a paid sick day because they just didn't feel like coming in that day. There is no abuse." *Id.* at 18. The survey also found that employees are cautious in their use of paid sick leave. As one employer stated "[p]eople ration it. People want to save it up in case something serious happens." *Id.* at 16. Most employers were able to cover absences with cost-free measures, such as temporarily reassigning duties to other employees or putting some work on hold. *Id.* at 19. Given these results, employers in New York City have a positive view of the earned sick leave law: 86% of employers surveyed now described themselves as supportive of the law, with more than half saying they were "very supportive." *Id.* at 28.

One employer, Tony Juliano, former general manager of XES Lounge in New York City, stated that before the city's paid sick leave law passed, "there were concerns that I and other small businesses had. But as it turns out, it hasn't had the kind of impact that I worried about. Not even close. And in fact, the impact that I saw in my business was a much stronger bond between ourselves and our employees, higher productivity, and a *more* successful business, not a *less* successful business." Zoe Ziliak Michel, *During Healthy Families Act Days of Action, Business Owners Stress Benefits of Paid Sick Time*, CLASP, <https://www.clasp.org/blog/during-healthy-families-act-days-action-business-owners-stress-benefits-paid-sick-time> (last visited Jun. 12, 2019).

Studies in Washington, D.C. and Seattle likewise saw no negative economic effects following implementation of their paid sick leave laws in either job loss or movement of businesses out of the city. In Washington, D.C., a report issued by the D.C. Auditor in 2013—five years after passage of the city’s paid sick leave law—found, based on interviews and responses to a questionnaire, that the law “did not have the economic impact of encouraging business owners to move a business from the District nor did the [law] have the economic impact of discouraging business owners to locate a business in the District of Columbia.” Yolanda Branch, *Audit of the Accrued Sick and Safe Leave Act of 2008*, Office of the District of Columbia Auditor (June 19, 2013), available at <http://dcauditor.org/report/audit-of-the-accrued-sick-and-safe-leave-act-of-2008/>. Likewise, a study of the economic impact of Seattle’s paid sick leave law at the time of its one-year anniversary found that a “preliminary look at available data shows no widespread negative economic impact as some opponents of the ordinance feared.” Main Street Alliance of Washington, *Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-Year Anniversary of Seattle’s Paid Sick and Safe Leave Law* (Sept. 2013), <http://www.eoionline.org/wp/wp-content/uploads/PSD-1-Year-Report-Final.pdf>. In fact, King County, which includes Seattle, continued to outpace the state in job growth following implementation of the law. Seattle maintained its share of King County’s businesses and revenues, including in the retail and food services sectors. No pattern of business flight from Seattle was evident. *Id.*

There are also many ways in which providing paid sick leave has proven to be *good* for businesses and for the economy. Indeed, significant benefits for business have been found in several studies of paid sick leave. Zoe Zilliak Michel, *The Business Benefits of Paid Sick Time*, Center for Law and Social Policy (Jan. 2016), <http://www.clasp.org/resources-and->

publications/publication-1/Business-Case-for-HFA-3.pdf. Paid sick leave results in reduced worker turnover, which leads to reduced costs incurred from advertising, interviewing, and training new hires. C. Siegwirth Meyer et al, *Work-Family Benefits: Which Ones Maximize Profits?*, Journal of Managerial Issues 13(1), Spring 2001. Replacing workers can cost approximately 21 percent of an employee’s annual compensation. Boushey, H., & Glynn, S. J., *There Are Significant Business Costs to Replacing Employees*, Center for American Progress (November 2012), <https://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>. Further, paid sick leave reduces the risk of “presenteeism”—workers coming to work with illnesses and health conditions that reduce their productivity—a problem that costs the national economy \$160 billion annually (\$207.6 billion after adjusting for inflation). Walter F. Stewart et al, *Lost Productive Work Time Costs from Health Conditions in the United States: Results from the American Productivity Audit*, Journal of Occupational and Environmental Medicine, 45(12) December 2003, available at <http://www.nationalpartnership.org/research-library/work-family/psd/lost-productive-work-time-american-productivity-audit.pdf> (unpublished calculation based on \$226 billion annually in lost productivity, 71 percent due to presenteeism).

Recognizing these benefits, the cities of San Francisco, Washington, D.C., and New York City—all among the earliest jurisdictions to adopt paid sick leave laws—have later *expanded* their paid sick leave laws following their initial adoption, underscoring how well these laws are working for workers, employers, and communities. New York City’s paid sick leave law has been so successful that the City Council has *twice* expanded it to include broader coverage—most recently to include extended family members and other loved ones in its family definition

and to allow workers to use paid sick leave to address various needs related to sexual assault and domestic violence.

CONCLUSION

The legislative amendments to MESTA transformed the ballot initiative from a robust paid sick leave law that would have provided needed economic security to workers and significant public health benefits into an anemic law that removes coverage from an estimated 1.8 million employees and greatly reduces the permissible uses of what little paid sick time it guarantees. In enacting these amendments, the Legislature deprived Michigan voters of the opportunity to decide whether or not they wanted to adopt a comprehensive paid sick leave law. This action impermissibly deprived Michiganders of their constitutionally protected initiative power. For the above reasons, *amici* respectfully urge this Court to determine that the Legislature's enactment of PA 369 violated the Michigan Constitution by acting beyond the enumerated grants of power of Art. 2, § 9.

Dated: June 19, 2019

Respectfully submitted,

/s/ Sheila C. Cummings

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2019, I electronically filed the above document with the Clerk of the Court using the ECF system, through which notification of such filing was sent to all attorneys of record in this matter.

/s/ Sheila C. Cummings

ATTACHMENT A



INSTITUTE FOR WOMEN'S POLICY RESEARCH
Informing policy. Inspiring change. Improving lives. 

December 14, 2018

To: Amy Steinhoff, State Policy Advisors
 From: Jessica Milli, Ph.D., Institute for Women's Policy Research
 Re: The Impact of Exemptions on Worker Coverage Under Michigan's Paid Sick Leave Law

IWPR used data from the 2016-2018 Current Population Survey's Annual Social and Economic Supplement (CPS ASEC) to calculate the share of workers in Michigan that met the major requirements for coverage under Michigan's amended paid sick leave law. The requirements that were evaluated were working for an employer of at least 50 employees, working at least 25 weeks in the past year for the employer, and working an average of 25 hours per week in the previous year for the employer.

We find that approximately 63 percent of Michigan workers meet all three criteria, and therefore 37 percent of workers would not be covered under the law. However, data limitations do not enable us to evaluate the impact of other exemptions such as workers exempt from overtime requirements under the FLSA, workers covered by collective bargaining agreements, and individuals working in specific occupations. Accounting for these exemptions would only increase the share of Michigan workers left uncovered by the law.

IWPR's previous research, however, indicates that part-time and part-year workers as well as workers at smaller businesses are more likely to lack access to paid sick time. An additional analysis of the 2015-2017 National Health Interview Survey (NHIS) indicates that nationally only about 45 percent of workers that do not meet the requirements for coverage under Michigan's law have access to paid sick days compared with 82 percent of the workers that do meet all three criteria. When this information is combined with the analysis above of the number and share of workers in Michigan that are left out by the law, we find that approximately 62 percent of workers that currently do not have explicit paid sick days policies at work would be left out under the current law.