STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE REQUEST FOR ADVISORY OPINION REGARDING 2018 PA 368 AND 2018 PA 369

Supreme Court Nos. 159160, 159201

_____/

BRIEF OF THE DEPARTMENT OF ATTORNEY GENERAL IN SUPPORT OF THE COURT TAKING JURISDICTION AND ARGUING THE *UN*CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369

ORAL ARGUMENT REQUESTED

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

Ann M. Sherman (P67762)
Deputy Solicitor General

Suzanne D. Sonneborn (P55511)
D.J. Pascoe (P54041)
Attorneys for the Department of Attorney General
Arguing against the Constitutionality
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7628

Dated: June 19, 2019

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF JURISDICTION

The Michigan Constitution authorizes either house of the Legislature to "request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." The Senate and the House of Representatives each timely requested that this Court issue an advisory opinion regarding the constitutionality of Public Acts 368 and 369 of 2018, which became effective on March 29, 2019. This Court has jurisdiction over this original proceeding under article 3, § 8 and MCR 7.303(B)(3), and this Court should exercise its jurisdiction to issue an advisory opinion in this matter.

STATEMENT OF QUESTIONS PRESENTED

This Court in its April 3, 2019 order requested briefing from the Attorney General on both sides of the three questions below. This team of attorneys from the Department of Attorney General supports this Court's exercise of jurisdiction and argues that the Acts are unconstitutional, answering as follows:

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

   Requesters' Answer: Yes.

   This Attorney General Team Answers: Yes.

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

   Requesters' Answer: Yes.

   This Attorney General Team Answers: No.

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

   Requesters' Answer: Yes.

   This Attorney General Team Answers: No.

CONSTITUTIONAL PROVISIONS INVOLVED

Const 1963, art 3, § 8 provides:

> Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

Const 1963, art 2, § 9 provides that:

> 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.

INTRODUCTION

This Court has asked the Attorney General to brief three issues: whether to exercise its jurisdiction to issue an advisory opinion, whether article 2, § 9, permits the Legislature to enact an initiative petition into law and then amend it within the same legislative session, and whether Public Acts 368 and 369 of 2018 were enacted in accordance with article 2, § 9. These issues cry out for this Court's guidance and are consonant with the reasoning behind the advisory opinion process. The latter two issues involve the voice of the People of Michigan—a voice they gave themselves through the initiative petition process when they ratified the 1963 State Constitution. And when this Court steps in to provide guidance, it should protect the People's will and the People's voice by concluding that Public Acts 368 and 369 were unconstitutionally enacted.

The Legislature's adoption of an initiative petition into law and its amendment in the same session, as it did with Public Acts 368 and 369 of 2019, eviscerates the will of the People as expressed by the plain language of article 2, § 9. That language sets forth the only options for legislative response to an initiative petition, none of which includes adoption and amendment in the same legislative session. Such a stratagem nullifies the option that the petition, if adopted by the Legislature, must be adopted *in full*. Indeed, the People did not give themselves a power so frail that it could be wholly stripped from them by legislative maneuvering, as occurred when the Legislature passed Public Acts 368 and 369.

The "adopt and amend" process is also insulting to the will of the People, as it is a gross manipulation of the process the People intended. And to say that the

People somehow permitted this gross manipulation by default—merely because they did not expressly prohibit what would have been inconceivable to them based on the legislative options they set forth in article 2, § 9—is the equivalent of importing a negative sales option (in other words, imposing acceptance unless there is an explicit rejection) into this important constitutional provision.

Initiative was intended to carve out some legislative power and put it in the hands of the People. Attorney General Frank Kelley was correct when he opined that adoption and amendment in the same legislative session is contrary to both the letter and spirit of article 2, § 9.

STATEMENT OF FACTS AND PROCEEDING

This brief adopts the statement of facts and proceedings outlined in the contrary brief filed by the Department of Attorney General. But this Attorney General Team's brief highlights two significant aspects of the enactment of PA 368 and 369: timing and substance.

The Legislature adopted both initiatives—the MI Time to Care petition (enacted as 2018 PA 337, the Improved Workforce Opportunity Wage Act) and the Michigan One Fair Wage petition (enacted as 2018 PA 338, the Earned Sick Time Act)—without change in the fall of 2018. Had they not been adopted in full, these initiatives would have been submitted to the People for a vote shortly thereafter, at the November 6, 2018 general election. Then, *just two days after the election*, the Senate introduced Bills to amend the initiatives—Senate Bill 1171 to amend PA 337, and Senate Bill 1175 to amend PA 338. Those Senate Bills (Senate Bill 1171

as PA 368 and Senate Bill 1175 as PA 369) were enacted during lame duck of the same legislative session[1] in which Public Acts 337 and 338 had been adopted, preventing the measures from going to the People for a vote.

As to their substance, Senate Bills 1171 and 1175 made key, substantive changes to the initiatives that had just been adopted. As the Michigan Restaurant and Lodging Association's brief conceded, the amendments to the Earned Sick Time Act "retained the requirement that sick leave accrue based on hours worked, but changed the accrual rate to every 35 hours and exempted small businesses with less than 50 employees. The amendments to the Improved Workforce Opportunity Wage Act increased the minimum wage over a longer period of time than originally proposed and reinstated the tip credit." The Michigan Restaurant and Lodging Association's Amicus brief, pp 3–4.

STANDARD OF REVIEW

This Court reviews de novo questions of constitutional interpretation. *UAW v Green*, 498 Mich 282, 286 (2015). This Court also reviews de novo questions of statutory interpretation. *Id*. But no court has thus far weighed in on the questions this Court has asked the Department of Attorney General to brief.

[1] Since the opening of the first legislature on November 2, 1835, and continuing through the 99th Legislature ending December 3, 2018, Michigan's legislative sessions have run for two years. See https://mdoe.state.mi.us/legislators/Sessions.

ARGUMENT

I. This Court should exercise its jurisdiction to grant the requested advisory opinion.

Michigan's constitutional provision concerning advisory opinions provides:

> Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date. [Const 1963, art 3, § 8.]

Thus, the Constitution contemplates this Court providing advisory opinions:

- on important questions of law,
- concerning the constitutionality of legislation,
- when requested by either house of the Legislature or the Governor after the legislation has been enacted into law but before the effective date,
- upon solemn occasions.

All these considerations are met in this instance and show that this Court should grant the request and provide an advisory opinion.

A. The requested advisory opinion seeks examination only of questions of law.

At issue are questions of law, not questions of fact. As has been noted, "in the context of an advisory opinion, [the Court] may not examine questions of fact." *In re Requests of Governor and Senate on Constitutionality of Act No 294 of Pub Acts of 1972*, 389 Mich 441, 483 (1973) (Levin, J., concurring). But here there are no disputed facts. It is a matter of public record that the Legislature adopted the initiative petitions as proposed by the People and then amended those statutes in

the same session, changing key substantive provisions of those previously adopted laws.

Moreover, the answers to these constitutional questions do not depend on how a law might be applied, or was applied, under a given or hypothetical set of facts—a very different type of case that may not be appropriate for an advisory opinion. To the contrary, these are questions of law that turn on undisputed facts as to the organic origin of the law as it was adopted, not as it was applied.

B. The questions concern the constitutionality of legislation.

Nothing can more unquestionably be the role of this Court than to fulfill its charge to preserve and protect the Constitution, including the powers that the People have granted to their government and the power that the People have reserved unto themselves. The very foundation of our system of government—the orderly business of governance and its effect on every facet of our daily lives—depends on the rule of law.

In this context, it has been noted that whether legislation has been adopted by proper constitutional procedure is just the sort of constitutional question that would warrant an advisory opinion. As Justice Williams noted in *In re Requests of Governor and Senate on Constitutionality of Act No 294 of Pub Acts of 1972*, "[Questions 1 and 2] . . . only relate to whether the No-Fault Act was enacted by proper and constitutional procedure." 389 Mich at 503. While there may have been disagreement within the Court on the resolution of that question, the Court agreed

that this was the *type* of question—a constitutional question—that warranted an advisory opinion.

C. The question was asked at the appropriate time by the appropriate parties.

The Constitution contemplates that the request that triggers an advisory opinion will be made by either house of the Legislature or the Governor after legislation has been passed but before it becomes effective. Both requirements are met here.

On November 8, 2018, Senate Bill No. 1171 was introduced to amend the "Improved Workforce Opportunity Wage Act" created under Public Act 337 of 2018; on November 8, 2018, Senate Bill No. 1175 was introduced to amend the "Earned Sick Time Act" created under Public Act 338 of 2018. Senate Bill No. 1171 and Senate Bill No. 1175 of 2018 were signed into law by Governor Rick Snyder on December 13, 2018, as Public Act 368 of 2018 and Public Act 369 of 2018, respectively. Neither was given immediate effect by the Legislature, so neither became effective until March 29, 2019—90 days from the end of the session at which it was passed. Const 1963, art 4, § 27.

Subsequently, on February 20, 2019, the Michigan House of Representatives adopted House Resolution 25 requesting an advisory opinion on the questions: "Does Article II, Section 9 of the Constitution of the State of Michigan of 1963 permit the Legislature to enact an initiative petition into law and then subsequently amend that law during the same legislative session?" and "Were

Public Act 368 of 2018 and Public Act 369 of 2018 enacted in accordance with Article II, Section 9 of the Constitution of the State of Michigan of 1963?" On February 20, 2019, Senate Resolution 16 of 2019 similarly requested an advisory opinion, and these requests were transmitted to this Court.

Consequently, the request for an advisory opinion was made at the appropriate time by the appropriate parties.

D. The occasion is solemn.

This case presents just the sort of question that is so basic and fundamental to the operation of our government that it offers a "solemn occasion" for this Court to uphold the will of the People. In adopting the Constitution, the People reserved for themselves the power to initiate and adopt legislation. They subsequently voiced their collective will and initiated legislation for their representatives to adopt, reject, or offer an alternative for the People to consider.

Now, for the first time in the 56 years since the Constitution was ratified and the People's mechanism for petition put in place, the Legislature chose a previously uncharted path. It chose to adopt the legislation as initiated by the People, thus keeping it off the ballot, and then only weeks later amend the legislation, making significant changes that were not consistent with the initiative as proposed by the People. This Court's guidance is needed to determine whether the People, when they ratified the self-executing provision of article 2, § 9 to zealously preserve and guard their newfound power, would have understood that power to be easily swept aside by the simple facade of adopt and amend. The sheer uniqueness of the

process, coupled with the profound impact such a strategy could have on future initiatives, demonstrates that this is indeed a solemn occasion warranting this Court's clear guidance.

E. Advisory opinions have intrinsic value and can reach questions of legislative process.

The argument has been raised that advisory opinions are not binding, and therefore the Court should not offer one here. AG Brief in Support of Constitutionality at 13. Obviously, if that were dispositive, it would counsel against ever issuing an advisory opinion. Yet this Court has done so several times, finding various statutes valid or unconstitutional. Some examples include:

- *In re Request for Advisory Opinion Re Constitutionality of 2011 PA 38*, 490 Mich 295 (2011) (holding various provisions of 2011 PA 38 constitutional and others unconstitutional and severable from the remainder of the act)
- *In re Request for Advisory Opinion Re Constitutionality of 2005 PA 71*, 479 Mich 1, 7 (2007) ("We hold that the photo identification requirement contained in the statute is facially constitutional under the balancing test articulated by the United States Supreme Court in *Burdick v Takushi*.")
- *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 98 (1988) (footnotes omitted) ("In light of the specificity of the issues, and the fact that resolution of these narrow but important questions of law does not depend upon 'factual situations the Court would be forced to hypothesize,' we agree to consider the questions presented. We conclude that the provisions of LDFA that allow the capture and use of tax increment revenues do not violate Const 1963, art 9, § 6.")
- *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 57 (1983) ("We advise that Act 47 … is constitutional.")
- *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 645–646 (1978) ("We are of the opinion that Lieutenant Governor

> Damman's action in casting the affirmative tie-breaking vote on HB 4407 was constitutionally proper. To the extent that this Court's decision in *Kelley*, *supra*, could be construed to the contrary, it is overruled.")

Moreover, the mere assertion that an advisory opinion is not binding ignores this Court's important role in issuing advisory opinions when appropriate and the due consideration given to these opinions. Justice Levin elaborated on these considerations:

> Although an advisory opinion is not an adjudicative decision of the Court and is not binding in the same sense a decision of the Court after a hearing on the merits constitutes a precedent under the doctrine of stare decisis, our advisory opinions are read by the public, the profession, the Governor and the Senate as a definitive expression of our views. Any such expression must be carefully circumscribed so as not to inhibit a seemingly different determination in a case where the contending parties have had an opportunity to present relevant facts, adjudicative as well as constitutional. [*In re Requests of Governor and Senate on Constitutionality of Act No 294 of Pub Acts of 1972*, 389 Mich 469, 483–484 (1973) (Levin, J., concurring).]

And the Court of Appeals has acknowledged that while advisory opinions may not be binding, they certainly will be afforded due consideration. See *Pletz v Sec of State*, 125 Mich App 335, 341 n 4 (1983) ("An advisory opinion may not be binding precedent, but discretion tells us not to disregard it.")

Additionally, the opposing-view Attorney General brief suggests that this Court should refrain from providing advisory opinions that address the process of governance as opposed to the substance of laws passed, citing *In re Request for Advisory Opinion Re Constitutionality of 1977 PA 108*, 402 Mich 83 (1977), a case in which this Court denied a request for an advisory opinion. AG Brief in Support of Constitutionality at 11. But there the Court appeared most concerned with the

"factual void" with which it was presented and the escalating number of requests for advisory opinions it had recently received. *In re Request for Advisory Opinion Re Constitutionality of 1977 PA 108*, 402 Mich at 86 ("This section was invoked eight times in the first 12 years of its existence. In the last three years, it has been invoked nine times.")

Moreover, this Court has provided an advisory opinion involving legislative process. In *Advisory Opinion on Constitutionality of 1978 PA 426*, the Court went to the heart of that process, answering the question whether the Lieutenant Governor's action in casting the affirmative tie-breaking vote under a particular set of circumstances was constitutionally proper. 403 Mich at 645–646. Similarly here, the very nature of the question goes to the core of the legislative process, and the power that the People have reserved to themselves in this regard makes this a question of law on a solemn occasion that warrants the Court answering the question now.

In sum, the considerations of article 3, § 8 have been met, the reasons posited for this Court declining to answer the question posed are unavailing, and this Court should grant the request and provide an advisory opinion on this important issue.

II. The plain language of article 2, § 9 and the common understanding of the ratifiers prohibit the Legislature from enacting an initiated law and then amending it during the same legislative session.

This Court's second question asks whether article 2, § 9 prohibits the Legislature from enacting an initiated law and then amending it during the same legislative session. The answer is yes. ***First***, this "adopt and amend" scheme is

contrary to the language of article 2, § 9, which gives three options for legislative response and does not include a fourth option for amendment in the same legislative session. ***Second***, just because article 2, § 9 does not expressly prohibit this tactic does not mean it is permitted. The People would not have conceived of such a stratagem, which makes a mockery of the limited options they set forth for legislative response to initiative petitions and thwarts the purpose behind their reserving to themselves the right to initiate laws.

A. The text of article 2, § 9 indicates that the "adopt and amend" process is prohibited.

The language of article 2, § 9 emphasizes the power of the People and shows that the People did not intend the Legislature to adopt and amend an initiated law in the same session.

1. Michigan courts look to the common understanding of the ratifiers.

The process of construing a constitutional provision "stands in marked contrast to a statute or other texts." *Michigan United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 374 (2001) (Young, J., concurring). The goal of this rule is to realize the intent of the People of the State of Michigan who ratified the Constitution—*not* to find a meaning that judges would prefer or that the People of Michigan today might prefer. *Id.* at 374–375. This is called the rule of "common understanding." *People v Bulger*, 462 Mich 495, 507 (2000).

Justice Cooley explained this rule of common understanding:

> 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, *[t]he 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, *[b]ut 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. [*Traverse City Sch Dist v Attorney General* (*In re Proposal C*), 384 Mich 390, 405 (1971), quoting Cooley's Constitutional Limitations 81 (internal quotations omitted) (emphasis added).]

In other words, constitutional analysis is not about employing hyper-technical rules of construction, but about trying to understand what the People—both learned and unlearned— would have believed the provision at issue to mean at the time of its adoption. And even though one might, post hoc, be able to make the words of a particular constitutional provision consistent with a desired meaning, the People who ratified the Constitution are not assumed to have looked for such a "dark or abstruse" meaning.

Constitutional analysis "begin[s] with an examination of the precise language" of the Constitution. *Michigan United Conservation Clubs v Secretary of State*, 464 Mich at 375 (Corrigan, J., concurring). If the constitutional language is clear, reliance on extrinsic evidence is inappropriate. *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 362 (2000). But "[t]o ascertain the common understanding of the Constitution, the Court may also consider the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished by it." *Traverse City Sch Dist*, 384 Mich at 405. For example, courts often consider "the Address to the People, which was distributed to Michigan

citizens in advance of the ratification vote and which explained in everyday language what each provision of the proposed new Constitution was intended to accomplish," and, to a lesser degree, the constitutional convention debates themselves. *UAW*, 498 Mich at 287–288 (internal citation omitted). These additional resources, while not controlling, are "relevant." *Id.* at 288 (internal citation omitted).

Finally, in addition to these general principles of constitutional construction, this Court has expressed its commitment to liberally construe constitutional provisions by which the people reserve for themselves "a direct legislative voice." *Michigan United Conservation Clubs*, 464 Mich at 413, citing *Kuhn v Dep't of Treasury*, 383 Mich 378, 385 (1971).

2. The plain language of article 2, § 9 includes only three options for legislative response to an initiated law, none of which includes adopting and amending in the same legislative session.

The plain language of article 2, § 9 presents only three options for the Legislature to respond to a law that the People have initiated. First, the Legislature can enact the law without change or amendment. Second, it can reject the law, whereby the law is submitted for popular vote at the next general election. Lastly, it can propose its own law on the same subject, whereby both the Legislature's and the People's proposals are submitted for popular vote at the next general election (in which case the proposal that receives a majority of the votes becomes law). Const 1963, art 2, § 9. The People did not adopt a fourth alternative

whereby the Legislature approves the initiated law without change or amendment and then immediately turns around and changes the law. If the People had wanted the Legislature to have that option, they would have said so in the text of article 2, § 9.

Indeed, the Convention Record underscores that there were only three options:

> And it does then give the legislature a chance to review what was done; *either* adopt it, do nothing, or provide an alternative in case the legislature, after hearings, can work out a better proposal. [2 Official Record, Constitutional Convention 1961, p 2394 (emphasis added).]

Because of the specificity of these options, the Legislature is not free to create a fourth option.

3. The text as a whole supports the People's desire to protect their own legislative power.

Constitutional provisions "must be interpreted in the light of the document as a whole. . . ." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156 (2003). In addition to the limited options for legislative response, other parts of the text demonstrate the People's desire to zealously protect their newfound power to initiate laws.

First, the text focuses on the power of the People, not the Legislature. The "People" are mentioned six times, "electors" five times. 1963 Const, art 2, § 9.

Second, neither people-initiated nor people-adopted laws are subject to the Governor's veto power. *Id*. This further demonstrates the People's efforts to insulate their voice.

Third, an initiated law that is rejected by the Legislature and is then adopted by the People at the polls cannot (unless provided for in the initiative measure) be amended or repealed except by a vote of the electors or by a three-fourths vote of the members of each House. *Id.* Even ballot measures do not require a supermajority for approval; all that is required for their approval is a simple majority of all votes cast on the measure. Again, this shows the extent to which the People intended to make it difficult for the Legislature to undo their "direct legislative voice." *Kuhn*, 383 Mich at 385.

Fourth, Michigan does not limit how soon an initiative can be re-attempted, Const 1963, art 2, § 9; art 12, § 2, again showing how important it is for the People to have a direct voice.

Fifth, the timetable favors the People. The People gave the Legislature only 40 session days from the time an initiative petition is received to either enact or reject a petition. Const 1963, art 2, § 9.

These aspects of the adopted text work in tandem with the three options for legislative response, underscoring the importance of the power the People reserved to themselves.

B. The absence of language prohibiting amendment in the same session or allowing amendment only in a subsequent session cannot be construed as permission to implement a scheme that thwarts the People's intent.

The plain language of article 2, § 9 does not include an express provision prohibiting the Legislature from adopting and amending initiated law in the same

session. But it need not. Adoption and amendment in the same session would have been inconceivable to the People based on the limited legislative options they put in place in article 2, § 9, their intent in reserving power for themselves through the initiative process, and their failure to anticipate either bad faith or an about-face by the Legislature. For the same reasons, article 2, § 9 did not need to use the language "at a subsequent session" for amendment of initiative petitions. Accordingly, the absence of this language cannot be interpreted as permission to engage in the "adopt and amend" process.

1. The absence of an express provision prohibiting "adopt and amend" must be interpreted in light of the People's purpose.

As argued above, the People have not been silent about prohibiting "adopt and amend." But to the extent the absence of an express prohibitive provision is considered silence on the issue, such silence cannot mean permission.

Even in the statutory context, this Court will interpret legislative silence in accordance with accepted, fundamental principles rather than "over-reading" silence to stand for a new principle. For example, in *People v Tombs*, 472 Mich 446, 448 (2005), this Court analyzed whether MCL 750.45c, which prohibits the distribution or promotion of child sexually abusive material, requires that the distribution or promotion be performed with criminal intent. The Legislature had not affixed the term "knowingly" to the distribution or promotion element. *Id.* at 458. But this Court did not require the Legislature to have articulated a *mens rea* requirement, even though "[c]onsidering solely the statute's words," it was

"apparent that criminal intent, *mens rea*, is not explicitly required." *Id*. at 452. The Court explained that that fact, standing alone "does not mean that the legislature intended a strict liability standard." *Id*. at 458. Instead, this Court presumed that "[a]bsent some clear indication that the Legislature intended to dispense with the requirement," silence suggested the Legislature's intent *not* to eliminate mens rea in MCL 750.145c(3). *Id*. at 457. Accord *Morissette v United States*, 342 US 246, 251, 265–269 (1952) (holding that Congress's failure to include a criminal intent element did not signal a desire to preclude the need to prove criminal intent and explaining that a relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to"….).

In the constitutional context, it is even more important not to read too much into absent language, because it is the understanding of the People that matters, not the intent of legislators or scriveners. In *Advisory Opinion on Constitutionality of 1982 PA 47*, for example this Court explained that although § 15, a new provision of the 1963 Constitution that involved long-term borrowing, was silent with respect to whether an act providing for long-term borrowing may be amended without a vote of the People, it was implicit "that it may not be amended in respect to the three particulars (amount, specific purpose, and method of repayment) expressly required to be stated in the ballot question." 418 Mich at 70. Focusing on the intent of the People rather than on the absent language, this Court held that "provisions of an act providing for long-term borrowing stating the amount to be borrowed, the

specific purpose to which the funds shall be devoted, and the method of repayment may not be amended without an approving vote by the people." *Id.* And the Court explained that "[a]ny other construction of § 15 would permit the Legislature to do *indirectly what it could not do directly* without a vote of the people." *Id.* (emphasis added).

The same is true here. Far from signaling permission, it is implicit in the absence of an express prohibition that the ratifiers would not have intended to allow the Legislature to do indirectly what it could not do directly by means of the options set forth in the text of article 2, § 9. See *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 214 (1985) (explaining that article 2, § 9 is the Peoples' "express limitation on the authority of the Legislature"). Moreover, article 2, § 9's text should be construed liberally in favor of the People's power to have a direct legislative voice. E.g., *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 327 (2004) (explaining that through the Constitution of the State the People can prohibit legislative authority).

2. The absence of "at a subsequent session" language in reference to initiative petitions must likewise be interpreted in light of the People's purpose.

For similar reasons, the fact that article 2, § 9 requires referendums to be amended at a subsequent session ("Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof") but does not use similar "at a subsequent session" language for initiative petitions does not in any way demonstrate the People's

intent to allow the Legislature the option of adopting and amending in the same legislative session. Cf. AG Brief in Support of Constitutionality at 20; Legislature's brief at 15–16. Such language was unnecessary where the People had already addressed the timing and process for amendment of an initiative petition: adopt in full or amend and send it as an alternate proposal for the People to vote on. Again, the text of article 2, § 9 shows that the People did not even contemplate any other possibility.

Additionally, the difference in the way article 2, § 9 treats amendment of initiative and referendum can be understood by considering how the power of initiative differs from that of referendum. Both give power to the People, but the initiative power is more direct. It starts with the People's voice, allowing the People to bypass their own Legislature and propose legislation of their own. Although the Legislature plays a role to the extent it can adopt the initiative, reject it, or reject it and propose its own law, the power has begun with the People. Clearly, the People did not foresee an outcome that would require "protection" when the Legislature's adoption in full would already have provided that protection of the People's voice. And the People certainly could not have conceived that the same Legislature that just adopted the People's law in full would subvert the intent of that process by turning around and stripping them of that protection.

In contrast, referendum begins with the Legislature and then allows the People the power to intervene. In that scenario, it would have been necessary to specify when amendment could take place because it had not been previously

addressed in article 2, §9. Later amendment of a law approved through referendum also gives the People another shot at having a voice—because that law is addressed by a different composition of the Legislature. But it defies logic that the People in article 2, § 9 somehow meant to afford *more* protection to referendum than to their own initiative process.

C. OAG 4303 was issued contemporaneously with article 2, § 9 and gives appropriate weight to these important principles.

The year after the 1963 constitution was ratified, Attorney General Frank Kelley was asked to opine on a number of questions related to an initiative petition for mandatory tenure that was presently pending before the Michigan Legislature. OAG, 1963–1964, No 4303, pp 309–312 (March 6, 1964). As this Court explained in *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 470 (1973), "those cases decided at a time proximate to the ratification of the constitution" "better reflect the meaning of the language of the constitution at the time it was written." In opining that an initiative petition was subject to amendment "at a *subsequent* legislative session," Attorney General Kelley clarified that "[i]t is equally clear 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 4303, p 311. That opinion's reference to both the spirit and letter of article 2, § 9 demonstrates that Attorney General Kelley appropriately considered the purpose behind the initiative process *and* the language of the text as a whole.

D. OAG 7306 and the contrary view are unsupported textually and discount the People's purpose.

Various entities argue that the text of article 2, § 9 supports the position that the Legislature is not barred from amending before the next legislative session. OAG 7306;[2] AG Brief in Support of Constitutionality at 28; Michigan Legislature brief at 8, 10–13. They miss the mark.

Unlike the contemporaneous opinion that first addressed this issue, the later opinion, OAG 7306, focuses largely on the mere absence of an express prohibition, as if that, standing alone, is tantamount to permission. It states that the People "did not impose any express limitations on amending a legislatively enacted initiated law." OAG 7306. The AG Brief in Support of Constitutionality echoes this theme, arguing that for the initiatives adopted by the Legislature, "the constitution merely states that these laws are subject to referendum, but otherwise does not identify any limits on the amendment or repeal of such laws."). AG Brief in Support of Constitutionality at 19. These views ignore the only three options offered by the People, as demonstrated above, which create both a procedural and a temporal constraint on the Legislature. They also demonstrate a fundamental misunderstanding of how a constitutional provision should be interpreted, wrongly making the absence of language tantamount to permission to do what is contrary to the People's intent. Finally, they do not give adequate weight to the intent of the People in "reserv[ing] to themselves the power to propose laws and to enact and

[2] Available online at https://www.ag.state.mi.us/opinion/datafiles/2010s/op10385.htm (last accessed June 12, 2019).

reject laws." 1963 Const, art 2, § 9. That power cannot be diminished by the Legislature absent an express *grant* of authority. (Again, initiative petitions are an "express limitation on the authority of the Legislature." *Woodland*, 432 Mich at 214.) Any other interpretation is contrary to the controlling principle that constitutional provisions by which "the people reserve for themselves a direct legislative voice" must be liberally construed. *Kuhn*, 383 Mich at 385.

Indeed, the People's power is illusory if the Legislature is allowed to adopt the People's initiative (rather than allowing it to go on the ballot if they cannot adopt it in full) and then turn around and amend it, or even repeal it, in the same legislative session. And that is precisely why the People expressly instructed that if the Legislature cannot adopt in full, it must either reject the petition or reject and "propose a different measure on the same subject." *Id.* The People also imposed a clear timing limit: If that Legislature thinks an amendment is warranted, it has just 40 days to offer a proposal for the People's consideration.

The Legislature argues that the "three options" "clearly apply [only] to the Legislature's options within the initial 40-day period when first presented with a proposed initiative" and that they "have absolutely no relevance to when a legislatively enacted initiative may *subsequently* be amended." Legislature's reply br at 7. But that argument, and the addition of a fourth option—adopt and amend in the same session—would make a nullity out of the requirement that the Legislature, if it adopts, does so *in full* with no changes or risk a vote by the

electors. Constitutions, as this Court has reminded, are "instruments of a practical nature. . . ." *Michigan Farm Bureau v Hare*, 379 Mich 387, 391 (1967).

The contrary view also raises Delegate Kuhn's statement that the Legislature "ha[s] full control. They can amend it and do anything they see fit." AG Brief in Support of Constitutionality at 29. But that statement is taken out of context. Mr. Kuhn's further explanatory remarks in the minutes of the Committee on Legislative Powers demonstrate the fuller extent of his view of the Legislature's power. His understanding was that the Legislature could adopt the proposal in toto or reject it, but to retain any subsequent control of the law, the Legislature would have to put the law up for approval via referendum:

> Mr. Kuhn pointed out that in every case the legislature has 40 days to act on a referendum and if they do not choose to do so and the people then adopt it on the ballot, he feels they deserve the protection to not allow the legislature to change it. All the legislature has to do to maintain control is to accept it *and put it on the ballot which they did with the oleo bill*. [Minutes and Action Journal No. 38, Committee on Legislative Powers, Tuesday, April 10, 1962, p 2, (emphasis added).][3]

Thus, this commentary assumes amendment at a subsequent session, because that is the only amendment consonant with the purpose of the initiative process, the limited alternatives for legislative response that are set forth in the constitutional text, and the procedure as contemplated. Moreover, this Court has often explained that although convention records may be "highly valuable," *People v Tanner*, 496 Mich 199, 226 n 20 (2014), they "cannot be used to contradict a

[3] Available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015071175775&view=1up&seq=277 (last accessed 6/12/2019).

limitation that appears in the constitutional text," *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 61 n 26 (2018).

Both the opposing view and OAG 7306 cite case law stating that legislatively enacted initiated laws are subject to the same process regarding amendment as legislation drafted by the Legislature. AG Brief Supporting Constitutionality at 22–23; OAG 7306. But these cases discuss the "equal footing" of the Legislature very generally and do not address the constitutional provisions of article 2, § 9 relating to initiative laws that are presented to the Legislature in advance of the general election. E.g. *Frey v Director of the Dep't of Social Services* case in both the Court of Appeals, 162 Mich App 586 (1987), and the Michigan Supreme Court, 429 Mich 315 (1987). Moreover, the opposing-view Attorney General brief essentially concedes that "equal footing" does not mean equal in every conceivable way, when it states that "[b]y comparison, the constitution *places laws that were enacted by voter approval in a different position* [from law that originated in the Legislature], a privileged one, requiring approval of 'three-fourths of the members elected to and serving in each house of the legislature." AG Brief in Support of Constitutionality at 19 (emphasis added).

In order to protect the initiative process and the right of the voters to participate fully in that process, article 2, § 9 expressly limits the Legislature to three options to deal with initiative legislation during the same legislative session. Once the Legislature chooses to exercise the first option—to enact the initiative legislation without change or amendment and thus to preclude the voters from

voting on the initiative legislation—the Legislature has completely exhausted its options for that legislative session. It may not amend the initiative law during the legislative session in which it has enacted the initiative law. It may amend the initiative law during the next session, when the initiative law stands on an equal footing with other laws—*but only then and not before*.

The opposing view also argues that the three-fourth vote requirement shows that the delegates to the Constitutional Convention recognized the importance of the Legislature's ability to amend voter-approved law. AG Brief in Support of Constitutionality at 20. First, the three-fourths requirement shows the People's desire to impose an extra safeguard on their legislative voice. Second, the point is not *whether* they can do so, but rather, *when* and *how*. In addition to the text of article 2, § 9, the comments of the delegates show that it was not intended that the Legislature would make a substantive change to the law as contemplated by the People, much less weeks after its adoption. As Delegate Downs elaborated on this subject,

> I believe that Delegate Hutchinson pointed out what technically and theoretically could be a problem; that if the initiative process got something into the statutes, and then a technical amendment was wanted later on, it would be almost impossible. Now, *what we wanted to guard against*, *and I felt very strongly about it*, *was a situation where the people go to all the effort of an initiative campaign*, *which is hard work*, *win it*, *and then have the legislature by a 51 per cent vote reverse it*. I think that the protection of the 3/4 would be such that it would mean the change would not be on the basic substance of what the people had gotten through the initiative process, but on what Delegate Hutchinson has referred to: some technical part that might need to fit into some other statute. [2 Official Record, Constitutional Convention 1961, p 2396 (emphasis added).]

Also, constitutional interpretation is about the understanding of the People, not the delegates. As *Advisory Opinion on Constitutionality of 1982 PA 47* notes, the Legislature is still a "coordinate legislative body" with the People. 418 Mich at 66.

The opposing view also reads *Advisory Opinion on Constitutionality of 1982 PA 47* as supporting the need for timing flexibility in amending voter-initiated law. AG Brief in Support of Constitutionality at 26, citing 418 Mich at 66–67. This Attorney General team respectfully disagrees. In *Advisory Opinion*, this Court discussed the reasoning of a few non-binding courts, including the Supreme Courts of South Dakota and Idaho, with respect to the need to make changes "before the next election." *Id*. But it never expressly adopted their reasoning. *Id*. And for good reason. The language of those States' constitutions and the intent of their ratifiers do not necessarily mirror those of Michigan. Also, this Court appeared to be discussing amendment *after* approval by voters in a statewide election without a further submission to the voters—*no*t the situation here where the Legislature turns around immediately and amends or repeals.

Finally, the Legislature attempts to minimize the impact of *Michigan Farm Bureau v Hare*, 379 Mich 387 (1967). In that case, this Court rejected the Legislature's strategy to "adopt and repeal" in the context of referendum petitions, the result of which would have allowed the Legislature to prevent the People from submitting referendum petitions on the daylight savings time law. *Id*. at 391–392. The Legislature argues that the Court "was careful to limit its holding to the situation where the right of referendum was completely taken away, not just when

it was negatively impacted by the acts of the Legislature." Legislative br at 9. But this Court's analysis did not ultimately hinge on the *extent* of the Legislature's intrusion on the People's reserved power, but instead on its mere existence. Indeed, the Court was dismissive of the argument that any doubt about the wording should be resolved in favor of the legislative process and against the referendum process, explaining that "the commonly understood referral process, forming as it does a specific power the people themselves have expressly reserved, [should] be saved if possible as against conceivable if not likely evasion or parry by the legislature." *Michigan Farm Bureau*, 379 Mich at 393. The very definitions of the words "evasion" (the act of "escap[ing] or avoid[ing] by cleverness or deceit" or "avoid[ing] the fulfillment of or performance of") and "parry" ("to deflect or ward off"), suggest that the Legislature should not act in bad faith. The American Heritage Dictionary 469, 904 (2d ed 1982). And this Court reiterated that "no court should so construe a clause or section of a constitution as to impede or defeat its *generally understood ends* when another construction thereof, *equally concordant with the words and sense of that clause or section*, will guard and enforce those ends." *Id*. (emphasis added).

III. Public Acts 368 and 369 of 2018 are unconstitutional because they are contrary to the People's intent as expressed in the plain language of article 2, § 9 of the Michigan Constitution and the ratifiers' common understanding.

This Court's third question asks whether 2018 PA 368 and 2018 PA 369 were enacted in accordance with the 1963 Michigan Constitution. As discussed above,

article 2, § 9 prohibits the Legislature from enacting initiated law and then amending it in the same legislative session. Yet that is just what happened when the Legislature enacted Public Acts 368 and 369. Accordingly, Public Acts 368 and 369 are unconstitutional.

When the Legislature enacted both proposed initiatives—the Earned Sick Time Act and the Improved Workforce Opportunity Act—it did so without change, as required by article 2, § 9. Thus, the Legislature signaled its approval of these initiated laws *in full*—not a temporary acceptance of them in order to retain the benefit of its approval (not having them submitted to popular vote). Indeed, had the Legislature not been able to accept these initiatives in full and instead desired to make changes, however big or small, that would have amounted to a legislative rejection of the initiatives. ("Any law proposed by initiative petition shall be *either* enacted or rejected by the legislature *without change or amendment*. . . ." Const 1963, art 2, § 9 (emphasis added). And that would have subjected the initiative petition to popular vote. ("If the law so proposed is not enacted by the legislature . . . the state officer authorized by law shall submit such proposed law *to the people for approval or rejection* at the next general election.") *Id*. (emphasis added).

A particular Legislative body's intent in showing its approval in full and then turning around and doing the very thing that would not have been permitted at the outset—making changes to the initiatives—would be contrary to article 2, § 9 no matter what the Legislature's intent. Nevertheless, here there are indications that

the Legislature intended all along to make significant changes to the initiative laws and that it adopted them only to avoid the popular vote. 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[4] (noting that the Legislature's effort to pass the two measures "was more about keeping the issues off the Nov. 5 ballot," that Republicans in both the state Senate and the House of Representatives "were the driving force behind passing the two proposals that they didn't like but wanted to more easily change after the Nov. 6 election," and that it was clear when they approved that they "intend[ed] to amend the laws.") At least one commentator, a Wayne State University law professor, has described this process as a "bait and switch" (Detroit News Op Ed 12/6/2018, Robert A. Sedler),[5] and with good reason. This maneuvering makes illusory the People's intent in article 2, § 9—and it is beneath a body to which the voters' confidence has been entrusted.

If the understanding since 1963 was that the Legislature could adopt and amend an initiative petition in the same session, one would think it would have been attempted—and litigated—long before the enactment of Public Acts 368 and 369. Yet none of the briefs in support of the constitutionality of Public Acts 368 and 369 cite to even one other such case or circumstance, leading to the assumption that

[4] Available at https://www.freep.com/story/news/politics/2018/09/07/minimum-wage-hike-paid-sick-leave-celebrations-would-premature/1216457002/ (last accessed June 11, 2019).

[5] Available at https://www.detroitnews.com/story/opinion/2018/12/07/opinion-lawmakers-pull-bait-and-switch/2218666002/ (last accessed May 26, 2019).

there are none. The absence of prior circumstances further underscores the intended prohibition of such emasculating antics.

CONCLUSION AND RELIEF REQUESTED

This Court's guidance is needed on the issues it has asked the Department of Attorney General to brief, and it should exercise its jurisdiction to accept these questions for review. In article 2, § 9, the People carved out for themselves—from the Legislature's powers—the power to initiate law. The plain language of article 2, § 9 and the common understanding of the ratifiers do not allow the Legislature to create for themselves a vehicle by which they can circumvent the People's will, as they did when they enacted Public Acts 368 and 369 of 2018.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

/s/ Ann M. Sherman
Ann M. Sherman (P67762)
Deputy Solicitor General

Suzanne D. Sonneborn (P55511)
D.J. Pascoe (P54041)
Attorneys for the Department of
Attorney General
Arguing against the Constitutionality
P.O. Box 30212
Lansing, Michigan 48909
517-335-7628

Dated: June 19, 2019