STATE OF MICHIGAN

MICHIGAN SUPREME COURT

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

Case Nos. 159160 and 159201

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Andrew Nickelhoff (P37990)
Nickelhoff & Widick, PLLC
Attorneys for Michigan State AFL-CIO,
Michigan Building and Construction
Trades Council, and Michigan Education
Association
333 W. Fort Street
Suite 1400
Detroit, Michigan 48226
Telephone: (313) 496-9429
anickelhoff@michlabor.legal

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BRIEF OF *AMICI CURIAE* MICHIGAN STATE AFL-CIO, MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL, AND MICHIGAN EDUCATION ASSOCIATION

STATEMENT OF BASIS OF JURISDICTION

Const 1963, art 3, § 8 confers authority for the Court's issuance of an advisory opinion in this matter.[1]

[1] Counsel for proposed *amici curiae* authored this brief. No entity or person other than a named *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF QUESTIONS PRESENTED

I. Should this Court exercise its discretion to grant the Michigan Legislature's request to issue an advisory opinion in this matter?

Amici curiae answer: Yes

II. Does Const 1963, art 2, § 9 permit the legislature to enact a proposed initiated law and then amend that law during the same legislative session?

Amici curiae answer: No

III. Was the legislature's enactment of 2018 Public Act 368 and 2018 Public Act 369 unconstitutional?

Amici curiae answer: Yes

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ARGUMENT

UNDER WELL-SETTLED PRINCIPLES OF CONSTITUTIONAL INTERPRETATION, THE LEGISLATURE VIOLATED CONST 1963, ART 2, § 9, WHEN AFTER ADOPTING CITIZEN-INITIATED PROPOSALS IT SUBSEQUENTLY AMENDED THOSE ACTS IN 2018 PUBLIC ACTS 368 AND 369.

Over many decades of deciding questions concerning the Michigan Constitution's provisions for citizen-initiated law, the Court has developed and applied a set of interpretive principles. As discussed below, those principles lead to the conclusion that Public Act 368 and Public Act 369 are unconstitutional.

A. The Constitution Should be Interpreted Based on the Common Understanding of the Ratifiers Based on the Plain Meaning of the Language.

The touchstone for determining the meaning of the Constitution's language is how the ratifiers – the people voting on it – would have understood it. *People v Tanner*, 496 Mich 199, 223; 853 NW2d 653 (2014); *Michigan United Conservation Clubs v Secretary of State (After Remand),* 464 Mich 359, 374; 630 NW2d 297 (2001). In an oft-quoted passage, Justice Cooley stated:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

1 Cooley, *Constitutional Limitations,* at 81 (6th ed)(*quoted in*, *for example*, *Michigan United Conservation Clubs v Secretary of State (After Remand)*, at 408); *Federated Publications, Inc v Michigan State University Board of Trustees,* 460 Mich 75, 85; 594 NW2d 491 (1999); *Traverse City School Dist v Attorney General*, 384 Mich 390, 405-406; 185 NW2d 9 (1971)). The question here, then, is whether the voters would have understood by reading art 2, § 9 that the Legislature has the power to enact an initiated proposal and then alter it significantly by amendment during the same session.

The relevant paragraphs of art 2, § 9 state:

> 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.

"We locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification." *UAW v Green*, 498 Mich 282, 286-287; 870 NW2d 867 (2015); *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 323; 870 NW2d 275 (2015); *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 66-67; 748 NW2d 524 (2008).

The plain meaning of the above language is that the Legislature has ***three*** options with respect to a submitted initiative proposal (not two as the Department of Attorney General asserts at page 18 of the Brief supporting constitutionality): (1) it can reject the proposal; (2) it can enact the proposal; or (3) it can submit its own alternative proposal to the voters. As the court stated in *Wolverine Golf Club v Hare*, 24 Mich App 711, 716-717 (1970), *aff'd*, 384 Mich 461 (1971), article 2, § 9, "requires that the proposal first be submitted to the legislature for approval, rejection or for an alternative proposal."

Read according to its plain meaning, art 2, § 9 does not state a fourth option of adopting and then amending the initiated proposal.[2]

B. A Provision Will Not Be Read To Nullify Another Provision.

"Every [constitutional] provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Clerk v Lapeer Circuit Court,* 469 Mich 146, 156; 665 NW2d 452 (2003). In *In re Proposals D & H*, 417 Mich. 409, 423; 339 N.W.2d 848 (1983) the Court stated:

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[2] With respect to this straightforward reading, the opinion of a single Delegate (Hon. Richard Kuhn quoted at page 29 of the Attorney General's brief in support of constitutionality) that the legislature is free to amend an enacted proposal at any time, is not a substitute for the plain reading that the majority of voters would have given the constitutional language. As this Court stated in *University of Michigan Regents v Michigan*, 395 Mich 52, 59; 235 NW2d 1 (1975): "The debates must be placed in perspective. They are individual expressions of concept as the speakers perceive them (or make an effort to explain them). Although, they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures."

> [W]e are guided by the fundamental rule of constitutional construction which requires this Court to construe every clause or section of a constitution consistent with its words or sense so as to protect and guard its purposes. *Michigan Farm Bureau v Secretary of State*, 379 Mich 387, 394; 151 NW2d 797 (1967). We are also mindful of the principle that all constitutional provisions enjoy equal dignity. *People v Blachura*, 390 Mich 326, 333; 212 NW2d 182 (1973). We therefore reject defendants' approach which would require us to nullify the plain language of art 2, § 9, para. 3 and to restrict the operation of art 4, § 34.

In *People v Blachura*, cited above, the Court set forth "two basic rules of constitutional construction. 1. Every statement in a state constitution must be interpreted in the light of the whole document. 2. Because fundamental constitutional principles are of equal dignity, none must be so construed as to nullify or substantially impair another." *Id* 390 Mich at 333.

The argument for the constitutionality of PA 368 and 369 is that art 2, § 9 does not expressly prohibit the legislature from enacting a petition proposal within the 40 session day referral period and then amending the enacted law later the same session. However, art 2, § 9, sets forth three clear alternatives for the legislature; the Court should not read in an unstated fourth option, especially if that unstated option would negate or undermine one of the stated alternatives.

If permitted the legislature's "adopt and amend" tactic would effectively nullify and override the third expressly stated option of presenting an alternative proposal to the voters. Why would a legislative majority that opposes an initiated proposal present an alternative for possible defeat by the voters, when it can exercise the unstated fourth option of adopting and then amending to strip away

offending provisions of the proposal that it dislikes? By invoking an unstated fourth option, the legislature can transmute an initiated proposal into the statute it desires without incurring the political risk of submitting it to the voters. But letting the voters choose is the alternative expressly called for in art 2 § 9.

Permitting the legislature to adopt an initiated proposal and then amend it in the same session also would nullify the following sentence in the third paragraph of § 9: "If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided." This language would have been understood by the ratifiers to provide in this case that once the legislature adopted the One Fair Wage and Time to Care proposals, the voters retained their right to vote ***on the submitted proposals*** as they were enacted, by means of a referendum. The voters could invoke this expressly-reserved right with a significantly lower petition signature threshold than was required to qualify the proposals for the ballot in the first place.

It is highly significant that the above-quoted sentence in the third paragraph of §9 ***specifically*** provides for referendum on an initiatory proposal enacted by the legislature. This is the ***only*** instance where the Constitution identifies a specific legislative enactment as subject to referendum. This provision would be rendered nugatory if the legislature could preclude a referendum on the adopted initiated proposal by later amending (or repealing) the enactment out of existence. The Department of Attorney General's brief in support of constitutionality as much as admits the foregoing: "When the Legislature opts to enact a proposed initiative, it

renders the rest of § 9 inapplicable other than the one sentence in ¶ 3, which provides that if the Legislature enacts an initiative 'it shall be subject to referendum, as hereinafter provided.'"(Brief p. 29) The Brief then ignores the salient fact that by amending the enacted proposals, the legislature denied voters their express right to vote on them by referendum.

Further, the language discussed above would have been read by the ratifiers *in pari materia* with the following passage in the first paragraph of § 2: "The power of referendum . . . must be invoked in the manner prescribed by law within the 90 days following the final adjournment of the legislative session at which the law was enacted." This express timetable would be negated if the legislature could insulate an enacted initiatory proposal from the voters by amending it during the same legislative session in which it was adopted. The ratifiers would have understood the logical necessity that in order for them to have the ability to exercise their expressly-stated right to refer an enacted initiatory proposal within the specified time limit, the enactment would have to remain in effect and unaltered for the remainder of the legislative session and for 90 days thereafter, to allow for the full time limit in which to invoke referendum. See, *Michigan Farm Bureau v Sec'y of State*, 379 Mich 387, 393-395; 11 NW2d 797 (1967)(*per curiam*). This is the only reading that preserves and harmonizes all of the voters' rights expressly set forth in § 9.

Michigan's Constitution must be read as an integrated and reticulated document. Const 1963, art 2, § 9 departed from its predecessor (Const 1908, art 5, §

1), by removing many of the implementation details and assigning them to the legislature. Those details that remained would have been read by the ratifiers in harmony with each other. Taken together, the provisions discussed above can only mean that if the legislature enacts an initiated proposal, in order to preserve the express right to referendum the enactment must be preserved without amendment through adjournment of the legislative session. The ratifiers would have understood that § 9 does not provide for an unstated fourth "adopt and amend" option that would negate one of the specified alternatives, and that §9 must be read so as not to impair citizens' expressly-conferred right to refer an adopted proposal for a vote of the people.[3]

C. The Constitution Should Be Read in a Manner that Protects the Right of Initiative.

For the reasons stated above, when established principles of construction are applied, art 2, § 9 cannot be read as permitting the legislature to adopt and "amend away" the One Fair Wage and Time to Care proposals. But even if the Court finds ambiguity or uncertainty as to the common understanding, the Court should read

[3] The first sentence of the third paragraph of §9 clearly requires that the legislature either enact or reject a proposal within 40 session days after it is received. That is how it was explained to voters in the *Address to the People*: "In the section is language which provides that the legislature must act upon initiative proposals within 40 session days, but may propose counter measures to the people." (vol. 2 *Official Record of the 1961 Constitutional* Convention, p. 3367) The voters would have understood the qualifier "without change or amendment" as limiting the legislature's action, not just during the 40 day presentment period but for long enough to preserve the enacted proposal for referendum. That is the only sensible reading, given the language in the next following sentence specifically reserving the right of referendum on an initiated proposal that the legislature has enacted.

the Constitution's language in a manner that favors and facilitates the right to initiate legislation and that deters and disables any action by the legislature to defeat or limit that right.

As to direct democracy generally, including the right to initiate legislation, this Court recently observed:

> 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, Const 1963, art 2, § 9; to reject statutes by referendum, id.; and to recall elected officials, Const 1963, art 2, § 8. Michigan is one of only eight states whose people have retained each of these forms of direct democracy. [citation omitted] After a 1913 amendment removing legislative oversight of the initiative process, the initiative 'has proven extremely popular,' according to a study prepared for the Constitutional Convention Preparatory Commission, adding that '[i]t is among the most used of Michigan's devices for direct government.' McHargue, *Direct Government in Michigan* (1961), p 19.

Citizens Protecting Michigan's Constitution v Sec'y of State, 503 Mich 42, 59, n 18; 921 NW2d 247 (2018).[4]

The Court has stated more specifically with respect to construing the constitutional grant of the right to initiate legislation:

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[4] Explaining the historical origins of the right to initiate legislation in the 1908 Constitution (as amended in 1913), the Court said: "The initiative found its birth in the fact that political parties repeatedly made promises to the electorate both in and out of their platforms to favor and pass certain legislation for which there was a popular demand. As soon as election was over their promises were forgotten, and no effort was made to redeem them. These promises were made so often and then forgotten that the electorate at last through sheer desperation took matters into its own hands and constructed a constitutional procedure by which it could effect changes in the Constitution and bring about desired legislation without the aid of the legislature." *Hamilton v Secretary of State*, 227 Mich 111, 130; 198 NW 843 (1924).

> Article 2, § 9 is a reservation of legislative authority which serves as a limitation of powers of the legislature. This reservation of power is constitutionally protected from government infringement once invoked.

Woodland v Michigan Citizens Lobby, 423 Mich 188, 215; 378 NW2d 337 (1985).

> The Court has a tradition of jealously guarding against *legislative* and *administrative* encroachment on the people's right to propose laws and constitutional amendments through the petition process.

Ferency v Secretary of State, 409 Mich 569, 601; 297 NW2d 544 (1980)(*per curiam*)(emphasis in original)(recently quoted in, *Protect Our Jobs v Bd of Canvassers*, 492 Mich 763, 772; 822 NW2d 534 (2012)).

> [U]nder a system of government based on grants of power from the people, constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed.

Kuhn v Department of Treasury, 384 Mich 378, 385; 183 NW2d 796 (1971).

> There is . . . an overriding rule of constitutional construction which requires that the commonly understood referral process, forming as it does a specific power the people themselves have expressly reserved, be saved if possible as against conceivable if not likely evasion or parry by the legislature. That rule is, in substance, 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.

Michigan Farm Bureau v Sec'y of State, *supra* (applied to a petition for referendum).

This firmly-rooted principle of constitutional construction demands that if there is any ambiguity or doubt as to whether the legislature may evade a popular vote on an initiated proposal by amending it, any uncertainty should be resolved in favor of full exercise of the right of direct democracy. Applied here, it means that the legislature's "adopt and amend" tactic should be invalidated. Article 2, § 9 does

not contemplate that any time the legislative majority disagrees with a proposal it can defeat it before it reaches the voters by adopting and then amending it. This conclusion does not require the Court to divine the "spirit" of art 2, § 9. The plain meaning of the language in art 2, § 9 is clear. And to the extent there is any doubt, the Court already has recognized the interpretive principle that all doubts or ambiguities should be resolved in favor of protecting and enabling the direct democracy rights of the people to make law.

CONCLUSION AND RELIEF SOUGHT

For the above reasons, the Court should issue an advisory opinion stating that 2018 Public Acts 368 and 369 violate the Constitution because the legislature may not adopt proposed voter-initiated law and then amend the law in the same legislative session.

Respectfully submitted,

/s/ Andrew Nickelhoff
By: Andrew Nickelhoff (P37990)
Nickelhoff & Widick, PLLC
Attorneys for Michigan State AFL-CIO, Michigan Building and Construction Trades Council, and Michigan Education Association
333 W. Fort Street, Suite 1400
Detroit, MI 48226
Telephone: (313) 496-9429
anickelhoff@michlabor.legal

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