

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

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**AMICUS CURIAE BRIEF OF THE GOVERNOR OF THE STATE OF
MICHIGAN IN SUPPORT OF AN ADVISORY OPINION THAT
2018 PA 368 AND 2018 PA 369 ARE UNCONSTITUTIONAL**

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STATEMENT OF JURISDICTION

Pursuant to MCR 7.303(B)(3) and article 3, § 8 the Michigan Constitution of 1963, this Court has jurisdiction over the instant request for an advisory opinion by the Michigan House of Representatives and the Michigan Senate (collectively, the “Michigan Legislature” or “Legislature”).

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?

The Governor of the State of Michigan,
as Amicus Curiae, Answers: Yes.

- II. DOES ARTICLE 2, § 9 OF THE MICHIGAN CONSTITUTION OF 1963 PERMIT THE LEGISLATURE TO ENACT AN INITIATIVE PETITION INTO LAW AND THEN AMEND THAT LAW DURING THE SAME LEGISLATIVE SESSION?

The Governor of the State of Michigan,
as Amicus Curiae, Answers: No.

- III. WERE PUBLIC ACT 368 OF 2018 AND PUBLIC ACT 369 OF 2018 ENACTED IN ACCORDANCE WITH ARTICLE 2, § 9 OF THE MICHIGAN CONSTITUTION OF 1963?

The Governor of the State of Michigan,
as Amicus Curiae, Answers: No.

STATEMENT OF FACTS AND PROCEEDINGS

This brief adopts the statement of facts and proceedings set forth in the brief of the Attorney General in favor of an advisory opinion from this Court that Public Acts 368 and 369 of 2018 are unconstitutional.¹

¹ Counsel for the Office of the Governor of the State of Michigan is the sole author of the instant brief, which was funded entirely by that Office. See MCR 7.312(H)(4).

ARGUMENT

The Governor of the State of Michigan agrees with the position advanced by the Attorney General and other supporting amici curiae that (1) the “adopt and amend” maneuver used by the Michigan Legislature in its 2017-2018 legislative session violated article 2, § 9 of the Michigan Constitution of 1963, rendering Public Acts 368 and 369 of 2018 unconstitutional; and (2) an advisory opinion from this Court to that effect is necessary to ensure this scheme is never used again. The Attorney General and other amici have aptly articulated the arguments for this position – the interpretive principles and authority that compel it, and the good sense that confirms it. One thing, however, cannot be stressed enough: the violence this “adopt and amend” maneuver does to the core constitutional values of this state and the democratic dignity of its people.

It is, in every sense, the first principle of this state’s Constitution that “[a]ll political power is inherent in the people.” Const 1963, art 1, § 1. In each word of the Constitution that follows, the people of Michigan have declared how their plenary power is to be exercised. Sometimes they have created a branch of government to exercise power on their behalf. Other times they have preserved power for themselves. Nonetheless, “[o]ur Constitution is clear”: the full political power of this state always remains, at root, with and for the people. *Citizens Protecting Michigan’s Constitution v Sec’y of State*, 503 Mich 42, 59; 921 NW2d 247 (2018).

Nowhere does this first principle find more meaning and life than in the ample political powers that the people of Michigan have expressly reserved for themselves

throughout their Constitution. As this Court has observed, Michigan’s constitutional commitment to direct democracy is uncommonly strong:

. . . 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. [*Id.* at 59 n 18.]

The impetus behind this constitutional commitment is as telling as its strength. This Court has made it clear: “ ‘distrust of the Legislative branch of our state government’ ” is what compelled the people of Michigan to stock their Constitution with “tools of direct democracy” – including the initiative process set forth in article 2, § 9, through which the people reserved for themselves the power to “ ‘bring about desired legislation without the aid of the legislature.’ ” *Id.* at 62-63 & n 33, quoting *Woodland v Mich Citizens Lobby*, 423 Mich 188, 218; 378 NW2d 337 (1985).

With its “adopt and amend” maneuver, the 2017-2018 Legislature both gutted this initiative process and validated the popular distrust that drove its creation. Nothing exceptional provoked this. Through two initiative petitions, hundreds of thousands of Michigan’s registered voters sought to make laws that the 2017-2018 Legislature opposed. In so doing, the people plainly invoked a power they had kept for themselves: to legislate according to their will when their representatives refused. The Legislature, disagreeing, was not without options. Under article 2, § 9, if a legislature wants to reject an initiative proposal or change it to its liking, that

legislature can voice its disagreement and put the matter to the people for a vote. But regardless of how a legislature may feel about an initiative proposal before it, the Constitution makes clear that the people ultimately decide what from the proposal becomes law. It is the people's legislative tool to wield, and theirs alone.

The 2017-2018 Legislature, however, eschewed this process, and its members chose instead to do something their predecessors never had: to block the path around them that the Constitution guaranteed; to commandeer the initiative power and use it to advance their will over the people's; to snatch this tool from the people's hands and silence their opposition with it. They chose to adopt and amend. It was an unprecedented power grab, plain and simple, and an affront to the rule of law. It must not happen again. The people of Michigan – the keepers of all political power – are entitled to more under their Constitution, and to better from their elected representatives.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Governor of the State of Michigan, as amicus curiae, respectfully requests that this Court issue an advisory opinion concluding that the 2017-2018 Legislature’s “adopt and amend” maneuver violated article 2, § 9 of the Michigan Constitution of 1963, and rendered Public Acts 368 and 369 of 2018 unconstitutional.

Respectfully submitted,

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