STATE OF MICHIGAN

IN THE SUPREME COURT

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

Supreme Court Case Nos. 159160 and 159201

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MICHIGAN ASSOCIATION FOR JUSTICE *AMICUS CURIAE* BRIEF ON THE 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 the Michigan Constitution of 1963, Article 3, § 8, MCR 7.303(B)(3) and MCR 7.308(B).[1]

1. No counsel for a party authored this *amicus* brief for the Michigan Association of Justice, in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this *amicus* 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?

Amicus Curiae MAJ answers: Yes

II. Does Article 2, § 9 of the Michigan Constitution of 1963 prohibit the Legislature from enacting an initiative petition into law and then subsequently amending that law during the same legislative session where the Michigan Constitution allows only three possible actions by the Legislature, to the exclusion of all other actions?

Amicus Curiae MAJ answers: Yes

INTRODUCTION

"I know, up on top you are seeing great sights,
But down on the bottom we, too, should have rights".

— Dr. Seuss, *Yertle the Turtle and Other Stories* (Random House)

Underneath the various arguments relating to Constitutional construction, there is a glaring and undeniable truth:

The Legislature took purposeful action to deny the people of the State of Michigan the right to vote on two ballot initiatives because it believed that the majority of Michiganders would vote in favor of the initiatives and the Legislature didn't want them to pass.

The Legislature's action violates the fundamental principles of a democracy. It can be prettied up and hidden under the rhetoric of constitutional construction (although there are stronger arguments for concluding that the legislative acts violated Michigan's Constitution), but what the Legislature did violated the trust that Michiganders have placed in them, does not pass the smell test and needs to be rectified.

As this brief is being written, the writer is accompanying approximately 180 eighth graders to visit our nation's Capital, to learn about the importance of democracy and the role that they have in preserving and protecting it. The students are learning about the fundamentals of democracy and its principles. They are being taught that their voice and their vote matters, about the principles of majority rule and minority rights, about the necessity of compromise and the importance of

checks and balances. As they tour the Capital, the lessons being taught bring the issues presented in this case home, simplifying them to their core.

Fundamentally, the Declaration of Rights in the Michigan Constitution provides, "All political power is inherent in the people." Const 1963, art 1, § 1. Simply put, Michiganders put an explicit check and balance on the Legislature's power when we reserved the power of the initiative and referendum. Const 1963, art 2, § 9. The lame duck Legislature has now tried to find a backdoor to nullify that check and balance. The actions of the Legislature violate democracy's core principles and should be repudiated. As Thomas Jefferson said:

> "Experience hath shewn, that even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny; and it is believed that the most effectual means of preventing this would be, to illuminate, as far as practicable, the minds of the people at large..."
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> — Thomas Jefferson, *Jefferson: Public and Private Papers.*

The power of the initiative is the power of illumination, of allowing the people to have a voice and a check on the people they have entrusted with power. It is a powerful tool of the people and it needs to be preserved and protected.

For over 50 years, the 1964 Attorney General's Opinion, AGO #4034 was followed by silent agreement and compromise of the political parties. The Michigan Constitution allows for a constitutional convention every 16 years, Const 1963, art 12, § 3, and in determining whether to convene the convention or not, the manner in which the Constitution has been interpreted and applied should be considered. For over 50 years, neither political party in the Legislature attempted to accept an initiative only to intentionally defeat the initiative's substance by amending it.

There clearly was a mutual belief that this was not an appropriate action by the Legislature and it served the people of Michigan well.

In our Constitution, the language of Article 2, Section 9 gives the Legislature three options when a citizen initiative receives the required number of signatures to be put for a vote.

1. The Legislature can do nothing and allow the initiative to go to a vote.
2. The Legislature can accept the initiative and enact it as written.
3. The Legislature can put their own competing initiative on the ballot and the higher vote getter of the two measures is enacted.

The Constitution does not include an option allowing the Legislature to ostensibly accept the initiative, enact it as written and then change it to be the statutory provision the Legislature preferred after the election in a lame duck session. Under the canon of construction known as *expressio unius est exclusion alterius*,[2] where the Constitution authorizes three possible specific actions that the Legislature can take, any other action should be considered excluded and prohibited. This doctrine is "a rule of construction that is a product of logic and common sense." *Hoerstman Gen Contracting Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). As a cannon of construction, the rule "characterizes the general practice that when people say one thing they do not mean something else." *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990) (opinion

2. Meaning "'the expression of one thing suggests the exclusion of all others.' " *People v Wilson*, 500 Mich 521, 526; 902 NW2d 378 (2017).

by Riley, C.J.), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.24, p 203. *See Bradley v Saranac Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997). As a matter of fact, this Court long ago acknowledged that no maxim of construction is more uniformly used than *expressio unius*. *Taylor v Michigan Pub Utilities Comm*, 217 Mich 400, 403; 186 NW 485 (1922). Use of traditional canons of construction has even often been associated with "textualism", including the canons *expressio unius* and *ejusdem generis* (limiting general language to items of the same sort as contemplated by specific language). Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), at 25-27.

The argument that the Legislature's actions are allowed because there is no language specifically ***prohibiting*** them, ignores the language explicitly authorizing the allowable courses of actions for the Legislature. If silence was permission, what was the point of enumeration in the Constitution of acceptable and available courses of action? To allow silence to constitute permission, ignores the power of written words and renders a significant portion of Const 1963, Article 2, § 9, superfluous, violating one of the most well established canons of construction. *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). Why would the Legislature ever offer their own competing initiative for a vote by the people, which they could lose, if they could guarantee they would win by enacting and then immediately amending the voters' initiative to say what they want? Any interpretation that allows this attempted Legislative workaround renders this

constitutional language superfluous and unnecessary and neutralizes the allowable actions stated in Article 2, §9.

Michigan's Constitution says what it means and means what it says; its words are sacrosanct and are more powerful than its silence.

STATEMENT OF FACTS

The Court of Appeals ordered the Board of Canvassers to certify the wage initiative spearheaded by Michigan One Fair Wage for a vote in 2018. *Michigan Opportunity v Board of State Canvassers,* Ct App No 344619 (Order of August 22, 2018), *lv den,* 503 Mich 918 (2018). The Board of Canvassers also certified the Michigan Time to Care initiative which proposed creating a right to sick leave.

As will no doubt be pointed out by various *amici*, including this brief, the Legislature, anticipating that, if allowed to vote, Michiganders would vote in favor of both initiatives, devised a plan to obviate the will of the people and make an end run around the initiative power that the people of Michigan had reserved to themselves. The Legislature voted to adopt the proposals in their entirety in order to keep them off the 2018 ballot, fully intending to gut them during the lame duck session. The Michigan One Fair Wage proposal was adopted as 2018 PA 337 and the Michigan Time To Care proposal was adopted as 2018 PA 338. During the lame duck session, the Legislature passed and the Governor signed 2018 PA 368 and 2018 PA 369, basically making the initiative organizers' objectives meaningless and drastically reducing the anticipated rights for most of the working people who were expecting to benefit from them.

ARGUMENT

STANDARD OF REVIEW

This case presents questions of law regarding the application of our state Constitution, which this Court reviews *de novo*. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional **unless its unconstitutionality is clearly apparent.**" *Id.* (emphasis added).

When construing Michigan's Constitution, this Court recently reiterated, "Our primary goal * * * is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of 'common understanding.' " *UAW v Green*, 498 Mich 282, 286-287; 870 NW2d 867 (2015). Further, this Court has explained, "We identify the common understanding of constitutional text by applying the plain meaning of the text at the time of ratification." *Id.* at 287. All provisions must be read in light of the whole document and no provision should be read to nullify another. *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003).

REQUEST FOR AN ADVISORY OPINION IS PROPER

Amicus Curiae MAJ supports this request for an Advisory Opinion. This is a quintessential separation of powers conflict, arising where the people of Michigan reserved a constitutional power to themselves and the Legislature is attempting to limit it.

a. Might Does Not Make Right

The Legislature is not more powerful than the people and, instead, must operate fairly within the framework of law stated in the Constitution. See, *e.g.*, Const 1963, art 1, § 1; Const 1963, art 4, § 1; Const 1963, art 3, § 2; Const 1963, art 3, § 8; and Const 1963, Schedule § 16 (deeming this revised Constitution, when adopted by a majority of the voters, the "supreme law of the state").

The Constitution gives the Legislature three choices when an initiative is certified: accept it as written, put their own initiative on the ballot as an alternative or let the initiative be voted on by the people. Const 1963, art 2, § 9. There is no other option available to the Legislature here. If silence gave the Legislature the power to stop initiated legislation, then there would be no need for the other three options to be stated. The maxim of *expressio unius est exclusion alterius* must rule the day. *See Bradley v Saranac Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997). By specifically giving the Legislature three avenues of action, the Constitution excludes all others for the Legislature.

Similarly, the long-established rule of construction prohibiting constitutional language to be rendered superfluous or "nugatory"[3] also supports a finding that the Legislature cannot constitutionally thwart a permissible initiative as they did here.

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3. See, Cooley, Constitutional Limitations (1868), p 58 (*effect is to be given, if possible, to the whole instrument, and to every section and clause*), 2 Blackstone, Commentaries on the Laws of England, pp *379-380 ("That the construction be made upon the entire deed, and not merely upon disjointed parts of it. '*Nam ex antecedentibus et consequentibus fit optima interpretatio.*' And therefore that every part of it, be (if possible) made to take effect; and no word but what may operate in some shape or other.")

The position adopted by the Legislature in this case is strikingly analogous to *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 87-88; 803 NW2d 674 (2011), addressing whether MCL 211.34c(6) could prevent aggrieved parties from appealing a decision of the State Tax Commission regarding classification decisions. The constitutional provision at issue in *Midland Cogeneration*, Const 1963, art 6, § 28, guaranteed judicial review of administrative decisions—provided they met certain requirements—and declared that those decisions "shall be subject to direct review by the courts *as provided by law*." (Emphasis added.) The defendant State Tax Commissioners argued that the constitutional phrase "as provided by law" meant that the Legislature could implement limited judicial review. *Midland Cogeneration*, 489 Mich at 93. This Court, however, held that "as provided by law" only meant that the Legislature could enact legislation as to the ***manner*** in which judicial review occurred. *Id.*, 489 Mich at 94. Further, this Court determined that the implementing language at issue in *Midland Cogeneration* did "not grant the Legislature the authority to circumvent the protections that the section guarantees. If it did, those protections would lose their strength because the Legislature could render the entire provision mere surplusage." *Id.* at 95.

A similar circumvention of constitutional protections by the Legislature has been manifested in this case. Why would the Legislature ever offer their own competing proposal for vote by the people, which they could lose, if they could guarantee the win by enacting the initiative and then immediately amending it to say whatever they want? Any interpretation by this Court allowing this

constitutionally unauthorized workaround would render this enabling language of Const 1963, Article 2, §9 superfluous and unnecessary.

b. Wrong Is Wrong

It is without question that the Legislature adopted the people's initiatives solely to thwart the people of Michigan from enacting them into law. Other *amici curiae* will walk this Court through the specific admissions from various Legislators. The Legislature does not deny that that was their intent. Instead, the Legislature's argument is that they have the right to thwart the will of the people, even where the people reserved a power to themselves, because the constitutional language does not specifically *prohibit* their obstructive behavior. However, the constitutional provision is not silent. It grants the Legislature three possible courses of action, (1) do nothing and allow the people to vote; (2) adopt the initiative as is, without change or amendment; or 3) propose their own competing version of the initiative so that the people can choose between the two. Since 1964, one year after our Constitution was ratified, the people of Michigan and the Legislature have accepted that these were the only three options available. Now, however, the Legislature is asking this Court to conclude that they can adopt the initiatives and then immediately amend or repeal them, despite the fact that that strategy is not authorized in the Constitution. Const 1963, art 2, § 9.

To accept the Legislature's request to add a fourth, unwritten, option to the Constitution, would render the specifically stated third option (allowing the voters to select between two competing proposals) superfluous. Axiomatically, initiatives are only necessary when the Legislature's majority does not want the proposed

statutory change to be enacted. Otherwise, the Legislature would simply pass the statutory change the voters seek without the need for an initiative. If the Legislature's majority wants to thwart an initiative and could just adopt and repeal (or water down) the bill, why would they ever propose a competing measure and leave it to the will of the voters?

c. The Power of Initiative Must Be Preserved

In *Michigan Farm Bureau v Secretary of State*, 379 Mich 387; 11 NW2d 797 (1967) (*per curiam),* this Court stated:

> There is nevertheless 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.

This Court continued stating:

> Mr. Justice Cooley's regularly quoted declaration in *People, ex rel Bay City* v *State Treasurer,* 23 Mich 499, 506:
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> "Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient." *Id.*

> The construction claimed here by plaintiffs would permit outright legislative defeat, not just hindrance, of the people's reserved right to test, by referendary process.

Here too, the construction proposed by the Legislature would permit outright legislative defeat, not just hindrance, of the people's reserved right to either place an initiative on the ballot before the voters of Michigan, or enactment "as is" by the Legislature.

We have the benefit of the interpretation of this provision, in close temporal proximity, with the passage of the Constitution, in the form of the 1964 Attorney General's opinion. 1964 AGO #4034. That opinion was not challenged for over 50 years by either of the major political parties as they came to power in the Legislature. As Justice Cooley explained, constitutions should not be interpreted based on the times or which political party is in power. Here, despite both Republicans and Democrats holding the Legislature at different junctures, no constitutional convention has been called to amend the language of this provision on popularly initiated legislation. The meaning of our Constitution should not change with the changing of our Attorney General and Governor, nor with the political party that is in control of the Legislature at any given moment. The people's constitutional right to initiate legislation, Const 1963, art 2, § 9, should withstand the efforts of political parties to thwart the lawfully exercised will of the people.

This Court ought to be aware of the danger of partisan politics clashing with constitutional rights and the importance of defending the Constitution, which is the right result even when it may be difficult or unpopular. The level of compromise

and collegiality shown by this Court during much of its history is proof that different viewpoints can make Michigan's rule of law stronger, rather than simply divided along partisan lines. When the political process is allowed to contravene the will of the people, who are exercising an indisputable constitutional power to initiate legislation, division and distrust naturally abounds. This Court is the ultimate enforcer of the people's constitutional rights, Const 1963, art 6, § 1 ("the judicial power of the state is vested exclusively in one court of justice"). It ought to protect the people's reserved right to initiate legislation and not allow the Legislature to evade or parry that right. Based on the plain language of the Constitution and principles of justice, fairness and democracy, this Court should hold that the Legislature cannot adopt and then defiantly amend initiative provisions just to overrule the evident will of the people.

d. The Importance of the Initiative Power

The people of the State of Michigan felt the power of initiative and referendum was important enough to reserve it for themselves as a check and balance on the Legislature. Const 1963, art 2, § 9. The people ratifying the Constitution understood that no one elected as Legislators would necessarily agree with their every view. Consequently, they preserved their right to disagree on specific matters with the Legislators they did elect. If the initiative power can be defeated by a simple majority of the Legislature, that power is necessarily diminished, if not rendered illusory. An initiative is needed only when the majority of the Legislature is not willing to enact a statutory change as initiated by the voters. If the legislative majority can simply enact an initiative proposal and then

immediately amend to dilute or repeal it entirely, why would anyone ever invest the time, effort or money necessary for a successful initiative campaign? It would be folly to undertake an initiative if the Legislative majority was against it and this Court were to determine that the Legislature could just nullify the initiative's result without even allowing the people to vote on it.

e. An Initiative Has More Power Than A Referendum

While both are powerful tools reserved to the people of Michigan, the initiative is clearly intended to be the people's more powerful voice over the referendum. Const 1963, art 2, § 9. When the people pass a referendum, the Legislature can amend it by a simple majority in the next legislative session. When the people pass legislation by an initiative, however, the Governor cannot veto it and the Legislature can only amend the initiative with a supermajority (75% vote).

Yet here, the Legislature denied the people their right to vote on two important economic proposals, which had been certified by the Board of Canvassers. Then the Legislature radically changed each proposal substantively. They are claiming that the Constitution – apparently through some authorization written in invisible ink – allows the Legislature to override proposals initiated by the people on minimum wages and entitlement to paid sick days for working people.

THERE IS NO SILENT PERMISSION; THE CONSTITUTION SPEAKS PLAINLY

Michigan's Constitution speaks directly to what the people can do when initiating legislation and what the Legislature may do in response. Const 1963, art 2, § 9. There is no other way for the people to initiate legislation and there are only three courses of action allowed to the Legislature by the clear language of the Constitution. *Id.*

This Court has been clear and strong in determining that "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63-64; 642 NW2d 663 (2002), citing *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). Even more clearly, courts should not read language into a constitutional provision that is not plainly there. *UAW v Green*, 498 Mich 282, 287; 870 NW2d 867 (2015). Certainly, silence in a constitutional provision should not be read to give permission to the Legislature, which is a governmental body with limited powers. Ultimately, "[a] fundamental and indisputable tenet of law is that a constitutional mandate cannot be restricted or limited by the whims of a legislative body through the enactment of a statute." *AFSCME Council 25 v Wayne County*, 292 Mich App 68, 93; 811 NW2d 4 (2011).

In our Constitutional system, a fourth "unstated" option for the Legislature's response to an initiative petition cannot be read between the lines of the plain language of the provision on initiatives, Const 1963, art 2, § 9. Reading the unambiguous Constitutional provision authorizing enumerated and limited options

for the Legislature, by interjecting another silent, unstated option, ignores this Court's established decisions on constitutional construction including honoring the principle of *exclusio unius*, refusing to render words superfluous and refusing to add language that was not ratified by the voters. If this Court grants an expanded, unstated constitutional power to the Legislature, it would erode, and potentially annihilate, the power the people reserved to themselves as wholly illusory and that result should be rejected.

The Legislature's behavior in this case may be compared to a teenage child being "grounded", or sent to their room, as a punishment by their parent and the child turning around immediately after they got to their room. The child might argue, having "technically" obeyed the parent's orders, they were free to socialize with their friends. We would expect the parent to immediately stop this cheeky and disrespectful response and perhaps increase the punishment. Here, the people are like the parent and the Legislature the cheeky kid, defying their parent's will by arguing that silence equals permission. But there is no real silence here; the Constitution speaks directly to what is allowed for the Legislature's response to initiatives.

CONCLUSION AND RELIEF SOUGHT

In the end, there is a right answer here. The power of the initiative, reserved by the people, must be protected from nullification by the Legislature. Otherwise, the political party in power in the Legislature would always have the capacity to thwart the will of the people and destroy initiative as a constitutional check and

balance retained by the people of Michigan. Firmly established principles of constitutional construction support the preservation of the people's power of initiative. Strong democratic values and case law also support the preservation of the initiative.

For the reasons stated, the Legislature's enactment of 2018 PA 368 and 2018 PA 369, amending initiated laws 2018 PA 337 and 2018 PA 338 in the same legislative session, contravenes the plain language Article 2, § 9 of the Michigan Constitution of 1963. *Amicus Curiae* MAJ respectfully requests this Court to uphold Const 1963, art 2, § 9, by preserving the power of the initiative and declaring that the Legislature cannot constitutionally adopt legislation initiated by the people under Const 1963, art 2, § 9, solely to keep it off the ballot and thwart the will of the people, in favor of its own will.

Respectfully submitted on June 19, 2019,

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