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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**BRIEF OF THE DEPARTMENT OF ATTORNEY GENERAL IN *SUPPORT* OF THE CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369**

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Dated: May 15, 2019

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## 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." Const 1963, art 3, § 8. Both the Senate and the House of Representatives timely requested an advisory opinion from this Court regarding the constitutionality of Public Acts 368 and 369 of 2018, which became effective on March 29, 2019. The Court thus has jurisdiction over this original proceeding under article 3, § 8 and MCR 7.303(B)(3). That said, as argued later in this brief, the Court should decline to exercise its jurisdiction to issue an advisory opinion in this matter.

## STATEMENT OF QUESTIONS PRESENTED

In its April 3, 2019 order, this Court requested briefing from the Attorney General on "both sides" of the following three questions. This team of attorneys from the Department of Attorney General is defending the constitutionality of these Acts and provides the following answers:

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

   Requestors' Answer: Yes.

   Brief in Support Answers: No.

2. Whether art 2, § 9 of the Michigan constitution permits the Legislature to enact an initiative petition into law and then amend that law during the same legislative session?

   Requestors' Answer: Yes.

   Brief in Support Answers: Yes.

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

   Requestors' Answer: Yes.

   Brief in Support Answers: Yes.

## 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 in full:**

> 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.

The legislature shall implement the provisions of this section.

## INTRODUCTION

This Court has asked that the Attorney General brief three legal issues, one addressing whether this Court should issue an advisory opinion, and the second and third addressing whether the Legislature may enact an initiative petition into law and then amend it within the same legislative session as it did with Public Acts 368 and 369 of 2018. This brief argues that this Court should decline to issue an advisory opinion here, but if it does, it should conclude that the Acts are constitutional because the Michigan Constitution, art 2, § 9 permits the Legislature to enact and amend within the same legislative session. There are two basic points here.

***First***, while the advisory opinion process ordinarily operates in a helpful way to provide guidance to the bench and bar, this case is ill suited to this process. Any answer here will relate deeply to the internal processes of the Legislature and the sharing of legislative authority between the people and their representatives. Therefore, the Court should await traditional adversarial litigation, which would be inevitable, so that the full authority of the Court would be invoked to ensure that there would be no confusion or conflicting claims of authority. And the claim here is not particularized to a statute, or set of statutory provisions, but addresses the constitutionality of a *process* under Michigan's constitution. In that way, if this Court advised that Public Acts 368 and 369 of 2018 were unconstitutional, even though not strictly speaking binding, one would expect the lower courts to follow the decision for these Acts. It is not clear, however, that the courts would do the same for other statutes that were enacted through the same process, when the actual substance of those laws may relate to entirely separate issues.

***Second***, the Michigan Constitution, like statutory law, must be applied as written. The Constitution, art 2, § 9, provides for two options for a law that has been proposed by initiative: either enact it or reject it. For the law that is enacted by the Legislature, the constitution only provides that such a law is subject to referendum, but places no other constraints on the Legislature's ability to amend such a law, as § 9 neither requires that an amendment occur at a later legislative session nor that it be only amended by a three-fourth supermajority. Thus, the constitution allows a law to be enacted and then later amended in the same legislative session. The limitations that the constitution creates for an initiated law that is rejected by the Legislature and later adopted by the voters is instructive, as § 9 limits any amendment of a law passed in that fashion to a three-fourth supermajority. The absence of that limitation for a legislatively enacted law – and the lack of a requirement that an amendment only occur in the next legislative session – is dispositive here.

The real gravamen of the claim here is that such an outcome – required by the constitution's plain language – leaves the enacted laws subject to legislative manipulation. The Legislature may enact and later amend an act, as it did here, where the legislative amendments might defeat the substance that the initiative petition proposed. But no one disputes that a later Legislature could amend the law – it does not remain unchanged in perpetuity – and there is good reason, supported by precedent, to have all legislatively-enacted laws sit on the same plane. An enacted law might need immediate revision. For the claim that this frustrates the will of the people, the remedy is at the ballot box at the next legislative election.

## STATEMENT OF FACTS

In the summer of 2018, two ballot proposal committees, MI Time to Care and Michigan One Fair Wage, submitted petitions to initiate legislation under article 2, § 9 of the Michigan Constitution to the Board of State Canvassers. MI Time to Care proposed to enact the Earned Sick Time Act, which would provide workers with various rights to earn sick time at work.[1] Michigan One Fair Wage proposed to enact the Improved Workforce Opportunity Act, which would, among other things, establish minimum wages for employees in Michigan.

In July 2018, the Board of State Canvassers determined that the MI Time to Care petition contained sufficient valid signatures for placement on the November 2018 general election ballot, but did not certify the Michigan One Fair Wage petition as sufficient.[2]

On July 30, 2018, the Secretary of State presented to the Legislature the MI Time to Care petition for consideration under article 2, § 9, which requires that the Legislature have at least "40 session days" to review the initiative and take action.[3]

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[1] The MI Time to Care petition is available online at http://legislature.mi.gov/documents/2017-2018/initiative/pdf/MITimeToCareFINAL.pdf. [Last accessed May 10, 2019.]

[2] See July 26-27, 2018, meeting minutes of the Board of State Canvassers, available at https://www.michigan.gov/documents/sos/07-26-18_Approved_Mtg_Minutes_635778_7.pdf. [Last accessed May 10, 2019.]

[3] The legislative history for 2018 Public Act 338 is available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=initiative. [Last accessed May 10, 2019.]

On August 24, 2018, consistent with an order from the Michigan Court of Appeals,[4] the Board of State Canvassers certified as sufficient for placement on the ballot the Michigan One Fair Wage petition.[5] And on August 27, 2018, the Secretary of State presented that petition to the Legislature.[6]

The Legislature then enacted both initiatives in the fall of 2018 without change. The Michigan One Fair Wage petition was enacted as 2018 PA 337, the Improved Workforce Opportunity Wage Act.[7] The MI Time to Care petition was enacted as 2018 PA 338, the Earned Sick Time Act. As a result, the initiatives were not submitted to the people for a vote at the November 6, 2018 general election.[8]

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[4] Michigan One Fair Wage filed a complaint for mandamus in the Court of Appeals requesting that the Board of State Canvassers be ordered to certify the petition as sufficient, which was granted. See Court of Appeals Docket No. 344619, August 22, 2018 order, available at https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=344619&CourtType_CaseNumber=2.

[Last accessed May 10, 2019.]

This Court later denied leave to appeal on the application on December 5, 2018.

[5] See August 24, 2018, meeting minutes of the Board of State Canvassers, available at https://www.michigan.gov/documents/sos/08-24-18_Mtg_Minutes_635779_7.pdf.

[Last accessed May 10, 2019.]

[6] The legislative history for 2018 PA 337 is available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=initiative. [Last accessed May 10, 2019.]

[7] See text of 2018 PA 337, available at http://legislature.mi.gov/documents/2017-2018/initiative/pdf/MichiganOneFairWageFinal.pdf. [Last accessed May 10, 2019.]

[8] Neither of these initiated laws were given immediate effect by the Legislature. As a result, the Acts as originally enacted did not become effective "until the expiration of 90 days from the end of the session at which it was passed," which was March 29, 2019. Const 1963, art 4, § 27; *Frey v Dep't of Management and Budget*, 429 Mich 315 (1987).

Two days after the election, the Senate introduced Senate Bill 1171, which proposed significant amendments to Public Act 337, the Improved Workforce Opportunity Wage Act.[9] The Senate also introduced Senate Bill 1175, which proposed significant amendments to Public Act 338, the Earned Sick Time Act.[10]

These proposed amendments generated significant public discussion regarding whether the Legislature could lawfully amend Public Acts 337 and 338 during the same legislative session in which it had enacted these initiatives. Some of that discussion related to the fact that former Attorney General Frank Kelley had opined in 1964 that legislatively-enacted initiatives could not be amended during the same legislative session. See OAG, 1963-1964, No. 4303, p 309 (March 16, 1964). Seeking clarity on this legal question, the Senate Majority Leader requested an Attorney General opinion.[11] On December 3, 2018, former Attorney General Bill Schuette issued OAG No. 7306, opining that article 2, § 9 does not prohibit the Legislature from amending enacted initiatives during the same legislative session.[12]

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[9] The legislative history for SB 1711 is available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=getObject&objectName=2018-SB-1171. [Last accessed May 10, 2019.]

[10] The legislative history for SB 1175 is available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=getObject&objectName=2018-SB-1175. [Last accessed May 10, 2019.]

[11] MCL 14.32 provides that "[i]t shall be the duty of the attorney general, when required, to give his opinion upon all questions of law submitted to him by the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer[.]"

[12] OAG No. 7306 is available online at https://www.ag.state.mi.us/opinion/datafiles/2010s/op10385.htm.

[Last accessed May 10, 2019.]

On December 13, 2018, the House and the Senate passed Senate Bills 1171 and 1175, and former Governor Snyder signed the bills. Senate Bill 1171 was enacted as Public Act 368 of 2018, and Senate Bill 1175 was enacted as Public Act 369 of 2018. Neither of these amendatory acts were given immediate effect, so they would not take effect until March 29, 2019. See Const 1963, art 4, § 27.

In February 2019, Attorney General Dana Nessel received a new opinion request noting the opposing opinions issued by General Kelley and General Schuette. That request asked for a formal opinion regarding whether article 2, § 9 prohibited the Legislature from amending an initiated law during the same session in which it was enacted, and whether Public Acts 337 and 338 of 2018 were amended in violation of article 2, § 9.

With the effective dates of the acts looming and the prospect of a third Attorney General opinion on the horizon, the House and Senate both resolved to request an advisory opinion from this Court pursuant to article 3, § 8 of the Michigan Constitution.[13] Separate requests for an advisory opinion were thereafter filed with this Court. On April 3, 2019, this Court entered an order setting oral argument in this matter, calling for briefing on the specified three legal questions, and requesting that the Attorney General submit separate briefs arguing both sides of the questions.

[13] See House Resolution 25 of 2019 and Senate Resolution 16 of 2019, available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=Resolutions. [Last accessed May 10, 2019.]

The instant brief is filed by the Department of Attorney General in ***support*** of the constitutionality of Public Acts 368 and 369.

## STANDARD OF REVIEW

The proper interpretation of the Michigan constitution and whether a statute violates the constitution are questions of law that are reviewed de novo. *Coalition of State Employee Unions v State,* 498 Mich 312, 322 (2015). When addressing a constitutional challenge to a statute, the statute is "presumed to be constitutional" and there is a "duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent. Further, when considering a claim that a statute is unconstitutional . . . the wisdom of the legislation" is not part of the inquiry. *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003) (citations omitted). "[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution" that the statute's validity will not be sustained. *Phillips v Mirac, Inc,* 470 Mich 415, 423 (2004) (quotation marks and citations omitted).

## ARGUMENT

### I. The Court should decline to exercise its jurisdiction to grant the requested advisory opinion.

Given the uncommon nature of advisory opinions and their lack of precedential value, this Court should exercise caution when deciding to issue one. Because of the particular focus of this request on the balance of power between the people and their Legislature and the process by which the Legislature may enact our laws, judicial review – not judicial advice – is the proper course. Moreover, the inherently political nature of these questions forecast uncertainty about how an opinion by this Court would affect the status quo. The typical considerations of jurisprudential significance, see, e.g., MCR 7.305(B), are present here, but they also counsel against issuing an advisory opinion. Rather, the traditional review process is warranted here, in which this Court may issue a binding opinion on the questions presented. This Court should decline to issue an advisory opinion.

#### A. Advisory opinions are the rare exception to the rule that this Court issues binding opinions in adjudicated cases.

The people have granted this Court the discretion to issue advisory opinions "on important questions of law" when requested by the governor or a house of the Legislature. Const 1963, art 3, § 8. But in recognition of the traditional and time-worn practice that courts decide only cases or controversies, this Court has made clear that the constitution contemplates only "sparing resort to this mechanism." *In re Request for Advisory Opinion Re Constitutionality of 1977 PA 108*, 402 Mich

83, 86 (1977); see also *In re 2002 PA 48*, 467 Mich 1203 (2002) ("Requests for advisory opinions are an extraordinary exception to the typical process that brings cases to this Court.").

The constitution's restraint on the frequency of advisory opinions, which may only be given on "solemn occasions," Const 1963, art 3, § 8, implicitly recognizes important limitations on their use. When rendering an advisory opinion, the justices are acting only as "constitutional advisers" to the coordinate branches. *Cassidy v McGovern*, 415 Mich 483, 497 (1982), citing *Anway v Grand Rapids Railway Co*, 211 Mich 592, 603–604 (1920). Advisory opinions "are not regarded as binding upon the Legislature, the executive, or the court itself." *Anway*, 211 Mich at 603; see also, e.g., *AFT Michigan v Michigan*, 303 Mich App 651, 668 (2014) (labeling this Court's advisory opinion "persuasive"). Put plainly, it "does not constitute a decision of the Court." *In re Requests of Governor & Senate on Constitutionality of Act No 294 of Pub Acts of 1972*, 389 Mich 441, 460 n 1 (1973).

### B. This Court should depart from its traditional adjudicative role in cases where the substance of an act is disputed, not where the very powers of government are at issue.

Rendering an advisory opinion on the constitutionality of the Legislature's chosen course for passing a law would be novel. The focus of this Court's advisory opinions over the years has been on the *substance* of various acts and whether the acts' provisions violate various constitutional provisions, not in addressing the process of governance.

A review of this Court's decision bears out this point. See, e.g., *In re 2011 PA 38*, 490 Mich 295 (2011) (considering the constitutionality of reduction or repeal of aspects of a tax exemption for pension income); *In re Request for Advisory Opinion re Constitutionality of 2005 PA 71,* 479 Mich 1 (2007) (constitutionality of photograph identification for voting); *In re Request for Advisory Opinion Re Constitutionality of 1986 PA 281*, 430 Mich 93, 97 (1988) (issuing opinion about use of revenues by local development finance authorities); *In re Advisory Opinion Re Constitutionality of 1974 PA 242*, 394 Mich 41 (1975) (reviewing a law requiring school districts to furnish all school children textbooks and school supplies); *In re Advisory Opinion Re Constitutionality of Act No 346 of Pub Acts of 1966*, 380 Mich 554, 562 (1968) (opining on establishment of a state housing authority). These opinions answer questions about whether the content of certain public acts violated the constitution. While significant, they address discrete provisions.

The questions presented here, however, concern the propriety of a *process* by which the Legislature chose to enact the challenged laws. Const 1963, art 4, § 1 ("[T]he legislative power of the State of Michigan is vested in a senate and a house of representatives."). The questions in the Legislature's instant request are different in kind from those typically presented to this Court, and an answer will concern not only the interpretation of a discrete passage of the constitution, but would touch on the balance of power between the power reserved for the Legislature, Const 1963, art 4, § 1, and the authority retained by the people themselves. Const 1963, art 1, § 1 ("All political power is inherent in the people.").

Thus, an answer by this Court would affect not only the substantive legislation passed by the enact-and-amend process and thereby affect the wages and leave accrual of many workers of this state, but would require grappling with the very scope of the Legislature's role in our state government.

In the past, this Court saw fit to decline an invitation by the governor that implicated this type of structure-of-government concern. See *In re Request for Advisory Opinion Re Constitutionality of 1977 PA 108*, 402 Mich 83 (1977). In that case, the Governor sought an opinion concerning a law enacted via a veto-override that empowered the Legislature to review rules adopted by executive branch agencies. *Id.* at 85. Recognizing the "serious disagreement" between the executive and legislative branches and the concerns about separation of powers, this Court found it an "inappropriate exercise" of its constitutional prerogative. *Id.* at 86. The Court, however, made clear that it "st[ood] ready to examine carefully, and to resolve expeditiously, any controversy that comes to it out of application of PA 108." *Id.* at 87. *In re 2011 PA 38*, 490 Mich 295, 347 (2011), this Court should be circumspect when considering whether to issue an advisory opinion on such weighty issues at the heart of our democracy, namely the scope of the Legislature's ability carry out its predominant constitutional prerogative of enacting laws.

The House, Senate, and amici agree that the question posed is an important one, and conclude that, therefore, this Court should issue an advisory opinion on the matter. But the significance of the constitutional question suggests that instead this Court should decide the issues based in its traditional adjudicative role.

Judicial review is the judiciary's check on its coordinate branches. See *Marbury v Madison*, 5 US 137, 177–178 (1803); Paul E. McGreal, *Ambition's Playground*, 68 Fordham L Rev 1107, 1112 (2000) (advocating a robust judicial review in support of the judiciary's role in performing checks and balances). To issue an advisory opinion on a question implicating the boundaries of the Legislature's authority would not ultimately satisfy the obligations of judicial review. Where the stakes of such an opinion address the touchstone of the structure of our state government, the Court should exercise its traditional function of judicial review rather than offer advice to the Legislature.

### C. An advisory opinion will create uncertainty and the speed of decision-making in this case is just as attainable in an adjudicated proceeding.

A non-adjudicative proceeding on this question would raise more questions than provide answers. Unlike, say, a relatively minor unconstitutional provision that could be carved out of a large tax overhaul, see *In re 2011 PA 38*, 490 Mich 295, 345–349 (2011), if this Court finds the Legislature may not enact and then amend an initiated law, the only legislative cure would be a wholesale reversion to the acts as adopted through initiative. Since an advisory opinion will not bind any actor, and since the Legislature is not legally required to cure any aspect this Court advises is unconstitutional, the question of remedy arises, asking whether the original public acts are revived or if a majority in both houses is bound to vote to reinstate the initiatives as initially adopted. And the next question is whether it is prudent to raise these issues in the form of advice, rather than binding law.

Although comity might prevail, the specter of an unheeded advisory opinion is reason enough to avoid the possibility of damage to the trust that Michiganders have in the functioning of their state government.

Moreover, the issue presented here is one that might well recur. It is not a discrete piece of legislation that is before the Court, it is the scope of the very power to legislate. And given the changing membership of the Legislature, enacting and then amending an initiated law may be a procedure that future iterations of the Legislature wish to use. Because of the real possibility that this could reoccur, a binding decision is the better course. Reliance on the comity of a coordinate branch is an inadequate substitute for the traditional check-and-balance of binding judicial review.

The speed with which a decision might be rendered has been proffered as another cognizable reason for issuance of an advisory opinion. (See Michigan Legislature's Br in Support, pp 6–8.) It is true that discussion at the Constitutional Convention recognized that "[b]y a solemn occasion the constitution means some serious and *unusual urgent* need." Constitutional Convention, based on 1 Official Record, Constitutional Convention 1961, p 1543 (statement of delegate McGowan) (emphasis added). But the questions presented here need not languish in the courts for prompt resolution. Just last term, traditional litigation yielded a fully briefed and extensively researched answer by this Court to the constitutionality of a ballot initiative roughly three months from the date of the filing of the complaint. See *Citizens Protecting Mich's Constitution v Sec'y of State*, 503 Mich 42 (2018) (case filed in Court of Appeals in April 2018 and resolved by this Court in July 2018).

Since it appears undisputed that the constitutional questions at issue here require no factual development, a lack of discovery and expedited briefing and decision-making would be appropriate. If this Court issues an advisory opinion that the Legislature's action is unconstitutional and a dispute arises about the necessary action of the legislative and executive branches to give that decision effect, it may require a private party to lodge the same constitutional arguments in the Court of Claims to bring finality to the decision. This is another possibility, and one that duplicates judicial resources and diminishes any virtue of this Court acting quickly in its advisory capacity.

Amicus curie present argument that this Court should issue an advisory opinion "for the benefit of all employers and employees in Michigan" so there is certainty about the ground rules pertaining to paid sick leave and the minimum wage. (See Amicus Curiae "The Coalition" Br, p 8.) While the desire for certainty on an expeditious basis regarding the constitutionality of PA 368 and PA 369 is understandable, the constitutionality of *the substance* of these acts is not before this Court. Thus, the constitutional questions to be decided are not at all linked to the impact on our state's employees and employers.

As noted above, two Attorneys General have issued opinions on this question and have come to opposite conclusions. Of course, neither is binding on the courts. *Frey v Dept of Mgt & Budget*, 429 Mich 315, 338 (1987). But an opinion from this Court would not strictly bind anyone either. This Court should not act as a non-binding tie-breaker and should decline the request for yet another advisory opinion.

## II. Article 2, § 9 of the Michigan Constitution does not prohibit the Legislature from enacting an initiated law and then amending it during the same legislative session.

Consistent with the principles of constitutional construction and the text of article 2, § 9, the Michigan constitution does not prohibit the Legislature from amending initiated laws during the same legislative session in which the Legislature has enacted them. Any remedy for those opposed to the manner in which they were amended is legislative in nature, not judicial.

### A. The principles of constitutional interpretation require that a court apply the text as written.

When interpreting any constitutional provision, the objective "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *People v Tanner*, 496 Mich 199, 223 (2014) (citation omitted). "[T]he primary rule is that of 'common understanding,'" as explained by Justice Cooley:

> 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." [*Federated Publications, Inc v Board of Trustees*, 460 Mich 75, 85 (1999) (citations omitted).]

Where the text is clear, this Court ordinarily does not need to move beyond the Constitution's provisions themselves. See *American Axle & Mfg, Inc v Hamtramck,* 461 Mich 352, 362 (2000), citing Cooley, Constitutional Limitations (1868), p 55. Rather, the Court looks to the Constitution's "plain language" to discern its meaning. See *Associated Builders v City of Lansing,* 499 Mich 177, 188 (2016).

And to help determine the "common understanding," the " 'constitutional convention debates and the address to the people, though not controlling, are relevant.' " *Tanner*, 496 Mich at 226, quoting *People v Nash*, 418 Mich 196, 209 (1983). In addition, the provisions of the Constitution must be read harmoniously. See *Straus v Governor,* 459 Mich 526, 533 (1999) ("Where, as here, there is a claim that two different provisions of the constitution collide, we must seek a construction that harmonizes them both."). Since the provisions of the 1963 Constitution were adopted simultaneously, "neither can logically trump the other." *Id.*

### B. Article 2, § 9 provides the authority for the people to initiate legislation through a petition and provides a role for the Legislature to enact or reject it.

Article 2, § 9 of the Michigan constitution empowers the people to propose laws, to enact laws, or to reject laws, called the initiative. Const 1963, art 2, § 9. Section 9 also empowers the people to approve or reject laws enacted by the Legislature, called the referendum. *Id.*[14] With respect to initiatives, § 9 provides in relevant part that the people may initiate laws through a petition process:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . The power of initiative extends only to laws which the legislature may enact under this constitution. . . . To invoke the initiative . . . petitions signed by a number of registered electors, not less than eight percent for initiative . . . 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. [Const 1963, art 2, § 9.]

[14] The Legislature has referendum power as well. See Const 1963, art 4, § 34 ("Any bill passed by the legislature and approved by the governor . . . may provide that it will not become law unless approved by a majority of the electors voting thereon.").

The Legislature implemented article 2, § 9 with respect to initiatives in various sections of the Michigan Election Law, MCL 168.1, *et seq*. Under the Constitution and the Election Law, in order for the people to place an initiative on the general election ballot, the people must take three actions:

> (1) prepare a petition that meets the formatting requirements of MCL 168.482;
>
> (2) gather the required number of valid signatures under article 2, § 9; and
>
> (3) file the petitions with the Secretary of State under MCL 168.472.

After filing, the Board of State Canvassers reviews the petition to determine whether there are sufficient valid signatures under MCL 168.476. Once that review is complete, the Board of State Canvassers will make an official declaration of the sufficiency or insufficiency of the initiative petition consistent with statutory law. MCL 168.477(1).

If the initiative petition is certified as sufficient, the Secretary of State then presents it to the Legislature for enactment or rejection within 40 session days under article 2, § 9:

> 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.
>
> [Const 1963, art 2, § 9.]

If the Legislature votes to reject the initiative, it "may . . . propose a different measure upon the same subject" to be placed on the ballot along with the people's proposed initiative. *Id.*

Thus, the Legislature has two options with respect to an initiative during the 40-day presentment period: (1) vote to enact it without change or amendment; and (2) vote to reject it without change or amendment.[15] The processes that follow from these two options – to enact or reject – are introduced by two "if" statements:

> ***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. [Const 1963, art 2, § 9 (emphasis added).]

For those initiatives that are "not enacted," the constitution then requires that the initiative be submitted to the people for a vote at the next general election: "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[.]" Const 1963, art 2, § 9. The constitution also provides express limitations, establishing the conditions under which initiated laws adopted by the people may be amended or repealed by the Legislature:

> 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 . . . or by three-fourths of the members elected to and serving in each house of the legislature***[.] [Const 1963, art 2, § 9 (emphasis added).]

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[15] The initiative process has been described as an "indirect" process because it "requires that the proposal first be submitted to the legislature for approval, rejection or for an alternative proposal." *Wolverine Golf Club v Hare*, 24 Mich App 711, 716-717 (1970), aff'd 384 Mich 461 (1971). This contrasts with the "direct" initiative process provided for amending the Michigan Constitution, which "operates independent of the legislature[.]" *Id.*, at 716. See also Const 1963, art 12, § 2.

In contrast, for those 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. The limitation during the 40-day presentment period requires that it be enacted "without change or amendment," but the constitution does not create any restriction on the subsequent amendment of an enacted law.

### C. Article 2, § 9 does not prohibit the legislative amendment of initiated laws during the same legislative session in which the Legislature enacts those laws.

Without any limitation imposed on the Legislature's ability to amend or repeal a law after a law is enacted, the constitution places legislatively-approved laws in the same posture as laws that originated in the Legislature. They may be amended after passage. By comparison, the constitution places laws that were enacted by voter approval in a different position, a privileged one, requiring approval of "three-fourths of the members elected to and serving in each house of the legislature." The wisdom of this scheme is for the people to determine themselves, not for the Court to second guess. For laws enacted by the Legislature, the remedy for an effort to defeat a voter initiative is petition for a referendum or to elect new representatives.

The court decisions that have examined questions related to the initiative process support this conclusion. The same is true of the constitutional convention debate.

***For voter-approved initiated law,*** as already noted, the text of § 9 reveals that the people provided for the Legislature's "amend[ment] or repeal[ ]" of initiated laws "adopted by the people at the polls," but limited the Legislature's ability to amend or repeal such laws by requiring approval of "three-fourths of the members elected to and serving in each house of the legislature," instead of a simple majority vote. Const 1963, art 2, § 9, ¶ 5. See also *Wolverine Golf Club v Hare*, 24 Mich App 711, 726–727 (1970) (noting three-fourths vote requirement was a "principal change[ ]" to article 2, § 9), aff'd 384 Mich 461 (1971). Moreover, § 9 includes temporal language within which the Legislature may act, but only with respect to referendums. Section 9 provides that "[l]aws approved by the people under the referendum provision of this section may be amended by the legislature *at any subsequent session thereof*." Const 1963, art 2, § 9, ¶ 5 (emphasis added).

In adding the three-fourths vote requirement to § 9, delegates to the Constitutional Convention recognized that the Legislature should have the ability to amend a voter-approved law. 2 Official Record, Constitutional Convention 1961, pp 2395–2397. Indeed, one delegate raised the subject of adding a timing component, e.g., the "subsequent session" language, in order to forestall the Legislature from "instantly" amending a voter-approved law. *Id.* (Convention), pp 2396–2397. But that did not prevail in light of arguments that the three-fourth vote requirement was a sufficient check on the Legislature's authority to amend or repeal such laws. *Id.* (Convention).

This Court has also acknowledged the rationale for permitting the Legislature to amend voter-approved laws in the same term. For example, in discussing the Legislature's authority to amend a voter-approved law under article 9, § 15 of the constitution, the Court observed that there may be a need for a revision to a voter-initiated law in a timely way:

> [C]ourts have reasoned that experience after the enactment of voter-approved legislation might indicate that legislation was not workable and that in providing for the initiative and referendum the people intended that *the Legislature possess the* ***power to make needed changes*** *as otherwise there would be no means of doing so before the next election.* [*Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66–67 (1983) (emphasis added; footnotes omitted).]

And "if the people disagree with a legislative amendment of voter-approved legislation their remedies are the (or another) referendum and, when the Legislature stands for re-election, the ballot." *Id.* (footnotes omitted).

Thus, with respect to voter-approved initiated laws, the people have expressly permitted amendments and repeals by the Legislature at any time after enactment, provided they receive a super-majority vote. If the people disagree with an amendment (or repeal), their remedy is to again invoke the initiative or referendum process, or to express their disapproval at the ballot box.

***For legislatively-enacted initiated laws***, as already noted, § 9 neither expressly permits nor prohibits the Legislature's authority to amend such laws and provides no temporal limitations on these changes. Rather, § 9 provides only that "any law proposed by such [initiative] petition" that "shall be enacted by the legislature [ ] *shall be subject to referendum*[.]" Art 2, § 9, ¶ 5 (emphasis added).

As a result, once the Legislature exercises its option to enact an initiative sometime within the 40 session days, the enacted initiative holds the same status as an ordinary law drafted and enacted by the Legislature. On this point, the courts have confirmed that initiatives are treated just like ordinary legislation.

In *Frey v Director of the Dep't of Social Services*, 162 Mich App 586 (1987), the Court of Appeals addressed whether the two-third vote requirement for giving legislation immediate effect under article 4, § 27 of the constitution applied to an initiated law enacted by the Legislature under article 2, § 9. The initiated law included a provision stating " 'This Act Shall Take Immediate Effect.' " *Id*. at 588–589. The Legislature enacted the initiated law but did not vote to give it immediate effect. *Id*. at 589-590. The plaintiffs argued that the initiated law could not be given immediate effect because article 4, § 27 applied to the law. *Id*. at 590.

The Court of Appeals agreed. That court examined the history and language of article 2, § 9 along with statements by the constitutional convention delegates and prior court decisions, and determined that article 4, including § 27, applies to initiated laws. *Id*. at 592–603. In conducting its analysis, that court observed that initiated legislation is not entitled to superior treatment to other laws:

> Acceptance of defendants' position [that article 4 does not apply] would place laws proposed by the initiative on a superior, not equal, footing with legislative acts not proposed by the people. *Since everything that emerges from the Legislature is legislation,* ***all legislative acts must be on an equal footing***. [*Id*. at 600 (emphasis added).]

See also *In re Proposals D & H,* 417 Mich 409, 422 (1983) (rejecting the "higher plane" theory for acts passed under article 2, § 9).

The Court of Appeals further noted that "[o]ther constitutionally mandated procedures of article 4 also necessarily apply to legislation initiated under article 2, e.g., § 14 (quorum requirement), § 20 (open meetings), § 35 (publication and distribution of laws)." *Id.*, at 600 n 4. See also *Leininger v Alger*, 316 Mich 644, 648-649 (1947) (article 4, § 24's title-object clause applied to petitions to initiate legislation); *Automobile Club of Mich Committee for Lower Rates Now v Secretary of State (On Remand),* 195 Mich App 613 (1992) (indicating that article 4, § 25's republication requirement applies to petitions to initiate legislation).

On appeal in *Frey*, this Court affirmed the decision of the Court of Appeals, observing that it was "limited to the language of the constitution when interpreting its provisions," and that "article 4, § 27 contain[ed] a general restriction that 'no act' passed by the Legislature may take immediate effect unless passed by a two-thirds vote of each house." 429 Mich 315, 335 (1987). This Court further reasoned that article 4, § 27 "applies to initiated laws enacted by the Legislature *because it does not provide an exception for initiated laws enacted by the Legislature*." *Id.* (emphasis added). See also *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66 (1983) ("The courts have reasoned that the legislative power retained by the people, through the initiative and referendum, does not give any more force or effect to voter-approved legislation than to legislative acts not so approved"; the initiative and referendum merely take "from the legislature the exclusive right to enact laws, at the same time leaving it a co-ordinate legislative body with them [the people].") (internal citations and quotes omitted).

That same reasoning may be applied here. The only limitation the constitution places on modifying legislatively-enacted initiatives comes in paragraph 5 of § 9, which singles out legislatively-enacted laws and states that they "shall be subject to referendum[.]" Const 1963, art 2, § 9, ¶ 5. The plain *inclusion* of this referendum power attached specifically to legislatively-enacted initiatives highlights the *absence* of any restraint on the Legislature's ability to modify a legislatively-enacted initiative, especially when set against the background principle that the Legislature may act unless constrained by the constitution. See *Coalition of State Employee Unions*, 498 Mich 312, 331–332 (2015) ("[O]ur Constitution is 'not a grant of power to the Legislature, but is a limitation upon its powers.' Therefore, the legislative authority of the state 'can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States.' "). This lack of limitation is controlling.

In this way, legislatively-enacted initiated laws are subject to the same processes regarding amendment or repeal as legislation drafted by the Legislature. It is a basic point that the Legislature has the power to amend or repeal any legislation it enacts pursuant to the requirements and limitations included in article 4. Const 1963, art 4, § 1. This right includes legislatively-enacted initiated laws because nothing in the constitution limits the Legislature's plenary power to legislate in this respect. See *Coalition of State Employee Unions*, 498 Mich at 331–332.

And since there is no exception or limitation in article 4, or in any other section of the Michigan constitution that restricts the Legislature from amending or repealing legislation it drafts during the same legislative session in which it was enacted, it follows that the Legislature may do so as well with respect to an initiated law it enacts since there is likewise no limitation on doing so in article 2, § 9. In addition to subjecting all legislative enactments to the same limitations, the constitution also creates a parallel in timing for amending voter-approved initiated laws and legislatively-enacted initiated laws. The Legislature may amend or repeal a voter-approved law within the same legislative session, as only the referendum process limits an amendment to the next legislative session.

### D. The contrary view that seeks to limit the Legislature's ability to amend an enacted initiated law is unsupported textually.

For those who contend that a legislatively-enacted initiative may only be amended or repealed in the next legislative session, their primary argument is that the contrary understanding of the constitution permits the Legislature to "defeat" the purpose of the initiative process. (Michigan One Fair Wage, *et al.*, March 22, 2019 Br, pp 11–14.) The argument presses the point that the strict interpretation of the constitution allows a bait and switch by enabling the Legislature to enact the initiative to avoid the people's vote on the legislation, but then later revise it to substantially mitigate or undermine the substance of the initiated law. Indeed, it was this type of "spirit" argument that former Attorney General Kelley invoked in reading into § 9 the limitation that the Legislature could not amend an initiated law

in the same session in which it was enacted. OAG, No. 4303, p 311. As a constitutional matter, these arguments are unavailing.

As stated earlier, the plain language of § 9 does not require that a later amendment to an enacted law occur at the next session (because that limitation applies only for a law enacted by a referendum), and does not require a super-majority legislative vote (because that limitation applies only to a law that was rejected by the Legislature and then passed by the voters). The text of the constitution is clear that neither of these limits applies to a law the Legislature enacts.

The people have allowed such a process to occur – as expressed through their enacted language – and the question of the wisdom of such an enactment is not for this Court, in the same way when this Court reviews legislation. See *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003) ("[T]he Court does not inquire into the wisdom of the legislation . . . ."). That is really the end of the inquiry.

But this scheme is not irrational or absurd in any event. It places a trust and confidence that the Legislature will make revisions, not to thwart the will of the people to pursue an initiative, but to make the necessary changes to enacted laws, whether the need for those changes arise within weeks or within years of a law's enactment. See *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich at 66–67 (noting "the power to make needed changes"). The rules govern all initiatives regardless of the timing within a legislative session.

For example, initiative petitions may be presented to and enacted by the Legislature early in the two-year session.[16] If the Legislature votes to give the initiated law immediate effect, the law would then become effective during the session.[17] If the operation of the initiated law later resulted in harmful or unanticipated consequences, under the contrary view, the Legislature could not amend the initiated law until the next legislative session. Without an express time limit for amending a legislative enactment in § 9 or elsewhere in the constitution, there is no basis to so limit the Legislature.

For those who are opposed to a legislative amendment, other remedies are available. One is through referendum. Const 1963, art 2, § 9. Another is through the ballot box. See *Advisory Opinion re 1982 PA 47*, 418 Mich at 67 ("[I]f the people disagree with a legislative amendment of voter-approved legislation their remedies are the (or another) referendum and, when the Legislature stands for re-election, the ballot."). And finally, the people are empowered to amend article 2, § 9 to provide other remedies. Const 1963, art 12, §2.

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[16] For example, 2013 PA 182 is an initiated law enacted by the Legislature in December 2013, almost a year before the end of the 2013-2014 legislative session. The Legislative history for Public Act 182 is available at http://www.legislature.mi.gov/(S(exzo4kszhkrnkf2gnwkpl3lv))/mileg.aspx?page=initiative. [Last accessed May 10, 2019.]

[17] For example, 2018 PA 171, is an initiated law that the Legislature enacted with immediate effect a few months before the end of the legislative session. The Legislative history for PA 171 is available at http://www.legislature.mi.gov/(S(exzo4kszhkrnkf2gnwkpl3lv))/mileg.aspx?page=initiative. [Last accessed May 10, 2019.]

In the end, all that is left regarding the equitable argument against the constitutional text is the issue of timing: whether the Legislature is barred from amending before the next legislative session. Yet, there is no dispute that the Legislature can amend an initiated law it enacts. In fact, the Legislature can *repeal* an initiated law it enacts. See OAG, 1975-1976, No. 4932, p 240 (January 15, 1976) (noting that Legislature can amend or repeal an initiated law it enacted by a majority vote). If this Court attempted to engraft on the constitutional text a requirement that the Legislature may only amend an enacted law – here Public Acts 368 and 369 of 2019 – in the next legislative session, it would merely mean just a small change in terms of time. What is prohibited in November 2018 would be permissible in January 2019, when the new session commenced. See Const 1963, art 4, § 13. Even so, the constitution's plain language places all legislatively enacted laws on the same plane, and, to reiterate, article 4 allows for the immediate revision of the laws because they may "need" to be changed immediately. Cf. *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich at 66–67.

Ultimately, the questions of equity must yield to the constitution's actual text. And on these points, the constitution is clear.

The text of § 9 does not support a contrary view. This argument contends that the "Legislature is clearly restricted to 3 options to be exercised only within a 40-day session window; it is not authorized by the people to do anything else in that legislative session." (Michigan One Fair Wage, *et al.*, March 22, 2019, Br, p 8.)

In other words, this position argues that because § 9 does not list another option – enacting the initiative and amending it – to be exercised within the 40 session days, the Legislature cannot "adopt and amend" a legislatively-enacted law either within the 40 session days or for the remainder of the session.[18] But the text does not support that point. Paragraphs 3 and 4 of § 9 prescribe what the Legislature's options are when presented with a proposed initiative. 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." Const 1963, art 2, § 9, ¶ 3. The constitution could have limited the Legislature's power to enact later legislation amending an initiated law, through a "three-fourths" vote requirement or that any amendment be enacted at a "subsequent session," but it did not.

As Delegate Kuhn stated "[i]f the legislature sees fit to adopt the petition of the initiative as being sent out, if the legislature in their wisdom feel it looks like it is going to be good, and they adopt it in toto, *then they have full control. They can amend it and do anything they see fit.*" 2 Official Record, Constitutional Convention 1961, p 2395 (emphasis added and deleted). And without any limitation, once enacted by the Legislature the initiated law is no different than a law enacted by ordinary means and it is subject to amendment or repeal under the Legislature's plenary legislative power under article 4, § 1.

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[18] The "40" session days reflects the length of time the drafters determined sufficient for the Legislature to review a proposed initiative and take action on it, if any. See *Wolverine Golf Club,* 24 Mich App at 723–725 (discussing 40-day requirement).

Based on the plain language of the constitution, article 2, § 9 does not limit the Legislature's power or authority to enact an initiative petition into law and to then amend that law during the same legislative session.

## III. Public Acts 368 and 369 of 2018 were properly enacted in accordance with the Michigan constitution.

The Court phrased its third question as "whether 2018 PA 368 and 2018 PA 369 were enacted in accordance with Const 1963, art 2, § 9." But as discussed above, article 2, § 9 does not govern subsequent amendments or repeals of legislatively-enacted initiated laws.

Rather, the regular legislative process described in article 4 of the Michigan constitution governs these amendments or repeals. No party has suggested that Public Acts 368 and 369 were not otherwise properly enacted in accordance with article 4. Furthermore, no one has suggested that the substance of either of these public acts is unconstitutional. As a result, Public Acts 368 and 369 are constitutional.

## CONCLUSION AND RELIEF REQUESTED

This Court should decline to accept this question for review, but if it does, the Legislature may enact and amend an initiated law in the same legislative session as was done by Public Acts 368 and 369 of 2018.

Respectfully submitted,

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Dated: May 15, 2019