STATE OF MICHIGAN
MICHIGAN SUPREME COURT

In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 and 2018 PA 369,

Supreme Court Docket No. 159160

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

Supreme Court Docket No. 159201

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BRIEF FOR *AMICI CURIAE* MICHIGAN UNITARIAN UNIVERSALIST SOCIAL JUSTICE NETWORK; MICHIGAN CONFERENCE–UNITED CHURCH OF CHRIST, SOCIAL JUSTICE TEAM; AND STATE EMPLOYEE RETIREES ASSOCIATION IN OPPOSITION TO THE CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369

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STATEMENT OF BASIS OF JURISDICTION

Jurisdiction over the House of Representatives and Senate requests for an advisory opinion is provided by Const 1963, Article 3, § 8 and MCR 7.303(B)(3) and 7.308(B).

STATEMENT OF QUESTIONS PRESENTED

I. Whether the Michigan Supreme Court should exercise its discretion to issue an advisory opinion in this matter?

These a*mici curiae* answer: Yes

II. Whether Const 1963, art 2, § 9 permits the Legislature to enact an initiative petition into law and then amend that law during the same legislative session?

These a*mici curiae* answer: No

III. Whether 2018 PA 368 and 2018 PA 369 were enacted in accordance with Const 1963, art 2, § 9?

These a*mici curiae* answer: No

STATEMENT OF INTEREST OF AMICI CURIAE

Michigan Unitarian Universalist Social Justice Network and *Michigan Conference–United Church of Christ, Social Justice Team*

The Michigan Unitarian Universalist Social Justice Network (MUUSJN) is a statewide network of individuals from 26 Michigan Unitarian Universalist congregations and our allies who work together for justice. The statewide Michigan Conference - United Church of Christ (UCC), Social Justice Team proclaims it is united in the love of Christ and is committed to work for a Just World for All.

Both these faith organizations share a common principle that all people have worth and should be treated with dignity. In support of the dignity of Michigan families, our volunteers worked in coalition to collect thousands of signatures needed to put proposals to raise the minimum wage and to expand access to earned paid sick time on the 2018 ballot. As people of faith, we believe in democracy and that all citizens should be able to have their voices heard through citizen ballot initiatives. As people of faith, we urge the court to affirm the importance of our State government's democratic processes to meet the needs of its citizens. We urge the Court in our brief to hear the moral voices of people of faith and affirm citizens' right to be heard through citizen ballot initiatives.

State Employee Retirees Association

The State Employee Retirees Association (SERA) works through its members, leaders, and committees to promote the best interests of Michigan state employee retirees and future retirees. SERA has 21 local chapters statewide that are linked through the Coordinating Council of the State Employee Retirees Associations of Michigan.

SERA is a non-profit, non-partisan association that includes former management and non-management retirees, and it has long used many of the tools of democracy to advance the

interests of SERA and its members. One of these tools of democracy is the ballot initiative. Members of SERA signed ballot petitions circulated to place the minimum wage and sick time proposals before the Legislature. These members and others looked forward to the opportunity to vote (for or against) both initiatives in the 2018 general election, an opportunity denied by the Legislature's use of its "enact and amend" tactics. Because preserving all the tools of democracy, including ballot initiatives, is vital to SERA's ability to promote and protect the interests of its members, it is joining in this brief in support of the unconstitutionality of the Legislature's actions in passing 2018 PA 368 and PA 369.

STATEMENT OF FACTS

These *amici curiae* adopt the Statement of Facts in the brief submitted on June 19, 2019 in opposition to the constitutionality of 2018 PA 368 and PA 369 by Michigan One Fair Wage and Michigan Time to Care.

ARGUMENT

THE TEXT OF CONST 1963, ART 2, § 9, ALONG WITH ITS STRUCTURE AND HISTORY, DEMONSTRATE THAT THE LEGISLATURE CANNOT BOTH ENACT AND LATER AMEND A BALLOT INITIATED LAW IN THE SAME LEGISLATIVE SESSION.

A. The Request for an Advisory Opinion and Standard of Review

These *amici* support the requests by the House of Representatives and Senate pursuant to Const 1963, Art 3, § 8 for an advisory opinion regarding the constitutionality of 2018 PA 368 and PA 369.[1]

"Statutory construction is a question of law subject to review de novo. . . . Constitutional issues, like questions of statutory construction, are subject to review de novo." *Wayne County v Hathcock*, 471 Mich 445, 455, 684 NW 2d 765, 772 (2004) (text and citations omitted).

B. Art 2, § 9 Does Not Authorize the Legislature to Enact A Voter Initiated Law During its Review Period and Then Amend that Initiated Law Later in the Same Legislative Session.

The decisions of this Court are consistent regarding the legal standards for interpreting constitutional provisions. Most recently, in *Citizens Protecting Michigan's Constitution v Secy' of State*, 503 Mich 42, 921 NW 2d 247 (2018), this Court considered the constitutionality of a directly initiated constitutional amendment under Const 1963, art 12, § 2. This Court in *Citizens*

[1] No counsel for any party authored this brief in whole or in part and no party made a monetary contribution intended to fund the preparation or submission of this brief. MCR 7.312(H)(4).

Protecting closely examined the constitutional "text, structure, and history" of Article 12, § 2 to conclude that the proposed Voters Not Politicians amendment met constitutional muster and could be submitted to a popular vote. 503 Mich at 54. *Citizens Protecting* reaffirmed that this Court's objective in interpreting our Constitution is to "determine the text's original meaning to the ratifiers, the people, at the time of ratification," while applying former Justice Cooley's directive to discover the "common understanding" regarding the meaning of the constitution's language. 503 Mich at 59 (citing *Federated Publishers v. Michigan State Univ,* 460 Mich 75, 85, 594 NW 2d 491 (1999) quoting Cooley, *Constitutional Limitations* (6th Ed.), p. 81.

When interpreting the Constitution, this Court has noted that "every provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer County Clerk v Lapeer Circuit Court,* 469 Mich. 146, 156, 665 NW 2d 452, 457-458 (2003). The U.S. Supreme Court has likewise noted that, "In expounding a statute, we must not be guided by a single sentence or member of the sentence, but look to the provisions of the whole law, and to its object and policy." *Philbrook v Glodgett*, 421 U.S. 707, 713; 95 S. Ct. 1893 at 1898; 44 L. Ed. 2d 525 (1975) (Rehnquist, J), quoting *United States v Boisdore's Heirs,* 49 U.S. (8 How.) 113, 122 (1850) (opinion of Court).

In 2018, two voter initiatives were submitted to the Legislature. One submission on behalf of Michigan One Fair Wage raised the minimum wage and made related changes while the other by Michigan Time to Care provided covered employees with earned paid sick time up to certain annual caps. The minimum wage initiative was enacted as 2018 PA 337 while the sick time proposal was enacted as PA 338. Following the November 2018 general election, the same Legislature passed 2018 PA 368 to amend PA 337, among other things delaying the minimum wage increase to $12.05 an hour in 2030, continuing a subminimum wage for tipped employees,

and repealing future minimum wage cost of living adjustments. The Legislature also adopted PA 369 and amended the sick time plan by exempting many employees covered by the earlier enacted proposal and reducing the amount of sick time that employees could earn and utilize under the plan submitted to the Legislature by voters. Both PA 368 and 369 were signed by the Governor in late December 2018 and took effect in March 2019. In following this path of first enacting and then amending the two voter initiatives, the Legislature left voters without an opportunity to vote on both initiative proposals in the general election and left employees with less minimum wage and sick time protection than proponents of both proposals intended.

We shall now show that the Legislature's enact and amend approach subverts the people's power reserved in Const 1963, art 2, § 9 to use ballot initiatives to enact laws without Legislative interference. We begin by closely examining the constitutional texts involved in this controversy.

1. The Legislature's General Power to Pass Legislation Can Not Subvert the People's Specifically Reserved Power to Initiate Legislation.

At its outset, the 1963 Constitution's Declaration of Rights states that "All political power is inherent in the people." Art 1, § 1. The first sentence of Article 2, § 9, ¶ 1 declares that the "people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum." The only constitutional limitations on the initiative power reserved in this initial paragraph of Section 9 are 1) that initiated laws can only address subjects about which the Legislature can otherwise pass laws under the Constitution and 2) that initiated laws must be supported by petitions signed by eight percent of the voters in the most recent gubernatorial election.

The general legislative authority offered by Article 4, § 1 has been explicitly withdrawn by the people's reservation of the power of initiative and referendum in the first sentence of Article 2, § 9. In the words of this Court, "Article 2, § 9 is a reservation of legislative authority which serves as a limitation of powers of the legislature. *This reservation of power is constitutionally protected from government infringement once invoked*." *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 215, 378 NW 2d 337 (1985) (emphasis added). In this matter, both ballot proposals were submitted to the Legislature, invoking the protections furnished by the provisions of Article 2, § 9.

Where there is a conflict between a specific constitutional provision and a general provision, a cardinal rule of interpretation requires that the specific provision should control. Reading the general grant of legislative power in Article 4 to override this specific reservation of power to the people to initiate legislation renders the protections for initiated laws in Article 2 meaningless. "The general/specific canon . . . has full application as well to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one, 'violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" *RadLAX Gateway Hotel v Amalgamated Bank*, 566 US 639, 645, 132 S. Ct. 2065, 182 L. Ed. 2d 967 (2012) (Scalia, J.)(text and citation omitted) quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932). See also *Detroit Edison Co v Dep't of Treasury*, 498 Mich. 28, 43-44, 869 N.W.2d 810 (2015); *Miles ex rel Kamferbeck v Fortney*, 223 Mich 552, 558, 194 NW 2d 605 (1923).

Applying this reasoning, the Legislature's attempted use of its general legislative powers to amend 2018 PA 337 and PA 338 after enacting them under its specific authority under Article 2, Section 9 is a clear breach of its constitutional protections for initiatives.

2. Once Invoked, Art 2, § 9, Restricts the Legislature's Role Concerning Initiated Laws to Three Alternatives and Does Not Authorize Amending Initiated Laws Using Ordinary Legislation.

Following the initial general reservation of legislative power to the people in paragraph 1, the remaining paragraphs of Article 2, Section 9 contain language that further limits the role of the Legislature when dealing with a proposed initiated law for which the required number of petition signatures have been gathered.[2] Here, once invoked, Article 2, Section 9 specifically limits the Legislature's role during its consideration of an initiated law.

The text of the remaining paragraphs in Article 2, Section 9 authorizes only three legislative alternatives in dealing with an initiated law.[3] The first sentence of paragraph 3 reads "Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days . . . ." Art 2, § 9, ¶ 3. Under this language, the Legislature has only 40 session days to consider the initiated law.

Second, in its time for review of initiated laws, the law "*shall be either enacted or rejected. . . .*" The use of the mandatory *shall* in this sentence plainly means that the Legislature's role is limited to enacting or rejecting any initiated law during the 40-day review

[2] The second paragraph of art 2, § 9 pertains only to ballot referenda. In the remainder of this textual analysis, the use of ellipses indicates that text is omitted and the use of italics is added for emphasis by the author.

[3] In this brief, the phrase "initiated law," adopted from the relevant text of Article 2, Section 9, is used to denote a ballot initiative with sufficient signatures submitted to the legislature for its review and/or a ballot proposal after its approval by the Legislature or by voters.

period. Just as plainly, the text of ¶ 3 dictates that the Legislature must carry out its limited role without altering ("*without change or amendment*") the initiated law.

The second alternative for the Legislature under the constitution is to neither accept nor reject an initiated law within the 40-day review period. This alternative arises from the first sentence of paragraph 4 of Section 9. Art 2, § 9, ¶ 4 provides that, if not adopted by the Legislature in the 40-day period, the initiated law will be placed on the ballot for the next general election. The third alternative applies if the Legislature rejects the initiated law. In this case, the second sentence of paragraph 4 states the Legislature can propose a "different measure upon the same subject . . . and *in such an event both measures shall be submitted . . . to the electors* at the next general election."

In this case, the Legislature first enacted both initiated laws without altering them, but then significantly amended them after the general election and before the initiated laws took effect. As a result, the initiated laws were not placed before voters and never took effect as intended by Article 2, Section 9. Instead, far weaker versions of the initiated laws were adopted outside any of the legislative alternatives provided by Art 2, § 9.

Critically, none of the three legislative alternatives offered in paragraphs 3 and 4 include enacting the initiated law and then amending it in the same session. Allowing the Legislature to avoid placing an initiated law on the ballot by enacting it within the 40-day review period simply to gut the initiated laws through amendments later in the same legislative session is not authorized by and is contrary to the constitutional language. This legislative course of action clearly subverted the protective requirements of Art 2, § 9 intended to protect initiated laws from legislative interference. Instead, once the protections of Art 2, § 9 are invoked, paragraphs 3 and 4 ensure that initiated laws are either enacted without change or submitted to a vote at a general

election. Enacting and amending initiated laws to keep them off the ballot subverts the protective treatment of voters' reserved powers to initiate legislation.

Added textual evidence of the unconstitutionality of enact and amend is found in paragraph 5 of Article 2, Section 9. The elements of paragraph 5 pertain to what happens to an initiated law or referendum *after voter approval*. But, the text of the second sentence of paragraph 5 protects these voter-approved laws from later legislative or executive interference. "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 shall be amended or repealed except . . . by three-fourths of the members elected to and serving in each house of the legislature." Art 2, § 9, ¶ 5. This sentence shows further proof of the constitution's protective intent regarding ballot initiatives.

In light of paragraphs 3 or 4 (requiring legislative enactment or consideration of initiated laws by voters in the next general election), this language in paragraph 5 should also be read as authorizing a legislative rejection of an initiated law no earlier than the session of the legislature following its adoption "at the next general election." This was the contemporaneous reading of the text by the Michigan Attorney General in OAG, 1963-1964, No. 4303 (March 6, 1964) (Question 3).

Further constitutional protection for initiated laws is found in paragraph 5 which requires a three-fourths supermajority for any legislative change in any voter-approved initiated law. This constitutional protection for initiatives was voided here by the Legislature's use of its "enact and amend" tactic. Having the same Legislature first enact and then amend the enacted measure on a simple majority vote in the same legislative session is contrary to this protective three-fourths majority language of Article 2, Section 9, ¶ 5.

In conclusion, the Legislature's initial passage of the initiated laws regarding the minimum wage (2018 PA 337) and sick days (2018 PA 338) took place under explicit constitutional authority in Article 2, Section 9, Paragraph 3. The purported authority for the later statutes weakening these enacted initiated laws is not found anywhere in Article 2, Section 9, and was adopted outside its scope contrary to its purposes. Instead, the Legislature acted through its authority to pass ordinary legislation under Article 4, Section 1 of the 1963 Constitution. Because its general legislative authority was withdrawn and limited by Article 2, § 9, the Legislature had no residual legislative power under Article 4, Section 1 to enact initiated laws 2018 PA 337 and PA 338 and later amend those initiated laws by passing 2018 PA 368 and PA 369 in the same legislative session. Therefore, this Court should advise the Legislature that both 2018 PA 368 and 369 are unconstitutional.

C. The History and Purpose of Voter Initiated Laws in Michigan Requires Diligent Judicial Protection for the People's Reserved Rights of Initiative.

The protective intent furnished by the text and structure of Art 2, § 9 is clarified and strengthened by examining the history and purposes of voter initiatives in Michigan and elsewhere. Near the close of the nineteenth century, a period characterized by historians as the Gilded Age was followed soon after in the early decades of the twentieth century by a time often referred to as the Progressive Era.[4]

[4] Charles W. Calhoun, Ed., *The Gilded Age: Perspectives on the Origins of Modern America*, (2nd Ed., 2007); Sean Cashman, *America in the Gilded Age: From the Death of Lincoln to the Rise of Theodore Roosevel*t (1984); Richard Hofstadter, *The Age of Reform: From Bryan to FDR* (1955);

Writing of this period, historian Richard C. Wade noted that "Progressivism . . . attempted to widen the democratic base of American politics."[5] Among the state reforms passed during this time were elections by secret ballots as well as referendum and recall. On the federal level, women won the right to vote in the Nineteenth Amendment (1920) and voters gained the right to elect senators (rather than their selection by state legislatures) with the Seventeenth Amendment (1913). Wade adds that "All these measures reflected the progressive maxim that, whatever the problem, the solution was more democracy."[6]

Writing in 1905, Frederick C. Howe, a reformer and Ohio lawyer, expressed the hopes of proponents of referenda and initiatives:

> [The] purpose [of referendum] is to democratize legislation, to enable the people to assume control of affairs, and insure responsible as well as responsive government. . . . The referendum will reestablish democratic forms, which have been lost through the complexity of our life, the great increase in population, the misuse of federal and state patronage, and the illegal combination of the boss with the privileged interests.
>
> The initiative carries this reform one step further on. It enables the people to originate legislation and secure an expression of opinion upon it. It involves the right of the people to demand the submission of any ordinance which may have been passed by the council to the final consideration of the public.[7]

Referenda and voter initiatives like those established by Article 2, Section 9 are both forms of governing through what is termed direct democracy. In contrast, ordinary legislation–either state or federal–is a product of representative democracy. As a result of its 1908 Constitution and 1913 amendments, Michigan has all three main forms of direct democracy;

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[5] Richard C. Wade, "Expanding Resources, 1901-1945," in Arthur M. Schlesinger, Jr., Ed., *The Almanac of American History* (1983), p. 400.
[6] Wade, supra, p. 401.
[7] Frederic C. Howe, *The City: The Hope of Democracy* (Univ of Wash. Press 1967) [orig. 1905], p. 171-172 (text omitted).

namely, referendum, initiative, and recall.[8] See Const 1908, Art III, § 8 and Art V, § 1 as amended in 1913. These provisions were continued into our 1963 Constitution. Const 1963, Art 2, § 8 and § 9.

This Court has long recognized the historical roots of the "tools of direct democracy" in Michigan and protected them from legislative interference. In *Concerned Citizens*, the Court stated:

> We have explained that the adoption of the initiative power, along with other tools of direct democracy, 'reflected the popular distrust of the Legislative branch of our state government.' While the right to propose amendments by initiative must be done according to constitutional requirements, we have observed that 'it may be said, generally, that [the right] can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises.' 503 Mich at 62-63 (footnotes omitted), quoting respectively *Woodland v Mich Citizens Lobby*, 423 Mich 188, 218, 378 NW 2d 337 (1985) and *Scott v Sec'y of State*, 202 Mich 629, 643; 168 NW 709 (1918).

A factually similar Legislative effort to prevent a referendum challenging Michigan's legislative rejection of daylight savings time was rejected by this Court in *Michigan Farm Bureau v Sec'y of State,*379 Mich 387, 151 NW 2d 797 (1967) (*per curiam*). Acting under a federal statute, the Michigan Legislature had passed an exemption for the state under a federal law attempting to create more national uniformity in the usage of daylight savings time. The exemption law was given immediate effect and Michigan remained on standard time as a result. A group favoring daylight savings time then sought to gather petitions to test the validity of the state exemption law in a voter referendum. Under Art 2, § 9, ¶ 2, once a referendum is properly invoked, the underlying legislation does not take effect until voters approve or reject it at the next general election.

[8] Laura Tallian, *Direct Democracy: An Historical Analysis of the Initiative, Referendum and Recall Process* (1977).

Opponents of the referendum challenged it as violating the requirement in Article 2, Section 9, Paragraph 1 that "The power of referendum . . . must be invoked . . . within 90 days following the final adjournment of the legislative session at the which the law was enacted." 379 Mich at 392-393 (Text omitted.) Foreseeing that a future state daylight savings time exemption law could take immediate effect prior to the federally-selected late April date required for daylight savings to take effect, and with opponents arguing that referendum petitions could not be filed until 90 days after the close of the legislative session, the *Michigan Farm Bureau* Court observed that, under this interpretation, the "legislature would stand free to avoid effective referral of this and future legislative exemptions . . . simply by repealing [the immediate-effect daylight savings exemption act] next November, then by enacting another immediate-effect act of exemption next spring and then by another repealer in the late fall, and so on through the years." 379 Mich at 395. The opinion in *Michigan Farm Bureau* went on to reject any legislative arrangement designed to "thwart" or "emasculate" the people's reserved power of referendum. *Id*.

A closely similar scenario to that found in *Michigan Farm Bureau* is presented in this appeal. The main difference is that the legislative arrangement challenged here is to enact and amend both initiated laws, while in *Michigan Farm Bureau* the Court was faced with a legislative scheme to enact and repeal a statute in the same session to avoid a referendum on the enacted law. This is a factual difference, but not a legal distinction. *Michigan Farm Bureau* illustrates both the Legislature's creativity when interfering with the people's reserved powers under Article 2, Section 9 as well as this Court's diligence in defending those powers from legislative subversion.

In this case, the Legislature first enacted both initiated laws without altering them, but then significantly amended them after the general election and before the initiated laws took effect. As a result, the initiated laws were not placed before voters and never took effect. Instead, far weaker versions of the initiated laws were adopted outside any of the legislative alternatives provided by Art 2, § 9. This course of action was not only contrary to the terms of the constitutional text, but designed to prevent an initiative from ever taking place. In light of the meaning, structure, and history of initiated laws embodied in Article 2, § 9, the Legislature must not be allowed to thwart the people's reserved power of initiative under Michigan's constitution.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, this Court should issue an advisory opinion holding that 2018 PA 368 and 2018 PA 369 constitute an unconstitutional legislative interference with the people's reserved powers to initiate legislation under Art 2, § 9 of Const 1963.

Respectfully submitted,

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Dated June 19, 2019

Certificate of Service

I certify that on June 19, 2019 I electronically filed the foregoing brief and accompanying motion with the Clerk of the Court through the ECF system, through which notification of such filing was sent to all attorneys of record in this matter.

/s/ Richard W. McHugh…….