**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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**DEMOCRATS FOR LIFE OF MICHIGAN'S AMICUS CURIAE BRIEF REGARDING THE MICHIGAN LEGISLATURE'S REQUEST FOR AN ADVISORY OPINION ON THE CONSTITUTIONALITY OF 2018 PA 368 AND 2018 PA 369[1]**

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

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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 according to Article 3, § 8 of Michigan Constitution of 1963, MCR 7.303(B)(3) and MCR 7.308(B).

## 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* Answer of Democrats for Life of Michigan: Yes

II. Does Article 2, § 9 of the Michigan Constitution of 1963 permit the Legislature to adopt an initiative petition into law and then subsequently amend that law during the same legislative session?

*Amicus Curiae* Answer of Democrats for Life of Michigan: No

III. Were Public Act 368 of 2018 and Public Act 369 of 2018 enacted in compliance with Article 2, § 9 of the Michigan Constitution of 1963?

*Amicus Curiae* Answer of Democrats for Life of Michigan: No

IV. Did Public Act 368 of 2018 and Public Act 369 of 2018 Frustrate the State's Compelling Interest in Reducing Abortion to Protect Unborn Children that was Advanced by the One Fair Wage and Earned Sick Time Initiatives.

*Amicus Curiae* of Democrats for Life of Michigan: Yes

V. Are the Legal Arguments of the Legislature and *Amici* of Restaurant and Lodging Association and Small Business Coalition Fundamentally Flawed?

*Amicus Curiae* of Democrats of Life of Michigan: Yes

## INTRODUCTION

Democrats for Life of Michigan is a Michigan nonprofit corporation in good standing with the State of Michigan. Democrats for Life of Michigan has a strong interest in the contested legislation in this matter since the legislation concerns providing working class people with a basic standard of living. Specifically, Democrats for Life has a strong interest in providing a living wage and sick leave for the mother and/or parents expecting the birth of a baby- benefits that will encourage such a mother and/or parents to carry a baby to term; and for the mother and/or parents of a newborn to sustain the newborn and the family unit. Democrats for Life also has a strong interest in providing a living wage and basic sick leave for all Michigan working class citizens as a matter of fundamental fairness.

In 2018, two ballot initiatives that were certified for placement on the ballot for the November election were never actually placed on the ballot. Even though the Michigan House and Senate (the "Legislature") opposed the initiatives, both chambers adopted them into law, and by doing so, prevented them from being placed on the ballot. This deprived the citizens of Michigan of their right to vote on the proposals. The Legislature did not do this because it agreed with the ballot initiatives; rather the Legislature's sole purpose was to amend them in its lame duck session in ways that diminish and negate their effect. This legislative slight-of-hand, called "adopt and amend", is unprecedented.

The Constitutional provision that governs the people's right of initiative is Article 2, § 9 which has been in the Constitution for 110 years. Based on the text of Article 2, § 9, this Court's precedents, and an Opinion of the Attorney General, "adopt and amend" is contrary to Article 2, § 9, since it frustrates the purpose of the people's constitutional right of statutory initiative in Michigan. Therefore, this Court should strike down this legislative attack on the people's constitutional right to direct democracy.

## STATEMENT OF FACTS

In the fall of 2017, Michigan One Fair Wage (MOFW) began circulating statutory initiative petitions to create a new Michigan minimum wage law which would, among other things, increase the minimum wage in steps to $12 per hour for all employees by January 1, 2022; increase the subminimum wage for tipped employees in steps to $12 per hour by January 1, 2024; and annually adjust the minimum wage thereafter based on the rate of inflation.

In May of 2018, MOFW timely filed 373,507 signatures with the Bureau of Elections (BOE). After review, the BOE certified the proposal for the 2018 general election ballot. In late 2017, Michigan Time To Care (MTTC) began circulating initiative petitions to create a new Michigan Earned Sick Time Act (MESTA) which would, among other things, allow all employees to earn 1 hour of paid sick time for every 30 hours worked to use for personal or family health needs.

On May 29, 2018 MTTC timely filed 377,560 signatures with the BOE. After review, the BOE certified the proposal for the 2018 general election ballot. The BOC certified the proposal.

The leadership of the Legislature publicly announced that the Legislature would adopt the proposals in order to keep them off the 2018 ballot and amend them during the lame duck session. *See,* Gray, *Michigan's OK of minimum wage hike, paid sick leave has a big catch*, Detroit Free Press (September 7, 2018). The Legislature adopted the MOFW and the MTTC proposals without change as 2018 PA 337 and 2018 PA 338.

During the same legislative session in December, 2018 (a lame duck session), the Legislature passed and the Governor signed 2018 PA 368, which significantly amended PA 337 in these ways: delaying the minimum wage increase to $12 per hour from 2022 until 2030, allowing no increase after inflation.

Similarly, during the same lame duck session in December, 2018, the Legislature enacted

and the Governor signed 2018 PA 369, which significantly amended PA 338 in these ways: restricting eligibility so that hundreds of thousands of employees would be excluded from coverage under the MESTA (renamed the Paid Medical Leave Act); substantially reducing the permitted uses of sick time; and drastically cutting the amount of sick time which can be earned and used by employees.

This Brief collectively refers to PA 368 and PA 369 as "the lame duck amendments" and refers to the Legislature's scheme of adopting an initiated law and then amending it during the same legislative session as "adopt and amend."

Prior to enacting the lame duck amendments, Michigan adopted numerous laws to restrict, ban and criminalize abortion: selling drugs to produce abortion is a crime MCL 750.15; use of medicine to destroy a quick child is a crime MCL 750.323; and use of drugs to procure abortion is a crime MCL 750.14. Several other statutes which limit or prohibit abortion services are described below, including especially parental consent requirements and the prohibition of the use of state dollars for abortion services which were enacted pursuant to the initiative process. These actions further demonstrate the clear public intent to discourage abortions -- see Doe v Department of Social Services, 439 Mich 650 (1992). While some of these legislative attempts were judicially restrained, the clear purpose of these laws is the protection of unborn children, which is a compelling state interest.

## ARGUMENT

### I. The Michigan Legislature's Request for An Advisory Opinion.

*Amicus Curiae* of Democrats for Life of Michigan supports the request.

### II. Article 2, § 9 of the Michigan Constitution of 1963 Prohibits the Legislature from Enacting an Initiative Petition into Law and Then Amending That Law During the Same Legislative Session.

As explained below, the Legislature's "adopt and amend" scheme violates Article 2, § 9 and a long line of Michigan Supreme Court decisions protecting the people's reserved constitutional rights of initiative and referendum from legislative encroachment. The Legislature's scheme of "adopt and amend" is also contrary to an on-point opinion by Attorney General Frank Kelley, which he authored soon after Article 2, § 9 was enacted as well as over 50 years of legislative acquiescence in that opinion. Finally, "adopt and amend" also frustrates Michigan's compelling interest in protecting unborn children from abortion.

### A. The Better Interpretation of the Constitution Demonstrates that the Legislature May Not Amend an Initiated Law in the Same Legislative Session in Which it Was Adopted.

#### 1. Rules of Construction of Constitutional Provisions

Michigan courts apply settled principles of law in interpreting constitutional provisions. OAG, 2011-2012, No 7268, p 2 (August 9, 2012). "It is a fundamental rule of constitutional interpretation that we determine the intent of the framers of the Constitution and of the people adopting it, and we do this principally by examining its language." *People v Tanner,* 496 Mich 199, 223; 853 NW2d 653 (2014). Similarly, all constitutional "analysis, of course, must begin with an examination of the precise language used in . . . [the] 1963 Constitution," *Michigan United Conservation Clubs v Secretary of State (After Remand),* 464 Mich 359, 375; 630 NW2d 297 (2001) (Corrigan, J concurring). In this task, the Court applies this principle: "When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited." *National Pride At Work, Inc v Governor*, 481 Mich 56, 80; 748 NW2d 524 (2008). Courts often use the phrase "plain meaning" when deciding whether a constitutional provision is "unambiguous." When a constitutional provision allows for two opposing interpretations or is silent on an issue, that provision is considered ambiguous. "Only if the language of the constitutional provision in question admits to

varying interpretations should this Court undertake an examination of the circumstances surrounding its ratification by the people." *Michigan United Conservation Clubs v Dep't of Treasury*, 239 Mich App 70 at 76-77; 608 NW2d 141, aff'd 463 Mich 995 (2001).

In *Mich Farm Bureau v Secretary of State*, 379 Mich 387; 151 NW2d 797 (1967), this Court decided a case in which there were two plausible interpretations of a constitutional provision involving the people's reserved right of referendum, one which would protect and safeguard the people's right of direct democracy and the other which would harm and denigrate it. This Court applied "an overriding rule of constitutional construction" that favors the interpretation that will save the people's right of direct democracy. Although *Mich Farm Bureau* involved a referendum petition, the case's holding is equally applicable here since the people's right of initiative is substantial the same as their right of referendum. In ruling in favor of the people's right of direct democracy in *Mich Farm Bureau,* this Court stated 379 Mich 387; 151 NW2d 797. (1967) (*per curium*) at 394:

> If by one mode of interpretation the right [of referendum] must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode it will **attain its just end and secure its manifest purpose,** it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail. No court of justice can be authorized so to construe **any clause** of the Constitution **as to defeat its obvious ends**, when another construction, equally accordant with the words and sense thereof, will enforce and protect them. (Emphasis added).

In an often-cited passage, Justice Cooley described these broad guidelines of construction:

> 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 Publication, Inc v Michigan State Univ Bd of Trustees*, 460 Mich 75, 85, 594 NW2d 491 (1999), quoting 1 Cooley, Constitutional Limitations (6th ed), p 81

(emphasis added).]

*Michigan United Conservation Clubs, supra,* 464 Mich at 374.

Another important rule of construction that applies in this matter is *expressio unius est exclusion alterius*-the express mention of one thing excludes all others. See *Hoerstman General Contracting, Inc v Hahn,* 474 Mich 66, 74-75; 711 NW2d 340 (2006).

Another key principal of construction that applies here is that every constitutional provision "must be interpreted in the light of the document as a whole," *Lapeer County Clerk v Lapeer Circuit Court,* 469 Mich 146, 156; 665 NW2d 452 (2003).

**2. The Other Relevant Constitutional Provisions**

The most important Constitutional provision that sheds light on Article 2, § 9 is Article 1, § 1 which states, "[a]ll political power is inherent in the people." In Michigan, there is no inherent political power in the three branches of government. Rather, the branches only have those powers that the people grant them in the Constitution. Article 2, sec 9, clearly states that the power of initiative is "reserved" by the people to themselves.

Another relevant provision to the inquiry is Article 4, § 1 which gives the "legislative power of the State of Michigan" to "a senate and a house of representatives." That power was discussed in *Taxpayers of Mich Against Casinos v State*, 471 Mich 306, 685 NW2d 221, 231 (2004) in a case concerning whether the legislature had the power to approve casino contracts when that power was not expressly granted to the legislature. In ruling that the legislature did have such power, this Court stated:

> The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, **subject only** to the Constitution of the United States and the restraints and limitations imposed **by the people** upon such power by the Constitution of the State itself. See *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 570(1034). (emphasis added).

Clearly Article 2, sec 9 is such a restraint and limitation imposed by the people in the Constitution of the State itself.

**3. The Legislative Role in Initiatives is Secondary to the People's Role**

However, as seen from this quote, the legislative power of the legislature, however broad, comprehensive, absolute and unlimited, does have one important caveat and exception which are those legislative powers the people have reserved for themselves in the Constitution. The primary, and perhaps only, legislative power reserved by the people is the people's right of initiative and referendum contained in Article 2, § 9:

> The people **reserve to themselves the power** to propose laws into an act and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. (Emphasis added).

The division of legislative power between Article 2 and Article 4 creates an inherent conflict between the Legislature and the people's reserved right of initiative, referendum and amending the Constitution. However, in view of Art 1, Sec 1, the people's direct legislative power preempts the Legislature's legislative power. As discussed below in Argument B, this Court has been the people's protector in this power conflict. In fact, the history of voter-initiated laws shows that the framers of Article 2, § 9 and the voters who approved them did not want the Legislature to be a substantive check on the people's petition power, rather they intended that a difficult signature requirement would instead be the appropriate check.[2]

This Court has repeatedly protected the people of Michigan as the cornerstone of political power especially when the people exercise that power directly through the initiative. See, *Citizens*

[2] The predecessor of Const 1963, Article 2, § 9, which was ratified as Const 1908, Art 17, Sec 2, initially gave the Legislature a veto power over voter-initiated amendments before the election at which the proposal would appear on the ballot. However, the legislative veto was deleted by amendment in 1913. This legislative veto idea was similarly not included in Const 1963.

*Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, 59; 921 NW2d 247 (2018), quoting *Blank v Dep't of Corrections*, 462 Mich 103 150; 611 NW2d 221 (2000) (Markman, J, concurring) (protecting the right of the people to directly amend the State Constitution by initiative); see also, *Taxpayers of Mich Against Casinos, supra* 471 Mich at 327.

**4. Any Perceived Ambiguity in The text of Article 2, § 9 Must be Resolved in Favor of Protecting the Reserved Power of the People of Direct Democracy**

The full text of that part of Article 2, § 9 (sometimes referred to as § 9) that concerns the legislature's role when an initiative is proposed reads as follows:

> Any law proposed by initiative petition shall be either enacted or rejected by **the legislature** without change or amendment **within 40 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 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. (emphasis added).

Const 1963, Article 2, § 9

Based on the rules of construction, the above text must be examined to discern whether a plain reading of § 9 gives the Legislature the power to "adopt and amend". In reading the various Briefs in this matter, each side contends that a plain reading of Article 2, § 9 supports its

interpretation -- both of which are diametrically opposed to each other. If the Court concludes that Article 2, § 9 is ambiguous, it still must find, based on its own precedent, that "adopt and amend" is unconstitutional.

There is no language in § 9 that grants the Legislature authority to "adopt and amend." It may be that this silence is simply the result of the lack of foresight of the framers of § 9 to cover every specific situation that might arise. If the Court concludes that this creates an ambiguity, it must to look for reasonable inferences from the text of § 9 and apply the "overriding rule of constitutional construction" that favors the interpretation that will save the people's right of initiative. See *Mich Farm Bureau, supra*; *Michigan United Conservation Clubs*, *supra,* 239 Mich App at 76-77.

**5. The Relevant Inferences from Article 2, § 9 Weigh Against the Constitutionality of "Adopt and Amend"**

As noted above, § 9 is silent as to whether the Legislature is authorized to accomplish "adopt and amend"; such authority being neither permitted nor prohibited. The brief of the Legislature observes, without citing to any on-point case law, that because of § 9's failure to prohibit "adopt and amend", the framers and the people must have intended that the Legislature is authorized to do it. Such an inference untenable.

There are more persuasive inferences based on the text of § 9 that confirm that the framers and the people did not authorize "adopt and amend." The first inference comes from the following sentence in § 9:

If any law proposed by such petition [of an initiative] shall be

enacted by the legislature it shall be subject to referendum, as hereinafter provided.

This sentence is important because it is the only language in § 9 that is remotely on point with the issue in contest. This is because the sentence is the only language in § 9 that discusses what happens after the legislature adopts an initiative as a law. Rather than providing the Legislature with a role in remedying, correcting or repealing an ill-conceived or unpopular legislatively adopted initiative in the same legislative session, the sentence instead provides the people themselves with that role through a future referendum procedure. The application of *expressio unius est exclusion alterius* is appropriate here. Since the people expressly reserved for themselves the use of the referendum procedure as a check on a legislative adopted initiative law, the framers and the people must have intended to exclude the Legislature from that role in the same legislative session in which the initiative was received.

The second important inference against "adopt and amend" derives from the fact that there is no explicit language in § 9 that permits the scheme. Instead, the text of § 9 provides the Legislature a 40-day period during which the Legislature can exercise one of three options after it has received an initiated petition: 1) it can enact the proposed law without any change, 2) it can reject the proposed law, in which case the proposed law is placed on the ballot for a vote at the next general election, or 3) it can propose a different law on the same subject, in which case both proposals are placed on the ballot for the next general election. These three options are the only ones granted to the Legislature. The rule of *expressio unius est exclusio alterius* applies here. Under this rule of construction, the expression of these three options excludes any other ones available within the same legislative session. Therefore, the Legislature does not have the power to adopt a proposal within the 40-day period, and then amend it during the same legislative session because that option is not

among those expressly granted by the people to the Legislature under Article 2, § 9. Had the framers of § 9 and the sovereign people who adopted that provision intended to give the Legislature a fourth option of "adopt and amend" within the same legislative session, they would have explicitly provided for it.

The conclusion that § 9 and the people who adopted it did not want the legislature to take an "adopt and amend" action in the same legislative session is also disclosed by § 9's use of the definite article "the" in the phrase "the legislature" as used in § 9. The above-quoted language provides instructions to the legislative branch of government as to its role in the initiative process, but which session of the legislature did the language refer to? Was the legislative role in § 9 intended to refer only to the current legislature, i.e. the same legislative session in which the initiated proposal was received or was it meant to apply to future legislatures, i.e. subsequent legislative sessions. By using the definite article "the" in the phrase "the legislature," the framers and the people clearly meant the above-quoted instructions to apply only to the current legislature in office which receives a proposed initiative; and perforce, the members comprising that current legislative session may only take actions in response to an initiative that are expressly allowed in the above-quoted language. This means that the members of the current legislative session cannot do anything in response to a proposed initiative outside of the prescribed 40-day period. The subject lame duck amendments-enacted in December of 2018-were accomplished outside of the 40-day permitted period, by the *same* legislature, and therefore were invalid.

The conclusion that "adopt and amend" within the same legislative session is unconstitutional is also confirmed by the following language from Article 2, § 9 [also quoted above]:

> Any law proposed by initiative petition shall either be enacted or rejected by the legislature without change or amendment within 40 days from the time such petition is received by the legislature. (emphasis added).

It is a fundamental rule of construction of a constitutional provision that every word has meaning and no word is surplusage. See *Detroit Bd of Ed v Superintendent of Public Instruction,* 319 Mich 436; 29 NW2d 902 (1947). Thus, the use of that phrase "without change or amendment" in § 9 has a definite meaning -- it is not surplusage. It means what it says: that it prohibits that particular Legislature from amending a law it previously adopted from an initiative within the same legislative session -- not only within but also after the 40-day period has expired. The use of the 40-day in § 9 was certainly intended to give the particular Legislature that received an initiative a time limit to take one of three permitted options; otherwise an uncooperative Legislature could simply stonewall and do nothing. In contrast, the Legislature's brief contends in effect that the Legislature can simply avoid the no-change/amendment prohibition by adopting the initiative word-for-word on the day before the 40 days expires and then changing or amending it on the day after the 40-day period expires.

Perhaps the most important reason why the Legislature's "adopt and amend" scheme is unconstitutional derives from the fact that such a scheme can frustrate the very purpose of the people's right to initiative. In this connection, this Court in *Mich Farm Bureau*, supra at 394-395 held:

If by one mode of interpretation the right [of referendum] must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail. No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them. (Emphasis added).

It is submitted that the people's intent in adopting the initial procedure was to provide the citizens of Michigan with a direct way to create and amend law when the sitting legislature refuses, or is unable to do so; in other words, to give the Michigan citizenry an ability to check and balance an autocratic or ineffective legislature. The Legislature should not be allowed the freedom to manipulate the people's right of initiative by redoing an initiative in a lame duck session, in this case one that was initiated by the State Senate only days after the November 2018 election, in a form that subverts and diminishes the proposed initiatives.

If this Court rules in favor of the Legislature's position, this could put at risk any future proposed initiatives, popular with the people, but disliked by a political party in complete control of the House, Senate and the Governor's office. The party in control of state government will change, as history has shown. If a party wins the House, Senate and the Governor's office in one election, that party can wield its power without being checked via § 9's direct democratic initiative procedure. Such a result cannot be what the framers and the people intended.

Moreover, the Legislature is not without remedies if it opposes an initiative. It can exercise the third option in § 9 and place a countermeasure on the ballot for the people to consider together with the proposal. The express availability of this oppositional option precludes the Legislature from using "adopt and amend" as an additional oppositional strategy.

### B. This Court Has Protected the Peoples' Reserved Direct Democracy Powers From Encroachment of the Initiative Process through Legislative "Adopt and Amend."

Not only does the Legislature's "adopt and amend" scheme violate the text of Article 2, § 9, but it is also inconsistent with many years of decisions of the Michigan Supreme Court that have protected the direct Democracy provisions of the Michigan Constitution against legislative encroachment.

Soon after the 1963 Constitution was adopted, this Court decided *Michigan Farm Bureau, supra* 379 Mich at 394-95. In *Farm Bureau,* the Court was asked to interpret the referendum provision of Article 2, § 9 to allow a legislative scheme similar to that used here. There, the people proposed a referendum exempting Michigan from daylight savings time. The legislature opposed the idea and devised a scheme to avoid it by using an "adopt and repeal" scheme in which it could serially adopt and repeal that law in the spring and fall every year, thus preventing the people from being able to propose an effective referendum. The Court rejected the scheme and held that there is "an overriding rule of constitutional construction" with regard to specific powers expressly reserved by the people in § 9 that requires these powers to "be saved…as against conceivable if not likely evasion or parry by the legislature." *Id at* 393.

There is little difference between the "adopt and repeal" scheme used by the Legislature to defeat the right of referendum rejected in *Farm Bureau* and the 2018 Legislature's "adopt and amend" scheme to defeat or harm the people's reserved right of statutory initiative. As in *Farm Bureau,* the 2018 Legislature's "adopt and amend" scheme here would allow the Legislature to "thwart," "emasculate," and "outright . . . defeat" the right of initiative.

This Court's later decisions on the people's right of direct Democracy were in accord with *Farm Bureau* and have created a line of precedent with Farm Bureau as their foundation, including *Kuhn v Department of Treasury,* 384 Mich 378; 183 NW2d 796 (1971); *In re Proposals D & H,* 417 Mich 409, 421; 339 NW2d 848 (1983); *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 215; 378 NW2d 337 (1985); and *Citizens Protecting Michigan's Constitution*, *supra.*

The most recent case supporting the direct democracy provisions of the Constitution was *Citizens Protecting Michigan's Constitution, supra* in which this Court overruled the Legislature's attempted use of "adopt and amend" to deny the people's reserved right to amend the Constitution by petition. Although *Citizens* involved a petition for a constitutional amendment under Article 12,

§ 2, the Court's position should be the same here with regard to an initiative under § 9. The *Farm Bureau* Court explained that the reservation of initiative power by the people "along with other tools of direct democracy, 'reflected the popular distrust of the Legislative branch of our state government.'" *Id* at 62-63.

### C. The Contemporaneous Opinion of Attorney General Frank Kelley Precludes "Adopt and Amend" and Attorney General Bill Schuette's Contrary Opinion Can Be Disregarded"

In the year after the 1963 Constitution was ratified, Attorney General Frank Kelley issued Opinion No 4303 in response to a request by State Senator William Milliken regarding initiative petitions under Article 2, § 9. *See* OAG, 1963-1964, No 4303 (March 6, 1964). That opinion at 311, question 3, is directly on point with the principal issue of the matter in contest and states in relevant point as follows:

> The people have not imposed similar restrictions [i.e. a 3/4th super majority vote of the legislature to amend a voter-approved initiative] upon a law enacted by the legislature in response to initiative petitions filed with that body under Article II, Sec 9. It must follow that the initiative petition enacted into law by the legislature in response to initiative petitions are subject to amendment by the legislature at a **subsequent** legislative session. It is equally clear that the legislature enacting an initiative petition proposal cannot amend the law so enacted at the **same** legislative session **without violation of the spirit and letter** of Article II, Sec 9 of the Michigan Constitution of 1963. (emphasis added).

Attorney General Kelley's opinion makes sense because if the Legislature were allowed to "adopt and amend" in the same legislative session, it could easily do an end run around a popular proposed ballot initiative that it did not like, and defeat it within the same session. Such a scheme would turn the constitutional allocation of legislative authority upside down: the legislative power the people reserved to itself would no longer be supreme but would be subordinate to the limited legislative authority it gave to the Legislature. Recall that, pursuant to Article 1, § 1 "[a]ll political power is inherent in the people."

Attorney General Kelley's opinion was issued shortly after the ratification of the 1963 Constitution and was a contemporaneous construction of the new Constitution. Therefore, it is entitled to weight in interpreting the provisions of § 9. *See, Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 470; 208 NW2d 469 (1973); and *Smith v Auditor General*, 165 Mich 140, 144; 130 NW 557 (1911).

Since 1964, the Legislature has acquiesced in Opinion No 4303, and not until 2018 did the Legislature ignore Opinion No 4303 by enacting PA's 368 and 369. Attorney General Kelley's Opinion No 4303 has been the subject of legislative acquiescence for more than 50 years.

However, on December 3, 2018, in one of his last actions as Attorney General, Attorney General Bill Schuette issued Opinion No 7306 (OAG, 2017-2018 Dec 3, 2018) which is diametrically opposed to Attorney General Kelley's Opinion No 4303 and declared that Opinion 4303 is "superseded." At page 3 of his Opinion, Attorney General Schuette contends:

> since nothing in the Michigan Constitution prohibits the Legislature from amending 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 enacted initiated law. (emphasis added)

This contention, however, is inconsistent with the fact that the legislative power, like all state governmental power, rests with the people as Article 1, Sec 1 states, and that the people's reserved legislative power in proposing initiatives and referendums is supreme over the legislative power the people granted to the Legislature. Therefore, the correct construction of Article 2, § 9 is that since it does not expressly authorize the Legislature to "adopt and amend" in the same legislative session, the Legislature does not have that power. See also Argument A above.

**D. The Legislature's Amendments Frustrated the State's Compelling Interest in Reducing Abortion to Protect Unborn Children that was Advanced by the One Fair Wage and Earned Sick Time Initiatives.**

Michigan statutory law going back many years and continuing until the present embodies and advances a compelling interest in protecting unborn children by banning through criminalizing and otherwise discouraging abortion. For example: selling drugs to produce abortion is a crime, MCL 750.15 (1931 PA 328); the use of medicine to destroy a quick child is a crime, MCL 750.323 (1931 PA 328); and the use of drugs or employment of an instrument to procure miscarriage (except in the first trimester) is a crime, MCL 750.14 (1931 PA 328); provides that abortion coverage is an opt-out rider in insurance policies (2013PA 182); requires and enumerates provisions for informed consent (MCL 333.17015); partial birth abortion prohibition (MCL 333.17016); prohibition of the use of public funds to provide for abortion (MCL 400.109a); parental consent required for abortion on a minor (MCL 722.903). While some of these legislative pronouncements have been limited by judicial determinations, this Court has found that the Legislature (and by extension the people through the constitutionally reserved right of initiative) clearly has the right to fund live birth while refusing to fund abortion (Doe v Department of Social Services, 439 Mich 650 (1992)).

The One Fair Wage and Earned Sick Time initiatives that were certified for placement on the 2018 ballot would have advanced that compelling interest.

One obvious benefit of increasing the minimum wage to $12 per hour, as provided in the One Fair Wage initiative and 2018 PA 337 that enacted it, would have been the improvement of the economic condition of pregnant working mothers who receive wages of less than $12 per hour. With that improved financial stability, those expectant mothers could better afford the health care and childcare needed to carry their babies to term and care for them rather than seeing no realistic alternative to the less costly and often emotionally wrenching decision to abort the pregnancy. The same positive income effect can be said of the sick leave benefit of the Earned Sick Time initiative enacted by 2018 PA 338.

The basis for the argument that increased income reduces the incidence of abortion is borne out from the longitudinal study *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014* by Rachel K. Jones PhD and Jenna Jerman MPH, published by the American Journal of Public Health (November 8, 2017). The authors found that "low-income and younger women have traditionally been at an increased risk for unintended pregnancy and, in turn, abortion." (page 2 of 15). They also found that "women with family income less than 100% the poverty level accounted for almost half of all abortions patients in 2014, and this group had the highest abortion rate: 6.0 per 1000." (page 6 of 15). A person earning less than $12 per hour would generally fall into less than 100% poverty level.

Therefore, increasing wages to $12 per hour and a providing humane sick leave benefits proposed by the two subject initiatives and the statutes that adopted them would be consistent with and promote Michigan's declared compelling interest of protecting unborn children by reducing abortion. By contrast, the Legislature's contested lame duck amendments frustrate and do violence to Michigan's existing abortion statutes and their legislative purpose of protecting unborn children.

### E. The Legal Arguments of the Legislature and *Amici* of Restaurant and Lodging Association and Small Business Coalition Are Fundamentally Flawed.

The arguments made in the Legislature's brief are unpersuasive and can be grouped in three categories.

#### 1. The Legislature's Argument that Article 2, § 9 Does Not Bar "Adopt and Amend" is Unpersuasive

The Legislature's principal argument is that since § 9 contains no express ban on "adopt and amend", it must be permitted. This position is inconsistent with § 9's purpose and opens the door for the Legislature to grab any available power to deprive the

people of their right of direct Democracy when the Legislature dislikes a proposed initiative. The Legislature's argument reverses the principal intent of the most important provision of the Michigan Constitution in Article 1, §1 which reserves the power in the people. It is submitted that since § 9 does not permit the Legislature to accomplish "adopt and amend", the Legislature cannot do it. It is true that the Legislature has broad authority under Article 4 to amend laws, but such authority does not expressly include the power to amend a law it previously adopted that was initiated by the people. The fact that Article 2, § 9 lists three options means that it excludes "adopt and amend" which would be a fourth non-listed option.

**2. The Legislature's Use of Language from Referendum Procedure is Misplaced**

The Legislature then attempts to draw an ineffective inference from certain language differences between the referendum text and the initiative text in Article 2, § 9. The operative language in § 9 states as follows:

> Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent legislative session thereof. (emphasis added).

The Legislature's Brief points out that this language is absent from the initiative provision. The obvious meaning of the quoted text is that since the legislature is authorized to amend a popularly approved referendum in a subsequent session, it cannot do so in the current session. The Legislature then makes a giant inferential jump by concluding that the absence of the quoted language in the initiative provision must mean that the framers and people somehow intended to allow the legislature the right to amend an enacted initiative-generated law during

the same legislative session.

To understand why this argument fails, a close look at Article 2, § 9 is needed. First, § 9 provides for three ways that laws generated by direct democracy become enacted: 1) via an initiative that the legislature rejects but is approved by the electorate without the need of a governor's approval, 2) via an initiative that the legislature and the governor approves without change or amendment, precluding the need to place the matter on the ballot, or 3) via a vote at a general election of the proposed initiated law or an alternative approved by the legislature during the 40 day period post ballot certification. Why does § 9 not provide for a referendum method similar to the second type of initiative in which the legislature and the governor can agree to adopt it, thereby precluding the need to place the matter on the ballot for the people to decide? The reason for this is because the purpose of a referendum is to amend or repeal an existing law that was previously enacted by the joint action of the legislature and the governor. An initiative, on the other hand, proposes a new law.

Another difference between the initiative and referendum in § 9 is the absence of a legislative role when a referendum is certified for placement on the ballot versus when an initiative is so certified. As stated above, when an initiative is certified, it is then received by the legislature which is given 3 options to act upon the initiative, to wit: enact the law, reject the law, or propose a different law on the same subject. By contrast, when a referendum is certified, § 9 does not give the legislature any responsive role at all. Rather, certified referendums are automatically placed on the ballot.

### 3. The Legislature's Treatment of Decisional Precedent is Incorrect

Finally, the Legislature's brief ignores the many years of Michigan Supreme Court decisions described above in Argument B that oppose the use of "adopt and amend." The cases the Legislature did cite were unpersuasive and not on point with the issue in contest. They failed to provide any adequate rationale that the Legislature's Article 4 legislative power is superior to the people's initiative rights under Article 2, § 9.

The Legislature cites *Frey v. Director of the Dep't of Social Services*, 429 Mich 315; 414 NW2d 873 (1987) as standing for the idea that the Legislature's power under Article 4, § 27 is somehow not subject to restrictions contained in Article 2, § 9. However, this Court's decision in *Fey* dealt with when legislatively adopted laws take effect which is irrelevant to the issue in contest in this matter.

## CONCLUSION

For the reasons stated above, the Legislature's adoption of 2018 PA's 368 and 369, amending initiated laws 2018 PA's 337 and 338, respectively, in the same legislative session, soon after the November 2018 election, violates Article 2, § 9 of the Michigan Constitution of 1963 and frustrates Michigan's compelling interest to protect unborn children.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 18, 2019, I electronically filed the above document with the Clerk of the Court using the ECF system, through which notification of such filing was sent to all attorneys of record in this matter.

/s/ Nick Ciaramitaro