**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

**MOTHERING JUSTICE, MICHIGAN ONE FAIR WAGE, MICHIGAN TIME TO CARE, RESTAURANT OPPORTUNITIES CENTER OF MICHIGAN, JAMES HAWK,** and **TIA MARIE SANDERS**,

Plaintiffs-Appellants,

v

**DANA NESSEL**, in her official capacity as Attorney General and head of the Department of Attorney General, and the **STATE OF MICHIGAN**,

Defendants-Appellant and Appellee.

Supreme Court No. _____
Court of Appeal No. 362271
Court of Claims No. 21-000095-MM

**THIS APPEAL INVOLVES A RULING THAT TWO (2) STATUTES ARE UNCONSTITUTIONAL**

_____/

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**PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JUDGMENT APPEALED FROM

Plaintiffs appeal from a decision of the Court of Appeals rendered in three separate opinions dated January 26, 2023, found in the Appendix, pp 1–30. This Court has jurisdiction under MCR 7.303(B)(1).

## STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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

Court of Appeals answer: Yes.

Court of Claims answer: No.

Plaintiffs-Appellants' answer: No.

Attorney General's answer: No.

State of Michigan's answer: Yes.

2. Where for the first time in the history of the 1963 Constitution, the Legislature has usurped the people's reserved right of initiative with an "adopt and amend' scheme, were Public Act 368 of 2018 and Public Act 369 of 2018 enacted in accordance with Article 2, § 9 of the Michigan Constitution of 1963?

Court of Appeals answer: Yes.

Court of Claims answer: No.

Plaintiffs-Appellants' answer: No.

Attorney General's answer: No.

State of Michigan's answer: Yes.

3. Because 2018 PA's 368 and 369 are unconstitutional, are 2018 PA's 337 and 338 in effect?

Court of Appeals did not reach this issue.

Court of Claims answer: Yes.

Plaintiffs-Appellants' answer: Yes.

Attorney General's answer: Yes.

State of Michigan's answer is unknown.

## INTRODUCTION

### Workers React [to Court of Appeals Decision]

> Romona Hall of Detroit, a restaurant industry worker . . . who's been in the industry on and off for about 30 years, said she makes $3.75 per hour plus tips and that her pay is difficult to predict day-to-day and week-to-week. "It's not consistent," she said. "And it's not something you can depend on." The proposed minimum wage increase, Hall said, would have helped . . . .
>
> – LeBlanc, Grzelewski & Mauger, *Court Ruling Blocks Minimum Wage Hike for Workers Next Month*, Detroit News (January 26, 2023)

For the first time in the 105 years that Michigan citizens have had the constitutional right to initiate laws, the 2018 Michigan Legislature usurped that right by adopting two statutory initiative proposals—raising the minimum wage and providing earned paid sick time—for the purpose of gutting them in its lame duck session. The Legislature even asserted that it had the power to repeal those laws if it so chose during that same session.

Judge Douglas Shapiro of the Court of Claims found the Legislature's conduct unconstitutional, but the Court of Appeals reversed his opinion, resulting in the devastating consequences to minimum wage workers describe above. If allowed to stand, the Court of Appeals decision upholding this unprecedented "adopt and amend" scheme means the end of the people's century-old constitutional right of statutory initiative because future legislatures will simply "adopt and amend" any proposal they dislike.

The Court of Appeals decision ignores these devastating consequences by failing to address how the people's right of initiative can survive its decision. Judge KELLY's concurring opinion candidly admitted that the anti-democratic result the Court allowed could not possibly have been intended by the Constitution's drafters:

> [T]his ploy—adopting an initiative into law so as to prevent it from

> going onto the ballot and then promptly and substantially amending that law in a manner that has left it essentially defanged—is anti-democratic. I cannot believe that this drastic action is what the drafters of our constitution even contemplated, let alone intended.

Appendix, p 21.

Based on the text of Article 2, § 9; its history since 1913, including the 1961–1962 Constitutional Convention Record and Address to the People; precedents of this Court; and other authorities, the Court of Appeals erroneous, anti-democratic decision should be reversed.

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In the fall of 2017, Michigan One Fair Wage ("MOFW") began circulating statutory initiative petitions to create a new Michigan minimum wage law that 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 for inflation.

In late 2017, Michigan Time To Care ("MTTC") began circulating statutory initiative petitions to create a new Michigan Earned Sick Time Act ("MESTA") that would, among other things, allow all employees to earn one hour of paid sick time for every 30 hours worked to use for personal or family health needs; set annual caps on employee usage at 72 hours at large employers and 40 hours at small employers; and provide for a variety of enforcement mechanisms.

On May 21, 2018, MOFW timely filed 373,507 signatures with the Bureau of Elections ("BOE"). After review, the BOE concluded that there were at least 283,553 valid signatures, sufficient to certify the proposal for the 2018 general election ballot. However, the Board of Canvassers ("BOC") deadlocked 2–2 on certifying the proposal. MOFW appealed and the Court of Appeals ordered the BOC to certify the proposal. *Mich Opportunity v Bd of State Canvassers*, order of the Court of Appeals, entered August 22, 2018 (Docket No. 344619), *lv den*, 503 Mich 918; 920

NW2d 137 (2018). The BOC certified the proposal for the ballot as ordered.

On May 29, 2018, MTTC timely filed 377,560 signatures with the BOE. After review, the BOE concluded that there were at least 271,088 valid signatures, sufficient to certify the proposal for the 2018 general election ballot. The BOC certified the proposal.

Upon receipt of both proposals by the Legislature, its leadership 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, e g,* Gray, *Michigan's OK of Minimum Wage Hike, Paid Sick Leave Has a Big Catch*, Detroit Free Press (September 7, 2018). The MOFW proposal was adopted as 2018 PA 337 and the MTTC proposal was adopted as 2018 PA 338, both scheduled to take effect 90 days after the Legislature adjourned *sine die*.

During the 2018 lame duck session, the Legislature passed and the governor signed 2018 PA 368, significantly amending PA 337 in these among other ways: delaying the minimum wage increase to $12 per hour from 2022 until 2030, essentially no increase at all after inflation; continuing the subminimum wage for tipped employees; and deleting the inflationary adjustment.

Similarly, during the lame duck session, the Legislature enacted and the governor signed 2018 PA 369, significantly amending PA 338 in these among other ways: restricting eligibility so that hundreds of thousands, if not millions, of employees would be excluded from coverage under MESTA (renamed the Paid Medical Leave Act); substantially reducing the permitted uses of sick time; and drastically cutting the amount of sick time that can be earned and used by employees.

Several members of the majority party in the Legislature dissented on constitutional grounds:

> As a constitutional conservative, I do not believe the Michigan Constitution grants the Legislature the authority to amend a citizens' initiative in this matter.

State Representative Jeff Yaroch, 2018 House Journal 2351, 2361 (explaining his no vote on SB's 1171 and 1175, *enacted as* 2018 PA's 368 and 369).

PA's 368 and 369 took effect on March 29, 2019.

In early 2019, the Legislature sought an advisory opinion from this Court that 2018 PA's 368 and 369 were constitutional. The Court declined to issue an opinion. *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241 (2019).

After unsuccessful efforts to resolve the issue of the constitutionality of 2018 PA's 368 and 369 without litigation, Plaintiffs filed this case in 2021 in the Court of Claims. Cross-motions for summary disposition were filed, briefed, and argued. Judge Douglas Shapiro of the Court of Claims held in his opinion that "adopt and amend" was unconstitutional, that PA's 368 and 369 were unconstitutional, and that 2018 PA's 337 and 338 were in effect. Appendix, pp 54–55. The Court's thoughtful and lengthy opinion thoroughly addressed all of the parties' arguments. It considered the constitutional text, *id* at 38–41, its history, *id* at 41–46, and the relevant case law, *id* at 46–53. The opinion went to great lengths to analyze and reject all of the State of Michigan's ("SOM") arguments. *See id* at 47–53.

The Court of Appeals reversed the Court of Claims, Appendix, p 19, and this appeal followed.

This Application refers to the Legislature's scheme of adopting an initiated law and then amending it during the same legislative session as "adopt and amend."

## ARGUMENT

### LEAVE TO APPEAL SHOULD BE GRANTED BECAUSE PLAINTIFFS-APPELLANTS MEET THE STANDARDS OF MCR 7.305(B)

MCR 7.305(B) sets forth the standards that parties must meet for the Supreme Court to grant their application for leave to appeal. The application must evidence one or more of the following:

> (1) the issue involves a substantial question about the validity of a legislative act;
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's capacity;
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
> . . .
> (5) in an appeal of a decision of the Court of Appeals,
> (a) the decision is clearly erroneous and will cause material injustice, or
> (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals . . . .

As detailed below, Plaintiffs-Appellants meet all of these standards. First described are the legal principles and precedents of this Court, demonstrating why the "adopt and amend" scheme is unconstitutional. The erroneous Court of Appeals decision is then dissected, showing why its analysis is flawed and should be reversed.

The Court should grant the application for leave to appeal and reverse the Court of Appeals.

### I. THE PEOPLE OF MICHIGAN HAVE DIVIDED THE LEGISLATIVE POWER, RETAINED FOR THEMSELVES THE LAWMAKING POWERS OF INITIATIVE AND REFERENDUM, AND HAVE NOT GRANTED THE LEGISLATURE THE POWER TO "ADOPT AND AMEND" A STATUTORY INITIATIVE.

#### A. The Rules of Constitutional Analysis.

This Court has established several rules governing state constitutional analysis applicable here.

First, all constitutional "analysis, of course, must begin with an examination of the precise

language used in art 2, § 9 of our 1963 Constitution." *Mich United Conservation Clubs v Secretary of State*, 464 Mich 359, 375; 630 NW2d 297 (2001) (CORRIGAN, CJ, concurring). In examining the text, the paramount rule of constitutional interpretation "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; 853 NW2d 653 (2014) (quotation marks omitted). When applying this principle of constitutional interpretation, "the people are understood to have accepted the words" used in a constitutional provision "in the sense most obvious to the common understanding and to have ratified the instrument in the belief that that was the sense designed to be conveyed." *Id* at 224 (internal quotation marks omitted). As often cited, Justice Cooley described this rule:

> 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 Mich State Univ Bd of Trustees*, 460 Mich 75, 85; 594 NW2d 491 (1999), *quoting* 1 Cooley, Constitutional Limitations (6th ed), p 81 (emphasis in original).

As part of this textual analysis, it is important to consider the structure of the Michigan Constitution when interpreting it. *See, e g, In re Konschuh*, 507 Mich 984, 986; 959 NW2d 708 (2021) (CAVANAGH, J, concurring) (using the constitutional structure to interpret the Constitution); *People v Pagano*, 507 Mich 26, 40; 967 NW2d 590 (2021) (VIVIANO, J, concurring) (same). This is because every constitutional 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 Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). In constitutional textual

analysis, this Court has also followed the 1963 Constitution's drafters' definitions of "prescribed by law" and "provided by law" in the constitutional text:

> The committee on style and drafting of the constitutional convention of 1961 made a distinction in the use of the words "prescribed by law" and the words "provided by law." Where "provided by law" is used, it is intended that the legislature shall do the entire job of implementation. Where only the details were left to the legislature and not the over-all planning, the committee used the words "prescribed by law."

*Beech Grove Investment Co v Civil Rights Comm*, 380 Mich 405, 418–19; 157 NW2d 213 (1968), *citing* 2 Official Record, Constitutional Convention 1961, pp 2673–74.

Second, in addition to the text, the history of a constitutional provision, the circumstances of its adoption, and its purpose all may be used to ascertain the common understanding of the voters who adopted it. *See, e g, Citizens Protecting Mich's Constitution v Secretary of State*, 503 Mich 42, 62, 75–83, 100–03 & nn 33, 73, 76, 78, 86, 98, 101, 177, 187, 192; 921 NW2d 247 (2018) (consulting treatises, records of the 1907–1908 and 1961–1962 Constitutional Conventions, 1913 constitutional amendments, and history books).

Finally, there is a special rule of constitutional interpretation when it involves the powers reserved by the people in Article 2, § 9. In *Michigan Farm Bureau v Secretary of State*, 379 Mich 387; 151 NW2d 797 (1967) (*per curiam*), the Supreme Court held that there is "an overriding rule of constitutional construction" with regard to the powers reserved to the people in Article 2, § 9. *Id* at 393. That rule requires these powers to "be saved if possible as against conceivable if not likely evasion or parry by the legislature." *Id.* The Court elaborated that it would not allow the Legislature to "thwart" or "emasculate" those powers or "permit outright legislative defeat, not just hindrance, of the people's reserved" powers. *Id* at 394–95.

The application of these rules leads to but one conclusion in this case: nothing in the constitutional text authorizes the Legislature to adopt an initiative proposal and then amend it in

the same legislative session; nothing in the history of Article 2, § 9 indicates that the voters in 1963 had a "common understanding" that "adopt and amend" was permitted; and the "adopt and amend" scheme is precisely the type of legislative "thwarting" of direct democracy the Supreme Court barred in *Farm Bureau.*

### B. 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.

The Legislature's "adopt and amend" scheme violates (1) the text of Article 2, § 9; (2) the intent of the drafters of that section and the "common understanding" of voters who adopted it; and (3) decades of this Court's decisions protecting the people's reserved constitutional rights of initiative and referendum from legislative evasion. As the Court of Claims correctly held, 2018 PA's 368 and 369 are unconstitutional.

#### 1. *The Text of Article 2, § 9 Does Not Permit the Legislature To "Adopt and Amend."*

Based on the rules of constitutional interpretation, the analysis begins with a thorough examination of the text of the Michigan Constitution "as a whole" without "nullify[ing] or impair[ing]" any provision. *Lapeer Co Clerk*, 469 Mich at 156. That examination reveals an extremely limited role for the Legislature in the initiative process, with great care taken by the drafters to tightly cabin the legislative role in several textual ways. The constitutional text is replete with safeguards against legislative subversion of statutory initiatives, and it does not countenance "adopt and amend."

##### a. *Justice Cooley on the People's Sovereign Right To Exercise Legislative Power.*

Long before the Michigan Constitution was amended in 1913 to expressly reserve the right of statutory initiative to the people, its foundation was established in fundamental principles

enunciated by Justice Thomas Cooley in his seminal treatise. He recognized that it is the people who are sovereign and state legislatures created by the people have only those powers granted by the people:

> The American legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people; and the legislatures which they have created are only to discharge a trust of which they have been made a depository, but with well-defined restrictions.

1 Cooley, Constitutional Limitations (1st ed), p 87.

This principle underlies the text of Article 1, § 1 of the Michigan Constitution that "[a]ll political power is inherent in the people." *See also* Const 1963, Preamble ("We, the people of the State of Michigan . . . do ordain and establish this constitution."). The Constitution establishes the primacy of the *people*, not the Legislature and that power "remains there, except as delegated by the Constitution or statute." *Pub Sch of Battle Creek v Kennedy*, 245 Mich 585, 587; 223 NW 359 (1929). Thus, it is not the Legislature, the Executive, nor the Judiciary in which all governing power naturally or inherently resides—the branches of Michigan's government only have such powers as the people *expressly grant* them in the State Constitution from the people's complete sovereign power.

From their exclusive monopoly on political power, the people of Michigan have granted *some* of the legislative power to the State Legislature in Article 4. *See* Const 1963, art 4, § 1. But even the delegated legislative power does not reside exclusively in the Legislature. *See, e g,* Const 1963, art 4, § 6(22) (legislative power to redistrict resides in the redistricting commission); Const 1963, art 5, §§ 18–20 (budget power shared with the governor).

Moreover, as this Court has long recognized—consistent with Justice Cooley's analysis—the Legislature's power to legislate also can be "prohibited . . . by the people through the Constitution of the State." *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 327;

685 NW2d 221 (2004), *citing Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934) (quotation marks omitted). Thus, "[d]irect democracy in Michigan is a series of powers that the people have *reserved to themselves from the Legislature*." *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 536; 975 NW2d 840 (2022) (emphasis original and added). The powers the people gave to the Legislature in the text of the State Constitution can also *be denied* by the people in the text of the State Constitution.

Justice Cooley's treatise went on to identify one of the ways in which the people can withhold the legislative power from a legislature—by voting directly on laws themselves:

> The authority of the people is exercised through *elections*, by means of which they select and appoint the legislative, executive, and judicial officers, to whom shall be entrusted the powers of government. *In some cases also they pass upon other questions specially submitted to them, and adopt or reject a measure according as a majority vote for or against it*. It is obviously impossible that the people should consider, mature, and adopt their own laws; but when a law has been perfected, or *when it is deemed desirable to take the expression of public sentiment upon any one question, the ordinary machinery of elections is adequate to the end, and the expression is easily and without confusion obtained by submitting the law for an affirmative or negative vote.*

Cooley, p 598 (emphasis added). The people of Michigan have asserted their historic prerogative to make laws themselves in derogation of the legislative power by adopting a statutory initiative process in Article 2, § 9.

b. *The Text of Article 2, § 9 Limits Legislative Power and Expressly Grants the Legislature Only Three Options Regarding Statutory Initiatives.*

The sovereign power of the people of Michigan to vote directly on laws themselves described by Justice Cooley is reserved by the text of Article 2, § 9:

> *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.

Const 1963, art 2, § 9 (emphasis added). As this Court has repeatedly recognized, the legislative power the people granted to the Legislature in Article 4, § 1 was withheld by the people in Article 2, § 9 when they reserved the initiative power to themselves. *See League of Women Voters*, 508 Mich at 536; *Citizens Protecting Mich's Constitution*, 503 Mich at 59 n 18 ("[T]he people of Michigan have also reserved the power to propose and enact statutes by initiative."); *Woodland v Mich Citizens Lobby*, 423 Mich 188, 215; 378 NW2d 337 (1985) ("Art 2, § 9, is a reservation of legislative authority which serves as a limitation on the powers of the legislature. This reservation of power is constitutionally protected from government infringement once invoked . . . .").[1]

Thus, under Michigan's constitutional structure, the question here is: Given that the people have *denied* the Legislature *any* legislative power in the area of initiatives in the first sentence of Article 2, § 9, what, if any, legislative powers have been *expressly granted back* to the Legislature by the people in the subsequent text of Article 2, § 9?

There are two types of initiative procedures: direct, under which a proposal goes directly to the ballot after satisfying the necessary signature and other requirements, and indirect, in which the proposal is presented to a legislature before going to the ballot. Most state constitutions that

[1] The United States Supreme Court has likewise acknowledged the fundamental right of the people to reserve legislative power. As Chief Justice Burger wrote:

> Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See, e.g., The Federalist, No. 39 (J. Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.

*Eastlake v Forest City Enterprises, Inc*, 426 US 668, 672; 96 S Ct 2358; 49 L Ed 2d 132 (1976) (citing authority).

provide for statutory initiative give a legislature no role at all in the initiative process. *See, e g,* National Conference of State Legislatures, *Initiative and Referendum Processes* https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx#/ (accessed February 7, 2023). Thus, no legislature has any inherent "right" to any role whatsoever in the initiative process—only the role, if any, the people expressly grant it in the state constitution under the conditions the people impose. The people of Michigan have chosen indirect initiative in their Constitution but have granted the Legislature only a very limited role in the process that does not include "adopt and amend."

Under Michigan's indirect initiative process, the Legislature receives an initiated petition after it has been certified for the ballot. After receipt, the people have granted the Legislature three options that must be exercised before a 40 session-day deadline. First, it can enact the proposed law without any change or amendment and the proposal does not reach the ballot. Second, the Legislature can reject the proposed law, in which case the proposal is submitted to the people for a vote at the next general election. Third, it can propose a different law on same subject, in which case both proposals are submitted to the people for a vote at the next general election. These three options granted by the people to the Legislature, with respect to initiative petitions and the 40 session-day deadline for using them, are expressly stated in the constitutional text:

> 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.

Const 1963, art 2, § 9.

The maxim *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) is applied to assist in interpreting the Michigan Constitution. *See, e g, Carton v Secretary of State*, 151 Mich 337, 341–42; 115 NW 429 (1908) (citing authority); 1 OAG, 2012, No. 7,268, p 4 (August 9, 2012). Under that well-established maxim, the Legislature does *not* have the power to adopt a proposal and then amend it during the same legislative session because that power is not among those expressly granted to the Legislature by the people in Article 2, § 9. The Legislature is restricted by the constitutional text to three options to be exercised before the 40 session-day deadline expires. It is not authorized by the people to do anything else during that legislative session. *See Blank v Dep't of Corrections*, 462 Mich 103, 142, 142 n 14; 611 NW2d 530 (2000) (MARKMAN, J, concurring) (when the voters of Michigan through the Constitution make a limited grant of authority to the Legislature, "the Legislature may do what is specifically set forth . . . *and no more* and "language couched in terms of an affirmative grant can also reasonably imply a restriction") (emphasis original); 1 OAG, 1976, No 4,932, p 240 (January 15, 1976) (the explicit language of Article 2, § 9 or the absence thereof controls its interpretation).

The conclusion that "adopt and amend" is not available to the Legislature is reinforced by the text of the first sentence of the constitutional provision:

> 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 (emphasis added). It is a fundamental principle of statutory construction that can generally be applied to the construction of the Constitution, *see, e g, Bd of Ed of Detroit v Superintendent of Pub Instruction*, 319 Mich 436, 447; 29 NW2d 902 (1947), that every word

should be given meaning, and no word should be treated as surplusage or rendered nugatory if at all possible. *State Bar of Mich v Galloway*, 422 Mich 188, 196; 369 NW2d 839 (1985). Therefore, "change" and "amendment" must have distinct, not identical meanings. According to dictionaries, "amendment" is defined as "the process of altering or amending a law." *See, e g, Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, the use of that term precludes the Legislature from altering or amending a legislatively enacted initiative—a "law"—during the same legislative session.

The second sentence of the constitutional provision also supports the conclusion that "adopt and amend" is not allowed. That sentence reads: "If any law proposed by such petition shall be enacted by the legislature *it* shall be subject to referendum, as hereinafter provided." Const 1963, art 2, § 9 (emphasis added). Because the right to referendum exists for up to 90 days *after* the legislative session adjourns and "it" refers to the enacted law, that means that the enacted law cannot be changed or amended until the referendum period expires *during the next legislative session*. This text buttresses the conclusion that "adopt and amend" is forbidden during the same legislative session.

The text of Article 2, § 9 does not grant the Legislature the power to "adopt and amend."

c. *Once Triggered, the Ban on "Adopt and Amend" Remains In Effect for the Balance of That Annual Regular Legislative Session.*

The Legislature operates on an annual regular session basis, *see, e g,* Const 1963, art 4, § 13, and the constitutional rules governing its legislative activities are in effect all session long. *See, e g,* Const 1963, art 4, § 24 (title object requirements for all bills); Const 1963, art 4, § 25 (republication requirement for all bills). Therefore, the ban on "adopt and amend"—a constitutional rule governing legislative activities—is also in effect during that entire regular annual session for an initiated proposal once triggered by the presentation of an initiative petition

to the Legislature.

d. *A Legislative Veto In the Initiative Process Was Removed Long Ago From the Text of the Michigan Constitution.*

If the Legislature can "adopt and amend" a proposal in the same session because that is within its legislative power, it can also "adopt and repeal" a proposal. The Legislature so asserted in the *Advisory Opinion* proceeding before this Supreme Court in 2019. *See* Reply Brief of Legislature, p 9 n 2, *In re House of Representatives Request*, 505 Mich 884. "Adopt and amend" or "adopt and repeal" are nothing more than a legislative veto of an initiative. However, the legislative veto in the initiative process was removed long ago from the text of the Michigan Constitution and should not be reincarnated disguised as "adopt and amend."

In Article 17, § 2 of the 1908 Constitution as ratified, the Legislature had the extraordinary power to block or veto a voter-initiated constitutional amendment from being voted on:

> Amendments may also be proposed to this constitution by petition of the qualified electors of this state . . . . All petitions for amendments filed with the secretary of state shall be certified by that officer to the legislature at the opening of its next regular session; and, when such petitions for any one proposed amendment shall be signed by not less than the required number of petitioners, he shall also submit the proposed amendment to the electors at the first regular election thereafter, *unless the legislature in joint convention shall disapprove of the proposed amendment by a majority vote of the members elected.*

Const 1908, art 17, § 2 (as ratified) (emphasis added); *see also* Address to the People, Const 1908, art 17, §§ 2–3, p 64. This power of the Legislature to veto a constitutional amendment was removed by a 1913 constitutional amendment. *See* Const 1908, art 17, § 2 (as amended in 1913). No legislative veto in any aspect of the Michigan initiative process has existed since. *See* Citizens Research Council of Michigan, *A Comparative Analysis of the Michigan Constitution, Volume I (Article V)* (October 1961), p v-5 (hereinafter CRCM, *A Comparative Analysis*) (stating that there was no legislative veto of a statutory initiative under the 1908 Constitution).

Allowing the Legislature to "adopt and amend or repeal" will resurrect the legislative veto rejected by the people over 100 years ago and not allowed since. *Cf Citizens Protecting Mich's Constitution*, 503 Mich at 73 ("In light of [the removal of the legislative veto over constitutional amendments in 1913], we should be wary of finding atextual limitations on voter-initiated amendments."). Reading into Article 2, § 9 legislative authority to "adopt and amend or repeal" would be just such an improper "atextual limitation" on the people's power of statutory initiative.

e. *Article 2, § 9 Is Self-Executing, Precluding Legislative Obstruction of Its Operation Through "Adopt and Amend."*

Yet another textual means by which the drafters who crafted Article 2, § 9 and the voters who approved it demonstrated their desire to limit the legislative role was by making it self-executing.

After a lengthy recital of the history and purposes of Article 2, § 9, the Court of Appeals in *Wolverine Golf Club v Secretary of State*, 24 Mich App 711; 180 NW2d 820 (1970), *aff'd*, 384 Mich 461; 185 NW2d 392 (1971), concluded that it was self-executing to protect it from "legislative encroachment":

> We view the term "self-executing" to be more than an after-the-fact description of the operative effect of the constitutional provision. *It is a term intended to cloak the provision with the necessary characteristics to render its express provisions free from legislative encroachment*. And this is so irrespective of the implementing provision contained therein.

*Id* at 728–29 (emphasis added). This Court has since reaffirmed that Article 2, § 9 is self-executing. *See, e g, League of Women Voters*, 508 Mich at 540–41 ("[T]he courts will protect a self-executing provision from legislative encroachment."), *citing Wolverine Golf Club*, 24 Mich App at 728–29; *Woodland*, 423 Mich at 213.

This is yet another textual demonstration that the Legislature may not "encroach" on the people's power of initiative by going beyond its "express provisions"—here, the three express

options it has for handling an initiative proposal and the 40-day deadline for doing so. It is difficult to imagine a more invasive "encroachment" on the people's power of initiative than as what occurred here: the Legislature adopting a proposal, blocking it from going on the ballot, and then proceeding to gut it.

f. *The Absence of the Phrases "Provided By Law" and "Prescribed By Law" Further Demonstrate Very Limited Legislative Authority Under Article 2, § 9.*

As observed by this Court in *Beach Grove Investment Company*, the term "provided by law" when used in the 1963 Constitution empowers the Legislature to completely implement a constitutional provision, while the phrase "prescribed by law" gives the Legislature a more limited implementation role. *Beech Grove Investment Co*, 380 Mich at 418–19.

Notable here is that *neither phrase* is found in Article 2, § 9, again signaling a very circumscribed role for the Legislature in the initiative process. That role is defined quite narrowly by the provision's last sentence allowing for "implementation" by the Legislature—a subordinate role given the strict reading it was afforded in *League of Women Voters*, *Wolverine Golf Club*, and *Woodland.*

That subordinate role of implementation does not remotely authorize the Legislature to block a proposal from the ballot and then eviscerate it.

g. *Article 2, § 8 Is Instructive on the Limited Legislative Powers Under Article 2, § 9.*

As demonstrated above, the drafters of Article 2, § 9 and its 1913 predecessor used every textual opportunity—by inclusion and omission of text—to tightly circumscribe the power of the Legislature in the initiative sphere to three options during a legislative session.

To illustrate the extent of that circumscription, a comparison to the text of the other direct democracy provision of the Michigan Constitution—Article 2, § 8 on recall—is instructional:

> Laws shall be enacted to provide for the recall of all elective officers except judges of courts of record upon petition of electors equal in number to 25 percent of the number of persons voting in the last preceding election for the office of governor in the electoral district of the officer sought to be recalled. The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question.

That's it—a single short paragraph with only three broad substantive requirements: (1) judges are excluded, (2) a petition signature requirement is set, and (3) the reasons for a recall are outside judicial power. Everything else shall be "provide[d] for" by the Legislature, giving it "the entire job of implementation." *Beach Grove Investment Co*, 380 Mich at 418–19.

The text of Article 2, § 8 and its broad empowerment of the Legislature vividly contrasts with and reaffirms the very confined role of the Legislature with statutory initiatives in Article 2, § 9.

h. *The Legislature Has Several Constitutional Options for Proposals It Opposes.*

This textual interpretation of Article 2, § 9 that forbids "adopt and amend" does not leave the Legislature or opponents of an initiated proposal without options if the Legislature opposes or prefers an alternative to the proposal. There are at least four such options in the text of the Constitution.

First, the Legislature can place a countermeasure on the ballot for the people to consider together with the proposal as allowed in Article 2, § 9. Second, the Legislature can use Article 4, § 34 to propose a countermeasure to the voters. *See In re Proposals D & H*, 417 Mich 409, 420; 339 NW2d 848 (1983). The Legislature used that option in 1982 and again in 1996 with Proposals D and G, and could have used it here. Third, members of the Legislature and other opponents of the proposal can work to defeat it at the polls. Fourth and finally, Article 2, § 9 allows a referendum to be undertaken over an initiated law adopted by the Legislature. *See, e g, Wolverine Golf Club*,

24 Mich App at 717 (1948 initiative adopted by Legislature subjected to referendum); Ellett, *The Government of Michigan* (Allyn & Bacon, 1936), p 22 ("The referendum is a balance for the initiative. In this way forced legislation started by an active minority can be checked.").

A hostile Legislature and other opponents of an initiated proposal thus have ample constitutional alternatives to the unconstitutional shortcut of "adopt and amend." The Legislature knows how to use them, and the Legislature has used them to successfully defeat proposals it dislikes. What the alternatives have in common is that they *all involve the use of direct democracy*.

This is further evidence that the drafters of Article 2, § 9 did not create any *legislative* mechanism that could be used to sabotage the initiative process—if the Legislature opposes an initiative proposal, it is required by the State Constitution to fight on equal footing with its proponents *before the voters of Michigan*. The proper constitutional path for the Legislature here was to place the bills that became PA's 368 and 369 on the ballot, alongside the initiated proposals, *for the voters to decide* whether they preferred the original proposals or those alternatives. Fearful of the voters—fearful of the Legislature's own sovereign—the Legislature instead chose to unconstitutionally bypass the voters. That cannot stand.

2. *The Voters Who Adopted the 1963 Constitution Did Not Have a "Common Understanding" That It Allowed "Adopt and Amend."*

There is no evidence in the text or history of Article 2, § 9 that the voters in 1963 had any idea, let alone a "common understanding," that it included "adopt and amend."

a. *The 1908 Michigan Constitution.*

Neither the 1835 nor the 1850 Constitutions had a statutory initiative procedure. But Michigan was not immune to the national unrest in the late nineteenth and early twentieth centuries over unresponsive and corrupt state legislatures. As one delegate to the 1907 Constitutional Convention put it:

> The trouble is not with the representative government, it is with this eternal mis-representative government . . . .

1 Proceedings and Debates of the Constitutional Convention of the State of Michigan 1907–1908, p 590 (remarks of Delegate Pratt).

This sentiment had deep roots:

> **National Roots**
>
> Associated with the Progressive Movement, the roots of the voter initiative in United States are found in the 1880s and 1890s when dissatisfaction with close relationships between legislative bodies and various interests, including railroads and utilities, and frustration in achieving legislative support for proposed reforms led *a number of citizens to form organizations aimed at promoting a means of circumventing those elected bodies to achieve legislative goals*. *The means chosen was the voter initiative*, which, together with the referendum and recall, was expected to give citizens the tools to hold their elected representatives to account.
>
> In 1898, South Dakota became the first state to amend its constitution to provide for the initiative and the referendum. Four years later, Oregon did the same thing and, over the following decade, 13 more states, including Michigan, followed suit.
>
> . . .
>
> **Early Michigan Experience**
>
> Movement in Michigan toward adoption of the initiative began in the mid-1890s with the formation of the Direct Legislation Club, which, with the support of Detroit mayor and later Michigan governor, Hazen S. Pingree, pushed for the voter initiative to facilitate adoption of a reform agenda. Their efforts did not meet with success until adoption of the 1908 Constitution, which contained a provision for the initiative that was, however, so restrictive that ever using it was doubtful.

Citizens Research Council of Michigan, *Amending the Michigan Constitution: Trends and Issues* (March 2010), p 2 (emphasis added); *see also* McHargue, *Direct Government in Michigan: Initiative, Referendum, Recall, Amendment, and Revision in the Michigan Constitution* (Constitutional Convention Preparatory Commission, 1961), pp 21–22; *Hamilton v Secretary of*

*State*, 227 Mich 111, 130; 198 NW 843 (1924). The initiative procedure referred to in the Citizens Research Council of Michigan report allowed only the Legislature to place issues or constitutional amendments on the ballot; it was not statutory initiative by citizen petition. *See* Const 1908, art 5, § 38 (as ratified); Const 1908, art 17, § 2 (as ratified); McHargue, p 22; Dunbar & May, *Michigan: A History of the Wolverine State* (3d ed, 1995), p 446.

b. *The 1913 Constitutional Amendment Creating Statutory Initiative.*

Not satisfied with the 1908 Constitution, reform efforts to amend it to include statutory initiative by petition began after its adoption. *See* McHargue, p 22–23. A scholar of this era observed:

> There has been no more striking phenomenon in the development of American political institutions during the last ten years than the rise to prominence in public discussion, and consequently to recognition upon the statute-book, of those so-termed newer weapons of democracy—the initiative [and the] referendum . . . .

Munro, *The Initiative, Referendum and Recall* (D Appleton & Co, 1913), p 1. Another contemporary scholar put it more bluntly:

> The American people despise legislatures, not because they are averse to representative government, but because legislatures are in fact despicable.

Ford, *Direct Legislation and the Recall*, 43 Annals of the American Academy of Political and Social Science 65, 72 (1912); *see also League of Women Voters*, 508 Mich at 538 (noting the "atmosphere of mistrust" of the state legislature surrounding the 1913 amendment).

In 1912, Michigan witnessed the election of a reform governor and legislature whose priorities included amending the 1908 Constitution to provide for statutory initiative by petition. In his Message to the Legislature on January 2, 1913, newly elected Governor Woodbridge Ferris referenced the popular pressure for reform, and he endorsed statutory initiative and referendum

by petition among other reform proposals. The hostility to the legislative process was palpable in his Message:

> We are entering upon a new era in statecraft. A general awakening is in process of evolution. The people are coming to feel with force the time-honored quotation, "A Government of the people, by the people and for the people." . . . Most of the measures that I shall recommend have commanded the attention of the people for at least a decade.
>
> . . .
>
> **INITIATIVE AND REFERENDUM**
>
> In order that the people may rule it is essential that they be given the proper tools to work with so that they may attain their own salvation. *The most important of these measures is the initiative and referendum*. This system has been adopted by nearly one-third of the states in the union, but in one-half of these the system is ineffective because of some "joker" inserted in the amendment. A constitutional amendment should be submitted providing for the initiative and referendum. Of all the states, Oregon has had the initiative and referendum the longest. It has been in operation there for over ten years and during that time the people have initiated or referred over one hundred measures by popular vote. The percentage of petition signers is reasonable and the amendment is self-operating. I suggest that it should be adopted without any substantial change. Its operation after a series of years has been so satisfactory, that after ten years the people voted down the attempt to repeal it by an overwhelming majority.

1913 House Journal 26–27 (emphasis added). Of the many reform proposals he urged that day, Governor Ferris placed initiative in the top five. *See id* at 35.

Resolutions placing a constitutional amendment creating statutory initiative on the ballot were quickly introduced, debated, amended, and received final passage in March 1913 as Concurrent Resolution No. 4. *See*, *e g*, 1913 Senate Journal 812–18, 833–40; Dunbar & May, p 452; Michigan Manual 1999–2000, p 16.

That proposed constitutional amendment was to Article 5 of the 1908 Constitution, the legislative article, and it stated in relevant part:

> SECTION 1. The legislative power of the State of Michigan is vested in a senate and house of representatives; *but the people reserve to themselves the power to propose legislative measures, resolutions and laws; to enact or reject the same at the polls independently of the legislature*; and to approve or reject at the polls any act passed by the legislature, except acts making appropriations for State institutions and to meet deficiencies in State funds. *The first power reserved by the people is the initiative*. At least eight per cent of the legal voters of the State shall be required to propose any measure by petition: *Provided*, That no law shall be enacted by the initiative that could not under this constitution be enacted by the legislature. Initiative petitions shall set forth in full the proposed measure, and shall be filed with the Secretary of State not less than ten days before the commencement of any session of the legislature. Every petition shall be certified to as herein provided as having been signed by qualified electors of the State equal in number to eight per cent of the total vote cast for all candidates for Governor at the last preceding general election, at which a Governor was elected. Upon receipt of any initiative petition, the Secretary of State shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors, and if the same has been so signed, the Secretary of State shall transmit such petition to the legislature as soon as it convenes and organizes. *The law proposed by such petition shall be either enacted or rejected by the legislature without change or amendment within forty 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 any law so petitioned for be rejected, or if no action is taken upon it by the legislature within said forty days, the Secretary of State shall submit such proposed law to the people for approval or rejection at the next ensuing 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 the Secretary of State to the electors for approval or rejection at the next ensuing general election.*

1913 Concurrent Resolution No. 4 (emphasis added). The amendment was adopted in a statewide vote on April 7, 1913, by 219,057 to 152,388, a margin of nearly 60% to 40%. *See* Michigan Manual 1939, p 55.

In this amendment, the people limited the legislative power of the Legislature when they expressly

> reserve[d] to themselves the power to propose legislative measures, resolutions and laws; [and] to enact or reject the same at the polls independently of the legislature . . . . The . . . power reserved by the people is the initiative.

Const 1908, art 5, § 1 (as amended). As this Court observed, this amendment "claw[ed] back from the Legislature the right of the people themselves to initiate legislation." *League of Women Voters*, 508 Mich at 538.

From the reservation of their power of initiative, the people expressly granted *back* to the Legislature only three options in regard to an initiative. After the Legislature received an initiative petition during a legislative session, the people gave it a 40-day deadline to exercise one of three options. First, it can enact the proposed law without any change or amendment. Second, it can reject the proposed law, in which case the proposal is submitted to the people for a vote at the next general election. Third, it can propose a different law on the same subject in which case both proposals are submitted to the people for a vote at the next general election. Const 1908, art 5, § 1 (as amended).

In developing this amendment, Michigan was the beneficiary of the experience of statutory initiative and referendum in 11 states, beginning with South Dakota in 1898. *See* Galbreath, *Provisions for State-Wide Initiative and Referendum*, 43 Annals of the American Academy of Political and Social Science 81, 84–106 (1912) (summarizing developments from 1898 to 1913). Many elements in the Michigan amendment were similar to Oregon, as Governor Ferris urged, but with the indirect method of initiative from California included.

A contemporary description of California's indirect initiative says nothing about a legislature's ability to "adopt and amend:"

> When a proposed law is submitted through the indirect initiative to the legislature, that body may enact it without change. If this is not done the proposed law must be submitted to the electors, but the legislature may

submit at the same election a competing measure of similar character.

Galbreath, p 106. Allowing the Legislature to have a limited role in the initiative process created several benefits for the Michigan reformers and voters—benefits not available through the direct initiative process that had no legislative role:

- An initiative could become law sooner and without the cost or risk of an election campaign;
- It provides legislative feedback to the proponents;
- Legislative consideration educates the public through committee hearings and staff analysis; and
- It creates two opportunities for the initiative to be enacted: by a legislative vote or by a vote of the people.

*See* 2 Official Record, Constitutional Convention 1961, p 2394 (remarks of Delegate Downs) (Michigan's indirect initiative "give[s] the legislature a chance to review what was done," including by holding hearings); *id* at 2395 (remarks of Delegate Kuhn) (the Legislature has the opportunity to adopt a proposal that "looks like it is going to be good"); Stern, *California Should Return to the Indirect Initiative*, 44 Loyola of Los Angeles L Rev 671, 680 (2011) (discussing the benefits of indirect initiative).[2]

Thus, the limited role for the Legislature in the initiative process was intended to *assist* a proposal's supporters and the voters, *not* open the door to legislative sabotage as occurred here. Until 2018, the process worked as intended. Proponents of several petitions since 1963 have had their petitions enacted by the Legislature without same session amendment, giving them quicker and less costly success than an election campaign would have entailed, exactly what the voters and original reformers and drafters of the indirect initiative process intended in 1913. *See, e g,* 1987 PA 59; 2006 PA 325; 2014 PA 281.

No elector voting on the 1913 constitutional amendment would have had any inkling, let

[2] Although it was a pioneer of indirect initiative, California repealed it in 1966. *See* Stern, p 673.

alone a "common understanding," that it allowed "adopt and amend." Allowing such legislative evasion would have been completely contrary to the era's distrust of the legislature and the purposes of indirect initiative.

c. *The 1941 Constitutional Amendment.*

In 1941, this section of the 1908 Constitution was amended to allow election officials additional authority to review the petition process for accuracy, but there were no substantive changes relevant here. *See* CRCM, *A Comparative Analysis* , pp v-4 to -5; McHargue, pp 23–24.

d. *The 1961–1962 Constitutional Convention.*

In preparation for the 1961–1962 Constitutional Convention, thorough reports were prepared on the entire 1908 Constitution. *See, e g,* CRCM, *A Comparative Analysis*, pp v-4 to -5; McHargue, pp 23–24. In *none* of those reports was there any reference to the Legislature being able to "adopt and amend" in the same legislative session. The reports consistently referred to the only three legislative actions described: adopt the proposal, reject it, or reject it and submit an alternative for the ballot. *See, e g,* CRCM, *A Comparative Analysis*, p v-5.

The Constitutional Convention Record does not demonstrate that the delegates intended to give the Legislature another option beyond the three expressly provided for in the 1908 Constitution, be it "adopt and amend" or any other. To the contrary, Delegate Downs succinctly summarized the Legislature's only three options when considering laws proposed by initiative:

> And it does then give the legislature a chance to review what was done; either adopt it, do nothing, or provide an alternative in case the legislature, after hearings, can work out a better proposal.

2 Official Record, Constitutional Convention 1961, p 2394. Delegate Kuhn agreed with Delegate Downs' interpretation:

> [W]hat are the rights of the legislature after the people start this petition

> and have the 10 per cent [sic][3] of the people who voted for governor? They must accept it within 40 days, and accept it in toto, or they must place it on the ballot.

*Id.* The Address to the People confirms this interpretation:

> In the section is language which provides that the legislature must act upon initiative proposals within 40 session days, but may propose counter measures to the people.

Address to the People, p 3367.

Thus, the Constitutional Convention Record does not demonstrate that the delegates gave the Legislature an "adopt and amend" option beyond the three options expressly provided in the 1908 Constitution. Instead, a review of the entire Record supports the conclusion that the three options found in the text are the *only* options and can *only* be exercised before the 40-day deadline.

The 1961–1962 Constitutional Convention's Address to the People also reaffirms that the delegates made no substantive change from the 1913 Constitution relevant here—they only eliminated language of a statutory nature and moved the initiative and referendum provision from the legislative article to the elections article at Article 2, § 9:

**ADDRESS TO THE PEOPLE**

**EXPLANATORY NOTE**

> Words printed in *italics* in the revised or new sections of the document indicate the insertion of new matter. The use of stars, thus ***, indicates the omission of words contained in the present constitution.
> …
>
> ***Article II***
> **ELECTIONS**
>
> …
>
> **Initiative and referendum.**
> Sec. 9. *** The people reserve to themselves the power to propose ** laws *and* to enact *and* reject *laws, called the* initiative, *and the power to*

[3] Delegate Kuhn misspoke. Statutory initiative has an 8% signature requirement.

*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.*

This is a revision of Sec. 1, Article V, of the present constitution eliminating much language of a purely statutory character. The new wording specifically reserves the initiative and referendum powers to the people, limits them as noted, and requires signatures equal to at least eight per cent of the electors last voting for governor for initiative petitions and at least five per cent for referendum petitions.

In the section is language which provides that the legislature must act upon initiative proposals within 40 session days, but may propose counter measures to the people.

No laws initiated or adopted by the people can be vetoed; and no law initiated and adopted by them can be amended or repealed except by a vote of the people unless otherwise provided in the initiative measure, or by three-fourths of the members in each house of the legislature. Laws adopted under the referendum provision can be amended or repealed by the legislature at any subsequent session.

Matters of legislative detail contained in the present section of the constitution are left to the legislature. The language makes it clear, however, that this section is self-executing and the legislature cannot thwart the popular will by refusing to act.

. . .

***Article IV***
**LEGISLATIVE BRANCH**

**Legislative power, where vested.**

Sec. 1. The legislative power of the State of Michigan is vested in a senate and *a* house of representatives. ****

No change from the first clause of Sec. 1, Article V, of the present constitution. The remaining language of the existing section is revised and transferred to Article II (Elections) since it relates to the initiative and referendum.

Address To the People, pp 12, 17, 20–21, 24, *reprinted in* 2 Official Record, Constitutional Convention 1961, pp 3363, 3365, 3367, 3369; s*ee also* 2 Official Record, Constitutional Convention 1961, p 2392 (similarly describing the changes).

e. *The Campaign To Adopt the 1963 Constitution.*

After the Convention concluded, explanatory materials were published to aid voters in understanding the proposed Constitution. Those materials made clear that while some changes were made to the initiative power, including several "new features," there was *no mention* of an existing or a new legislative power to "adopt and amend:"

**ELECTIONS**

> Many of the provisions on elections were altered by the convention in framing the proposed constitution. The provisions for the popular initiative by petition for statutes and for popular referendum by petition on laws enacted by the legislature were transferred from the legislative article to the elections article.
>
> **Major Changes**
>
> …
>
> 6. Changes are made in initiative and referendum for statutes: detail deleted; amendment of initiated laws by a three-fourths vote of legislature allowed; law given immediate effect made subject to referendum.
>
> …
>
> **Initiative and Referendum for Statutes**
>
> The provisions on the popular initiative by petition for laws and on popular referendum by petition for laws enacted by the legislature were shifted from the legislative article in the present constitution to the elections article in the proposed constitution. Much of the procedural and other detail was deleted, but the provisions remain self-executing.
>
> The number of signers required for an initiatory petition remains eight per cent—and for a referendum petition five per cent—of the total number of votes for governor at the preceding general election. Use of the referendum with respect to appropriation acts continues to be prohibited. The provision on the referendum was altered to make it clear that the referendum may be invoked against an act given immediate effect which would then be suspended until approved or rejected by voters.
>
> An initiated measure remains immune from the governor's veto. An initiated law cannot be amended or repealed except by a vote of the

> electors unless otherwise provided in that law, or by a three-fourths vote of the members elected to and serving in each house of the legislature. Such amendment or repeal by the three fourths legislative vote is a new feature. The legislature continues to be permitted to amend any law approved by the people under the referendum procedure.

Citizens Research Council of Michigan, *An Analysis of the Proposed Constitution (Number 2)* (December 17, 1962), pp 4, 6.

Consistent with the constitutional text since 1913 and all of the materials explaining the meaning of that text, *there is no mention whatsoever* of a legislative power to "adopt and amend" in any of the public records before, during, or after the 1961–1962 Constitutional Convention. There is *no evidence* that the electors who voted on the initiative provisions of the proposed 1963 Constitution had the "common understanding" that the Legislature had the extraordinary power to "adopt and amend" a proposal in the same legislative session.

f. *Contemporaneous Construction of the 1963 Constitution and Legislative Acquiescence Weigh Against "Adopt and Amend."*

In 1964, Attorney General Frank Kelley issued Opinion No. 4,303 in response to a number of questions from then-State Senator William Milliken regarding initiative petitions under Article 2, § 9. *See* 1 OAG, 1964, No. 4,303, p 309 (March 6, 1964). That opinion was issued shortly after the ratification of the 1963 Constitution, and was thus a contemporaneous construction of the new Constitution. Therefore, it is entitled to weight in determining the proper construction of the initiative provisions of Article 2, § 9. *See, e g, Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 470; 208 NW2d 469 (1973) (contemporaneous judicial interpretation "better reflect[s] the meaning" of constitutional language); *Smith v Auditor General*, 165 Mich 140, 144; 130 NW 557 (1911) (contemporaneous legislative construction of the Constitution entitled to weight in constitutional interpretation); *Marsh v Chambers*, 463 US 783, 790; 103 S Ct 3330; 77 L Ed 2d 1019 (1983) (same).

In Opinion No. 4,303, Attorney General Kelley found that the plain language of the Constitution was "clear" that an initiative petition enacted into law by the Legislature is not subject to amendment in the same legislative session "without violation of the spirit and letter of Article II, Sec. 9 of the Michigan Constitution of 1963." 1 OAG, 1964, No. 4,303, at 311 (Question 3). Attorney General Kelley's opinion was correct for the legal reasons previously detailed.

For 54 years, the Legislature followed and acquiesced in Opinion No. 4,303 and did not violate its stricture against "adopt and amend" despite many opportunities to do so. During that period, there were seven statutory initiative proposals that the Legislature adopted without amendment during the same session. There were 14 statutory initiative proposals that the Legislature could have "adopted and amended" but instead took no action, meaning that they went to the voters, including two proposals that had legislative counter proposals. *See* Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963* (January 2019) https://www.michigan.gov/documents/sos/Initia_Ref_Under_Consti_12-08_339399_7.pdf (accessed February 7, 2023). This legislative conduct also weighs in favor of the interpretation that Article 2, § 9 does not allow "adopt and amend." *See, e g, Menton v Cook*, 147 Mich 540, 543; 111 NW 94 (1907); Cooley, p 67 (writing that "a practical construction, which has been acquiesced in for a considerable period" has "a plausibility and force which it is not easy to resist").

g. *Conclusion: The Voters Had No "Common Understanding" That Article 2, § 9 Permitted "Adopt and Amend."*

Nothing in the text or history of Article 2, § 9 and its predecessors, its purposes, or the circumstances of its adoption and implementation demonstrates that the voters who ratified the 1963 Constitution could possibly have had a "common understanding" that the Legislature could "adopt and amend" an initiated law in the same legislative session.

3. *Michigan Supreme Court Decisions Protect the Peoples' Reserved Direct Democracy Powers and Prevent Thwarting of the Initiative Process Through "Adopt and Amend."*

Not only does the Legislature's "adopt and amend" scheme violate the text of Article 2, § 9, the intent of the drafters as expressed in the history of the section dating to 1913, and the "common understanding" of the voters who adopted it in 1913 and 1963, but it also transgresses decades of Michigan Supreme Court precedent that zealously guards the direct democracy provisions of the Michigan Constitution against legislative encroachment.

Just a few years after the 1963 Constitution was adopted, this Court was asked to construe the referendum provision of Article 2, § 9 to permit a legislative scheme similar to that employed here. In that contemporaneous construction of the Constitution, *see, e g, Advisory Opinion re 1972 PA 294*, 389 Mich at 470, this Court described the scheme it was asked to allow: in order to avoid a referendum on a controversial law exempting Michigan from daylight savings time, the Legislature could simply serially "adopt and repeal" that law in the spring and fall of every year, thus preventing citizens from ever submitting referendum petitions on the law. *See Mich Farm Bureau*, 379 Mich at 394–95. The Court emphatically rejected the legislative "adopt and repeal" scheme by refusing to interpret Article 2, § 9 to allow it. *Id.* In so doing, it held that there is "an overriding rule of constitutional construction" with regard to specific powers expressly reserved by the people for themselves in Article 2, § 9. *Id* at 393. That rule requires these powers to "be saved . . . as against conceivable if not likely evasion or parry by the legislature." *Id.* This Court elaborated that it would not allow the Legislature to "thwart" or "emasculate" those powers or "permit outright legislative defeat, not just hindrance, of the people's reserved" powers. *Id.* at 394–95.

There is no material difference between the "adopt and repeal" scheme to defeat the

people's reserved right of referendum categorically rejected in *Farm Bureau* and the "adopt and amend" scheme employed by the Legislature here to defeat the people's reserved right of statutory initiative. Both would effectively destroy the people's reserved rights at which they are aimed because "adopt and amend" can not only be used to gut initiatives as occurred here, but to repeal them entirely. Indeed, in its Reply Brief to this Court in the *Advisory Opinion* matter, the Legislature asserted that it would have been "within its rights to completely repeal" 2018 PA's 337 and 338. Reply Brief of Legislature, p 9 n 2, *In re House of Representatives Request*, 505 Mich 884.

The *Farm Bureau* Court's "overriding rule of constitutional construction" applies equally to statutory initiatives because statutory initiative and referendum are both reservations of power to the people that are vulnerable to "evasion or parry by the legislature." *Mich Farm Bureau*, 379 Mich at 393. As in *Farm Bureau*, the Legislature's "adopt and amend or repeal" scheme here would allow the Legislature to "thwart" and "outright . . . defeat," *id* at 394–95, the right of initiative by adopting every initiated law with which it is presented and then proceeding to repeal or amend it in the same legislative session to obliterate its original purpose, as was accomplished by 2018 PA's 368 and 369. "Adopt and amend or repeal" means the end of the people's reserved power of statutory initiative and it should be rejected based on the well-established holding and principles of *Farm Bureau*.

Not only does the "adopt and amend" scheme run afoul of the *Farm Bureau* case, but it also contravenes this Court's decisions that built on it. Shortly after *Farm Bureau*, the Court in *Kuhn v Department of Treasury*, 384 Mich 378; 183 NW2d 796 (1971), declared that "under a system of government based on grants of power from the people, constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed"

and that the language of Article 2, § 9 cannot be "stretch[ed]" to deny the people their reserved right of referendum. *Id* at 385–86, *citing Mich Farm Bureau*, 379 Mich at 393. So, too, here. It is an unconstitutional "stretch" to read "adopt and amend" into the clear text of Article 2, § 9 and in defiance of its history.

This Court has continued to rely upon the holding and fundamental principles of *Farm Bureau*. *See, e g, In re Proposals D & H*, 417 Mich at 421 (in a statutory initiative case the Court is "guided by the fundamental rule of constitutional construction which requires this Court to construe every clause or section of a constitution consistent with its words or sense so *as to protect and guard its purposes*"), *citing Mich Farm Bureau*, 379 Mich at 394 (emphasis added); *Woodland*, 423 Mich at 215 ("Art 2, § 9, is a reservation of legislative authority which serves as a limitation on powers of the Legislature. This reservation of power is *constitutionally protected from government infringement once invoked* . . . .") (emphasis added).

In a recent case on the direct democracy provisions of the Michigan Constitution, this Court protected the people's reserved right to amend the Constitution by petition in *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42; 921 NW2d 247 (2018). While *Citizens* involved a petition for a constitutional amendment under Article 12, § 2 and not an initiative petition under Article 2, § 9, the Court's rebuke of any official interference in constitutional powers reserved for the people demonstrates that it still adheres to the principles of *Farm Bureau* and its progeny:

> 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."

*Id* at 63, *quoting Woodland*, 423 Mich at 216. The 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, *quoting Woodland*, 423 Mich at 218. That distrust means that constant judicial vigilance is required to prevent the Legislature, the natural enemy of the people's initiative lawmaking power, from "thwart[ing]" or "outright . . . defeat[ing]" that power. *Mich Farm Bureau*, 379 Mich at 394–95.

The Legislature's "adopt and amend" scheme thus violates decades of Michigan Supreme Court decisions protecting the people's reserved constitutional rights of referendum, statutory initiative, and constitutional amendment initiative, beginning with the authoritative *Farm Bureau* case, by allowing the Legislature to "thwart," and "outright . . . defeat" the right of statutory initiative.

## II. 2018 PA'S 337 AND 338 ARE IN EFFECT.

Because PA's 368 and 369 are invalid, the Court of Claims correctly held that PA's 337 and 338 are in effect. Because of its decisions upholding PA's 368 and 369, the Court of Appeals did not reach this issue.

Under long-standing principles of constitutional law and statutory interpretation, when a court declares a statute unconstitutional, that "unconstitutional statute is void *ab initio*." *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144; 253 NW2d 114 (1977). This means that "an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed." *Id* at 144–45 (noting that "this rule has been consistently followed in Michigan" and citing authorities), *quoting* 16 Am Jur 2d, Constitutional Law, § 117, pp 402–03; *see also Norton v Shelby Co*, 118 US 425, 442; 6 S Ct

1121; 30 L Ed 178 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.").

Because 2018 PA's 368 and 369 are void, it cannot be gainsaid that 2018 PA's 337 and 338, which they amended, are in effect as if they were never amended:

> If an amendatory act is wholly invalid, the statute sought to be amended remains in full force.

1A Singer & Singer, Sutherland Statutory Construction (7th ed), § 22:37. This has long been the law of Michigan. *See, e g*, *People v Smith*, 246 Mich 393, 398; 224 NW 402 (1929) ("We must hold the amendment . . . unconstitutional, and, therefore, no amendment. This holding leaves the law as it was before the abortive attempt to amend.") (citing authority); *People v Ringstaff*, 64 Mich App 638, 644; 236 NW2d 728 (1975) ("[A]n unsuccessful attempted amendment to a statute is a nullity, leaving the law as it was before the abortive attempt to amend.") (citing authorities).

2018 PA's 337 and 338 are in effect as the Court of Claims correctly held.

## III. THE COURT OF APPEALS DECISION IS WRONG.

The Court of Appeals ignored or misapplied all of the principles and precedents described in Section I when it upheld "adopt and amend" as constitutional. The Court of Appeals provided six (6) reasons why it sustained "adopt and amend." All of those reasons are fatally flawed in several ways.

### A. There Is No "Common Understanding" That Adopt and Amend Is Allowed.

In a single paragraph, the Court of Appeals asserts that it is the "common understanding" that once the Legislature adopts an initiated law, it is "subject to amendment at any time." Appendix, p 9.

This conclusion is wrong for several reasons.

First, as detailed earlier, in the more than 100-year history of initiatives in this State, there is *no evidence whatsoever* of any such "common understanding"—not in the drafting of Article 2, § 9 and its predecessor, not in the election campaigns to adopt them, and not in the behavior of the Legislature.

Second, the sole authority cited by the Court of Appeals is its opinion in *Frey v Department of Management and Budget*, 162 Mich App 586; 413 NW2d 54 (1987). However, in its subsequent opinion in *Frey*, this Court limited the holding when it expressly stated: "We *only hold* that when an initiated law is enacted by the Legislature, it is subject to art 4, § 27." *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 338; 414 NW2d 873 (1987) (emphasis added). That narrow holding does not remotely support "adopt and amend," which was not before the Court. *Frey* acknowledged that its analysis is "limited to the language of the constitution when interpreting its provisions." *Id* at 335. The language the *Frey* Court was charged with interpreting was a "general restriction" in Article 4, § 27 "that 'no act' passed by the Legislature may take immediate effect unless passed by a two-thirds vote of each house." *Id*. Unlike the "general" language in Article 4, § 27 at issue in *Frey*, Article 2, § 9 does not contain general language—it provides only three specific and express options for the Legislature to use before a 40-day deadline, options that do not include "adopt and amend." For all of these reasons, *Frey* is not relevant here. It sheds no light on the question of whether an initiated petition can be amended in the same legislative session it was adopted because that issue was not before it.

Finally, the Court of Appeals analysis is faulty because it essentially creates two separate time periods in Article 2, § 9: the 40-day time limit for the Legislature to act on a proposal and the rest of the legislative session. This is a false distinction. The 40-day reference is solely a *deadline* for the Legislature to act, nothing more. Its obvious purpose is to prevent the Legislature from

preventing a proposal from going to the ballot by stalling, not to create two different time periods in the latter of which the Legislature can eviscerate a proposal it adopted.

**B. The Comparison To Referenda Is Incorrect.**

The Court of Appeals decision claims that the Legislature is free to "adopt and amend" initiatives because Article 2, § 9 "plainly states" that the Legislature is only barred from amending laws subject to referendum during the same legislative session:

> Further supporting this common understanding of art 2, § 9 is the fact that in art 2, § 9, the people did preclude the Legislature from amending a law during the same legislative session, *but only as to referendums*. Any reasoned person reading this proposed constitutional provision in 1963 would have concluded that the limitation on amendments during the same legislative session only applied to referendums, for that is what it plainly states. And, because that specific limitation was not placed on initiated laws, that same reasoned person would understand that the Legislature could amend during the same legislative session any law adopted during the 40-day session period.

Appendix, p 10 (emphasis original).

This rationale fails for several reasons.

First, *there is no such language* in Article 2, § 9 prohibiting laws subject to referendum from being amended during the same legislative session:

> The people reserve to themselves . . . the power to approve or reject laws enacted by the legislature, called the referendum. . . . The power of referendum . . . 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 . . . referendum, petitions signed by a number of registered electors, not less than . . . five percent . . . 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 submitted to the people by . . . 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. . . . Laws 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. Because there is no language whatsoever in Article 2, § 9 prohibiting the Legislature from amending laws subject to referendum during the same legislative session, the entire premise of this section of the Court of Appeals' decision is incorrect. Without that fundamental premise, the rest of its analysis and conclusion—that the Legislature can adopt and amend an initiated law—is wrong.

Second, the Court of Appeals opinion on this issue is contradicted by an earlier Court of Appeals opinion that held that the Legislature could, while a referendum is pending on a law, simply reenact that law. *See Reynolds v Martin*, 240 Mich App 84; 610 NW2d 597 (2000). How could it be that the Legislature cannot amend a referred law, but it can reenact it without violating Article 2, § 9? The Court of Appeals decision does not even cite its prior opinion in *Reynolds*, let alone attempt to reconcile it, which is not possible.

Finally, this section of the Court of Appeals opinion repeatedly reveals its misunderstanding of the initiative and referendum process. For example, the opinion states that "laws . . . approved through a referendum also cannot be vetoed." Appendix, p 10. There is no such language in Article 2, § 9 and that language would make no sense because laws are only subject to referendum *after* they are enacted and signed by the governor.

This section of the Court of Appeals decision is rife with errors, relying on non-existent language and betraying a fundamental misunderstanding of the initiative and referendum processes and the text of Article 2, § 9.

### C. The Legislature Does Not Have Plenary Power In the Realm of Initiatives.

The Court of Appeals next asserts that the Legislature has plenary power to adopt and amend unless expressly prohibited. Appendix, pp 11–12.

As was thoroughly explained earlier, while the Legislature may have plenary authority under Article 4, the legislative article, it has no such power under Article 2, which governs initiatives. The very first sentence of Article 2, § 9—reserving to the people the power of initiative and referendum—is a limitation on legislative authority. *See League of Women Voters*, 508 Mich at 536 ("The initiative provision set forth in art 2, § 9 . . . serves as an express limitation on the authority of the Legislature.") (quotation marks omitted).

Every case cited by the Court of Appeals decision is an Article 4 case and does not apply in this Article 2 case. In fact, even those Article 4 cases recognize that the people can restrict the Legislature's authority as they did in Article 2. *See, e g*, *Young*, 267 Mich at 243 ("The legislative power . . . [is] subject . . . to . . . the restraints and limitations imposed by the people upon such power by the Constitution of the State itself."); *Southeastern Mich Fair Budget Coalition v Killeen*, 153 Mich App 370, 380; 395 NW2d 325 (1986) (citing *Young*'s limitation language); *In re Brewster Street Housing Site*, 291 Mich 313, 333; 289 NW 493 (1939) (legislative power can be "restrained by the people through the Constitution of the State"); *Attorney General ex rel O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936) (legislative authority can be prohibited by the state constitution).

The Legislature does not have plenary authority to "adopt and amend" in the absence of an express bar in Article 2, § 9. It can only "adopt and amend" if Article 2, § 9 expressly allows it, which it does not.

### D. "Adopt and Amend" Is Inconsistent with the Constitutional Right To Referendum.

Continuing its misunderstanding of the initiative and referendum procedures, the Court of Appeals next claims that "adopt and amend" does not interfere with referendum. Appendix, p 12. The Court does so by mischaracterizing Plaintiffs' argument as a "timing impediment." *Id*.

The issue is not timing but that the text of Article 2, § 9 expressly reserves the right of referendum as to the original adopted initiated law:

> If any law proposed by such petition shall be enacted by the legislature *it* shall be subject to referendum, as hereinafter provided.

Const 1963, art 2, § 9 (emphasis added). Because the right to referendum exists for up to 90 days *after* the legislative session adjourns and "it" refers to the enacted law, that means that the enacted law cannot be changed or amended until the referendum period expires *during the next legislative session*. This buttresses the conclusion that "adopt and amend" is forbidden during the same legislative session.

Allowing the Legislature to adopt and amend would interfere with the right of referendum on the originally adopted law by changing it.

### E. The Court of Appeals' Reliance on the Constitutional Convention Debates Is Misplaced.

The Court of Appeals also resorts to the Constitutional Convention debates to support the constitutionality of "adopt and amend." Appendix, pp 14–18. That ground is unavailing.

The Court of Appeals relies upon statements by Delegate Kuhn in the Constitutional Convention Record to argue that the delegates intended to allow the Legislature to "adopt and amend." *Id* at 14. His statements do not do so for several reasons.

First, in his statement about an oleomargarine proposal in 1950, *id* at 14, Delegate Kuhn acknowledged that the Legislature only has three options to be exercised by the 40-day deadline.

2 Official Record, Constitutional Convention 1961, p 2394. Nowhere does he claim that the Legislature is able to adopt and amend in the same legislative session. When Delegate Kuhn discusses legislative adoption, his reference to later changes contains no time frame, so it provides no support for "adopt and amend."

Similarly, Delegate Kuhn's statements in colloquy with Delegate Wanger, Appendix, pp 14–15, were in response to a question from Wanger about what happens to an initiated law *after* it is adopted by the people in comparison to a referendum. Delegate Kuhn was not asked and was not addressing the Legislature's ability to "adopt and amend" an initiated law during the same legislative session, as even the Court of Appeals decision admits. *Id* at 15 ("[T]here is no discussion regarding when the amendment power can be used for legislatively enacted laws.").

Delegate Kuhn statements do not support "adopt and amend."

The statements of Delegate Hutchinson, *id* at 16–17, do not support "adopt and amend" either because that discussion concerned amendment of voter-*approved* initiatives. This discussion sheds no light on—and certainly offers no support for—"adopt and amend" during the same legislative session.

Moreover, even if any of these delegate remarks are found to be supportive of an "adopt and amend" option—which they are not—the statement of a delegate is not controlling and cannot be used to contradict the express language of Article 2, § 9. As this Court held in *Regents of University of Michigan v Michigan*, 395 Mich 52, 59–60; 235 NW2d 1 (1975):

> The debates must be placed in perspective. They are individual expressions of concepts as the speakers perceive them (or make an effort to explain them). Although they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures.

There is a final reason not to credit Delegate Kuhn for an expansive interpretation of the

Legislature's role in Article 2, § 9. The Convention Record indicates that he personally was not a supporter of the right of initiative:

> We want to make it tough. It should not be easy. The people should not be writing laws. That's what we have a senate and house of representatives for.

2 Official Record, Constitutional Convention 1961, p 2394. Just as dissenting legislators do not determine the meaning of a law, *see, e g, Fieger v US Attorney General*, 542 F3d 1111, 1119 (CA 6, 2008), so, too, should a single skeptic of the people's constitutional right of initiative not determine the meaning of Article 2, § 9.

### F. The Unambiguous and Undisputed Unconstitutional Motivation of the Legislature Should Not Be Ignored.

Seeking to avoid the undisputed evidence of what the Legislature did here, the Court of Appeals dismisses its motivations. Appendix, pp 18–19. However, this Court should not ignore the reality of what occurred, including the undisputed motive of the Legislature.

Although the Court does not usually rely on legislative history or motive in assessing statutes because that history is usually ambiguous and even contradictory, *see, e g, Rouch World, LLC v Dep't of Civil Rights*, ___ Mich ___; ___ NW2d ____ (2022) (Docket No. 162482); slip op at 25–27 n 19, here there are no such difficulties. As detailed earlier, the legislative leadership in 2018 publicly admitted that its motive was to adopt the proposals to keep them off the ballot and then to gut them in lame duck. There is no ambiguity or uncertainty—the Legislature's motives and goals were stated publicly and carried out.

This Court should not ignore the reality of what occurred here and why.

## CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Plaintiffs-Appellants respectfully request that the Court grant leave to appeal and reverse the decision of the Court of Appeals.

Respectfully submitted,

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## Certificate of Compliance

I certify that this brief complies with the word volume limitation set forth in MCR 7.212(B)(1) and with the format requirements of MCR 7.212(B)(5). I am relying on the word count of the word-processing system used to produce this document. The word count is 14,724.

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**Proof of Service**

The undersigned certifies that on February 10, 2023 the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
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