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,

Defendant-Appellant,

and

THE STATE OF MICHIGAN,

Defendant-Appellee.
_____/

Supreme Court No. 165325

Court of Appeals No. 362271

Court of Claims No. 21-000095-MM

The appeal involves a claim that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

THE STATE OF MICHIGAN'S CORRECTED ANSWER TO PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction to review the plaintiffs' application for leave. See MCR 7.305(A).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

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

Mothering Justice's Answer:	No.
The Attorney General's Answer:	No.
The State of Michigan's Answer:	Yes.
The Court of Appeals' Answer:	Yes.
The Court of Claims' Answer:	No.

II. Whether Public Acts 368 and 369 of 2018 were enacted in accordance with article 2, § 9 of the Michigan Constitution?

Mothering Justice's Answer:	No.
The Attorney General's Answer:	No.
The State of Michigan's Answer:	Yes.
The Court of Appeals' Answer:	Yes.
The Court of Claims' Answer:	No.

CONSTITUTIONAL PROVISIONS INVOLVED

Const 1963, art 2, § 9 provides in full:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
>
> No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.
>
> Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.
>
> If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.
>
> Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors

unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature. Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. If two or more measures approved by the electors at the same election conflict, that receiving the highest affirmative vote shall prevail.

The legislature shall implement the provisions of this section.

Const 1963, art 4, § 1 provides in full:

Except to the extent limited or abrogated by article IV, section 6 or article V, section 2, the legislative power of the State of Michigan is vested in a senate and a house of representatives.

INTRODUCTION

Ordinarily, as the ultimate authority on Michigan's Constitution this Court should grant an application raising basic questions of how legislation is enacted by the people and the Legislature under the Constitution. But given the posture of this case, that consideration should yield, and this Court should deny leave for two interrelated reasons.

First, the Court of Appeals' opinion provided the only tenable reading of the Michigan Constitution. The language of the Constitution is clear, and it requires the outcome provided by that court. As this Court explained in describing the remarkable breadth of authority enjoyed by the Legislature under article 4, § 1, "the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States."[1] And nothing in article 2, § 9 prohibits the Legislature from adopting an initiative proposed by the people and amending it within the same legislative session.

Under article 2, § 9, the Michigan Constitution limits the Legislature to three options "within 40 session days" of receiving a proposed initiative petition of the people: (1) enact it, (2) propose an alternative, or (3) reject it. In contrast, for a law that is enacted by the Legislature, the Constitution only provides that such a law is subject to referendum, but it places no constraints on the Legislature's ability to amend it.

[1] *Coalition of State Employee Unions v State*, 498 Mich 312, 331–332 (2015).

The limitations on actions of the Legislature after the 40-session-day period appear in paragraph 5 of § 9 of article 2. Section 9 provides that for an initiated law that is rejected by the Legislature and later adopted by the voters, any amendment of that law must be passed by a three-fourths supermajority. The Constitution contains no such limitation for a legislatively enacted initiative petition. And § 9 provides that a law approved by referendum may only be amended at "any subsequent session." The absence of such limitations for legislatively enacted initiative laws – either the three-fourths majority requirement or the next-legislative session limit – confirms the conclusion that the Constitution does not bar the Legislature from adopting an initiative and then amending it in the same legislative session.

As an indication of the Constitution's clarity, Judge Michael Kelly in his concurrence asserted that the Legislature's actions in 2018 may have been "anti-democratic" and did not reflect its "finest hour." Nonetheless, he agreed that "this procedure is permissible under the language of our constitution." In short, the will of the people is known through the language that they adopted in our Constitution.

Second, the timing weighs heavily against a grant of leave. The Legislature amended the acts in the fall of 2018, *more than four years ago*. The complaint here was filed in 2021 after this Court denied an advisory opinion request in 2019 on the very issue presented here. Separate from the merits of the arguments regarding the constitutional text, there may well be immediate and broad-based effects if somehow this Court ruled differently from the Court of Appeals on this issue.

For example, Public Act 337 of 2018 created a five-year window for tipped workers' minimum wage to increase from 48% of the minimum wage in 2019 to 100% on January 1, 2024. The general minimum wage increases were similarly staggered over multiple years. Any decision here would not likely come down until after that date. On this point, the plaintiffs seek to revive Public Acts 337 and 338 before their amendment, which originally would have taken effect in early 2019, more than six months after their initial passage. By contrast, a decision by this Court would take effect in 21 days, leaving almost no lead time for the stakeholders to adjust to any change in the status quo. That has the potential to create confusion for hourly workers and their employers.

Rather than a belated judicial review of a question that this Court has already declined to answer more than three years ago, this Court should deny the application, as the Court of Appeals correctly ruled on the question in a unanimous published decision.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

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

In July 2018, the Board of State Canvassers determined that the Michigan Time to Care petition contained sufficient valid signatures for placement on the November 2018 general election ballot, but it did not certify the Michigan One Fair Wage petition as sufficient.[3]

On July 30, 2018, the Secretary of State presented to the Legislature the Michigan Time to Care petition for consideration under article 2, § 9, which requires that the Legislature have at least "40 session days" to review the initiative and take action.[4] On August 24, 2018, consistent with an order from the Michigan Court of

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[2] The MI Time to Care petition is available online at http://legislature.mi.gov/documents/2017-2018/initiative/pdf/MITimeToCareFINAL.pdf. [Last accessed March 10, 2023.]

[3] See July 26–27, 2018, meeting minutes of the Board of State Canvassers, available at https://www.michigan.gov/-/media/Project/Websites/sos/01diljak/08PRIM_CALHOUN.pdf?rev=e2bde1488ab149d985491dc2fc85ddb3. [Last accessed March 10, 2023.]

[4] The legislative history for 2018 Public Act 338 is available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=initiative. [Last accessed March 10, 2023.]

Appeals,[5] the Board of State Canvassers certified as sufficient for placement on the ballot the Michigan One Fair Wage petition.[6] And on August 27, 2018, the Secretary of State presented that petition to the Legislature.[7]

The Legislature then enacted both initiatives on September 5, 2018 without change. The Michigan One Fair Wage petition was enacted as Public Act 337 of 2018, the Improved Workforce Opportunity Wage Act.[8] The Michigan Time to Care petition was enacted as Public Act 338 of 2018, the Earned Sick Time Act. As a result, the initiatives were not submitted to the people for a vote at the November 6, 2018 general election.[9]

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

[Last accessed March 10, 2023.]

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

[6] See August 24, 2018, meeting minutes of the Board of State Canvassers, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Meeting-Minutes/Aug-24-2018-BSC-Meeting-Minutes.pdf?rev=4dab698ee5974ecf9b356ccb746a13bb&hash=CE6C7FADE6990EB585F95092F5DB4192. [Last accessed March 10, 2023.]

[7] The legislative history for Public Act 337 of 2018 is available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=initiative. [Last accessed March 10, 2023.]

[8] See text of Public Act 337 of 2018, available at http://legislature.mi.gov/documents/2017-2018/initiative/pdf/MichiganOneFairWageFinal.pdf. [Last accessed March 10, 2023.]

[9] Neither of these initiated laws were given immediate effect by the Legislature. Consequently, the Acts as originally enacted did not become effective "until the expiration of 90 days from the end of the session at which it was passed," which would have been March 29, 2019. Const 1963, art 4, § 27.

Two days after the November 2018 election, the Senate introduced Senate Bill 1171, which proposed significant amendments to Public Act 337, the Improved Workforce Opportunity Wage Act.[10] The Senate also introduced Senate Bill 1175, which proposed significant amendments to Public Act 338, the Earned Sick Time Act.[11]

These proposed amendments generated public discussion regarding whether the Legislature could lawfully amend Public Acts 337 and 338 during the same legislative session in which it had enacted them. Some of that discussion related to the fact that former Attorney General Frank Kelley had opined in 1964 that legislatively enacted initiatives could not be amended during the same legislative session. See OAG, 1963-1964, No. 4303, p 309 (March 16, 1964).[12] Seeking clarity on this legal question, then Senate Majority Leader Arlan Meekhof requested an Attorney General opinion.[13] On December 3, 2018, former Attorney General Bill Schuette issued OAG No. 7306,[14] opining that article 2, § 9 does not prohibit the Legislature from amending enacted initiatives in the same legislative session.

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[10] The legislative history for SB 1711 of 2018 is available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=getObject&objectName=2018-SB-1171. [Last accessed March 10, 2023.]

[11] The legislative history for SB 1175 of 2018 is available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=getObject&objectName=2018-SB-1175. [Last accessed March 10, 2023.]

[12] Available https://www.ag.state.mi.us/opinion/datafiles/1960s/op03082.pdf. [Last accessed March 10, 2023.]

[13] MCL 14.32 provides that "[i]t shall be the duty of the attorney general, when required, to give his opinion upon all questions of law submitted to him by the legislature . . . [.]"

[14] Available at https://www.ag.state.mi.us/opinion/datafiles/2010s/op10385.htm. [Last accessed March 10, 2023.]

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

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

With the effective dates of the acts looming and the prospect of a third Attorney General opinion on the horizon, the House and Senate both resolved to request an advisory opinion from this Court under article 3, § 8 of the Michigan Constitution.[15] Separate requests for an advisory opinion were thereafter filed with this Court. On April 3, 2019, the Court entered an order setting oral argument in this matter, calling for briefing on three legal questions, and requesting that the Attorney General submit separate briefs arguing both sides of the questions. The undersigned team of attorneys was assigned the position of defending the constitutionality of amending Public Acts 337 and 338.

[15] See House Resolution 25 of 2019 and Senate Resolution 16 of 2019, available at http://www.legislature.mi.gov/(S(jlyjwr1qns4rnsozd4mzqzwz))/mileg.aspx?page=Resolutions. [Last accessed March 10, 2023.]

After briefing, on December 18, 2019 this Court decided not to review the questions, instead ruling that it was "not persuaded that granting the requests would be an appropriate exercise of the Court's discretion." *In re Constitutionality of 2018 PA 368 & 369*, 505 Mich 884 (2019). Thus, this decision left the question of the constitutionality of these public acts for another day.

In May of 2021, the plaintiffs filed suit challenging the constitutionality of Public Acts 368 and 369 of 2018 but named only the Attorney General as a defendant. On March 25, 2022, plaintiffs filed an amended complaint, adding the State of Michigan as a defendant. As the lower court noted, the "Attorney General is aligned with plaintiff[s] on the substantive issues," and thus the State was added as a party and is defending the constitutionality of these public acts. COC Op, p 11.

In response to cross-motions for summary disposition, the Court of Claims ruled that Public Acts 368 and 369 were unconstitutional by violating article 2, § 9 of Michigan's Constitution. The reasoning of the court rooted the decision in two conclusions in reviewing the constitutional language.

First, the court ruled that article 2, § 9 provided only for three options: (1) "rejecting the proposed law"; (2) "propos[ing] a different law; or (3) "enact[ing] the law proposed in the initiative without change." COC Op, pp 8–9. The court then determined that this structure did not allow for a "fourth option" of enacting the law and then amending it in the same legislative session. COC Op, pp 10–11. It did not address the fact that the phrase "without change" was itself limited to "within 40 session days" from the time the petition was received in § 9.

Second, the court reasoned that a law proposed by the people is subject to referendum under § 9, which "indicates that the People intended the *exact law* will be subject to the referendum." COC Op, p 9 (emphasis in original). The court then concluded that "the provision makes clear that the initiated law cannot be subject to amendment until *after* the referendum period has run." *Id.* The court did not address the State's argument that a referendum even if amended in the same legislative session may be subject to referendum in its unamended form.

Regarding the State's arguments about the possibility that the Legislature may have to amend a law in the same legislative session because of "changed circumstances" or "an emergency," the court "decline[d] to address this scenario." COC Op, p 24, n 8. The court also addressed the constitutional convention debate, the case law, and the competing Attorney General opinions on this issue. COC Op, pp 11–23.

In the end, the court ruled that Public Acts 368 and 369 were "voided" and that Public Acts 337 and 338 "remain in effect." COC Op, p 25. The State moved for a stay of this decision, and the court denied the motion, but ruled that its effect of its decision would be held for 205 days, which is the amount of time between the Legislature's enactment of Public Acts 337 and 338 of 2018 and when they would go into effect:

> Accordingly, the Court GRANTS a stay, without bond, for a period of 205 days, i.e., *through February 19, 2023*. Any further stays should be sought at the Court of Appeals and/or Supreme Court.
>
> [COC Order on stay, p 2 (emphasis added).]

On appeal, the Court of Appeals reversed in a published decision. The decision was unanimous, with Judge Murray authoring the lead opinion, and Judges Kelly and Riordan writing concurring opinions. The decision was given immediate effect under MCR 7.215(F). See slip op, p 20. Thus, Public Acts 368 and 369 remain in effect.

In the lead opinion, which included approximately 15 pages of analysis, slip op, pp 4–19, Judge Murray examined the common understanding of the Michigan Constitution, by reviewing the limitations that were included in article 2, § 9 on the Legislature as well as the authority the Legislature enjoys unless restricted by the Constitution. The lead opinion ruled that the Constitution's language was clear that the Legislature did not impose limitations on adopting and amending an act in the same term, listing five different principles that guided its analysis:

> [F]or several reasons, we conclude that the Legislature acted within its constitutional authority when it amended PAs 337 and 338.
>
> First, focusing on the common understanding of the words employed within art 2, § 9, the commands placed on the Legislature were satisfied by adoption of the initiative proposals, in full, within 40 session days of their submission.
>
> Second, although art 2, § 9 contains a provision precluding the Legislature from amending certain laws until the next legislative session, that restriction is specifically and only for laws subject to referendum. That same restriction, which the trial court essentially imposed upon the Legislature for initiatives as well, was not placed by the people on initiative laws.
>
> Third, the constitutional convention record shows both that the framers envisioned the Legislature taking "full control" of legislation by adopting it, and specifically rejected making the Legislature wait until the next legislative session to amend voter-approved initiated laws.
>
> Fourth, in the absence of any restrictions, the Legislature is empowered to amend any law, and our case law states that an initiated law enacted by the Legislature is on the same footing as any other law passed by the Legislature.

> Fifth, construing art 2, § 9 as not prohibiting the "adopt and amend" procedure does not interfere with any other constitutional provision, and particularly the right to a referendum on the initially adopted laws. [Slip op, p 9 (paragraph breaks added).]

Judge Murray later stated that the Legislature was at liberty to amend an act it adopted in the same session as there was no "constitutional provision precluding it":

> Because there are no limitations with respect to the amendment of initiated laws beyond the initial 40-session day period for legislative action, the Legislature is free to amend laws adopted through the initiative process during the same legislative session. [Slip op, p 11.]

The analysis was based on the "actual language" in the Constitution, see slip op, p 13, but the opinion went on to address the history of the process, the debates at the convention, and the arguments of the plaintiffs and the Attorney General. See slip op, pp 13–18. It noted that the "motives of the Legislature in adopting and amending are irrelevant." *Id.* at 18.

And, as noted in the introduction, Judge Michael Kelly agreed, see slip op p 1, (Kelly, J., concurring) ("I concur with the majority that ['adopt and amend'] does ['pass muster']"), but he noted his view that the actions by the Legislature were "anti-democratic." *Id.* Also, Judge Riordan wrote, noting that he "concur[s] with Judge Murray's opinion and join[s] it in full." Slip op, p 1 (Riordan, J., concurring). His subsequent analysis addressed the question whether an earlier Attorney General opinion should be given more weight than a later one, as found by the trial court, and also addressed the issue whether Attorney General opinions are binding on state agencies so that the question might be "carefully considered" in a later case. See *id.* at 1, 8.

Regarding the timing of the Public Acts at issue here, the plaintiffs on appeal are asking for the Public Acts 337 and 338 of 2018 to be reinstated without amendment. See App, pp 2, 4. As noted above, these acts were enacted by the Legislature on September 5, 2018 and would have taken effect on March 29, 2019, more than six months later. The Public Acts 368 and 369, which amended these acts, took effect on March 29, 2019, almost four years ago.

Before its amendment, Public Act 337 governing the minimum wage provided the following framework for tip workers from 2018 through 2024:

> (2) For purposes of subsection (1)
>
> the minimum hourly wage rate of an employee shall be ***48%*** of the minimum hourly wage rate established under section 4 effective ***January 1, 2019***;
>
> beginning ***January 1, 2020***, it shall be ***60%*** of the minimum hourly wage rate established under section 4;
>
> beginning ***January 1, 2021***, it shall be ***70%*** of the minimum hourly wage rate established under section 4;
>
> beginning ***January 1, 2022***, it shall be ***80%*** of the minimum hourly wage rate established under section 4;
>
> beginning ***January 1, 2023***, it shall be ***90%*** of the minimum hourly wage rate established under section 4;
>
> and beginning ***January 1, 2024*** and thereafter, it shall be ***100%*** of the minimum hourly wage rate established under section 4. [Public 337 of 2018, establishing MCL 408.934d (emphasis and paragraph breaks added).][16]

In other words, the original framework of Public 337 of 2018 would have increased the wage of tip workers to 100% of the minimum wage over a five-year period.

[16] See n 8 above for the text of Public Act 337 of 2018.

Similarly, the increases of the general minimum under Public Act 337 were set to occur over a four-year period:

> (1) Subject to the exceptions specified in this act, the minimum hourly wage rate is:
>
> a. Beginning ***January 1, 2019***, ***$10.00***.
>
> b. Beginning ***January 1, 2020***, ***$10.65***.
>
> c. Beginning ***January 1, 2021***, ***$11.35***.
>
> d. Beginning ***January 1, 2022***, ***$12.00***.
>
> [Public 337 of 2018, establishing MCL 408.934(1) (emphasis added).][17]

Thus, the original Public Act 337 was designed to change the minimum to occur gradually with steps of 65 or 70 cents per year over four years.

And it is worth noting that a petition has been filed with the Secretary of State for her review by the Raise the Wage ballot proposal committee, which would change the minimum wages over the *next four years*.[18] The petition is currently being canvassed by the Bureau of Elections. If the Board of Canvassers certifies the petition as sufficient, and the Legislature enacts the measure, this law would again amend Public Act 337 of 2018, MCL 408.932 and 408.934, add 408.934e, and it would increase the minimum wage to $11 an hour in 2023, $12 in 2024, $13 in 2025, $14 in 2026, and $15 in 2027; and it would adjust over six years the minimum employer-paid portion of pay for workers receiving tips until it matches minimum wage for all employees.

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[17] See n 8 above for the text of Public Act 337 of 2018.

[18] https://www.michigan.gov/sos/-/media/Project/Websites/sos/23delrio/Statewide-Petition-Status.pdf?rev=02ca8a29ff2e4b43a21ec23429f7cfb1&hash=7CE2A7592B937B603BF9C295C3566102 [last accessed on March 10, 2023.]

STANDARD OF REVIEW

The proper interpretation of the Michigan Constitution and whether a statute violates the Constitution are questions of law that are reviewed de novo. *Coalition of State Employee Unions v State,* 498 Mich 312, 322 (2015). When addressing a constitutional challenge to a statute, the statute is "presumed to be constitutional" and there is a "duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent.

Further, "when considering a claim that a statute is unconstitutional . . . the wisdom of the legislation" is not part of the inquiry. *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003). "[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution" that the statute's validity will not be sustained. *Phillips v Mirac, Inc,* 470 Mich 415, 423 (2004) (cleaned up).

Regarding the standards for granting leave for an application, these factors are listed by court rule. See MCR 7.305(B).

ARGUMENT

I. The Court of Appeals correctly ruled that article 2, § 9 of the Michigan Constitution is unambiguous that the Legislature may amend a legislatively enacted initiative law in the same session.

In giving the text of article 2, § 9 its common understanding, the Michigan Constitution does not prohibit the Legislature from amending initiated laws during the same legislative session in which the Legislature has enacted them. Any remedy for those opposed to the manner in which Public Acts 337 and 338 were amended is legislative or electoral in nature, not judicial.

The Michigan Constitution places all legislatively enacted laws on the same plane. While they are subject to referendum, they may be amended at any time, including during the same legislative session in which they were passed. The lone kind of law that may only be amended in the next legislative session is one that is approved by the voters in a referendum. The Court of Appeals correctly ruled that nothing in the Constitution prohibits the action at issue, and in the absence of such a limitation, the Legislature retains this authority. This Court should deny leave.

A. In reading the text, the constitutional convention debate, and the cases, all support the conclusion of the Court of Appeals that Public Acts 368 and 369 of 2018 are constitutional acts.

The Constitution's language is clear that there are no limits placed on the ability of the Legislature to amend an initiative law it adopts. While not necessary to review, this understanding is further supported by the constitutional debate and the case law, including the proper understanding of the analysis of the relevant Attorney General opinions.

1. Applying the constitutional text by reading as the ordinary citizen, it is clear that article 2, § 9 does not limit the ability of the Legislature to enact and amend an initiative in the same legislative session.

When interpreting the Constitution, the objective "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *People v Tanner*, 496 Mich 199, 223 (2014). See also *Kuhn v Dep't of Treasury*, 384 Mich 378, 384 (1971). "[T]he primary rule is that of 'common understanding,' " as Justice Cooley explained:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the *common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed."
>
> [*Federated Publications, Inc v Board of Trustees*, 460 Mich 75, 85 (1999) (citations omitted; emphasis added).]

Where the text is clear, a court ordinarily does not need to move beyond the Constitution's provisions themselves. See *American Axle & Mfg, Inc v Hamtramck,* 461 Mich 352, 362 (2000), citing Cooley, Constitutional Limitations (1868), p 55. Rather, a court looks to the Constitution's "plain language" to discern its meaning. See *Associated Builders v City of Lansing,* 499 Mich 177, 188 (2016). And to help determine the "common understanding," the " 'constitutional convention debates and the address to the people, though not controlling, are relevant.' " *Tanner*, 496 Mich at 226, quoting *People v Nash*, 418 Mich 196, 209 (1983).

In addition, the provisions of the Constitution must be read harmoniously. See *Straus v Governor,* 459 Mich 526, 533 (1999) ("Where, as here, there is a claim that two different provisions of the constitution collide, we must seek a construction that harmonizes them both."). Since the provisions of the 1963 Constitution were adopted simultaneously, "neither can logically trump the other." *Id.*

Article 2, § 9 provides the authority for the people to initiate legislation through a petition and provides a role for the Legislature to enact, propose an alternative, or reject it within the 40 session days of having received it. Const 1963, art 2, § 9. Section 9 also empowers the people to approve or reject laws enacted by the Legislature, called the referendum. *Id.*[19] With respect to initiatives, paragraph 1 of § 9 provides in relevant part that the people may initiate laws by petition:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . The power of initiative extends only to laws which the legislature may enact under this constitution. . . . To invoke the initiative . . . petitions signed by a number of registered electors, not less than eight percent for initiative . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required. [Const 1963, art 2, § 9, ¶1.]

The Legislature implemented article 2, § 9 with respect to initiatives in various sections of the Michigan Election Law, MCL 168.1, *et seq*. Under the election law for initiatives, the people must gather sufficient signatures and then file the petitions with the Secretary of State. See MCL 168.472.

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

After filing, the Board of State Canvassers makes an official declaration of the sufficiency or insufficiency of the initiative petition consistent with statutory law. MCL 168.477(1). If sufficient, the Secretary of State then presents it to the Legislature for enactment or rejection without change or amendment within 40 session days under paragraph 3 of article 2, § 9:

> Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature.
>
> [Const 1963, art 2, § 9, ¶3.]

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

Thus, the Legislature has three options with respect to an initiative during the 40-day presentment period: (1) vote to enact it without change or amendment; (2) vote to reject with a new proposal; or (3) vote to reject without change or amendment.[20] The processes that follow from these options are introduced by two "if" statements:

> ***If** any law proposed by such petition shall be **enacted** by the legislature* it shall be subject to referendum, as hereinafter provided.
>
> ***If** the law so proposed is **not enacted** by the legislature within the 40 days*, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. [Const 1963, art 2, § 9, ¶3 and ¶4 (emphasis added).]

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

For those initiatives that are "not enacted," the Constitution then requires that the initiative be submitted to the people for a vote at the next general election. *Id.* As the other option for an initiative that is "not enacted," as noted the Legislature may "propose a different measure," and then "both measures shall be submitted" "for approval or rejection at the next general election." *Id.*

The Constitution also provides express limitations in paragraph 5 in article 2, § 9, establishing the conditions under which initiated laws adopted by the people may be amended or repealed by the Legislature:

> No law initiated or adopted by the people shall be subject to the veto power of the governor, and *no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed,* ***except by a vote of the electors . . . or by three-fourths of the members elected to and serving in each house of the legislature***[.] [Const 1963, art 2, § 9, ¶5 (emphasis added).]

In contrast, for those initiatives adopted by the Legislature, the Constitution merely states that they are not subject to veto and that these laws are subject to referendum, but it does not identify any limits on the amendment of such laws. The limitation during the 40-day presentment period requires that it be enacted "without change or amendment," art 2, § 9, but after those 40 session days the Constitution does not create any restriction on the subsequent amendment of a legislatively enacted law.

In this way, the Michigan Constitution creates two critical time frameworks for how the process unfolds.

In the first 40 session days after "any initiative petition" is received, the Legislature may take one of three actions. Const 1963, art 2, § 9, ¶¶ 3, 4. The limitation that it not "amend[] or change" the law is localized to this 40-day period.

The Constitution provided this 40-day time period in which the Legislature may act, and the Court of Appeals has previously explained that this window of time provided "sufficient time for legislative consideration." *Wolverine Golf Club v Hare*, 24 Mich App 711, 724 (1970), affirmed 384 Mich 461 (1971).

After this 40-day session period and depending on whether the Legislature enacted the law or rejected it, the Constitution then describes what occurs. For the enacted law, a legislatively enacted initiative is "subject to referendum," but no limit is placed on the Legislature's ability to amend. Art 2, § 9, ¶¶ 3, 5. For the proposed law "not enacted within the 40 days," the initiative is then placed on the ballot, *id.* at ¶ 4, and, if approved by the people, it is not subject to veto and may only be amended "by three-fourths of the members" of the Legislature, *id.* at ¶ 5. Those are the only relevant parameters following this 40-day session period, and the Constitution does not limit the ability of the Legislature to amend the law as enacted or adopted by the people in the same legislative session, which is one year in length. See Const 1963, art 4, § 13.

Significantly, the Constitution states that "the legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. This Court has explained in thundering terms the breadth of this authority:

> Unlike the federal Constitution, our Constitution is not a grant of power to the Legislature, but is a limitation upon its powers. Therefore, *the legislative authority of the state* ***can do anything*** *which it is* ***not prohibited*** from doing by the people through the Constitution of the State or the United States.
>
> [*Coalition of State Employee Unions v State*, 498 Mich 312, 331–332 and n 4 (2015) (cleaned up; emphasis added), citing *Attorney General v Montgomery*, 275 Mich 504, 538 (1936).]

This awesome power is invested in the Legislature, as representatives of the people, because of the importance of the Legislature being able to change laws as necessary in its view. As explained by this Court for a voter-approved law under article 9, § 15 of the Constitution for borrowing money, the Legislature might conclude the legislation "was not workable," and thus retains "the power to make ***needed changes*** as otherwise *there would be no means of doing so before the next election*." *In re Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66–67 (1983) (emphasis added; footnotes omitted). In short, absent some constitutionally stated limitation, the Legislature has been granted and retains the authority to amend laws it adopts whenever it determines it necessary. Nothing in article 2, § 9 states to the contrary.

Without any limitation imposed on the Legislature's ability to amend a law after a law is enacted, the Constitution places legislatively approved initiative laws in the same posture as laws that originated as bills in the Legislature. They may be amended after passage. By comparison, the Constitution places initiative laws that were enacted by voter approval in a different position, a privileged one, requiring approval of "three-fourths of the members elected to and serving in each house of the legislature." Const 1963, art 2, § 9, ¶ 5. See also *Wolverine Golf Club*, 24 Mich App at 726–727 (noting three-fourths vote requirement was a "principal change[ ]" to article 2, § 9). In adding the three-fourths vote requirement to § 9, delegates to the Constitutional Convention recognized that the Legislature should have the ability to amend a voter-approved law. See 2 Official Record, Constitutional Convention 1961, pp 2395–2397.

Moreover, the delegates did include a temporal limit on legislative amendments to laws that are approved by the people at *referendum*, but not for voter-approved *initiated* laws. Section 9 of article 2 includes temporal language, providing that "[l]aws approved by the people under the referendum provision of this section may be amended by the legislature *at any subsequent session thereof*." Const 1963, art 2, § 9, ¶ 3 (emphasis added). But not so for voter-enacted initiated laws or for initiated laws enacted by the Legislature.

For initiated laws enacted by the Legislature, the remedy for an amendment to a law initiated by the people is to petition for a referendum or to elect new representatives. This is the same point this Court made in *In re Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, for amendments to voter approved laws under article 9, § 15. See *id.* at 67 ("[I]t has been said by some courts that if the people disagree with a legislative amendment of voter-approved legislation their remedies are the (or another) referendum and, when the Legislature stands for re-election, the ballot.") The wisdom of this framework is for the people to determine themselves, not for the Court to second guess.

And for initiated laws enacted through voter approval, the people have permitted amendments by the Legislature at any time after enactment, provided they receive a super-majority vote. If the people disagree with an amendment, their remedy is to again invoke the initiative or referendum process, or to express their disapproval at the ballot box.

2. The constitutional convention debate further confirms that no limit was placed on the ability of the Legislature to amend a law it enacted in the same legislative session.

As noted earlier, the "common understanding" may be assisted through a review of the " 'constitutional convention debates and the address to the people,' " even if they are not "controlling." *Tanner*, 496 Mich at 226, quoting *People v Nash*, 418 Mich at 209. The debates here did not expressly discuss this specific issue, but the language used in related discussions confirms the point that nothing limits the ability of the Legislature to amend an initiative law that it has enacted after the 40 session days have passed.

In the critical stage of the convention where article 2, § 9 was amended to include the three-fourth requirement for voter-approved initiative laws on April 12, 1962, there was a discussion about the difference between the initiative process and referendum process:

> MR. WANGER: Yes, a brief question for Mr. Kuhn, Mr. Chairman. Mr. Kuhn, isn't there another difference between initiative and referendum namely: that referendum cannot result in having a statute on the books which it takes a popular vote to repeal? Whereas, the initiative, if the initiated statute is adopted, means that the people, in order to make any change in that statute, have to vote; and the legislature cannot vote to change it.
>
> [2 Official Record, Constitutional Convention, p 2395.]

In response, Delegate Kuhn said two things: first, that initiative law that the Legislature adopts remains within its "full control" and can be amended as "they see fit"; and second, that an initiative law adopted by the voters cannot be changed at all by the Legislature:

> MR. KUHN: Well, not exactly. I'll try to explain this a little bit, Mr. Wanger. [1] If the legislature sees fit to adopt the petition of the initiative as being sent out, if the legislature in their wisdom feel it looks like it is going to be good, and they adopt it in toto, *then they have full control. They can* ***amend it*** *and do anything they see fit.* [2] But if they do not, and you start an initiative petition and it goes through and is adopted by the people without the legislature doing it, then they are precluded from disturbing it.
>
> [2 Constitutional Convention, p 2395 (bracketed numbers, emphasis added).]

This statement by itself supports the lack of limitation on the Legislature's authority to amend an initiated law adopted by the Legislature.

But the actions of the delegates that followed provide further context and definition to Delegate Kuhn's comments, where Delegate Hutchinson proposed the three-fourth supermajority vote by the Legislature to make changes to voter-approved initiative laws:

> MR. HUTCHINSON: Now, under the present constitution and under the constitutional provision here before you, under those circumstances [where the people adopted the initiative measure] the situation would be that the legislature could never amend that act in any respect. All they could do would be to submit amendments to the people.
>
> * * *
>
> I offer this proposition: that the Legislature be empowered to amend or even repeal those initiated statutes, but only a ¾ vote in each house.
> [*Id.* at 2396.]

Delegate Kuhn then further proposed that this supermajority limitation be coupled with another requirement, that it only occur "in a subsequent legislative session," so an amendment would not occur "instantly." *Id.* ("I was wondering whether if the gentleman would include in his proposal something to the effect of this being done in a subsequent legislative session; so we wouldn't have to worry about amending it instantly, like it provides down below in a few sentences.").

Significantly, Delegate Hutchinson demurred on the point, indicating that the three-fourth majority protection would be sufficient:

> MR. HUTCHINSON: Mr. Chairman, if Mr. Kuhn or any other delegate would desire to offer an amendment to this amendment, I would be very happy accept it. However, the reason I didn't offer it at this time is because in talking with members of the committee, including Mr. Downs, *we thought that this ¾ vote requirement would be a sufficient safeguard and that the time element would become very secondary*. [*Id.* at 2396 (emphasis added).]

In other words, the Delegates at the convention expressly considered the limitation of delaying the Legislature's authority to amend a voter-approved law until another legislative session. The fact that just a few minutes earlier Delegate Kuhn – who proposed the timing amendment to voter approved initiatives – stated that the Legislature may amend as it "sees fit" for legislatively approved initiative laws supports the clear language here that it may amend in the same session.

3. None of the case law has addressed the issue here, but the appellate courts have confirmed that initiatives enacted by the Legislature are treated just like ordinary legislation.

The central cases interpreting article 2, § 9, including *Frey v Director of the Dep't of Social Services*, 162 Mich App 586, affirmed 429 Mich 315 (1987) and *Michigan Farm Bureau v Secretary of State*, 379 Mich 387, 396 (1967), confirm the clear understanding of the Constitution's plain language. A legislatively enacted law – whether proposed by the people or prepared by the Legislature – stand on the same plan and stand on equal footing.

In *Frey v Director of the Department of Social Services*, the Court of Appeals addressed whether the two-thirds vote requirement for giving legislation immediate effect under article 4, § 27 of the Constitution applied to an initiated law enacted by the Legislature under article 2, § 9. The initiated law included a provision stating " 'This Act Shall Take Immediate Effect.' " 162 Mich App at 588–589. The Legislature enacted the initiated law but did not vote to give it immediate effect. *Id*. at 589–590. The plaintiffs argued that the initiated law could not be given immediate effect because article 4, § 27 applied to the law even though it arose from article 2, § 9. *Id*. at 590. The circuit court had ruled otherwise. *Id*. ("[The circuit court] ruled that the initiative process under article 2, § 9 was separate from the legislative process of article 4, and, therefore, the initiative was not subject to article 4, § 27.").

The Court of Appeals in *Frey* agreed with the plaintiffs and not the circuit court. It examined the history and language of article 2, § 9 along with statements by the constitutional convention delegates and prior court decisions, and determined that article 4, including § 27, applies to initiated laws. *Id*. at 592–603. In its analysis, the Court of Appeals in *Frey* observed that initiated legislation is on an "equal footing":

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

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

The Court of Appeals in *Frey* further noted that "[o]ther constitutionally mandated procedures of article 4 also necessarily apply to legislation initiated under article 2, e.g., § 14 (quorum requirement), § 20 (open meetings), § 35 (publication and distribution of laws)." *Frey,* 162 Mich App at 600 n 4. On appeal, this Court affirmed the decision of the Court of Appeals, observing that it was "limited to the language of the Constitution when interpreting its provisions," and that "article 4, § 27 contain[ed] a general restriction that 'no act' passed by the Legislature may take immediate effect unless passed by a two-thirds vote of each house." 429 Mich 315, 335 (1987). This Court further reasoned that article 4, § 27 "applies to initiated laws enacted by the Legislature *because it does not provide an exception for initiated laws enacted by the Legislature*." *Id.* (emphasis added). See also *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66 (1983) ("The courts have reasoned that the legislative power retained by the people, through the initiative and referendum, does not give any more force or effect to voter-approved legislation than to legislative acts not so approved"; the initiative and referendum merely take "from the legislature the exclusive right to enact laws, at the same time leaving it a co-ordinate legislative body with them [the people].") (cleaned up). See also *Leininger v Alger*, 316 Mich 644, 648–649 (1947) (article 4, § 24's title-object clause applied to petitions to initiate legislation under the 1908 Constitution); *Automobile Club of Mich Committee v Secretary of State (On Remand),* 195 Mich App 613, 622 (1992) (indicating that article 4, § 25's republication requirement applies to petitions to initiate legislation).

That same reasoning may be applied here. The only parameters the Constitution identifies for legislatively enacted initiatives comes in paragraph 3 of § 9 of article 2, which states that legislatively enacted initiative laws "shall be subject to referendum[.]" Const 1963, art 2, § 9, ¶ 3. The plain *inclusion* of this referendum power attached specifically to legislatively enacted initiatives highlights the *absence* of any restraint on the Legislature's ability to modify a legislatively enacted initiative, especially when set against the background general principle that the Legislature may act unless constrained by the Constitution. See *Coalition of State Employee Unions*, 498 Mich 312, 331–332 (2015) ("[O]ur Constitution is 'not a grant of power to the Legislature, but is a limitation upon its powers.' Therefore, the legislative authority of the state 'can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States.' "). This lack of limitation is controlling.

Properly construed, the decision in *Farm Bureau* provides further support for this conclusion. This Court was addressing the timing under which the people may submit signatures to bring a referendum to "approve or reject" a law, which must be invoked "within 90 days following the final adjournment of the legislative session at which the law was enacted." Art 2, § 9, ¶ 1. The question was whether (1) this language created merely an end date, i.e., "not later than" 90 days following the end of the session, i.e., no later than April 1 of the following year, or (2) that a referendum "cannot properly be invoked . . . until [the] end of the legislative session." *Farm Bureau,* 379 Mich at 391–393.

Given what this Court described as competing "equally concordant" constructions of the phrase, it interpreted it to be the one that would not frustrate ("emasculate") the referral process by allowing repeated repeals. *Id.* at 395. Thus, the phrase is properly understood as an end date. *Id.* See also *Bingo Coalition for Charity – Not Politics v Bd of State Canvassers*, 215 Mich App 405, 408 (1996) ("The 1994 legislative session adjourned on December 29, 1994. This gave B.I.N.G.O. until March 29, 1995, to submit referendum."). Unlike the issue there, however, here there is only one tenable reading of Michigan's Constitution as noted above. Thus, where the language is clear, *Farm Bureau* supports applying the text as is.

A fair reading of the relevant Attorney General opinions also supports the Court of Appeals' reading of the Constitution's plain text. There are three opinions that are relevant for this inquiry. And Attorney General opinions are generally of "persuasive value" to the Court. *Cheboygan Sportsman Club v Cheboygan County Prosecuting Attorney*, 307 Mich App 71, 83, n 6 (2014).

In the first, in 1964 the Attorney General issued an opinion that supports the arguments of plaintiffs that was issued close in time to the convention, see OAG 1963–1964, No. 4303, p 309, (March 16, 1964), but it is notable in two ways that undercuts its value here.

First, there is virtually no analysis. Its entire examination of the particular issue appears in a single sentence:

> It is equally clear that the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session without violation of the spirit and letter of Article II, Sec. 9 of the Michigan Constitution of 1963. [OAG, 1963–1964, No. 4303, p 309 (March 16, 1964.)]

Why this is so clear in the opinion is not explained. Given that an Attorney General opinion's value is ordinarily in its reasoning, see *Michigan Educ Ass'n Pol Action Comm v Sec'y of State,* 241 Mich App 432, 442 (2000), the value of this opinion is more limited because it does not explain its reasoning.

Second, the opinion's invocation of the "spirit" of the Constitution suggests that the letter was not so clear or otherwise the opinion would not have to rely on what appears to be equitable considerations apart from the express text. See, e.g., *Detroit Auto Inter-In Exch v Felder*, 94 Mich App 40, 43 (1979) (rejecting an argument based on the "spirit of the law" where the statute at issue was unambiguous). The people's will is known here by the language they adopted. In fact, the Court of Appeals in *Reynolds* previously addressed a similar argument addressing the referendum process, rejecting an argument from "the spirit":

> [C]ounsel . . . devote most of their effort to show that to allow the Legislature to again consider and legislate upon a subject once referred to the people, until the latter had voted on such reference, *would violate not so much the letter* ***as the spirit of the referendum clauses*** *of the [Arizona] Constitution*[.]"
>
> [*Reynolds v Bureau of State Lottery*, 240 Mich App 84, 99, n 10 (2000), quoting *McBride v Kerby,* 32 Ariz 515, 524 (1927), overruled in part on other grounds, *Adams v Bolin,* 74 Ariz 269 (1952).]

That point applies with similar force here.

Regarding the persuasive quality of Attorney General opinions, the subsequent opinion from the Attorney General in 2018 provided a lengthy and persuasive analysis. See OAG, 2017–2018, No. 7306, pp 85–89. The State's analysis here tracks the opinion's reasoning, as does the analysis from the Court of Appeals. See slip op, p 19 n 15 (Murray, J., lead opinion).

Insofar as the plaintiffs rely on the 1964 opinion as a contemporaneous statement regarding the Constitution's meaning, see App, p 31, such evidence is unnecessary where the constitutional text is, as here, unambiguous. See *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 362 (2000) ("Th[e] reliance on extrinsic evidence was inappropriate because the constitutional language is clear."). And any resort to external sources should be drawn from the constitutional convention itself anyway. See *Tanner,* 496 Mich at 226.

That being said, it is worth pointing out that an Attorney General opinion issued between the one in 1964 and the one in 2018, the 1976 opinion matter-of-factly states that very thing that Court of Appeals ruled here:

> If a measure proposed by initiative petition is enacted by the legislature within 40 session days without change or amendment, *the legislature can amend or repeal such a measure by majority votes in each as specified elsewhere in Mich Const 1963.* [OAG, 1975–1976, No. 4932 (Jan 15, 1976) (emphasis added).][21]

There is nothing about the next legislative session. This is the unambiguous reading of the constitutional text as explained by the Court of Appeals here.

B. The plaintiffs' claim that this construction "thwarts" the initiative process misunderstands the law.

In their application, the plaintiffs contend that allowing the Legislature to adopt and amend a law proposed by the people in the same legislative session would "thwart" the initiative process. See App, p 33. The Court of Claims had relied on similar reasoning. COC Op, pp 10–11, 24. These claims misunderstand the law.

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[21] Available at https://www.ag.state.mi.us/opinion/datafiles/1960s/op04186.pdf. [Last accessed on March 10, 2023.]

There really are three points here.

To begin, as noted there may well be a need to change a law during the same legislative session. In particular, in discussing the Legislature's authority to amend a voter-approved law under article 9, § 15 of the Constitution, this Court observed that there may be a "need" for a revision to a voter-initiated law in a timely way:

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

As a case in point, consider the revision to the Court of Claims Act that moved that court from the Ingham Circuit Court bench to the Michigan Court of Appeals, effective November 12, 2013. MCL 600.6404(1); see also Public Act 164 of 2013. There was some question whether this stripped a litigant of the right to a jury trial under the Elliott Larsen Civil Rights Act and other acts, which gave rise to an amendment that was enacted within weeks of the passage of the earlier public act, clarifying that the right to a jury trial remain unchanged, taking effect on December 18, 2013, just a few weeks later. MCL 600.6421 ("Nothing in this chapter eliminates or creates any right a party may have to a trial by jury"). See also Public Act 205 of 2013. While not enacted by voter initiative, the point is plain that a law may require an immediate revision even by those who support the law.

Moreover, the question whether such a change was made in good faith is really beyond the scope of judicial review. That was the reasoning of the Court of Appeals in *Reynolds* when it examined an analogous issue whether the Legislature may reenact virtually the identical law that was suspended by the referendum process, rendering the referendum ineffective in substance if it rejected the suspended law because the other enacted law would remain in place. See *Reynolds*, 240 Mich App at 97–99. There, the Court of Appeals rejected any claim that the new legislation would have to be passed in "good faith" or to respond to some intervening "emergency." 240 Mich App at 101–102. The effort to determine what is a legitimate reason for reenacting some or all of the suspended law that was subject to a referendum petition would ensnare the courts in a "political quagmire," because such an endeavor implicated the "political question doctrine," which counseled restraint, and not judicial second guessing of legislative action. See *Reynolds,* 240 Mich App at 102, citing *Straus v Governor,* 230 Mich App 222, 225–226 (1998), affirmed 459 Mich 526 (1999).

Likewise, this Court in examining the power of referendum has cast doubt on the wisdom of attempting to discern the "motives" of the legislators:

> "*Courts are not concerned with* ***the motives*** *which actuate the members of the legislative body* in enacting a law, but in the results of their action."
>
> [*Kuhn v Dep't of Treasury*, 384 Mich 378, 383 (1971), quoting *C. F. Smith Co v Fitzgerald*, 270 Mich 659, 681 (1935).]

This reasoning is equally applicable here.

Furthermore, as noted above any true remedy lies elsewhere. In response to the question of the available remedy for a legislative amendment to a law under article 9, § 15, this Court explained that there are at least two possible remedies, either another referendum or the ballot, and it approvingly cited from the Idaho Supreme Court that identified remedies for amendments in its initiative process: (1) either a second initiative or (2) a vote for new members of the Legislature:

> If the legislature repeals or amends an initiative act, the people have at least two remedies, both of which they may exercise at the same time, to redress their grievance, if indeed they have a grievance, over the act of the legislature:
>
> *First*, they may reenact the measure by another initiative and,
>
> *second*, at the same time and at the same election, may elect other members of the legislature who will, or may, better heed their wishes.
>
> [See *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich at 67, ns 24, 26, 27 (paragraph breaks and emphasis added), quoting *Luker v Curtis,* 64 Idaho 703, 706–707 (1943), overruled in part on other grounds, *Reclaim Idaho v Denney,* 169 Idaho 406, 439 n 19 (2021).]

Otherwise, the "policy concerns" at issue here are "best directed to appropriate changes to the Michigan Constitution." See *Reynolds,* 240 Mich App at 103.

And it is worth noting that nothing in paragraph 1 or 3 of article 2, § 9 forecloses the ability of the people to bring a referendum on a law that has already been amended by the Legislature. See, e.g., *Keep Michigan Wolves Protected v Dep't of Natural Resources*, an unpublished, per curiam opinion of Court of Appeals (Nov 22, 2016), attached, slip op, pp 2–3, n 3 (describing that a referendum petition was submitted in March 2014 against Public Act 21 of 2013, which was further amended by Public Act 108 of 2013 in that same session with respect to one provision, MCL 324.43536a(1), but a referendum petition was not filed against Public Act 108.). The lead opinion below recognized as much. See slip op, p 12 (Murray, J., lead opinion)

("There is likewise nothing within the state Constitution that precludes a referendum on a law that is subsequently amended. The original laws, or the laws as amended, or all four, are separately identifiable public acts that are subject to referendum until the time authorized by art 2, § 9 expires.").

Indeed, the question arises about the relationship between the original act and the later amended act if the voters approve the referendum on the original act. *Reynolds* suggests an answer in its favorable quotations of an Arizona Supreme Court case, *McBride,* 32 Ariz 515, overruled in part on other grounds, *Adams,* 74 Ariz 269. In relying on *McBride,* the Court of Appeals noted that it was "impressed" by its reasoning and explained that *McBride* made clear that the referendum referred to "a definite, specific act" and that when the act subject to referendum is approved by the people at ballot, it "become[s] law":

> Any measure . . . to which the referendum is applied, shall be referred to a vote of the qualified electors, and *shall become law when approved by a majority of the votes cast thereon* . . . and not otherwise. [*Reynolds,* 240 Mich App at 96 (ellipses in original), quoting *McBride,* 32 Ariz at 522–523.]

This analysis thus suggests a subsequent amendment that is inconsistent with the original act would have to give way, because the approval by the people operates as a later in time enactment of the original law that had been suspended by the referendum process. See Const 1963, art 2, § 9, ¶1 ("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."). But here there was no referendum filed for PAs 337 or 338 or PAs 368 and 369 of 2018.

And the Constitution is unambiguous that the Legislature may adopt and amend even a voter initiative law that is approved by the electorate in the same legislative session as long as it can obtain the necessary supermajority vote. Const 1963, art 2, § 9, ¶5. The fact that an initiated law may be amended in the same legislative session, whether by a three-fourths supermajority for a voter-approved initiative law or by a simple majority for a legislatively enacted one, does not recreate the legislative veto. As noted, there may be a need for a legislative fix during the same session. Cf. *In re Advisory Opinion*, 418 Mich at 66–67. And the plaintiffs fail to explain why requiring this to occur during the next legislative session however many months later would remedy the allegation that the Legislature thwarted the people's will. The most obvious candidate for a remedy – if the Court had the authority to rewrite the Constitution – would be to require a three-fourths majority to amend an initiated law adopted by the Legislature, a limitation that was expressly not imposed on the laws at issue here.

C. The Court of Appeals properly ruled here, and the plaintiffs' arguments in their application to the contrary are unavailing.

As noted above, the lead opinion by Judge Murray provided a long and thorough analysis of the Michigan Constitution persuasively reasoning that it does not limit the ability of the Legislature to adopt law proposed by the people and then amend that law in same legislative session. See slip op, pp 4–19 (lead opinion). This argument is fully in accord with Michigan's Constitution. The plaintiffs' arguments asking this Court to grant the application do not merit further review, as they reflect a misunderstanding of the law in several important respects.

To begin, plaintiffs argue that the only case the Court of Appeals relied on was *Frey* and that it was "not relevant here." App, p 38. This is wrong on both counts.

The lead opinion relies on other key constitutional cases relevant to this issue. See, e.g., slip op, pp 4, 5, 6, citing *Mich Coalition of State Employee Unions*, 498 Mich 312; pp 6, 11, citing *Young v Ann Arbor*, 267 Mich 241, 243 (1934); pp 3, 7, 19, citing *Mich Farm Bureau*, 379 Mich 387; p 16, citing *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66 (1983); pp 7, 11, citing *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306 (2004); pp 4, 7, 13, citing *League of Women Voters of Mich v Secretary of State*, 508 Mich 520 (2022); pp 9 n 5, 13, citing *Woodland v Mich Citizens Lobby*, 423 Mich 188 (1985); p 12, citing *Reynolds*, 240 Mich App 84. The claim that *Frey* was the only case relied on is mistaken.

More importantly, the plaintiffs fail to grasp the significance of *Frey*, which is one of their central errors. They argue that "[e]very case cited by the Court of Appeals' decision is an Article 4 case and *[it] does not apply in this Article 2 case*." App, p 41 (emphasis). The plaintiffs' exact argument was *rejected* by the Court Appeals in *Frey*, 162 Mich App at 598, when it held that the immediate effect provision of article 4, § 27 applied to a proposed law initiated by the people, noting that *article 4 applies to article 2*:

> *Defendants' and intervening defendants' position that article 4 is in no way applicable to article 2 is further weakened* by the fact that article 2, § 9 states: "No law initiated or adopted by the people shall be subject to the veto power of the governor." The veto power is conferred by article 4, § 33. *If the delegates had not meant to have sections of article 4 apply to article 2, the language exempting initiatives from the governor's veto power would not have been necessary*. [Emphasis added.]

On this basis, the Court of Appeals in *Frey* ruled that "all legislative acts must be on an equal footing," because "the wall that is said to exist between article 2 and article 4 does not exist." *Id.* at 600. Both of these points apply equally here. And, in affirming in *Frey*, this Court explained that article 4, § 27 "applies to initiated laws enacted by the Legislature *because it does not provide an exception for initiated laws enacted by the Legislature*," *id.* (emphasis added), which reflects the principle that article 4 applies to article 2. The point that article 4 applies here is equally true.

The plaintiffs also argue that the Legislature may "only 'adopt and amend' if Article 2, § 9 expressly allows it." App, p 41. This is the plaintiffs' other central misunderstanding in criticizing the analysis of the Court of Appeals here.

As noted above, "*the legislative authority of the state* ***can do anything*** *which it is* ***not prohibited*** from doing by the people through the Constitution of the State or the United States." *Coalition of State Employee Unions v State*, 498 Mich at 331–332 (emphasis added). The Court of Appeals in the lead opinion here references this principle in three different places in its opinion. See slip op, pp 6, 11 (twice). But the plaintiffs do not address *Coalition of State Employees* nor this principle other than to argue that while the Legislature "may have plenary authority under Article 4, the legislative article, it has no such power under Article 2." App, p 41. Yet, this argument is premised on the plaintiffs' failure to understand that article 4 *does apply* to article 2. As the Court of Appeals explained, there would otherwise be no reason in article 2 to exempt initiatives from the Governor's veto power. *Frey*, 162 Mich App at 598. The plaintiffs mistakenly flip the presumption.

The other mistakes of the plaintiffs regarding the lead opinion of the Court of Appeals are less significant and may be examined in summary fashion.

The plaintiffs argue that the lead opinion of the Court of Appeals below misunderstood the Michigan Constitution, contending that the opinion stated that "Article 2, § 9 prohibit[s] laws subject to referendum from being amended during the same legislative session." App, pp 39, 40. But the plaintiffs misapprehend the point.

The lead opinion fully understands that a law subject to referendum may be amended in the same legislative session. See, slip op, p 12 ("There is no timing impediment to the exercise of a referendum on these public acts."). Rather, the lead opinion was addressing a law approved at a referendum that the Legislature would like to amend: "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*." Slip op, p 10 (emphasis added). The later statement on the same page of the opinion makes this clear:

> And of critical importance to this case, with respect to *amending a law approved through referendum*, art 2, § 9 prohibits the Legislature from amending the law during the same legislative session[.] [*Id.* (emphasis added).]

The point is the constitutional framers knew how to impose a next-session limit, see art 2, § 9, ¶ 5,[22] but they did not do so for amending a legislatively enacted initiative petition.

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[22] Here is the sentence for convenience from paragraph 5:

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

As a second misunderstanding, the plaintiffs argue that the lead opinion mistakenly states that "laws . . . approved through a referendum also cannot be vetoed." App, p 40, citing slip op, p 10.[23] But the lead opinion's statement is accurate, because a law approved by the people at a referendum "shall take effect 10 days after the date of the official declaration of the vote." Const, art 2, § 9, ¶5. It is not subject to veto. The plaintiffs argue that such laws "are only subject to referendum after they are enacted and signed by the [G]overnor," App, p 40, but this argument misses the more basic point. Paragraph 5 includes "importan[t] and precis[e] . . . restrictions" on "both the initiative and referendum," see lead opinion, slip op, p 10, and the claimed limit that a legislatively enacted initiative petition may only be amended at the next legislative session is not among them.

Finally, the plaintiffs argue that the lead opinion wrongly relies on the comments of Delegate Kuhn. App, pp 42–44. Not so.

While unnecessary because the Constitution's plain language is unambiguous, Delegate Kuhn's comments did indeed support the proper understanding. See pp 23–25 above. As he stated, when the Legislature "adopt[s] it in toto, then they have full control. They can amend it and do anything they see fit." 2 Constitutional Convention, p 2395. But the Constitution is clear without resorting to the constitutional debates anyway.

[23] Here is the lead opinion's full statement: "Laws subject to a referendum are suspended until the next general election, and those that are approved through a referendum also cannot be vetoed." [Slip op, p 10.]

D. The plaintiffs' analysis in their general argument about the Michigan Constitution reflects the same errors.

In the plaintiffs' application for leave, the plaintiffs lay out their affirmative argument about why article 2, § 9 prevents the Legislature from adopting an initiative petition proposed by the people and then amending it in the same legislative session. See App, pp 8–32. The same misunderstandings of law that inform their arguments criticizing the ruling of the Court of Appeals pervades this analysis. These errors may be digested into three primary mistakes.

First, the plaintiffs premise their arguments on the idea that the Legislature cannot adopt and amend an initiative petition in the same legislative because "that power is not among those expressly granted to the Legislature by the people in Article 2, § 9," citing the *expression unius* canon of construction. App, p 13. But as noted above, this argument fails to understand that the Legislature has plenary power under article 4, and that the only actions that it cannot take are those that are expressly prohibited by article 2. The lead opinion persuasively refuted the plaintiffs' point:

> As defendants and their amici argue, the pivotal question is not, as the trial court considered it, whether the Legislature was granted the power to adopt and then amend an initiative proposal during the same legislative session. Instead, *under long-settled law described above, the germane question is whether there was a constitutional provision precluding it*. *Young*, 267 Mich at 243; *Attorney General* [*v Montgomery*], 275 Mich at 538 ("The legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the state or of the United States.") [Slip op, p 11 (emphasis added).]

While the State has primarily relied on *Coalition of State Employee Unions* for this proposition, the lead opinion also relied on not only *Young* and *Attorney General v Montgomery*, but also two other opinions from this Court about the Legislature's powers:

Taxpayers of Mich Against Casinos v Michigan, 471 Mich 306, 327–328 (2004); and *In re Brewster Street Housing Site*, 291 Mich 313, 333 (1939). It is a well-established principle of Michigan law, and it controls here.

Second, the plaintiffs argue that the Constitution grants "the Legislature only three options regarding statutory initiatives." App, p 10. But these limitations only apply during the 40 session days. Indeed, the limitations of the "three options" is expressly localized to the first "40 session days from the time such petition is received":

> 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, ¶3 (emphasis added).]

It does not limit the Legislature's authority to take action after this time has run.

In fact, insofar as the plaintiffs seek to detach this "40 session day" time limitation from the three options provided in article 2, § 9, the claim proves too much. The Michigan Constitution in article 2, § 9 does not expressly provide that the Legislature may *ever* amend an initiative law that it legislatively enacts, either in the same session or the next one.[24] But the plaintiffs do not claim the latter limitation applies.

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[24] By comparison, the 1908 Michigan constitution *expressly limited* the Legislature from ever amending a voter approved initiative law on its own:

> No act initiated or adopted by the people, shall be subject to the veto power of the governor, and *no act 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 said initiative measure*, but the legislature may propose such amendments, alterations or repeals to the people. [Emphasis added.]

As noted earlier, the limits that constrain the Legislature after that 40-day period appear in paragraph 5 of article 2, § 9. In specific, the Constitution limits the ability of the Legislature to amend or to repeal a law "*adopted by the people at the polls*" except upon a "three-fourths" vote of the Legislature. Const 1963, art 2, § 9, ¶ 5 (emphasis added). But it imposes no limit on the ability to amend an initiative petition that the Legislature adopted. And the fact that it may occur in the same legislative session, whether by a three-fourths supermajority for a voter-approved initiative petition or by a simple majority for a legislatively enacted one, does not frustrate the evident purpose of this section.

Again, the lead opinion of the Court of Appeals correctly addressed and rejected the plaintiffs' argument:

> Specifically, the Legislature can (1) adopt the proposed law in its entirety, (2) reject the proposed law, or (3) reject the proposed law and submit a counter proposal for the ballot. These three directives are the only options given to the Legislature when presented with an initiative proposal under this section of the Constitution. *Importantly, each is a specified action that must be taken during the 40-session day time period. Unlike initiated laws approved by the voters,* ***no other constitutional directives or restrictions are placed on the Legislature relative to initiated proposals enacted by the Legislature during that 40-session day time period***. And, once enacted, these public acts were on the same footing as any other legislation passed by the Legislature, *Frey*, 162 Mich App at 600, meaning they are subject to amendment at any time, and not only after the start of the next legislative session or expiration of the 90-day referendum period. [Slip op, p 9 (emphasis added).]

The Court of Claims had relied on the same analytic flaw in its analysis. See COC Op, pp 10–11 (reasoning that the Constitution does not allow for a "a fourth option into the initiative process"). In contrast, the Court of Appeals provided the proper guidance here.

Third, the plaintiffs rely on *Farm Bureau* to argue that "[t]here 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." App, p 34. This argument is based on the analysis from *Farm Bureau* that identifies the "rule of constitutional construction which requires that the commonly understood referral process, forming as it does a specific power the people themselves have expressly reserved, be saved if possible as against conceivable if not likely evasion or parry by the legislature." 379 Mich at 393. See App, p 7. But the plaintiffs' argument misconstrues the significance of *Farm Bureau* in the same fashion as they do in pressing a claim about this lead opinion's decision allegedly recreating the "legislative veto." See App, p 15. The short answer to rebut these claims is that the constitutional language governs.

In *Farm Bureau,* the controlling principle of statutory construction requires the Court not to allow "a clause or section of a constitution as to impede or defeat its generally understood ends," but it anchors this limitation on the presence of "another construction thereof, equally concordant with the words and sense of that clause or section, will guard and enforce those ends." *Id.* And that is the rub. There is no contrary construction that gives rise to a limitation on the ability of the Legislature to amend a law that it has enacted after the 40 session days have passed. The Constitution is unambiguous. The Court of Appeals correctly ruled here.

And this returns the analysis to the principal point. The only limitation on the Legislature for initiative petitions that the Michigan Constitution imposes outside of the 40 session days is to require a three-fourths vote to amend initiatives adopted by the people. Const 1963, art 2, § 9, ¶5. And for a referendum approved by the people, the Legislature may only amend at a "subsequent session." *Id.* Nowhere do the plaintiffs explain why the principle of the people's power of initiative is offended by an amendment that occurs in the same session, but not in a subsequent one. The argument seems to contend that what is a defeat of the people's power on December 13, 2018 would have been perfectly permissible on January 1, 2019 or April 1, 2019. The point is that the Legislature retains its authority to amend the law that it enacts under article 4, § 1, which makes sense. As noted, the Legislature may find a law not to be "workable," justifying its "power to make ***needed changes*** as otherwise *there would be no means of doing so before the next election*." See *In re Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich at 66–67 (emphasis added; footnotes omitted) (addressing the Legislature's power in relation to article 9, § 15). In the lead opinion, the Court of Appeals rightly ruled that "the Legislature is not prohibited from amending an initiated law enacted by the Legislature during the same legislative session. . . . [and] the option to also offer an alternative proposal [during the 40-session day window] is not the exclusive remedy for the Legislature that adopted the measure, and there is nothing in the text of the Constitution or in the historical evidence to suggest otherwise." Slip op, p 18.[25]

[25] This answer has referred to the "lead opinion" of Judge Murray for the Court of Appeals, but this opinion reflected the decision of the Court as Judge Riordan joined it "in full." Slip op, p 1 (Riordan, J., concurring).

II. The Court of Appeals correctly ruled that Public Acts 368 and 369 of 2018 were properly enacted in accordance with the Michigan Constitution.

In this way, Public Acts of 368 and 369 of 2018 were enacted in accordance with article 2, § 9 of Michigan's Constitution. As discussed above, article 2, § 9 does not prohibit subsequent amendments of legislatively enacted initiated laws. The Court of Appeals correctly ruled here.

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

* * *

Under the constitutional language, legislatively enacted initiated laws are subject to the same processes regarding amendment as legislation drafted by the Legislature. It is a basic point that the Legislature has the power to amend any legislation it enacts pursuant to the requirements and limitations included in article 4. Const 1963, art 4, § 1. This right includes legislatively enacted initiated laws because nothing in the Constitution limits the Legislature's plenary power to legislate in this respect. See *Coalition of State Employee Unions*, 498 Mich at 331–332 ("the legislative authority of the state can do anything which it is not prohibited from doing") (internal quotes omitted). And such a right to amend a law may be critical where a change is necessary within the same legislative session.

And since there is no exception or limitation in article 4, or in any other section of the Michigan Constitution that restricts the Legislature from amending legislation it drafts during the same legislative session in which it was enacted, it follows that the Legislature may do so as well with respect to an initiated law it enacts since there is likewise no limitation on doing so in article 2, § 9. As the Michigan courts have explained in general terms, all legislatively enacted laws stand on the same plane, on equal footing. And the Constitution also creates a parallel in timing for amending voter-approved initiated laws and legislatively enacted initiated laws. The Legislature may amend a voter-approved law within the same legislative session if it can gain a three-fourths majority in each chamber. The Constitution only limits to the next legislative session the Legislature's ability to amend a law approved by referendum, a limitation not created for laws enacted by the Legislature as initiated by the people. The Legislature acted within its authority in amending the acts it enacted here in the same legislative session.

The Court of Appeals ruled properly on this issue, so this Court's review is unnecessary. And frankly the timing of these issues does not support further review as well. Public Acts 337 and 338 were amended in 2018, and the original frameworks – before amendment – for increases to the minimum wage generally and for tip workers in particular were intended to unfold over the last five years. But that time has passed. This Court should decline to grant review of this application.

CONCLUSION AND RELIEF REQUESTED

This Court should deny leave.

Respectfully submitted,

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WORD COUNT STATEMENT

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