STATE OF MICHIGAN

IN THE SUPREME COURT

In re HOUSE OF REPRESENTATIVES REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2018 PA 368 & 369

Supreme Court No. 159160

In re SENATE REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2018 PA 368 & 369

Supreme Court No. 159201

Andrea L. Hansen (P47358)
Doug Mains (P75351)
Honigman LLP
Attorneys for Michigan Senate and Michigan House of Representatives
222 N. Washington Square, Suite 400
Lansing, Michigan 48933
(517) 377-0709

B. Eric Restuccia (P49550)
Deputy Solicitor General

Heather Meingast (P55439)
Christopher Allen (P75329)
Assistant Attorneys General
Defending the Constitutionality of 2018 PA 368 & 368
Department of the Attorney General
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7628

Peter D. Houk (P15155)
Graham K. Crabtree (P31590)
Jonathan E. Raven (P25390)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Amicus Curiae Count MI Vote, d/b/a Voters Not Politicians
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

AMICUS CURIAE BRIEF OF COUNT MI VOTE, d/b/a VOTERS NOT POLITICIANS

AMICUS CURIAE BRIEF OF COUNT MI VOTE, d/b/a VOTERS NOT POLITICIANS

Submitted by,

Peter D. Houk (P15155)
Graham K. Crabtree (P31590)
Jonathan E. Raven (P25390)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Amicus Curiae Count MI Vote,
d/b/a Voters Not Politicians
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

THE JURISDICTION OF THE COURT

The Court has jurisdiction of the pending requests for Advisory Opinion and discretionary authority to grant the requested Advisory Opinion pursuant to Const 1963, art 3, § 8, MCR 7.303(B)(3) and MCR 7.308(B).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE REQUESTS TO ISSUE AN ADVISORY OPINION IN THIS MATTER.

Amicus Curiae Count MI Vote, d/b/a Voters Not Politicians contends the answer is "Yes."

II. WHETHER CONST 1963, ART 2, § 9 PERMITS THE LEGISLATURE TO ENACT AN INITIATIVE PETITION INTO LAW AND THEN AMEND THAT LAW DURING THE SAME LEGISLATIVE SESSION.

Amicus Curiae Count MI Vote, d/b/a Voters Not Politicians contends the answer is "No."

III. WHETHER 2018 PA 368 AND 2018 PA 369 WERE ENACTED IN ACCORDANCE WITH CONST 1963, ART 2, § 9.

Amicus Curiae Count MI Vote, d/b/a Voters Not Politicians contends the answer is "No."

THE INTEREST OF THE AMICUS CURIAE

On February 22, 2017, the Voters Not Politicians Ballot Committee was registered with the Michigan Secretary of State as a ballot question committee in accordance with the Michigan Campaign Finance Act, MCL 169.201, *et seq.* Amicus Curiae Count MI Vote is a Michigan non-profit corporation which was subsequently formed and incorporated for the purpose of operating the Voters Not Politicians Ballot Committee under the assumed names "Voters Not Politicians" and "Voters Not Politicians Ballot Committee." For ease of reference, Amicus Curiae Count MI Vote will be referred to herein as "Voters Not Politicians" or "VNP."[1]

VNP was the sponsor of the voter-initiated ballot proposal for amendment of the Michigan Constitution to create an Independent Citizens Redistricting Commission which was approved by the voters as Proposal 18-2 in the general election of 2018. As the sponsor of that proposal, VNP has a unique appreciation of the right to propose constitutional amendments reserved by the People of Michigan under Const 1963, art 12, § 2 and the legislative authority to propose and enact legislation, and to reject or approve legislation by referendum which they have reserved for themselves by their approval of Const 1963, art 2, § 9.

VNP's appreciation of those constitutionally-reserved rights is especially strong because it has encountered and prevailed against the nearly insurmountable obstacles which face any sponsor of a voter-initiated proposal for amendment of the Constitution, enactment of an initiated law, or referendum of enacted legislation. In the case of Proposal 18-2, those obstacles included the need to collect the large number of valid petition signatures required for

[1] This Amicus Curiae Brief was written in its entirety by the undersigned counsel for Amicus Curiae Count MI Vote d/b/a Voters Not Politicians. The full cost for the preparation and submission of this Amicus Curiae Brief has been paid by Amicus Curiae Count MI Vote d/b/a Voters Not Politicians.

certification of the proposal for submission to the voters within the short time allowed for collection of those signatures by the governing statutory provisions – a challenge which VNP would not have been able to meet without the assistance of a highly motivated and organized force of thousands of volunteers who circulated its petitions without financial compensation – and the need to wage an expensive legal battle against opposing interest groups determined to prevent the submission of VNP's proposal to the voters.

VNP has a continuing interest in acting to promote the People's right to propose beneficial changes by voter initiative. Its purpose is succinctly summarized in its Mission Statement as follows: "Voters Not Politicians is a nonpartisan advocacy organization that works to strengthen democracy by engaging people across Michigan in effective citizen action." Consistent with that mission, VNP is opposed to all efforts to hinder, curtail or defeat the free exercise of the People's reserved right of initiative. [2]

Accordingly, VNP has been alarmed by the Legislature's employment of the "adopt and amend" technique used in relation to the voter-initiated proposals at issue in this matter to defeat the People's right to propose and enact legislation of their choosing by voter initiative. This Amicus Curiae Brief is therefore respectfully submitted on behalf of VNP with the hope that it will help the Court to fully understand the nature and significance of the manipulation which has denied the People their constitutionally-guaranteed rights in relation to these proposals, and that it will persuade the Court to hold that the amendatory legislation enacted in last year's lame duck session was not enacted in accordance with Const 1963, art 2, § 9 and provide instruction

[2] Following the approval of Proposal 18-2 by 61% of the voters in the November general election, VNP turned to safeguarding the newly-approved constitutional provisions against legislative interference by vigorously opposing inconsistent "implementing legislation" – Senate Bill 1254 (Pavlov – R) – which was introduced and taken up in the lame duck session. VNP's efforts were successful and SB 1254 was not enacted.

that the "adopt and amend" technique at issue in this matter cannot be used to defeat the People's constitutionally-guaranteed right of initiative in the future.

STATEMENT OF FACTS

The pertinent facts are straightforward, and most of them have been ably summarized in the briefs previously submitted. The pending requests for Advisory Opinion seek the Court's ruling on the constitutionality of 2018 PA 368 and 2018 PA 369 – two pieces of amendatory legislation enacted in last year's lame duck session which amended prior public acts created in September of last year by the Legislature's enactment of voter-initiated proposals for enactment of initiated laws.

The first initiative proposal, received by the Legislature from the Secretary of State on July 30, 2018 after certification by the Board of State Canvassers, proposed the creation of a new act to be known and cited as the "improved workforce opportunity wage act." As proposed, that new act would have required increases in the minimum wage as specified therein. The second initiative proposal, received by the Legislature from the Secretary of State on August 27, 2018 after certification by the Board of State Canvassers, proposed the creation of a new act to be known and cited as the "earned sick time act." As proposed, that new act would have established new procedures and requirements related to the accumulation of sick time for the benefit of employees and the payment of sick time benefits by employers as provided therein. Those proposals were promptly taken up and passed by both houses of the Legislature without change on September 5, 2018 and were subsequently assigned Public Act numbers 337 and 338 upon filing with the Secretary of State on September 25, 2018.

To gain a complete understanding of this matter, it is important for the Court to take note of the evidence showing that these proposals were taken up by the controlling majority

party and enacted without change as part of a preconceived plan to prevent their submission to the voters in order to avoid the requirement of a three-fourths vote for repeal or amendment of an initiated law approved by the voters, and to then amend the new acts to the liking of its members by a simple majority vote after the election in the lame duck session – a plan referred to at the time and in subsequent discussions as "adopt and amend."

The existence of this scheme, revealed by public statements made by members of the majority party, was noted by a number of legislators on September 5, 2018 when explaining their votes in opposition to the enactment of the initiative proposals. Democratic Representative Guerra explained her vote in opposition as follows"

> "Mr. Speaker and members of the House: I voted no because the majority party is going to gut this legislation during lame duck and that is not what the people wanted. The people wanted a chance to vote on this initiative and I believe they should have been able to do so." (2018 House Journal No. 61, p. 1960)

Democratic Representative Phelps explained his vote in opposition, noting the public statements made by members of the majority party disclosing their plan to adopt the proposed legislation and then "gut" its main provisions after the election:

> "Mr. Speaker and members of the House: The changes that INIT 2 will make to Michigan law will have a positive impact on workers lives and their overall wellbeing. However, I do not trust that the majority party will keep all parts of this citizen led petition past the end of this term. I strongly feel that it is their intent to pass this item now, then make drastic changes to it after the voters have spoken this fall. ***There have been several public statements made by members of the majority party saying they would pass this petition today so they can gut the main provisions to it later.*** I feel they are doing this because if the voters were to approve this measure in November, it would require a much larger number of votes to strip provisions from this law, and they do not have enough votes to do so within their majority alone. This is an end round of democracy and is a deceptive and cowardly parliamentary maneuver. By doing this they have cheated all Michigan voters of a chance to weigh the merits of this policy and they have outright violated the constitutional rights of all those who supported this initiative. I can not support my colleagues in their endeavor to

deceive the public and therefore have voted no." (2018 House Journal No. 61, p. 1960 – Emphasis added)

In the Senate, Minority Leader Ananich explained his vote in opposition, expressing his disapproval of the plan already known as "adopt and amend":

> ". . . This has wide support across the state. Michiganders organized thousands of signatures-thousands of signatures were collected – and voters deserve the chance to make their opinion known at the ballot box.
>
> "But I'm not convinced that the other side of the aisle truly cares about this. ***I've noticed that you've come up with a catchy term to refer to what you're trying to do here, called "adopt and amend."*** In reality, it's "approve and remove," or even more cynically on my part, "undo and screw." (2018 Senate Journal No. 64, p. 1641 – Emphasis added)

Republican Senator Colbeck also voted against enactment of the initiatives and explained his vote in opposition, condemning the "procedural gimmick" employed to avoid the three-fourths vote requirement:

> "We need to do better, folks. Right now, we're trying to use a procedural gimmick to go off and try to avoid a three-quarter vote threshold. That's not how we should be doing things. We should be debating the merits of the legislation, not just trying to circumvent a three-quarter vote threshold. Now, most of the people in this room who are going to be voting in favor of this actually oppose the premise of the legislation, at least the idea that we should be increasing the minimum wage or we should be mandating, from a state prospective, paid sick leave. That's something most of us – at least with an "R" next to their name – typically oppose because it hurts individuals seeking employment and it hurts employers. That affects both of these pieces of legislation.
>
> "So, my colleagues, I urge you to vote "no." It's important to go off and win the argument or else we're going to continue to have these white-washing events like we have before us today. I don't know about you, but I would like to leave *The Adventures of Tom Sawyer* back in my youthful memories. I don't want to keep reliving it, and I don't want future generations of legislators to keep on reliving it here. Let's win on the merit of our vote, not go off and try and play these procedural gimmicks." (2018 Senate Journal No. 64, p. 1640 - 1641)

As predicted, 2018 PA 337 and 2018 PA 338 were promptly amended after the November election. Senate Bill 1171 (Hildenbrand – R), proposing amendments of 2018 PA 337 (the improved workforce opportunity wage act) and Senate Bill 1175 (Shirkey – R), proposing amendments of 2018 PA 338 (the earned sick time act) were promptly introduced on November 8, 2018, two days after the general election. Those Bills, each of which proposed substantial substantive changes, were passed by simple majority party-line votes on November 28, 2018 and December 4, 2018, and upon filing with the Secretary of State, were assigned 2018 PA 368 and PA 369.

LEGAL ARGUMENTS

I. THE COURT SHOULD RENDER THE REQUESTED ADVISORY OPINION ON THE CONSTITUTIONALITY OF 2018 PUBLIC ACTS 368 AND 369.

Amicus Curiae Voters Not Politicians respectfully suggests that this is an appropriate occasion for the Court to exercise its discretion in favor of issuing an Advisory Opinion, and that the Legislature's request to issue an Advisory Opinion should therefore be granted.

Under the rather unique circumstances of this matter, there can be no question that the "adopt and amend" procedure employed in relation to the voter initiatives at issue has denied the People the right that they have reserved for themselves under Const 1963, art 2, § 9, to vote on the adoption of the laws that ***they*** have proposed and to have the laws that voter approval would have created endowed with the durability conferred by the constitutional requirement that any law so approved cannot be repealed or amended by the Legislature without a three-quarters vote in both houses.

Under the governing terms of Const 1963, art 2, § 9, the Legislature had the option of either approving the proposed initiated laws without amendment or rejecting them within 40 session days after the date of their submission for approval or rejection. The constitutional language did not allow the Legislature any leeway or discretion in approving the sufficiently supported and certified voter-initiated proposals; it was provided only two options, from which it was required to choose only one – to pass them as presented or reject them.[3]

[3] Const 1963, art 2, § 9 provides, in pertinent part, that "[a]ny 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." (Emphasis added)

The Legislature had the option to reject the proposed initiated laws in any one of three ways. Either or both houses of the Legislature could have manifested their disapproval by votes taken in legislative proceedings. Either or both houses could have simply chosen to take no action on the proposals. Alternatively, the Legislature could have rejected the proposed initiated laws by approving an alternative proposal to put on the ballot with the voter-initiated proposals. If the voter-initiated proposals had been rejected by any of those means, the proposals would have been submitted to the voters for their approval or disapproval in last year's general election. Had the Legislature proposed its own alternative to either or both of the proposals, its alternative would also have been put before the voters for their approval or rejection.

Faced with the requirement to choose one of these two limited options – approval as presented or rejection – the Legislature chose to approve the voter-initiated proposals without amendment. In doing so, the Legislature completed, in ministerial fashion, the task initiated by the electors who had prepared and submitted the properly supported initiative petitions for its consideration – completing, in that way, the ***People's*** exercise of ***their*** **constitutionally-reserved legislative authority** on their behalf without the necessity for seeking approval by the voters at the polls. And in this way, the voter-initiated proposals became the law of the state of Michigan upon their filing with the Secretary of State, regardless of the actual intent harbored by the individual legislators voting in favor.

Many observers have raised serious questions regarding the constitutional legitimacy of the amendatory acts subsequently passed in last year's lame duck session. By its votes taken in September, the Legislature accepted the voter-initiated proposals without change, but its passage of the amendatory acts effecting substantial substantive changes a very short time later in the lame duck session has confirmed the predictions that its approval would be short-lived

and provided strong proof that many of those who voted in favor never really intended to confer any continuing approval upon either of the proposals as presented. If that was indeed the case, as it clearly appears, it would have been a much more honest fulfillment of legislative duty to vote against enactment or simply take no action. But that would have put the proposals on the ballot for the voters to approve or reject – an outcome that it seems was feared, or at least undesired, by those who devised the plan to "adopt and amend." And as previously discussed, the Legislature also had the opportunity to present its own alternative proposal for either or both of the voter-initiated proposals for submission to the voters within the constitutionally-prescribed period in accordance with Const 1963, art 2, § 9, but it did not elect to do so.

The Legislature did not choose to reject the proposed initiated laws by any of the available means; it chose instead to simply amend the proposals which it had passed without change in September by a simple majority vote in both houses, the supporters of the changes being unable to muster the three-quarters vote constitutionally required to amend an initiated law approved by the voters. Under these circumstances, the Legislature's amendment of the original acts in the lame duck session can and should be considered a rejection of the properly supported and certified voter-initiated proposals in a manner not authorized by the controlling language of Const 1963, art 2, § 9, notwithstanding its prior enactment of those measures. And because the amendatory acts approved in the lame duck session were not enacted in compliance with the mandatory requirements of Const 1963, art 2, § 9, they should therefore be considered null and void.

The important questions which have been raised with respect to the propriety of the Legislature's actions in the lame duck session and the legitimacy of the amendatory legislation produced by those actions have undermined the public's confidence in the Legislature and the

legislation in question, and the Legislature's requests for an advisory opinion addressing those questions were presumably motivated by a desire to settle those questions. Voters Not Politicians respectfully suggests that this Honorable Court should provide the requested Advisory Opinion so that the public may know whether 2018 PA 368 and PA 369 must be respected and enforced as duly-enacted legislation, and whether the Legislature may properly deny the People's constitutionally-reserved right to propose and vote on legislation of *their* choosing by the simple expedient of an "adopt and amend" strategy.

II. THE PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION

It is useful to note, at the outset, the rules of constitutional construction which must be applied in the interpretation of Const 1963, art 2, § 9. It has become well settled that the primary objective in interpreting a constitutional provision is to faithfully determine and give effect to the text's original meaning to the ratifiers, the people, at the time of ratification. *UAW v Green,* 498 Mich 282, 286-287; 870 NW2d 867 (2015); *National Pride at Work, Inc. v Governor,* 481 Mich 56, 67-68; 748 NW2d 524 (2008); *Studier v Michigan Public School Employees' Retirement Board,* 472 Mich 642, 652; 698 NW2d 350 (2005). This principle was aptly summarized in *Traverse City School District v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971) as follows, quoting Justice Cooley's time-honored summary:

> "The primary rule is the rule of "common understanding" described by Justice Cooley:
>
> "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great* mass *of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the

> belief that that was the sense designed to be conveyed.' (Cooley's Const Lim 81)." 384 Mich at 405 (Emphasis in Opinion)

Our appellate courts typically discern the common understanding of constitutional text by applying each term's plain meaning at the time of ratification, but if the constitution employs technical or legal terms of art, those terms are construed in their technical, legal sense. *Studier, supra,* 472 Mich at 652. The decisions have emphasized that there is no necessity for construction of unambiguous constitutional language, but when constitutional language is ambiguous, a reviewing court may consider extrinsic evidence, including the circumstances surrounding the adoption of the constitutional provision in question and the purpose sought to be accomplished, to determine the meaning that would have been commonly understood by the voters who adopted it. *People v Nash,* 418 Mich 196, 209; 341 NW2d 439 (1983) (Opinion by Brickley, J.); *Traverse City School District, supra,* 384 Mich at 405; *National Pride at Work, Inc. v Governor,* 274 Mich App 147, 157; 732 NW2d 139 (2007), *aff'd* 481 Mich 56; 748 NW2d 524 (2008).

To determine the meaning of constitutional language which would have been commonly understood by the People at the time of ratification, the courts may consider the Address to the People, which explained in everyday language what each provision of the proposed Constitution was intended to accomplish, and to a lesser degree, the convention debates, are also relevant in determining the People's intent. But although relevant, the convention debates and Address to the People are not controlling. *UAW v Green, supra,* 498 Mich at 287-288; *Lapeer County Clerk v Lapeer Circuit Court,* 469 Mich 146, 156; 665 NW2d 452 (2003); *People v Nash, supra,* 418 Mich at 209. It is also appropriate to consult dictionary definitions. *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273, 295; 761 NW2d 210 (2008), *affirmed as to result,* 482 Mich 960 (2008).

The decisions have also recognized that judicial interpretations of prior constitutional provisions and the meaning of specific terms intended by the drafters are also relevant to interpretation of constitutional language. In *Boards of County Road Commissioners v Board of State Canvassers,* 391 Mich 666; 218 NW2d 144 (1974), this Court noted that:

> "Where a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new or revised constitution, or amendment, it will be presumed to have been retained with a knowledge of the previous construction, and courts will feel bound to adhere to it." 391 Mich at 675, quoting *Richardson v Secretary of State*, 381 Mich 304, 311; 160 NW2d 883, 887 (1968).

But the ultimate question remains the same: What was the common understanding of the people who voted for adoption?

Finally, it is of utmost importance to recall the Court's precedents emphasizing that the constitutional provisions reserving the People's rights of initiative and referendum should be liberally construed to facilitate, rather than restrict, the free exercise of those rights, and that doubts concerning the meaning of implementing legislation should be resolved in favor of the People's exercise of the right. *Ferency v Secretary of State*, 409 Mich 569, 590-591; 297 NW2d 544 (1980). In *Ferency,* which involved a proposed constitutional amendment and statutory provisions governing its submission to the voters, the Court emphasized that its decision was consistent, in this regard, with a long line of cases in which Michigan courts have actively protected and enhanced the initiative and referendum power, noting that, "[C]onstitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed" and "their exercise should be facilitated rather than restricted." 409 Mich at 602.

III. CONST 1963, ART 2, § 9 DID NOT PERMIT THE LEGISLATURE TO ENACT THE INITIATIVE PETITIONS AT ISSUE INTO LAW AND THEN AMEND THE LAWS CREATED THEREBY DURING THE SAME LEGISLATIVE SESSION, AND THUS, 2018 PA 368 AND 2018 PA 369 WERE NOT ENACTED IN ACCORDANCE WITH THAT PROVISION.

The discussion of the important substantive questions posed in the Court's Order of April 3, 2019 must begin with a reminder of the most basic principle underlying the design and functioning of our state government. That essential principle is embodied in two separate, but related concepts set forth in the very first section of our Constitution – that "[all political power is inherent in the people" and that "[g]overnment is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. Thus, power reserved by the People must be respected and preserved. Government in all of its forms has been created and maintained to serve the interests of the People, not the government or any of its branches, or of any political party, person or interest group.

There is no dispute that the power retained and exercised by the People through the initiative and referendum is legislative power. *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66; 340 NW2d 817 (1983) . The power retained by the People to propose and enact laws by voter initiative is an exercise of legislative authority which the People have reserved for themselves by their adoption of Const 1963, art 2, § 9, which must be liberally construed to facilitate rather than restrict their free exercise of that right. *Ferency*, *supra,* 409 Mich at 602.

As previously discussed, Const 1963, art 2, § 9 specifies a role for the Legislature in relation to proposals for voter-initiated laws, but its options are specifically defined and narrowly limited. Those options did not come into play at all until the voter-initiated proposals were certified by the Board of State Canvassers as sufficiently supported and in proper form for

submission to the voters. When the proposals were so certified and referred, the Legislature had a mandatory obligation to choose between two, and only two, narrowly defined and clearly stated options; it could ***either*** approve the proposed initiated laws ***or*** reject them without change or amendment within 40 session days after the date of their submission for approval or rejection. Thus, the constitutional language did not allow the Legislature any leeway or discretion in approving or rejecting the sufficiently supported and certified voter-initiated proposals; it was provided only two options, from which it was required to choose only one – to pass them as presented or reject them.[4]

The Legislature had the option to reject the proposed initiated laws in any one of three ways. Either or both houses of the Legislature could have manifested their disapproval by votes taken in legislative proceedings. Either or both houses could have simply chosen to take no action on the proposals. Alternatively, the Legislature could have rejected the proposed initiated laws by approving an alternative proposal to put on the ballot with the voter-initiated proposals. If the voter-initiated proposals had been rejected by any of those means, the proposals would have been submitted to the voters for their approval or disapproval in last year's general election. Had the Legislature proposed its own alternative to either or both of the proposals, its alternative would also have been put before the voters for their approval or rejection. Then, if an alternative proposed by the Legislature had been approved by the voters with a greater number of votes than the number cast in favor of the voter-initiated proposal, the Legislature would have had its way. If the voter-initiated proposals had been approved by a majority of the voters in the absence of an alternative proposed by the Legislature or with a greater number of

[4] Const 1963, art 2, § 9 provides, in pertinent part, that "[a]ny 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." (Emphasis added)

votes, the adopted voter-initiated proposals would have become Public Acts of 2018 which could not be repealed or amended without a new vote of the People or a three-fourths vote in both houses of the Legislature.

Faced with the requirement to choose one of these two limited options – approval as presented or rejection – the Legislature chose to approve the voter-initiated proposals without amendment. In doing so, the Legislature completed, in ministerial fashion, the task initiated by the electors who had prepared and submitted the properly supported initiative petitions for its consideration – completing, in that way, the ***People's*** exercise of ***their*** **constitutionally-reserved legislative authority** on their behalf without the necessity for seeking approval by the voters at the polls. And in this way, the voter-initiated proposals became the law of the state of Michigan upon their filing with the Secretary of State, regardless of the actual intent harbored by the individual legislators voting in favor.

The Court has been asked to provide its Advisory Opinion as to whether the initiated laws duly-enacted as 2018 PA 337 and 2018 PA 338 could be amended by the same Legislature in the lame duck session. VNP contends that the Legislature was not empowered to do so because the Legislature's passage of inconsistent amendatory legislation after its initial approval of the proposals was action taken in pursuit of a third unauthorized option which did not fall within the narrowly-defined scope of the Legislature's authority conferred under Const 1963, art 2, § 9. And thus, being unauthorized, the amendatory legislation now at issue should be declared null and void.

Those who have advocated in support of 2018 PA 368 and 369 have argued that the Legislature has plenary authority to enact any legislation that it may think advisable, consistent with the authority conferred under Article IV of the Constitution, limited only by specific

limitations of that authority imposed under the state and federal constitutions. Although this is generally true, the Court must not lose sight of two important points: 1) that the legislative authority conferred upon the Legislature under Article IV is the power that the People have chosen to confer upon the Legislature, which does not include the legislative power that the People have reserved for themselves under Const 1963, art 2, § 9; and 2) that consistent with the People's reservation of this legislative authority under Const 1963 art 2, § 9, the procedures established by that provision to govern the Legislature's involvement in the review of voter-initiated proposals, including its right to approve or reject such proposals and to present alternative proposals to the voters, are restrictions upon the authority granted to the Legislature under Article IV. Because the authority given to the Legislature under Const 1963, art 2, § 9 has been provided for implementation of the legislative authority reserved to the People by that provision – authority never granted to the Legislature in the first place under our present Constitution[5] – the authority given to the Legislature under Const 1963, art 2, § 9 is strictly limited, and must be exercised in strict compliance with the controlling terms of that provision.

The defenders of 2018 Public Acts 368 and 369 have also noted that voter-initiated laws are subject to limitations imposed upon the Legislature under Article IV, and have suggested that this can somehow be construed as a grant of additional authority to the Legislature beyond the limited authority specified in Const 1963, art 2, § 9. This argument lacks merit for two reasons. First, it comes as no surprise that limitations upon legislative activity and discretion

[5] The Court should note, in this regard, that the constitutional provisions authorizing voter-initiatives for enactment of legislation and referendum of legislation enacted by the Legislature were first established in 1913 by amendment of the 1908 Constitution and placed within the legislative Article, Const 1908, art 5, § 1. Under our present Constitution, those provisions are found in Article II, pertaining to Elections – separate and distinct from the constitutional provisions granting legislative authority to the Legislature.

imposed under Article IV also limit the People's exercise of their reserved legislative authority under Const 1963, art 2, § 9 because that provision specifically states that "[t]he power of initiative extends only to laws which the legislature may enact under this constitution."[6] Second, there is no basis for a conclusion that this ***limitation*** of the People's reserved authority under Const 1963, art 2, § 9 can be considered a ***grant*** of authority to the Legislature.

The Court should also note, in this regard, that the Legislature's arguments have substantially undervalued the rights reserved by the People under Const 1963, art 2, § 9. In its brief dated March 5, 2019, the Legislature has asserted that "[w]hen an initiative is submitted to the Legislature, it is simply a *proposed* law for the Legislature to consider, similar to any other proposed legislation that may be introduced for its consideration." (Legislature's Brief, p. 13) It is unnecessary for the Court to look beyond the constitutional language to see that this is a gross mischaracterization.

When a sufficiently supported and certified proposal for enactment of an initiated law is presented to the Legislature, the People are not merely proposing the initiated law, as the Legislature has suggested. Nor is the submitted proposal "similar to any other proposed legislation that may be introduced for its consideration." Proposals for legislation made by constituents or others may be acted upon or ignored, and the same may be said of the many Bills introduced in the Legislature every year, many of which are never taken up. Laws are proposed to the Legislature in the normal course every day in every kind of way.

[6] The title-object clause of Const 1963, art 4, § 24, the republication requirement of Const 1963, art 4, § 25 and the separate supermajority vote for immediate effect required by Const 1963, art 4, § 27 are examples of limitations imposed under Article IV which also limit the scope and enactment of initiated laws under Const 1963, art 2, § 9 by virtue of its language providing that "[t]he power of initiative extends only to laws which the legislature may enact under this constitution."

A proposal submitted to the Legislature by the People is qualitatively and quantitatively different. It has teeth because it must be submitted to a vote of the People if rejected by the Legislature. When a properly supported and certified initiative is submitted to the Legislature under Const 1963, art 2, § 9, it attains a new status which confers both rights and obligations. The Legislature has the obligation to enact the law as presented without change or reject it. If it is rejected, it must be put on the ballot for the voters to approve or disapprove at the next general election. Thus, the proponent of the voter-initiated proposal and all interested members of the public have a constitutionally-guaranteed right to vote for approval or disapproval of the voter-initiated proposal if the Legislature does not enact the proposed law without change, and if approved by the voters, they have a constitutionally-guaranteed right to have the law enacted by virtue of their efforts protected from repeal or amendment by future legislative action unless that action can be supported by a subsequent vote of the People or a three-fourths vote in both houses of the Legislature.[7]

The defenders of 2018 PA 368 and PA 369 have also emphasized that the constitutional language does not contain any specific prohibition of amendatory legislation being passed by the same Legislature after its approval of an initiated law, and this has been offered as justification for the action taken in relation to the passage of this legislation in the lame duck session. Reduced to its most basic essence, this argument in support of 2018 PA 368 and PA

[7] It has been suggested that the ability to challenge the subsequently-enacted legislation by referendum may be considered an appropriate remedy for the initiative sponsors and the voters denied their right to vote in favor of the initiative as presented. This, also, is without merit. If an initiative proposal is enacted and then gutted by subsequent legislation enacted by the same Legislature in the lame duck session, the amendatory act is subject to referendum, but the ability to pursue a referendum should not be considered an acceptable remedy for the sponsors and supporters of the original proposal who have already made the extraordinary effort and incurred the great expense required to secure the support required for submission of their voter-initiated proposal to the Legislature.

369 amounts to a claim that the Legislature was free to proceed in the manner it chose because the operative language of Const 1963, art 2, § 9 does not specifically say that it could not.

VNP contends that this argument misses the mark for a number of reasons. First, the Court should again recall that Const 1963, art 2, § 9 effects a reservation of legislative power for the People – a portion of the legislative power that was never granted to the Legislature in the first place – and that its governing terms specify a narrowly-limited role for the Legislature. Thus, an argument that "we can do it because it doesn't say we can't" – an argument which might carry the day with respect to *other* types of legislation routinely enacted under Article IV – cannot be considered valid or controlling when considering the question of whether the Legislature's action has exceeded its limited authority in relation to initiated laws under Const 1963, art 2, § 9.

Second, as previously discussed, the governing language of Const 1963, art 2, § 9 requires the Legislature to choose between two, and only two, specific and narrowly defined choices when it has been presented with a properly supported and certified proposal for enactment of an initiated law; it can either approve the proposed law as presented or reject it. With respect to the proposals at issue, the Legislature made its choice to approve them. Subsequent events have shown, however, that the Legislature preferred to approve the proposals as presented in order to avoid the three-fourths vote requirement for subsequent repeal or amendment and then amend them later, but that strategy, implemented over vigorous objection in the lame duck session, clearly represented a third alternative ***not*** authorized by the constitutional language – a strategy to both approve ***and*** reject the proposals as presented. The difficulty is that the clear language of Const 1963, art 2, § 9 provided only the two options listed therein, and its listing of those specific options necessarily suggests an intent to exclude other

options not specified. Thus, the governing constitutional language did not authorize the "adopt and amend" strategy employed in this matter or any others that could have been devised.

Third, if the Court should find any necessity for interpretation, it must construe the language of Const 1963, art 2, § 9 liberally to facilitate rather than restrict or defeat the People's right to initiate legislation, and it must therefore ask whether the People voting to approve the Constitution intended to approve the stratagem at issue here. VNP contends that this question must be answered with a resounding "No." The language considered and approved by the voters in 1963 contains nothing to suggest an expectation that this or any other similar unspecified choice of action would ever be contemplated, implemented or allowed, and it is doubtful that the framers of the language submitted for their approval would have anticipated or favored the use of any strategy to defeat the People's right to vote on a properly presented and supported initiative.

As this Court has often noted, the reservation of the People's right of initiative was born of a popular distrust of the legislative branch and motivated in large part by its repeated failures to pass legislation for which there was a popular demand. *Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, 62-63 fn. 33; 921 NW2d 247, 254 (2018); *Woodland v Citizens Lobby,* 423 Mich 188, 218; 378 NW2d 337 (1985); *Ferency v Secretary of State*, *supra,* 409 Mich at 591-592; *Hamilton v Secretary of State,* 227 Mich 111, 129-130; 198 NW 843 (1924)

Although the constitutional rights of initiative and referendum were still sufficiently new as to be considered "innovations in representative government" in 1924, when this Court issued its decision in *Hamilton,* the Court emphasized that they were nonetheless "a part of the organic law of the State, and must be respected." 227 Mich at 129-130. The respect and

protection accorded those rights has not waned in the intervening years. In *Ferency,* this Court noted that the provisions governing voter-initiated legislation in Const 1963, art 2, § 9 had been found to be self-executing in *Wolverine Golf Club v Secretary of State,* 384 Mich 461, 466; 185 NW2d 392 (1971), in spite of that provision's language directing that "the legislature shall implement the provisions of this section." *Id.,* 409 Mich at 591, fn 9. And the decisions of this Court have also frequently emphasized that, although the Legislature may enact supplementary legislation to facilitate the implementation of a self-executing constitutional right reserved to the People, it may not impose additional requirements that curtail or unduly burden the free exercise of the guaranteed right. *Ferency, supra,* 409 Mich at 589-592; *Wolverine Golf Club v Secretary of State, supra,* 384 Mich at 461; *Hamilton v Secretary of State, supra,* 227 Mich at 129-130.

With these underlying motivations and principles in mind, it is inconceivable that the framers of the Constitution or the voters who approved it could have intended to sanction the use of an unspecified "adopt and amend" option to accomplish an end-run around petition sponsors who have devoted the very substantial time, effort and financial resources required to secure the certification of an initiative proposal for the ballot and defeat the People's right to vote on such proposals with a constitutionally-based expectation that, if passed, the proposed law will not be subject to change by a simple majority vote.

The amendatory legislation passed in the lame duck session was clearly a rejection of the proposals as presented, intentionally made after the People's ability to vote on them had passed. Although an intent to reject a properly supported and certified proposal and defeat the People's right to approve or disapprove might be less clear with respect to other amendatory legislation enacted by the same Legislature after an initial approval, the abridgement of the

People's reserved right of initiative by the type of stratagem employed here can only be effectively prevented by interpreting the language of Const 1963, art 2, § 9 to mean what it clearly seems to say – that the only options available to the Legislature are to approve an initiative proposal as presented or reject it and allow the voters to decide, and that an unspecified option of approving it and amending it later is unauthorized. The last Legislature had the choice to choose one alternative or another – it could not do both.[8]

These well-established principles and authorities provide clear answers to the second and third questions posed by the Court's Order of April 3, 2019. An initiated law passed by the Legislature without change or amendment under Const 1963, art 2, § 9 cannot be amended or repealed by subsequent action of the same Legislature. This being the case, 2018 PA 368 and 2018 PA 369 were not enacted in accordance with Const 1963, art 2, § 9, and should therefore be declared null and void.

[8] It should not be considered significant that a subsequent Legislature may be empowered to amend or repeal a law proposed by the People and enacted by a prior Legislature without change. The choice to enact or reject the proposed laws at issue in this matter was a choice that the last Legislature was required to make. The proposals and the choices presented were not addressed to any subsequent Legislature, and thus, the general rule that a subsequent Legislature can amend or repeal acts enacted by a prior legislature is not implicated here.

RELIEF REQUESTED

Wherefore, Amicus Curiae Voters Not Politicians respectfully suggests that this Honorable Court should grant the Legislature's pending requests for an Advisory Opinion and issue its Opinion holding that an initiated law passed by the Legislature without change or amendment under Const 1963, art 2, § 9 cannot be amended or repealed by subsequent action of the same Legislature, and that 2018 PA 368 and 2018 PA 369 were not enacted in accordance with Const 1963, art 2, § 9.

Respectfully submitted,

Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Amicus Curiae Count MI Vote,
d/b/a Voters Not Politicians

By: _____

Peter D. Houk (P15155)
Graham K. Crabtree (P31590)
Jonathan E. Raven (P25390)
124 W. Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

Dated: June 19, 2019