STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiffs/Appellees,

v.

DANA NESSEL, in her official capacity as the Attorney General and head of the Department of Attorney General,

Defendant/Appellee,

STATE OF MICHIGAN,

Defendant/Appellant.

Court of Appeals No. 362271

Michigan Court of Claims
Case No. 21-000095-MM

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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THE BRIEF IN SUPPORT OF
THE SMALL BUSINESS FOR A BETTER MICHIGAN COALITION'S
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

For the reasons explained in the accompanying Motion for Leave to File an Amicus Curiae Brief, the Small Business for a Better Michigan Coalition respectfully requests that this Court grant this motion for leave to file an Amicus Curiae Brief, attached as **EXHIBIT A**.

Dated: September 28, 2022

Respectfully submitted,

/s/ Gary P. Gordon

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AMICUS CURIAE BRIEF OF THE SMALL BUSINESS FOR A BETTER MICHIGAN COALITION IN SUPPORT OF APPELLANT THE STATE OF MICHIGAN

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Small Business for a Better Michigan Coalition (the "Coalition") respectfully submits this proposed amicus curiae brief in support of Defendant-Appellant's, the State of Michigan, position that Public Act 368 of 2018 ("Act 368") and Public Act 369 of 2018 ("Act 369") (collectively, "Public Acts 368 and 369") are constitutional.[1] Public Acts 368 and 369 broadly set the minimum wage and mandate certain paid sick leave benefits for employers to provide their employees, respectively. The Coalition is comprised of the following members:

Michigan Chamber of Commerce (the "Chamber"): The Chamber is the leading voice of business in Michigan. The Chamber advocates for job providers in the legislative and legal forums and represents approximately 5,000 employers, trade associations, and local chambers of commerce of all sizes and types in every county of the state. The Chamber's member firms employ over 1 million Michiganders. The Chamber and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The Chamber also has an interest in maintaining the integrity of the legislative process, especially when it lobbies and advocates to create jobs and free enterprise in Michigan.[2]

[1] Pursuant to MCR 7.212(H)(3), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the amicus curiae and its members contributed money that was intended to fund preparing or submitting the brief.

[2] In *In Re Request for Advisory Opinion Regarding 2018 PA 368 and 2018 PA 369*, 505 Mich 884; 936 NW2d 241 (2019), Docket Nos. 159160 and 159201, the Michigan Manufacturers Association, Michigan Restaurant and Lodging Association, National Federation of Independent Businesses, Small Business Association of Michigan, the Chamber, Associated Builders and Contractors, Grand Rapids Area Chamber, Homebuilders Association of Michigan, Lansing Regional Chamber of Commerce, Mackinac Center for Public Policy, Michigan Farm Bureau, Michigan Retailers Association, West Michigan Policy Forum and the Michigan Freedom Fund, asserting the same interests cited here, were authorized to participate as amici curiae before the

The Michigan Manufacturers Association ("MMA"): The MMA is the state's leading advocacy voice dedicated to the interests of Michigan manufacturers consisting of over 1,700 members ranging from small manufacturers with fewer than 50 employees to the world's largest and most well-known corporations. Manufacturers employ 605,700 people and produce $99.6 billion in total manufacturing output. The MMA and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The MMA also has an interest in maintaining the integrity of the legislative process, especially when it lobbies and advocates for a strong economic environment for Michigan manufacturing.[3]

National Federation of Independent Businesses—Michigan ("NFIB"): NFIB is the voice of small business in Michigan. NFIB is a member-driven organization advocating for small and independent business owners in Washington, DC, and all 50 states. Small businesses in Michigan represent over one million jobs. NFIB and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. NFIB also has an interest in maintaining the integrity of the legislative process, especially when it lobbies and advocates for small businesses in Michigan.

Small Business Association of Michigan ("SBAM"): SBAM is the premier organization for Michigan's small business owners with over 30,000 diverse members from every industry,

Michigan Supreme Court in support of the Legislature's request for an advisory opinion (1) on the constitutionality of Public Acts 368 and 369, and (2) that these laws were enacted in accordance with article 2, § 9. The Legislature's request was ultimately denied.

[3] While a member of the Coalition, the MMA anticipates filing a separate amicus curiae brief due to the unique and adverse impact of the lower court's ruling on its members and manufacturing in Michigan.

spread across all 83 of Michigan's counties. It has advocated for Michigan's small businesses since 1969. SBAM's members are as diverse as the state's economy, ranging from accountants to appliance stores, manufacturers to medical, and restaurants to retailers. SBAM and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. SBAM also has an interest in maintaining the integrity of the legislative process, especially when it lobbies and advocates for small businesses in Michigan.

Associated Builders and Contractors of Michigan ("ABC"): ABC is a statewide trade association dedicated to providing Michigan with high-quality, affordable, safe and on-time construction. ABC is an equal opportunity organization that opposes all discrimination in the construction industry including discrimination based on union affiliation. A leading construction industry voice within state government, ABC provides many member services including legislative advocacy, networking opportunities, member benefits, legal updates, business development and educational opportunities. ABC and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. ABC also has an interest in maintaining the integrity of the legislative process, especially when it lobbies and advocates for its members.

Community Bankers of Michigan: The Community Bankers of Michigan is a 300+ member trade association serving community banks, and their financial services partners, throughout Michigan. Headquartered in East Lansing, the Community Bankers of Michigan is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, professional education programs and high-quality

products and services. The Community Bankers of Michigan has one mission—community banks. The Community Bankers of Michigan and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The Community Bankers of Michigan also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Detroit Regional Chamber: Serving the business community for more than 100 years, the Detroit Regional Chamber is one of the oldest, largest, and most respected chambers of commerce in the country. As the voice for business in the 11-county Southeast Michigan region, the Detroit Regional Chamber's mission is carried out by creating a business-friendly climate and providing value for members. The Detroit Regional Chamber leads the most comprehensive education and talent strategy in the state. The Detroit Regional Chamber also executes the statewide automotive and mobility cluster association, MICHauto, and hosts the nationally recognized Mackinac Policy Conference. The Detroit Regional Chamber and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The Detroit Regional Chamber also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Grand Rapids Area Chamber of Commerce ("Grand Rapids Chamber"): The Grand Rapids Chamber leads the business community in creating a dynamic, top-of-mind West Michigan region. Together with over 2,500 member businesses (80% of which are small businesses with fewer than 50 employees), it works to expand the influence, access, and information required to actively encourage entrepreneurial growth and community leadership. It offers the connections,

resources, and insights needed to develop strong leaders, engage a diverse workforce, foster an inclusive and welcoming community, and advance a vibrant business environment that nurtures economic prosperity for all. The Grand Rapids Chamber and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The Grand Rapids Chamber also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Jackson Area Manufacturers Association ("JAMA"): JAMA is a not-for-profit association of manufacturers and associate members located or doing business in Jackson County, Michigan, and the surrounding region. It has one goal in mind: the continued prosperity of its manufacturing members and the broader regional community as a whole. JAMA focuses on helping to improve the manufacturing climate of south-central Michigan and positioning it as a leading provider of technology information, training, workforce and economic development support services, and issue advocacy at the local, state and federal levels. JAMA and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. JAMA also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Jackson Chamber of Commerce ("Jackson Chamber"): The Jackson Chamber is a local association to promote and protect the interests of the business community in the Jackson area. The Jackson Chamber and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The Jackson Chamber also

has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Lansing Chamber of Commerce ("Lansing Chamber"): The Lansing Chamber serves as the voice of Lansing businesses on issues and policies that impact the business community and economic climate of the Greater Lansing region. The Lansing Chamber and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The Chamber also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Michigan Chemistry Council: The Michigan Chemistry Council is the state industry association for Michigan's business of chemistry, one of the state's largest manufacturing sectors and one that directly touches 96% of all manufactured goods. The Council and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The Council also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Michigan Golf Course Association (the "Association"): As the voice of Michigan golf business, Michigan Golf Course Association represents owners and operators of golf courses throughout the state. The 800 golf courses in Michigan represent 60,000 seasonal jobs and a $4.2 billion economic impact. The Association and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The

Association also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Michigan Licensed Beverage Association ("MLBA"): The MLBA was established in 1939 and is Michigan's first and only bar, restaurant and tavern owners' association. The MLBA's purpose is promoting the general welfare of licensees, improving business standards, discouraging harmful trade practices, and further legitimizing the business of selling alcoholic beverages in a lawful and upright manner. The MLBA and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The MLBA also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Michigan Realtors®: Michigan Realtors® is one of Michigan's largest nonprofit trade associations, comprising 40 local boards and a membership of approximately 36,500 individual associate brokers and salespersons licensed under Michigan law. Brokerage firms across the state, and many of the independent contractors who work for those brokerage firms, are employers such that this decision will impact the terms and conditions under which they operate. These terms and conditions directly impact budgeting and the labor force. Michigan Realtors® also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Michigan Retailers Association ("Retailers Association"): The Retailers Association is the voice of Michigan's retail industry which provides more than 790,000 jobs to Michigan workers. The Retailers Association represents more than 5,000 businesses and 15,000 stores and online retailers. The Retailers Association and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member

employers. These terms and conditions directly impact budgeting and the labor force. The Retailers Association also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Midland Business Alliance ("MBA"): The MBA represents more than 3,000 businesses as Midland County's comprehensive business hub, leading the attraction, development, and growth of businesses. By bringing together economic development and the chamber of commerce, the MBA is a leader and catalyst for growth, building and cultivating a strong and diverse economy. The MBA serves as a voice for all business and is a leader in advocacy for Midland and the entire Great Lakes Bay Region. The MBA and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The MBA also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Saginaw County Chamber of Commerce ("Saginaw Chamber"): The Saginaw Chamber is a business membership-based organization of nearly 1000 members. It leads on behalf of business. It communicates, connects, and influences. Its vision is to create a thriving economy in Saginaw County and beyond. The Saginaw Chamber and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The Saginaw Chamber also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Southwest Michigan Regional Chamber ("SMRC"): SMRC is a member-driven business advocacy organization working to grow existing industry and improve the region's

overall business climate. As the region's leading "Voice for Business," SMRC has a responsibility to advance policies that will position Southwest Michigan for economic success and to oppose policies that will harm their members and deprive the region of future growth opportunities. SMRC and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. SMRC also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

Three Rivers Area Chamber of Commerce ("TRA Chamber"): The Three Rivers Area Chamber of Commerce is St. Joseph County's premier business organization representing the interests of approximately 300 members across a broad cross section of services and industries in Southwest Michigan. The TRA Chamber and its members have a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for its member employers. These terms and conditions directly impact budgeting and the labor force. The TRA Chamber also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

West Michigan Policy Forum ("Policy Forum"): The Policy Forum strives to create jobs and opportunities through identifying and removing barriers to competitiveness to help Michigan become a top 10 state in the nation. The Policy Forum has a direct interest in this matter since the Court's decision would impact the terms and conditions of operation for employers. These terms and conditions directly impact budgeting and the labor force. The Policy Forum also has an interest in maintaining the integrity of the legislative process, especially when it advocates for its members.

The Court of Claims' July 19, 2022 Order ("July 19, 2022 Order") striking down Public Acts 368 and 369 (and giving effect to Public Acts 337 and 338 of 2018 instead) will have immediate, adverse and irreversible impacts on the Coalition's members and their employees. The Coalition's members are predominately small businesses that have carefully budgeted for their goods, services, and labor costs in accordance with Public Acts 368 and 369. Changing the laws on employee wages and benefits—almost three years after their enactment—will have an immediate and adverse impact on the Coalition's members and their employees.

Under Public Act 337 of 2018, the Improved Workforce Opportunity Wage Act ("IWOWA"), Michigan businesses—no matter their size—would be forced to quickly raise minimum wages with annual adjustments for inflation. For the hospitality industry, tipped employees would have to earn 80% of the minimum wage in 2022 with the tip credit completely phased out by 2024.

The immediate increase of the minimum wage will adversely impact the workers that it purports to support. The Harvard Business Review found a $1 minimum wage hike resulted in reduced hours worked for employees, reductions in eligibility for benefits, and more inconsistent scheduling in order for employers to handle the increased strain on their budgets. The same study found that that for every $1 increase in the minimum wage, the result was net losses of "at least $1,590 per year per employee—equivalent to 11.6% of workers' total wage compensation (and this is assuming that workers were able to use their reduced hours to work a second job—an assumption which may not hold true for many employees.)"[4]

[4] Quiping Yu, Shawn Mankad, and Masha Shunko, *Research: When a Higher Minimum Wage Leads to Lower Compensation*, The Harvard Business Review (June 10, 2021) available at https://hbr.org/2021/06/research-when-a-higher-minimum-wage-leads-to-lower-compensation#:~:text=For%20every%20%241%20increase%20in,per%20week%20decrease%20by%2020.8%25.

The impact will be equally devastating to businesses across Michigan. "Large and sudden increases in the minimum wage have the potential to shock the economy and have ripple effects that hurt both low-wage workers and everyone else."[5] A study of a $15 minimum wage mandate found that, if implemented, Michigan would lose approximately 200,000 full-time jobs.[6] Sudden wage hikes impact the ability of the Coalition's members to stay fully staffed and remain productive. According to a study done by researchers at the Harvard Business School, a $1 minimum wage increase leads to a 14% increase in the likelihood of closure for certain businesses.[7] A sudden wage hike impacts not only employers, but also impacts employees and the health of the economy overall.[8] Another study specific to the restaurant industry found that increases in cash wages cause restaurants to reduce service levels and reduce employment of workers who are typically eligible for tip credits.[9] The compelled re-enactment of IWOWA would cause these immediate, adverse consequences. These changes would apply equally to all employers, including hospitals, schools, local governments, and universities. An increase in costs to governmental entities in turn increases costs for employers through inevitable increased taxation.

Public Act 338 of 2018, the Earned Sick Time Act ("ESTA"), requires that employees earn a minimum of one hour of sick time for every 30 hours worked. Employees of "small businesses"

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[5] James M. Hohman, *A Look at What Happens After Minimum Wage Hikes in Michigan*, Mackinac Center for Public Policy (Nov 19, 2018) available at https://www.mackinac.org /a-look-at-what-happens-after-minimum-wage-hikes-in-michigan.

[6] James Sherk, *How $15-per-Hour Minimum Starting Wages Would Affect Each State*, The Heritage Foundation (Aug 17, 2016), available at https://perma.cc/BAQ6-6X5Q.

[7] Dara Lee Luca and Michael Luca, *Survival of the Fittest: The Impact of the Minimum Wage on Firm Exit*, Harvard Business School (2018), available at https://www.hbs.edu/ris/Publication% 20Files/17-088_9f5c63e3-fcb7-4144-b9cf-74bf594cc308.pdf

[8] Hohman, *supra* n 5.

[9] William Even & David Macpherson, *Tip Credits and Employment in the U.S. Restaurant Industry*, Employment Policies Institute (Nov 2011), available at https://perma.cc/V7EX-6AXB.

(employers with fewer than 10 employees and which includes many of the Coalitions' members) accrue up to 40 hours of paid sick time and 32 hours of unpaid sick time each year. Earned sick time will carry over from year to year up to the annual maximums. Under the ESTA, employers cannot require employees to arrange for coverage during an absence and employees are not required to give documentation for an absence until three days after the absence is incurred. Further, the ESTA definition redefines the term "employee" to include anyone that performs a service for an employer—which may even include contract employees. Because employers must allow employees to accrue paid sick leave as they work (as opposed to front-loading annual sick time at the beginning of the year), employers will face increased administrative burdens allocating and tracking the new system. These higher benefit costs will also force employers to reduce workers' pay by approximately the cost of providing the benefit, and employers will need to spend more on leave benefits and less on wages—often hurting their employees.[10]

The ESTA prohibits employers from "retaliating" against an employee for engaging in activity protected by the act. Importantly, there is a rebuttable presumption that an employer violated the act if any adverse personnel action against an employee is taken within 90 days after the employee engages in protected activity. This will likely create additional litigation and liability concerns for employers who need to terminate employees within 90 days of their use of a sick day for unrelated reasons. The ETSA creates a private cause of action for employees without any administrative exhaustion requirement, which will likely unnecessarily burden both the courts and employers.

[10] See James Sherk, *Understanding Mandatory Paid Sick Leave*, Heritage Foundation (Jan 12, 2012), available at https://perma.cc/5RMA-LJGF.

The Court of Claims' decision claims to support the "will of the people" and, as evidence of this will, cites the filing of 372,105 and 377,650 signatures, respectively, in support of the proposed initiatives (out of a Michigan population of approximately 10 million).[11] But the Court of Claims possesses no crystal ball to prophesy whether Michigan's 10 million voters would have adopted the proposed initiative as originally drafted—it does not know whether IWOWA and ESTA actually represent the will of the People. The Legislature also represents the will of the People through representative democracy. The Court's decision gives little attention to the fact that Public Acts 368 and 369 were enacted by the elected representatives of ALL of the electors of Michigan—not a small fraction proposing an initiated law. Additionally, the lower court's opinion discards the clear language of the Constitution and the Legislature's plenary authority to both enact and amend laws. The lower court's opinion erroneously reads into the Constitution limitations on legislative authority that do not exist. The judiciary should not be in the business of shaping the state's economic policies that impact all businesses and employees—under the Constitution, such activities fall within the powers of the legislative branch. The Legislature is best positioned to represent the "will of the people" and interests of its constituents, just as it did in 2018 by lawfully passing Public Acts 368 and 369.

The Coalition is well positioned to provide this Court with the perspective of businesses and employers that will be impacted most by the outcome of this case. Because of these interests, the Coalition has been permitted to participate in prior litigation regarding similar matters. This Court should permit the Coalition to participate as amicus here.

[11] United States Census Bureau, *Quick Facts: Michigan* (last accessed Sept. 20, 2022), available at https://www.census.gov/quickfacts/MI. This Court may take judicial notice of the total population in Michigan under MRE 201. See *AFSCME Council 25 v Co of Wayne*, 292 Mich App 68, 92; 811 NW2d 4 (2011) (taking judicial notice of the population of Wayne County).

STATEMENT OF JURISDICTION

On July 19, 2022, Judge Douglas B. Shapiro of the Court of Claims granted summary disposition for Plaintiffs and the Attorney General. July 19, 2022 Order at 25. The Order was a final order that resolved the last pending claim and closed the case.

The State timely claimed an appeal of right to this Court on July 20, 2022. MCR 7.204(1)(a).[12] This Court has jurisdiction over an appeal of right filed by an aggrieved party from a final order of the Court of Claims. MCR 7.203. The Coalition's proposed amici curiae brief in support of the State is timely pursuant to MCR 7.212(H)(1).

ORDER APPEALED FROM AND RELIEF SOUGHT

The Court of Claims voided Act 368 and Act 369—which directly impact employee wages and benefit programs—as unconstitutional and found that the original language of the initiated laws must be given effect. July 19, 2022 Order at 25.[13] The court held that article 2, § 9 of the Michigan Constitution "does not permit the Legislature to adopt a proposed law and, in the same legislative session, substantially amend or repeal it." *Id*. at 1. Section 9 provides the Legislature three options that it may take within 40 days when faced with an initiative petition—adopt it, reject it, or propose an alternative. According to the court, the State's reading of article 2, § 9 would allow an impermissible "fourth option." *Id*. at 10. The court relied heavily on selected constitutional history and former Attorney General Kelley's 1964 advisory opinion. Because the

[12] The Attorney General's office represents the "State" in defending the constitutionality of Public Acts 368 and 369 and the Attorney General's office representing the "Attorney General" opposes the constitutionality of the acts.

[13] On July 29, 2022, the Court of Claims denied the State's request for a stay pending the appeal but granted a stay for 205 days—through February 19, 2023, to at least allow employers some time to implement the dramatic changes in pay and benefits required by 2018 PA 337 and 2018 PA 338. July 29, 2022 Stay Order.

court concluded that Legislature enacted the initiated acts and then "substantially amended" them, the court also determined that Public Acts 368 and 369 are unconstitutional under article 2, § 9.

The Coalition supports the State's request to reverse the decision of the Court of Claims and affirm the constitutionality of Public Acts 368 and 369 and further supports a published decision in this case on or before February 1, 2023.

STATEMENT OF QUESTIONS INVOLVED

I. "The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. Because the Legislature has plenary authority granted under the Constitution, did the Legislature lawfully enact the IWOWA and ESTA and then amend these laws in the same legislative session?

The State of Michigan answers:	Yes
Plaintiffs answer:	No
The Coalition answers:	Yes
The Court of Claims answered:	No
This Court should answer:	Yes

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

The State of Michigan answers:	Yes
Plaintiffs answer:	No
The Coalition answers:	Yes
The Court of Claims answered:	No
This Court should answer:	Yes

MICHIGAN CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Sec. 1 Legislative Power

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.

Article II, Sec. 9 Initiative and Referendum; Limitations; Appropriations; Petitions

[1] 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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.

[6] The legislature shall implement the provisions of this section.

INTRODUCTION

When deciding the constitutionality of Public Acts 368 and 369, the Court should consider the direct impact on the welfare of the Coalitions' members—the parties tasked with paying employee wages and implementing employee benefits programs. Michigan businesses are facing historic labor shortages and record inflation while attempting to recover from the economic damage inflicted by the Covid-19 pandemic. The Court of Claims' decision nullifies lawfully enacted legislation dating back to 2018 and re-imposes legislation that would raise minimum wages and mandate paid sick leave benefits. The lower court's judicial overreach grabs power from the governmental body tasked with creating economic policies and labor and employment laws—the Legislature. If upheld, the lower court's decision will have drastic consequences on Michigan's entire labor force, including all of its employers and employees.

The role of the judiciary is not to engage in policymaking—that is the purview of the Legislature, a body that directly represents the People. *Kyser v Kasson Twp*, 486 Mich 514, 536; 786 NW2d 543 (2010) ("policy-making is at the core of the legislative function"). In its July 19, 2022 Order, the Court of Claims voided Michigan's current laws governing sick leave and the minimum wage by ignoring the clear language of the Constitution and favoring policy-based rationales. The court further concluded that an initiative petition signed by a small fraction of Michigan voters (and never voted on statewide by the electorate) represents the "will of the People" more effectively than their elected representatives. This conclusion is unsupported by law and fact. The Court of Claims created a limitation on legislative power that is contrary to the Michigan Constitution and should be overturned by this Court.

The Court should reject Plaintiffs' attempts to use the "court of public opinion," to create new limits on the Legislature's power and facially attack Public Acts 368 and 369. The text of the

Michigan Constitution governs here. The Legislature, as a directly-elected representative body, manifests the will of its constituents. *People v Taylor*, 495 Mich 923, 931; 844 NW2d 707 (2014), MARKMAN, J. concurring ("The Legislature represents the whole of the people in the broadest possible manner, and the laws that it produces must pass muster by the support of at least a majority of legislators, representing constituencies that are urban, rural, and suburban; constituencies of every socioeconomic, racial, and ethnic composition; constituencies in which different businesses, interests, and political and partisan philosophies are reflected and balanced[.]").

The Constitution acts not as a *grant* of power to the Legislature, but as a *limitation* on its inherent (plenary) authority. Const 1963, art 4, § 1; *Taxpayers of Mich Against Casinos v Michigan*, 471 Mich 306, 327; 685 NW2d 221 (2004). If the Constitution does not limit or prohibit an action of the Legislature, then the Legislature has plenary power to exercise its authority. The Legislature's plenary authority, including its power to adopt and amend laws, even an initiated law that it enacted and amended during the same session, is not abrogated by article 2, § 9. Finally, to the extent that any ambiguity regarding the constitutionality of Public Acts 368 and 369 exists, (and Amicus does not believe there is any ambiguity) mandates of constitutional construction require an interpretation in favor of the constitutionality of the Legislature's actions. See *O'Brien v Hazelet & Erdal*, 410 Mich 1, 17; 299 NW2d 336 (1980).

STATEMENT OF FACTS

Proposed Amicus adopts the statement of facts provided by the State of Michigan. (Appellant's Brief at 4.) However, a short summary is provided of the most relevant facts.

Laws proposed by initiative were submitted by two groups. Michigan One Fair Wage's ("MOFW") petition proposed a new Michigan minimum wage law. The second group, Michigan Time To Care ("MTTC") proposed mandatory sick leave to be granted under various

circumstances. In order to initiate legislation, each was required to submit 252,523 valid signatures.[14] Both petitions filed enough valid signatures and, per Const 1963, art 2, § 9, were submitted to the Legislature for its consideration.[15]

On September 5, 2018, the initiative petitions were approved by a majority of both the House and Senate and enacted as Acts 337 and 338.[16] Months later, amendments to Acts 337 and 338 were adopted by the Senate on November 28, 2018 and by the House on December 4, 2018. The Governor signed Public Act 369 into law on December 12, 2018 and Public Act 368 into law on December 13, 2018. Prior to final adoption of the amendments by the Legislature, Attorney General Schuette had affirmed the legality of the process. [17]

Additionally, on February 20, 2019, before the March 29, 2019 effective date of the Public Acts, the Legislature requested an advisory opinion from the Supreme Court regarding the constitutionality of the amended acts. The Court, on December 18, 2019 stated that "we are not persuaded that granting the requests would be an appropriate exercise of the Court's discretion." *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241 (2019).

Almost two and one-half years after the Court's denial of the request for opinion, on May 5, 2021 the Plaintiff filed this case in the Court of Claims.

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[14] Signatures of at least 8% of the total votes cast for governor at last general election are required to initiate a law. Const 1963, art 2, § 9.

[15] The Court of Appeals, after a Board of Canvassers deadlock ordered the MOFW petition certified. *Mich Opportunity v Bd of State Canvassers,* unpublished Order of the Court of Appeals in Docket No 344619 (Aug. 22, 2018), lv den 503 Mich 918, 920 NW2d 137 (2018).

[16] The signature of the Governor is not required on laws proposed by initiative petition and adopted by the legislature. Const 1963, art 2, § 9.

[17] "[A]rticle 2, § 9 of the Michigan Constitution does not prohibit the Legislature from amending a legislatively enacted initiated law during the same legislative session in which the Legislature enacted the initiated law." OAG, 2017-2018, No. 7306, p 9 (December 3, 2018).

STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Promote the Vote v Secretary of State*, 333 Mich App 93, 116–17; 958 NW2d 861 (2020). Summary disposition is proper under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Id.* at 117.

"This Court reviews de novo a question of constitutional law." *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018). "A statute challenged on a constitutional basis is 'clothed in a presumption of constitutionality,' and the burden of proving that a statute is unconstitutional rests with the party challenging it." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) (citation omitted). Questions of statutory interpretation are also reviewed de novo. *McQueer v Perfect Fence Co*, 502 Mich 276, 285–86; 917 NW2d 584 (2018).

ARGUMENT

I. Public Acts 368 and 369 are constitutional as they were duly enacted under article 4, § 1 of the Michigan Constitution.

Plaintiffs bring facial challenges to the constitutionality of Public Acts 368 and 369 and accordingly must clear a high bar for nullifying these laws. They cannot. "Legislation is presumed to be constitutional absent a clear showing to the contrary." *AFT Mich v State*, 497 Mich 197, 214; 866 NW2d 782 (2015). "Acts of the Legislature enjoy a presumption of constitutionality and the legislative judgment must be accepted if it is supported by any state of facts either known or which could reasonably be assumed." *O'Brien v Hazelet & Erdal*, 410 Mich 1, 17; 299 NW2d 336 (1980) (cleaned up). A statute "comes clothed in a presumption of constitutionality" because "the Legislature does not intentionally pass an unconstitutional act." *Cruz v Chevrolet Grey Iron*, 398

Mich 117, 127; 247 NW2d 764 (1976). The Court must "scrupulously sustain the legislative will if within the constitutional limits of its function." *Advisory Opinion Re Constitutionality of 1970 PA 100*, 384 Mich 82, 89; 180 NW2d 265 (1970). The Court must "uphold all laws that do not infringe the state or federal Constitutions and invalidate only those laws that do so infringe" and "not render judgments on the wisdom, fairness, or prudence of legislative enactments." *AFT Mich*, 497 Mich at 214 (cleaned up); see also *People v Collins*, 3 Mich 343, 348-349 (1854) ("It is never to be forgotten that the presumption is always in favor of the validity of the law, and it is only when manifest assumption of authority and clear incompatibility between the constitution and the law appears, that the judicial power can refuse to execute it.").

Plaintiffs—as the parties challenging Public Acts 368 and 369—bear the burden to overcome this presumption of constitutionality. *Cruz*, 398 Mich at 127. The party challenging the facial constitutionality of an act must "establish that no set of circumstances exits under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient." *Council of Orgs & Others for Ed About Parochiaid v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997).

The Michigan Constitution expressly provides that "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. "Simply, legislative power is the power to make laws." *In re Rovas Complaint*, 482 Mich 90, 98; 754 NW2d 259 (2008). "The legislative power prescribes rules of action. The judicial power determines whether, in a particular case, such rules of action have been transgressed." *People v Konopka*, 309 Mich App 345, 362; 869 NW2d 651 (2015). The legislative power of the People is enacted through the Legislature, in which this legislative power "is limited only by the Constitution, which is not a grant of power, but a limitation on the exercise of power[.]" *Oakland Co Taxpayers' League v Bd*

of Supervisors, 355 Mich 305, 323; 94 NW2d 875 (1959). The Legislature "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, 331–32; 870 NW2d 275 (2015).

The Legislature's broad powers are rooted in article 4, §1 of the Michigan Constitution. The Michigan Constitution provides few limitations on that power. One such limitation is codified as article 2, § 9 of the Michigan Constitution—the powers of the public to propose and enact laws through initiative and referendum. But the Legislature's power does not vanish when a question regarding an initiative petition or referendum arises. Article 2, § 9 does not exist in a vacuum. Michigan courts have long held that the legislative requirements of article 4 of the Michigan Constitution *do apply* to article 2, § 9. *Frey v Dir of the Dep't of Social Servs*, 162 Mich App 586, 600 at n 4; 413 NW2d 54 (1987) ("[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)."). See also *Leininger v Alger*, 316 Mich 644, 648–649; 26 NW2d 348 (1947) (article 4, § 24's title-object clause applied to petitions to initiate legislation under the 1908 Constitution); *Auto Club of Mich Comm for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613, 622; 491 NW2d 269 (1992) (indicating that article 4, § 25's republication requirement applies to petitions to initiate legislation). Plaintiffs urge this Court to carve out an exception to the Legislature's plenary powers under article 4 for article 2, § 9, but fail to demonstrate that such an exception exists in the Michigan Constitution.

Because article 4, § 1 grants the Legislature plenary powers and because it is not otherwise prohibited, see *infra* II, the Legislature may enact a law proposed by an initiative petition and then subsequently amend that law during the same legislative session. The Legislature adopted

IWOWA (2018 PA 337) and ESTA (2018 PA 338) in whole and within 40 session days of receipt of the certified initiative petitions, as required under article 2, § 9. Then, the Legislature—exercising its plenary authority—amended the acts by majority votes during the same session—but after expiration of the 40 days—and the Governor signed these bills into law. Public Acts 368 and 369 were enacted in accordance with article 2, § 9 because that provision places no prohibition on amending (substantial or not) initiated laws enacted by the Legislature during the same session. Because Public Acts 368 and 369 were lawfully enacted under article 4, § 1 and are presumed constitutional, Plaintiffs' carry the burden of demonstrating their unconstitutionality. Plaintiffs fail to do so.

II. Article 2, § 9 of the Michigan Constitution does not prohibit the Legislature from amending a legislatively enacted initiative law in the same session.

Because the Legislature has plenary legislative authority under the Michigan Constitution, the Court must consider whether article 2, § 9 checks the Legislature's power to amend a legislatively enacted initiative law in the same session. Section 9 undisputedly places some limitations on the Legislature's plenary authority under the Constitution by reserving to the People the power for initiatives and referenda of laws. *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214; 378 NW2d 337 (1985). But these limitations, as evidenced by the constitutional text, the controlling caselaw, and the superseding Attorney General's opinion are inapplicable to amendment of a legislatively adopted law. The lower court, therefore, should be reversed.

When interpreting the Michigan Constitution, courts must "determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Citizens Protecting Mich Const v Secretary of State*, 503 Mich 42, 61; 921 NW2d 247 (2018) (cleaned up). All parties to this case agree that the "primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of

'common understanding.'" *Coalition of State Employee Unions*, 498 Mich at 323. (See also Appellant's Brief at 12; Appellee's Brief at 17.) Courts "locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification." *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 535; 975 NW2d 840 (2022) (citation omitted). The interpretational exercise is to objectively examine the ratifiers' common understanding, "not to impose on the constitutional text . . . the meaning . . . judges would prefer, or even the meaning the people of Michigan today would prefer, but to search for contextual clues about what meaning the people who ratified the text in 1963 gave to it." *Mich United Conservation Clubs v Secretary of State*, 464 Mich 359, 375; 630 NW2d 297 (2001), YOUNG, J., concurring. The analysis therefore begins with "an examination of the precise language used in art 2, § 9 . . . ." *Id.*; see also *Frey*, 429 Mich at 335 ("This interpretation is . . . in accordance with the 'common understanding rule' [by which we] are limited to the language of the constitution when interpreting its provisions."). "Th[e] reliance on extrinsic evidence [is] inappropriate [when] the constitutional language is clear." *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 362 (2000); see also *Taxpayers for Mich Const Gov't v Dep't of Technology, Mgt & Budget*, 508 Mich 48, 79; 972 NW2d 738 (2021) (holding this Court erred in relying on the drafters' notes of the Headlee Amendment when "the constitutional language is clear").

The Court of Claims recited the applicable rules of constitutional construction, but then ignored the plain text of article 2, § 9 by reading non-existent limitations on the Legislature's authority into the provision. July 19, 2022 Order at 6–7.[18] Determining the "common

[18] The lower court relied on the general statement that courts "liberally construe[] constitutional initiative and referendum provisions . . . ." July 19, 2022 Order at 8, quoting *League of Women Voters of Mich v Secretary of State*, __ Mich App __; __ NW2d __ (Oct. 29, 2021), Docket Nos. 357984 and 357986, slip op at 9. This rule of construction alone cannot carry the day for many

understanding" of a constitutional term necessitates looking at the actual language of the provision, not language absent from the provision. "The most obvious way to divine what meaning 'the great mass of the people themselves would give' any word or phrase would be the common meaning *of the language used*." *Walker v Wolverine Fabricating & Mfg Co*, 425 Mich 586, 596; 391 NW2d 296 (1988) (emphasis added). The "common understanding" of the People cannot mean that the courts can add non-existent limitations on the Legislature to the plain language of article 2, § 9.

A. Article 2, § 9 places no limitation on legislative authority to amend an initiated law enacted by the Legislature.

Article 2, § 9 provides the following processes for initiatives: (1) a law may be proposed to the Legislature for enactment by gathering a certain number of signatures on a petition; (2) once the initiated law is submitted, the Legislature must either enact or reject it "without change or amendment within 40 session days . . ."; (3) if the Legislature enacts the proposed law, it is subject to referendum, like any other law enacted by the Legislature; (4) if the proposed law is not enacted, the law is submitted to the people on the ballot for a vote during the next general election; and (5) if a law initiated by the people is either enacted by the Legislature or adopted by the people, then it is not subject to the governor's veto power. Const 1963, art 2, § 9. There is no language limiting whether or when the Legislature may amend an enacted initiative law after the 40 session days. *Id*. at ¶ 3.

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reasons. Public Acts 368 and 369, like all legislation, are presumed to be constitutional. *AFT Mich*, 497 Mich at 214. And a liberal construction of article 2, § 9 cannot mean the Court may read into the law something that is not there. See *People v Williams*, 463 Mich 942; 621 NW2d 214 (2000) (Mem), CORRIGAN, J., dissenting ("I cannot endorse a 'liberal' construction that reads into the statute words that plainly are not there."); 82 C.J.S. Statutes § 504 (liberal construction "does not empower the court to read into a statute something that cannot reasonably be implied from the statute's language."). Finally, the Michigan Supreme Court "has more recently tended to restrain calls for liberal or strict construction, opting instead for a reasonable construction *of all legal texts*." *Sanford v State*, 506 Mich 10, 18; 954 NW2d 81 (2020) (emphasis added).

The lower court acknowledged—but wrongly rejected—the plenary authority of the Legislature, stating "there was no need for the people to specify" that the Legislature could not adopt-and-amend an initiated law and "[t]he People granted the legislature three options that it may take within 40 days when faced with an initiative petition." July 19, 2022 Order at 10. This conclusion is antithetical to the concept of plenary legislative power. The People need not *grant* the Legislature any specific power when the People have *already granted* the Legislature plenary authority under the Constitution. *Coalition of State Employee Unions*, 498 Mich at 331–32 (The Legislature "can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States."). The lower court, though, imposed a legislative restriction by claiming that amendment of the enacted laws was an impermissible "forth option"—even though the so-called option was exercised outside of the 40 day period. July 19, 2022 Order at 8-9, 10. In the context of article 2, § 9, lacking any specific (or implied) prohibition, the Legislature may amend—by simple majority vote and within the same session—an initiated law that it enacted within 40 session days after receiving a certified initiative proposal.

Additionally, the Court of Claims' interpretation does not square with other established authority providing for amendment of laws initiated by public. If the Legislature concludes that an initiated law "was not workable," it 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; 340 NW2d 817 (1983) (emphasis added; footnotes omitted). Opponents concede such amendments are permissible. (Attorney General's Brief at 13 ("It is true that article 4 places substantial power in the hands of the Legislature and generally allows for the immediate revision of laws because they may "need" to be changed immediately. See *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich at 66–67

(1983).").) Thus, Plaintiffs' admit that amendments are appropriate—even necessary sometimes—but here they simply do not like the outcome. Under Plaintiffs' theory, the Legislature is prohibited from amending an existing law when it was proposed by an initiative petition, *even though* there is no prohibition in article 2, § 9, *and* amendments are permitted sometimes, *but* only when needed. This is not a workable standard—particularly when this Court has already determined that "since everything that emerges from the Legislature is legislation, all legislative acts must be on an equal footing." *Frey*, 162 Mich App at 600.

If the ratifiers wanted to limit the Legislature's authority to amend legislatively enacted laws proposed by initiative, it would have and could have said so. See *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 313; 806 NW2d 683 (2011). This is especially true when article 2, § 9 expressly limits when the Legislature may amend laws passed by referendum, which "may be amended by the legislature *at any subsequent session thereof*." Const 1963, art 2, § 9, ¶ 5 (emphasis added). A law approved by referendum has been approved twice: once by the Legislature when enacted and once by the people at the polls when presented for potential rejection. *Id.* The Constitution protects such twice-approved laws by providing for amendment only in subsequent legislative sessions. *Id.* That same protection does not extend to laws initiated by the people and then enacted by the Legislature. Because article 2, § 9 does not explicitly state that the Legislature must wait until a subsequent legislative session to amend an initiated law that it enacted, this atextual limitation does not exist and the common understanding is that the Legislature may amend a legislatively enacted initiative law if and whenever it so chooses outside of the 40 day window. The lower court's determination that the Legislature's use of its plenary authority "nullified" the People's right to vote on a rejected initiative constitutes an inappropriate policy judgment beyond the scope of judicial review.

B. Article 2, § 9 neither requires a popular vote nor approval of three-fourths of each legislative house to amend an initiated law enacted by the Legislature.

The lower court's erroneous reading of article 2, § 9 creates a singular constitutional requirement applicable to *all* initiated legislation (regardless of whether it has been voted on by the electorate) and then treats any legislative activity as an attempt to "thwart" that (manufactured) constitutional process. July 19, 2022 Order at 16–18. There is not a one-track process for initiated legislation. In contrast to the Legislature's unlimited ability to amend an initiated law that it enacted (*supra* I), if the Legislature rejects an initiated law that is subsequently enacted by the people at the polls, then that law may not be repealed or amended unless: (a) the electors vote to repeal or amend the law; or (b) three-fourths of the members of each house of the Legislature vote to repeal or amend it. Const 1963, art 2, § 9, ¶ 5. The requirement does not apply to initiated laws proposed by the people and *enacted by the Legislature* within 40 session days, nor is there any other limitation on legislative prerogatives. *Ibid.*

The Attorney Generals' opinions unanimously support this reading of article 2, § 9. "Here . . . the Legislature enacted the initiated laws and the three-fourths vote requirement does not apply." OAG, 2017-2018, No. 7306 (A.G. Bill Schuette) (December 3, 2018). "[T]he Legislature may amend the initiated laws it enacted by a majority vote of the members elected to and serving in each house of the Legislature." *Ibid.* This is consistent with Attorney General Kelley's 1976 opinion that "[i]f 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 house . . . ." OAG, 1975-1976, No. 4932, p 240 (A.G. Frank J. Kelley) (January 15, 1976). As Attorney General Kelley stated, "had the drafters of the Constitution intended . . . [to] require extraordinary majorities in each house, explicit language to that effect

would have been utilized" and "interpret[ed] the absence of such language as signifying intent that such laws be adopted by [simple] majorities . . . ." *Id.*

The same rule of interpretation applies to article 2, § 9 as to whether the Legislature may amend an initiated law enacted by the Legislature during the same legislative session: if the drafters and ratifiers of the Constitution had intended to limit the Legislature's ability to amend such legislation to only subsequent sessions, explicit language to that effect would have been included.

The lower court's conclusion that the State's reading of article 2, § 9 "would effectively thwart the power of the People to initiate laws and then vote on those same laws" is far-fetched. July 19, 2022 Order at 25. To start, the People's power to initiate laws was not thwarted when the Legislature enacted the initiative laws within 40 session days, which was all that was required under article 2, § 9. Section 9 provides no constitutional right to vote on every initiative petition, presumably because such direct democracy would be unworkable and costly, but more importantly would erode our representative democracy. See *Henry v Dow Chem Co*, 473 Mich 63, 98; 701 NW2d 684 (2005) ("In our representative democracy, it is the legislative branch that ought to chart the state's course through such murky waters."). While the People "desired strong safeguards" with their right to propose laws by initiative, that doesn't grant the Court the ability to read into the Constitution non-existent restrictions on the Legislature's power.[19]

[19] The Michigan Supreme Court has observed that to help discover the common understanding of a constitutional "constitutional convention debates and the address to the people, though not controlling, are relevant." *Citizens Protecting Mich's Const*, 503 Mich at 61. The Coalition concurs with the State's reading that the constitutional convention debate supports the common understanding of article 2, §9 in that no limit was placed on the ability of the Legislature to amend a law it enacted in the same legislative session. State Brief at 19–21.

C. Controlling caselaw supports that laws initiated by petition and enacted by the Legislature have the same stature as laws enacted solely through the legislative process and, therefore, may also be amended during the same legislative session.

The Michigan Constitution does not prohibit the Legislature from amending any act, including one proposed by initiative petition, at the same session at which it was adopted. This conclusion is bolstered by the Michigan Supreme Court's rulings that all duly enacted laws, whether initiated by petition, enacted by the Legislature, or adopted at a general election, have the same stature, unless the Constitution provides otherwise; that is, no special protection is afforded to laws initiated or enacted by the people.[20] *In re Proposals D & H*, 417 Mich 409, 421–22; 339 NW2d 848 (1983). In *Proposals D & H*, the Court rejected the contention that a law enacted by the people through an initiative petition and ballot vote is on a "higher plane" than a law enacted by the Legislature subject to the people's approval by referendum. *Id.* (finding that the Constitution does not "afford[] a 'higher plane' to measures adopted under the initiative provisions of art 2, § 9"). The Court based its holding in part on the "principle that all constitutional provisions enjoy equal dignity." *Id.* at 421. The Court found that an initiated law enacted under article 2, § 9 was on equal footing with a law enacted by the Legislature and conditioned on voter approval under article 4, § 34.

The same can be said of the initiated acts, both of which were initiated laws and enacted by the Legislature under article 2, § 9, and any other law that is introduced as a bill and enacted by the Legislature under article 4 of the Constitution. Because they are on equal footing—because no special protections are afforded to initiated laws unless explicitly stated in the Constitution—laws

[20] The two exceptions explicitly provided for in article 2, § 9, ¶ 5 are: (1) the popular vote or three-fourths legislative majority requirement to amend or repeal an initiated law enacted by the people at the polls; and (2) the subsequent legislative session requirement to amend a law approved after a referendum vote by the people at the polls.

initiated by the people under article 2, § 9 are subject to amendment during the same legislative session just like laws introduced by legislators. See, e.g., *Detroit United R v Barnes Paper Co*, 172 Mich 586, 588–89; 138 NW 211 (1912) (holding that when the Legislature enacts two conflicting laws during the same session, "the section stand[s] as last amended"); see also 2018 SB 1162 and 2018 SB 1094, which both amended MCL 437.1517a and were both enacted during December 2018.

Other cases have also recognized that an initiated law is subject to the same article 4 constitutional requirements as a legislatively introduced bill. For example, in *Frey v Department of Mgt & Budget*, 429 Mich 315, 335; 414 NW2d 873 (1987), the Court held that, despite language in the initiative petition stating that the law would take immediate effect, the law could not take immediate effect without approval of two-thirds of each legislative house, as required by article 4, § 27 of the Michigan Constitution. This is because all procedural provisions of article 4 of the Constitution, which establish constitutional limits on "the legislative power of the State of Michigan . . . vested in a senate and a house of representatives" (article 4, § 1), "apply to the Legislature when it votes to enact an initiated law" under article 2, § 9. *Id.* at 337.

Similarly, in *Leininger v Secretary of State*, 316 Mich 644, 648–49 (1947), the Court held that the title–object clause, currently found in article 4, § 24, applies equally to initiated laws and laws introduced by the Legislature.[21] The constitutional limitations of article 4 apply to initiated laws as well as to laws introduced and enacted by the Legislature, and that laws enacted through different constitutional processes "enjoy equal dignity." *In re Proposals D & H*, 417 Mich at 421. Because it is also the case that no part of article 2, § 9 or article 4 prohibits the Legislature from

[21] The title–object clause states, "No law shall embrace more than one object, which shall be expressed in its title." Const 1963, art 4, §24.

amending a legislatively introduced law during the session that it was enacted, initiated laws may also be amended during the same session.

D. Attorney General Schuette's superseding opinion on these exact issues is persuasive.

The lower court erred in its reliance on Attorney General Kelley's 1964 conclusory opinion on article 2, § 9 over Attorney General Schuette's 2018 opinion, which thoroughly analyzed this exact issue. July 19, 2022 Order at 15. While not binding on this Court, Attorney General opinions are generally of "persuasive value." *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 83 n 6; 858 NW2d 751 (2014). In the absence of judicial guidance, the Legislature should be able to rely on the Opinion of the State's constitutional legal officer—which it did here. In addressing the exact issues here, AG Schuette's opinion concludes that article 2, § 9 permits the Legislature to enact a law proposed by the people through the initiative process and subsequently amend that law during the same session. See OAG, 2017-2018, No. 7306 (December 3, 2018). The lower court determined that AG Kelley's opinion concluding the opposite was more persuasive because it had "stood for approximately 55 years." July 19, 2022 Order at 22. The Coalition is unaware of any authority supporting the supposed logic that the vintage of an opinion alone, absent any additional support, is sufficient grounds to find its reasoning more persuasive. AG Schuette's opinion examines relevant caselaw—much of which was determined subsequent to AG Kelley's opinion—and supports its reasoning with cogent constitutional analysis. In contrast, AG Kelley's opinion provides *no* legal analysis to support its conclusions. Summary rejection of AG Schuette's opinion, which is supported by case law and the plain language of the constitution, in favor of an earlier opinion given credence solely because of its age, is not supportable.

III. Plaintiffs' and the Attorney General's application of judicial precedent in this case is not consistent with its past application nor the parties' own arguments.

Both Plaintiffs' and the Attorney General (collectively, "Plaintiffs") argue that the will of the "People" was unconstitutionally violated by the Legislature's actions regarding Public Acts 368 and 369. (AG's Brief at 1; Plaintiffs' Brief at 1.) However, the Legislature equally represents the will of the People—its constituents. *Taylor*, 495 Mich at 931, MARKMAN, J. concurring ("The Legislature represents the whole of the people in the broadest possible manner, and the laws that it produces must pass muster by the support of at least a majority of legislators, representing constituencies that are urban, rural, and suburban; constituencies of every socioeconomic, racial, and ethnic composition; constituencies in which different businesses, interests, and political and partisan philosophies are reflected and balanced[.]"). This case deals with two pieces of legislation that stand on an "equal footing." See *Frey*, 162 Mich App at 600. IWOWA and ESTA had their genesis as petition initiatives. Acts 368 and 369 were passed under the traditional bi-cameral legislative process with the Governor's approval. The Court should reject attempts to cloak a particular piece of legislation that *has not been voted on by the electorate* with a presumption that it is the "true" will of the People. This case is not about ascertaining which set of acts is *more* representative of the will of the People, it is about the constitutional restrictions on the Legislature's procedures for passing and amending legislation.

A. While all parties argue that the "common understanding" of article 2, § 9 should control here, only the State applies this doctrine to the actual text of the constitutional provision.

All of the parties in this case identify the common understanding doctrine as the controlling rule in this case. Plaintiffs, however, expand the common understanding to include words and prohibitions *not* included in the actual text of article 2, § 9. (AG's Brief at 8; Plaintiffs' Brief at 6.) This interpretation transforms the rule of common understanding into a generalized conception

of the commonly understood spirit of a constitutional provision—an unworkable standard to apply. Plaintiffs extensively quote the rule of common understanding, yet—at the same time—Plaintiffs urge that a technical review of the language should not be applied because the People would not undertake such an analysis. (AG's Brief at 9-10.) This reverses how this Court should apply judicial precedent in this case. The Court should look first to the actual text of article 2, § 9 and then apply the common understanding of those words when performing its interpretation. *People v Tanner*, 496 Mich 199, 223; 853 NW2d 653 (2014) (When interpreting the Michigan Constitution, the objective "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification."). See also *Kuhn v Dep't of Treasury*, 384 Mich 378, 384; 183 NW2d 796 (1971).

The Attorney General argues that the text of article 2, § 9 is ambiguous and certain interpretive tools are needed to ascertain the intent of the provisions. (AG's Brief at 10.) After applying these tools of interpretation, the Attorney General's analysis still relies on implications and best-guesses. The Attorney General argues that the language of article 2, § 9 "*strongly signals*" that an initiated law cannot be amended in the same legislative session, that the language "*signals* that adopt-and amend is prohibited," and that the People "*essentially* already said" that amendments to initiatives and referendums should be treated the same. (AG's Brief at 11, 14, and 22.)[22] Constitutional analysis must be rooted in what the text of the constitution actually says, not what Plaintiffs' desire it to say. *Tanner*, 496 Mich at 220. The Court need not engage in these

[22] Indeed, the Attorney General rejects an overly-technical examination of the text of article 2, § 9 but then proceeds to parse the language of the provision such as the words "such" and "it" to reach her conclusion that amendment of legislation adopted by the legislature but initiated by the public is impermissible. (AG's Brief at 12-13.) This argument is inconsistent. Either the Attorney General urges that the "spirit" of article 2, § 9 prevails over its actual text or that the actual text supports her position—both cannot be true.

strained interpretations if it—as the Coalition urges—looks at the unambiguous text of article 2, § 9.

Plaintiffs argue that because article 2, § 9 is self-executing, the plenary powers of the Legislature are guarded against by the courts. (Plaintiffs' Brief at 14-15.) Plaintiffs cite to *Wolverine Golf Club v Secretary of State*, 24 Mich App 711; 180 NW2d 820 (1970) in support of this proposition. This case, however, does not provide an apt foundation for Plaintiff's assertion. In *Wolverine Golf Club*, the Court examined the *substance* of an act of the Legislature and its restraints on a constitutional right—where the Legislature's amendments to the Michigan Election Law conflicted with the timelines set in article 2, § 9. *Id* at 734-736. There is no argument here that the minimum wage or employee benefits fall outside of the Legislature's policymaking authority. Here, rather, Plaintiffs assert that the Legislature's *procedures* have the effect of curtailing a constitutional right. This is not supported by the facts. The petition advocates were in no way restrained from collecting signatures, use of the secretary of state's approval process, or transmitting the initiatives to the legislature. Plaintiffs take issue with the way the Legislature exercised its own power—the remedy for which is entirely political.

The language of article 2, § 9 provides a finite number of limitations on the powers of the Legislature. While Plaintiffs' argue that the powers of the People under article 2, § 9 are independent of article 4, this Court has already determined that is not the case. *Frey*, 162 Mich App at 598-601 (rejecting that article 4 is "in no way applicable to article 2"). As enacted by the Legislature, IWOWA and ESTA are treated like any other piece of legislation, free to be amended by the Legislature through the ordinary bicameral and presentment procedures. Plaintiffs cannot point to any express provisions of article 2, § 9 that prohibit the Legislature from taking the actions

it took. There is unambiguously no prohibition against the Legislature amending a duly enacted piece of legislation—regardless of its origins.

B. Plaintiffs rely on hyperbole and hypotheticals to advance their argument, which is inconsistent with the facts of this case.

Plaintiffs rely significantly on slippery slope arguments that this will be "the end of the people's century-old constitutional right of statutory initiative in Michigan[.]" (Plaintiff's Brief at 1.) Subsequent successful initiatives prove this hypothesis wrong.[23] Additionally, this Court should not address the entire universe of hypothetical circumstances raised by Plaintiffs. "[C]onstitutional issues affecting legislation will not be determined in broader terms than are required by the precise facts to which the ruling is to be applied." *People v Mell*, 227 Mich App 508, 510; 576 NW2d 428 (1998), rev'd on other grounds 459 Mich 881; 586 NW2d 745 (1998), citing *Rescue Army v Muni Ct of Los Angeles*, 331 US 549, 569; 67 SCt 1409 (1947).

When arguing that the Legislature created a "fourth" option in article 2, § 9, Attorney General inadvertently misattributes the conclusion of the Court of Claims to the Court of Appeals. (AG's Brief at 15.) The Attorney General states that the Court of [Claims] held that "reading a fourth option into the initiative process would essentially nullify the provision allowing the people to vote on (and potentially adopt) a rejected initiative." (*Id.*) There is no "fourth" option, there is simply the ability of the Legislature to undertake all acts that it is not prohibited from taking. The ability to amend legislation proposed by the People and adopted by the legislature is one of those actions—and the only action that is factually at issue here.

[23] See 2021 PA 77.

C. The Attorney General's reliance on former Attorney General Kelley's 1963 opinion is misplaced.

Plaintiffs erroneously conclude that the opinion of former Attorney General Kelley is entitled to more weight than the more recent opinion of former Attorney General Schuette because it "was issued shortly after the ratification of the 1963 Constitution and was a contemporaneous construction of the new constitution." (Plaintiffs' Brief at 29; AG's Brief at 23.) Vintage, however, should not trump sound legal reasoning. The opinion of former Attorney General Kelley relies only on his perceived "spirit" of article 2, § 9. Otherwise, his conclusion that the Legislative session must conclude before amendment is unsupported. What former Attorney General Schuette lacked in contemporaneousness to the passing of the Michigan Constitution, is made up for by the decades of court precedent with binding interpretations of article 2, § 9. Attorney General Schuette had the benefit of being able to review these interpretations and the court's past binding precedent formed the basis of his opinion. Since all courts are bound by the rule of common understanding, to discount Attorney General Schuette's opinion because of its recency discards the fact that each opinion he examined and applied the same constitutional standards that this Court is asked to apply. Plaintiffs do not appear to take issue with Attorney General Schuette's logic, merely the outcome of that logic.

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The People are not powerless to the Legislature's authority to adopt-and-amend initiative laws. The lower court wrongly stated that "a simple majority" can prevent an initiative from ever becoming law, when the Governor has the veto power over an amendment to an initiative law. Const 1963, art 4, § 33; see also *United Ins Co v Attorney Gen*, 300 Mich 200, 205; 1 NW2d 510 (1942) ("By virtue of [their] veto power, the governor is part of the law-making power."). And, as thoroughly discussed, the People have the power of referendum against unfavorable legislation

under article 2, § 9. A referendum, unlike a legislatively enacted initiative law, holds more textual safeguards under article 2, § 9. Lastly, Michigan voters are able to exercise their political power to vote out their state legislators and the governor that enacted and signed into law any unfavorable legislation. See, e.g., *Phillips v Snyder*, 836 F3d 707, 721 (CA6 2016).

CONCLUSION AND RELIEF REQUESTED

The Coalition supports the State's request to reverse the decision of the Court of Claims and affirm the constitutionality of Public Acts 368 and 369 and further supports a published decision on or before February 1, 2023.

Dated: September 28, 2022

Respectfully submitted,

/s/ Gary P. Gordon

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CERTIFICATE OF COMPLIANCE

I certify that this **Amicus Brief** complies with the type-volume limitation set forth in MCR 7.212(B). This brief uses a 12-point proportional font (Times New Roman), has one and a half line spaced text, and the word count is 7,368 based on the word count of the word-processing system used to produce this document.

Dated: September 28, 2022

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UNPUBLISHED OPINION

Court of Appeals, State of Michigan

ORDER

Michigan Opportunity v Board of State Canvassers

Docket No. 344619

LC No.

Stephen L. Borrello
Presiding Judge

Jane M. Beckering

Michael J. Riordan
Judges

The Court orders that Michigan One Fair Wage's cross-complaint for mandamus is GRANTED, and Michigan Opportunity's complaint for mandamus is DISMISSED. The Court has concluded that the constitutional challenge presented by Michigan Opportunity is ripe for review. See *Citizens Protecting Michigan's Constitution v Sec'y of State*, ___ Mich App ___; ___ NW2d ___; slip op p 13 (Docket No. 343517, June 7, 2018). The Court has further concluded that the proposal sponsored by Michigan One Fair Wage does not violate the requirements of Const 1963, art 4, § 25. See *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 477; 208 NW2d 469 (1973), citing *People ex rel Drake v Mahaney*, 13 Mich 481 (1865). In addition, the Court has concluded that the challenges to the form of the petition do not preclude certification of the petition.

The Court orders the Michigan Secretary of State, the Board of State Canvassers, and the Director of Elections to take all necessary measures to place the proposal on the November 2018 general election ballot. This order is given immediate effect pursuant to MCR 7.215(F)(2).

RIORDAN, J., I respectfully dissent. I would have dismissed Michigan One Fair Wage's (MOFW) cross-complaint for mandamus because the petition signers that checked both the "Township" and "City" boxes were not protected by the safe-harbor provision of MCL 168.552a(1). That statute provides that, "a petition or a signature is not invalid solely because the designation of city or township has not been made on the petition form if a city and an adjoining township have the same name." MCL 168.552a(1). The majority surreptitiously concludes that when both boxes are checked "the designation of city or township has not been made." *Id.* However, if the statutory "language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Charter Twp of York v Miller*, 322 Mich App 648, 659; 915 NW2d 373 (2018) (quotation marks omitted). By checking both boxes, a "designation" has been made, but it is merely the wrong designation. The safe-harbor provision does not protect such errors, and extending it to do so is tantamount to adding language to the statute that the Legislature saw fit to leave out. MCL 168.552a(1). I would refuse to do so because "nothing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself." *Detroit Pub Sch v Conn*, 308 Mich App

234, 248; 863 NW2d 373 (2014). If the Legislature wanted MCL 168.552a(1) to protect signatures that marked both boxes, it would have included that language in the statute. Its decision not to is determinative. Therefore, by failing to properly identify the city or township in which they were registered to vote, the signatures of those individuals who checked both boxes were presumably invalid. MCL 168.552(13). The parties do not dispute that, absent those presumably invalid signatures, the proposal does not have sufficient signatures to be qualified for the ballot.

Thus, because the proposal did not satisfy the signature requirement to be placed on the ballot, mandamus is not required, and I would dismiss the cross-complaint seeking such. Given that conclusion, I would not consider the constitutional issues presented by the parties because "we generally avoid constitutional decisions if nonconstitutional grounds can resolve a case . . . ." *People v Smith (After Remand)*, ___ Mich ___, ___; ___ NW2d ___ (2018) (Docket No. 156353), slip op at 6. That being said, I believe the issue of whether the proposal violated Const 1963, art 4, § 25, warrants a more thorough review than that provided by the majority. For example, certain case law suggests the proposal at issue amounts to an attempt by MOFW to indirectly revise, alter, or amend the existing minimum wage statute in Michigan, which requires application of Const 1963, art 4, § 25. See *Alan v Wayne Co*, 388 Mich 210, 285; 200 NW2d 628 (1972). Additionally, there was evidence presented to suggest that the proposal arose from the intent to abrogate an existing, specific, statutory provision, which required compliance with the constitutional provision at issue. See *Nalbandian v Progressive Mich Ins Co*, 267 Mich App 7, 14-16; 703 NW2d 474 (2005). Consequently, I dissent.