STATE OF MICHIGAN

COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendants.
_____/

OPINION AND ORDER

Case No. 21-000095-MM

Hon. Douglas B. Shapiro

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan.

The question before the Court is whether the adopt-and-amend strategy that the Legislature employed to enact and, in the same legislative session, substantially amend two voter-initiated laws violated Article 2, § 9 of Michigan's 1963 Constitution (the Michigan Constitution). The parties have each moved for summary disposition. The Court heard the motions on June 27, 2022. For the reasons discussed herein, the Court concludes that the adopt-and-amend strategy the Legislature used to enact 2018 PA 368 and 2018 PA 369 was unconstitutional. Article 2, § 9 grants the Legislature three options to address a law proposed through the initiative process—enact the law, reject the law, or propose an alternative. Article 2, § 9 does not permit the Legislature to adopt a proposed law and, in the same legislative session, substantially amend or repeal it. Were

the Court to adopt the state's argument, it would mean that anytime a simple majority of the Legislature opposed the content of an initiative, it could, by legislative sleight-of-hand, prevent the initiative from ever becoming law without ever allowing the People to vote on it. This would plainly violate Article 2, § 9 of our Constitution, which reserves such power to the People. While the Legislature has the power to pass, amend, and repeal statutes, that power does not authorize it to do so in a manner that destroys the People's right to initiative defined in the Constitution. The Court therefore GRANTS plaintiffs' and the Attorney General's motions for summary disposition, and DENIES defendant state of Michigan's motion for summary disposition.

I. BACKGROUND

The Court notes that the relevant factual background is not in dispute. Justice CLEMENT detailed the factual background in her concurring opinion in *In re House of Representatives Request for Advisory Opinion regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884, 884-885; 936 NW2d 241 (2019) (CLEMENT, J., concurring), as follows:

> The Michigan Constitution allows Michigan voters to exercise various forms of direct democracy, one of which is to initiate legislation via petitions signed by a requisite number of voters. See Const. 1963, art. 2, § 9. Groups known as "Michigan One Fair Wage" and "MI Time to Care" sponsored, respectively, proposals known as the "Improved Workforce Opportunity Wage Act" and the "Earned Sick Time Act." Pursuant to MCL 168.473, they filed those petitions with the Secretary of State in the summer of 2018. The Secretary of State then notified the Board of State Canvassers, MCL 168.475(1), which canvassed the petitions to determine whether an adequate number of signatures was submitted, MCL 168.476(1). The Board ultimately certified both petitions as sufficient, MCL 168.477(1), and, pursuant to Const. 1963, art. 2, § 9, the proposals were submitted to the Legislature. This constitutional provision required that the proposals were to "be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition [was] received by the legislature," with enactment not "subject to the veto power of the governor." The Legislature ultimately adopted both "without change or amendment" on September 5, 2018. 2018 PAs 337 and 338. Enacting them meant that they were not "submit[ted] . . . to the people for approval or rejection at the next general election." Const. 1963, art. 2, § 9. Had they been submitted to the people and adopted, they

would only have been amendable with a three-fourths majority in the Legislature. *Id*.

> After the 2018 elections, the Legislature turned its attention to these policy areas once again. Although Attorney General Frank Kelley had, several decades ago, opined that "the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session," . . . a member of the Michigan Senate asked for an opinion on that issue and Attorney General Bill Schuette issued a new opinion which superseded the prior opinion and concluded that the Legislature could enact amendments to an initiated law during the same session at which the initiated law was itself enacted. . . . The Legislature thereafter did adopt certain amendments to these proposals with a simple majority, which—as ordinary legislation—the Governor signed into law. See 2018 PA 368 and 369. Because neither law contained a more specific effective date, both took effect on the 91st day after the 99th Legislature adjourned *sine die*. . . . The Legislature adjourned on December 28, 2018 . . . so the effective date of 2018 PA 368 and 369 was March 29, 2019. [Citations omitted; alteration in original).]

Following the enactment of 2018 PA 368 and 2018 PA 369, the Michigan Supreme Court denied the Michigan House of Representatives' and the Michigan Senate's request for an advisory opinion regarding the constitutionality of the two statutes. *Id*. (order of the Court). Plaintiffs then sued in this Court. Because the Attorney General is aligned with plaintiff on the substantive issues, the Court ordered plaintiffs to amend their complaint to add the state of Michigan (the State) as a party defendant and to indicate that the Attorney General is named as a representative of the State, only. The Department of Attorney General created a conflict wall allowing the Department to argue both sides of the substantive issue. Plaintiffs amended their complaint in accordance with this Court's order. The Court also permitted the House of Representatives and Senate to submit an amicus curiae brief.

The parties have filed cross-motions for summary disposition under MCR 2.116(C)(10), requesting that this Court determine whether the Legislature enacted 2018 PA 368 and 2018 PA 369 in accordance with Article 2, § 9 of the Michigan Constitution. In short, plaintiffs and the Attorney General argue that the common meaning of Article 2, § 9 contains no carve-out for the

adopt-and-amend tactic, and the Legislature's only options for responding to a voter-initiated proposed law are those specifically provided for in Article 2 § 9, i.e., to (1) adopt the law, (2) reject the law, or (3) propose an alternative law to be placed on the ballot at the next general election. They also argue that the history and spirit of the Michigan Constitution, as well as the caselaw analyzing Article 2, § 9, support the common understanding. Plaintiffs and the Attorney General do not dispute that, once the Legislature enacted the Earned Sick Time Act and the Improved Workforce Opportunity Wage Act, the Legislature was free to amend the laws in a subsequent legislative session.

For its part, the State argues that because Article 2, § 9 does not expressly *forbid* the Legislature from adopting and amending a voter-initiated law in the same legislative session, the Legislature was able to do so under its powers outlined in Article 4 of the Michigan Constitution, which governs and outlines the powers of the Legislature. Const 1963, art 4, § 1. In other words, the State's view is that the Legislature has a plenary power to enact and amend laws under Article 4, which is uninhibited unless the Michigan Constitution expressly enjoins it. Without an express mandate to the contrary, the Legislature was free to adopt the voter-initiated laws and then substantially amend them in the same legislative session.

The Court heard oral argument on the motions on June 27, 2022, and took the matter under advisement.

II. ANALYSIS

A. SUMMARY DISPOSITION STANDARD

The parties request summary disposition under MCR 2.116(C)(10). Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue of material fact. *El-Khalil*

v Oakwood Healthcare, Inc, 504 Mich 152, 160; 934 NW2d 665 (2019). " 'A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.' " *Id*. (citation omitted). As noted above, the parties do not dispute the facts of this case, and the case centers on whether 2018 PA 368 & 369 are constitutional. A party challenging the constitutionality of a statute has the burden to establish that there are no factual circumstances under which the act may be valid, meaning that the Court will analyze whether the statutes are unconstitutional in the abstract, rather than as applied to a specific case. *League of Women Voters of Mich v Sec'y of State*, 508 Mich 520; ___ NW2d ___ (2022) (Docket Nos. 163711, 163712, 163744, 163745, 163747, and 163748); slip op at 8 (*League of Women Voters III*).

B. ANALYSIS OF ARTICLE 2, § 9

By way of background, "the Michigan Constitution reserves to the People the ability to approve legislation that the Legislature has already adopted (the referendum), and to propose laws to the Legislature and enact them if the Legislature refuses (the initiative)." *League of Women Voters III*, ___ Mich ___; slip op at 10. Article 2, § 9 of the Michigan Constitution governs initiatives and referendums. The Article provides, in full:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
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> No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

> Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.
>
> If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.
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> 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.
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> The legislature shall implement the provisions of this section. [Const 1963, art 2, § 9.]

1. LEGAL BACKGROUND

To interpret Article 2, § 9, the Court first looks to the rules of constitutional analysis and notes that the rules differ from those of statutory interpretation. *Birchwood Manor, Inc v Comm'r of Revenue*, 261 Mich App 248, 257; 680 NW2d 504 (2004). In the constitutional-interpretation context, the starting point is the common meaning (or understanding) of the constitutional language. See *O'Connell v Dir of Elections*, 317 Mich App 82, 88; 894 NW2d 113 (2016); *Birchwood Manor*, 261 Mich App at 254. In other words, "[t]he primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004); see

also *League of Women Voters of Mich v Sec'y of State*, 333 Mich App 1, 14; 959 NW2d 1 (2020) (*League of Women Voters I*) (the Court will look at the common understanding, or the meaning that a "great mass of people themselves" would give the provision). Thus, the "primary goal in construing a constitutional provision—in marked contrast to a statute or other texts—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." *Mich United Conservation Clubs v Sec'y of State*, 464 Mich 359, 373; 630 NW2d 297 (2001) (YOUNG, J., concurring) (quotation marks omitted). This differs from the method of statutory interpretation, which is to determine the intent of the Legislature that passed the law, and absent an ambiguity, the plain and ordinary meaning of the language will control *Birchwood Manor*, 261 Mich App at 257. As Justice Cooley once described in his seminal treatise on constitutional analysis:

> 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 was the sense designed to be conveyed.* [*Id*. at 254, quoting 1 Cooley, Constitutional Limitations (6th ed), p 81 (citation omitted; emphasis added).]

The Court's analysis, therefore, begins with the common meaning of the constitutional provisions as the ratifiers, i.e. the People, understood them. *Mich United Conservation Clubs*, 464 Mich at 373 (YOUNG, J., concurring). The Court's task is not to "impose on the constitutional text at issue . . . the meaning we as 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." *Id*. at 375. The "common meaning" or "common understanding" is determined " 'by applying each term's plain meaning at the time of ratification.' " *Oshtemo*

Charter Twp v Kalamazoo Co, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 355634); slip op at 2 (citation omitted). The Court may also consider the circumstances of the provision and the purpose of the provision. *Id*. Additionally, "[e]very constitutional provision must be interpreted in the light of the document as a whole, and *no provision should be construed to nullify or impair another*." *League of Women Voters I*, 333 Mich App at 14 (citation and quotation marks omitted) (emphasis added).

Next, the Court will consider " 'the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished.' " *Id*. (citation omitted). For example, the Address to the People—which is distributed to citizens in advance of the ratification vote—as well as the constitutional convention debates, are also relevant to understanding the intent of the ratifiers. *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 323-324; 870 NW2d 275 (2015). In addition, the Court "liberally construes constitutional initiative and referendum provisions, through which the people reserve to themselves a direct legislative voice, to achieve their purposes." *League of Women Voters v Sec'y of State*, ___ Mich App ___; ___ NW 2d ___ (2021) (Docket Nos. 357984 and 357986); slip op at 9 (*League of Women Voters II*), aff'd 508 Mich 520 (2022).

2. COMMON MEANING OF ARTICLE 2, § 9

The Court turns first to the common meaning of the language of Article 2, § 9, as the People would have understood it. Article 2, § 9 explicitly and affirmatively outlines the three options that are available to the Legislature during the 40 days following its receipt of the initiative petition after certification by the State. First, it can do nothing thereby rejecting the proposed law, in which case it must await the voters' decision at the ballot box whether to approve the measure. Second, the Legislature may propose a different law on the same subject in which case both measures, the

initiative and the legislative alternative will appear on the ballot and if both pass, the one garnering the most votes will prevail and become law. The Legislature's third alternative defined in art 2, § 9 is to enact the law proposed in the initiative *without change*. See Const 1963, art 2, § 9. Article 2, § 9 does not provide the Legislature with any other options during (or after) the 40-day period, including the option to significantly amend the proposed law after adopting it.

Moreover, the fact that the People gave the Legislature the option to propose an alternative belies the State's argument that the Legislature may substantially amend the voter-initiated law once enacted. The common meaning of the provision lends itself to the opposite conclusion. For example, the same paragraph provides, "If any law proposed by such petition shall be enacted by the legislature *it* shall be subject to referendum, as hereinafter provided." *Id.* The use of the words "such" and "it" indicates that the People intended that the *exact law* will be subject to the referendum. Thus, the provision makes clear that the initiated law cannot be subject to amendment until *after* the referendum period has run.

Then, if the proposed law is approved through the general-election process, the law takes effect 10 days after the official-vote declaration. And once passed by the voters, the initiated law can only be repealed by another election vote or by a supermajority vote of ¾ of the Legislature. *Id*. This provision once again indicates that the Legislature cannot significantly amend a voter-initiated law in the same legislative session. Otherwise, the adopt-and-amend procedure would render the purpose of the supermajority requirement meaningless. As is demonstrated in this case, all a Legislature that opposes the initiative need do is adopt the initiative and then amend or repeal it by simple majority. The State argues that the fact that the amendment must be passed by a ¾ vote supports its position because the Constitution has no similar requirement for legislatively-enacted laws. But the fact that the People contemplated that a law enacted through popular vote

could only be amended or repealed by a supermajority in both Houses only confirms that the People desired strong safeguards against legislative interference with the People's constitutional right of initiative.

Finally, Article 2, § 9 goes on to state that "[l]aws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof." *Id*. The State contends that because this statement only applies to referendums, the paragraph supports the State's interpretation that the Legislature may amend a voter-initiated law within the same legislative session. But the State's interpretation fails to consider that the People never granted the Legislature the option to amend a voter-initiated law in the first instance. So there was no need for the People to specify, yet again, that the Legislature lacked that power.

The State relies on the fact that Article 2, § 9 does not expressly prohibit the Legislature from adopting and amending a voter-initiated law within the same legislative session. But this "fourth option" does not appear in the language of Article 2, § 9. The State's overarching position is that the Legislature has a plenary power that allows it to amend or appeal a law when the constitution does not expressly limit this power. The State invokes Article 4 to argue that the Legislature can do " 'anything which it is not prohibited from doing.' " But Article 2, § 9 *does* prohibit the Legislature from taking action beyond what is outlined in the constitutional provision. In essence, the State attempts to treat the Legislature's power regarding initiatives as if it stemmed from their powers defined in Article 4. It does not. Article 2, § 9 affirms that the initiative power arises from the People—not the Legislature. The People granted 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. The Legislature chose none of these three options. And, as noted, 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.[1] The Court will not look for meanings between the lines to determine the common meaning of a constitutional provision or grant the Legislature an implied power which so clearly and unambiguously nullifies a power explicitly granted to the People.

For these reasons, the language of Article 2, § 9, as it would have been understood by a great mass of people, supports that the Legislature only has three options in response to an initiative petition—adopt the initiative presented before it, reject the petition, or propose an alternative law. Article 2, § 9 does not permit the adopt-and-amend tactic.

3. SPIRIT AND HISTORY OF ARTICLE 2, § 9

The history and spirit of Michigan's Constitutions align with the common meaning. Article 1, § 1 of Michigan's Constitution sets the precedent for the rest of the Constitution: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. The inherent power of the people to govern themselves stems back to Michigan's origins and its 1835 Constitution. See Const 1835, art I, § 1 ("First. All political power is inherent in the people."). Similarly, the Preamble invokes the power of the people and provides, "We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish this constitution." Const 1963, Preamble. The starting point for any constitutional analysis, therefore, is the will of the People.

[1] Article 4, § 13 of the Michigan Constitution provides that the Legislature operates on an annual, regular-session basis, which further supports that the Legislature cannot amend the voter-initiated law within the same legislative session.

The earliest iterations of the Michigan Constitution (the 1835 Constitution and the 1850 Constitution) did not contain a statutory-initiative procedure. See generally Const 1835 and Const 1850. The idea of the initiative first appeared in Michigan's 1908 constitution. *League of Women Voters III*, ___ Mich ___; slip op at 11. Initially, the 1908 Constitution provided for an initiative arising from the Legislature—not from a citizen petition. Const 1908, art 5, § 38 (as ratified) ("Any bill passed by the legislature and approved by the governor, except appropriation bills, may be referred by the legislature to the qualified electors; and no bill so referred shall become a law unless approved by a majority of the electors voting thereon."); see also *League of Women Voters III*, slip op at 11 (explaining the evolution of the initiative petition).

The Michigan Constitution was amended in 1913 during a period of "mistrust" of the government. *League of Women Voters III*, slip op at 11-12. The 1913 amendment added significant additional details "clawing back" the right of the People to initiate and approve legislation. *Id*. at 11.

> The initiative found its birth in the fact that political parties repeatedly made promises to the electorate both in and out of their platforms to favor and pass certain legislation for which there was a popular demand. As soon as election was over their promises were forgotten, and no effort was made to redeem them. These promises were made so often and then forgotten that the electorate at last through sheer desperation took matters into its own hands and constructed a constitutional procedure by which it could effect changes in the Constitution and bring about desired legislation without the aid of the legislature. [*Id*., quoting *Hamilton v Deland*, 227 Mich 111, 130; 198 NW 843 (1924) (BIRD, J., dissenting)].

Then, during the 1963 Constitutional Convention, the initiative language was "substantially slimmed down" to remove technical language. *League of Women Voters III*, ___ Mich ___; slip op at 12. The corresponding Constitutional Convention Record does not indicate any intent to permit the Legislature to adopt, and then substantially amend, the initiative petition within the same legislative session. To the contrary, the constitutional history suggests that the

Delegates envisioned only three options for the Legislature—adopt in full, reject, or propose an alternative.

For example, in the context of discussing a proposed amendment lowering the percentage of registered electors, Delegate Downs stated, "I think by making it half as difficult to initiate legislation, we will then encourage that process, rather than the constitutional amendment process. And it does then give the legislature a chance to review what was done; *either adopt it, do nothing, or provide an alternative* in case the legislature, after hearings, can work out a better proposal." 2 Constitutional Convention Record, 1961-1962, p 2394 (emphasis added). Delegate Kuhn added, "[B]ut what are the rights of the legislature after the people start this petition and have the 10 per cent [sic] of the people who voted for governor? They must accept it within 40 days, and accept it in toto, or they must place it on the ballot." *Id*. This colloquy further supports that the common understanding of the initiative process was that the Legislature's options were either to adopt or reject the proposed law, or propose an alternative law for the voters to decide.

The State relies on Delegate Kuhn's later remark that "[i]f the Legislature sees fit to adopt the petition of the initiative as being sent out, if the legislature in their wisdom feel it looks like it is going to be good, and they adopt it in toto, then they have full control. They can amend it and do anything they see fit." *Id*. at 2395. But Delegate Kuhn did not explain the time frame for when the Legislature can begin the amendment process. [2] As outlined earlier, Delegate Kuhn signaled his understanding that the Legislature could *not* amend within the same legislative session. Even

[2] Delegate Kuhn also expressed his distaste for the initiative process: "It's tough. We want to make it tough. It should not be easy. The people should not be writing the laws. That's what we have a senate and a house of representatives for. But they should have the power, which they do not have in our federal government, but they do have it in this matter . . . ." *Id*. at 2394.

if Delegate Kuhn's understanding was in line with the State's position, Delegate Kuhn's sole opinion does not override the common understanding of the People.

In the Address to the People, the Convention explained Article 2, § 9 as follows:

> This is a revision of Sec 1, Article V, of the present constitution eliminating much language of a purely statutory character. The new *wording specifically reserves the initiative and referendum powers to the people*, limits them as noted, and requires signatures equal to at least eight per cent of the electors last voting for governor for initiative petitions and at least five per cent for referendum petitions.
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> *In the section is language which provides that the legislature must act upon initiative proposals within 40 session days, but may propose counter measures to the people.*
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> No laws initiated or adopted by the people can be vetoed; and *no law initiated and adopted by them can be amended or repealed except by a vote of the people . . . or by three fourths of the members in each house of the legislature. . . .*
>
> Matters of legislative detail contained in the present section of the constitution are left to the legislature. The language makes it clear, however, *that this section is self-executing and the legislature cannot thwart the popular will by refusing to act*. [*What the Proposed New State Constitution Means to You: A Report to the People of Michigan by Their Elected Delegates to the Constitutional Convention of 1961-1962 (Address to the People)*, August 1, 1962, p 21 (emphasis added).][3]

The Address of the People therefore reflects an ongoing attempt by the drafters to prevent the Legislature from "thwarting" the popular will, as expressed in the initiative. Furthermore, the adopt-and-amend strategy does not appear in the constitutional history, or in the Address to the People. Nor has it ever been asserted before in the 60 years since the 1963 constitution was ratified.

[3] In another section, the Convention explained that the remaining language in Article 5 of the previous Constitution was transferred to Article 2 (Elections) because "it relates to the initiative and referendum." 2 Official Record, p 3369.

The initiative process has only been invoked a handful of times throughout its history, including in 2018. See Michigan Legislature, *Voter Initiatives* <http://www.legislature.mi.gov/(S(idwphh5op24v3uahhgm3pqtu))/mileg.aspx?page=initiative.> (accessed July 12, 2022). And, as the parties appear to agree, the Legislature has never previously attempted to amend a voter-initiated law within the same legislative session after adopting the law. See *id*.

In 1963 (shortly after ratification), Attorney General Frank Kelley was asked to opine on certain questions relating to Article 2, § 9, in the context of an initiative petition regarding a mandatory tenure law. OAG 1963, No. 4303, pp 309-312 (March 6, 1964). Attorney General Kelley opined that the Legislature could *not* adopt and then amend an initiative petition within the same legislative session without violating both the body and spirit of the Michigan Constitution:

> The people have not imposed similar restrictions upon a law enacted by the legislature in response to initiative petitions filed with that body under Article II, Sec. 9. It must follow that the initiative petition enacted into law by the legislature in response to initiative petitions are subject to amendment by the legislature at a subsequent legislative session. *It is equally clear that the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session without violation of the spirit and letter of Article II, Sec. 9 of the Michigan Constitution of 1963*. [*Id*. at 311 (emphasis added).]

Attorney General Kelley's viewpoint was therefore in line with plaintiffs' and the Attorney General's position in this matter. His opinion is entitled to more weight than subsequent opinions because Attorney General Kelley issued his opinion shortly after the Michigan Constitution was ratified. See *In re Requests of Governor and Senate on Constitutionality of 1972 PA 294*, 389 Mich 441, 470; 208 NW2d 469 (1973) ("[T]hose cases decided at a time proximate to the ratification of the constitution are important in that they better reflect the meaning of the language

of the constitution at the time it was written."). Therefore, both the history and the spirit of Article 2, § 9 support the common meaning.

4. CASELAW REGARDING ARTICLE 2, § 9

Shortly after the Michigan Constitution was ratified, Article 2, § 9 became the subject of several court decisions. In *Mich Farm Bureau v Hare*, 379 Mich 387; 151 NW2d 797 (1967) (per curiam), the Michigan Supreme Court addressed a timing issue regarding the People's referendum power outlined in Article 2, § 9. The specific referendum petition related to a state statute that exempted Michigan from a recently-enacted federal law imposing uniform daylight savings time on all states. *Id*. at 392. The specific issue was whether the referendum power could be exercised within the 90-day period after the session adjourned, or could only be exercised before the adjournment of the legislative session. *Id*. at 392-393. The plaintiffs' concern was that the Legislature could adopt and repeal the relevant law in the spring and fall of every year, preventing citizens from ever submitting referendum petitions on the law. See *id*. at 392-393, 395.

In the context of analyzing whether a referendum petition complied with the Michigan Constitution, the Supreme Court explained that the referendum power was reserved to the People and should "be saved if possible as against conceivable if not likely evasion or parry by the legislature." *Id*. at 393. The Court explained that "no court should so construe a clause or section of a constitution as to impede or defeat its generally understood ends when another construction thereof, equally concordant with the words and sense of that clause or section, will guard and enforce those ends." *Id*. The State's interpretation would permit "outright legislative defeat, not just hindrance, of the people's reserved right" to referendum. *Id*. at 394. Thus, the Court rejected the "adopt-and-repeal" approach. *Id.* The Court then cautioned against an interpretation like the one the State advocates here:

> With such construction announced judicially, the legislature would stand free to avoid effective referral of this and future legislative exemptions. . . simply by repealing [the statute] next November, then by enacting another immediate effect act of exemption next spring and then by another repealer in the late fall, and so on through the years." [*Id*. at 395.]

The Court declined to adopt an interpretation that would "thwart" the constitutional process. *Id*. at 395. See also *Woodland v Mich Citizens Lobby*, 423 Mich 188, 215; 378 NW2d 337 (1985) ("Art. 2, § 9, is a reservation of legislative authority which serves as a limitation on the powers of the Legislature."). This Court concludes that *Farm Bureau* is entitled to additional weight because it was decided within a few years after the 1963 Constitution was ratified. See *Constitutionality of 1972 PA 294*, 389 Mich at 470.

The State relies on *In re Proposals D & H*, 417 Mich 409; 339 NW2d 848 (1983), in which the Supreme Court addressed a situation involving a legislatively-initiated law under Article 4, § 34 of the Michigan Constitution (providing that a bill may specify that it will not become law unless the majority of electors vote it into law). *Id*. at 418. *Proposals D & H* has a lengthy procedural history but, in short, the Court concluded that the People's power to file an initiative petition did not suspend the Legislature's authority under Article 4, § 34. *Id*. at 421. The Court acknowledged, however, that it was not addressing "whether the Legislature may act under art. 4, § 34 after it *receives* a certified initiative petition." *Id*. at 421 n 3. *Proposals D & H* is therefore distinguishable from this matter. Furthermore, to the extent that *D & H* is on point, *D & H* supports the Attorney General's and plaintiffs' position because the Court confirmed that the Legislature has yet another mechanism to propose a countermeasure to an initiative proposal—a proposed law under Article 4, § 34.

The State also relies, in large part, on *Frey v Dir of Dep't of Social Servs*, 162 Mich App 586; 413 NW2d 54 (1987), aff'd sub nom *Frey v Dep't of Mgt and Budget*, 429 Mich 315 (1987).

In *Frey*, the Court of Appeals addressed a proposal to initiate legislation preventing state-funded abortions for welfare recipients (unless necessary to save the mother's life). *Id*. at 588. The Legislature adopted the proposal. *Id*. at 589. The specific issue in *Frey* was whether the law should have immediate effect. *Id*. at 589-590. The plaintiffs relied on Const 1963, art 4, § 27 to argue that the amendment should *not* have immediate effect unless a supermajority of the Legislature voted for it. *Id*. at 590. The Court of Appeals, therefore, was *not* faced with the issue in this case whether the Legislature could amend an adopted voter-initiated law within the same legislative session.

The Court explored the language and history of Article 2, § 9, and ultimately concluded that Article 4, § 27 applied to the law. *Id*. at 595-596. The Court also suggested that certain provisions of Article 4 provided procedural safeguards in the context of Article 2, § 9, but the Court never held that the Legislature's authority was all-encompassing. *Id*. at 598-599 (explaining, among other things, that "[u]nless article 4, § 27 is incorporated into the initiative process, there is no guide as to when an initiative without immediate effect language, enacted by the Legislature, becomes effective"). Rather, the Court's ruling was limited to the process outlined in Article 4, § 27.

The Supreme Court affirmed, explaining that Article 4 of the Michigan Constitution outlined the procedure when the Legislature enacts a voter-initiated law. *Frey v Dep't of Mgt and Budget*, 429 Mich 315, 337-338; 414 NW2d 873 (1987). The Court reasoned that certain other rules outlined in Article 4 would apply to voter-initiated laws, such as the time of convening, quorums, and open meetings. *Id*. at 337. But the Court limited its holding: "We *only hold* that when an initiated law is enacted by the Legislature, it is subject to art. 4, § 27." *Id*. at 338 (emphasis added). The *Frey* decision was therefore limited to its facts and to the question whether art 4, § 27

applied to enacted laws arising from a legislatively-proposed initiative. The Court interprets *Frey* to stand for the position that the Legislature may employ certain procedures from Article 4 of the Michigan Constitution to implement laws adopted through the initiative process outlined in Article 2, § 9 (specifically art 4, § 27). But *Frey* does *not* signal that the Legislature has carte-blanche authority to adopt and then amend a voter-initiated law within the same legislative session.

Next, the Supreme Court decided *In re Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49; 340 NW2d 817 (1983). *Advisory Opinion 1982 PA 47* did not address any issues relating to Article 2, § 9. See *id*. Rather, the Court addressed a question relating to Article 9, § 15 of the Michigan Constitution, which pertained to long-term borrowing. *Id*. at 55. The State points to the language in the opinion that "[v]oter-approved acts are 'on an equal footing' with legislation that has not been submitted to the people." *Id*. at 66 (citation omitted). But the Court never addressed whether the Legislature can amend a voter-initiated law under Article 2, § 9.[4] And the Court was cautious to note, when concluding that certain provisions of a statute could not be amended without a vote of the People, that "[a]ny other construction of § 15 would permit the Legislature to do indirectly what it could not do directly without a vote of the people." *Id*. at 70. Plaintiffs do not challenge whether the law would have been on "equal footing" with a legislatively-enacted law, had the electors approved the law. So, like *Frey*, *Advisory Opinion 1982 PA 47* is distinguishable from this matter.

[4] The State quotes the opinion for the position that the Legislature can "make needed changes" to the voter-initiated law before the next election. *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich at 66-67. But the State does not argue that it was confronted with an emergency situation in this case, or even that the significant changes it made to the laws were "needed." Furthermore, the Court's discussion on this issue was mere dicta regarding how other states have addressed similar issues. See *id*.

The State points to *Reynolds v Bureau of State Lottery*, 240 Mich App 84; 610 NW2d 597 (2000). In *Reynolds*, the question was whether the Legislature had the power enact a law while a referendum regarding the same law was pending, but before the election deciding the referendum. *Id*. at 86. In short, the Court held that the Legislature had that power. *Id*. The statute at issue prohibited political candidate committees from hosting bingo games (and was known as the "Bingo Act"). *Id*. at 87. Referendum petitions were filed and while the certification and appeals process took place, the Legislature enacted a law that amended the Bingo Act. *Id*. at 89. The People then rejected the referendum during the general election. *Id*. at 90. The Court concluded that the Legislature retained its ordinary constitutional powers during the referendum process. *Id*. at 97. *Reynolds* is limited to the issue presented—whether the Legislature could amend a law while a voter referendum was pending.[5]

The State latches onto language in *Reynolds* suggesting that the Legislature could have responded to the popular will expressed in the referendum vote after the election by repealing the Bingo Act, either late in the same session or in the following session. *Id*. at 100. But the Court's statement was mere dictum because the Court's statement was not necessary to a resolution of the case. See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007) ("It is a well-settled rule that statements concerning a principle of law not essential to

[5] While the viability of the *Reynolds* decision is questionable given our Supreme Court's more recent jurisprudence, the Court notes that even in *Reynolds*, the Court was careful to note that: there was certainly no bad-faith attempt to subvert the referendum at issue. As noted, below, the legislators apparently did not understand the potential effect their passage of the later legislation might have on the referendum process . . ." By contrast, in this case, the State has offered little, if anything, in the way of a denial that the Legislature took its actions with the specific and intended purpose of circumventing the People's right to initiative.

determination of the case are obiter dictum and lack the force of an adjudication."). Furthermore, the instant matter involves voter-initiated laws—not the referendum process. *Reynolds* therefore holds no weight in this context.[6]

Most recently, our Supreme Court reaffirmed the role of the voter initiative in carrying out the will of the People. This year, the Supreme Court reiterated that Const 1963, art 2, § 9 is self-executing. *League of Women Voters III*, ___ Mich ___; slip op at 9. The Court explained:

> In sum, we have always understood the section on citizen-initiated constitutional amendments to be self-executing—meaning the Legislature is constrained from encroaching upon it just as the Legislature is constrained from encroaching upon the statutory initiative and referendum. "Of the right of qualified voters of the State to propose amendments to the Constitution by petition it may be said, generally, that it can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises." . . . We have confirmed that the alterations made in the 1963 Constitution did not change the self-executing character of this section. . . . While the 1963 Constitution did add a role for the Legislature to play, the constitutional text and convention debates point to a limited role for the Legislature, and we have said that "the principle that the Legislature may not unduly burden the self-executing constitutional procedure applies equally to both" initiated legislation and initiated constitutional amendments. [*League of Women Voters III*, ___ Mich ___; slip op at 21-22 (citations omitted).]

See also *Citizens Protecting Michigan's Constitution v Sec'y of State*, 503 Mich 42, 62-63; 921 NW2d 247 (2018) ("We have explained that the adoption of the initiative power, along with other

[6] The State also relies on an unpublished decision, *Keep Mich Wolves Protected v State Dep't of Natural Resources*, unpublished opinion per curiam of the Court of Appeals, issued November 22, 2016 (Docket No. 328604). But the *Wolves* decision involved the question whether a statute amending the National Resources Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, violated the Title-Object Clause of the Michigan Constitution. Const 1963, art 2, § 24. The Court also addressed an argument that the law violated article 4, § 25 of the Michigan Constitution because the petition did not properly identify certain changes it made to NREPA. *Id*. at 10. The Court did not analyze the language of Article 2, § 9 in any detail. Furthermore, unpublished Court of Appeals' opinions are not binding. MCR 7.215(C)(1).

tools of direct democracy, 'reflected the popular distrust of the Legislative branch of our state government.' ") (Citation omitted.) Thus, the *League of Women Voters III* Court concluded that the Legislature's role in the initiative process should be limited.

Lastly, the State buttresses its reliance on *Frey* with Attorney General Bill Schuette's opinion on this subject. Attorney General Kelley's 1964 opinion stood for approximately 55 years until then-Attorney General Schuette was asked to opine on the constitutionality of the Legislature's actions in this matter. OAG 2018, No. 7306, 1-4 (December 3, 2018).[7] Attorney General Schuette opined that the absence of any limiting language in Article 2, § 9 led to the conclusion that the Legislature could amend a voter-initiated law within the same legislative session. *Id*. at 2. He explained that "since nothing in the Michigan Constitution prohibits the Legislature from amending legislation it drafts during the same legislative session in which it was enacted, it follows that the Legislature may do so as well with respect to an enacted initiated law." *Id*. at 3. Attorney General Schuette relied, primarily, on the *Frey* decision. *Id*. at 3-4. But, as noted above, the *Frey* decision is limited to its facts, and interpreted a different constitutional provision. Finally, Attorney General Schuette issued his opinion in the context of this matter. The Legislature, in turn, has used Attorney General Schuette's opinion as justification for their conduct.

[7] In 1976, Attorney General Kelley concluded that the enaction of a voter-initiated proposed law did not require extraordinary majorities in either legislative chamber. OAG 1975-1097, Opinion No. 4932 (January 15, 1976), pp 240-241. The State points out that Kelley goes on to state 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 as specified elsewhere in Mich Const 1963." But Attorney General Kelley had already explained, in OAG 4303, that the Legislature's powers were limited to the next legislative session. Thus, when read in harmony, OAG 4303 and OAG 4932 stand for the position that the Legislature may amend an adopted voter-initiated law at the next legislative session—a point which the parties do not contest in this case.

In contrast, Attorney General Kelley's opinion was issued within a year after the People ratified the Michigan Constitution and stood for 55 years. Therefore, the Court concludes that Attorney General Kelley's original opinion is entitled to more weight than Attorney General Schuette's opinion.

Farm Bureau remains the most persuasive and relevant authority. The *Farm Bureau* Court cautioned against "outright legislative defeat, not just hindrance, of the people's reserved right[s]" under Article 2, § 9. *Farm Bureau*, 379 Mich at 394. The State's strained interpretation of Article 2, § 9 would lead to just that. For these reasons, both the spirit of the Constitution and the relevant caselaw support that Article 2, § 9 prohibits the Legislature from adopting, and then substantially amending, a voter-initiated law within the same legislative session.

C. APPLICATION TO 2018 PA 368 AND 2018 PA 369

The Court now turns to the specific laws at issue in this matter. The State has not attempted to explain why the Legislature enacted the Earned Sick Time Act and the Improved Workforce Opportunity Wage Act, and then immediately amended them once the opportunity of the People to vote had been circumvented. And the amendments were substantial. For example, 2018 PA 368, which amended the Improved Workforce Opportunity Wage Act, (1) reduced the increase on the minimum wage from $12 per hour to $10.10 per hour, (2) removed the annual adjustment after 2022 based on inflation, and (3) eliminated language specific to tipped employees. See House Fiscal Agency, *Legislative Analysis: Minimum Wage* Amendments (March 11, 2019), p 1, available at <http://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-1171-58F01032.pdf>; Senate Fiscal Agency, *Bill Analysis: Senate Bill 1171 (as enacted)*, p 1, available at <http://www.legislature.mi.gov/documents/2017-2018/billanalysis/Senate/pdf/2017-SFA-1171-N.pdf>.

As for 2018 PA 369, the new law, which amended the Earned Sick Time Act (and renamed it the Paid Medical Leave Act), (1) exempted employers with fewer than 50 employees, (2) lowered the minimum number of hours that could be used in a year to 40, and (3) repealed a section prohibiting employers from taking retaliatory personnel actions against employees. House Fiscal Agency, *Legislative Analysis: Paid Medical Leave Act* (February 25, 2019), p 1, available at http://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-1175-7A3AF60B.pdf; Senate Fiscal Agency, *Bill Analysis: Senate Bill 1175 (as enacted)*, p 1, available at http://www.legislature.mi.gov/documents/2017-2018/billanalysis/Senate/pdf/2017-SFA-1175-N.pdf. The new laws, therefore, substantially amended the original laws proposed by the voters. The process effectively thwarted the intent of the People and denied them the opportunity to vote on whether they preferred the voter-initiated proposal or the Legislature's suggested modifications.

Therefore, in line with the language of the constitutional provision, the history/spirit of the Michigan Constitution, and the Supreme Court's decision in *Farm Bureau* and its progeny, the Court concludes that the adopt-and-amend process the Legislature used to enact 2018 PA 368 and 2018 PA 369 violated Article 2, § 9 of the Michigan Constitution.[8]

III. CONCLUSION

Both the letter and spirit of Article 2, § 9 support the conclusion that the Legislature has only three options to address voter-initiated legislation within the same legislative session—adopt

[8] The State argues that the Legislature may need to revise an enacted law within the same legislative session based on changed circumstances or an emergency. The Court declines to address this scenario, as it is not before this Court. And, as noted above, the State has not provided a reason for why the Legislature substantially amended 2018 PA 337 and 338 other than as a means to deprive the voters of their access to the initiative process.

it, reject it, or propose an alternative. Once the Legislature adopted the Earned Sick Time Act and the Improved Workforce Opportunity Act, it could not amend the laws within the same legislative session. To hold otherwise would effectively thwart the power of the People to initiate laws and then vote on those same laws—a power expressly reserved to the people in the Michigan Constitution.[9]

For these reasons, IT IS HEREBY ORDERED that plaintiff's and the Attorney General's motions for summary disposition are GRANTED.

IT IS FURTHER ORDERED that the State's motion for summary disposition is DENIED.

IT IS FURTHER ORDERED that 2018 PA 368 and 2018 PA 369 are VOIDED, and the initiatives adopted by the Legislature as 2018 PAs 337 and 338 remain in effect.

IT IS SO ORDERED. This is a final order that disposes of the last claim and closes the case.

Date: July 19, 2022

Douglas B. Shapiro
Judge, Court of Claims

[9] The Court notes that plaintiffs have not requested monetary damages in their amended complaint. At oral argument, plaintiffs' counsel confirmed that plaintiffs are not requesting monetary damages. Therefore, the Court does not award monetary damages.