STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs-Appellants,

v

ATTORNEY GENERAL,

Defendant-Appellant,

and

STATE OF MICHIGAN,

Defendant-Appellee.
_____/

SC No. 165325

COA No. 362271

LC No. 21-000095-MM
Hon. Douglas B. Shapiro

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, LEAGUE OF WOMEN VOTERS OF MICHIGAN, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN OF MICHIGAN, NATIONAL EMPLOYMENT LAW PROJECT, AND MICHIGAN STATE AFL-CIO

Andrew Nickelhoff (P37990)
NICKELHOFF & WIDICK, PLLC
333 W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 496-9429
anickelhoff@michlabor.legal

Attorneys for Amicus Curiae
Michigan State AFL-CIO

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Sharon Dolente (P67771)
Cooperating Attorney, American Civil Liberties Union Fund of Michigan

Attorneys for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union of Michigan ("ACLU") is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting the rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the right to vote, the freedom to petition, ballot access, and other rights vital to a healthy and robust democracy. The ACLU litigates and files amicus curiae briefs in cases involving civil rights that impact the democratic process, including voting rights, ballot access and the right to petition.

The League of Women Voters of Michigan ("League of Women Voters") is the Michigan affiliate of a nationwide, nonpartisan organization. The League of Women Voters is committed to diversity and pluralism, recognizes that diverse perspectives are important and necessary for responsible and representative decision making, and subscribes to the belief that diversity and pluralism are fundamental to the values it upholds. The League of Women Voters has been a party in numerous cases to protect the civil rights of Michigan citizens.

The American Association of University Women of Michigan ("AAUW") is the Michigan chapter of a national, nonpartisan organization promoting equity and education for women and girls. The AAUW's goal is to advance gender equity for women and girls through research, education and advocacy. Raising the minimum wage and adoption of earned paid sick leave for employees are among the national priorities of the organization. The AAUW's members actively engaged in collection of signatures for both citizen initiatives.

[1] Pursuant to MCR 7.312(H)(5), amici state that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici curiae, their members, or their counsel made any such monetary contribution.

The National Employment Law Project ("NELP") is a national legal, research, and policy organization known for its expertise on workforce issues. For fifty years, NELP has advocated for the employment rights of low-wage and unemployed workers. NELP has worked extensively across the United States on federal, state, and local employment and labor laws, with a special emphasis on minimum wage and benefits legislation. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers under federal and state wage and hour laws. As part of that work, NELP has partnered with Michigan allies on policy campaigns, ballot initiatives, and litigation relating to Michigan's wage and hour laws – and for many years NELP had staff based in Michigan. NELP has an interest in ensuring that the minimum wage and paid sick days ballot initiatives at issue in this litigation are allowed to take effect so that Michigan workers may benefit from them.

The Michigan State AFL-CIO ("AFL-CIO") is a labor federation comprised of constituent labor organizations throughout Michigan. Local labor organizations and other organizations affiliated with the AFL-CIO represent hundreds of thousands of Michigan's public sector and private sector employees. A primary objective of the AFL-CIO is to improve the quality of life for working families in Michigan. This objective is furthered by a broad range of legal actions, legislative efforts, advocacy, and referenda and initiatives. The AFL-CIO has a strong interest in promoting and protecting constitutional and statutory avenues for direct citizen democracy.

Amici believe that, given their expertise and history of advocacy around issues involving constitutional law, voting rights, democracy, and employment and labor law, this amicus curiae brief will be of assistance to the Court.

QUESTION PRESENTED

Does Const 1963 art 2, § 9 permit the Legislature to enact an initiative petition into law and then subsequently amend the law during the same legislative session?

Amici's answer: No. And that constitutional infirmity is particularly pronounced when the Legislature enacts an initiative petition into law, and subsequently amends the law during a lame-duck portion of the same legislative session.

INTRODUCTION

The briefing in this case is less remarkable for what it says than for what it does not. None of the proponents of the Legislature's decision to adopt citizen proposals on minimum wage and paid sick leave—and then "amend" those proposals during a lame-duck legislative session—suggests that the Legislature acted out of a good-faith desire to further those policies. Nor does any interested party suggest that real-world circumstances changed between the time the Legislature "adopted" the proposals, and the time it "amended" them. Instead, all agree that the Legislature did what it said it would do. Faced with two citizen-led ballot proposals with which it disagreed, the Legislature "adopted" the proposed laws to keep them away from voters. Then, during a lame-duck session after the general elections, the Legislature eviscerated those laws by "amendment."

In so doing, the Legislature stymied the will of the citizens who sought to place questions on the ballot. It denied Michigan voters the opportunity to weigh in on the proposals directly. Perhaps worst of all, the Legislature evaded any chance that it would be held accountable. By waiting until a lame-duck session to "amend" the laws—*after* Michigan voters had passed judgment on their legislators during the November elections—the Legislature ensured that the bulk of its members would never be held to account for their "adopt-and-amend" maneuver.

The Michigan Constitution does not permit such interference with the people's reserved power to enact laws directly. See Const 1963 art 2, § 9. When the people exercise their authority to enact laws directly, they are doing so to circumvent a recalcitrant legislature. The *very same legislature*, therefore, may not use its amendment power to undermine the people's will. That much has been clear at least since Attorney General Frank Kelley, in the year the Constitution was enacted, issued an opinion stating that the Constitution does not permit "the legislature enacting an initiative petition proposal" to "amend the law so enacted at the same legislative session." 19 OAG, 1963-1964, No. 4303, p 311 (March 6, 1964). To do so, Attorney General Kelley suggested, would effectively allow the Legislature an atextual, unenumerated veto over any citizen-led ballot initiative. See *id*. ("letter of" Const 1963 art 2, § 9 does not permit adopt-and-amend tactic).

Not only does the Constitution categorically forbid amendment of an adopted ballot initiative during the same legislative session in which adoption occurred, the circumstances here present the apex of unconstitutionality. The Legislature dismantled the adopted laws during a lame-duck session, when its members could no longer be held accountable by voters. Indeed, because of legislative term limits, the overwhelming majority of the legislators who "amended" the proposals will *never again* have to face voters. The Legislature's actions thus eliminated any chance that the people would be able to exercise their will and hold their elected legislators to account. Such blanket denial of the people's reserved authority to "enact and reject laws," Const 1963 art 2, § 9, violates the Michigan Constitution.

STATEMENT OF FACTS

In 2017, two citizen groups began circulating initiative petitions to enact laws that would significantly alter the legal landscape for Michigan workers. Michigan One Fair Wage circulated a proposal that would, among other things, increase the minimum wage to $12 per hour for all

employees by January 1, 2022, increase the subminimum wage for tipped employees to $12 per hour by January 1, 2024, and ensure that minimum wage tracked inflation moving forward. Michigan Time To Care circulated a proposal that would, among other things, grant employees one hour of paid sick time for every 30 hours worked.

The two petitions garnered overwhelming support: 373,507 people signed the petition seeking to increase the minimum wage, and 377,560 people signed the petition seeking to provide paid sick leave. In May 2018, Michigan One Fair Wage and Michigan Time To Care filed their respective signatures with the Bureau of Elections. The Michigan Board of State Canvassers ultimately concluded that both proposals had enough valid signatures to be placed on the ballot in the November 2018 statewide election.

As required by the Michigan Constitution, the two proposals were then submitted to the Legislature, which was given the opportunity to reject the proposed laws, or to enact them "without change or amendment." Const 1963 art 2, § 9. The Legislature opted to enact both proposals "without change." *Id.*; see 2018 PA 337 (adopting minimum wage proposal); 2018 PA 338 (adopting paid sick leave proposals). Because the Legislature declined to give either law "immediate effect," the laws were scheduled to take effect 90 days after the adjournment of the legislative session. Const 1963 art 4, § 27.

But even as it adopted the two proposals, legislative leaders made clear that they planned to undermine the newly enacted laws at a later date. Immediately following the Legislature's adoption of the laws, the Speaker of the House lambasted "these citizen-initiated laws" as "very poorly written," and announced his intention to "make certain that the Legislature was still going to have a say." Gray, *Michigan's OK of Minimum Wage Hike, Paid Sick Leave Has a Big Catch*,

Detroit Free Press (September 7, 2018). Similarly, the Senate Majority Leader announced that the Legislature was considering a "whole suite of options" to amend the laws. *Id.*

In the November 2018 election, Michigan voters overwhelmingly opted for change. Voters replaced the outgoing Republican governor, attorney general, and secretary of state with Democrats. They also overwhelmingly voted for Democratic legislative candidates. The Republican majority in the House of Representatives was reduced from 63-46 to 58-52; the Republican majority in the state Senate was reduced from 27-10 to 22-16. In the aggregate, Democratic House candidates received approximately 175,000 more votes than Republican candidates, whereas Democratic Senate candidates received approximately 117,300 more votes than Republican candidates. Nevertheless, because of the way in which Michigan districts had been drawn, Republicans were able to maintain control of both legislative chambers. See Perkins, *Once Again, Michigan Dems Get More State Senate and House Votes, But GOP Keeps Power*, Detroit Metro Times (November 7, 2018).

Following the November 2018 election, but before the new Governor and Legislature were sworn into office, the Legislature convened a "lame duck" session. The Legislature that was seated during that session was the outgoing Legislature, not the new Legislature that had been selected by voters.

True to its word, that outgoing Legislature immediately acted to dismantle the citizen-initiated minimum-wage and paid sick leave laws. On minimum wage, the Legislature passed a bill that delayed the increase to $12 per hour from 2022 to 2030, meaning that, adjusted for inflation, there would be effectively no increase at all. The Legislature also eliminated the provisions that required tipped employees to receive a $12-per-hour minimum wage and deleted the requirement that minimum wage be adjusted for inflation. On paid sick leave, the Legislature

slashed the amount of sick time that could be used by employees, dramatically reduced the number of families that were eligible to accrue paid sick time and eliminated many of the permissible uses of paid sick leave.

These "amendments" to the citizen-initiated proposals were signed into law by outgoing Governor Rick Snyder, eliminating any chance of a veto by newly elected Governor Gretchen Whitmer. The "amended" laws took effect on March 29, 2019.

ARGUMENT

The text of the Constitution forbids the Legislature from adopting a citizen-initiated proposal, only to amend it later in the session. Contemporaneous understandings of the 1963 Constitution confirm what its plain text provides. And even if the Constitution did allow a Legislature to amend a citizen-initiated proposal that it had previously purported to "adopt," the Legislature certainly cannot do so during a lame-duck legislative session, when its members can evade any consequences at the polls. The idea that legislators who are unanswerable to the people could undermine the people's will would have been an anathema to those who enacted the 1963 Constitution. This Court should therefore reverse the judgment of the Court of Appeals.

I. The Constitution Does Not Permit the Legislature to Adopt an Initiative Petition and Subsequently Amend the Law During the Same Legislative Session.

The very first section of the Michigan Constitution provides: "All political power is inherent in the people." Const 1963 art 1, § 1. Consistent with that overarching principle, Const 1963 art 2, § 9 reserves for "[t]he people . . . the power to propose laws and to enact and reject laws" via the initiative and referendum process.

The right of citizens to initiate lawmaking was added to the Michigan Constitution through a constitutional amendment in 1913, McHargue, *Direct Government in Michigan: Initiative, Referendum, Recall, and Revision in the Michigan Constitution* (1961), p 19, part of a national

trend towards "direct lawmaking by the electorate," *Ariz State Legislature v Arizona Indep Redistricting Comm*, 576 US 787, 794; 135 S Ct 2652; 192 L Ed 2d 704 (2015). The initiative is an extraordinary action that the people can take to "correct sins of omission by representative bodies." *Id.* (alterations and quotations omitted). As this Court has explained, the initiative "serves as an express limitation on the authority of the Legislature." *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214; 378 NW2d 337 (1985). If the Legislature is refusing to accede to the people's wishes, the Constitution provides that the people may circumvent the Legislature and enact laws directly.

It therefore violates the Constitution for the Legislature to do what it did here: "adopt" the people's proposal—with no intention of allowing it to become law—and then snuff out that proposal during the same legislative session. The text of the Constitution lays out the options available to "the Legislature" (that is, to *that* Legislature) when presented with a ballot initiative. It can (1) enact the law "without change or amendment within 40 session days." Const 1963 art 2, § 9. It can (2) reject the petition, in which case it shall be submitted "to the people for approval or rejection at the next general election." *Id.* Or it can (3) "propose a different measure" on the same subject, in which case "both measures shall be submitted to . . . the electors for approval or rejection at the next general election." *Id.*

What the Legislature cannot do is wrest the proposed law from the hands of voters and enact its own policy preferences instead. Nothing in the Constitution provides that the same Legislature which was presented with a citizen-initiated proposal can adopt that proposal and then amend it out of existence. If the Legislature believes, for example, that a citizen-initiated proposal is "very poorly written," see Gray, *Michigan's OK of Minimum Wage Hike, Paid Sick Leave Has a Big Catch*, Detroit Free Press (September 7, 2018) (quoting Speaker of the House Tom Leonard),

it can "propose a different measure" on the same subject. See Const 1963 art 2, § 9. But once the requisite signatures have been gathered, the Legislature cannot cut the people out of the lawmaking process entirely to enact a different measure.

And if there is any doubt as to whether the Legislature can create an end-run around the people's reserved powers to enact laws themselves, it must be resolved in favor of the people. As Justice BIRD explained in *Hamilton v Secretary of State*, 227 Mich 111, 130; 198 NW2d 843 (1924), "[a] constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation upon legislative will." The initiative process in Michigan, like the initiative process in so many other states, was created to "correct sins of omission by representative bodies." *Ariz State Legislature*, 576 US at 794 (alterations and quotations omitted). Whether those "sins of omission" can actually be corrected cannot, therefore, be dependent "upon the legislative will." *Hamilton*, 227 Mich at 130.

That straightforward understanding of the 1963 Constitution is confirmed by contemporaneous understandings of the document. In 1964, the same year the Constitution took effect, Attorney General Frank Kelley wrote that it is "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." OAG, 1963-1964, No. 4303, p 309 (March 16, 1964). Attorney General Kelley's opinion is highly probative of the Constitution's meaning. The court's "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.'" *Mich United Conservation Clubs v Secretary of State*, 464 Mich 359, 373; 630 NW2d 297 (2001). It is difficult to conceive of a more probative

"common understanding" of a constitutional provision than that reflected in an attorney general opinion issued just months after the provision was enacted.

Straining to brush aside Attorney General Kelley's nearly contemporaneous opinion, the State accuses the former Attorney General of issuing his opinion with "virtually no analysis" and relying improperly on the "spirit" of the Constitution. State Br, pp 29-30. But if Attorney General Kelley's discussion was brief, that is because the issue is straightforward. As Attorney General Kelley noted, the "letter of Article II, Sec. 9" does not allow an unenumerated legislative veto of a citizen-initiated proposal. OAG, 1963-1964, No. 4303, p 309 (March 16, 1964). The text of the Constitution is clear. When faced with a citizen-initiated ballot proposal, the Legislature has three options. None of those options includes circumventing the people's will via "amendment." And when the text is clear, the legal inquiry should end. See *Ligons v Crittenton Hosp,* 490 Mich 61, 70; 803 NW2d 271 (2011).

II. The Constitution Forbids the Legislature from Amending an Enacted Initiative During a Lame-Duck Legislative Session.

Not only does the Constitution categorically forbid the same Legislature that adopted a citizen initiative from later amending it out of existence, the constitutional infirmity is heightened here. The Legislature chose to wait until a lame-duck session—when a sizeable majority of its members would never again have to answer to voters at the polls—to extinguish proposals that hundreds of thousands of Michiganders supported. The idea that a Legislature that was unanswerable to the people could eliminate a citizen-initiated proposal would have been unthinkable to the electors of the State when they enacted the 1963 Constitution. The Constitution does not allow it.

A. Amending a Citizen Initiative During a Lame-Duck Session Would Have Been Unthinkable in 1963.

"Lame-duck" legislative sessions—which occur when the Legislature meets after the voters have elected a new Legislature, but before the new one can be sworn in—are a mostly modern innovation. Prior to amending the Michigan Constitution to add the citizen initiative in 1913, the Michigan Legislature generally met only during an odd year, which meant that the legislative session ended more than a year before the general election. *Public Acts and Joint and Concurrent Resolutions of the Legislature of the State of Michigan*, 1863-1964.

On occasion, the Legislature did call special sessions during an even year, but lame-duck sessions that occurred *after* the election were exceedingly rare. The first lame-duck session did not occur until 1932, nineteen years after the Michigan Constitution was amended to provide citizens with the power to initiate laws. In the 100 years preceding the adoption of the 1963 Constitution, the Michigan Legislature met for a lame-duck session only six times. And those sessions were, in the main, sleepy affairs. During five of those six lame-duck legislative sessions, the Legislature passed four public acts or fewer.

At the time of the 1963 Constitution's enactment, then, it was virtually unheard of for major issues of public policy to be decided during a lame-duck session. For good reason. As a general matter, the legitimacy of any action taken during a lame-duck legislative session is questionable. That is because—as the Michigan Constitution makes clear—"political power is inherent in the people." Const 1963 art 1, § 1. A lame-duck session is a meeting of a legislative body that the people have very recently replaced. Many observers have thus expressed serious concerns about the legitimacy of lame-duck legislative sessions. See, e.g., Koopman, Mitchell & Hamilton, *How Lame Are Lame Ducks?* (December 1, 2014) <https://www.mercatus.org/publication/how-lame-are-lame-ducks> (quoting scholars). As Yale Law Professor Bruce Ackerman has explained, it is

"utterly undemocratic for repudiated representatives to legislate in the name of the American people." *Id*. Similarly, the Heritage Foundation has strongly urged Congress to complete its work prior to the November election "[t]o avoid the representational breakdown that occurs in lame-duck sessions when policy outcomes may be contrary to the will of the people." Wallner & Winfree, *The Implications of Regular Lame-Duck Sessions in Congress for Representative Government* (September 6, 2016) <https://www.heritage.org/political-process/report/the-implications-regular-lame-duck-sessions-congress-representative>. "Without accountability," the Heritage Foundation notes, "representative government does not work." *Id*. That principle is as true in Michigan as it is elsewhere. In Michigan, "[b]ecause of its timing, the lame-duck session is understood to be a period of diminished public accountability." *Mich United Conservation Clubs*, 464 Mich 359 at 405 n 2 (CAVANAGH, J., dissenting).

Again, for most of Michigan's history, these fundamental principles of democratic accountability have been followed. Prior to the enactment of the 1963 Constitution, the Michigan Legislature mostly declined to enact major legislation during the interstitial period following the election.

It thus would have been particularly inconceivable for the Legislature to seek to undermine a citizen initiative during a lame-duck session. Though the people's right to initiative had been a part of the Michigan Constitution since 1913, the initiative process, at the time of the Constitutional Convention of 1963, had been used only once. McHargue, *Direct Government in Michigan: Initiative, Referendum, Recall, and Revision in the Michigan Constitution* (1961). The initiative, in other words, was an extraordinary tool, used by the people only on extraordinary occasions. Cf. *Ariz State Legislature*, 576 US at 793-794. Given that almost no lawmaking occurred during lame-duck legislative sessions prior to 1963, it would have been unthinkable to the Constitution's

framers and the citizens who ratified the 1963 Constitution that a lame-duck Legislature would directly undermine the people's will and dismantle an adopted citizen-initiated ballot proposal during a lame-duck session. To do so would not only violate the citizen-initiative provision of the Constitution, see Const 1963 art 2, § 9, it would run afoul of the defining constitutional principle that "political power is inherent in the people." Const 1963 art 1, § 1.

B. Term Limits Exacerbate the Undemocratic Nature of Lame-Duck Sessions.

The illegitimacy of an adopt-and-amend tactic during a lame-duck session is exacerbated by legislative term limits. In Michigan, term limits often render it impossible for voters to *ever* pass judgment on the vast majority of lame-duck legislators. If the adopt-and-amend strategy were permitted during a lame-duck session, legislators would be able to eradicate a voter-initiated proposal without ever being held to account at the polls. Whatever else might be said, the Constitution surely does not permit an unaccountable lame-duck Legislature to eliminate the people's power to enact laws directly.

In 1992, Michigan's Constitution was amended to provide that no person can be elected as a state representative "more than three times," and no person can be elected to the state senate "more than two times." Const 1963 art 4, § 24. That means that, during a lame-duck session, there are three categories of legislators who will never again be answerable to voters: (1) legislators who will be leaving the Legislature because they lost their re-election campaigns or because they are voluntarily retiring; (2) legislators who will, in a matter of weeks, be leaving the Legislature because they served the maximum number of permissible terms; and (3) legislators who won re-election, but—because of term limits—are ineligible to run for re-election again.

Notably, in a lame-duck session following a quadrennial senatorial election, that means *every single member of the lame-duck Senate* will never again be on the ballot. That is because the lame-duck Senate consists only of Senators who are (a) at the end of their second term and will

thus leave office within weeks; (b) won re-election but are ineligible to run again due to term limits; or (c) lost their re-election campaigns. In other words, following a senatorial election, the *only* members of a lame-duck legislature who will again be answerable to voters are members of the *House* who recently won re-election to their second term in office—and are therefore eligible to run, once more, for a third term.

That was the situation in 2018, when the Legislature "amended" the One Fair Wage and Michigan Time To Care proposals during the lame-duck legislature. As is always the case following a senatorial election, every single Senator during that lame-duck session was ineligible to run again. The entire Senate could thus never be held accountable by voters. Similarly, 62 of the 110 members of the House of Representatives were ineligible to run for re-election in the House. Thus, a sizeable majority of the legislators who voted to eviscerate the people's proposals knew that they could not be penalized for their actions by the people. In a state where all "political power is inherent in the people," Const 1963 art 1, § 1, that is unconstitutional. The framers of the 1963 Constitution could never have envisioned that a Legislature that is totally unaccountable to the people could veto the people's validly proposed laws during a lame-duck session.

The undemocratic nature of the Legislature's actions here is further exacerbated by a 2012 law—itself enacted during a lame-duck session—which eliminated one of the last possible checks the people might have on lame-duck legislators. In 2012, the Michigan Legislature introduced and passed a law, in the span of just 18 days, that eliminated the power of citizens to recall elected officials for conduct during a prior term in office. See 2012 PA 417, codified at MCL 168.951a(1)(c) (limiting the permissible reasons that a citizen could recall their elected official to "conduct during his or her current term in office"). The net result? No member of the House or

Senate who is now serving can be recalled for the violence they did to the people's proposals during the lame-duck legislative session.

C. There Is No Reason to Amend a Citizen Initiative During a Lame-Duck Session Apart from Avoidance of Electoral Accountability.

That the minimum wage and paid sick leave proposals were dismantled by the Legislature during a lame-duck session puts lie to the fiction, espoused by the State in support of the "adopt-and-amend" tactic, that the people retain a remedy through the "ballot box" in the next legislative election. State Br, pp 3, 22. Here, the Legislature purposefully waited until *after* voters had gone to the polls on Election Day in November 2018 to "amend" the laws the people had proposed. At that point, the majority of the House—and the entirety of the Senate—knew that they could never face electoral consequences for undermining the people's will. The people's initiatives were undermined, and the voters in this State were without remedy.

Supporters of the adopt-and-amend tactic suggest that the tactic is simply good public policy: "[T]here may well be a need to change a law during the same legislative session." *Id.* at 31. But whatever can be said about that argument as a general matter, it certainly has no bearing here. The Legislature did not adopt the laws because it agreed with them, only to later decide that circumstances warranted amendment. The Legislature made its intentions clear from the start. It adopted the proposals *because it disliked them* and planned to amend those laws out of existence at a politically auspicious time. See Gray, *Michigan's OK of Minimum Wage Hike, Paid Sick Leave Has a Big Catch*, Detroit Free Press (September 7, 2018).

In any event, it is difficult to conceive of some real-world circumstance in which the Legislature suddenly discovers some massive public-policy issue with an adopted law that requires legislative action *during a lame-duck session*—when democratic accountability is conveniently at its nadir. That is particularly true here: The minimum wage and paid sick-leave laws were not

given immediate effect, and thus had not even been put into place when they were dismantled. There was no "need for a legislative fix" to the adopted laws that arose suddenly after the general election. Cf. State Br, p 36. The only things that changed were two political realities. First, the vast majority of legislators were, as a result of term limits, freed from any accountability to voters. Second, Michigan's voters had elected a new governor who was unlikely, in future sessions, to support drastic amendments to the initiatives. The Legislature knew that the lame-duck session was its last best chance to dismantle the people's proposed laws and avoid an expected veto by the people's newly elected governor.

The Constitution forbids this. The very legislature that adopted a proposed law cannot, through amendment during the same legislative session, deprive the people of their constitutional right to enact such laws. Const 1963 art 2, § 9. And the Legislature is certainly prohibited from doing so during a lame-duck session, when the people have no "political power" to hold their elected officials accountable. See Const 1963 art 1, § 1 ("[a]ll political power is inherent in the people").

A final point bears emphasis. The Legislature's actions here were, quite literally, unprecedented. Never before in the history of this State has the Legislature adopted a citizen-initiated law, then amended it during the same legislative session. In fact, it is uncommon for the Legislature to adopt a citizen-initiated law at all, and it has generally done so when it is supportive of the issue, rather than opposed, and seeks to avoid the Governor's veto.[2] It certainly has never adopted a proposed law, then amended it during the *lame-duck session*. Since the framing of the

[2] Prior to 2018, the Legislature adopted only six of twenty citizen-initiated laws in the 55 years since the Michigan Constitution of 1963 was ratified. *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963* (January 2019) <https://www.michigan.gov/documents/sos/Initia_Ref_Under_Consti_12-08_339399_7.pdf>.

1963 Constitution, the constitutional division of lawmaking authority between the legislature and "the people" has been respected. This Court should not permit the recognition of a newly invented, atextual legislative veto of the people's right to initiate lawmaking. Cf. *NLRB v Noel Canning,* 573 US 513, 514; 134 S Ct 2550; 189 L Ed 2d 538 (2014) (noting that "[t]he longstanding 'practice of the government,' *McCulloch v Maryland*, 17 US [(4 Wheat) 316, 401; 4 L Ed 579 (1819)], can inform this Court's determination of 'what the law is' in a separation-of-powers case"). To do so would effectively eliminate the Michigan Constitution's grant of power to the citizens of this State "to propose laws and to enact and reject laws" via the initiative and referendum process. Const 1963 art 2, § 9.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

/s/ Daniel S. Korobkin

Andrew Nickelhoff (P37990)
NICKELHOFF & WIDICK, PLLC
333 W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 496-9429
anickelhoff@michlabor.legal

Attorney for Amicus Curiae
Michigan State AFL-CIO

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Sharon Dolente (P67771)
Cooperating Attorney, American Civil Liberties Union Fund of Michigan

Attorneys for Amici Curiae

Dated: October 30, 2023

WORD-COUNT CERTIFICATION

I hereby certify that this brief contains 4,500 words in the sections covered by MCR 7.212(C)(6)-(8).

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)