STATE OF MICHIGAN

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CONST 1963, ART 2, § 9: Amendment of initiated law during legislative session.

INITIATIVES:

CONSTITUTIONAL LAW:

Article 2, § 9 of the Michigan Constitution of 1963 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.

Opinion No. 7306 December 3, 2018

The Honorable Arlan B. Meekhof
State Senator
The Capitol
Lansing, MI 48909

You have asked whether an initiative proposed by the people but enacted by the Legislature under article 2, § 9 of the Michigan Constitution may be amended during the same legislative session in which it was enacted.

Article 2, § 9 of the Michigan Constitution empowers the people to propose laws or to enact or reject laws, called the initiative. Const 1963, art 2, § 9. Section 9 also empowers the people to approve or reject laws enacted by the Legislature, called the referendum. *Id.* With respect to initiatives, § 9 provides in relevant part:

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

The Legislature implemented article 2, § 9 with respect to initiatives in various sections of the Michigan Election Law, MCL 168.1 *et seq*. Under the Constitution and the Election Law, in order for the people to place an initiative on the general election ballot, the people must: (1) prepare a petition that meets the formatting requirements of MCL 168.482; (2) gather the required number of valid signatures under article 2, § 9; and (3) file the petitions with the Secretary of State under MCL 168.472. After filing, the Board of State Canvassers must review the petition to determine whether there are sufficient valid signatures under MCL 168.476. Once the review is complete, the Board of State Canvassers must make an official declaration of the sufficiency or insufficiency of the initiative petition two months before the election at which the proposal is to be submitted. MCL 168.477(1).

If the initiative petition is certified as sufficient, the Secretary of State must present it to the Legislature for enactment or rejection under article 2, § 9:

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

Alternatively, if the Legislature rejects the initiative, it "may . . . propose a different measure upon the same subject" to be placed on the ballot with the people's initiative. *Id.*

If the Legislature rejects the initiative, it must be submitted to the people for a vote at the next general election: "If the law so proposed is not enacted by the

legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election[.]" Const 1963, art 2, § 9. If the initiative is approved by the people, it "shall take effect 10 days after the date of the official declaration of the vote[.]" Const 1963, art 2, § 9, MCL 168.842, MCL 168.845.

Finally, article 2, § 9 provides that initiated laws adopted by the people may, with certain limitations, be amended by the Legislature:

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

Relevant to your request, in the fall of 2018 the Secretary of State presented to the Legislature two initiatives for enactment or rejection under article 2, § 9. The Legislature thereafter enacted the initiatives without change within 40 session days. See 2018 PA 337,[1] 2018 PA 338.[2] As a result, the proposals were not

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[1] The legislative history for the initiative is available online at http://www.legislature.mi.gov/(S(kglaqzo1jtlc1zwkptzrghop))/mileg.aspx?page=initiative, (last accessed December 3, 2018).

[2] The legislative history for the initiative is available online at http://www.legislature.mi.gov/(S(0w1zom3ku25e1ukegvbqo33z))/mileg.aspx?page=initiative, (last accessed December 3, 2018).

submitted to the people for a vote at the November 2018 General Election.[3]

You ask whether legislatively enacted initiatives may be amended during the same legislative session in which the Legislature enacted the initiatives.[4]

As noted above, article 2, § 9 provides that initiated laws "adopted by the people at the polls" may "be amended . . . by a vote of the electors . . . or by three-fourths of the members elected to and serving in each house of the legislature." Const 1963, art 2, § 9. Here, however, the Legislature enacted the initiated laws and the three-fourths vote requirement does not apply. Rather, the 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. OAG, 1975-1976, No. 4932, p 240 (January 15, 1976).

Regarding the timing of amendments to initiated laws, Attorney General Frank Kelley issued an opinion in 1964 that concluded an "initiative petition enacted into law by the legislature in response to initiative petitions [is] subject to amendment by the legislature *at a subsequent legislative session.*" OAG, 1963-1964, No. 4303, pp 309, 311 (March 6, 1964) (Emphasis added). The Attorney General

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[3] Neither of these initiated laws were given immediate effect by the Legislature; thus, the laws are not effective "until the expiration of 90 days from the end of the session at which it was passed[.]" Const 1963, art 4, § 27; *Frey v Dep't of Management and Budget*, 429 Mich 315 (1987).

[4] Regarding the legislative session, article 4, § 13 provides that the "legislature shall meet at the seat of government on the second Wednesday in January of each year at twelve o'clock noon. Each regular session shall adjourn without day, on a day determined by concurrent resolution, at twelve o'clock noon." Const 1963, art 4, § 13. Also, "[a]ny business, bill or joint resolution pending at the final adjournment of a regular session held in an odd numbered year shall carry over with the same status to the next regular session." *Id.*

determined that to amend the initiated law during the same session would violate the "spirit and letter" of article 2, § 9. *Id.* The language of the Constitution and subsequent decisions by the Michigan courts, however, cast doubt on the validity of this conclusion.

As with any constitutional provision, the objective " 'is to determine the text's original meaning to the ratifiers, the people, at the time of ratification.' " *People v Tanner*, 496 Mich 199, 223 (2014) (citation omitted). "[T]he primary rule is that of 'common understanding,' " as explained by Justice Cooley:

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

Any "analysis, of course, must begin with an examination of the precise language used in art[icle] 2, § 9 of [the] 1963 Constitution." *Michigan United Conservation Clubs v Sec'y of State*, 464 Mich 359, 375 (2001) (Corrigan, J., concurring), citing *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 362 (2000). And to help determine the "common understanding," the " 'constitutional convention debates and the address to the people, though not controlling, are

relevant.' " *Tanner*, 496 Mich at 226, quoting *People v Nash*, 418 Mich 196, 209 (1983).

A careful review of article 2, § 9 reveals that while the people imposed express limitations on amending an initiated "law adopted by the people at the polls," i.e., the three-fourths vote requirement, the people did not impose any express limitations on amending a legislatively enacted initiated law. Rather, article 2, § 9 states only that "any law proposed by such [initiative] petition" that "shall be *enacted by the legislature* [ ] shall be subject to referendum[.]" (Emphasis added). Nothing in article 2, § 9 limits the Legislature's ability to substantively amend a legislatively enacted initiated law, or from doing so during the same legislative session in which the initiated law was enacted. In contrast, article 2, § 9 expressly imposes such a requirement on *referendums*. Section 9 provides that "[l]aws approved by the people under the referendum provision of this section may be amended by the legislature *at any subsequent session thereof*." Const 1963, art 2, § 9 (emphasis added). No similar limitation was included for initiated laws enacted by the Legislature.

Rather, legislatively enacted initiated laws are subject to the same processes regarding amendment as legislation drafted by the Legislature. And 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. This

conclusion is further supported by the Constitutional Convention record and the statement of Delegate Kuhn regarding initiatives under article 2, § 9:

> If the legislature sees fit to adopt the petition of the initiative as being sent out, if the legislature in their wisdom feel it looks like it is going to be good, and they adopt it in toto, *then they have full control. They can amend it and do anything they see fit.* But if they do not, and you start an initiative petition and it goes through and is adopted by the people without the legislature doing it, then they are precluded from disturbing it." [2 Official Record, Constitutional Convention 1961, p 2395 (emphasis added) (emphasis deleted).]

Likewise, the Michigan courts have held that legislatively enacted initiatives should be treated similarly to ordinary legislation. In *Frey v Director of the Dep't of Social Services*, 162 Mich App 586 (1987), the Court of Appeals addressed whether the two-thirds vote requirement for giving legislation immediate effect under article 4, § 27 of the Constitution applied to an initiated law enacted by the Legislature under article 2, § 9. The initiated law included a provision stating " 'This Act Shall Take Immediate Effect.' " *Id.* at 588-589. The Legislature enacted the initiated law but did not vote to give it immediate effect. *Id.* at 589-590. The plaintiffs argued that the initiated law could not be given immediate effect because article 4, § 27 applied to the law. *Id.* at 590.

The Court of Appeals agreed. The Court examined the history and language of article 2, § 9 along with statements by the constitutional convention delegates and prior court decisions, and determined that article 4, including § 27, applies to initiated laws. *Id.* at 592-603. In conducting its analysis, the Court observed that initiated legislation is not entitled to superior treatment:

> Acceptance of defendants' position [that article 4 does not apply] would place laws proposed by the initiative on a superior, not equal, footing with legislative acts not proposed by the people. *Since everything that emerges from the Legislature is legislation, all legislative acts must be on an equal footing.* Stated in other language, once it is conceded that it is necessary to refer to article 4 in order to determine the effective date of initiated legislation that does not refer to an effective date, it becomes immediately apparent that the wall that is said to exist between article 2 and article 4 does not exist. [*Id.* at 600 (emphasis added).]

The Court further noted that "[o]ther constitutionally mandated procedures of article 4 also necessarily apply to legislation initiated under article 2, e.g., § 14 (quorum requirement), § 20 (open meetings), § 35 (publication and distribution of laws)." *Id.*, at 600 n 4. See also, *Leininger v Alger*, 316 Mich 644, 648-649 (1947) (article 4, § 24's title-object clause applied to petitions to initiate legislation); *Automobile Club of Mich Committee for Lower Rates Now v Secretary of State (On Remand),* 195 Mich App 613 (1992) (article 4, § 25's republication requirement applied to petition to initiate legislation).

On appeal, the Michigan Supreme Court affirmed *Frey*, observing that it was "limited to the language of the constitution when interpreting its provisions," and that "article 4, § 27 contain[ed] a general restriction that 'no act' passed by the Legislature may take immediate effect unless passed by a two-thirds vote of each house." *Frey v Dep't of Mgmt & Budget*, 429 Mich 315, 335 (1987). The Court concluded that article 4, § 27 "applies to initiated laws enacted by the Legislature *because it does not provide an exception for initiated laws enacted by the Legislature.*" *Id.* (emphasis added).

Similarly, there is no exception or limitation in article 2, § 9, in article 4, or in any other section of the Michigan Constitution that restricts the Legislature's ability to amend a legislatively enacted initiated law during the same legislative session in which the Legislature enacted the law. Given the plain text of the Constitution and the courts' later instruction that legislatively enacted initiated laws are on an equal footing with ordinary legislation, OAG No. 4303 is superseded to the extent it opined to the contrary.[5]

It is my opinion, therefore, that article 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.

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[5] OAG No. 4303 answered four questions; only the answer to the third question is superseded.