



BILL SCHUETTE
ATTORNEY GENERAL
STATE OF MICHIGAN

July 20, 2012

The Honorable Rick Snyder
Governor of Michigan
P.O. Box 30013
Lansing, Michigan 48909

Re: "Protect Our Jobs" Initiative Petition

Dear Governor Snyder:

Pursuant to your request, I am sending you the legal memorandum regarding the pending collective bargaining proposal. In light of the significance of this issue, we are providing a copy of this legal memorandum to the Board of Canvassers. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Bill Schuette".

Bill Schuette
Attorney General

WDS/rab
Enclosure

DEPARTMENT OF
ATTORNEY GENERAL
MEMORANDUM

July 20, 2012

Attorney-Client Privileged Communication

TO: Governor Rick Snyder
FROM: Bill Schuette
Attorney General
RE: "Protect Our Jobs" Initiative Petition

EXECUTIVE SUMMARY

You have asked that I evaluate whether the Board of Canvassers has the authority to reject an initiative petition that cannot comply with Michigan constitutional requirements. I conclude that the Board has that power.

For nearly a century, the Michigan Supreme Court has recognized that Michigan officials have the authority to reject an invalid petition. *Scott v Secretary of State*, 202 Mich 629; 168 NW 709 (1918). That authority extends to petitions that do not conform to constitutional requirements. *Id.* at 644.

BACKGROUND

Overview of the proposal

The "Protect Our Jobs" initiative petition proposes a new constitutional provision, Section 28 to Article 1 of the State Constitution, and an amendment to Section 5 of Article 11. The proposal represents breathtaking changes to governmental branches' and units' prerogative to perform their constitutional function, establish their goals and objectives, determine budgets, compensation, retirement, medical or other benefits, and control terms and conditions of public employment.

The proposal's language raises fundamental questions about future control of the terms and conditions of public and private employment in Michigan, jeopardizing the fiscal stability that the last two years of legislative reforms have brought to the State. In general, if the proposal is adopted it may, in part, do the following: *first*, prohibit governmental units from adopting laws fixing the compensation, terms, and conditions of employment; *second*, eviscerate such units' control over budgets for public employment; *third*, produce inconsistencies amongst unit's budgets, public employees' salaries, and services; and *fourth*, abrogate constitutional provisions and scores of state laws approved in accord with the mandates voiced by Michigan's citizens.

Constitutional abrogations

If the proposal is approved by a majority of the electors voting on the question, the Constitution provides that “it shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved.” Const 1963, art 12, § 2. This proposal could, in part, abrogate or otherwise substantially limit, constitutional provisions authorizing the following:

1. The Civil Service Commission’s power to classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service, Const 1963, art 11, § 5;
2. Cities’ and villages’ power to adopt resolutions and ordinances relating to municipal concerns, property, and government, Const 1963, art 7, § 22; see *Mack v Detroit*, 467 Mich 186, 194; 649 NW2d 47 (2002);
3. Local governments’ authority to determine terms and conditions of employment for their employees, Const 1963, art 11, § 6;
4. The Legislature’s discretion to appropriate moneys to education institutions, Const 1963, art 4, §§ 4, 6, 7;
5. The Legislature’s power to enact laws to resolve disputes concerning public employees, Const 1963, art 4, § 48;
6. The Legislature’s power to enact laws relative to the hours and conditions of employment, Const 1963, art 4, § 49;
7. The State Officers Compensation Commission’s power to determine the salaries and expense allowances of members of the Legislature and other public officials, Const 1963, art 4, § 22;
8. The Legislature’s discretion to determine general appropriation, Const 1963, art 4, § 31; Const 1963, art 11, § 5;
9. The Legislature’s ability to pass suitable laws for the protection and promotion of the public health and welfare, if such laws are dependent upon public employees’ performance, Const 1963, art 4, § 53;
10. The Governor’s discretion to make changes in the executive branch’s organization and assignment of functions, Const 1963, art 5, § 2;

11. The Governor's ability to propose a budget and reduce expenditures, Const 1963, art 5, §§ 18, 20;
12. The State Transportation Commission's ability to establish transportation programs and other public works, Const 1963, art 5, § 28;
13. The Michigan Supreme Court's ability to control budgets and expend moneys and control performance of judicial staff, Const 1963, art 6, § 7;
14. The Michigan Supreme Court's authority to assure uniformity of judges' salaries within all counties or districts and limit increases during a term of office, Const 1963, art 6, § 18;
15. Boards of Supervisors' power to fix compensation of county officers, Const 1963, art 7, § 9;
16. Counties' obligation to refrain from incurring indebtedness that increases total county debt beyond 10% of the county's assessed valuation, Const 1963, art 7, § 11;
17. The University of Michigan, Michigan State University, and Wayne State University regents' ability to control and direct all expenditures from the institutions' funds, Const 1963, art 8, § 5; and
18. Other Michigan universities' ability to control and direct all expenditures from the institutions' funds, Const 1963, art 8, § 6.

Statutory abrogations

The proposal renders null and void any existing or future law of the State or its political subdivisions that "abridge, impair or limit the collective bargaining rights; except those that prohibit or restrict strikes by public employees." No law would be able to abridge or otherwise limit any such rights "respecting financial support by employees."

Based on these prohibitions, press reports have indicated that some 80 laws/bills that would be adversely impacted. "Unions Launch Omnibus Constitutional Amendment." MIRS Capitol Capsule. 6 Mar. 2012

<<http://www.mirsnews.com/capsule.php?gid=3782%2330309#30309>>. Bouffard, Karen. "Business groups protest Michigan union-backed 'Protect Our Jobs' initiative." Detroit News. 22 Jun. 2012.

<<http://www.detroitnews.com/article/20120622/POLITICS01/206220357>>. These would include the following major statutory enactments:

1. The Public Employment Relations Act;

2. The Revised School Code;
3. The Compulsory Arbitration Act;
4. The Employment Relations Commission Act;
5. The Local Government and School District Fiscal Accountability Act;
6. The Home Rule City Act;
7. The Payment of Wages and Fringe Benefits Act;
8. The Michigan Occupational Safety and Health Act;
9. The Michigan Worker's Disability Compensation Act of 1963;
10. Portions of the Elliott-Larsen Civil Rights Act and Persons with Disability Act;
11. The State Ethics Act;
12. The Publicly Funded Health Insurance Contribution Act; and
13. The Fair and Open Competition in Governmental Construction Act.

In fact, based on this preliminary review, the proposal's first five numbered paragraphs appear to abrogate in whole or in part more than 170 existing Michigan laws (note that in the following lists, some laws appear more than once because they are abrogated by more than one of the proposal's paragraphs):

Proposal

Paragraph Laws abrogated in whole or in part

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|---|---|
| 1 | MCL 4.1104a; MCL 4.1106; MCL 4.1501; MCL 4.1601; MCL 124.505; MCL 124.534; MCL 124.610; MCL 423.9e; MCL 423.17a; MCL 423.28; MCL 423.201; MCL 423.213 |
| 2 | MCL 423.30; MCL 423.215 |
| 3 | MCL 2.102b; MCL 4.1109; MCL 4.1501; MCL 4.1601; MCL 12.280; MCL 15.182; MCL 15.183; MCL 15.211; MCL 15.243; MCL 15.243a; MCL 15.322; MCL 15.323; MCL 15.342; MCL 15.395; MCL 15.403; MCL 15.404; MCL 15.563; MCL 15.564; MCL 15.565; MCL 15.566; MCL 15.567; MCL 15.583; MCL 15.584; MCL 15.602; MCL 17.3; MCL 18.1215; MCL 18.1455; MCL 24.153; MCL 28.6c; MCL 28.425n; MCL 30.411a; MCL 32.273; MCL 38.13; MCL 38.16; MCL |

38.17a; MCL 38.17h; MCL 38.17i; MCL 38.17l; MCL 38.17n; MCL 38.19; MCL 38.20; MCL 38.24; MCL 38.31; MCL 38.67a; MCL 38.68b; MCL 38.68c; MCL 38.81; MCL 38.82a; MCL 38.83; MCL 38.83a; MCL 38.83b; MCL 38.91; MCL 38.93; MCL 38.103; MCL 38.112; MCL 38.419; MCL 38.465; MCL 38.507; MCL 38.512; MCL 38.514; MCL 38.556; MCL 38.556e; MCL 38.559; MCL 38.1181; MCL 38.1202; MCL 38.1203; MCL 38.1204; MCL 38.1205; MCL 38.1206; MCL 38.1343a; MCL 38.1343b; MCL 38.1343e; MCL 38.1347; MCL 38.1365; MCL 38.1366; MCL 38.1369c; MCL 38.1371; MCL 38.1375; MCL 38.1381; MCL 38.1381c; MCL 38.1382; MCL 38.1384; MCL 38.1385; MCL 38.1387; MCL 38.1431; MCL 38.1624a; MCL 38.1626; MCL 38.1627; MCL 38.1628; MCL 38.1630; MCL 38.1632; MCL 38.1633; MCL 38.1634; MCL 38.2506; MCL 38.2703; MCL 41.110b; MCL 46.12a; MCL 46.16j; MCL 48.37; MCL 51.356; MCL 51.360; MCL 51.362; MCL 64.3; MCL 120.127; MCL 124.122; MCL 124.404a; MCL 124.413; MCL 124.505; MCL 124.534; MCL 124.610; MCL 124.673; MCL 125.1422; MCL 141.1517; MCL 141.1518; MCL 141.1519; MCL 141.1520; MCL 169.257; MCL 205.4; MCL 205.28; MCL 206.703; MCL 206.711; MCL 207.1128; MCL 224.10a; MCL 257.1851; MCL 259.119; MCL 285.170; MCL 288.702; MCL 290.704; MCL 324.63540; MCL 330.1113; MCL 330.1134a; MCL 331.154a; MCL 333.2638; MCL 333.20173a; MCL 338.838; MCL 338.1067; MCL 338.1068; MCL 338.1069; MCL 338.1079; MCL 338.1081; MCL 338.2155; MCL 338.2156; MCL 380.620; MCL 380.1230; MCL 380.1230a; MCL 380.1230b; MCL 380.1230d; MCL 380.1235; MCL 380.1248; MCL 380.1249; MCL 380.1249a; MCL 380.1250; MCL 380.1280c; MCL 380.1284a; MCL 380.1284b; MCL 380.1312; MCL 380.1317; MCL 380.1535a; MCL 380.1539b; MCL 388.1701; MCL 408.384a; MCL 408.477; MCL 423.201; MCL 423.215; MCL 423.215b; MCL 423.217; MCL 432.207c; MCL 791.543a

4 MCL 423.210

5 MCL 124.505; MCL 124.534; MCL 124.610; MCL 423.201; MCL 600.591; MCL 600.593a; MCL 600.8271; MCL 600.8274

Federal funding

The proposal would give all State classified employees the right to elect an exclusive representative and bargain collectively over all conditions and aspects of employment, except for promotions. Such a broad grant of collective bargaining power could eviscerate the Civil Service rules on prohibited subjects of bargaining and the merit system that the Commission was charged to establish and enforce, since the

terms and conditions of State employment would be dependent on and governed by collective bargaining negotiations and not by an independent, constitutionally-established body. Without a merit system in place, Michigan may be prohibited from receiving certain federal funding. For example, the Social Security Act prohibits the payment of federal unemployment compensation funds to states that do not use merit-staffed governmental employees to operate its unemployment compensation programs. 42 USC 503(a)(1). This is but one example of federal funding that is contingent on the existence of a merit-based government employment system. There very well could be other programs involving State agencies and departments that have the same or similar requirements.

Proposal's validity

At a minimum, the initiative's Trojan Horse-style repeal and revision of so many constitutional provisions and statutes cannot possibly be communicated, fairly, in "not more than 100 words" as the Michigan Constitution requires. Const 1963, art 12, § 2. *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960; 755 NW2d 157, 158 (2008) [hereinafter "CPMC"] (Cavanaugh, Weaver, and Markman, JJ, concurring).¹ Just to give a single word to each constitutional and statutory alteration would require double the allowable words. And any 10,000-foot summary of the statute would be unable to describe the "true and impartial statement of the purpose of the amendment." Const 1963, art 12, § 2. As a result, a 100-word summary would create "prejudice for . . . the proposed amendment." *Id.* The only proper way to invalidate existing Michigan laws is a repeal initiative or referendum. Const 1963, art 2, § 9. In attempting to circumvent the proper process to invalidate each of the many provisions and Acts the proposal abrogates, the proposal's organizers have created a facially unconstitutional petition.

DISCUSSION

A ballot proposal of this extraordinary scope and multitude of constitutional and statutory abrogations "clearly cannot be reasonably communicated to the people in 'not more than 100 words.'" *CPMC*, 755 NW2d at 158 (Cavanaugh, Weaver, and Markman, JJ, concurring), citing Const 1963, art 12, § 2. Accordingly, the proposal "cannot be placed on the ballot without violating our constitution." *Id.*

That legal reality gives rise to the question the Governor has posed: is the Board of Canvassers legally obligated to place an unconstitutional proposal on the ballot? As common sense would suggest, the answer is no.

¹ The initiative also raises serious questions as a general revision of the Michigan Constitution and of Michigan laws. See Const 1963, art 4, § 36; Const 1963, art 12, § 3. The provision also fails to list all provisions of the Constitution that will be altered or abrogated, as required by Michigan Election Law.

Nearly 100 years ago, in *Scott v Vaughan*, 202 Mich 629; 168 NW 709 (1918), the Michigan Supreme Court was asked the same question in the context of a ballot petition that violated the constitutional requirement that a petition contain the full text of a proposed amendment. The Court acknowledged the ministerial nature of the Secretary of State's duties and agreed that the Secretary lacked discretion to reject a petition. *Id.* at 644-46. But the Court expressly recognized that "performance of a purely ministerial duty may involve something more than doing a prescribed thing in a prescribed way," *id.* at 644:

Knowledge of the correlation of facts, the exercise of reason, the application of established principles and rules, may be required before performance of a duty is indicated, before the fact upon the existence of which the duty arises can be said to be established. *One must appreciate the meaning and effect of what appears upon the face of a petition before he can determine whether, upon its face, it imports one thing or another.* [*Id.* (emphasis added).]

Thus, the Court held that, just as the Secretary is "compelled to refuse to receive an improper petition," so too is it the Secretary's "duty to reject—at least to refuse to take further action concerning—petitions not conforming to the constitutional mandate." *Id.*

The Michigan Supreme Court's conclusion makes good sense. It is true that the Secretary and Board of Canvassers have limited duties with respect to initiative petitions. But, just like the Attorney General, both the Secretary of State and the Board's members take an oath of office as provided in article 11, section 1 of Michigan's Constitution, *see* MCL 168.80 (Secretary of State); MCL 168.22c (Board of Canvassers), swearing to support the "constitution of this state," 1963 Const, art 11, § 1. And if a proposed initiative violates the Michigan Constitution, both the Board and the Secretary have the authority to stop the process of placing the proposal on the ballot. *See Leininger v Secretary of State*, 316 Mich 644; 26 NW2d 348 (1947) (holding that a constitutionally fatal defect in an initiative petition supported a writ of mandamus prohibiting the Secretary of State from even *transmitting* the proposed law to the Board of Canvassers where the issue is whether the petition meets constitutional requirements); *Scott*, 202 Mich at 643 (the right to submit petitions that amend the Michigan Constitution must "be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution."); *City of Jackson v Comm'r of Revenue*, 316 Mich 694, 711; 26 NW2d 569 (1947) (recognizing that the Michigan Supreme Court in *Leininger* "directed the secretary of State, the State board of canvassers and the attorney general to refrain from submitting [a] proposal to the voters" that was "fatally defective"). In light of the Michigan Supreme Court authorities noted above, it would be incongruous for the

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Board of Canvassers to acknowledge the constitutional invalidity of an initiative proposal yet allow that proposal to appear on the ballot.

In any event, Michigan law specifically vests in the Board the responsibility of approving the 100-word statement for a ballot initiative. 2012 PA 823, § 32(2); see former MCL 168.474, and MCL 168.22e. Due to the proposal's extensive rewriting of Michigan's Constitution and statutes—a facially discernible reality that the proposal's organizers have touted publicly—it is not possible to fairly present such a summary, as Michigan's Constitution requires. Accordingly, the Board of Canvassers has the authority to refrain from approving the 100-word statement and placing the Protect Our Jobs proposal before the electorate for consideration.

cc: Board of Canvassers