STATE OF MICHIGAN
IN THE SUPREME COURT

STUDENTS AGAINST GSRA UNIONIZATION,
and MELINDA DAY,

Proposed Intervenors – Appellants

and

MSC #_____
COA # 307964
MERC Case No. R11 D-034

GRADUATE EMPLOYEES ORGANIZATION/AFT,

Petitioner – Appellee,

and

THE UNIVERSITY OF MICHIGAN,

Employer – Appellee.
_____/

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BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL
AND MOTION FOR IMMEDIATE CONSIDERATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

REGULATIONS

CONSTITUTIONAL PROVISIONS

JURISDICTIONAL STATEMENT

On September 14, 2011, the Michigan Employment Relations Commission prevented Appellant Melinda Day, a graduate student research assistant (RA) pursuing her doctorate at the University of Michigan, from intervening in a representation petition proceeding. But, it also dismissed the petition for lack of subject matter jurisdiction. A motion for reconsideration was filed by the union seeking to be named the collective bargaining representative for RAs at the University of Michigan. During the pendency of that motion, Appellant Students Against GSRA Unionization ("SAGU"), a group of over 370 RAs, filed a motion to intervene and argued against reconsideration. On December 16, 2011, MERC granted reconsideration of its dismissal order. It also denied SAGU's motion to intervene. MERC set a jurisdictional hearing before an Administrative Law Judge, but limited the participants to those that believe that RAs are public employees subject to mandatory collective bargaining. An application for leave to appeal was filed at the Court of Appeals on January 6, 2011, and denied on January 25, 2012.

This application meets the criteria of MCR 7.302(B) and is timely pursuant to MCR 7.302(C).

STATEMENT OF QUESTIONS INVOLVED

Did the Michigan Employment Relations Commission improperly exclude all interested persons who seek party status to argue against MERC subject matter jurisdiction and who further seek to present evidence in support of that argument from an evidentiary hearing meant to accumulate evidence on jurisdictional issues?

Appellants say:	Yes
MERC says:	No
Union Graduate Employees Organization/AFT says:	No
University of Michigan says:	No

STATEMENT OF FACTS

Introduction

This case concerns an issue that has been settled in Michigan for three decades — that graduate student research assistants (RAs)[1] at state universities are not public employees and therefore cannot participate in mandatory collective bargaining under the Public Employment Relations Act (PERA). This holding came from a 1981 Michigan Employment Relations Commission (MERC) decision. *Regents of the University of Michigan and Graduate Employees Organization*, 1981 MERC Labor Op 777.

The case also concerns MERC's failure to comply with the Administrative Procedures Act (APA) by failing to promulgate a procedure by which its jurisdiction can be challenged by interested persons as that term is defined in the APA. The ad hoc process that MERC created in the instant case is likely to lead to chaos for graduate students that attend public universities in Michigan.[2] The flawed hearing process that Appellants seek to have stayed is set to begin on February 1, 2012.

The union that lost the above referenced 1981 case filed a representation petition in April 2011 seeking to unionize the same class of employees. Initially, MERC did not take notice of its prior decision, which had been resolved after an adversarial hearing that featured 19 days of live testimony and thousands of pages of exhibits. Perhaps MERC's actions were related to the lack

[1] The legal treatment of other types of graduate students at public universities in Michigan will be discussed below.

[2] The University of Michigan's 2011 expenditure for research was $1,236,510,624. http://research.umich.edu/content/2012/01/2012-fy11-financial-summary.pdf at 2. In 2010, the University of Michigan, Michigan State University, and Wayne State University cumulatively expended $1.878 billion on research. http://urcmich.org/reports_studies/pdf/URC-Econ-Impact-2011.pdf at ii. For 2008 and 2009, only John Hopkins spent more on research than the University of Michigan. http://research.umich.edu/content/2012/01/2012-fy11-financial-summary.pdf at 9.

of objection by the proposed employer, the University of Michigan, which through a resolution of its Board of Regents last May, sought to reclassify RAs as public employees.

After it became apparent that the University was not going to challenge the unionization effort, Appellant Melinda Day notified MERC that the prior decision was still binding and deprived it of subject matter jurisdiction over RAs. At first, while holding that Day did not have a right to intervene, MERC agreed with Day's arguments and dismissed the representation petition.

The union filed a motion for reconsideration and submitted an affidavit from a graduate student who claimed that factual changes since 1981 should allow for reexamination of the 1981 holding. Appellant Students Against GSRA Unionization (SAGU), a group of over 370 RAs opposed to the unionization effort at issue here, sought intervention and noted that almost every matter raised in the affidavit had been considered in the 1981 decision.

Due to public representations by MERC, the Attorney General had become aware that MERC was likely to order a hearing to examine whether facts had changed sufficiently since 1981 to allow RAs to be designated as public employees, and that MERC was not planning to let either Day or SAGU participate. The AG filed a motion against reconsideration and sought to participate in any evidentiary hearing.

MERC granted the reconsideration motion. It ordered an Administrative Law Judge (ALJ) to hold a hearing, but it limited the parties that could participate in that hearing to the union, which wants RAs to be held to be public employees, and the University, which is under orders from its Regents to argue that RAs are public employees. MERC excluded all three parties – Day, SAGU, and the AG – that sought party status to assert RAs are not public employees.

Appellants and the AG filed separate applications for leave to appeal with the Court of Appeals. Both were denied.

Appellants filed the instant motion and brief seeking a stay until this Court determines whether or not to allow Appellants to participate in the hearing or to provide some alternative type of relief.

The instant application concerns a state agency decision that denies due process to thousands of RAs and that may significantly impact the research activities of the University of Michigan, which is a national leader in the field spending over $1 billion annually. The question of the outer limits of what constitutes a public employee is a matter of major significance. Therefore, Appellants meet the requirements of MRC 7.302(B).

Facts and background

On April 27, 2011, Graduate Employees Organization/AFT ("GEO") filed a representation petition seeking to unionize the 2,200 RAs at the University of Michigan. This renewed attempt may be due to developments in similar, but not controlling, federal labor law. A quick review of the federal decisions on graduate students in private universities may provide this Court with useful context.

For decades, graduate students at private universities could not participate in mandatory collective bargaining. The National Labor Relations Board first addressed the issue in *Leland Stanford*, 214 NLRB 621 (1974), and held that graduate students were not employees under the National Labor Relations Act. The NLRB found that the payments made to graduate students were "in the nature of stipends or grants to permit them to pursue their advanced degrees" and that a graduate student's interaction with the university was directed "toward the goal of obtaining the Ph. D. degree." *Id*. at 621-22. The NLRB found that the pursuit of a degree divided

those who could not participate in mandatory collective bargaining from those who could. *Id*. at 623 (comparing "research associates" who already have a degree with graduate assistants who do not). The NLRB concluded that graduate students are "primarily students" and that "they are not employees." *Id*.

Twenty-six years later, the NLRB reached a different conclusion when the issue arose at a different university. *New York Univ*, 332 NLRB 1205 (2000). The board held that even though graduate students were "predominately students," they could still "be statutory employees." *Id*. at 1205. The NLRB rejected the pursuit-of-degree distinction; the claim that the money the students received was really financial aid, not compensation; and the argument that the educational benefit to the graduate students should prevent an employee designation. *Id*. at 1206-07.

Four years later, the NLRB reversed itself again in *Brown University*, 342 NLRB 483 (2004), holding that graduate students were not employees under the NLRA. Noting that the "academic reality" for graduate students "has not changed, in relevant respects, since our decisions nearly 25 years ago," the NLRB returned to its previous rationale. *Id*. at 492. The board rejected the argument that "changing financial and corporate structures of universities" should impact the analysis. *Id*. The board recognized that "some states permit collective bargaining at state universities," but it chose "to interpret and apply a single federal law differently to the large number of private universities under" its jurisdiction. *Id*. at 493.

There is some indication that the NLRB may be willing to reverse itself again and permit unions to organize graduate students under the NLRA. In an October 25, 2010, order in *New York University*, the board indicated that "there are compelling reasons for reconsideration of the decision in *Brown University." New York Univ*, 2010 WL 4386482 (NLRB October 25, 2010).

Thus under the NLRA, there was a long period in which graduate students could not be organized for mandatory collective bargaining because they were not considered employees of private universities under the statute. The last eleven years have seen the NLRB vacillate on this holding. One other interesting facet of the NLRB's holdings is that the board has uniformly considered graduate students in the aggregate and not spent much time, if any, discussing whether various subgroups of graduate students should be evaluated separately.

In contrast to the federal rulings concerning the NLRA, the legal treatment of graduate students in Michigan has been unswerving for the last thirty years — two specific types of graduate students have met the PERA definition of public employee, while a third kind has not. The distinction between graduate students who are and are not public employees was set forth in a 1981 MERC decision in a dispute between the University of Michigan Board of Regents — the "employer" in the instant action — and the GEO — the union in the instant action. *Graduate Employees Org*.

The University of Michigan had allowed all of its graduate students, including RAs, to organize in 1974, and after a vote (and a failure on MERC's part to recognize a potential jurisdictional problem), the students did so. A month-long strike in 1975 preceded a contract.[3] In the process of negotiations for a second contract, conflicts developed between the union and the University. The University sought the dismissal of a grievance, and the union filed an unfair labor practice charge contending that the University was demanding dismissal before it would execute a second contract. The University's sole defense was that MERC lacked jurisdiction because the graduate students were not public employees under PERA. *Graduate Employees Org*, 1981 MERC Labor Op at 790.

[3] Assuming any graduate students were properly characterized as public employees under PERA, the strike was illegal. MCL 423.202.

On August 17, 1977, the ALJ issued a recommended order that the University had engaged in an unfair labor practice. *Id*. After the University filed objections, on January 18, 1978, MERC remanded the matter to the ALJ. *Id*. That order stated:

> The exceptions object to the refusal of the ALJ to take evidence on the issue of whether or not graduate students assistants are employees under PERA. Respondent's sole defense to the unfair labor practice charge was that there was no obligation to bargain under PERA since graduate students are not employees within the meaning of the Act. At the hearing, the ALJ limited [the University] to making an offer of proof, finding that the issue had been decided by the Commission in prior cases. . . .
>
> . . . The ALJ erred in excluding evidence on this issue, **since we believe this matter can only be resolved on the basis of a complete record. . . .**
>
> **. . . Many facts introduced in the offer of proof and at oral argument must be more fully developed before a determination can be made as to the essential nature of the relationship between graduate assistants and the University**.

Graduate Employees Org, 1981 MERC Labor Op at 790-91 (citations omitted and emphasis added). The hearing on remand "was cast in the form of a hearing on [the University]'s motion to dismiss the charge for lack of jurisdiction by MERC over graduate student assistants." *Id*. at 791. That hearing was adversarial: "At the hearing both parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to present evidence and arguments on the issues raised in the charge." *Id*. at 789-90.

Testimony was taken over 19 days of hearings. *Id*. at 791. The record was over 3,000 pages long and included several volumes of exhibits. *Id*. The parties also submitted approximately 100 pages of legal briefs. *Id*.

That jurisdictional conflict concerned the GEO's claim that all people "holding appointments as graduate student assistants at the University of Michigan are employees within the meaning of PERA when engaged in activities within the scope of the graduate student appointment." *Graduate Employees Org*, 1981 MERC Labor Op at 791. At the time, there were approximately 2,000 graduate student assistants at the university. *Id*. at 780. The record revealed

that graduate students were split into three categories: (1) graduate student teaching assistants (TAs), whose duties consisted primarily of teaching about 30% of the university's undergraduate courses, *id*. at 780; (2) graduate student staff assistants (SAs), whose duties included counseling undergraduates and advising them about course selection, *id*. at 781; and (3) graduate student research assistants (RAs), who generally "perform[ed] research under the supervision of the faculty member who is the primary researcher of a research grant." *Id*.[4]

At the conclusion of the remand hearing, the ALJ recommended that TAs and SAs be categorized as public employees and that RAs not. MERC accepted that recommendation.

MERC explained that while "PERA does not define public employees to specifically include or exclude students, MERC has consistently held that students can be employees." *Id*. at 782. MERC noted that its holding that medical interns at the University of Michigan could be both students and public employees had been affirmed by this Court. *Id*. at 783 (citing *Regents of the Univ of Michigan v MERC*, 389 Mich 96 (1973)).

The NLRB's then controlling "primarily student" approach under the NLRA was noted and rejected. *Graduate Employees Org*, MERC Labor Op at 784. The test MERC then adopted for determining a student's status under PERA was "whether students are providing benefit for another rather than pursuing their individual goals." *Id.*

Applying this test, it was determined that TAs and SAs were public employees:

> TA's provide a benefit to the University rather than engaging in pursuits of their own. They provide services similar to those of nonstudent employees; they do not control what courses they teach or what hours they work; they are supervised and may be removed for inadequate performances; and, they are compensated based

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[4] At the time, TAs were 77% of graduate student assistants; SAs were 4%; and RAs were 17%. *Id*. at 780-81. Some students held multiple designations, and they account for the remainder.

In the university's current nomenclature, TAs are referred to as graduate student instructors (GSIs); SAs are graduate student staff assistants (GSSAs); and RAs are graduate student research assistants (GSRAs). For ease of reference, Intervenor will use the titles that MERC used in 1981.

> on the amount of work they provide. They are supervised by faculty who retain control and oversight, as Respondent's principal representatives, for the quality of the work performed. They are subject to the immediate direction and control of the Respondent and they may be disciplined or relieved of their duties for inadequate performance. The work they perform fulfills one of the central missions of the Respondent. Likewise, the SA's perform regular duties of a type which benefit the University.

Id. at 785. Thus, while the TAs and SAs were "principally students," they were public employees in "their teaching and counseling." *Id*.

MERC held that "sufficient indicia of an employment relationship" did not exist with RAs:

> The nature of RA work is determined by the research grant secured because of the interests of particular faculty members and/or by the student's own academic interest. They are individually recruited and/or apply for the RA position because of their interest in the nature of the work under the particular grant. Unlike the TA's who are subject to regular control over the details of their work performance, RA's are not subject to detailed day-to-day control. RA's are frequently evaluated on their research by their academic advisors and their progress in their appointments is equivalent to their academic progress. Nor does the research product they provide further the University's goal of producing research in the direct manner that the TA's and SA's fulfill by their services. Although the value of the RA's research to the University is real it is clearly also more indirect than that of teaching 30% of the undergraduate courses. RA's . . . are working for themselves.

Id. at 785-86.

No appeal was taken, and this remained the state of the law for the last thirty years.

Nevertheless, as noted above, on April 27, 2011, the GEO filed a representation petition with MERC. Just as in 1981, the GEO again seeks to represent RAs at the University of Michigan.

At the May 19, 2011, meeting of the University of Michigan Regents, the following resolution was passed by a 6-2 vote:

> Resolved, that consistent with the University of Michigan's proud history of strong, positive, and mutually productive labor relations, the Board of Regents supports the rights of University Graduate Student Research Assistants, **whom we**

> **recognize as employees**, to determine for themselves whether they choose to organize.

http://www.regents.umich.edu/meetings/06-11/2011-06-I-1.pdf (emphasis added).[5] With this resolution, the controlling board of the University of Michigan declared it university policy that contrary to MERC's 1981 holding, RAs are public employees who can engage in mandatory collective bargaining under PERA.

On July 28, 2011, pursuant to R. 423.145(3), Appellant Melinda Day filed a motion to intervene and claimed that the 1981 decision should be considered binding. Day noted that because MERC had held that RAs are not public employees, MERC lacked subject matter jurisdiction over the representation petition. On August 3, 2011, the union filed a motion to deny the intervention.

At MERC's August 8, 2011, meeting Day's intervention motion was discussed. Commissioner Nino Green noted that the 1981 decision should be controlling and that a hearing to see if the facts had changed would be futile since the Regents were forcing the University administration to argue that RAs were public employees:

> Commissioner Green continued that the Commission is faced with the unusual request to certify a bargaining unit of employees that the Commission has previously determined is not eligible for certification. He noted that a majority of the Regents of the University has entered into an agreement to recognize research assistants as employees, but that a party cannot confer employee status simply by agreement.
>
> . . . First, he stated that he is unwilling to ignore the Commission's previous ruling. To do so, would settle the question only until there is a "bump in the road" and an unfair labor practice is filed or there is an ideological shift at the U of M. If an election results in certification now, it may still be asserted in a future proceeding that research assistants are not employees, and the issue would need to be adjudicated again. Another option to consider is for an ALJ to hold a hearing to determine if there is a change in the facts. He, however, expressed concern that the U of M Regents would not appear at the hearing to advocate a

[5] The six Democratic Party regents voted in favor. The two Republican Party regents were opposed.

> position contrary to its resolution, and it is not likely that the U of M administration will oppose the position taken by the Board of Regents. Therefore, the ALJ will have no case or controversy to decide.

Proposed Minutes of August 8, 2011 MERC meeting.[6]

In an order issued in September of last year, MERC refused to disturb its 1981 ruling. MERC stated:

> Usually, we do not inquire into the nature of an employment relationship or the legality of a bargaining agreement when we have a Consent Election Agreement signed by the parties. However, this is not the usual case because the issue of the Commission's jurisdiction is squarely before us in light of our previous decision involving these same parties. To decide this issue, we have no information that would allow us to reach a conclusion contrary to the one reached in 1981, that RAs are not employees under PERA.
>
> Our jurisdiction derives from statutory authority and does not extend to individuals who are not employees of a public employer. The Commission's jurisdiction cannot be expanded by an agreement. . . . We cannot find that RAs are employees based solely upon an agreement of the parties. Absent a showing of a substantial and material change of circumstance, we are bound by our previous decision.
>
> . . .
>
> Having previously determined that RAs are not employees entitled to the benefits and protections of PERA, we decline to declare that they have become employees based on the Employer's change of heart and present willingness to recognize them as such. The RAs cannot be granted public employee status under PERA predicated on the record before us.

September 14, 2011 Decision and Order at 3-4. While MERC accepted the arguments presented by Day, it held that she could not intervene in the proceeding:

> While Commission Rule 423.145(3) provides that an employee, group of employees, individual, or labor organization may intervene in an election proceeding, it also provides that there **must be evidence showing that ten percent of the members of the unit in which the election is sought support the petition to intervene**. Day has not offered any evidence that members of the proposed unit support the petition to intervene; she, therefore, lacks standing to participate in these proceedings.

[6] A copy of this document is attached.

September 14, 2011 Decision and Order at 4 (emphasis added).[7]

On October 3, 2011, the union filed a motion requesting that MERC reconsider its September 14, 2011, rejection of the GEO's representation petition. In this motion, the GEO tried to introduce some "new" facts through an affidavit of RA Andrea M. Jokisaari that the union claimed should lead to a reexamination of the 1981 holding.

On October 17, 2011, the University of Michigan filed a "Response to Petitioner's Motion for Reconsideration." This document indicated that current facts are nearly identical to those that the Commission considered important in 1981. While the University's filing showed the factual similarities between 1981 and the current time, no argument or conclusion on whether RAs are public employees was presented.

On November 1, 2011, Appellant Students Against GSRA Unionization ("SAGU") filed a motion to intervene. Its President, Adam Duzik, filed an affidavit saying that its 371 members were opposed "to the Graduate Employees Organization/AFT's attempt to organize University of Michigan graduate student research assistants into a compulsory union." November 1, 2011, Affidavit of Adam Duzik at ¶ 3. The brief in support of the motion to intervene showed that the "facts" presented by the union in its reconsideration motion were not different than those considered by MERC in 1981. Also, the brief's "Statement of Questions Involved" page characterized the University's response as being opposed to a finding that the RAs were public employees.

[7] MERC also discussed its willingness "to conduct an election as a service to the parties, and tabulate the results of that election without certifying representative status under PERA." September 14, 2011 Decision and Order at 4. What would have been accomplished by this nonbinding *ultra vires* election was not made clear; regardless, subsequent events have prevented this from becoming an issue needing resolution.

On November 4, 2011, the University filed a document titled "Supplemental Response of Public Employer University of Michigan." The University cited the Regent's resolution and clarified that it "wishes the election to go forward."

At its November 8, 2011, meeting, a potential majority of MERC members indicated that it was ready to remand the question of whether the facts had changed sufficiently from 1981 to an Administrative Law Judge, which would allow MERC to decide whether to revisit its determination that RAs were not public employees. The potential majority stated that it was likely to hold that SAGU could not intervene in the proceedings, which would thereby leave the only two parties allowed to participate – the union and the University – in agreement that RAs are public employees. MERC staff was requested to work on written orders to reflect these preliminary discussions.

On November 30, 2011, the Attorney General filed a motion to intervene. This motion cited the importance of the University's role as a job creator due to its status as a "nationally recognized research institution." Michigan Attorney General's Motion to Intervene at ¶ 2. It noted that if a hearing were going to be ordered, intervention would be necessary "to ensure all the facts are presented through the benefit of the full adversarial process." *Id*. at ¶ 5. The Attorney General continued:

> Unlike in 1981, the University is constrained from opposing this position because of the Regents' majority vote. Both sides being in agreement on the pivotal issue, there would be no adversarial process to develop the record whatsoever at any hearing.

Id. at ¶ 12. On December 5, 2011, the union filed its opposition to the Attorney General's motion to intervene. On December 6, 2011, SAGU filed a response to the Attorney General's motion. On December 7, 2011, the union filed a letter response to the SAGU filing. On that same day, the Attorney General filed a reply to the union's opposition to the Attorney General's intervention

motion. On December 9, 2011, the University filed a response to the Attorney General's motion to intervene.

MERC held a meeting on December 13, 2011. It issued its 2-1 decision on December 16, 2011. Despite having previously indicated that a student group that comprised over 10% of the proposed bargaining unit could intervene, the MERC majority denied SAGU's intervention motion:

> While Commission Rule 423.145(3) provides that an employee, group of employees, individual or labor organization may intervene in an election proceeding, it also states that there must be evidence showing that ten percent of the members of the unit in which the election is sought support the petition to intervene. The affidavit filed in support of the motion to intervene submitted on the behalf of Students Against GSRA Unionization simply states that the group has 371 members. There is no assertion as to how many of this number support the motion to intervene and no authorization cards accompanied that motion. Furthermore, intervention in an election proceeding is only granted when, upon a proper showing of interest, a rival to the labor organization seeking representative status wishes to be included on an election ballot. See Commission Rule 145(3). The Group known as Students Against GSRA Unionization does not seek placement on a ballot. Rather, it seeks to intervene in this proceeding for the purpose of expressing its opposition to our conducting an election, a purpose that it lacks standing to pursue in a representation proceeding.

December 16, 2011 Decision and Order at 3-4. MERC also denied the AG's motion to intervene, and in doing so, indicated that it was hostile to the participation of any party aside of the employer and the union:

> Although there is no dispute between [the union] and the University over whether an election should be authorized in this matter, we must determine whether, in light of [the 1981 decision], we have jurisdiction to do so. Thus, we must find whether there has been a material and substantial change of circumstances since the 1981 decision that would justify our further review of the RA's status. Such a review is an investigatory and not an adversarial proceeding. *University of Michigan*, 1970 MERC Lab Op 754, 759. MCL 423.212. We must carry out our statutory responsibility without interference from non-parties opposed to the very rights provided to public employees by PERA.

December 16, 2011 Decision and Order at 4-5.

Without identifying anything specifically, MERC indicated the Jokisaari affidavit provided by the union was sufficient to make MERC question the continued vitality of its 1981 decision:

> Some of the facts attested to in the affidavit, which were not before us when we decided to dismiss the petition for election, suggest some or all of the RAs presently may possess the necessary indicia of employment to distinguish them from the RAs who were the subject of this Commission's 1981 decision.
>
> . . . [T]he assertions in the affidavit submitted by Petitioner persuade us that this matter requires further inquiry.

Id. at 6. MERC contended that this matter is a representation case, which is an investigatory proceeding "in which it is [MERC]'s duty to try and find the truth." *Id*. It emphasized that representation cases "are information gathering, rather than adversarial, proceedings." *Id*. at 6 n. 2. Despite claiming that the process was non-adversarial, MERC referred the matter "to a senior administrative law judge to conduct an evidentiary hearing at which [the union] will have the opportunity to attempt to show that there have been a substantial and material change in circumstances since [the 1981 decision]." *Id*. at 6. MERC indicated it was the union's burden to show a change, and MERC described this burden as "heavy." *Id*.

The MERC majority described the new process it was creating just for this hearing:

> We direct the administrative law judge to issue a detailed pre-hearing order regarding the disclosure of witnesses and exchange of exhibits in response to which both [the union] and the University shall provide relevant information and actively participate in the hearing process. The administrative law judge may call any witnesses and receive any evidence, in addition to testimony and other evidence offered by the Petitioner and the University, as may be probative and relevant, and may, by subpoena, compel the production of evidence. The administrative law judge may receive stipulations of fact from the parties, but shall not accept any stipulation as to the ultimate legal issue of employment status.
>
> If, upon the conclusion of the hearing, the Commission determines from the factual record that some or all of the Graduate Student Research Assistants in question are employees of the University and are covered by PERA, the Commission will direct an election by secret ballot as to those positions only, in a new unit, or as an accretion to an existing unit, or take such other action as may be appropriate.

Id. at 7. The majority opinion included Commissioner Green, who 4 months earlier stated such a hearing would not work.

MERC Chairman Callaghan dissented. First, he indicated he would not have granted the motion for reconsideration:

> Nothing has materially changed the nature of the mentor-mentee relationship that is so critical to the research function of the University of Michigan as a world class research university. Even though the number of RAs and the amount of funding have increased, the essential nature of the mentor-mentee relationship between student and faculty member that is at the core of the university research function remains unaltered.

Id. at 8 (Callaghan, dissenting). While he agreed with the denial of SAGU's intervention motion, he thought the AG needed to be allowed to intervene so that a balanced hearing could be held:

> If I agreed with the decision to refer this matter to an administrative law judge for a hearing, I would be concerned that testimony regarding the relevant experiences of the University president, numerous deans and faculty members, and hundreds of RAs might not be presented without the Attorney General's intervention. **Indeed, a decision to refer this matter for hearing would appear, to all who oppose the Regents' May 19 resolution, to be a sham if we were to permit only one side of this crucial debate to be proffered at hearing.** If I had joined in the decision to refer the matter to an administrative law judge, then in the interests of fairness and due process, I would encourage the majority to grant the Attorney General's motion to intervene for the purpose of ensuring that both sides of this issue were fully and fairly examined.

Id. at 10 (emphasis added).

On January 6, 2012, Appellants filed an application for leave with the Court of Appeals seeking an expedited review and an order allowing their full participation in the jurisdictional hearing before the ALJ.[8] On January 20, 2012, both the union and the University filed a

[8] On that same day, the AG filed a separate application. *University of Michigan v Graduate Employees Organization/AFT* No. 307959.

response.[9] On January 25, 2012, the Court of Appeals issued an order dismissing the application for leave:

> The Court orders that the motion for immediate consideration and the application for leave to appeal are DISMISSED for lack of jurisdiction. This Court lacks jurisdiction to entertain an appeal from an interlocutory order of the MERC. MCR 7.203(B)(3); MCL 423.2 J 6(e); *Harper Hosp Employees' Union Local No. I v Harper Hosp*, 25 Mich App 662, 664-666; 181 NW2d 566 (1970). MCL 24.301 does not confer jurisdiction on this Court because the current proceeding before the MERC is not a contested case. MCL 24.203(3); *McBride v Pontiac School Dist (On Remand)*, 218 Mich App 105, 122; 553 NW2d 646 (1996); *Michigan Ass'n of Public Employees v Michigan Employment Relations Comm'n,* 153 Mich App 536, 549; 396 NW2d 473 (1986).

Order of January 25, 2012.[10]

Appellants then filed the instant motion and application for leave to appeal.

ARGUMENT

I. The Michigan Employment Relations Commission improperly excluded all interested persons who sought party status to argue against MERC jurisdiction and present evidence in support of that argument from an evidentiary hearing meant to accumulate evidence on jurisdictional issues

A. Standard of Review

This Court defers to agency findings of fact, but legal finding can be set aside "if they are in violation of the constitution or a statute, or affected by other substantial and material error of law." *In re Complaint of Rovas*, 482 Mich 90, 105 (2008).

B. Given the facts presented in this case, Appellants have statutory and due process rights to participate in any MERC hearing on jurisdiction

MERC is poorly situated to handle a jurisdictional challenge from a non-employer due to serious flaws in its administrative rules. In the last decade there have been a number of instances

[9] On that same day, both filed responses in the AG's application.

[10] That same day, a nearly identical order dismissing the AG's application was issued.

where a public employees union works in concert with political allies in charge of a public employer to push the boundaries of public employment and thereby potentially subject individuals who heretofore had not been considered public employees into mandatory collective bargaining units represented by public sector unions. This Court recently considered two applications related to this phenomenon in *Loar v Department of Human Services*, 489 Mich 782 (2011) and *Loar v Department of Human Services*, 488 Mich 860 (2010)[11], both of which concerned the improper unionization of home-based day care workers.

MERC's rules fail to provide a clear avenue for an individual or group of individuals who do not believe that they are public employees to challenge MERC's subject matter jurisdiction. The harm from MERC's poorly designed rules could have been ameliorated had MERC interpreted its rules in the instant matter to allow the graduate students party status in the jurisdictional hearing. Having failed to do so, MERC is violating the APA and denying Appellants due process.

1. Public sector labor law basics

In order to understand the flaws in MERC's administrative rules, some background on labor law is required. As a primary matter, mandatory public sector bargaining is neither required by the federal constitution, *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979), nor is it prohibited, *Abood v Detroit Board of Education*, 431 US 209 (1977). Thus, each state can decide whether it wants mandatory public sector bargaining at all[12], and if so, in what

[11] This Court's docket numbers were 141810 and 142237. The unionization of day care providers came to an end when Governor Snyder pulled out of an interlocal agreement that had created the so-called employer of the providers. In light of that, this Court mooted application 142237. *Loar v Dep't of Human Services*, 489 Mich 782 (2011).

[12] As an example, North Carolina prohibits all mandatory public sector bargaining. N.C. Gen-Stat § 95-98.

circumstances. Michigan allows it and tasked the Legislature to define its scope. See Const 1963, art 4, § 48.

In 1965, the Legislature enacted PERA, which allows "public employees" as defined by MCL 423.201(e) to engage in mandatory collective bargaining. MERC administers PERA. Two of MERC's major functions are to administer elections and to resolve unfair labor practice charges. MCL 423.212 covers representation petitions and MCL 423.216 allows an unfair labor practice charge to be filed for a violation of MCL 423.210. These two functions will be discussed below.

2. The scope of MERC's jurisdiction

The Court of Appeals has defined subject matter jurisdiction as "the types of cases and claims that a court has authority to address." *In re AMB*, 248 Mich App 144, 166 (2001). It noted that jurisdiction must be present and that a court has a duty to raise the issue even if the parties do not:

> Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement. It cannot be conferred by consent, by conduct or by waiver or by estoppel. Subject matter jurisdiction is so critical to a court's authority that a court has an independent obligation to take notice when it lacks such jurisdiction, even when the parties do not raise the issue.

Id. at 166-67 (footnote and internal citations omitted). Subject matter jurisdiction is the very source of a court's authority. Without subject matter jurisdiction, a court's orders are void:

> When there is a want of jurisdiction over the parties, or the subject matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist.

Jackson City Bank Trust Co v Fredrick, 271 Mich 538, 544-45 (1935). Jurisdiction cannot be expanded by the court or the parties:

> The jurisdiction of a court arises by law, not by the consent of the parties. Parties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction. When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void. Further, a court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings.

Bowie v Arder, 441 Mich 23, 54 (1992) (citations omitted).

On two separate occasions, the Court of Appeals has held that MERC has subject matter jurisdiction over public employees only. In *Prisoners' Labor Union at Marquette v Department of Corrections*, 61 Mich App 328 (1975), the Court of Appeals held that inmates would be under MERC's jurisdiction "if, and only if, those inmates are 'public employees' within in [sic] the meaning given that term in PERA." *Id*. at 330.[13]

In *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003), the Court of Appeals affirmed MERC's decision that it lacked jurisdiction to decide an unfair labor practice claim brought by a private contractor. The Court of Appeals explained the limits of PERA: "PERA addresses the bargaining rights and privileges of public employees, using the term 'public employee' to distinguish those individuals covered under PERA from private employees." *Id* at 631. Further, it stated that "PERA is directed at *public* rather than *private* employees and it indicates no intent to regulate the labor relations of public employers generally." *Id*. at 637.

Thus, if RAs are not public employees, then MERC lacks subject matter jurisdiction over them and cannot certify a mandatory collective bargaining representative for them. This question concerns both Appellants' liberty and property interests.

3. Constitutional due process generally

[13] After reviewing the correctional facilities act, MCL 800.321 et seq and the purposes behind it, the Court of Appeals held that inmates were not public employees.

Under the Fourteenth Amendment, a State may not "deprive any person of life, liberty, or property, without due process of law." US Const, Am XIV. Const 1963, art 1, § 17 states "No person shall . . . be deprived of life, liberty or property, without due process of law." These constitutional provisions are "coextensive." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 32 (2005).

Appellants have two potential due process interests – liberty and property. Appellants have First Amendment associational rights not to be forced to associate with others. See *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 681 (2003). Clearly, that interest can be overcome where a state has an interest in "labor peace." *Abood,* 431 US at 224. But that is the entire point that Appellants want to raise here – they are students not "public employees. Therefore, labor peace does not apply. The second interest is a property interest. It is true that this is probably not ripe at this point. The union has announced what its likely dues will be in an email – $442[14] – but that would not occur unless and until the union were to win an election.

The Supreme Court has stated that: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v Eldridge*. 424 US 319, 333 (1976). The Court of Appeals has stated that: "The fundamental requirements of procedural due process are notice and a meaningful opportunity to be heard before an impartial decision maker." *In re Beck*, 287 Mich App 400, 402 (2010).

As holders of constitutionally recognized and protected liberty and property interests, Appellants must have some sort of avenue to challenge a MERC action that designates them as public employees and thereby subjects them to mandatory collective bargaining.

[14] This document is attached.

4. Declaratory rulings under APA

One potential avenue would be if RAs could seek a declaratory ruling from MERC on their status. Under the APA, an agency must provide a process for an "interested party" to seek a declaratory ruling:

> On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. **An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition**. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

MCL 24.263 (emphasis added). Note that a declaratory ruling is subject to judicial review in the same manner as a final agency decision or contested case.

In pertinent part, the APA defines a "person" as "an individual, partnership, association, corporation, limited liability company, limited liability partnership, government subdivision, or public or private organization of any kind." MCL 24.205(7) (emphasis added). Thus, any of these parties may seek a declaratory ruling.

While the APA defines person, it does not define the adjective "interested." For that, Appellants contend the proper focus is on whether the person has a sufficient interest to meet the constitutional standing requirements.

It is clear both Day and SAGU have a sufficient interest to meet the state constitutional requirements for standing. Aside of the liberty interest identified above, assuming the union was to be certified as a mandatory collective bargaining representative for the RAs, GEO has indicated in an email that it will charge each student around $442 a year in dues.

In *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349 (2010), the Michigan Supreme Court indicated that standing is proper wherever a litigant meets the requirements for declaratory judgments under MCR 2.605. Further, even "where a cause of action is not provided at law," a court has the discretion to "determine whether a litigant has standing." *Id*. at 372. The court provided guidance on when standing should be found:

> A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Id. Here, the dues deduction that would almost certainly occur if the union was named a mandatory collective bargaining representative is sufficient to provide standing. Further, even if the Michigan Supreme Court were to return to the more strict standing rules found in *Lee v Macomb County Board of Commissioners*, 464 Mich 726 (2001) and its progeny,[15] the improper taking of $442 would be sufficient to provide standing.

The administrative rules for MERC are located from R. 423.101 to R. 423.194. Either these rules contain a process by which an interested person may seek "a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency" or MERC is violating the APA. The word "declaratory" does not show up a single time in MERC's rules.

5. Representation proceedings

Another avenue for Appellants to protect their liberty and property interests would be if they could participate in the representation process and any hearing related thereto.

[15] *Lansing Schools Education Association* overturned the *Lee* line of cases over a vigorous dissent and two members of the *Lansing Schools Education Association* majority are no longer on the Michigan Supreme Court.

Michigan's representation process, MCL 423.212, was based on 29 USC § 159 of the National Labor Relations Act, which is sometimes referred to as section 9. Between the two regulatory schemes there is at least one key difference regarding judicial review. Michigan allows pre-election judicial review of representation proceedings; under the NLRA, such review is generally prohibited.

Professors Gorman and Finkin explain the NLRA review scheme:

> Any agency determinations at this pre-election state are almost completely impregnable to immediate review by the courts. To challenge these determinations, a party must first commit an unfair labor practice, assert as a defense thereto the alleged error of the Board in the representation proceeding – an "error" which the Board will commonly adhere to in the unfair labor practice case – and only then seek appellate review in the federal courts.

Robert A. Garmon & Matthew W. Finkin, Basic Text on Labor Law Unionization and Collective Bargaining 57 (2nd ed 2004). The record of the representation proceeding is incorporated into the unfair labor practice charge[16] and challenged in that manner. The underlying theory is that Congress wanted to limit judicial review in order to let elections occur earlier in the process. *Id*. at 78.

There are exceptions where the federal courts have allowed court review more expeditiously. For example, in *Leedom v Kyne*, 358 US 184 (1958), the Supreme Court allowed a district-court challenge where the NLRB, in clear violation of the NLRA, included professional employees in a unit without allowing them to vote. The court stated: "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id*. at 190. But see *Boire v Greyhound Co*, 375 US 473 (1964) (limiting application of *Leedom*).

[16] Under the NLRA, unfair labor practice charges are covered by 29 USC § 160, which is often referred to as section 10.

Another exception to the general rules is where an employee seeks to challenge the Board's ruling. Generally, employees cannot trigger unfair labor practice charges and thus that method of securing judicial review is not available to them. In *Templeton v Dixie Printing Co*, 444 F2d 1064 (5th Cir 1971), the Fifth Circuit allowed employees to file an action despite lacking a final order from the NLRB. The court noted that there was "no administrative remedy to correct a clear wrong that undermines the employees' paramount right." *Id*. at 1070.

Further, despite the strong level of deference given to the NLRB's representation-petition process, the requirements of procedural due process must be met. For example, in *Alaska Roughnecks and Driller Association v NLRB*, 555 F2d 732 (1977), the Ninth Circuit held that a putative joint employer who was not provided with a notice and opportunity to participate in a representation hearing was not bound by the Board's determination that it was a joint employer: "Because [the putative joint employer] had no opportunity to participate in the representation proceeding, it was not accorded due process." *Id*. at 736.

Michigan differs in the manner of judicial review. In *Board of Trustees of Michigan State University v State Labor Mediation Board*, 381 Mich 44 (1968), the State Labor Board authorized an election of a unit of Michigan State University employees. Before the election could occur, Michigan State filed in the Court of Appeals seeking a stay of the proceedings, and leave to appeal the order. This Court took note of Const 1963, art 6, § 28, which states:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, **shall be subject to direct review by the courts as provided by law**. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

> In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

Id. This provision requires that there be direct judicial review. Thus, Michigan did not require that a party must wait until an election has occurred and then attempt to trigger an unfair labor practice charge before obtaining judicial review.[17] See also, *Escanaba v State Labor Mediation Bd*, 19 Mich App 273 (1969).

In *Hepler v State Department of Labor*, 64 Mich App 78 (1975) , the Court of Appeals was presented with a decertification question. A professor at Central Michigan University had gotten over 30% of the bargaining unit to sign a card requesting an election, but had not used sufficient language to indicate that the petitioners no longer wanted to be represented by their collective bargaining agent. MCL 423.212 allows decertification petitions "[b]y a public employee . . . alleging that 30% or more of the public employees within a unit . . . assert that the individual or labor organization, which is certified or is being currently recognized by their public employer as the bargaining representative, is no longer a representative as defined in section 11." The petition in question stated: "I am in favor of having an election to determine whether or not Central Michigan University Faculty Association should be my collective bargaining agent." *Hepler*, 64 Mich App at 84. The petition was dismissed administratively, not after a hearing.

Borrowing from NLRA principles, the Court of Appeals stated "our judicial review is quite limited since it is not the function of the courts to second-guess the designated agency for labor matters on the purely administrative question of holding an employee election." *Id*. at 85.

[17] It should be noted, however, that at the time GCR 1963 806.2 allowed appeal of interlocutory orders of administrative agencies. In 1985, MCR 7.203(B)(3) sought to limit appeals to final agency orders.

But the court agreed that some level of judicial review was necessary to "guard against arbitrary and capricious dismissals." *Id*. at 86. Despite what it noted was "serious implications concerning employee exercise of free choice" the Court of Appeals indicated that: "Absent a showing that MERC's discretionary decision is so perverse or palpably wrong as to effectively amount to a breach of its statutory duty, the Court will not set MERC's determination aside." *Id*. at 87.

Hepler applied the wrong standard of review. The question was not one of facts, where dereference to an agency is owed. Rather, it was a pure question of law. No one disputed that the professor got signatures of 30% of the bargaining unit; the sole question was whether the form of the petition he circulated complied with MCL 423.212. The court seemed to base its abuse-of-discretion review standard on federal NLRA decisions despite Michigan having established a different path of judicial review in *Board of Trustees of Michigan State University v State Labor Board*.

Michigan Association of Public Employees v MERC, 153 Mich App 536 (1986) concerned another administrative dismissal, this time of a representation petition. There, a union and a bargaining agent were engaged in an Act 312 arbitration and a rival unit filed a representation petition, which MERC administratively dismissed. Relying on the *Hepler* abuse-of-discretion standard, the Court of Appeals affirmed the dismissal. As with *Hepler*, this was a question of law issue not a question of fact.

The Court of Appeals did note that when the administrative rules of an agency are insufficient to resolve a situation, an agency can act "by individual order as a matter of necessity." *Id*. at 547. Thus, MERC can rectify the shortcomings of its rules by an appropriate order and it does not need to "promulgate rules covering every conceivable situation before the fact." *Id*.

In *Sault Ste Marie Area Public Schools v Michigan Education Association, 213 Mich App 176 (1995)*, 213 Mich App 176 (1995), the Court of Appeals upheld a unit clarification that had occurred without a hearing. Based on a change in MERC's treatment of substitute teachers in another case, a school district filed a unit clarification petition with MERC. MERC required the union to respond. The union did so and requested a hearing. *Id*. at 180. Noting that the law was clearly settled, MERC issued its decision without a hearing. *Id*. Because there was no factual issue in dispute, the Court of Appeals held that MERC did not abuse its discretion by not holding an evidentiary hearing. *Id*. at 182. (citing *Hepler*).

As noted above, MCL 423.212 concerns representation petitions. The statute indicates that MERC is to hold "appropriate hearings" where there is an issue that needs to be resolved:

> When a petition is filed, in accordance with rules promulgated by the commission:
>
> (a) By a public employee or group of public employees, or an individual or labor organization acting in their behalf, alleging that 30% or more of the public employees within a unit claimed to be appropriate for such purpose wish to be represented for collective bargaining and that their public employer declines to recognize their representative as the representative defined in section 11, or assert that the individual or labor organization, which is certified or is being currently recognized by their public employer as the bargaining representative, is no longer a representative as defined in section 11; or
>
> (b) By a public employer or his representative alleging that 1 or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 11; **The commission shall investigate the petition and, if it has reasonable cause to believe that a question of representation exists, shall provide an appropriate hearing after due notice.** If the commission finds upon the record of the hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the rules of the commission.

Id.

Factual findings of agencies are entitled to deference. Legal determinations are not. Under MCL 423.212, where there are clear factual issues to be determined, an appropriate hearing is required. To the extent that the three Court of Appeals cases discussed immediately above state anything to the contrary, they are incorrect and need to be overruled.

6. MERC rules

MERC's regulations are broken into 9 parts: (1) general provisions, R 423.101-05; (2) meditation of labor disputes, R 423.121-24; (3) fact finding related to grievance mediation, R 423.131-38; (4) representation proceedings, R 423.141-149b; (5) unfair labor practice charges, R 423.151-58; (6) motion practice, R 423.161-67; (7) hearings, R 423.171-79; (8) filing and service of documents, R 423.181-84; and (9) public school strikes, R 423.191-94.

Appellants have done their best to work within this framework to present their argument. They have cited the following rules: R 423.145, which allows intervention from the representation-proceeding part; R. 423.157, which allows joinder of parties necessary to allow complete relief from the unfair-labor-practice part; and R 423.165(2)(b), which allows challenges to subject matter jurisdiction from the motion-practice part (this latter part is generally tied to unfair labor practice charges). Throughout this litigation, the union and the University, with some justification have noted that none of these rules is on all fours with the situation presented here and that some do not apply to representation petition matters.[18]

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[18] While not mentioned earlier, R. 423.164 also provides some support for Appellants. It states:

> The commission or administrative law judge designated by the commission may, on its own motion or on a motion by any party, order that a charge and any proceeding which may have been initiated with respect thereto, be consolidated with any other proceeding which may have been instituted thereto, or be severed from any other proceeding with which it may have been consolidated pursuant to this section. The commission or administrative law judge designated by the commission shall grant such motion if the consolidation or severance will promote the just, economical, and expeditious determination of the issues presented.

Id. It comes from the unfair-labor-practice part.

7. The unique circumstances present in the instant matter

MERC itself has previously held that RAs are not public employees, so obviously Day and SAGU's contention that the 1981 holding is still valid is a serious one. Their argument goes to the very question of whether MERC has any power over them. MERC has set a factual hearing to explore this issue, so it clearly agrees that factual developments related to this issue are important. Thus, the question arises as to how the RAs can present their assertion that the 1981 decision still applies and therefore deprives MERC of subject matter jurisdiction?

Normally, the putative public employer would have an incentive to argue before MERC that no public employment is involved and an individual who does not believe himself or herself to be a public employee could rely on the employer to present the issue. A June 24, 2011, letter to University of Michigan Provost Philip Hanlon signed by 19 University deans shows that those who handle the day-to-day operations at the University are opposed to the unionization effort. These deans expressed their "deep and collective concern about the potential negative impacts that would result from unionization of the University's [RAs]."[19]

In 1981, when the University was willing to make the jurisdictional claim, MERC set an adversarial hearing, which was described at length above. In its remand order setting that hearing, MERC had emphasized the need for "a complete record" with "fully developed" facts and the ALJ had noted that "both parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to present evidence and arguments on the issues raised in the charge."

But here it can be argued that political considerations of the individual members of the governing board of the putative employer overcame institutional interests. Thus, Day and SAGU

[19] The letter is attached.

could not rely on the putative employer to advance their interests at MERC. Both sought to intervene at MERC to make the jurisdictional argument on their own.

Both Day and SAGU meet the APA's definition of person. Further, their ability to meet the constitutional standing requirement demonstrates that they are "interested" under MCL 24.263. Students Against GSRA Unionization is comprised of University of Michigan RAs and has 371 members.[20] To the extent that R 423.145 has any relevance[21], that figure exceeds 10% of the GEO's proposed representation unit of 2,200 University of Michigan RAs.

In 1981, when the University challenged jurisdiction, a full evidentiary hearing was needed. MERC did not cast it as a mere "investigatory proceeding" where the ALJ would be given a dual role to act as adjudicator and in some sense as a stand-in for the traditional role played by employer's counsel. It is true that in 1981 the genesis of the jurisdictional conflict was an unfair labor practice charge, which leads to adversarial proceedings. But, the only issue in that matter was jurisdiction and MERC felt compelled to take 19 days worth of live testimony in an adversarial proceeding, create a 3,000-page record, and allow over a hundred pages of briefing. The fact that the Regents in 2011 did not allow the University to challenge MERC's jurisdiction seems a strange rationale for preventing any one from challenging jurisdiction in the instant case.

Assuming MERC is justified in allowing the jurisdictional issue to be raised in the representation proceeding context instead of an adversarial one, it is not justified in the unique factual circumstance presented here by the exclusion of Day and SAGU, who seek to challenge MERC's jurisdiction over them. Perhaps in a normal case where the employer is acting in its traditional role of challenging a representation petition, potentially affected "employees" could

[20] November 1, 2011, Affidavit of Adam Duzik.

[21] That threshold was identified by MERC itself in its September 14, 2011, Opinion and Order.

be excluded as redundant and held to be in privity with the employer. Here, however, the "employer" is under orders to contend that unionization is proper. At its proposed hearing, MERC has prevented any argument to the contrary from being presented.

MERC's actions are all the more difficult to accept given representations made by its director, Ruthanne Okun, at a Michigan Senate committee hearing. That testimony arose due to concerns raised in state court litigation regarding the home-based day care unionization. The case challenged whether home-based day care providers were public employees. The case was filed after an union certification election had occurred and so-called dues had begun to be collected. The relief sought was to have the state agency cease collecting dues. This Court ordered the Court of Appeals to explain its initial dismissal of the action, and the Court of Appeals stated that the state agency involved did not have a duty "to ignore the results of the union election." *Loar v Dep't of Human Services*, COA Docket No. 294087 (September 22, 2010).[22] The day care unionization matter led the Legislature to hold hearings to determine how MERC came to certify that approximately 40,000 home-based day care providers were public employees. On May 4, 2010, Okun testified before a State Senate committee on this matter.[23] As noted previously, a tribunal has an obligation to raise jurisdictional issues even if the parties do not. Despite this requirement, Okun indicated that MERC does not inquire into jurisdiction but would allow someone in the bargaining unit to raise the issue:

> **Sen. Hardiman:** Ok. In the case of the MHBCCC, were they determined to be the employer in this case?

[22] That order was mooted on appeal because Governor Snyder had taken action to end the collection of the dues. *Loar v Dep't of Human Services*, MSC Docket No. 142237 (July 13, 2011).

[23] A transcript of this testimony is attached. MERC, the union, the University, and the AG have all previously been provided with a DVD of this testimony.

> **Okun:** In this particular case, the documents that were submitted to us indicated that they in fact were the employer, and neither side challenged that – nor did any person in the bargaining unit challenge the employment relationship.
>
> . . .
>
> **Sen. Hardiman**: When you say there was no question, meaning, as far as DLEG or MERC was concerned, the council was the employer?
>
> **Okun**: No one challenged the employment relationship – the employer-employee relationship. **Nor did any person in the bargaining unit challenge the employment relationship. So, it was not something that we needed to look into.**
>
> . . .
>
> **Sen. Hardiman**: So there was a consent from the council that these employees – say that again. The council consented to…
>
> **Okun**: There was a consent election agreed to. In other words, indicating the employment relationship and that – who was in the bargaining unit and who would be eligible to vote. And it was that consent election that happens – when there's a consent election there never is an independent determination by the Michigan Employment Relations Commission. They're the only body that would have the authority to make that determination, and there were no hearings in this case. **Had in fact someone wished to challenge the employment relationship, they would be welcome to do that, and then they would seek a hearing with the Michigan Employment Relations Commission.**

(Emphasis added). Day and SAGU made such a challenge in the instant case but were barred from participating in the jurisdictional hearing.

If MERC prevents SAGU or individuals who claim not to be public employees from participating in this hearing at this time, it is hard to see why such entities would be allowed to file an "unfair labor practice" charge or some other type of claim after an election. MERC would be setting itself up for two hearings – one by two parties that agree on the employment status of RAs before an election and, if the union should win that election, a post-election second hearing with additional parties who take a different view on the RAs' public-employee status afterwards. Such a duplication of effort makes no practical sense.

If MERC is shutting out interested persons from obtaining a ruling on an issue that could adversely affect those persons – here, that RAs are public employees susceptible to mandatory collective bargaining and the likely imposition of around $440 in annual dues – then MERC is violating MCL 24.263.

MERC actions are setting up a potential judicial train wreck. Of course it should be noted that despite the flaws in the hearing process, the ALJ could determine that the facts today are sufficiently similar to 1981 so that MERC's 31-year-old decision remains binding. Or perhaps if an election were to occur, the students would vote against unionization (this outcome would not be ideal for the students, for while it might save them from any short-term harm regarding dues payments and loss of liberty, they still would face the detrimental effect of reclassification as public employees and the potential that unionization could become a recurrent issue for them). The other options are of the train-wreck variety. Just to name a few: another round of appeals could be filed if MERC were to certify the students as an appropriate unit for mandatory collective bargaining; new actions under *Leedom v Kyne* alleging lack of procedural due process could be brought; and the issue of primary jurisdiction would need to be addressed in whatever action was taken, see *Travelers Insurance Company v Detroit Edison Company*, 465 Mich 185 (2001); and potentially conflicting jurisdictional holdings would need to be resolved.

MCL 24.301 of the Administrative Procedures Act states:

> When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. **A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy**.

Id. (emphasis added). As noted previously, MCL 24.263 requires that MERC have a process by which an interested person can seek a declaratory ruling as the application of a statute "administered by the agency." *Id*. Day and SAGU's intervention requests were attempts to have MERC declare whether the mandatory collective bargaining process found in PERA, a statute administered by MERC, applied to them since MERC previously held that RAs are solely students and not public employees. MCL 24.203 defines "contested case":

> "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency.

This crux of this appeal is that Day and SAGU are both parties who have clear interests sufficient to meet the requirements for constitutional standing and who seek a determination that RAs are not public employees, as has been the case for the last 30 years. Whether this Court orders MERC to make that matter a contested case to cure a violation of the APA or to allow Day and SAGU party status in the representation proceeding to cure that procedural due process problem, they need to be able to participate.

The best result is to allow a party (or in this case parties) opposed to RA unionization to argue that point before MERC just as was done 30 years ago. Due process would be adhered to and a full factual record that would be binding on all affected parties (students, the University, and the union) would be created.

RELIEF REQUESTED

For the reasons stated above, Appellants request that this Court expedite review of this matter and stay the proceedings at MERC pending the resolution of this appeal. Further,

Appellants seek an order that allows them to participate as a party at the hearing before MERC and that the hearing be characterized as an evidentiary hearing/contested case to cure the APA defect. Alternatively, Appellants request they be allowed to participate in the representation proceeding as parties.

Respectfully Submitted,

_____

Patrick J. Wright (P54052)
Attorney for Appellants Melinda Day and
Students Against GSRA Unionization

Date: January 30, 2012