STATE OF MICHIGAN
IN THE COURT OF APPEALS

REGENTS OF THE UNIVERSITY OF MICHIGAN
Appellee,
and

GRADUATE EMPLOYEES ORGANIZATION, AFT MI, AFT, AFL-CIO
Appellee,
and

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

and

MICHIGAN ATTORNEY GENERAL,
Proposed Intervenor,
Appellant.

Court of Appeals No.: 308663

Ingham County Circuit Court No. 12-135 AA

Michigan Employment Relations Commission No. R11 D-034

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BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL AND OPPOSING MOTION FOR STAY

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COUNTER STATEMENT OF QUESTIONS INVOLVED

Did the Ingham County Circuit Court err when it dismissed an application for leave to appeal because MCL 600.631 is not applicable?

The trial court held "no."

The Appellee Graduate Employees Organization says "no."

The Appellee University of Michigan says "no."

The Appellant Attorney General says "yes."

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Introduction

The Court should deny the application for leave to appeal and dismiss as moot the motion for stay. The officious application by the Attorney is not supported by law and invades the Constitutional autonomy of the Regents of the University of Michigan.

This is the fourth attempt by the Attorney General to appeal a decision of the Michigan Employment Relations Commission refusing him authority to interfere with the Commission's role in conducting elections among public employees. The Attorney General has no standing and his demand to intervene was rightly rejected by the Michigan Employment Relations Commission ("MERC"). Appeals from that decision have been rejected by this Court and the Supreme Court. This Court should find that the Attorney General is bound by those decisions; that the Court lacks jurisdiction to consider yet another appeal.

The Facts

A. The Proceedings at MERC

1.

The Graduate Employees Organization, AFT Michigan, AFT, AFL-CIO, ("GEO") is a labor organization representing some 1200 Graduate Student Instructors working for the University of Michigan. In the Spring of 2011, GEO filed a petition with the Michigan Employment Relations Commission requesting that the Commission conduct an election among a unit of some 2000 Graduate Student Research Assistants also employed by the University. As required by R423.145 the petition was supported by the requisite "showing of interest." After extensive discussions, GEO and the University reached an agreement for a consent

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election. The agreement was presented to the Michigan Employment Relations Commission in September, 2011.

Consent election agreements are not just common; they are the norm. Most elections conducted by the Michigan Employment Relations Commission are the result of an agreement between the petitioning union and the respondent employer. The agreement relates to the mechanics of the election (i.e. date, time and place) and who is eligible to vote. The consent agreement here was not substantially different.

2.

(a) In 1981 the Commission issued a decision involving these parties. 1981 MERC Lab Op 777. In that ruling, MERC found that Graduate Student Instructors (then titled "Teaching Assistants") and Graduate Student Staff Assistants were public employees for the purposes of PERA but that Graduate Student Research Assistants ("RA") were not. That decision was not appealed and remained extant. GEO and the University have engaged in collective bargaining now for three decades for a unit which includes Graduate Student Instructors and Graduate Student Staff Assistants.

(b) A lot has changed in the 30 years that has elapsed between the 1981 ruling and the filing of this petition. The role of research at the University of Michigan has shifted; it is now the central focus of the University with more than a billion dollars expended annually. The number of Research Assistants has increased exponentially; there were some 340 in 1981; there are more than 2,000 now.

The University has also changed its relationship with Research Assistants; it now considers them employees and relates to them as employees. Research Assistants are required to comply with statutes applicable only to employees. For example, Research Assistants are

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required to execute the statutory oath required of all public employees to support the Constitution of the United States. Graduate Student Research Assistants are provided rights under statutes available only to employees; GSRAs are eligible for leave under the Family Medical Leave Act if they meet the hours and other conditions of the statute.

Based upon these facts, GEO and the University prepared and submitted to MERC a consent election agreement and anticipated that the Commission would approve it.

3.

On September 12, 2011, MERC refused to order an election based on the parties' consent. It did not make any findings of fact; it did not reject the petition for an election outright. Rather, it stated that it did not have a sufficient factual basis to determine that the Commission should disregard its 1981 decision. Further, the Commission noted that the parties could not vest the Commission with jurisdiction by agreement.

On October 3, 2011, GEO submitted a request for reconsideration of the Commission's order. In that motion, GEO provided the Commission with an extensive affidavit which provided facts showing that Graduate Student Research Assistants were, indeed, employees. On December 16, 2011, MERC granted the Union's motion. It found that the Union had provided an adequate basis on which to conduct a further inquiry into the employment status of Graduate Student Research Assistants. It ordered a hearing on the merits. The hearing has been conducted; the parties presented witnesses and the Administrative Law Judge elected to call witnesses on her own.

B. The Attorney General's Effort to Intervene

On November 30, 2011, the Attorney General sought to intervene in the proceedings pending before the Commission. The Attorney General's motion made the same arguments

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submitted here: that the Attorney General is entitled to participate; that the Attorney General is authorized to determine what is best for the University of Michigan; that MERC has no authority to refuse the request to intervene.

On December 16, 2011, MERC rejected these assertions. It found that the Attorney General did not have an right to participate in a representation case; that intervention would not serve a legitimate purpose under the Public Employment Relations Act, MCL 423.201 et seq. As the Commission noted, "...(T)he Attorney General is not seeking to intervene in order to advocate for the interest of a State agency. Rather, the Attorney General seeks intervention for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan, an autonomous State institution." Slip. Op., at 5.

C. The Attorney General Appeals

1.

On January 6, 2012, the Attorney General submitted an application for leave to appeal to the Court of Appeals. On January 25, 2012 the application was dismissed by a unanimous decision of the panel based on a lack of jurisdiction:

> "The Court orders that the motion for immediate consideration, the motion to stay proceedings 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 423.216(e); *Harper Hosp Employees' Union Local No. I v Harper Hosp*, 25 Mich App 662; 181NW2d 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)."

Unpublished order of the Court of Appeals, entered January 25, 2012 (Docket No. 307959)

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2.

On January 31, 2012 the Attorney General submitted an application for leave to appeal to the Supreme Court. On February 3, 2012 the Supreme Court denied the application. The order stated:

> "On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the January 25, 2012 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for stay is DENIED."

Unpublished order of the Supreme Court, entered February 3, 2012 (Docket No. 144544)

The Attorney General quotes comments from the concurring statements of Justice Young and Justice Markman. However, their concurrences do not bind this Court. The commentary is not even dicta; it is their observations. With respect, the comments relate to matters which were not fully briefed or argued and reflect views which are not shared by the other members of the Court.

3.

On February 7, 2012, the Attorney General again appealed, this time to the Ingham County Circuit Court. He raised the issues he had raised in both prior appeals. This time, however, he added, in passing, an argument regarding jurisdiction. He contended that, in addition to having a right to appeal under MCL 24.301, he could appeal under MCL 600.631. The Court rejected the arguments out of hand. First, MCL 24.301 did not apply because the proceeding at MERC was not a "contested case." Second, MCL 600.631 did not apply because the Public Employment Relations Act, MCL 423.201 et seq. provided an express avenue of appeal; MCL 423.216(e).

This application followed. It raises only the question of MCL 600.631.

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Argument

I. MCL 600.631 Does Not Apply

A. The Order is Interlocutory

MCL 600.631 does not apply here because the order appealed from is interlocutory. Section 631 of the Revised Judicature Act is the legislative enactment of Article 6 § 28 of the Constitution of 1963. "Review of administrative agency decisions under § 631 is limited to the review provided by Const 1963, art 6, § 28, which by its terms applies only to 'final decisions, findings, rulings and orders of any administrative officer or agency . . . .'" *Attorney General v PSC,* 237 Mich App 27, 41-42 (1999), citing *Southeastern Oakland Co Incinerator Authority v Dept of Natural Resources,* 176 Mich App 434, 438 (1989). Under Article 6 § 28 of the Constitution, only "final decisions" of agencies are subject to review. Hence, review is limited to final orders of agency decisions under section 631 as well.

The order appealed from is the December 16, 2011 decision of the Michigan Employment Relations Commission denying the Attorney General the right to intervene. That is not a final order of the Commission. Accordingly, section 631 does not apply here.

B. MCL 600.631 Does Not Apply Because MCL 423.2106(e) Does

1.

The Revised Judicature Act specifically allows appeals of decisions by state agencies when judicial review "has not otherwise been provided by law." However, where a statute creates a right of appeal, that right is exclusive. See: *Envtl Disposal Sys v Fitch*, 2005 Mich App LEXIS 2720, 5-6 (2005):

> "EDS chose the second option, 'direct review by the courts as provided by law.' MCL 324.1101(2). There are generally three statutory mechanisms for such review: (1) *the review process prescribed in a statute applicable to the agency,*

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> (2) an appeal to the circuit court under the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules, 7.104(A), 7.101, and 7.103, or (3) the review provided in the Administrative Procedures Act (APA), MCL 24.201 et seq. *Preserve the Dunes, Inc v Dep't of Environmental Quality,* 471 Mich. 508, 519; 684 NW2d 847 (2004). In its second amended complaint, EDS averred that the appeal was brought under MCL 600.631 of the RJA. Because *there is no review process set forth in an applicable statute and it was not a "contested case" within the contemplation of the APA, review must proceed under MCL 600.631.*"

Emphasis added.

See also *Hino Motors Mfg. United States v Naftaly*, 2011 Mich App LEXIS 1562 (2011) (Because MCL 211.34c(6) precluded judicial review in violation of article 6, § 28, judicial review "has not otherwise been provided by law," and MCL 600.631 applies. Therefore, the circuit court has subject matter jurisdiction over appeals of a decision of the STC regarding property classifications.)

2.

The Public Employment Relations Act, MCL 423.201 et seq. expressly provides for appeals from final decisions of the Commission. MCL 423.216(e). Appellee Graduate Employees Organization does not concede that the Attorney General may appeal. However, the statute provides parties the right to appeal. Therefore, section 631 does not apply as there is a statutory alternative.

C.

The Attorney General complains that he does not have any avenue of appeal. If true, that is because the Attorney General is attempting to participate in a process that is not open to outsiders. The Attorney General lacked standing; tried to enter into a process that is purely investigative (and not a "contested case") and has no right to do so.

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MCL 600.631 does not permit the appeal of every directive or order of an agency. If the Attorney General is correct, then any order–interlocutory or final–is subject to circuit court review. This would cause chaos. An agency might refuse to grant an adjournment of a hearing. An agency might order witnesses sequestered during a contested hearing. By the Attorney General's logic, each of these decisions would be subject to judicial review. That is an absurd result which is not justified by the clear language of Article 6 § 28. The decision here is not appealable because it is interlocutory. It is also correct.

II. The Michigan Employment Relations Commission Did Not Err

A. The Right of the Attorney General to Intervene Is Not Absolute

1.

(a)

The right of the AG to intervene is broad but not unlimited:

"We recognize that the Attorney General's statutory discretion to intervene in cases "is not unlimited." *In re Intervention of Attorney Gen*, 326 Mich 213, 217; 40 NW2d 124 (1949). Indeed, "[c]ourts acting within their inherent powers of judicial control . . . may restrain the intervention of the attorney general" when there is a showing that such intervention would be "clearly inimical to the public interest . . . ." *Id. People v Unger*, 278 Mich App 210, 260-261 (2008).

Recognizing some disparity in authority on the subject, in *AG v PSC*, 243 Mich App 487 (2000), the Court of Appeals confirmed the right of the AG to participate in "administrative proceedings against state agencies." So the AG may participate in proceedings before the Liquor Control Commission or the Public Service Commission. No case has ever held that the

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AG may participate in a proceeding before the Michigan Employment Relations Commission (except as counsel for a party. See, *e.g. Department of Mental Health* 11 MPER ¶ 29008).

(b)

Assuming, generally, that the AG may participate in proceedings before the Commission does not end the discussion. MCL 14.101–the only statute on which the AG can rely here (14.28 limits intervention to the courts)–also limits intervention to "actions." *A representation proceeding is not an "action."* It is a fact finding process in which MERC determines if an election is requested, is supported by the requisite showing of interest and whether there is a community of interest in the proposed unit.

B. The Attorney General Lacked Standing

1.

The Attorney General is required to have standing as a condition of intervention. The AG cannot participate in a matter out of whim; he must meet the same standing and "case in controversy" obligations imposed on the parties:

> "We are of the opinion that the statutory right of the attorney general to intervene in any action in which the State is interested (1 Comp. Laws 1929, § 187) does not give the State any greater or different rights than are possessed by a private party who intervenes as a litigant in a case of this character. It may be noted that it is not contended otherwise in the attorney general's brief; but the question is raised in an objection filed in behalf of the State to the order of the trial judge for the issuance of the writ."

John Wittbold & Co v Ferndale, 281 Mich 503 (1937). (Emphasis added)

In *Federated Ins Co v Oakland County Rd Comm'n*, 475 Mich 286 (2006) the AG sought to intervene in the Supreme Court when neither of the parties had, themselves, sought leave to appeal. Rejecting the assertion that his right to intervene was, essentially absolute, the Court stated that:

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> "At issue in this case is whether the Attorney General can appeal as an intervenor in this Court on behalf of the people and a state agency when the named losing parties did not themselves seek review in this Court. Notwithstanding the Attorney General's broad statutory authority to intervene in cases, we hold that to pursue such an appeal as an intervenor there must be a justiciable controversy, which in this case requires an appeal by an 'aggrieved party.' Because neither of the losing parties below filed a timely appeal, and because the Attorney General does not represent an aggrieved party for purposes of this case, there is no longer a justiciable controversy. Under such circumstances, the Attorney General may not independently appeal the Court of Appeals judgment. We therefore dismiss this appeal."

In *Federated,* the Attorney General lacked standing because neither party–the actual "aggrieved parties"–had sought leave to appeal to the Supreme Court. In dismissing the intervention by the Attorney General, the Court made clear that the AG does not have the right to participate in a matter simply it interests him. Rather, he must have standing and there must be a justiciable controversy. *Id.*, 292. See also *Mich Educ Ass'n v Superintendent of Pub Instruction*, 272 Mich App 1, 9-10 (2006) (To the extent one might read MCL 14.101 or MCL 14.28 as allowing the Attorney General to prosecute an appeal from a lower court ruling without the losing party below also appealing, and without the Attorney General himself being or representing an aggrieved party, the statutes would exceed the Legislature's authority because, except where expressly provided, this Court is not constitutionally authorized to hear nonjusticiable controversies).

2.

(a) The Attorney General lacks standing because the persons whose interest he allegedly advocates (executives and "no" voters) lack standing in a representation proceeding.

This is a representation case. As such, there are two parties–an employer and a petitioning labor organization. Those are the sole participants. The Commission's rules make clear that intervention in a representation case requires a showing of interest. R423.145. An

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intervenor must present not less than a 10% showing to be heard. The AG does not present any tangible support.

A party without standing may not intervene in a MERC proceeding. *City of Detroit Fire Department*, 9 MPER ¶ 27011 (1995) (As an individual employee and member of the bargaining unit, it is clear that Charging Party has no standing in the first place to raise such issues, since the bargaining obligation under PERA is owed by the collective bargaining representative to the employer and vice versa, and not to individual employees.)

(b) The Attorney General purports to represent persons *who would have no right to participate in the proceedings were they to appear in person.* First, the Attorney General claims that the view of executives (Deans) should be heard. Second, he claims that the view of "no" voters should be heard. Neither view would be relevant were it offered. The sole question in a unit dispute is "community of interest" and the make up of the proposed bargaining unit. Individual members of the proposed bargaining unit cannot argue that there should not be an election at all. And executives or supervisors cannot be heard at all; MCL 423.210(a) prohibits representatives of an employer from interfering with the exercise of rights under PERA. The views of such persons are not relevant in a representation matter.

The Attorney General lacks standing because the persons he purports to represent would not have standing. They cannot enter into a representation proceeding for the purpose of trying to prevent an election. Neither can he.

C. Permitting Intervention Would Cause Chaos

The motion here is submitted by the Attorney General but, if granted, would open the possibility of other persons intervening in representation cases simply because they want to prevent an election.

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The AG asserts that he wants to present argument on behalf of persons opposed to collective bargaining for Graduate Student Research Assistants. Such persons have no role in a representation proceeding. There are nay-sayers in every representation case. Individuals may object to the unit description, the inclusion of some jobs and exclusion of others. Some individuals who oppose any public employees being represented for collective bargaining may object merely to the holding of an election. Allowing such persons to participate as parties would turn factfinding proceedings into platforms for airing of polemics. It would open the door to the sharing of every view no matter how irrelevant or how obstructionist. It would permit a single person to prevent an election simply because that person had some objection no matter how invalid.

PERA guarantees public employees the right to organize and bargain collectively. MCL 423.209. Interlopers in a representation process would be able to so contaminate proceedings, so delay and obstruct proceedings, that this statutory right could be rendered nugatory by a single intransigent person. Intervention without a showing of interest is prohibited for that very reason. This situation is no different.

III. There Is No Irreparable Injury

The Attorney General has failed to demonstrate any basis for a stay of proceedings. He engages in mere speculation about the proceedings before MERC and is unable to provide any evidence which, if true, suggests that anyone will suffer an irreparable injury as a consequence of continuing the proceeding.

A. Speculation about the Trial

The Attorney General speculates on the nature of the trial before the Administrative Law Judge. His contention is not just wrong; it is completely devoid of factual support.

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1.

In granting the GEO motion for reconsideration, the Michigan Employment Relations Commission directed that the hearing process before the Administrative Law Judge be complete and comprehensive. The order states in part:

> "The motion for reconsideration is granted, the petition for a representation election filed by the Graduate Employees Organization/AFT, is reinstated, and this matter is referred to a senior administrative law judge for an expedited evidentiary hearing. At such hearing, the petitioner shall have the burden of proving, by substantial, competent evidence, such material change of circumstances since the decision in Regents of the University of Michigan, 1981 MERC Lab Op 777, as to warrant a finding that some or all of the Graduate Student Research assistants are employees of the University of Michigan and are entitled to the protection and benefits of the Public Employment Relations Act. The Commission will require competent proofs to each category of employee to show that the facts are different from our previous decision."

Slip op., 7.

The Attorney General seems to think that the parties will somehow so distort the record that a fantasy will be spun rather than facts. The Commission order gives the Administrative Law Judge authority to, on her own motion, secure evidence including compelling testimony of witnesses. This process will not be a charade; it will be a reasonable inquiry into the facts. Any other suggestion is complete conjecture.

2.

Speculation will not support a request for extraordinary relief. The Attorney General is seeking what amounts to an injunction. As such, he has to demonstrate real, not imagined , irreparable injury. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11 (2008) (Speculation about harm caused by layoffs insufficient to justify injunction).

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The Attorney General has no evidence–because there is none–that the trial before the ALJ will be anything other than a fruitful investigation into the facts. As such, his demand to participate is without merit.

3.

In the event, the Attorney General is wrong about the nature of the proceedings before the Administrative Law Judge. Judge Stern has permitted testimony from academics; these persons were suggested as witnesses by the Attorney General. She has conducted the interrogation of these persons. Hence, even the Attorney General's speculation is wrong.

B. Speculation about Collective Bargaining

The Attorney General speculates about the impact of collective bargaining by Research Assistants. The speculation is without any validity.

First, the Attorney General cites to nothing–no study, no opinion–to support his contention that collective bargaining for RAs will somehow compromise the excellence of the University of Michigan. This assertion is devoid of intellectual support. And it is utterly false.

Second, collective bargaining for Research Assistants will be a mutual process between GEO and the University in which the "educational sphere" will be respected. See *Central Michigan University Faculty Association v Central Michigan University,* 404 Mich 268 (1978).

Finally, the impact of collective bargaining is not relevant to the question of whether public employees may bargain. That right is created by statute and "adverse impact" is not a basis to deny it. Nothing supports the wild claims made by the Attorney General. Therefore there is no factual basis for a claim that his intervention is necessary to prevent harm.

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IV. Intervention Compromises the Constitutional Authority of the University Regents

The premise of the Attorney General's motion to intervene is that the University of Michigan is not capable of governing itself. The AG asserts that there are those who disagree with the policy adopted by the University Regents. That claim presupposes that the Regents are not authorized to make such policy; that whenever someone disagrees with policy the AG, or someone else, may challenge the Regents' decisions.

The Constitution grants to the Regents the sole authority to govern the University:

> "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. Each board shall have general supervision of its institution and the control and direction of all expenditures from the institutio's funds. Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board. The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law. The governor shall fill board vacancies by appointment. Each appointee shall hold office until a successor has been nominated and elected as provided by law."

Const. Art. VIII, § 5

For reasons known only to him, the AG has decided that the actions of the Regents are unacceptable; that he should be authorized to contest the determination of the Regents.

The Attorney General may somehow believe that collective bargaining for Research Assistants is not a good idea. But that decision does not belong to him; it belongs to the Regents and MERC. He seeks to invade the unique and exclusive authority of the Regents to the "general supervision" of the University. The motion by the AG seeks to exercise authority that is granted exclusively to the Regents pursuant to Article VIII, section 5 of the Constitution.

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Conclusion

The premise on which the Attorney General proceeds is that (a) the University of Michigan should oppose the election but is not; (b) people opposed to collective bargaining will not be heard. Neither premise is relevant; indeed, neither makes sense.

The Attorney General contends that "...the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected" citing MCL 423.1. However, this statute does not apply here.

The referenced clause comes from the Labor Relations and Mediation Act, MCL 423.1, et seq., a statute enacted *three decades before the Public Employment Relations Act* and applicable only in the private sector. See MCL 423.(f) ("'Employer'...shall not include...the state or any political subdivision thereof..."). The applicable statute, the Public Employment Relations Act, MCL 423.201 et seq., states that the public policy of Michigan is to "...provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees..." The statute then declares those rights to be to "...organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice."

This is the law applicable here. This is the law that the Michigan Employment Relations Commission will apply. And this is why the Attorney General has no role in this process. His effort is designed to interfere with, rather than support, a statutory process.

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The Circuit Court did not err in dismissing the application for leave to appeal. And the Attorney General lacks a factual basis for a request for stay. This application should be denied.

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February 23, 2012

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was timely served upon each of the attorneys of record herein at their respective email addresses as follows: coxk3@michigan.gov; cmgerdes@umich.edu; dfink@finkandassociateslaw.com and by way of Odyssey E-Serve.

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