STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN THE MATTER OF:

UNIVERSITY OF MICHIGAN,
Appellee Public Employer,

And

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Appellee Petitioner Labor Organization,

And

MICHIGAN ATTORNEY GENERAL,
Appellant Proposed Intervenor.
_____/

Court of Appeals No. 308663

Ingham County Circuit Court No. 12-135-AA

Michigan Employment Relations Commission No. R11 D-034

APPELLEE PUBLIC EMPLOYER UNIVERSITY OF MICHIGAN'S ANSWER TO THE MICHIGAN ATTORNEY GENERAL'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES II

COUNTER-STATEMENT OF JURISDICTION IV

STATEMENT OF QUESTIONS INVOLVED VI

INTRODUCTION 1

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS 2

ARGUMENT 10

I. STANDARD OF REVIEW 10

II. THE REVISED JUDICATURE ACT DOES NOT GIVE APPELLANT THE RIGHT TO APPEAL THIS INTERLOCUTORY ORDER 11

A. The Revised Judicature Act Only Authorizes Appeals From Final Orders 11

B. Appellant's Reliance on the Michigan Constitution is Unavailing 13

C. Even if the APA Applied, Appellant Would not be Entitled to an Appeal 13

III. THE "LAW OF THE CASE" DOCTRINE PRECLUDES APPEAL 14

IV. INTERVENTION WAS PROPERLY DENIED BECAUSE APPELLANT'S INTERVENTION WOULD BE UNCONSTITUTIONAL 17

A. Michigan's Constitution Confers Significant Autonomy on the Board of Regents 17

B. Appellant's Intervention Would Impermissibly Interfere with the Regents' Autonomy 19

V. APPELLANT'S INTERVENTION WAS PROPERLY DENIED BECAUSE THE ATTORNEY GENERAL DID NOT HAVE AUTHORITY TO INTERVENE 22

A. Appellant Does Not Have a Constitutional or Statutory Right to Intervene in the Representation Proceedings 22

B. Appellant has no Right to Intervene to Represent Purportedly "Unrepresented" Parties 25

C. The Commission Properly Determined that Appellant's Intervention is Inimical to the Public Interest 26

D. Intervention as an "Adversary" is Inappropriate 28

E. Even though the Proofs are Closed, Appellant Does Not Provide any Evidence in Support of his Hypothetical Claims that the Process would be Incomplete or Biased Unless he Intervened 30

CONCLUSION AND RELIEF REQUESTED 32

INDEX OF AUTHORITIES

Cases

13-Southfield Associates v Dep't of Pub Health, 82 Mich App 678; 267 NW2d 483 (1978), lv den, 404 Mich 804 (1978) 12
Ashker ex rel Estate of Ashker v Ford Motor Co, 245 Mich App 9; 627 NW2d 1 (2001). 15
Attorney Gen v Michigan Pub Serv Com'n, 237 Mich App 27; 602 NW2d 207 (1999) 12
Attorney General ex rel Lockwood v Moliter, 26 Mich 444 (1873) 21
Attorney General v Public Srvc Comm'n, 237 Mich App 27; 602 NW2d 207 (1999) iv
Bd of Control of Eastern Michigan Univ v Labor Mediation Bd, 384 Mich 561; 184 NW2d 921 (1971) 18
Bowie v Arder, 441 Mich 23; 490 NW2d 568 (1992) 24
Christie v Bd of Regents of Univ of Mich, 364 Mich 202111 NW2d 30 (1961) 18
Citizens for Common Sense in Government v Attorney General, 243 Mich App 43; 620 NW2d 546 (2000) 10
Co of Wayne v Michigan State Tax Com'n, 261 Mich App 174; 682 NW2d 100 (2004) 12
Detroit v Michigan, 262 Mich App 542 (2004) 14
Driver v Hanley (After Remand), 226 Mich App 558; 575 NW2d 31 (1997) 15
Etefia v Credit Technologies, Inc, 245 Mich App 466; 628 NW2d 577 (2001) iv
Federated Ins Co v Oakland Cty Rd Comm'n, 475 Mich 286; 715 NW2d 846 (2006) 24
Fodera v Van Lobbs, 2006 WL 234871 (Mich App Jan 31, 2006) 25
Glennon v State Emples Ret Bd, 259 Mich App 476; 674 NW2d 728 (2003) 11
Harper Hosp Employees' Union v. Harper Hospital, 25 Mich App 662; 181 NW2d 566 (1970) v, 7, 15
McBride v Pontiac School Dist, 218 Mich App 113; 553 NW2d 646 (1996) ..... v, 7
McCahan v Brennan, 291 Mich App 430; 804 NW2d 906 (2011) 27
Michigan Ass'n of Public Employees v Michigan Employment Relations Comm'n, 153 Mich App 536; 396 NW2d 473 (1986). 7
Michigan Gaming Ins, Inc v State Bd of Ed, 211 Mich App 514; 536 NW2d 289 (1995), rev'd on other grounds 451 Mich 899 (1996) 13
Oliver v Dep't of State Police, 132 Mich App 558; 349 NW2d 211 (1984) 26
Regents of the Univ of Michigan v Michigan, 395 Mich 52; 235 NW2d 1 (1975) 17
Richardson-Merrell Inc v Koller, 472 US 424,; 105 S Ct 2757 (1985) 14
SE Oakland CO Incinerator Auth v Dept of Natural Res, 176 Mich App 434; 440 NW2d 649 (1989) 12
Sprik v Regents of Univ of Michigan, 43 Mich App 178; 204 NW2d 62 (1972), aff'd 390 Mich 84 (1973) 27
State Bd of Agric v State Admin Bd, 226 Mich 417; 197 NW 160 (1924) 19
State v Felts, 79 NC App 205, 211; 339 SE2d 99, 102 (1986 24
Sterling v Regents of Univ of Michigan, 110 Mich 369; 68 NW 253 (1896) 17
Stringfellow v Concerned Neighbors in Action, 480 US 370; 107 S Ct 1177 (1987) 14
Syrkowski v Appleyard, 122 Mich App 506; 333 NW2d 90 (1983), rev'd on other grounds 420 Mich 367; 362 NW2d 211 (1985) 25, 26
Tenbusch v Dep't of Civil Service, 172 Mich App 282; 431 NW2d 485 (1988) 26
Universal Am-Can Ltd v Attorney General, 197 Mich App 34, 37; 494 NW2d 787 (1992) 10
University of Michigan, 1970 MERC Lab Op 754 (1970) 28

Viculin v Dep't of Civil Service, 386 Mich 375; 192 NW2d 449 (1971) 12
W A Foote Mem Hosp v Michigan Dep't of Pub Health, 210 Mich App 516; 534 NW2d 206, 210 (1995) 10

Statutes

Administrative Procedures Act ("APA"), MCL 24.301 et seq. ..... passim
MCL 14.101 23
MCL 14.254 23
MCL 14.28 ..... 23, 24
MCL 400.610a(3) 23
MCL 460.6h(e) 23
MCL 500.2409c 23
Public Employee Relations Act ("PERA"), MCL 423.212 et seq. ..... v, 2, 7, 15
Revised Judicature Act ("RJA"), MCL 600.601 et seq. ..... iv, 11, 12, 13

Other Authorities

Const 1850, Art XIII, § 8 17
Const 1963 Art V § 21 22
Const 1963 Art V, § 3 ..... 18, 22
Const 1963 Art VIII, § 5 4
In re Certified Question from US Dist Court for E Dist of Michigan, 465 Mich 537; 638 NW2d 409 (2002) 21

Rules

Michigan Rule of Court 7.103(B)(1) v
Michigan Rule of Court 7.203(B)(3) 7

COUNTER-STATEMENT OF JURISDICTION

The Attorney General ("Appellant") asks this Court for leave to appeal an Order entered by the Ingham County Circuit Court, holding that the Circuit Court did not have jurisdiction over an interlocutory appeal from representation proceedings before the Michigan Employment Relations Commission ("MERC" or "Commission"). The only issue before this Court is whether the Circuit Court properly declined to exercise jurisdiction.

Appellant previously sought review of the same order in the Court of Appeals and the Supreme Court. Both Courts denied the request.

The Circuit Court agreed with the two prior Courts and held that: (1) there was no jurisdiction pursuant to the Michigan Administrative Procedures Act ("APA"), because the underlying proceeding is not a contested case; and (2) there was no jurisdiction under Appellant's newly claimed alternative statutory route—the Revised Judicature Act, MCL 600.631 (RJA Section 631), which "provides for judicial review of any order, decision, or opinion to the circuit court where 'judicial review has not otherwise been provided for by law.'" The Circuit Court was correct in determining that the RJA does not provide an avenue for the appeal.[1] The referenced provision in the Act—MCL 600.631—only permit appeals after final decisions. See *Attorney General v Public Srvc Comm'n*, 237 Mich App 27, 41-42; 602 NW2d 207 (1999) ("Review of administrative agency decisions under § 631 is limited to the review provided by Const 1963, art 6, § 28, which by its

[1] The Circuit Court found that MCL 600.631 was inapplicable because "MCL 423.216(e) of the Public Employment Relations Act provides a mechanism for review of Michigan Employment Relations Commission decisions. That statute provides that a party aggrieved by a final order of the Commission may within twenty days of such order as a matter of right obtain review of the order in the Court of Appeals by filing a petition." Whether that rationale is correct or not, as discussed infra, the Circuit Court did not have jurisdiction—and its order therefore is not subject to reversal. See e.g. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001) ("[T]his Court will not reverse a trial court's order if it reached the right result for the wrong reason").

terms applies only to 'final decisions, findings, rulings and orders of any administrative officer or agency.'").

The Circuit Court's decision is supported by this Court's holding, entered in this same matter 23 days before Appellant filed this second Application to this Court. As this Court correctly held, there are no interlocutory appeals of representation proceedings before MERC, under the statutory scheme governing such proceedings—the Public Employment Relations Act ("PERA"), MCL 423.212 et seq. PERA limits the right to appeal to a party aggrieved by a **final order** of the commission granting or denying in whole or in part the relief sought in an **unfair labor practice** case. MCL 423.216; see also *Harper Hosp Employees' Union Local No. 1 v Harper Hosp*, 25 Mich App 662; 181 NW2d 566 (1970). Representation proceedings are factfinding exercises, from which interlocutory appeal is unnecessary and inefficient.

As this Court also held, the Administrative Procedures Act ("APA"), MCL 24.301 et seq., does not permit interlocutory appeal under these facts. The APA only confers intermediate appellate jurisdiction to review interlocutory orders in **contested cases**. The underlying proceeding here is a representation proceeding, not a contested case. *McBride v Pontiac School Dist (On Remand)*, 218 Mich App 105, 122; 553 NW2d 646 (1996).

Finally, the Application to the Circuit Court was untimely under MCR 7.103(B)(1), since it was filed more than 21 days after the Order appealed from. The Order appealed from was entered on December 16, 2011; the deadline to file an Application to the Circuit Court was thus January 6, 2012—the appeal to the Circuit Court was not filed until February 7, 2012.

STATEMENT OF QUESTIONS INVOLVED

Appellant asks this Court for leave to appeal a Circuit Court Order declining to exercise jurisdiction over an appeal of an interlocutory order issued by the Michigan Employment Relations Commission denying Appellant's Motion to Intervene.

I. Does the Revised Judicature Act provide Appellant with the right to appeal an interlocutory order entered in a Michigan Employment Relations Commission ("MERC") representation proceeding?

Appellee University of Michigan says: No

Appellant says: Yes

II. Was the Circuit Court's ruling in error, even though the Court of Appeals, the Supreme Court and the Circuit Court have each determined that interlocutory review is not available in a representation proceeding?

Appellee University of Michigan says: No

Appellant says: Yes

III. Did the Appellant demonstrate to the Circuit Court that he has a right to intervene, even though such intervention conflicts with the constitutional autonomy of the Board of Regents of the University of Michigan and is thus inimical to the public interest?

Appellee University of Michigan says: No

Appellant says: Yes

IV. Is the Appellant's intervention proper, even though the Commission is conducting a non-adversarial factfinding investigation, Appellant does not have a right to intervene and Appellant is participating in that factfinding process?

Appellee University of Michigan says: No

Appellant says: Yes

INTRODUCTION

Appellant is not a party in the underlying matter—he is a proposed intervenor. Appellant seeks leave to appeal a Circuit Court order concluding that the Circuit Court did not have jurisdiction to hear an interlocutory appeal from an order entered by the Michigan Employment Relations Commission ("MERC" or "Commission") denying Appellant's motion to intervene in a representation proceeding between the Graduate Employees Organization/AFT ("GEO" or "Petitioner") and the Public Employer, the University of Michigan ("University").

The controlling question before this Court is whether the Circuit Court was correct that Appellant cannot appeal interlocutory orders entered in a representation proceeding—as opposed to a contested case—prior to entry of a final decision. If the answer to that question is "yes," then every other argument briefed to this Court is immaterial and this appeal ends here.[2] If the answer is "no," the other arguments are still superfluous when presented to this Court, but Appellant can address them to the Circuit Court.

The question is not close. This Court and the Supreme Court have already provided an answer; this is the fourth time that Appellant has sought interlocutory review from the same MERC Order. On January 6, 2012, Appellant filed an appeal to this Court, in which he argued he had the right to pursue an interlocutory appeal. This Court correctly determined that, because the underlying proceedings were representation proceedings and not a contested case, Appellant could not appeal an interlocutory order. On February 3, 2012, the Supreme Court affirmed this Court.

Despite the unanimous decision of this Court and then of the Supreme Court, Appellant filed an Application for Leave to the Circuit Court on February 7, 2012. The Circuit Court appeal was

[2] The University acknowledges that any portion of its Response brief that does not directly address whether the Circuit Court had jurisdiction is ultimately superfluous. These side-arguments are included so that Appellant cannot later argue the University failed to respond to a particular argument—no matter how irrelevant to the controlling issue.

from the same MERC Order. There had been no change in the underlying proceedings that would merit another appeal. A final decision had not—and has not—issued. The only difference between the instant Appeal and the previous appeal is that Appellant now makes a new argument for Circuit Court jurisdiction—styling the appeal as also falling under the Revised Judicature Act, MCL 600.631. Even if Appellant were permitted to bring a new appeal merely because he has a new argument, this new basis for jurisdiction leads to another dead end. Appeals arising under the Revised Judicature Act can only be maintained after a final decision has been rendered. The law on this is absolutely clear.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

On April 27, 2011, GEO filed a Petition for Representation pursuant to Sections 12 and 13 of PERA. The Petition sought to accrete GSRAs to the union's bargaining unit of Graduate Teaching Assistants ("TAs") and Graduate Staff Assistants ("SAs"). On May 19, 2011, the Board of Regents of the University of Michigan adopted a resolution that supports the recognition of GSRAs as employees. The resolution does not take a position on the Petition itself, or on whether the GSRAs should accrete to the existing unit; the Regents simply recognized the fact that GSRAs are employees.

The University and GEO then presented a Consent Election Agreement to MERC, the preliminary step in allowing the GSRA employees to determine for themselves whether they want GEO to be their exclusive bargaining agent. The Consent Election Agreement clarified that the proposed bargaining unit would not accrete to the existing unit, but would be separate.

On September 14, 2011, the Commission entered an Order denying the Petition, because it concluded it was bound by its 1981 finding that GSRAs, in the late 1970s, did not bear sufficient

indicia of employment to be considered public employees under PERA. (MERC Decision and Order, September 14, 2011). On October 3, 2011, GEO filed a Motion for Reconsideration.

On November 30, 2011, Appellant filed a Motion seeking intervention and opposing GEO's Motion for Reconsideration. (Motion to Intervene, November 30, 2011). Appellant focused on the harm he foresaw if GSRAs were permitted to engage in an election. He argued that this "case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research institution, to the detriment of all Michigan citizens who support and value the University …." (Motion to Intervene, pp. 1-2). Appellant argued that the 1981 Opinion is controlling and that his intervention was necessary to "ensure all the relevant facts and arguments are presented to the Commission," because there was no "true adversity" between GEO and the University. (Motion to Intervene, p 24).

GEO argued that Appellant did not have standing to intervene, because, among other reasons, MCL 14.101 limits intervention to "actions." (GEO Brief Opposing Motion to Intervene, p 4, December 5, 2011). GEO argued that "a representation proceeding is not an action." (Id.). Rather, "[i]t is a factfinding process in which [the Commission] 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." (Id.).

The University opposed intervention for one reason—Appellant's intervention is prohibited by Michigan's Constitution. (Public Employer University of Michigan's Brief Opposing Intervention by the Attorney General, December 9, 2011). The University advised MERC that the Board of Regents of the University of Michigan derives its authority directly from Article VIII, Section 5, which provides:

> 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] board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. [The] 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 ... 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.

(Id. at 3) (citing Const 1963 Art VIII, § 5). The "constitution protects the right of the Regents to make decisions regarding the University's operations." (Id. at 4). The Board of Regents has the authority to "make and implement judgments about the mission of the University and how to further the mission, even if the Board's judgment differs from the opinions of some of the University's executives, faculty, staff, or students, and even if such decision is unpopular in some quarters." (Id.). Appellant is thus constitutionally barred from intervening to "advocate for those from within the University who would have made a judgment different from the judgment made by the Regents about the merits and risks of allowing a representation election in this case." (Id.).

On December 16, 2011, the Commission entered an Order denying Appellant's Motion to Intervene and granting GEO's Motion for Reconsideration. (MERC Decision and Order on Motions to Intervene and Motion for Reconsideration of Order Dismissing Petition, Dec 16, 2011)("Dec 16 Order")(Exhibit 1). The Commission determined that the doctrine of *res judicata* does not apply to a representation matter such as this. (Dec 16 Order at 5). The Commission determined that GEO had adequately supplemented the record, after denial of the original petition, to show that it is possible that there has been a change in circumstances since the 1981 Opinion. (Dec 16 Order at 6). The Commission referred the matter to a senior Administrative Law Judge to "conduct an evidentiary hearing at which [GEO] will have the opportunity to attempt to show that there has been a

substantial and material change in circumstances since [the 1981 Opinion] was issued." (Id.). The Commission held:

> Representation cases such as this are investigatory proceedings in which it is our duty to try to find the truth. Now that Petitioner has asserted facts that may indicate there has been a substantial and material change in circumstances since the 1981 decision, it is our statutory obligation to send this matter to an administrative law judge to gather facts with which we can make a final determination as to whether a question of representation may exist.

(December 16 Order at 6).

In denying the Motion to Intervene, the Commission noted that Appellant's discretion to intervene is not unlimited, and should be restrained when intervention would be inimical to the public interest. (Id. at 4). The Commission reasoned that:

> We are clearly cognizant of the University's national standing and reputation as a major research institution. However, that is not a factor that we may consider in determining whether the RA's are public employees within the meaning of PERA. If the RAs are not public employees, we have no jurisdiction over their relationship with the University and the matter is at an end. If they are public employees, they are entitled, by law, to seek an election to determine whether they will bargain collectively through a representative of their choice. We cannot consider speculation as to the impact on the University by the RAs potential exercise of a statutory right; it is merely our responsibility to determine whether the RA's have the right to organize under PERA. We find opposition to the exercise of a statutory right is inimical to the public interest.
>
> ***
>
> Furthermore, the 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. Article VIII, Section 5 of the Michigan Constitution vests the University's Board of Regents with sole responsibility for the general supervision of the University. The Board of Regents adopted a resolution supporting 'the rights of University Graduate Student Research Assistants ... to determine for themselves whether they choose to organize.' It is not our role to determine whether the Regents made the correct policy decision in passing that resolution.
>
> ***

> Moreover, we are not bound by the Regents' assessment of the RAs' status under PERA. We find that it would be inappropriate to allow the Attorney General to intervene for the purpose of opposing a policy decision made by the Regents when that policy decision does not determine the results of our investigation in this matter. We find that such intervention would be unduly disruptive of the proceedings and inimical to the public interest.

(December 16 Order at 4-5). The Order specified that the assigned 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. (Id. at 7).

Administrative Law Judge Julia C. Stern was assigned to the matter and entered a Pre-Hearing Order addressing the proofs to be submitted by the Petitioner and by the University, and reserving time to "allow [ALJ Stern] to subpoena additional witnesses or documents" if she were to deem further proofs to be necessary. (ALJ Stern Pre-Hearing Order at 1-2)(Exhibit 2).

On January 6, 2012, prior to the commencement of the administrative law hearing, Appellant filed an Application for Leave to Appeal to the Court of Appeals. That appeal was from the same interlocutory order which is at issue in the present Application. Appellant's previous brief to this Court closely tracks its present brief. Appellant argued: that the Commission erred in denying his Motion to Intervene; that since the University and the union both agreed that GSRAs were employees, no party would make the case for those (non-parties) who opposed unionization, and; that Appellant should have been allowed to intervene to make that case and argue that unionization would harm the University and the State. Appellant argued that it was authorized to appeal an interlocutory order of the Commission:

> The Commission's order denying intervention to the Attorney General is appealable to the Court of Appeals under the Administrative Procedures Act (APA). Section 101 of the APA, MCL 24.301, provides that an Agency's "decision or order is subject to direct review by the courts as provided by law .... 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."*

(Appellant's Application for Leave to Appeal, Statement of Jurisdiction, January 6, 2012)(emphasis in original).

The University opposed Appellant's statement of jurisdiction. The University argued that PERA only authorizes appeals of final orders. MCL 423.216(e). (Appellee Public Employer University of Michigan's Answer to the Michigan Attorney General's Application for Leave to Appeal, Counter-Statement of Jurisdiction, January 20, 2012).

This Court agreed with the University's position and held that the APA does not permit an interlocutory appeal in a representation proceeding, because the APA only applies to contested cases. This Court agreed that the method for appeal of a representation proceeding is found in PERA, MCL 423.216(e), which only authorizes appeals of final orders. (Michigan Court of Appeals Order, COA Case No. 307959, January 25, 2012)(Exhibit 3). The Order was succinct and is quoted here in its entirety:

> 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 1 v Harper Hosp*, 25 Mich App 662; 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).

(Id.).

On January 31, 2012, Appellant filed an Application for Leave to Appeal to the Supreme Court. Again, Appellant argued that he could appeal interlocutory orders in representation

proceedings. Following expedited briefing, the Supreme Court issued a decision on February 3, 2012. The Order was unanimous:

> 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.

(Michigan Supreme Court Order, SC Case No. 144535, February 3, 2012)(Exhibit 4).

Thus, as of February 3, 2012, this Court and the Supreme Court had both determined that Appellant did not have the right to seek intermediate review of MERC's interlocutory order, because it had been entered in a representation proceeding—not in a contested case. Nevertheless, on February 7, 2012, Appellant asked the Circuit Court for intermediate appellate review of the same interlocutory order. There was no intervening change in the procedural state of the case. A final decision had not—and has not—been entered by the Commission; the appeal remained and remains intermediate. In fact, the only thing that had changed since this Court's holding and subsequent Supreme Court affirmation was that Appellant had formulated new legal arguments for jurisdiction. The new appeal argued that the Circuit Court had jurisdiction over the matter under the Revised Judicature Act.

The Circuit Court reached the same conclusion that this Court and the Supreme Court had reached:

> Pursuant to MCL 24.30, *et seq.*, this Court does not have jurisdiction to hear appeals from the Michigan Employment Relations Commission. This statute does not confer jurisdiction on this Court because the current proceeding before the Michigan Employment Relations Commission is not a contested case. MCL 24.301; *University of Michigan* v *Graduate Employees Organization/AFT,* Order of the Court of Appeals, docket number 307959, issued January 25, 2012.
>
> The Attorney General cites to MCL 600.631 as a basis for invoking this court's jurisdiction. That statute provides for judicial review of any order, decision, or opinion to the circuit court where "judicial review has not otherwise been provided for by law." However, MCL 423.216(e) of the Public Employment Relations Act

> provides a mechanism for review of Michigan Employment Relations Commission decisions. That statute provides that a party aggrieved by a final order of the Commission may within twenty days of such order as a matter of right obtain review of the order in the **Court of Appeals** by filing a petition.
>
> Therefore, for the reasons stated above, this Court does not have jurisdiction to hear this appeal. Accordingly, Appellant's Motion for Immediate Consideration and Motion to Stay are **DENIED.**

(Ingham County Circuit Court Order Denying Appellant's Emergency Motion to Stay Administrative Proceedings and Motion for Immediate Consideration, Manderfield, J., Feb 9, 2012)(Exhibit 5)(emphasis in original).

Appellant styles his current Appeal as an "Emergency," but it was not filed until February 17, 2012—eight days after the Circuit Court entered its Order and just one business day before the factfinding proceedings were scheduled to resume. The hearing that Appellant would have this Court stay is now complete. Both parties presented their proofs, Judge Stern received suggestions from the Attorney General for further witnesses and documents, five additional witnesses were called, and the record has been closed. The only remaining tasks—prior to findings being submitted to the Commission—are the filing of post-hearing briefs and the filing of *amici* briefs by the non-parties.

Appellant was **not** excluded from the now-concluded evidentiary proceedings. Before the administrative proceedings began, Judge Stern assured Appellant that she would solicit his "input, after the parties have presented their evidence at the hearing, as to whether there is other evidence which might be of assistance to the Commission in making its decision." (ALJ Stern Correspondence to Assistant Attorney General Kevin J. Cox, December 27, 2011)(Exhibit 6). As Judge Stern stated on the record:

> I have taken a very unusual step of asking two entities, that is the Michigan Attorney General's Office and an organization called Students Against GSRA Unionization, to

> provide me with input after the parties have presented their evidence as to whether there's other evidence that the Commission could consider.

Volume One Transcript of Proceedings Before Administrative Law Judge Julia C. Stern, 7:13 - 19 (Exhibit 7). Assistant Attorneys General were present to observe every witness and Judge Stern sought the Appellant's assistance in the factfinding process. In fact, Appellant submitted the proposed evidence and witnesses he argues would have been excluded if he could not intervene. Over half of the testimony elicited during the proceedings was from witnesses proposed by Appellant and another proposed intervenor. Not only did Appellant participate in the factfinding process (by observing the proceedings and recommending additional evidence), he was also granted permission to submit an amicus brief, to be filed contemporaneously with the Post-trial Briefs being filed by the parties.

ARGUMENT

I. STANDARD OF REVIEW

Generally, as asserted by Appellant, the issue of subject-matter jurisdiction is a question of law that this Court reviews de novo. (Application for Leave to Appeal ("Application") at 22) (citing *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000)). However, in most instances (as in *Common Sense*), the issue arises in a matter that was an original proceeding filed in the Circuit Court. See also *WA Foote Mem Hosp v Michigan Dep't of Pub Health*, 210 Mich App 516, 522; 534 NW2d 206, 210 (1995), citing *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 37; 494 NW2d 787 (1992). This is not such a case; instead, this is an interlocutory appeal to the Court of Appeals, from an interlocutory appeal to the Circuit Court, from an administrative agency decision on a matter of statutory interpretation that was not appealable pursuant to the APA.

This case falls under the standard of review enunciated in *Glennon v State Emples. Ret Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003); the Court of Appeals "reviews for **clear error** a circuit court ruling concerning an administrative agency's decision." This Court "will overturn the circuit court's decision only if [it is] left with the definite and firm conviction that a mistake has been committed." Id.

II. THE REVISED JUDICATURE ACT DOES NOT GIVE APPELLANT THE RIGHT TO APPEAL THIS INTERLOCUTORY ORDER

A. The Revised Judicature Act Only Authorizes Appeals From Final Orders

This Court, the Supreme Court and then the Circuit Court have all determined that Appellant does not have the right to appeal an interlocutory order entered in a representation proceeding. Appellant argues that those holdings do not bar the new appeal, because his right to appeal is not only derived from the statutes he previously cited, but also from the Revised Judicature Act, MCL 600.631, which provides:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases.

MCL 600.631. Appellant states that the "[t]he question presented here is simple: should the Circuit Court have exercised jurisdiction under MCL 600.631 and reviewed the Commission's decision denying Appellant intervention, where no other statute provides for judicial review of this decision?" (Application at 1). The answer to the question is as simple as the question itself: MCL 600.631 does not apply to appeals **prior to entry of a final decision**.

It is well-settled that MCL 600.631 is limited to appeals following final decisions. This principle has been affirmed repeatedly. In *SE Oakland CO Incinerator Auth v Dept of Natural Res*, 176 Mich App 434, 438; 440 NW2d 649 (1989), this Court stated:

> **Review of administrative agency decisions under § 631 is limited to the review provided by Const.1963, art. 6, § 28**.[3] Const.1963, art. 6, § 28 provides in pertinent part:
>
> "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.*"

176 Mich App at 438 (bold emphasis added); See also *Attorney Gen v Michigan Pub Serv Com'n*, 237 Mich App 27, 41-42; 602 NW2d 207 (1999) ("Review of administrative agency decisions under § 631 is limited to the review provided by Const. 1963, Art. VI, § 28, which by its terms applies only to 'final decisions, findings, rulings and orders of any administrative officer or agency....'") (citing *SE Oakland Co Incinerator Authority*, 176 Mich App at 438).; *Co of Wayne v Michigan State Tax Com'n*, 261 Mich App 174, 190; 682 NW2d 100 (2004) (MCL 600.631 "has been interpreted as limiting review to that contained in Const 1963, Art VI, § 28").

Additionally, the premise of Appellant's argument is incorrect. RJA §631 only applies when judicial review from final decisions has not otherwise been authorized by law. Judicial review of final decisions **is** authorized by law. PERA explicitly authorizes appeals of final decisions, precluding the application of RJA §631. See MCL 423.216(e). The fact that a non-party does not have a right to an appeal does not mean that the statutory scheme runs afoul of the Constitution.

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[3] Citing *Viculin v Dep't of Civil Service*, 386 Mich 375, 392, 394-398; 192 NW2d 449 (1971); *13-Southfield Associates v Dep't of Pub Health*, 82 Mich App 678, 686; 267 NW2d 483 (1978), lv den, 404 Mich 804 (1978).

Since it is clear that MCL 600.631 does not allow a party to appeal intermediate rulings and since this Court and the Supreme Court have already determined that Appellant is not entitled to interlocutory review under the APA or under PERA, Appellant has failed to cite a single statute or Court Rule under which the instant appeal can be pursued.

B. Appellant's Reliance on the Michigan Constitution is Unavailing

Appellant links his appeal under MCL 600.631 to the constitutional grant of appellate review of administrative decisions. Appellant argues that the Michigan Constitution, Const 1963, Art VI, § 28, provides an independent basis for review of administrative agency decisions, "evidencing the mandate of the People that judicial review not be confined solely to the cases that are considered 'contested' under the APA." (Application at 18).

This argument has already been rejected by this Court and by the Supreme Court. Moreover, the Constitution expressly limits the right to appeal "decisions, findings, rulings and orders of any administrative officer or agency" to "**final** decisions, findings, rulings and orders." Const 1963, Art VI, § 28. (emphasis added). The Constitution has no relevance to this interlocutory application. See e.g. *Michigan Gaming Ins, Inc v State Bd of Ed*, 211 Mich App 514, 516; 536 NW2d 289 (1995), rev'd on other grounds 451 Mich 899 (1996) (If contested case rules of Administrative Procedures Act (APA) do not apply, **final** decisions, findings, rulings, and orders of administrative agency are reviewed pursuant to the Constitution to determine whether they are authorized by law.)

C. Even if the APA Applied, Appellant Would not be Entitled to an Appeal

While the proceedings are **not** a contested case subject to the APA, assuming *arguendo* that the APA contested case appeal rules did apply, in order to pursue an interlocutory appeal, Appellant would have to demonstrate that "review of the agency's final decision or order would not provide an adequate remedy." MCL 24.301. This rule is intended to prevent piecemeal appeals, because

"appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the 'final judgment' rule." *Detroit v Michigan*, 262 Mich App 542, 545 (2004). The rule is based on important considerations of judicial administration and "promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment." *Richardson-Merrell Inc v Koller*, 472 US 424, 430; 105 S Ct 2757 (1985). Piecemeal appeals "also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial." *Stringfellow v Concerned Neighbors in Action*, 480 US 370, 380; 107 S Ct 1177 (1987).

Predicting the ultimate outcome of the matter pending at MERC is an exercise in pure speculation. Perhaps the Commission will decide that GSRAs are employees under PERA; perhaps not, rendering Appellant's concerns moot. Even if the Commission determines that GSRAs are employees, those employees might vote to reject union representation, again rendering Appellant's concerns moot. Granting this interlocutory appeal instead of awaiting a final decision could be a complete waste of the resources of this Court and of the parties. Conversely, waiting until a final ruling poses no risk of prejudice to Appellant, precisely because review of the agency's final decision **would** provide an "adequate remedy." If Appellant does have appellate rights, those rights will not be harmed by allowing the administrative process to reach its conclusion.

III. THE "LAW OF THE CASE" DOCTRINE PRECLUDES APPEAL

Not only does Appellant fail to present a statutory basis for appeal, the previous holdings of this Court and of the Supreme Court bar the present appeal. The law of the case doctrine dictates that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Driver v Hanley* (After Remand), 226 Mich App 558, 565; 575

NW2d 31 (1997). Thus, "a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Ashker ex rel Estate of Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

In its January appeal, Appellant argued to this Court that he had the right to seek interlocutory review under Section 101 (MCL 24.301) of the APA. In its Order denying the Application, this Court disagreed:

> 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).

The decision was not based on a determination that the appeal should have first been filed in the Circuit Court; rather, it turned on whether the appeal could be pursued at all. Even Appellant admits that "the sole reason for denying the application was that the representation proceeding is not a contested case." (Application at 18).

In the prior appeal, Appellant also argued that he had a right to appeal under PERA. This Court correctly determined that appellate review of MERC decisions in representation proceedings – as opposed to contested cases - is authorized by PERA, MCL 423.216. But, PERA only extends appellate review to a "party aggrieved by a final order of the commission …." MCL 423.216(e). PERA does not authorize intermediate review of a MERC order. Thus, this Court correctly concluded that there is no appellate "jurisdiction to entertain an appeal from an interlocutory order of the MERC." (citing MCL 423.216(e); *Harper Hosp Employees' Union Local No. 1 v Harper Hosp*, 25 Mich App 662; 181 NW2d 566 (1970)). Appellant appealed this determination to the Supreme Court, but the Supreme Court unanimously affirmed this Court, setting the law of the case.

Appellant essentially argues that the Circuit Court erred because it did not accept a rule of law Appellant infers from Justice Young's concurrence. That concurring opinion discussed this Court's conclusion that an interlocutory order entered in a representation proceeding is not appealable until a final decision is rendered. Justice Young stated:

> The Court of Appeals claimed that MCL 24.301 does not give it jurisdiction to hear this matter "because the current proceeding . . . is not a contested case." Thus, the Court of Appeals interpreted MCL 24.301 as allowing interlocutory appeals only during contested cases. While the proposed intervenors present nonfrivolous arguments rejecting that claim, the Court of Appeals does not have jurisdiction in this particular matter even if MCL 24.301 generally allows interlocutory appeals on matters that are not contested cases.

Id. This statement cannot be construed as adopting or even endorsing Appellant's argument. It simply refers to the argument as "nonfrivolous." Id. Justice Young chose to deny the Application on a different ground, which did not require any analysis of what he labeled the "nonfrivolous" argument. He found that "the interlocutory review provision of MCL 24.301 requires an appellant to seek *circuit court* review of an agency's action before proceeding to the Court of Appeals." Id. (emphasis in original). This concurrence does not state that a party can seek appellate review of interlocutory orders in representation proceedings; it states that an appeal must be denied if it is first filed in the wrong court.

Appellant extends the language of the concurrence to mean that Justice Young "suggested that the Circuit Court has jurisdiction to review the Commission's decision" and faults the Circuit Court for "[r]ejecting the Chief Justices reasoning … [in] finding that it had no jurisdiction." (Application at 3). But, Justice Young's concurrence does not support Appellant's argument. Justice Young stated that Appellant had presented a "nonfrivolous" argument that MCL 24.301 could apply an otherwise timely and proper Appeal were brought in the Circuit Court. Ironically, Appellant's instant appeal does not even raise the "nonfrivolous" issue. The instant appeal is

premised on an argument—which was first raised in the Circuit Court appeal—that Appellant has the right to an interlocutory appeal under the Revised Judicature Act, not under MCL 24.301 (the APA).

In any event, Justice Young's statements in concurrence do not control. This Court and the Supreme Court have both ruled that there is no right to interlocutory appeal in representation proceedings. Even though Appellant claims he is harmed by those decisions – premised on new constitutional and statutory deconstruction[4] – the law of this case, and of interlocutory appeals in representation proceedings, is set. Appellant has no right to obtain intermediate review of the order denying his intervention.

IV. INTERVENTION WAS PROPERLY DENIED BECAUSE APPELLANT'S INTERVENTION WOULD BE UNCONSTITUTIONAL

A. Michigan's Constitution Confers Significant Autonomy on the Board of Regents

"Long ago, the Legislature controlled and managed our first public university, The University of Michigan." *Federated Publications, Inc v Bd of Trustees of Michigan State Univ.*, 460 Mich 75, 84; 594 NW2d 491 (1999) (citing *Regents of the Univ of Michigan v Michigan*, 395 Mich 52, 63; 235 NW2d 1 (1975)). "This experiment failed, prompting extensive debate regarding the future of the university at the Constitutional Convention of 1850." *Id.* (citing *Sterling v Regents of Univ of Michigan*, 110 Mich 369, 374-378; 68 NW 253 (1896)). Thus, members of the Constitutional Convention drafted, and the people ratified, Const 1850, Art XIII, § 8, which placed control of the University in an elected board. *Sterling* at 377-380. The Constitutional provision

[4] Appellant claims that the Commission's final decision will be unconstitutionally shielded from appellate review because the parties – the University and the union – might not appeal. This argument would apply to virtually every proceeding. Court decisions are not subject to appellate review unless a party decides to pursue an appeal. A proposed intervenor does not have a supra-judicial right to an interlocutory appeal just because the parties **might** not appeal a final decision.

grants the Board of Regents "the general supervision of the university, and the direction and control of all expenditures...." *Fed Pubs* at 85-86. "The University of Michigan thrived under the leadership of its board of regents." *Id.* at 86.

Thus, voters ratified this provision in 1909 and 1963, when the precept was applied to additional Michigan universities. The 1963 Constitution holds:

> 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 institution'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.

Mich Const. 1963 Art. VIII, § 5.

The people of Michigan have chosen to bestow on their state universities, "the dignity of fourth coordinate arms of the state government." *Christie v Bd of Regents of Univ of Mich,* 364 Mich 202, 209; 111 NW2d 30 (1961). Therefore, Michigan courts have "jealously guarded" the autonomy of its universities. *Bd of Control of Eastern Michigan Univ v Labor Mediation Bd,* 384 Mich 561, 565; 184 NW2d 921 (1971). Although universities are not exempt from all regulation, regulation that infringes "on the university's educational or financial autonomy must … yield to the university's constitutional power." *Fed Pubs* at 88. "Although a university is subject to [PERA] the regulation cannot extend into the university's sphere of educational authority …." *Id.* Similarly, although the Legislature "may attach conditions to an appropriation, the conditions cannot invade

university autonomy." *Id.* (citing *State Bd of Agric v State Admin Bd*, 226 Mich 417, 423; 197 NW 160 (1924)). Given the constitutional authority to supervise the institution generally, the Supreme Court determined that applying the Open Meetings Act to an internal function of "the governing boards of our public universities" (e.g. non-public sessions of a presidential search committee) is "beyond the realm of legislative authority." *Fed Pubs* at 89.

B. Appellant's Intervention Would Impermissibly Interfere with the Regents' Autonomy

The Regents—under whose leadership the University has thrived and become a pre-eminent center of higher learning—have determined that the University will be best-served by recognizing that GSRAs are employees fully capable of deciding whether to organize. The Regents balanced the interests of all University stakeholders, and ultimately decided to act in what they determined to be the University's best interests.

Once the Regents determine University policy, that policy is established. Those who disagree with a lawful policy decision do not have the right to challenge the Regents in a court of law; their resort is to the electoral process. Despite this, Appellant seeks to intervene to advocate for those who oppose the Regents' policy decision. But, these individuals do not have the authority to challenge the Regents' decision—which no one claims is unlawful. Since these individuals do not have standing, Appellant does not have standing to advocate on their behalf.

More to the point, Appellant seeks to intervene for a specific purpose—a purpose in direct contravention of a policy decision of the Regents. The Commission correctly determined that "the 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." (Dec 16 Order at 5)(Exhibit 1). Appellant argues that unionization of GSRAs is contrary to the best interests

of the University and the State; substituting his judgment for the determination of the Regents, he states that unionization "would compromise the established excellence of the graduate students" at the University and that "[t]he excellence of the University will be seriously jeopardized if its status as a research institution, with the funding that status brings, is undermined." (Application, 10). He argues that "this case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research institution, to the detriment of all Michigan citizens …" (Motion to Intervene, November 20, 2011, pp. 1-2). Appellant supports his demand for intervention by asserting that—in the absence of "true adversity" between the University and GEO—his presence is necessary to "ensure all the relevant facts and arguments are presented to the Commission."

The Michigan Attorney General is elected by the citizens of this State, who are well-served by his advocacy. However, his advocacy has limits—including those found here. Even assuming *arguendo* that **only** Appellant could ensure that the "relevant facts and arguments" are presented to the Commission, the sole reason he wants to present those "relevant facts and arguments" is to oppose the Regents' policy decision. His rejection of the autonomy of the Regents is reflected in his explanation that "any proceeding that may affect the University's ability to continue to attract research funding … implicates a number of state interests." But, if GSRAs choose to seek union representation, any effect that this may have on Michigan citizens would be wholly-derivative of its effect on the University. Even if Appellant were correct that unionization could be harmful, Michigan citizens would not be directly harmed; their harm could only come from the putative decline in the stature of the University. Conversely, if Appellant is wrong and the Regents are correct, Michigan citizens would only benefit because the University itself first benefited. In other words, Appellant does not seek to intervene to avert harm to Michigan's citizens; he intervenes

because he believes the University itself will be harmed. This intervention is precisely the type of intervention that Michigan citizens disallowed when they placed governance of the University solely within the domain of its Regents. Appellant may not intervene to prevent the University from inflicting "harm" upon itself, when that supposed harm is actually a policy decision made by the Regents.

Appellant cannot represent what he believes to be the University's interests, in opposition to the Regents. Therefore, Appellant frames the issue as an intervention to protect the State's interest in having a world-class University. But, such a State interest cannot be divorced from its predicate: the petition by GEO and the Regents' resolution. Because Appellant has no authority to protect a State interest that is, in reality, an interest of the University, Appellant does not have standing to pursue his claims. See e.g. *In re Certified Question from US Dist Court for E Dist of Michigan*, 465 Mich 537, 545-48; 638 NW2d 409 (2002) (citing *Attorney General ex rel Lockwood v Moliter*, 26 Mich 444, 447 (1873)) ("although the Attorney General has the authority to intervene in and to initiate litigation on behalf of the state, such authority is limited to matters of state interest.") Moreover, since the Regents have a constitutional right to set policy for the University, it follows that the right to defend that policy also belongs to them. Thus, even if Appellant's sole basis for intervention is to ensure that there is an "adversarial" process, intervention would be improper. The only reason for Appellant to argue for such a process would be to protect the University from the supposed harm of unionization—advocacy that exceeds Appellant's portfolio. As the Commission noted, a "Commission proceeding is not the proper forum for Appellant to debate the correctness of a policy decision made by an autonomous State institution." (Dec 16 Order at 5)(Exhibit 1). The Regents—and the Regents alone—have the right to defend their policy decisions and to litigate on behalf of the University. Appellant cannot second guess the Regents' chosen litigation strategy.

Allowing intervention over the Regents' opposition would create a dangerous precedent that could significantly erode the constitutional mandate to the boards of Michigan universities. Every significant Regential policy decision affects the administration, the faculty, students and citizens throughout the State. If Appellant is allowed to intervene here, future attorneys general might seek to block a university's decision to expend funds to upgrade its business school, to hire a politically-controversial president, to spend more on undergraduate education or to teach politically-unpopular courses.

V. APPELLANT'S INTERVENTION WAS PROPERLY DENIED BECAUSE THE ATTORNEY GENERAL DID NOT HAVE AUTHORITY TO INTERVENE

A. Appellant Does Not Have a Constitutional or Statutory Right to Intervene in the Representation Proceedings

Appellant posits that the "law on Attorney General intervention is unambiguous—his authority to intervene is limited only where there is a clear showing that the intervention is inimical to the public interest." (Application at 14). This is not correct. A representation proceeding is a factfinding exercise by an administrative agency. Appellant has no right to intervene in an agency's factfinding.

In his Motion for Stay, Appellant argues that he has constitutional authority to intervene, but the provisions cited for that claim of extraordinary authority do not even tangentially support the claim. Article 5, Section III merely provides, in pertinent part, that the "single executives heading principal departments shall include a secretary of state, a state treasurer **and an attorney general**." (Emphasis added.) Likewise, section 21 does not support Appellant's claim to extraordinary authority; it simply states that the "attorney general shall be elected for four-year terms," shall be "nominated by party conventions," and when there is a vacancy in the office of the attorney general, the position shall be filled by appointment of the governor. Clearly the Constitution of 1963 does

not give the Office of Attorney General sweeping powers to participate in every proceeding—administrative, legislative or judicial—that occurs in State Government.

The right to intervention is statutory. Where the Legislature contemplates the grant of particular rights of intervention for Appellant, it does so in clear terms. Thus, where rate hearings are involved, the Attorney General can intervene (afterward) to challenge the result, pursuant to MCL 500.2409c which provides:

> Any person who disagrees with the report and findings of the commissioner may request a contested hearing pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, not later than 60 days after issuance of the report under this subsection.

See also MCL 14.254 (attorney general as a necessary party in certain judicial proceedings relating to charitable trusts); MCL 400.610a(3) (attorney general may intervene in Medicaid False Claims Act litigation); MCL 460.6h(e) (attorney general included in definition of "interested persons" who may participate in gas cost recovery clause proceedings before the Public Service Commission).

The Legislature has not provided Appellant with an analogous right to intervene under PERA or the APA. Therefore, Appellant relies generally on MCL 14.28 and MCL 14.101; but neither statute provides Appellant with the authority to participate in **administrative** proceedings such as the one at MERC.

MCL 14.101 is limited to court "actions" and 14.28 is limited, in relevant part, to intervention in "any other **court** or **tribunal**, in any **cause** or **matter**, civil or criminal, in which the people of this state may be a party or interested … when in [Appellant's] own judgment the interests of the state require it." (emphasis added). The factfinding proceedings are not before a court or tribunal and are not in the nature of a "cause" or "matter" as those terms are intended under the statute. The Supreme Court has clearly tied the terms of the statute, including the phrase "any other

court or tribunal in any cause or matter, civil or criminal" to the existence of a "case," "action" or "justiciable controversy:"

> These statutes purport to provide the Attorney General with the authority to prosecute, defend, and intervene in certain "actions." But, this case ceased to be an "action" when the losing parties below (plaintiffs) failed to file a timely application for leave to appeal in this Court. Once plaintiffs' deadline for filing a timely application for leave to appeal expired, the case ceased to be a justiciable controversy.

Federated Ins Co v Oakland Cty Rd Comm'n, 475 Mich 286, 294; 715 NW2d 846 (2006). Here, as in *Federated Ins*, there is no "case," "action" or "justiciable controversy" in which Appellant could intervene—there is a factfinding process.

The proceedings are not pending before a "court." Nor are they pending before a "tribunal." The term "tribunal" refers to the adjudicative function of a judicial or quasi-judicial body and is derived from the Middle English, from Latin, where it referred to the platform for magistrates, from *tribunus* tribune. Merriman-Webster Online Dictionary. http://www.merriam-webster.com/dictionary/tribunal. The adjudicative function of MERC is not implicated in a representation proceeding. The operative term "cause or matter" in Michigan jurisprudence has been used exclusively in reference to the definition of the subject matter jurisdiction of courts**.** See, e.g., *Bowie v Arder*, 441 Mich 23, 36; 490 NW2d 568 (1992) ("in general, subject-matter jurisdiction has been defined as a court's power to hear and determine a **cause or matter**")(emphasis added).[5]

Thus, the powers set forth in MCL 14.28 do not apply outside of an adjudicative setting. The same arguments that would allow Appellant to intervene in a non-adjudicatory fact finding proceeding at an administrative agency would support his right to demand admission to a legislative

[5] The statutory power of an attorney general thus does not extend to any situation where a proceeding is neither civil nor criminal. See e.g. *State v Felts*, 79 NC App 205, 211; 339 SE2d 99, 102 (1986).The *Felts* court noted that historically, the phraseology "cause or matter, civil or criminal" would appear to have its origin in the definition of the term "inquest" and is likewise inextricably coupled with the judicial process. *Id.* at 211. (citation omitted).

caucus, a meeting of the Committee on Model Civil Jury Instructions or the chambers in which the Supreme Court discusses the disposition of pending cases.

B. Appellant has no Right to Intervene to Represent Purportedly "Unrepresented" Parties

Appellant argues he should have been allowed to intervene because "a significant percentage of GSRAs have expressed opposition to employment status and possible unionization" and a "broad contingent of the University's faculty leadership registered their opposition to and concern regarding unionization." (Id. at 13).[6] Appellant claims that without him there is no longer any voice to "support the position articulated by the current and former deans and a significant number of GSRAs." (Id.).

There is no support for Appellant's expansive claim of authority to represent the unrepresented, as he argues:

> If the proceedings are allowed to proceed without Attorney General intervention, the interests of the State, the unrepresented faculty leadership, and a large group of GRSAs [*sic*] will not be presented. *Syrkowski v Appleyard*, 122 Mich App 506, 513; 333 NW2d 90 (1983), rev'd on other grounds 420 Mich 367; 362 NW2d 211 (1985).

Even if Appellant had such inherent power, what State interests are left unprotected by the State's representative, MERC, proceeding in the usual administrative fashion in this matter? Nor is the "faculty leadership" left "unrepresented" when the Regents determine University policy. Surely

[6] Appellant states that, "at least 785 GSRAs and faculty at the University signed an Open Letter to the Board of Regents of the University of Michigan expressing opposition to GSRAs being recognized as employees." (Application at 13, referencing Exhibit 2 of Application). The referenced Open Letter is not part of the underlying record, is not properly before the Court. See *Fodera v Van Lobbs*, 2006 WL 234871 (Mich App Jan 31, 2006) ("Appeals are heard on the original record, MCR 7.210(A)(1), and it is impermissible to expand the record on appeal.") Moreover, the reference to the exhibit ambiguously states the nature of opposition to unionization. The number of faculty that signed the petition is 323—out of a faculty of well over 4,000. The petition does not identify how many of the "graduate students" who signed it would meet the proposed unit definition. In any event, the stated opposition of some University students and faculty is irrelevant to the underlying proceedings.

Appellant cannot claim any right to represent individual University employees regarding internal policy at a state University. Finally, the rights of the GSRAs who oppose unionization are addressed in PERA itself—and Appellant has no right to step in where he may disagree with the balance struck by a State statute.

This is not comparable to *Syrkowski*, an adversarial proceeding in the courts, in which this Court noted:

> We agree with the trial court's decision to permit intervention by the Attorney General. The issues raised by Mr. Syrkowski and Mrs. Appleyard [relating to parental rights in matters involving artificial insemination] involve significant matters of state interest and public policy. It is noted that the child in this case has been without legal representation. **Interest in the welfare of the child** must continue to be of paramount importance to the people of this state.

122 Mich App at 513; 333 NW2d 90 (emphasis added). In *Syrkowski*, moreover, intervention was not by claim under inherent right or general principles of government, it was pursuant to court rule, as there was a civil action. By contrast, in this matter, there is no court proceeding to support the application of the court rules. As noted by the Court of Appeals in *McLaurin v Detroit Parking Violations Bureau:*

> Administrative proceedings are not "civil actions" as defined by *MCR 2.101* because they are not commenced by filing a complaint with a court. See *Tenbusch v Dep't of Civil Service*, 172 Mich App 282, 297; 431 NW2d 485 (1988), adopting the view of *Oliver v Dep't of State Police*, 132 Mich App 558, 572-578; 349 NW2d 211 (1984)(holding that an appeal of an administrative decision was not a "civil action" within the meaning of *MCL 600.6013* governing interest) . . . .

2010 WL 4226626, *2 (Mich App Oct 26, 2010).

C. The Commission Properly Determined that Appellant's Intervention is Inimical to the Public Interest

The Commission correctly determined that it was faced with the rare instance where there was no choice but to deny intervention because intervention would be inimical to the public interest.

(Dec 16 Order at 5) ("We find that such intervention would be unduly disruptive of the proceedings and inimical to the public interest.") Appellant takes exception to this holding.

Appellant incorrectly asserts that he has a mandate to advocate for the University (or its administration or for members of the public affected by University decisions), because the public has an interest in the University. Generally, Appellant's advocacy for the University—and the public's interest in the University—is important to the State. In fact, the University often invites precisely that relationship. See e.g. *Sprik v Regents of Univ of Michigan*, 43 Mich App 178, 184; 204 NW2d 62 (1972), aff'd 390 Mich 84 (1973) (Finding that since claims against the Regents are claims against the state, the Attorney General had the power to appoint a special assistant to represent the Regents.); *and see McCahan v Brennan*, 291 Mich App 430, 431; 804 NW2d 906 (2011)(In which a Special Assistant Attorney General represented the University of Michigan Regents.) But, where there is a conflict between the Regents and Appellant relating to a University matter—or a matter that only affects the public because it first affects the University—the public has determined that the Regents represent their interest. Appellant simply does not have discretion to intervene to advocate for a position regarding the University of Michigan, if that position is contrary to a policy adopted by the Regents of the University of Michigan. His exercise of discretion to intervene here would have been unconstitutional and thus inimical to the Constitution and the public interest.

Appellant has consistently argued that: "[t]his case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research institution, to the detriment of all Michigan citizens … [because] unionization of the University's GSRAs would compromise the established excellence of the graduate students." (Application at 8). The Commission noted that it was "clearly cognizant of the University's national standing and reputation as a major research institution. However, [the alleged impact of GSRA unionization] is not a factor

that we may consider in determining whether the RA's are public employees within the meaning of PERA." (Dec 16 Order at 4)(Exhibit 1). In fact, the very 1981 MERC opinion which Appellant argues is sacrosanct and cannot be set aside made this same point:

> we reject Respondent's assertion that the ALJ should have received evidence on the potentially adverse effects that collective bargaining could have on graduate education, on the recruitment of graduate students, on faculty-student relationships and on the University's ability to compete with universities whose graduate students cannot organize. **Although such impact might arguably result from collective bargaining, its existence is irrelevant to whether the GSA's are employees under PERA**.

1981 Order at 781-782 [emphasis added]. The Commission in 2011 was faced with a single factual determination, not a policy decision: whether GSRAs are employees under PERA.

Thus, the Commission was correct when it held "we cannot consider speculation as to the impact on the University by the RAs (sic) potential exercise of a statutory right; it is merely our responsibility to determine whether the RA's (sic) have the right to organize under PERA. We find opposition to the exercise of a statutory right is inimical to the public interest." (Id.).[7]

D. Intervention as an "Adversary" is Inappropriate

Appellant argues that his intervention is necessary to ensure that the proceedings are adequately "adversarial." But, this misconstrues the very nature of the proceedings. As this Court has made clear, the proceedings are not in the manner of a contested case—they are representation proceedings. The review "is an investigatory and not an adversarial proceeding." (December 16 Order at 4)(Exhibit 1) (citing *University of Michigan*, 1970 MERC Lab Op 754, 759 (1970) and

[7] Because he does not represent a valid State interest, the Attorney General cannot intervene. He does not represent a party in interest. He does not represent the Commission, the University or the union. He does not represent University administrators, faculty members, or graduate students. Even if he did, those individuals do not have standing to intervene in a representation proceeding.

MCL 423.212.)[8] Since this is not a contested case, which, for purposes of the APA, "is a proceeding in which a determination of the legal rights, duties, or privilege of a named party is required by law to be made after *an opportunity for an evidentiary hearing*,"[9] the proceedings are "not subject to the APA requirement that a decision be made only after the parties have been afforded an opportunity for an evidentiary hearing." See e.g. *In re Wayne Co*, 1997 WL 33352796 (finding that a petition for unit clarification is not a contested case for purposes of the APA).[10] Because representation proceedings are "investigatory and not contested or adversary proceedings"[11] Appellant's argument that he needs to intervene to serve as an "adversary" in the University's stead, is without merit. No "adversary" is needed in a factfinding representation proceeding.

The Commission seeks to determine whether GSRAs are, in fact, employees, within the meaning of PERA. Since the Commission has determined that a representation proceeding is warranted, its determination must be driven by the facts and the law, not by policy perspectives. The only issue under review is whether there has been a "material change in circumstances" since the 1981 ruling in Regents of the University of Michigan, 1981 MERC Lab Op 777, which would warrant a determination that some or all GSRAs are employees under PERA. (December 16 Order)(Exhibit 1). All relevant facts are available to the Union, the University and the

[8] The Court of Appeals has resolved the theoretical tension between Section 12, of PERA which gives the Commission discretion not to hold an evidentiary hearing prior to issuing a finding on a representation issue and the APA's requirement of a hearing prior to an administrative agency decision on the merits of an issue. Section 12, of PERA, "which specifically grants the MERC discretion to hold a hearing on a unit clarification petition should be regarded as an exception to the general requirement that administrative agencies generally hold a hearing prior to rendering a decision in a contested matter." *In re Wayne Co*, No. 190660, 1997 WL 33352796 (Mich Ct App April 11, 1997) (citations omitted).

[9] *In re Wayne Co*, No. 190660, 1997 WL 33352796 (Mich Ct App April 11, 1997).

[10] Section 12 of PERA "gives the MERC the discretion to determine whether to hold a hearing regarding a representation question, as do the administrative rules." *Sault Ste Marie Area Pub Sch v Michigan Ed Ass'n*, 213 Mich App at 182.

[11] *Sault Ste Marie Area Pub Sch v Michigan Ed Ass'n*, 213 Mich App at 181.

Administrative Law Judge, irrespective of Appellant's participation. In any event, Appellant has presented the evidence and proffered the witnesses he believed possessed relevant information.

E. Even though the Proofs are Closed, Appellant Does Not Provide any Evidence in Support of his Hypothetical Claims that the Process would be Incomplete or Biased Unless he Intervened

Appellant insists his presence is necessary because he would "act in the fact-finding proceeding to ensure that a complete and unbiased record is created." (Application at 14). Appellant argues "it seems inevitable that the evidentiary hearing will not fully disclose the facts and arguments crucial to determining whether the GSRAs' relationship with the University has substantially changed since the 1981 decision." (Id. at 14).

Tellingly, Appellant couches such arguments in the hypothetical. There is no longer a need for the question to be posed in such a way. The record is closed (proofs of the University and Union had fully concluded when Appellant filed this appeal). The University and the Union have presented stipulations and called witnesses. The ALJ examined witnesses proposed by Appellant (and another non-party). The testimony of those witnesses comprises more than half of the record. Appellant's argument remains hypothetical, because the representation proceedings have been completely proper—there is no evidence that the ALJ has allowed an incomplete or biased record. The record is complete and unbiased. Judge Stern has properly been presented with the facts—not arguments—necessary to allow the Commission to make a decision on the merits.

Appellant's claims are also belied by the fact that the evidence he claims would be missing without him, has actually being offered into evidence. Although the Commission did not allow Appellant to intervene as an adversary, the Commission ensured that the factfinding process would be robust, by not limiting the Administrative Law Judge to the record to be presented by the Union and the University:

> 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.

(December 16 Order at 7)(Exhibit 1). On the first day of the hearings, ALJ Stern announced that Appellant would be able to provide the evidence he argues is missing from the proceedings. She stated clearly on the record:

> After the parties have completed putting in their evidence, which I anticipate will be no later than the end of next Monday, these entities will have three or four days to provide me with suggestions for additional documents they believe that the Commission should consider in making their decision or additional witnesses that should be called, along with an explanation of why this evidence is relevant in light of the testimony presented by the parties during this hearing.
>
> If I decide that this evidence is relevant and not cumulative, I will reopen the hearing, probably sometime in the week of February 21st, give the parties an opportunity to comment on the proposed new evidence. And if I conclude that the testimony of additional witnesses may be relevant, subpoena and question the additional witnesses myself.

(Exhibit 7 at 7:20-8:13). In keeping with this statement, Appellant provided Judge Stern with a list of additional witnesses who could supplement the factfinding process. The testimony of five witnesses identified by Appellant and by counsel for another non-party proceeded during the week of February 21, 2012 (the week immediately following filing of the instant appeal). These witnesses included faculty members, a University Vice President, and a graduate student, all opposed to unionization. These were the very witnesses that Appellant claims would only be available through his intervention. With the record complete, Appellant has also been afforded the opportunity to file an amicus brief to address the facts.

Thus, even though Appellant did not participate in the proceedings as an adversary—there are no "adversaries" in a factfinding investigation—he was able to provide the Commission with the evidence he believes was necessary for a robust factfinding process.

CONCLUSION AND RELIEF REQUESTED

The University of Michigan respectfully requests that this Court summarily deny the Appellant's Application for Leave to Appeal. If this Court were to grant the Application, the University of Michigan respectfully requests that the Court exercise its power to enter an Order AFFIRMING the Circuit Court.

Respectfully submitted,

FINK + ASSOCIATES LAW

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PROOF OF SERVICE

I hereby certify that on February 24, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the electronic court filing system which will send notification of such filing to Assistants Attorney General Kevin J. Cox, Esq. and Danila V. Artaev, Esq., who have agreed to e-service in this case through newly received case-specific permission and upon Mark Cousens, Esq., who is included in the List of Approved E-mail Addresses for E-Service.

I declare under the penalty of perjury that the statements made above are true to the best of my knowledge, information, and belief.

Dated: February 24, 2012

By: /s/ David H. Fink
David H. Fink

INDEX OF EXHIBITS

Exhibit 1: MERC Decision and Order on Motions to Intervene and Motion for Reconsideration of Order Dismissing Petition, Dec 16, 2011

Exhibit 2: ALJ Stern Pre-Hearing Order

Exhibit 3: Michigan Court of Appeals Order, COA Case No. 307959, January 25, 2012

Exhibit 4: Michigan Supreme Court Order, SC Case No. 144535, February 3, 2012

Exhibit 5: Ingham County Circuit Court Order Denying Appellant's Emergency Motion to Stay Administrative Proceedings and Motion for Immediate Consideration, Manderfield, J., Feb 9, 2012

Exhibit 6: ALJ Stern Correspondence to Assistant Attorney General Kevin J. Cox, December 27, 2011

Exhibit 7: Volume One Transcript of Proceedings Before Administrative Law Judge Julia C. Stern, 7:13 - 19