STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN THE MATTER OF:

Court of Appeals No. 307959

UNIVERSITY OF MICHIGAN,
Appellee Public Employer,

Michigan Employment Relations Commission No. R11 D-034

And

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Appellee Petitioner Labor Organization,

And

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

And

MICHIGAN ATTORNEY GENERAL,
Appellant Proposed Intervenor.
_____/

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

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COUNTER-STATEMENT OF JURISDICTION

The Attorney General asks this Court for leave to appeal an interlocutory order issued by the Michigan Employment Relations Commission ("MERC" or "Commission") denying the Attorney General's Motion to Intervene. The Attorney General's statement of jurisdiction is incorrect.

This Court does not have jurisdiction over this matter, because MCR 7.203(B)(4) – the Rule under which the Attorney General pursues his appeal – does not provide for interlocutory review of an order, unless that order is appealable by law or rule. MCR 7.203 (B)(4) ("The court may grant leave to appeal from: any other judgment or order appealable to the Court of Appeals by law or rule.") The Public Employment Relations Act, 1965 PA 379, as amended, MCL 423.201 et seq. ("PERA") only authorizes appeals of final orders. MCL 423.216(e). Therefore, the Commission's Order is not "appealable by law or rule" as required for an interlocutory appeal under MCR 7.203(B)(4).

Moreover, the Attorney General lacks standing to appeal the underlying matter because the Attorney General cannot appeal as an intervenor on behalf of the people when the named parties themselves do not seek appellate review. *Federated Ins Co v Oakland Co Rd Com'n*, 475 Mich 286, 288; 715 NW2d 846 (2006).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

The Attorney General asks this Court for leave to appeal an interlocutory order issued by the Michigan Employment Relations Commission denying the Attorney General's Motion to Intervene.

I. Has the Attorney General demonstrated that he has a right to intervene, even though such intervention interferes with the University of Michigan Board of Regents' constitutional autonomy and is thus inimical to the public interest?

Appellee University of Michigan says: No

Appellant Attorney General says: Yes

The Commission says: No

II. Is the Attorney General's intervention proper, even though the Commission is conducting a non-adversarial fact-finding investigation and has invited the Attorney General to participate as a non-adversary?

Appellee University of Michigan says: No

Appellant Attorney General says: Yes

The Commission says: No

III. Should the Attorney General be granted interlocutory appeal, even though he may not obtain such appeal under the Michigan Court Rules or relevant statutes and where final review would provide a complete remedy?

Appellee University of Michigan says: No

Appellant Attorney General says: Yes

INTRODUCTION

The Michigan Attorney General seeks leave to appeal from an interlocutory order of the Michigan Employment Relations Commission ("MERC" or "Commission") denying his intervention in representation proceedings between the Graduate Employees Organization/AFT ("GEO" or "Petitioner") and the Public Employer, the University of Michigan.

The representation proceedings have one purpose: to determine whether Graduate Student Research Assistants ("GSRAs") are employees pursuant to the Public Employment Relations Act ("PERA"), MCL 423.212 et seq. The Commission is not starting with a clean slate, because in 1981 it determined that GSRAs were not employees under PERA. The Commission has declared that although it will not lightly set aside this finding, it will allow a fact-finding exercise – the representation proceedings – for the purpose of determining whether circumstances have sufficiently changed since 1981 to warrant reconsideration of the prior finding. If the Commission determines that GSRAs are employees pursuant to PERA, Michigan law gives them the right to decide for themselves whether they want union representation.

Michigan's Constitution charges the Regents with the supervision of the University of Michigan and treats them with "the dignity of fourth coordinate arms of the state government." This arrangement – which began in the 1800s only after a disastrous experiment in Legislature control of the University – has proven to be a remarkable success for the University and the State. As more than one court has acknowledged, the "University of Michigan [has] thrived under the leadership of its board of regents." The Board of Regents fulfilled its constitutionally-created role in managing the University and setting its policy, when it recognized that GSRAs are treated as employees by the University and thus should be able to hold an election on union representation.

The Attorney General opposes the Regents' decision to recognize GSRAs as employees. He argues that a vote on unionization "will have a significant impact on the University's role as an elite research institution, which would detrimentally impact the interests and rights of the State and the People of Michigan." He also argues that the Regents are effectively constraining the University from opposing the union. Not so. When the Regents make a policy or management decision within their purview, they are not "constraining" the University, they are speaking for and guiding the University.

The People have entrusted the Attorney General with the heavy burden of protecting their interests in numerous arenas. But, those same People have also entrusted the Regents with managing the University of Michigan, rather than subjecting the school to the vagaries of the Legislature or even of the Executive. Even though the Attorney General may oppose the Regents' decision, the Constitution forbids him from intervening in a proceeding to oppose the Regents' decision in a matter that is entirely internal to the University. He cannot intervene in the representation proceedings to voice the opposition of the "constrained" University or to protect the University from supposed self-inflicted harm. He cannot intervene to substitute his judgment for that of the Regents, in order to protect the University from itself. He cannot intervene to substitute his judgment regarding the proper prosecution of a representation proceeding for that of the constitutionally-empowered party.

Moreover, the Attorney General's intervention does not find constitutional refuge in the argument that he is seeking to prevent "harm" to the public. As is made completely clear in his Application, the putative harm is limited solely to that harm the Attorney General argues the University will suffer: if the public's University is harmed, the public is harmed. But this is not the type of "harm" or state interest that the Attorney General is authorized to argue for in opposition to

the Regents. Rather than serving the public interest, the Attorney General's intervention – in opposition to the Regents and the Constitution – would actually thwart the will of the public that has placed its faith in him and in the Regents.

Since the Attorney General's intervention is unconstitutional and inimical to the public interest, the Commission properly determined that he could not intervene as an adversarial party. Recognizing, however, that it was engaged in a fact-finding process and that the Attorney General may have contributions to make to such a process, the Commission has solicited the Attorney General's participation, in part, to advise the Administrative Law Judge of evidence that may help her reach the correct conclusion. This approach strikes the appropriate balance between impermissible intervention and the Attorney General's stated concern that all relevant evidence may not be presented to the fact-finder.

COUNTER-STATEMENT OF FACTS

On April 27, 2011 GEO filed a Petition for Representation pursuant to Sections 12 and 13 of PERA. (Exhibit 1). 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 University of Michigan Board of Regents, 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 would like union representation. 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. (Decision and Order, September 14, 2011)(Exhibit 2). The Commission discussed its 1981 Opinion in *Regents of the University of Michigan*, 1981 MERC Lab Op 777 ("1981 Opinion"). The 1981 Opinion considered whether TAs, SAs and GSRAs were "employees" under PERA. The 1981 Opinion held that the distinction between "student" and "employed" turned on whether the "work is being performed in a 'master-servant' relationship or whether the person performing the work does so as his own 'master.'" In the 1981 Opinion, the Commission held:

> TAs provide a benefit to the University rather than engaging in pursuits of their own. They provide services similar to those of nonstudent employees; they do not control what courses they teach or what hours they work; they are supervised and may be removed for inadequate performance; and, they are compensated based on the amount of work they provide. . . . Likewise, SAs perform regular duties of a type which benefit the University.
>
> . . . [T]he relationship between the RAs and the University does not have sufficient indicia of an employment relationship. The nature of RA work is determined by the research grant secured because of the interests of particular faculty members and/or by the student's own academic interest. They are individually recruited and/or apply for the RA position because of their interest in the nature of the work under the particular grant. Unlike the TAs who are subject to regular control over the details of their work performance, RAs are not subject to detailed day-to-day control . . . . RAs are substantially more like the student in the classroom . . . . They are working for themselves.

After considering its 1981 Opinion, the Commission found that the neither the Petitioner nor the University had presented any evidence regarding a change in circumstances and that the parties' agreement did not confer employee status on GSRAs. Thus the Commissioner held "[t]he RAs cannot be granted public employee status under PERA predicated on the record before us." (Ex. 2).

On October 3, 2011, GEO filed a Motion for Reconsideration. On November 30, 2011, the Michigan Attorney General filed a Motion seeking intervention and opposing GEO's Motion for Reconsideration. (Attorney General Motion to Intervene, November 20, 2011)(Exhibit 3). The

Attorney General focused on the harm he foresaw if GSRAs were permitted to engage in an election. For instance, the Attorney General claimed:

> 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 ….
>
> The University has been incredibly successful as a research institution for the past 50 years, and the Commission should decline the invitation to compromise that success and reconsider the same issue it had already decided in 1981. Because this is a matter that will impact important state interests, the Attorney General requests to intervene and oppose reconsideration ….

(Ex. 3, pp. 1-2). The Attorney General argued that the 1981 Opinion remains meritorious 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. (Id. at 24).

GEO opposed the Attorney General's intervention. (See GEO Brief Opposing Motion to Intervene, December 5, 2011)(Exhibit 4). GEO argued that the Attorney General did not have standing to intervene, because, among other reasons, MCL 14.101 – the statute that arguably allows Attorney General intervention in MERC proceedings – limits intervention to "actions." (Id. at 4). GEO argued that a representation proceeding is not an "action." It is a fact finding 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 the Attorney General's intervention for one primary and fundamental reason – the Attorney General's intervention is prohibited by Michigan's Constitution. (See Public Employer University of Michigan's Brief Opposing Intervention by the Attorney General, December 9, 2011)(Exhibit 5). The University noted 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 Mich. 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.). The Attorney General 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 the Attorney General's Motion to Intervene and granting GEO's Motion for Reconsideration. (Decision and Order on Motions to Intervene and Motion for Reconsideration of Order Dismissing Petition)("Dec 16 Order")(Exhibit 6). The Commission determined that the doctrine of *res judicata* does not apply to a representation matter such as this. (Id. 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. (Id. 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.

(Id. at 6).

In denying the Motion to Intervene, the Commission noted that the Attorney General'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.

(Id. 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 deems further proofs to be necessary. (Pre-Hearing Order at 1-2)(Exhibit 7). Judge Stern has since stated that she will "solicit the Attorney General's 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 8).

ARGUMENT

I. STANDARD OF REVIEW

A decision regarding intervention "is an administrative action and shall be made exclusively by the commission or its agent." Commission Rule 423.145(3). Similarly, the determination whether to hold a hearing regarding a representation question is within the Commission's discretion. *Sault Ste Marie Area Pub Sch v Michigan Educ Ass'n*, 213 Mich App 176; 539 NW2d 565 (1995). The standard of review on such decisions is based upon abuse of discretion. *Michigan Association of Public Employees v MERC*, 153 Mich App 536, 546; 396 NW2d 473 (1986) (The court of appeals

will not set aside a discretionary decision by the Commission absent a showing that the commission's decision "is so perverse or palpably wrong as to expressly amount to a breach of its statutory duty"); See also *In re Wayne County*, No. 190660; 1997 WL 33352796 (April 11, 1997) ("we will not disturb a remedy imposed by the MERC unless the order constitutes a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the PERA.")

II. INTERVENTION WAS PROPERLY DENIED BECAUSE THE ATTORNEY GENERAL'S INTERVENTION IS 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 13, § 8, which placed control of the University in an elected board. *Sterling* at 377-380. The Constitutional provision 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 *Bd of Agriculture*, 226 Mich 417, 425; 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. The Attorney General'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, the Attorney General seeks to intervene to advocate for those who oppose the Regents' policy decision. The Attorney General asserts that his presence is necessary to ensure that "the interests of the many GSRAs and faculty leadership who do not want public employee status and unionization" are considered. (Application for Leave to Appeal, Allegation of Error, p. 1). 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, the Attorney General does not have standing to advocate on their behalf.

More to the point, the Attorney General 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)(Ex. 6). The Attorney General argues that unionization of GSRAs is contrary to the best interests of the University and the State. The Attorney General, substituting his judgment for the determination of the Regents, 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 for Leave to Appeal, 8). 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 …" (Attorney General Motion to Intervene, November 20, 2011, pp. 1-2). The Attorney General 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 the Attorney General 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 the Attorney General 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 the Attorney General is wrong and the Regents are correct, Michigan citizens would only benefit because the University itself first benefited. In other words, the Attorney General 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. The Attorney General 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.

The Attorney General cannot represent what he believes to be the University's interests, in opposition to the Regents. Therefore, the Attorney General 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 the Attorney General has no authority to protect a State interest that is, in reality, an interest of the University, the Attorney General 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 the Attorney General's sole basis for intervention is to ensure that there is an "adversarial" process, intervention would be improper. The only reason for the Attorney General to argue for such a process would be to protect the University from the supposed harm of unionization – advocacy that exceeds the Attorney General's portfolio. As the Commission noted, a "Commission proceeding is not the proper forum for the Attorney General to debate the correctness of a policy decision made by an autonomous State institution." (Dec 16 Order at 5)(Ex. 6). The Regents – and the Regents alone – have the right to defend their policy decisions and to litigate on

behalf of the University. The Attorney General cannot second guess the Regents' chosen litigation strategy and cannot substitute his judgment as to the prosecution of GEO's petition for theirs.[1]

Allowing intervention by the Attorney General 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 the Attorney General 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.

III. THE ATTORNEY GENERAL'S INTERVENTION IS INIMICAL TO THE PUBLIC INTEREST AND IS UNNECESSARY

A. The Commission Properly Determined that the Attorney General'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.") This finding is fully supported by the fact that the Attorney General's intervention is unconstitutional.

The Attorney General takes exception to this holding. He argues that the Commission "afforded no deference to [his] legitimate decision to intervene in an otherwise one-sided hearing the result of which may have a significant impact on the State and the People of Michigan." (Application at 20). But, the Attorney General's discretion to intervene is not unlimited and is

[1] The Attorney General does not seek intervention because the proceedings may have an impact on other MERC decisions. The Commission's decision here would have no precedential effect beyond the University of Michigan.

properly "restrained where such intervention is clearly inimical to the public interest." *Id.* (*citing People v Unger*, 278 Mich App 210, 260-61 (2008)). The Attorney General incorrectly asserts that he has the 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, the Attorney General'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 the Attorney General 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. The Attorney General simply does not have discretion to intervene to advocate for a position contrary to the University's. His intervention would thus be inimical to the Constitution and the public interest.

The Attorney General argues that "[w]hile it is true that the Attorney General has expressed concern about the negative impact GSRA unionization may have on the University and the State as a whole, the Attorney General's Motion and Brief in Support make it clear that the Attorney General's intervention is to ensure a full, complete, and balanced presentation of the facts and arguments." (Application at 22). In fact, the Attorney General 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 … and that the Commission should decline the

invitation to compromise that success and reconsider the same issue it had already decided in 1981." (Motion to Intervene at 1)(Ex. 3). The Attorney General's argument for the necessity of an adversarial process – ensuring a "full, complete, and balanced presentation" – was premised on his contention that the absence of such a process would harm the public by leading to GSRA unionization. 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)(Ex. 6). The Commission was faced with a single factual determination, not a policy decision: whether GSRAs are employees under PERA. The Legislature has determined the public policy – if GSRAs are employees under PERA, they have the right to seek union representation. If they are not employees, they do not have that right. 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.). Arguments against unionization itself or its impact on the University and the public have no place in a Commission proceeding – those arguments are for the Legislature.[2]

[2] 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 interfere in a representation proceeding. Management or employees cannot intervene. Individuals in a valid bargaining unit also do not have that right – if they are opposed to unionization, they have the right to vote.

B. Intervention as a "Adversary" is Unnecessary Because the Attorney General can Participate in the Fact-finding Process

The Attorney General argues that he must intervene to ensure the best interests of the public are served because 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 ...." in Commission proceedings. Setting aside the fact that the best interests of the people are being considered by the Commission, the Attorney General mistakenly cites MCL 423.1 to suggest that representation proceedings must consider the "interests and rights of the consumers and the people of the state." Actually, MCL 423.1 states that the Commission must consider the people and consumers of Michigan regarding the "prevention or prompt settlement of labor disputes." The provision cited is not applicable to a representation proceeding under PERA, where the Commission's only goal is to make a factual determination, the legal effects of which have already been decided by the People.

Along those same lines, the Attorney General argues that his intervention is necessary to ensure that the proceedings are adequately "adversarial." But, this misconstrues the very nature of the proceedings. As the Commission 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)(Ex. 6).(citing *University of Michigan*, 1970 MERC Lab Op 754, 759 (1970) and MCL 423.212.)[3] 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

[3] 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 precedent to issuing a finding on a representation issue and the APA's requirement of a hearing precedent 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).

privilege of a named party is required by law to be made after *an opportunity for an evidentiary hearing*,"[4] 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).[5] Because representation proceedings are "investigatory and not contested or adversary proceedings"[6] the Attorney General'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 representation proceeding.

PERA compels the Commission to determine whether GSRAs are, in fact, employees, within the meaning of the Act. Since the Commission has determined that a representation proceeding is warranted, its determination is to be driven by the facts and the law, not by policy perspectives and not by the preferences of the graduate students, the Deans or the faculty. The Commission has stated that 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)(Ex. 6). Have the facts of the relationship between the University and the GSRAs changed? Has the law changed? Has the benefit to the University from the work changed? The Attorney General has not suggested that he is exclusively privy to facts which would answer these questions. All relevant facts are available to the Union, the University and the Administrative Law Judge,

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

[5] 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.

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

irrespective of the Attorney General's participation. The Attorney General has not demonstrated that he would add anything to the Commission's fact-finding process.

In any event, although the Commission did not allow the Attorney General to intervene as an adversary, the Commission ensured that the fact-finding process would be robust. The Commission did not limit 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)(Ex. _). In keeping with this instruction, Administrative Law Judge Julia C. Stern entered a Pre-Hearing Order which addresses the proofs to be submitted by the Petitioner and by the University, but which also reserves time to "allow [ALJ Stern] to subpoena additional witnesses or documents" if she deems further proofs to be necessary. (Pre-Hearing Order at 1-2). Judge Stern specifically advised the Attorney General that she will:

> solicit the Attorney General's 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)(Ex. 8). Thus, even though the Attorney General may not participate in the proceedings as an adversary – there are no "adversaries" in a fact-finding investigation - he has been invited to advise the Commission of evidence he believes would be of assistance in the fact-finding process.

IV. INTERLOCUTORY REVIEW IS UNAVAILABLE AND UNNECESSARY

A. The Michigan Rules of Court Do Not Permit Interlocutory Review of MERC Orders

The Attorney General purports to seek interlocutory review under MCR 7.203(B)(4), but, in light of the current posture of this matter, there is no right to interlocutory review under that Rule. MCR 7.203(B)(4) provides the Appellate Courts with jurisdiction to grant leave to appeal any "judgment or order appealable to the Court of Appeals by **law or rule**." (emphasis added). In order for the Attorney General to show that this Court may have jurisdiction, he must demonstrate that the Commission's Order is appealable by "law or rule." PERA ("PERA") only authorizes appeals of final orders. MCL 423.216(e). There is no PERA rule permitting interlocutory review in a representation proceeding, nor would such a rule make sense. Piecemeal appeals of representation proceedings would create inefficiencies that are simply unnecessary, because petitioners have no countervailing interest in immediate review. Even if MERC issued an improper decision, appellate review of the final decision would fully remedy any prejudice.

Further, since the administrative proceedings are representation proceedings, not a contested case subject to the Administrative Procedures Act, the appeal cannot be based on MCL 24.301.

Because MCR 7.203(B)(4) is unavailable to the Attorney General, the only Rule upon which he may rely to argue for this Court's jurisdiction is MCR 7.203(B)(3), which is the rule generally applicable to orders of administrative agencies. The express language of that Rule limits its application to "final orders."

B. The Attorney General Has Not Identified any Harm That Could Not be Remedied by Review of a Final Decision

The Attorney General argues that he should be allowed interlocutory appeal, because review from a final decision would not be adequate: "the irreparable and significant harm that the Attorney

General is trying to preclude through intervention, i.e., a one-sided presentation of the relevant facts and arguments, would already be complete." (Application at 6.).

Even though the proceedings are not a contested case subject to the APA, making interlocutory review impossible, assuming *arguendo* that the Attorney General could seek appeal, he would have to demonstrate that "review of the agency's final decision or order would not provide an adequate remedy." MCL 24.301. Similarly, MCR 7.205(B)(1) provides that "if the order appealed from is interlocutory," the appellant must "set[] forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." The aim is 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).

As the Commission has made clear, there are no foregone conclusions here. Predicting how this case will ultimately play out would be an exercise in speculation. Perhaps the Commission will decide that GSRAs are employees under PERA. Perhaps not, rendering the Attorney General's concerns moot. Granting this interlocutory appeal instead of awaiting a final decision will waste the resources of this Court and of the parties. Even if the Attorney General were correct both with respect to his right to intervene and with respect to the hypothesized "one-sided" presentation of

facts leading the Commission to find that GSRAs are employees under PERA, the Court of Appeals would have the power to remand this matter to the Commission for further proceedings with the involvement of the Attorney General. Thus, appellate review of the Commission final decision – which could include review of the decision denying intervention - would provide an "adequate remedy," making interlocutory review unnecessary.

C. The Attorney General Lacks Standing to Seek Interlocutory Review Because There is No Case in Controversy

Although it is unclear on whose behalf exactly the Attorney General seeks to intervene, he either does so on behalf of the People, members of the University or members of the proposed bargaining unit. Since these constituencies do not have a right to an appeal and since neither the University nor GEO have sought an appeal, the Attorney General does not have standing to pursue an appeal.

The Attorney General cannot appeal as an intervenor on behalf of the people when the named parties themselves do not seek appellate review. *Federated Ins Co v Oakland Co Rd Com'n*, 475 Mich 286, 288; 715 NW2d 846 (2006). This is because the intervention statutes – MCL 14.101 and MCL 14.28 – "purport to provide the Attorney General with the authority to prosecute, defend, and intervene in certain 'actions.'" *Id.* But, an appeal is not an "action" unless a losing party timely seeks appeal. *Id.* As the *Federated Ins* Court noted, to the extent one might read the intervention statutes "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." *Id.*

CONCLUSION AND RELIEF REQUESTED

The University of Michigan respectfully requests that this Court summarily deny The Michigan Attorney General'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 Michigan Employment Relations Commission's denial of the Attorney General's Motion to Intervene.

Respectfully submitted,

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By: /s/ David H. Fink

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PROOF OF SERVICE

I hereby certify that on January 20, 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 Mark Cousens, Esq., who is included in the List of Approved E-mail Addresses for E-Service, and upon the following, via US Mail:

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

/s/ Cheryl A. Pinter___
Cheryl A. Pinter

Dated: January 20, 2012

INDEX OF EXHIBITS

Exhibit 1: Petition for Representation Proceedings

Exhibit 2: Decision and Order Dismissing Petition and Denying Motion to Intervene, dated September 14, 2011

Exhibit 3: Michigan Attorney General's Motion to Intervene, dated November 30, 2011

Exhibit 4: Petitioner's Brief Opposing Motion to Intervene, dated December 5, 2011

Exhibit 5: Public Employer University of Michigan's Brief Opposing Intervention by the Attorney General, dated December 9, 2011

Exhibit 6: Decision and Order on Motions to Intervene and Motion for Reconsideration of Order Dismissing Petition, dated December 16, 2011

Exhibit 7: Pre-Hearing Order, dated January 6, 2012

Exhibit 8: Letter from Judge Stern to Assistant Attorney General Kevin J. Cox, dated December 27, 2011