**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS**

**(Saad, P.J., and Donofrio and Gleicher, J.J.)**

UAW, UAW LOCAL 6000,
et. al.,
Plaintiffs-Appellants,

v

NATALIE YAW,
et. al.,
Defendants-Appellees.

Docket No. 147700
COA: 314781

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# BRIEF OF AMICUS CURIAE MACKINAC CENTER LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES

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## JURISDICTIONAL STATEMENT

Amicus Curiae does not contest jurisdiction.

## STATEMENT OF QUESTIONS INVOLVED

I. **In 1963, would the ratifiers of Michigan's Constitution have considered the term "conditions of employment" to include the imposition of agency fees?**

Amicus Mackinac Center Legal Foundation: No.

II. **Due to federal constitutional concerns, is the type of "collective bargaining" approved by the Civil Service Commission sufficient to support the imposition of agency fees?**

Amicus Mackinac Center Legal Foundation: No.

## INTRODUCTION

This case requires a determination of what the ratifiers of the 1963 Constitution meant when they stated that: "The commission shall . . . regulate all conditions of employment in the classified service." Appellants contend that 2012 PA 349, Michigan's right-to-work law, which outlaws union security agreements that make it a condition of employment for a public employee to be required to pay "any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative," MCL 423.210(3)(c), impermissibly conflicts with Civil Service Rule 6-7.2, which purports to allow union security agreements that requires nonmembers to pay agency fees.

Amicus Curiae Mackinac Center Legal Foundation makes two claims: (1) the ratifiers of April 1, 1963, would not have considered the imposition of agency fees as a "condition of employment" since the concept of agency fees or service fees was limited to railway unions and the concept of mandatory public-sector unionism was in its infancy nationally and nonexistent in Michigan; and (2) agency fees are at the far edge of legality when there is a true collective bargaining relationship; but, under the Civil Service Rules "bargaining" provisions, the Civil Service has the ability to modify any "collective bargaining agreement" in almost any manner and at any time thereby making a service fee more akin to a tax by the union or an appropriation payable to the unions instead of a permissible fee for services.

## STATEMENT OF FACTS

Amicus Curiae has no additions to the factual presentations of the parties.

## ARGUMENT

### I. Union security – terms and general issues

This case concerns right to work and agency fees, both of which are issues related to the general topic of union security. A review of the some key terms and more recent holdings in this field may be useful.

One leading labor treatise set forth security from the unions' perspective:

> If all employees were required to join the union, this would protect the union against employer attempts to woo employees away and against "raiding" by other unions; would assure a reliable source of funds for union activities, including collective bargaining and grievance processing, which inure to the benefit of all employees in the unit; would strengthen the union in bargaining (since even reluctant workers might more readily support a strike call because of peer pressure and formal discipline within the union); and would tend to promote stability in the relationship between employer and the union, which sometimes brings more responsible union leadership to the fore but sometimes also entrenches irresponsible leadership. Those often diverging interests of the unions, the employees and the public make "union security" a volatile issue, the treatment of which under the law has followed a complex and evolving path.

Robert A. Gorman and Matthew W. Finkin, Basic Text on Labor Law Unionization and Collective Bargaining (2nd Ed Thomson West 2004) at 897-98. The term "union security" thus "embraces a number of different kinds of arrangements designed to bolster the membership and finances of a union." *Id.* at 900.

The most stringent form of union security is likely a "closed shop," which requires "employers to hire only persons who were already union members." *Communication Workers of America v Beck*, 487 US 735, 747 (1988). Another stringent form of union security is the "union shop," under which, "an employee

must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." *Abood v Detroit Bd of Educ*, 431 US 209, 217 n 10 (1977). A third type of union security is the "agency shop," which "entitles the union to levy a fee on employees who are not union members but who are nonetheless represented by the union in collective bargaining. The primary purpose of such arrangements is to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport v Washington Educ Ass'n*, 551 US 177, 181 (2007). In *NLRB v General Motors*, 373 US 734 (1963), the Supreme Court held that under the Nation Labor Relations Act (NLRA) membership is "whittled down to its financial core," which entails only "payment of fees and dues." *Id.* at 742. The Supreme Court has indicated that the stripping of membership to its financial core has made a "union shop . . . the 'practical equivalent' of an agency shop" under "federal law." *Abood*, 431 US at 217 n 10.[1] A lesser form of union security is the "dues checkoff":

> A *dues checkoff* provision in itself requires no one to join a union or retain membership in a union, but simply provides that the employer shall deduct from the earnings of those union members who authorize it the periodic membership dues (just as it would for taxes, insurance premiums or charitable contributions) and shall pay that amount directly to the union. The checkoff is commonly utilized in conjunction with some more effective union security provision. It

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[1] This same footnote notes that the Supreme Court has only approved of financial support to a union in the union-shop context and has not considered the constitutionality of a requirement that an employee join the union. *Abood*, 431 US at 217 n 10. The implication is that such a requirement would be impermissible.

> relieves the union of the burden in time and expense of collecting membership dues.

Basic Text on Labor Law at 901.

In *Davenport*, the United States Supreme Court discussed agency fees:

> The labor laws of many States authorize a union and a government employer to enter into what is commonly known as an agency-shop agreement. This arrangement entitles the union to levy a fee on employees who are not union members but who are nevertheless represented by the union in collective bargaining. [See, e.g., *Lehnert v Ferris Faculty Assn*, 500 US 507, 511 (1991)]. The primary purpose of such arrangements is to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred. [See, e.g., *Machinists v Street*, 367 US 740, 760–64 (1961)].

*Davenport*, 551 US at 181. Further, the Supreme Court likened agency fees in the public-sector context to taxation: "The public-sector agency-shop arrangement authorizes a union to levy fees on government employees who do not wish to join the union. Regardless of one's views as to the desirability of agency-shop agreements it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees." *Id.* at 184 (citation omitted).

In *Knox v Service Employees International Union, Local 1000*, 132 SCt 2277 (2012), the Supreme Court was faced with a "special assessment" imposed by a union to fight a ballot initiative that the union disagreed with. In the course of deciding that matter, the Supreme Court reexamined its agecy fee jurisprudence:

> When a State establishes an "agency shop" that exacts compulsory union fees as a condition of public employment, "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." [*Ellis v Railway Clerks*, 466 US 435, 455 (1984)]. Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, see Tr. of Oral Arg. 48–49, the

compulsory fees constitute a form of compelled speech and association that imposes a "significant impingement on First Amendment rights." [*Ellis*, 466 US at 455]. Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.

"The primary purpose" of permitting unions to collect fees from nonmembers, we have said, is "to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." [*Davenport*, 551 US at 181]. Such free-rider arguments, however, are generally insufficient to overcome First Amendment objections. Consider the following examples:

> "If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assessments are not levied on all parents. If an association of university professors has as a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs." [2]

[2] Summers, Book Review, Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory, 16 Comparative Labor L.J. 262, 268 (1995).

Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering "labor peace." [*Chicago Teachers Union v Hudson*, 475 US 292, 303 (1986)] But it is an anomaly nevertheless.

*Knox*, 132 SCt at 2289-90.

While in *Knox* the Supreme Court indicated that it was not revisiting the issues of the constitutionality of agency fees, that very issue may be considered and

decided by in *Harris v Quinn*, No 11-681, which is currently before that court and likely to be decided before June 30, 2014 – the end of the Supreme Court's term.[2]

## II. In 1963, the ratifiers of Michigan's Constitution would not have considered the term "conditions of employment" to include the imposition of agency fees

### A. Standard of review

This Court reviews "de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650 (2012).

### B. State of the law before April 1, 1963

This Court recently discussed the general goal when interpreting the Michigan Constitution:

> Our goal in construing our Constitution is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers, the people, who are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have ratified the instrument in the belief that that was the sense designed to be conveyed.

*People v Vaughn*, 491 Mich 642, 650 n. 25 (2012) (internal quotations and citations omitted). In rare instances, in determining the common understanding of a "legal term of art," this Court has endorsed consideration of "those sophisticated in the law at the time of the Constitution's ratification." *County of Wayne v Hathcock*, 471 Mich 445, 470 (2004).

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[2] For example, at the oral argument transcript on p. 38, Justice Kennedy states: "Well, you say it's a fair share, but that's the issue in the case if you're looking at the legitimacy of *Abood*." The transcript can be found at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-681_8mj8.pdf

Looking at Michigan's constitutional history for guidance as to what "conditions of employment" would have meant to the ratifiers in April of 1963, there is no evidence that they would have thought the term included unionization of public employees and the forced payment of agency fees since agency fees were limited to railway unions and mandatory public-sector unionism was in its infancy.

There was no mention of the term "employment" in the 1835 Constitution. The 1850 Constitution did mention the employment of a chaplain. Const 1850, art 4, § 24. Further, the word employment was used when discussing the prohibition on debtors' prison. Const 1850, art 6, § 33.

The 1908 Constitution is the first time the word "condition" is used near a word related to "employment." A provision stated that: "The legislature shall have power to enact law relative to the hours and conditions under which men, women and children may be employed." Const 1908, art 5, § 29.[3]

The federal Railway Labor Act was passed in 1926. In 1934, that act was amended "by the declaration in 1934 of a congressional policy of complete freedom of choice of employees to join or not to join a union." *International Ass'n of Machinists v Street*, 367 US 740, 750 (1961).

In 1935, the Wagner Act, i.e. the National Labor Relations Act, passed. Included in its provisions was 29 USC § 158(d), which included a definition of "bargain collectively":

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[3] As originally enacted, this provision was limited to women and children. A 1920 amendment expanded it to include men.

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement.

*Id.*

On August 16, 1937, President Franklin D. Roosevelt wrote a letter to National Federation of Federal Employees President Luther C. Steward declining to attend that organization's 20th anniversary celebration. In the letter, President Roosevelt expressed the view that mandatory public sector unionism was inappropriate:

> The desire of Government employees for fair and adequate pay, reasonable hours of work, safe and suitable working conditions, development of opportunities for advancement, facilities for fair and impartial consideration and review of grievances, and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry. Organization on their part to present their views on such matters is both natural and logical, but meticulous attention should be paid to the special relationships and obligations of public servants to the public itself and to the Government.
>
> All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.
>
> Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have

> to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable. It is, therefore, with a feeling of gratification that I have noted in the constitution of the National Federation of Federal Employees the provision that "under no circumstances shall this Federation engage in or support strikes against the United States Government."

http://www.presidency.ucsb.edu/ws/?pid=15445.

In 1939, Michigan passed the Labor Relations and Mediation Act, 1939 PA 176. This act allowed for small-scale private-sector unionization. It defined a labor organization as one that "exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." MCL 423.2(g). It defined a "labor dispute" as "any controversy concerning terms, tenure, or conditions of employment." MCL 423.2(b).

The Civil Service Commission was created by a constitutional amendment initiative petition that was ratified by the people on November 5, 1940. In pertinent part the 1940 constitutional amendment stated:

> The commission shall classify all position in the state civil service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the state civil service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the state civil service.

Const 1908, art 6, § 22 (emphasis added).

In comparing the above constitutional amendment to the Wayne County Civil Service Act, this Court held that neither was intended to allow for mandatory public-sector unionism:

> The earlier act was conceived and enacted immediately after the people had adopted the civil service amendment of 1940, effective January 1, 1941 for State employment (Const1908, art 6, s 22). Designed as that act was for adoption by counties having a Population of 300,000 or more, the measure strove in applicable terms to provide the same rights for employee of such counties, and the same betterment of public service in such counties, as the people had just approved hopefully with respect to the State service. **In neither instance could collective bargaining by public employees have been in the minds of the people, or of the legislators.** The thought of strikes by public employees was unheard of. **The right of collective bargaining, applicable at the time to private employment, was then in comparative infancy and portended no suggestion that it ever might enter the realm of Public employment**.

*Civil Service Comm'n for Wayne Co v Wayne Co Bd of Supervisors*, 384 Mich 363, 371-72 (1971) (emphasis added).

On July 25, 1941, the Michigan Attorney General entered an opinion that would "apply with equal force to all departments, boards, commissions, and other agencies of state government, counties, municipalities, boards of education; in fact any and all branches of the government while engaged in the performance of a governmental function." OAG, 1941-1942, p 247 (July 25, 1941).[4] In this opinion, the Attorney General stated:

> In the industrial field collective bargaining has been adopted as a method of solving private labor disputes. However, because of fundamental concepts and principles of government, it is obvious that

[4] The Attorney General did not assign numbers to opinions at that time.

> collective bargaining cannot apply to public employment and public labor which involves the expenditures of public funds.

*Id.*

In 1943, in *Fraternal Order of Police v Harris*, 306 Mich 68 (1943), the Michigan Supreme Court upheld the firing of a police officer for joining the Fraternal Order of Police. The majority stated that "those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights," such as the right to join an association. *Id.* at 79. In May 1947, the Michigan Supreme Court upheld the firing of a police officer on identical grounds in *State Lodge of Michigan, Fraternal Order of Police v Detroit*, 318 Mich 182 (1947).

In June 1947, the Attorney General entered an opinion indicating that a road commission could not engage in collective bargaining with a union. OAG 1947-1948, No 29, p 170 (June 6, 1947).

On July 3, 1947, Michigan's Hutchinson Act was passed. It allowed "a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board" to have their grievances mediated by that board. 1947 PA 116 § 7. This act also stipulated that striking public employees could be dismissed from their jobs and stripped of their pension and retirement benefits. *Id.* at §§ 2, 4.

In August 1947, the Attorney General entered a third opinion indicating that public-sector collective bargaining was improper. OAG 1947-1948, No 496, p 380 (August 12, 1947). In March 1951, the Attorney General entered a fourth opinion

indicating that public entities could not engage in collective bargaining with a union. OAG 1951-1952, No 1368, p 205 (March 21, 1951).

In 1952, the Michigan Supreme Court upheld the Hutchinson Act against a constitutional attack. *Detroit v Street Electric Ry & Motor Coach Employees Union*, 332 Mich 237 (1952). The Court held that under common law, there was no right for public employees to strike. *Id.* at 248.

In *Railway Employes' Department v Hanson*, 351 US 225 (1956), the Supreme Court held that under the Railway Labor Act, it was permissible for a union to use a union-shop clause and that such a clause trumped Nevada's state constitutional right-to-work provision. The Supreme Court noted that a 1951 amendment to the Railway Labor Act permitted union shops. *Id.* at 231. From 1934 until 1951 union shops had been prohibited. *Id.* During the debate on the 1951 change it was noted that around 20 to 25 percent of railroad employees were not members of unions and that they "got the benefits of the collective bargaining" and "they bore 'no share of the cost of obtaining such benefits.'" *Id.* (citation omitted). The Supreme Court held that the 1951 change was permissible under the Commerce Clause. *Id.* at 233.

In 1959, Wisconsin enacted the first statewide public-sector bargaining law.

In *International Association of Machinists v Street*, 367 US 740 (1961), the Supreme Court considered the union-shop agreement of a railway union, which was covered by the Railway Labor Act. In that case, the plaintiffs alleged "that the money each was thus compelled to pay to hold [their jobs] was in substantial part used to finance the campaigns of candidates for federal and state offices whom

[they] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." *Id.* at 743. The plaintiffs in *Street* claimed that this violated their rights under the First Amendment.

To avoid a constitutional issue, the Supreme Court examined whether the RLA was amenable to a construction "which denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Id.* at 750. It was held that such a construction was "entirely reasonable." *Id.* To reach this construction, the Supreme Court took a lengthy look at the history of unionism and union security in the railroad industry. It noted a long history of voluntary unionism and the high costs associated with negotiations due to the heavy regulation associated with railroads. It then concluded:

> [W]e construe [the RLA] as not vesting the unions with unlimited power to spend exacted money. We are not called upon to delineate the precise limits of that power in this case. We have before us only the question whether the power is restricted to the extent of denying the unions the rights, over the employee's objection, to use his money to support political causes which he opposes. Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union shop agreements was justified.

*Id.* at 768.

In 1962, President John F. Kennedy allowed some federal employees to have some limited collective bargaining rights under Executive Order 10988 (January 17, 1962).

The 1963 Constitution contained the language from Article 11 section 5 cited above that mirrored language found in Const 1908, art 6, § 22. This Court in *Civil Service Commission for Wayne County* has already held that the ratifiers of the 1940 provision would not have had "collective bargaining by public employees" on their minds and that "right of collective bargaining, applicable at the time to private employment, was then in comparative infancy and portended no suggestion that it ever might enter the realm of Public employment." A couple of years before the 1940 provision was enacted, President Roosevelt had indicated that "the process of collective bargaining . . . cannot be transplanted into the public service." During the period between 1940 and 1963 there were numerous AG opinions that public sector bargaining was improper. On two separate occasions, this Court upheld the firing of a police officer for joining a union. In 1947, the Hutchinson Act, which allowed striking employees to be fired and to have their pensions and retirements stripped, passed. In 1952, this Court upheld that law in the face of a constitutional challenge.

While there were some events nationally between 1940 and 1963 that signaled a softening toward the prohibition of mandatory public-sector unions, such as the use of agency fees with railway workers, the creation of mandatory public sector unionism in Wisconsin, and limited bargaining given to federal employees there were no similar events in Michigan. Further, there is nothing indicating that "conditions of employment" in 1963 was meant to provide the Civil Service Commission with more power than that term provided in 1940. Nor was there any indication that the April 1, 1963 ratifiers sought to equate the constitutional term

"conditions of employment" with the NLRA's statutory term "terms and conditions of employment."

Thus, there is no indication that the ratifiers of 1963 meant the phrase "regulate all conditions of employment in the classified service" to mean anything more than that phrase meant to the ratifiers of the 1940 constitutional provision. Even if this Court were to determine that the those-sophisticated-in-the-law standard applies, despite that standard's infrequent application, the result would be the same. There is no indication that the ratifiers of 1963 would have understood "conditions of employment" to allow the Civil Service to create mandatory public sector bargaining. Therefore, this Court need not determine whether there is a conflict between Civil Service Rule 6-7.2 and 2012 PA 349 since under the 1963 ratifiers' common understanding, the Civil Service Commission lacked the power to create mandatory public-sector unions and/or agency fees.

**C. Events after the passage of the 1963 Constitution**

In 1965, Michigan passed the Public Employment Relations Act, which allowed for mandatory public-sector collective bargaining. As part of this statute, "to bargain collectively" was defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and terms and conditions of employment." MCL 423.215.

While the historical evidence is overwhelming that the Civil Service Commission lacked the power to allow mandatory public sector unions, it is undisputed that in 1976, the Civil Service Commission purported to do so and that

Commission has had rules allowing "a form of collective bargaining" since then. See generally, Chapter 6 of Civil Service Rules (Editor's notes); and Civil Service Rule 6-1.1. How this was accomplished when this Court just five years earlier in *Civil Service Commission for Wayne County* had indicated that the Civil Service provision did not encompass the power to create mandatory public sector unions has not been explained.

Even before 1976, there was some indication that the Civil Service had sought to permit unionization of Civil Service employees. *Michigan Civil Service Commission v Local 567, AFSCME, AFL-CIO*, 32 Mich App 104 (1971). The policy allowed recognition of employee organizations that did not assert a right to strike. It also allowed the organizations to utilize dues checkoffs. *Id.* at 106. Two employees brought suit when the Civil Service Commission stopped use of the checkoffs as a punishment for union involvement in strike activity. It was argued this was permissible since "dues checkoff is a condition of employment." *Id.* at 107. The justification for this was a 1953 federal case interpreting private sector employment under the NLRA, not the Michigan Constitution or any Michigan case law.

The Court of Appeals assumed that union recognition and the union security rule was permissible. It did not discuss *Civil Service Commission for Wayne County*, which had been decided four months earlier. The Court of Appeals held that the Civil Service Commission had to follow its own rules and that those rules did not allow suspension of dues checkoffs as a strike penalty. *Local 567*, 32 Mich App at 107-08.

In 1977, the United States Supreme Court rejected a federal constitutional challenge to agency fees under PERA. *Abood v Detroit Bd of Educ*, 431 US 209 (1977).

In 1978, this Court construed the term "other terms and conditions of employment" under PERA. *Central Michigan Faculty Ass'n v Central Michigan University*, 404 Mich 268 (1978). Borrowing from the NLRA interpretations, this Court explained that phrase referred to mandatory subjects of bargaining, which prevent a party from taking unilateral action without an impasse being reached. *Id.* at 277. This Court noted "one of the primary purposes of the NLRA is labor relations peace and that this objective can best be achieved by adopting a liberal approach to what constitutes a mandatory subject of bargaining." *Id.*

In 1979, the United States Supreme Court construed "terms and conditions of employment" under the NLRA. *Ford Motor Co v NLRB*, 441 US 488 (1979). In that case, the union sought to force the auto company to negotiate over the price of food and beverages in its vending machines and at the cafeteria. *Id.* at 490. The Supreme Court deferred to a NLRB determination that these issues were a term and condition of employment and therefore subject to mandatory collective bargaining. The court stated: "[T]he availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those 'conditions' of employment that should be subject to the mutual duty to bargain." *Id.* at 498.

In 1980, this Court decided *Council # 11, AFSCME v Civil Service Commission*, 408 Mich 385 (1980). At issue in that case was a conflict between a state statute allowing certain political activity and a Civil Service Rule banning such activity. The Civil Service Commission pointed to the "conditions of employment" language from Const 1963, art 11, § 5. *Council # 11*, 408 Mich at 396. It claimed that language gave it "plenary power." *Id.* at 403.

This Court applied the "great mass of the people" construction rule to interpretation of the constitutional provision. It was held that the Civil Service Commission did have plenary power within its grant of authority, but that the rule banning political activity was outside the grant. *Id.* This Court then discussed matters it considered to be within the Civil Service Commission's grant of authority, including collective bargaining:

> The power to make "rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service" is indeed a plenary grant of power. But it is to be exercised with respect to determining the conditions "of employment", not conditions for employment. . . .
>
> **We do not question the commission's authority to regulate employment-related activity involving internal matters such as** job specifications, compensation, grievance procedures, discipline, **collective bargaining** and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance. This Court has said as much in [*Viculin v Dep't of Civil Service*, 386 Mich 375 (1971)].

*Council # 11*, 408 Mich at 406-07 (emphasis added).[5]

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[5] The Civil Service Commission filed an amicus brief at the application stage. In that brief, it argued that the creation of agency shops fell with its plenary authority. Civil Service Amicus Brief at pp 28-30. *Council # 11* was the sole basis cited in this portion of the brief. No mention was made of *Civil Service Commission*

*(Note continued on next page.)*

*Viculin* was concerned with whether a state employee could seek review of a Civil Service Commission determination to terminate that employee. This Court noted that the Civil Service Commission is "a constitutional body possessing plenary power and may determine, consistent with due process, the procedures by which a State Civil Service Employee may review his grievance." *Id.* at 393. *Viculin* was decided a little over nine months after *Civil Service Commission for Wayne County*. There is no indication that this Court in *Viculin* sought to overturn or modify *Civil Service Commission for Wayne County*.

In 1983, the Court of Appeals considered whether the Civil Service Commission followed its own rules in amending its agency fee process. *Dudkin v Michigan Civil Service Comm'n*, 127 Mich App 397 (1983). The Court of Appeals indicated that "the CSC has plenary power over all aspects of civil service employment." *Id.* at 407 (citing *Viculin*). *Civil Service Commission for Wayne County* was not discussed.

In 1988, the United States Supreme Court construed the NLRA to allow employees to become agency fee payers. *Communications Workers of America v Beck*, 487 US 735 (1988).

Many years after 1963, the concept of agency fees became fairly commonplace in labor law. The Supreme Court decision in *Abood* fourteen years after 1963 dictated the process as a matter of constitutional law for the workers in mandatory

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*for Wayne County* nor did the Civil Service Commission explore the common understanding of conditions of employment as it related to mandatory public sector unionization in 1940 or 1963.

public-sector unions. The *Beck* decision a quarter of a century after 1963 applied the concept to workers in a mandatory private sector union governed by the NLRA. Somewhat similarly, mandatory public sector unionism has seen tremendous growth since 1963. In 2013, 7.2 million public sector workers (35 percent of the public sector) were unionized. http://www.bls.gov/news.release/union2.nr0.htm. That same year, 7.3 million private sector workers (6.7 percent of the private sector) were unionized. *Id.* Solid numbers for 1963 are more difficult to find (particularly for the public sector), but a graph indicates that the union density rate in the private sector was around 30 percent, while public-sector unions were just beginning their rapid accession.[6]

It may be tempting to look at events that postdate April 1, 1963, including the significant uptick in mandatory public-sector unionization since that date and try to shoehorn the NLRA's and PERA's expansive concepts of "terms and conditions of employment" into the constitutional term "conditions of employment." But the constitutional construction test does not look at what happened subsequent to ratification; rather, it requires a determination of what the ratifiers would have understood on April 1, 1963. On that date, it was clear that the term "conditions of employment" did not refer to the NLRA's "terms and conditions of employment" or the then-nonexistent PERA's similar term and did not give the Civil Service Commission the power to allow mandatory union and/or agency fees for employees in the civil service.

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[6] http://www.law.harvard.edu/programs/lwp/graphpics/union_density_over_time.gif

Thus, the agency fee question at issue in the instant matter presents this Court with a larger problem – under a proper interpretation of Const 1963, art 11, § 5, mandatory public-sector unions are not permissible for employees in the civil service and yet they have existed since 1976. It may be that this Court can find a solution to the instant matter that does not require it to determine this larger issue. But one thing is certain – this Court should not compound the problem by giving effect to the Civil Service Commission's ultra vires Civil Service Rule 6-7.2.

## III. Due to federal constitutional concerns, the type of "collective bargaining" approved by the Civil Service Commission is insufficient to support the imposition of agency fees

### A. Standard of Review

This Court reviews "de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650 (2012).

### B. Collective bargaining under the Civil Service Rules

The Civil Service Rules are replete with indications that regardless of what the union and administration agree to, the Civil Service can ignore their agreement, modify it, or change it almost at will. The union's inability to make an enforceable bargain makes its actions more akin to lobbying than collective bargaining, and that makes the imposition of any "service fee" more like a tax by the union or appropriation for the union. The Civil Service Commission lacks the power to allow the union to tax and the Civil Service Commission also lacks the power to appropriate funds to a private entity.

Civil Service Rule 6-1.1 indicates that it allows employees to engage in "a form of collective bargaining." But any bargaining agreement must be subject to

"review, modification, and approval by the commission." Civil Service Rule 6-1.2; Civil Service Rule 6-2.1(c). An approved collective bargaining agreement "is not binding on the civil service commission." Civil Service Rule 6-2.1(e). The Commission states that it "cannot delegate its constitutional responsibilities to the collective bargaining parties and the privilege to engage in collective bargaining remains subject to the commission's sovereign authority and the rules of the commission." Civil Service Rule 6-3.1. The Commission "retains the authority, during the term of a collective bargaining agreement, to modify the agreement without the approval of the parties." Civil Service Rule 6-3.1(c).

This process makes it clear that a public-sector union has no real power during negotiations. It may make suggestions, but the ultimate authority resides with the Civil Service Commission. There is no power for the union to take a conflict to impasse. Even where the union's bargain is accepted by the Civil Service Commission, it can be altered without the union's consent.

In *Knox, supra,* the United States Supreme Court indicated that free rider arguments are generally insufficient to overcome a First Amendment objection. The purported "collective bargaining" here is more like the activities of the community association, parent-teacher association, association of university professors, or medical association described in *Knox* at 2289-90. The "service" provided by the union can be entirely ignored by the Civil Service Commission. Thus, right-to-work seems appropriate since it allows each covered employee to pay to the union any

amount (including none) that the employee feels the service, which is essentially lobbying, was worth.

Because the Civil Service Commission correctly notes that it "cannot delegate its constitutional responsibilities to the collective bargaining parties," it therefore cannot agree to a system where civil service employees get charged by a third party for a service the Commission itself must provide.

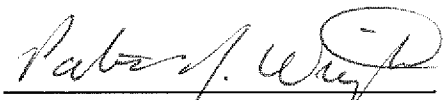
As the Supreme Court noted in *Davenport, supra*, an agency fee gives "a private entity the power, in essence, to tax government employees." Under Const 1963, art 9, § 2 the power to tax cannot be delegated. To the extent that the agency fee would be considered an appropriation, the Constitution requires that appropriations for private purposes require a two-thirds vote of the Legislature. Const 1963, art 4, § 30.

Perhaps one benefit to this argument is that reliance on it by this Court may obviate the need to decide whether the 1963 ratifiers considered mandatory public-sector unions to be within "conditions of employment" in the instant matter and allow that issue to developed more fully before consideration by this Court.

## RELIEF REQUESTED

For the reasons set out above, Amicus Curiae Mackinac Center Legal Foundation requests that this Court hold that the Civil Service Commission was without power to promulgate Civil Service Rule 6-7.2.

Respectfully Submitted,



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