STATE OF MICHIGAN
IN THE COURT OF APPEALS

STUDENTS AGAINST GSRA UNIONIZATION,
and MELINDA DAY,

Proposed Intervenors – Appellants

COA # _____
MERC Case No. R11 D-034

and

GRADUATE EMPLOYEES ORGANIZATION/AFT,

Petitioner -- Appellee,

and

THE UNIVERSITY OF MICHIGAN,

Employer – Appellee.
_____/

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BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL

EMERGENCY APPEAL PURSUANT TO MCR 7.205(E)
ACTION REQUIRED BEFORE MERC BEGINS A FLAWED HEARING IN LATE JANUARY OR EARLY FEBRUARY

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

This Court has jurisdiction pursuant to MCR 7.203(B)(3), (4) and MCR 7.205(A).

STATEMENT OF QUESTIONS INVOLVED

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

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

STATEMENT OF FACTS

Introduction

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

The union that lost that case filed a representation petition earlier last year seeking to unionize the same class of employees. Initially, MERC did not take notice of its prior decision, which had been resolved after an adversarial hearing that featured 19 days of live testimony and thousands of pages of exhibits. Perhaps MERC's actions were related to the lack of objection by the proposed employer, the University of Michigan, which through a resolution of its Board of Regents last May, sought to reclassify RAs as public employees.

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

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

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

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

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

Appellants filed the instant motion and brief seeking to participate in this hearing.

Facts and background

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

For decades, graduate students at private universities could not participate in mandatory collective bargaining. The National Labor Relations Board first addressed the issue in *Leland Stanford*, 214 NLRB 621 (1974), and held that graduate students were not employees under the National Labor Relations Act. The NLRB found that the payments made to graduate students were "in the nature of stipends or grants to permit them to pursue their advanced degrees" and that a graduate student's interaction with the university was directed "toward the goal of obtaining the Ph. D. degree." *Id.* at 621-22. The NLRB found that the pursuit of a degree divided those who could not participate in mandatory collective bargaining from those who could. *Id.* at 623 (comparing "research associates" who already have a degree with graduate assistants who do not). The NLRB concluded that graduate students are "primarily students" and that "they are not employees." *Id.*

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

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

state universities," but it chose "to interpret and apply a single federal law differently to the large number of private universities under" its jurisdiction. *Id.* at 493.

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

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

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

The University of Michigan had allowed all of its graduate students, including RAs, to organize in 1974, and after a vote (and a failure on MERC's part to recognize a potential

jurisdictional problem), the students did so. A month-long strike in 1975 preceded a contract.[2] In the process of negotiations for a second contract, conflicts developed between the union and the University. The University sought the dismissal of a grievance, and the union filed an unfair labor practice charge contending that the University was demanding dismissal before it would execute a second contract. The University's sole defense was that MERC lacked jurisdiction because the graduate students were not public employees under PERA. *Graduate Employees Org*, 1981 MERC Labor Op at 790.

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

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

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

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

were afforded full opportunity to be heard, to examine and cross-examine witnesses and to present evidence and arguments on the issues raised in the charge." *Id.* at 789-90.

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

That jurisdictional conflict concerned the GEO's claim that all people "holding appointments as graduate student assistants at the University of Michigan are employees within the meaning of PERA when engaged in activities within the scope of the graduate student appointment." *Graduate Employees Org,* 1981 MERC Labor Op at 791. At the time, there were approximately 2,000 graduate student assistants at the university. *Id.* at 780. The record revealed that graduate students were split into three categories: (1) graduate student teaching assistants (TAs), whose duties consisted primarily of teaching about 30% of the university's undergraduate courses, *id.* at 780; (2) graduate student staff assistants (SAs), whose duties included counseling undergraduates and advising them about course selection, *id.* at 781; and (3) graduate student research assistants (RAs), who generally "perform[ed] research under the supervision of the faculty member who is the primary researcher of a research grant." *Id.*[3]

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

MERC explained that while "PERA does not define public employees to specifically include or exclude students, MERC has consistently held that students can be employees." *Id.* at

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

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

782. MERC noted that its holding that medical interns at the University of Michigan could be both students and public employees had been affirmed by the Michigan Supreme Court. *Id.* at 783 (citing *Regents of the Univ of Michigan v MERC*, 389 Mich 96 (1973)).

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

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

> TA's provide a benefit to the University rather than engaging in pursuits of their own. They provide services similar to those of nonstudent employees; they do not control what courses they teach or what hours they work; they are supervised and may be removed for inadequate performances; and, they are compensated based on the amount of work they provide. They are supervised by faculty who retain control and oversight, as Respondent's principal representatives, for the quality of the work performed. They are subject to the immediate direction and control of the Respondent and they may be disciplined or relieved of their duties for inadequate performance. The work they perform fulfills one of the central missions of the Respondent. Likewise, the SA's perform regular duties of a type which benefit the University.

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

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

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

> more indirect than that of teaching 30% of the undergraduate courses. RA's . . . are working for themselves.

Id. at 785-86.

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

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

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

> Resolved, that consistent with the University of Michigan's proud history of strong, positive, and mutually productive labor relations, the Board of Regents supports the rights of University Graduate Student Research Assistants, **whom we recognize as employees**, to determine for themselves whether they choose to organize.

http://www.regents.umich.edu/meetings/06-11/2011-06-I-1.pdf (emphasis added).[4] With this resolution, the controlling board of the University of Michigan declared it university policy that contrary to this MERC's 1981 holding, RAs are public employees who can engage in mandatory collective bargaining under PERA.

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

At MERC's August 8, 2011, meeting Day's intervention motion was discussed. Commissioner Nino Green noted that the 1981 decision should be controlling and that a hearing

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

to see if the facts had changed would be futile since the Regents were forcing the University administration to argue that RAs were public employees:

> Commissioner Green continued that the Commission is faced with the unusual request to certify a bargaining unit of employees that the Commission has previously determined is not eligible for certification. He noted that a majority of the Regents of the University has entered into an agreement to recognize research assistants as employees, but that a party cannot confer employee status simply by agreement.
>
> . . . First, he stated that he is unwilling to ignore the Commission's previous ruling. To do so, would settle the question only until there is a "bump in the road" and an unfair labor practice is filed or there is an ideological shift at the U of M. If an election results in certification now, it may still be asserted in a future proceeding that research assistants are not employees, and the issue would need to be adjudicated again. Another option to consider is for an ALJ to hold a hearing to determine if there is a change in the facts. He, however, expressed concern that the U of M Regents would not appear at the hearing to advocate a position contrary to its resolution, and it is not likely that the U of M administration will oppose the position taken by the Board of Regents. Therefore, the ALJ will have no case or controversy to decide.

Proposed Minutes of August 8, 2011 MERC meeting.[5]

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

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

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[5] A copy of this document is attached.

. . .

> Having previously determined that RAs are not employees entitled to the benefits and protections of PERA, we decline to declare that they have become employees based on the Employer's change of heart and present willingness to recognize them as such. The RAs cannot be granted public employee status under PERA predicated on the record before us.

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

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

September 14, 2011 Decision and Order at 4 (emphasis added).[6]

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

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

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

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

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

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

On November 30, 2011, the Attorney General filed a motion to intervene. This motion cited the importance of the University's role as a job creator due to its status as a "nationally recognized research institution." Michigan Attorney General's Motion to Intervene at ¶ 2. It

noted that if a hearing were going to be ordered, intervention would be necessary "to ensure all the facts are presented through the benefit of the full adversarial process." *Id.* at ¶ 5. The Attorney General continued:

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

Id. at ¶ 12. On December 5, 2011, the union filed its opposition to the Attorney General's motion to intervene. On December 6, 2011, SAGU filed a response to the Attorney General's motion. On December 7, 2011, the union filed a letter response to the SAGU filing. On that same day, the Attorney General filed a reply to the union's opposition to the Attorney General's intervention motion. On December 9, 2011, the University filed a response to the Attorney General's motion to intervene.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> If I agreed with the decision to refer this matter to an administrative law judge for a hearing, I would be concerned that testimony regarding the relevant experiences of the University president, numerous deans and faculty members, and hundreds of RAs might not be presented without the Attorney General's intervention. **Indeed, a decision to refer this matter for hearing would appear, to all who oppose the Regents' May 19 resolution, to be a sham if we were to permit only one side of this crucial debate to be proffered at hearing.** If I had

> joined in the decision to refer the matter to an administrative law judge, then in the interests of fairness and due process, I would encourage the majority to grant the Attorney General's motion to intervene for the purpose of ensuring that both sides of this issue were fully and fairly examined.

Id. at 10 (emphasis added).

Appellants then filed the instant motion and brief.

ARGUMENT

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

A. Standard of Review

The Michigan Supreme Court has indicated that: "Legal rulings of an administrative agency are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law. *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 450 (1990).

B. Argument

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

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

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

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

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

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

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

On two separate occasions, this Court has held that MERC has subject-matter jurisdiction over public employees only. In *Prisoners' Labor Union at Marquette v Department of Corrections*, 61 Mich App 328 (1975), this Court held that inmates would be under MERC's jurisdiction "if, and only if, those inmates are 'public employees' within in [sic] the meaning given that term in PERA." *Id.* at 330.[7]

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

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

R. 423.165(2)(b) allows a challenge that MERC lacks subject-matter jurisdiction. MERC has held that Appellants Day and SAGR were not permitted to assert the lack of subject matter jurisdiction.

It is clear, however, that both Day and SAGU have a sufficient interest to meet the state constitutional requirements for standing. Assuming the union was to be certified as a mandatory collective bargaining representative for the RAs, GEO has indicated in an email that it will charge each student around $442 a year in dues.[8]

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

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

Id. Here, the dues deduction that would almost certainly occur if the union was named a mandatory collective bargaining representative is sufficient to provide standing. Further, even if the Michigan Supreme Court were to return to the more strict standing rules found in *Lee v Macomb County Board of Commissioners*, 464 Mich 726 (2001) and its progeny,[9] the improper taking of $442 would be sufficient to provide standing.

MERC itself has previously held that RAs are not public employees, so obviously Day and SAGU's contention that the 1981 holding is still valid is a serious one. Thus, the question

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[8] This document is attached.

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

arises, as to how the assertion that the 1981 decision still applies and therefore deprives MERC of subject matter jurisdiction can be presented?

Normally, the putative public employer would have an incentive to argue before MERC that no public employment is involved and an individual who does not believe himself or herself to be a public employee could rely on the employer to present the issue. A June 24, 2011, letter to University of Michigan Provost Philip Hanlon signed by 19 University deans shows that those who handle the day-to-day operations at the University are opposed to the unionization effort. These deans expressed their "deep and collective concern about the potential negative impacts that would result from unionization of the University's [RAs]."[10]

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

But here it can be argued that political considerations of the individual members of the governing board of the putative employer overcame institutional interests. Thus, Day and SAGU could not rely on the putative employer to advance their interests at MERC. Both sought to intervene at MERC to make the jurisdictional argument on their own.

Under the Administrative Procedures Act (APA), an agency must provide a process for an "interested party" to seek a declaratory ruling:

> On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by

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[10] The letter is attached.

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

MCL 24.263 (emphasis added). In pertinent part, the APA defines a "person" as "an individual, partnership, association, corporation, limited liability company, limited liability partnership, government subdivision, or public or private organization of any kind." MCL 24.205(7) (emphasis added).

Both Day and SAGU meet the APA's definition of person. Further, their ability to meet the constitutional standing requirement demonstrates that they are "interested" under MCL 24.263.

The administrative rules for MERC are located from R. 423.101 to R. 423.194. Therefore, either these rules contain a process by which an interested party may seek "a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency" or MERC is violating the APA.

R. 423.145(3) allows both an individual and a group of the purported employees representing more than 10% of "unit claimed to be appropriate" to intervene in a MERC representation proceeding. It states in relevant part:

> An employee, group of employees, individual, or labor organization which makes a showing of interest not less than 10% of the employees within the unit claimed to be appropriate may intervene in the proceedings and attend and participate in all conferences and any hearing that may be held. . . . The determination with respect to . . . an intervenor's 10% showing of interest is an administrative action and shall be made exclusively by the commission or its agent. . . . Intervention may be permitted . . . with the approval of the commission upon a showing of good cause.

R. 423.157 permits persons having an interest in the subject of an action to be added as a party: "Persons having such an interest in the subject of the action that their presence in the action is essential to permit the commission to render complete relief shall be made parties and aligned as charging parties or respondents in accordance with their respective interests."

Students Against GSRA Unionization is comprised of University of Michigan RAs and has 371 members,[11] a figure that exceeds 10% of the GEO's proposed representation unit of 2,200 University of Michigan RAs. Thus, while Day and SAGU contend that Day alone could intervene, SAGU met the R. 423.145(3) test identified by MERC itself in its September 14, 2011, Opinion and Order.[12]

In its December 16, 2011, Opinion and Order, MERC indicated that it was considering SAGU's motives in denying it the opportunity to intervene: "[SAGU] seeks to intervene in this proceeding for the purpose of expressing its opposition to our conducting an election, a purpose that it lacks standing to pursue in a representation proceeding." In that same order, it stated "We must carry out our statutory responsibility without interference from non-parties opposed to the very rights provided to public employees by PERA."

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

[12] The membership for this group was generated after the Commission set the 10% threshold in its September 14, 2011, Order. Two emails were involved. The first email was to a University email list (coe-grad-students-announce@umich.edu) for the college of engineering and mentioned the Commission's 10% threshold for RAs opposed to GEO's unionization attempt and provided a link to a petition. There was also an online letter explaining the situation at the saynotogeo.org (last visited December 6, 2011) website with a link to the petition. The petition provided enough RAs to meet the 10% threshold. The second email was sent to all petitioners and indicated that the undersigned was willing to provide legal representation free of charge and that signing up was solely for the issue of preventing "compulsory GSRA unionization." All petition signees were provided with an opportunity to withdraw from the group if they were no longer GSRAs or if they had developed qualms about legal representation. After those names were removed, there were 371 people left on the list.

Pursuant to R. 423.145(3), MERC could have verified "the showing of interest" by SAGU. In fact, through briefing, MERC was offered a copy of the emails to prove the students interest. Further, while the December 16, 2011 Decision or Order referenced a lack of "authorization cards" there is no indication in MERC's rules that such are required.

Thus, it appears that it was at least in part because of Day and SAGU's desire to challenge jurisdiction that MERC decided to exclude them. MERC seems to believe that if the employer is not making the jurisdictional challenge, interested parties cannot and only MERC can explore its own jurisdiction. Its failure to employ R. 423.157 lends credence to this claim. An order making Day or SAGU a party would allow for a full evidentiary hearing with counsel advocating both for and against MERC jurisdiction and would further allow MERC to give complete relief.

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

MERC's actions are all the more difficult to accept given representations made by its director, Ruthanne Okun, at a Michigan Senate committee hearing. That testimony arose due to concerns raised in state court litigation regarding the home-based day care unionization. The case challenged whether home-based day care providers were public employees. The case was filed after an election had occurred and so-called dues had begun to be collected. The relief sought was to have the state agency cease collecting dues. This Court was ordered to explain its

initial dismissal of the action, and this Court stated that the state agency involved did not have a duty "to ignore the results of the union election." *Loar v Dep't of Human Services*, COA Docket No. 294087 (September 22, 2010).[13] The day care unionization matter led the Legislature to hold hearings to determine how MERC came to certify that approximately 40,000 home-based day care providers were public employees. On May 4, 2010, Ruthanne Okun, Director of MERC, testified before a State Senate committee on this matter.[14] As noted previously, a tribunal has an obligation to raise jurisdictional issues even if the parties do not. Despite this requirement, Okun indicated that MERC does not inquire into jurisdiction but would allow someone in the bargaining unit to raise the issue:

> **Sen. Hardiman:** Ok. In the case of the MHBCCC, were they determined to be the employer in this case?
>
> **Okun:** In this particular case, the documents that were submitted to us indicated that they in fact were the employer, and neither side challenged that – nor did any person in the bargaining unit challenge the employment relationship.
>
> . . .
>
> **Sen. Hardiman**: When you say there was no question, meaning, as far as DLEG or MERC was concerned, the council was the employer?
>
> **Okun**: No one challenged the employment relationship – the employer-employee relationship. **Nor did any person in the bargaining unit challenge the employment relationship. So, it was not something that we needed to look into.**
>
> . . .
>
> **Sen. Hardiman**: So there was a consent from the council that these employees – say that again. The council consented to…

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

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

> **Okun**: There was a consent election agreed to. In other words, indicating the employment relationship and that – who was in the bargaining unit and who would be eligible to vote. And it was that consent election that happens – when there's a consent election there never is an independent determination by the Michigan Employment Relations Commission. They're the only body that would have the authority to make that determination, and there were no hearings in this case. **Had in fact someone wished to challenge the employment relationship, they would be welcome to do that, and then they would seek a hearing with the Michigan Employment Relations Commission.**

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

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

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

If Day and SAGU cannot proceed before MERC, perhaps they might be allowed to bring an action in circuit court. But, as will be seen below, this question is complicated by potential application of the primary jurisdiction doctrine.

Some cases decided before the enactment of PERA may help guide this Court in determining if Appellants have other options outside of MERC. *Labor Relations Division, Michigan Road Builders Association v Michigan State Labor Mediation Board*, 330 Mich 176

(1951), concerned an allegation that a process undertaken by the Labor Mediation Board violated the due process rights of an alleged employer, but did not involve a challenge to that Board's jurisdiction to hear a particular matter. In that case, the Labor Mediation Board set up a strike election. The employer objected to the place of the election, a particular union being named as the bargaining representative, and the group of employees that the board was intending to let vote. *Id.* at 179. Plaintiffs did not have a hearing before the board (and the case does not clearly indicate whether they made a request for one). Plaintiffs filed an action in circuit court and claimed "that less than an opportunity for a full hearing on the facts and the law constitutes a denial of due process." *Id.* at 180.

The board sought a dismissal of that action based on a statute, MCL 423.23, that then limited appeals from board decision to a petition for writ of certiorari to the Supreme Court. The Michigan Supreme Court held that the statute adequately protected plaintiffs' rights so long as plaintiffs could file a remedial writ challenging the procedure:

> We see no bar to presenting the facts asserted by the bill of complaint, on which plaintiffs rely, in an application to this court for an appropriate remedial writ. If the existence of such facts, or any of them, is challenged, the method provided by the statute for the determination of disputed matters is adequate. As we understand plaintiff's position, they do not question the power of the legislature to limit the jurisdiction of the circuit court in equity if an adequate remedy is otherwise afforded.

Id. at 182. The Michigan Supreme Court emphasized that it viewed the issue to relate "solely to procedure," not to the merits.

Thus, the Michigan Supreme Court did not allow a circuit court action alleging a lack of due process because of claimed irregularities about an election overseen by the Labor Mediation Board. However, it could be asserted that a claim related to jurisdiction is more fundamental and could permit a new trial court action. The claim would not be that MERC is making a procedural

error in a matter where it clearly has jurisdiction; rather, the claim would be that MERC is making gross procedural errors in determining whether it has jurisdiction – i.e. the power to act.

The United States Supreme Court has recognized the importance of providing a judicial avenue for an interested party that claims an administrative agency is improperly expanding its jurisdiction. In *Leedom v Kyne*, 358 US 184 (1958), the National Labor Relations Board admitted to improperly including professional employees in a bargaining unit without allowing those employees to vote on the matter. The employees filed suit in a federal district court. The NLRB sought to have the action dismissed. The Supreme Court held that the employees could file an original action to challenge the agency action "taken in excess of delegated powers." *Id.* at 190. Thus, the employees did not have to wait for a final agency order and were not limited to review of a final agency order at a federal court of appeals.

School District of City of Garden City v Labor Mediation Board, 358 Mich 258 (1959), concerned a challenge to the Labor Mediation Board's jurisdiction by a school district. After a hearing at the Labor Mediation Board, where the school district was allowed to present testimony, the board held that there were a sufficient number of teachers who signed interest cards to give the board jurisdiction. *Id.* at 261.

After losing at the Labor Mediation Board, the school district filed an original action in circuit court making the same allegations. The circuit court held that the Labor Mediation Board had properly exercised jurisdiction and the Michigan Supreme Court agreed. The Michigan Supreme Court also noted that "once its jurisdiction is established, the acts and procedures of the labor mediation board are not generally subject to review in equity." *Id.* at 266. Thus, where an agency allows a party to argue jurisdiction, its decisions will be respected. Where it does not, however, there is a possibility that some form of equity could be appropriate.

Thus, before PERA's enactment there was some indication in federal case law to support the filing of an original action challenging an agency's expanse of its own jurisdiction without the need to exhaust administrative remedies. Under Michigan law, there is no case concerning an interested party being foreclosed from challenging jurisdiction before an administrative agency and then going to a state trial court. There was one case, *Labor Relations Division*, where a due-process challenge was prevented at the trial court since the Michigan Supreme Court could correct agency errors through remedial writs. Another case, *Garden City*, prohibited a trial court action on the jurisdiction of the agency where the party had been allowed to present evidence before that agency.

Theoretically, a state court cause of action challenging MERC certification of an election not involving public employees should be possible. As noted above, the Michigan Supreme Court has held that actions and proceedings taken by a tribunal without jurisdiction "are of no more value than as though they did not exist." *Jackson City Bank Trust Co*, 271 Mich at 544. But, it is at this point that the doctrine of primary jurisdiction complicates matters.

The Michigan Supreme Court discussed primary jurisdiction at length in *Travelers Insurance Company v Detroit Edison Company*, 465 Mich 185 (2001). The Michigan Supreme Court described this doctrine as: "[W]hether the questions . . . involved are administrative in character such as to preclude the state court from inquiring into and adjudicating them without application having first been made to the commission." *Id.* at 194 (citation omitted). One justification for this doctrine is: "Adhering to the doctrine of primary jurisdiction reinforces the expertise of the agency to which the courts are deferring the matter, and avoids the expenditure of judicial resources that can better be resolved by the agency." *Id.* at 197. Further, the doctrine shows "respect for the separation of powers and the statutory purposes underlying the creation of

the administrative agency." *Id.* at 199. This promotes "the principle that courts are not to make adverse decisions that threaten the regulatory authority and integrity of the agency." *Id.* Finally, "the doctrine exists to promote consistent application in resolving controversies of administrative law." *Id.* The doctrine of primary jurisdiction generally is not susceptible to waiver. *Id.* at 204-05. Regarding its application, the Michigan Supreme Court indicated "there is no fixed formula. . . . [T]he question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Id.* at 198 (citations omitted).

The Supreme Court has rejected two attempts by MERC to assert primary jurisdiction and this Court has held it applied in one case. In *Smigel v Southgate Community School District*, 388 Mich 531 (1972), the Michigan Supreme Court rejected a claim that a lawsuit related to agency fees should have first been addressed by MERC. In that case, an action was filed in circuit court and when the matter reached the Michigan Supreme Court, MERC filed an amicus curiae brief to argue it had primary jurisdiction. *Id.* at 552. (Brennan, J., dissenting). *In re Michigan Employment Relations Commission Order*, 406 Mich 647 (1979), concerned MERC attempting to assert jurisdiction over the Michigan Supreme Court where a union filed a petition to represent secretaries, janitors and other employees at the court. In a 4-3 decision, the Michigan Supreme Court held that this was improper.

This Court has recognized that MERC's primary jurisdiction over labor relations matters prevented a union's attempt to use an Act 312 arbitration panel decision to preclude relitigation of the interpretation of a collective bargaining agreement. *Jackson Fire Fighters Ass'n, Local 1306, IAFF, AFL-CIO v City of Jackson*, 227 Mich App 520 (1998).

These cases show both that MERC is generally protective of its jurisdiction and that the doctrine of primary jurisdiction can apply to matters within MERC's purview. *Smigel* stands for the proposition that where a question is purely legal and does not involve the acquisition and analyzing of factual material related to an agency's expertise, the doctrine of primary jurisdiction will not apply.

Thus, there is more than a remote possibility that any attempt by Day or SAGU to file a lawsuit or seek a declaratory relief in the trial court would lead to MERC or the union seeking to invoke the doctrine of primary jurisdiction. Even if that doctrine were not to apply and a circuit court action permitted, the end result would be competing jurisdictional holdings: one entered by MERC without the participation of Day or SAGU and one entered by a court with those parties' participation. Thus, witnesses might need to be called in two separate hearings. This is a recipe for chaos.

MCL 24.301 of the Administrative Procedures Act states:

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

Id. (emphasis added). As noted previously, MCL 24.263 requires that MERC have a process by which an interested person can seek a declaratory ruling as the application of a statute "administered by the agency." *Id.* Day and SAGU's intervention requests were attempts to have MERC declare whether the mandatory collective bargaining process found in PERA, a statute

administered by MERC, applied to them since MERC previously held RAs are solely students and not public employees. MCL 24.203 defines "contested case":

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

This crux of this appeal is that this matter should be a contested case that allows for the participation of Day and SAGU both parties who have clear interests sufficient to meet the requirements for constitutional standing and who seek a determination that RAs are not public employees, as has been the case for the last 30 years.

Once it is properly recognized that this matter should be a contested case, the question comes whether there would be an adequate remedy if this Court failed to act at this time. As shown above, there is a decent possibility that any attempt to file a circuit court action could lead to the invocation of primary jurisdiction and bring this matter back before MERC. Even if it did not, any reviewing court would be left with a necessarily flawed factual determination from MERC that could not be binding on the Appellants. The court's choices would include entirely discarding the MERC factual findings and starting over or attempt to reopen the findings and/or fix them in some manner (but there still would likely need to be witnesses reexamined who were in the first hearing). If this Court were to hold that Appellants must wait until the hearing is over, it seems unlikely it would allow any challenge until the completion of an election (assuming that the ALJ finds sufficient facts to prevent application of the 1981 decision). That significantly increases the likelihood of harm to Appellants and to others similarly situated.

Further, it may be that this Court or some other court would ignore the previously mooted decision in *Loar* wherein this Court stated a state agency had no legal duty "to ignore the results

of the union election." But, a certified election and incomplete factual record will make reaching the correct result more difficult than it need be and could lead to multiple litigations (perhaps even a class action) and perhaps multiple evidentiary hearings. The best result is to allow a party (or in this case parties) opposed to RA unionization to argue that point before MERC just as was done 30 years ago. Due process would be adhered to and a full factual record that would be binding on all affected parties (students, the University, and the union) would be created.

RELIEF REQUESTED

For the reasons stated above, Appellants request that this Court expedite review of this matter and stay the proceedings at MERC pending the resolution of this appeal. Further, Appellants seek an order that allows them to participate as a party at the hearing before MERC and that the hearing there be characterized as an evidentiary hearing/contested case.

Respectfully Submitted,

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

Date: January 6, 2012