STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN THE MATTER OF:

UNIVERSITY OF MICHIGAN
Appellee Public employer,

and

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Appellee Petitioner Labor Organization,

and

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

and

MICHIGAN ATTORNEY GENERAL,
Appellant Proposed Intervenor.
_____/

Court of Appeals No. _____

Michigan Employment Relations Commission No. R11 D-034

PURSUANT TO MCR 7.205(E)(1), EXPEDITED DECISION REQUESTED BY JANUARY 31, 2012 BECAUSE THE ADMINISTRATIVE PROCEEDING FOR WHICH THE ATTORNEY SEEKS INTERVENTION WILL BE SCHEDULED FOR THE END OF JANUARY 2012

THE MICHIGAN ATTORNEY GENERAL'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

1. The law grants the Attorney General broad discretion to intervene at any stage of any administrative proceeding when he deems in his own judgment that it is in the best interest of the State and the People to do so. To deny intervention, the Michigan Employment Relations Commission (Commission) had to conclude not only that the Attorney General had incorrectly determined that intervention is in the best interest of the State and the People, but that such intervention is inimical to that interest. Did the Commission err in so concluding?

   Public Employer's answer: No

   Petitioner Labor Organization's answer: No

   Proposed Intervenor Students Against Unionization: Yes

   The Michigan Attorney General's answer: Yes

   Commission's answer: No

STATEMENT OF ORDER APPEALED FROM, ALLEGATIONS OF ERROR, AND RELIEF SOUGHT

The question presented here is simple: should the Commission hold hearings on an issue that might cause serious harm to the University of Michigan and the public without anyone arguing against that possible result? The Commission thinks not; the Attorney General emphatically disagrees.

A few months ago, the Commission decided again, as it had previously already in 1981, that Graduate Student Research Assistants (GSRAs) are not public employees subject to unionization. The Commission Order contested here was entered on December 16, 2011. There, two members of the Commission (with one dissenting) reconsidered its earlier decision and appointed an administrative law judge (ALJ) to conduct fact-finding on the question. The Order also denied the Attorney General's request to intervene in this case, to assure that both sides of the question, and all relevant facts, are presented to the Administrative Law Judge (ALJ) for consideration.

As a matter of public policy, the Michigan Employment Relations Commission Act (Act) mandates "that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected." MCL 423.1. Absent Attorney General intervention, the public policy will not be served. All participants in the process will be advocates for one side, and based upon these participants' previous positions, would assert that the Commission's long-standing decision is now incorrect. While the University, the public employer here, would ordinarily be expected to oppose

that result, it is constrained from doing so by a decision of a majority of its Regents (with two members dissenting). The Regents inappropriately have determined that the GSRAs are public employees (a decision they have no legal standing to make).

The Attorney General has determined that the outcome of the ALJ's decision will have a significant impact on the University's role as an elite research institution, which would detrimentally impact the interests and rights of the State and the People of Michigan. Further, the interests of the many GSRAs and faculty leadership who do not want public employee status and unionization need to be considered. To further the statutorily recognized public policy, the Attorney General thus sought to intervene to assure that the proceedings will not be a one-sided effort to ratify the decision that the Regents and the union want.

By denying the Attorney General intervention, the Commission committed a substantial and material error of law. It found that the Attorney General's intervention would unduly disrupt the proceedings, which is simply without foundation. And it concluded that having more than one viewpoint presented is somehow inimical to the public interest. The Commission's decision was based on nothing more than conjecture regarding the Attorney General's motives and was contrary to the well-established case-law that mandates liberal construction of and deference to the Attorney General's decision to intervene.

The Attorney General understands that interlocutory appeals to this Court are rare and disfavored. However, the question to be decided by the ALJ and Commission is of such import that it should be subjected to the usual rigors of a

two-sided adversarial process. If the Attorney General waits until the fact-finding is complete and the Commission issues a final decision before appealing, this Court will not be able to provide an adequate remedy retrospectively. Because the Commission improperly denied the Attorney General's intervention, he asks this Court to grant leave to appeal and to stay further proceedings below pending appeal.

REASONS FOR GRANTING THE APPLICATION

The Attorney General asks this Court to grant leave to appeal the Commission's order denying the Attorney General intervention as its conclusion that the Attorney General's intervention is inimical to the public interest is contrary to law, and is arbitrary and capricious. There are substantial reasons why this Court should grant the Attorney General's application for leave under MCR 7.203(B)(4) and MCR 7.205.

- The Commission's decision to deny intervention in favor of a one-sided fact-finding process jeopardizes important interests and rights of the State and the People of Michigan. The University of Michigan's national renown as an elite research university will likely be compromised if the Commission revisits 30 years of precedent and reclassifies GSRAs as public employees. The issue whether the GSRAs are public employees under the Public Employment Relations Act, MCL 423.201, *et seq.*, is a significant legal issue. A reviewing Court will be significantly handicapped if the record developed is not subject to the usual adversarial process, where both sides of the facts and arguments are presented.

- This case contains issues of jurisprudential significance relating to the Attorney General's authority and discretion to intervene whenever state interests are involved in a cause or matter. Neither party to the proceeding has even attempted to show that the Attorney General's intervention would be contrary to the public interest. So, the Commission determined this fact unilaterally and on the basis of mere speculation. The Commission's order ignores controlling case law requiring that the Attorney General be allowed to intervene *unless there is a showing* that such intervention is clearly contrary to the public interest. *VanStock v Township of Bangor*, 61 Mich App 289, 299; 232 NW2d 387 (1975); *Kelley v Gremore*, 8 Mich App 56, 59; 153 NW2d 377 (1967) (*Gremore*).

- There is a significant public interest that the Attorney General be allowed to intervene in a broad range of both administrative and judicial proceedings, in order to protect the interests of the State and the People of Michigan. The Commission's decision to deny the Attorney General's intervention without any showing that the Attorney General's intervention is against the public interest sets a troubling precedent that undermines the Act's mandate to protect the rights and interests of the

People of this State, and decades of case law that liberally construes and defers to the Attorney General's discretion regarding intervention.

For these reasons, and those discussed below, the Attorney General respectfully requests this Court to grant this application for leave to appeal and enter a stay of proceedings below pending appeal. A motion to stay and for immediate consideration accompanies this Application.

STATEMENT OF JURISDICTION

The Commission's order denying intervention to the Attorney General is appealable to the Court of Appeals under the Administrative Procedures Act (APA). Section 101 of the APA, MCL 24.301, provides that an Agency's "decision or order is subject to direct review by the courts as provided by law... . A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, *except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.*" (emphasis added). Clearly, the present situation is one where leave to appeal is appropriate – the Attorney General's intervention is needed to protect the rights and the interests of the State and the People of this State, and to ensure a complete record before the ALJ. That goal will be stymied if he must wait to appeal the intervention decision until the non-adversarial fact finding process is complete and the Commission issues its final order. The irreparable and significant harm that the Attorney General is trying to preclude through intervention, i.e., a one-sided presentation of the relevant facts and arguments, would already be complete. In that sense, as stated in the APA, later review cannot "provide an adequate remedy." MCL 24.301.

The Act directs appeals from Commission decisions to the Court of Appeals. MCL 423.23. This application for leave challenging the Commission's December 16, 2011 interlocutory order denying intervention, a predecessor to a final order, is properly filed with this Court within "21 days after entry of the judgment or order to be appealed from." MCR 7.205(A).

STATEMENT OF PROCEEDINGS AND FACTS

A. Introduction

On December 16, 2011, the Commission denied the Attorney General's motion to intervene in this matter. Bill Schuette, in his official capacity as Attorney General of Michigan, had sought to intervene in this case because, in his judgment, it involves matters of important public interest. (December 16, 2011 Commission Decision, attached as Ex. 1.) Specifically, this case has the potential to significantly damage the University of Michigan's reputation as a nationally recognized research institution, to the detriment of all Michigan citizens who support and value the University as one of our country's elite institutions of higher education. The unionization of the University's GSRAs would compromise the established excellence of the graduate students by allowing a third party – the union – to interpose itself between the relationship of the faculty and the graduate students. There is ample support for the Attorney General's concern in this regard, especially as evidenced by a letter signed by academic deans as well as the hundreds of GSRAs who have gone on record as being against unionization. The unionization of the GSRAs is also not supported in law and the process before the Commission should be an adversarial one, rather than one in which only a single legal position is presented. The issue whether the graduate students are public employees under the Public Employment Relations Act is a significant legal issue, one in which the Attorney General and the State have a specific interest.

Under the law applicable here, the Commission should have granted the motion to intervene. Instead, it ignored decades of judicial precedents that require liberal construction of the Attorney General's statutory right to intervene

B. The University of Michigan's vital role in Michigan.

The University of Michigan plays a vital part in Michigan economy. The University of Michigan undoubtedly is a major research institution, ranking second in the nation in terms of total research expenditures. (University's October 17, 2011 Response to Petitioner's Motion for Reconsideration, p 4, attached as Ex. 2.) External funding supports a large majority of GSRA studies – with total research funding exceeding $1.14 billion in fiscal year 2010. (Office of the Vice President for Research, Quick Facts, *http://research.umich.edu/quick-facts.*) The University of Michigan thus is an essential component of the University Research Corridor – a coalition between the University of Michigan, Michigan State University, and Wayne State University that has generated an "economic impact" of $14.8 billion in 2009 for the State of Michigan. (2010 Empowering Michigan Report, available at *http://urcmich.org/economic/2010/2010econimpact-report.pdf.*) Even as state funding support dropped, Michigan's research universities remained the largest cluster in the U.S. in terms of enrollment, and they ranked third in terms of high-tech degrees. (*Id.*) The research corridor has continued to provide a significant fiscal impact on Michigan – for example, over 550,000 research alumni live in Michigan, collectively earning about $26 billion annually; generating over $400 million in state tax revenue for 2009 alone. (*Id.*) Obviously, given these numbers,

any proceeding that may affect the University's ability to continue to attract research funding and play an integral role as a member of the University Research Corridor implicates a number of state interests.

The excellence of the University will be seriously jeopardized if its status as a research institution, with the funding that status brings, is undermined. All of Michigan's taxpayers, and certainly the University's thousands of alumni, are rightfully proud of this outstanding public university. Each will lose something if an incorrect determination of the facts underlying this dispute is rendered, without the benefit of the usual adversarial process. The Attorney General has correctly judged that the public interest is implicated in having a fair and complete fact-finding process before the ALJ, especially where the Act creating the Commission requires that "the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected." MCL 423.1. Accordingly, this Court should grant the Attorney General leave to appeal the Commission's decision.

C. Procedural History

On April 27, 2011, the Graduate Employees Organization/AFT (the Organization) filed a petition with the Commission, seeking an election to be certified as the exclusive representative of GSRAs of the University of Michigan. (September 14, 2011 Commission Decision, p 1, attached as Ex. 3.) A majority of the University's Board of Regents later passed a resolution recognizing the GSRAs as employees under the Public Employment Relations Act (Act), and thus endorsing the Organization's petition. (Ex. 3 at 2.) The Regents' position was opposed by 19 current and former deans who wrote a letter to the University provost on June 24, 2011:

> [T]o express our *deep and collective concern about the potential negative impacts that would result from unionization* of the University's graduate student research assistants (GSRAs). We believe that such *a union would put at risk the excellence of our university and the success of our graduate student assistants.*
>
> Research assistantships provide graduate students with opportunities to develop their research skills while working in a lab or on a project under faculty supervision. As students assist with various aspects of scholarly work, they gain in their capacity for independent research. This is an important part of their academic training. *A union would be a third party intervening in the educational program, in the middle between faculty mentors and their students. This would compromise the essential nature of doctoral preparation.*
>
> We note those graduate student research assistants are not unionized at the peer institutions against whom the University competes for faculty and graduate students. The Board of Regents in their public statements at the June 16, 2011 meeting included a list of other public institutions at which research assistants are unionized; although they are fine institutions, none of them competes in research at the same level as Michigan. *It would be a great loss to the state and the nation if our research efforts were to decline to the quality seen at lesser universities. We worry that a GSRA union would make Michigan an outlier when the best and brightest graduate students compare research*

opportunities, and when we work to recruit excellent research faculty. A vast majority of the faculty members with whom we have spoken do not support GSRA unionization because of the potential negative impact on their one-on-one relationships with students and the University's competitive position among its peers.

[Ex. 2 (emphasis added).]

The Commission rejected the Organization's petition, correctly reasoning that GSRAs are not public employees and thus are outside the Commission's jurisdiction. The Commission had made the same finding in 1981 with the same parties as present today and, in the absence of materially different circumstances, the Commission was bound by the prior decision. (Ex. 3 at 4.)

The Organization moved for reconsideration. The Organization's motion relied on a single affidavit, and it argued in essence (and illogically) that because research has grown in volume and importance to the University, and because GSRAs are an integral part of this research, they are employees of the University. Furthermore, the motion tried to reargue the law established in 1981. And, finally, it contended that the Regents' majority decision is a binding stipulation of fact. (Organization's Motion for Reconsideration, attached as Ex. 4.) None of these grounds presented a compelling case for reconsideration.

Constrained from directly opposing reconsideration by the majority Regents' vote, the University merely set forth facts seeming to show that nothing has materially changed since the Commission last considered the question in 1981. (University's Response to Motion for Reconsideration, attached as Ex. 5.) The University has since clarified its position that, consistent with the Regents'

resolution, it supports the GSRAs rights to vote on unionization. (University's November 4, 2011 Supplemental Response, attached as Ex. 6.)

The Commission's record also shows that a significant percentage of GSRAs have expressed opposition to employment status and possible unionization. (See Students Against GSRA Unionization November 1, 2011 Brief in Support of Motion to Intervene and in Opposition to Motion for Reconsideration, attached as Ex 7.) Stephen Raiman, a member of a group called Students Against GSRA Unionization, stated "[w]e believe our research and our lives as students are between ourselves and our departments and our advisors. We don't believe that a third party should be interfering in that." Goldsmith, Rayza & Williams, Kaitlin, *MERC to Reconsider GSRAs' Positions as Employees*, The Michigan Daily, Nov 8, 2011. Similarly, as noted above, a broad contingent of the University's faculty leadership registered their opposition to and concern regarding unionization.

None of these voices was to be heard by the Commission, even though the Act establishing the Commission requires that "the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected." MCL 423.1. Once the University elected to acquiesce to the Organization's petition, there is no longer any voice to support the position articulated by the current and former deans and a significant number of GSRAs. There is also no party to represent the legal position that the GSRAs are not public employees under the Public Employment Relations Act. So, the Attorney General sought to intervene before the Commission when it considered

the motion for reconsideration. Further, assuming the Commission was to order fact-finding, the Attorney General requested intervention to fully participate in hearings before the ALJ.

The Attorney General has determined, in his judgment, that intervention in this matter is necessary to protect significant state interests, and would act in the fact-finding proceeding to ensure that a complete and unbiased record is created. Where the University administration is constrained to agree with the Organization on the critical issue, it seems inevitable that the evidentiary hearing will not fully disclose the facts and arguments crucial to determining whether the GSRAs' relationship with the University has substantially changed since the 1981 decision. The Attorney General relied on his broad authority to intervene in any matter under MCL 14.101 and MCL 14.28, as well as precedents mandating liberal construction of this authority and deference to the Attorney General's judgment to intervene at any stage of any administrative proceeding. The law on Attorney General intervention is unambiguous – his authority to intervene is limited only where there is a clear showing that the intervention is inimical to the public interest.

D. The Commission's December 16, 2011 Decision

A majority of the Commission granted the Organization's motion for reconsideration, reinstated the Organization's petition for a representation election, ordered an ALJ to conduct a factual inquiry into whether GSRAs at the University of Michigan are "employees" of the University, and denied the Attorney General's

motion to intervene both at the December 16th hearing, and in the subsequent fact-finding before the ALJ. (Ex. 1.) The majority reasoned that the Attorney General had moved to intervene only in "opposition to the exercise of a statutory right," that of the students to consider unionization. (*Id* at 4.) The majority further maligned the Attorney General's motives, stating that "the Attorney General seeks intervention for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan." (*Id* at 5.) The Commission found it "inappropriate to allow the Attorney General to intervene for the purpose of opposing a policy decision made by the Regents when that policy decision does not determine the results of our investigation in this matter." (*Id.*) Finally, the Commission baldly concluded – without any support – that intervention "would be unduly disruptive to the proceedings and inimical to the public interest." (*Id.*)

The dissenting Commissioner (Dr. Edward Callahan) opposed granting the motion for reconsideration, but opined that, in the event the Commission did so, it should grant the Attorney General's motion to intervene. Such intervention is necessary to assure the presentation all of the facts in the hearing given the lack of adversity between the University and the Organization. (*Id* at 10.) Commissioner Callahan also reiterated the Commission's prior concern "over whether the University would present evidence at a hearing that might show facts exist contrast to the Regents' resolution." (*Id.*) Astutely, Commissioner Callahan noted that the Organization "has offered no arguments that might persuade me that an evidentiary hearing in this matter would fully disclose the facts necessary to

accurately discern whether the [GSRAs'] relationship with the University has substantially changed since the decision in [the 1981 case]." (*Id.*) He expressed valid concerns over the legitimacy of any fact-finding process where there is no adversity of interests between the parties; it "would appear... to be a sham if we were to permit only one side of this crucial debate to be proffered at hearing." (*Id.*) Significantly, he concluded that "interests of fairness and due process" compel granting the Attorney General's motion to intervene. (*Id.*)

E. The Administrative Proceedings

Immediately following issuance of the Commission's December 16, 2011 decision, the Michigan Administrative Hearing System assigned Administrative Law Judge Julia C. Stern (ALJ) to hear the administrative hearing. To the best of the Attorney General's knowledge, the ALJ conducted a telephone conference on January 4, 2012, and plans to conduct pre-hearing conferences sometime before January 17, 2012, and to schedule three days of hearing for the last week of January and first week of February. When the Attorney General requested to participate in the January 4, 2012 telephone conference, the ALJ advised the Attorney General that his only participation will be as "an observer of a public hearing." (December 27, 2011 ALJ Stern Letter to Attorney General, attached as Ex. 8.)

ARGUMENT

I. The Commission improperly denied the Attorney General's motion to intervene where it gave no deference whatsoever to the Attorney General's discretion, conjured up ulterior motives in the Attorney General's reasons to intervene, and otherwise was arbitrary and capricious in finding the Attorney General's intervention would be inimical to the public interest.

A. Issue Preservation

The Attorney General argued in his brief to the Commission that it should defer to the discretion of the Attorney General in determining that this matter implicates state interests, and grant his motion to intervene, as there has been no argument or other showing that the intervention would be inimical to state interests. (Attorney General's Brief in Support of Motion to Intervene, pp 10-11, attached as Ex. 9.) The Commission declined the Attorney General's request for oral argument and therefore no arguments for intervention were presented on the record. (Ex. 1 at 2.)

B. Standard of Review

The Court of Appeals reviews Commission decisions to determine whether they were "authorized by law." *Ingham County v Capitol City Lodge No. 141 of the Fraternal Order of Police, Labor Program, Inc*, 275 Mich App 133, 141; 739 NW2d 95 (2007). The legal conclusions that the Commission makes are reviewed *de novo*. *Id.* "Authorized by law" means "allowed, permitted or empowered by law." *Northwestern National Casualty Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998) (*quoting* Black's Law Dictionary (5th ed, 1979)). Under this

standard, an agency decision may be overturned if it is "in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious." *Northwestern*, 231 Mich App at 488; *Hitchingham v Washtenaw County Drain Comm'r*, 179 Mich 154, 161, 162 n2; 445 NW2d 487 (1989). Arbitrary means "fixed or arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances or significance" and capricious means "apt to change suddenly, freakish or whimsical." *Roseland Inn, Inc, v McClain*, 118 Mich App 724, 728; 325 NW2d 551 (1982). Here, the Commission's decision was contrary to law, and was both arbitrary and capricious.

C. Analysis

1. The Attorney General's right to intervene should only be denied when a showing is made that it is clearly against the public interest.

Attorney General Bill Schuette is the chief law enforcement officer for the State of Michigan and has a duty to ensure that the laws of the state are followed. *See* Const 1963, art 5, §§ 3, 21. When the Attorney General determines, in his own judgment, that the interests of the state require intervention, he may "intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal." MCL 14.28; see also MCL 14.101. The Attorney General may intervene in administrative proceedings at any stage. *Kelley v Thayer*, 65 Mich App 88, 92-93; 237 NW2d 196 (1976).

Courts are to give great deference to the Attorney General's unconditional statutory right to intervene in matters of state interest. *Gremore,* 8 Mich App at 59. Unless there is a showing that the Attorney General's intervention is *clearly* contrary to the public interest, the Attorney General should be permitted to intervene. *Id*; *VanStock,* 61 Mich App at 299.

Attorney General intervention is proper when significant matters of state interest and public policy are involved, and when a proceeding may affect unrepresented parties. *Syrkowski v Appleyard,* 122 Mich App 506, 513; 333 NW2d 90 (1983), *rev'd on other grounds* 420 Mich 367; 362 NW2d 211 (1985) (noting that intervention was proper to represent the unrepresented child's interests on the issue of entry of petitioner's name on birth certificate as natural and legal father of a child to be born to a surrogate mother who had been artificially inseminated with the sperm of petitioner). That is exactly the case here. The Act outlines the public policy to be served by the Commission:

> It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; *that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected*; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state. [MCL 423.1 (emphasis added).]

The Regents' vote to recognize the GSRAs as employees and the Organization's statements made in the letter accompanying the motion for

reconsideration show that the Organization and the University administration will not be truly adverse parties before either the Commission or any ALJ assigned to hear this case. And there is no other party to represent the voice of the People of the State, dissenting students, and faculty in the proceeding.

Further, and even more troubling, the APA authorizes the "parties in a contested case" by a stipulation in writing to agree "upon any fact involved in the controversy" and mandates that the stipulated fact is "binding upon all parties." MCL 24.278. Thus, as has already happened in this case, if the University and the Organization stipulate to facts, those facts are binding, not only on the parties but on the ALJ. For the APA requires the ALJ to render a decision reflecting "findings of fact based exclusively on the evidence and on matters officially noticed." MCL 24.285. In the absence of any party opposed to the union and the Regent's viewpoint on the GSRAs' "employee" status, the fact-finding process will be, at best, one-sided and incomplete; at worst, the lack of an adversarial process will result in a biased and foreordained outcome.

The Attorney General has determined, in his judgment, that intervention in this matter is necessary to protect significant state interests. The Commission's ultimate decision regarding the GSRAs' status as employees implicates a number of important state interests. There are over 2,000 GSRAs, making them the largest group of graduate students within the University. According to affidavits, more than 17 percent of those students actively oppose employee status. (Ex. 7, Affidavit of Adam Duzik.) Moreover, according to the Dean's Letter to the University's

Provost and the affidavits submitted with the University's Response to the Motion for Reconsideration, GSRA unionization will likely have a substantial negative impact on the University's ability to attract top researchers and to procure significant research funding. (Ex. 2.)

Any proceeding that may have an impact on the University's competitiveness and status as an elite institution is in the interest of the entire State and it cannot be inimical to the state interest to have the factual record developed fully through a truly adversarial process. The University has developed into a nationally renowned research institution over the past 30 years without union presence in the educational relationship between elite students and elite faculty. The University, its students, and the State of Michigan as a whole have greatly benefitted as a result – and it is of the utmost public interest that all the relevant facts and positions are presented against the otherwise uncontested position that GSRAs are employees.

2. The Commission's ruling that the Attorney General's decision to intervene was inimical to the public interest was contrary to the many precedents requiring deference to the Attorney General's discretion; the Commission committed a substantial and material error of law when it failed even to consider the Attorney General's stated reasons for intervention.

The law is clear – the Commission can only deny Attorney General intervention if it finds it to be inimical to the public interest. *VanStock*, 61 Mich App at 299; *Gremore*, 8 Mich App at 59. The Commission substantially misapplied the law when it ignored the Act's stated public policy, gave no deference to the

Attorney General's stated reasons for intervention, and premised its finding that intervention was inimical to the public interest on impermissible speculation about the Attorney General's motives.

The Commission failed to give substantial deference to the Attorney General's reasoning and determination that it is in the state's interest to intervene and ensure a balanced, adverse presentation in the fact-finding process. *See Michigan State Chiropractic Ass'n v Kelley*, 79 Mich App 789, 791; 262 NW2d 676 (1977). The Commission afforded no deference to the Attorney General's legitimate decision to intervene in an otherwise one-sided hearing the result of which may have a significant impact on the State and the People of Michigan.

The majority of the Commission took the Attorney General's statement that unionization of the GSRAs may negatively affect the University's reputation and competitiveness out of context to conclude that he seeks intervention solely to oppose the majority Regents' policy decision. (Ex. 1 at 4.) Actually, reading the Attorney General's Brief in Support of Intervention as a whole, the Attorney General's statements regarding the negative impact of unionization were merely part of his argument that the hearing in front of the ALJ involves the interests of the State and People of Michigan. (Ex. 9.) This rather obvious position has been consistent throughout this whole matter.

But instead of liberally construing and deferring to the Attorney General's broad intervention authority as required by law, the Commission ignored the Attorney General's arguments that an adverse position needs to be presented to the

ALJ to assure full and complete fact-finding on this issue of great state importance. Only the dissenting Commissioner addressed the Attorney General's argument that it is crucial that all the relevant facts are presented to the ALJ, in the absence of adversity between the University and the Organization – the majority's decision was silent. (Ex. 1 at 10.) The Commission's failure to follow well-established case law or even to discuss the Attorney General's articulated reasons for intervention is action contrary to law and amounts to a substantial and material error of law. The Commission's decision should be reversed for that reason alone.

3. The Commission's decision to deny the Attorney General's motion to intervene was arbitrary and capricious, as its finding that intervention was inimical to the public interest was without legal or factual basis.

But even more troubling are the Commission's unfounded conclusions regarding the Attorney General's motives, and its finding that, given such motives, intervention is inimical to the public interest. (Ex.1 at 4-5.) Despite failing to cite to any statement in the Attorney General's Motion or Brief in Support of Intervention, the Commission concludes that "the Attorney General seeks intervention *for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan*, an autonomous state institution." (*Id* at 5 (emphasis added).) While it is true that the Attorney General has expressed concern about the negative impact GSRA unionization may have on the University and the State as a whole, the Attorney General's Motion and Brief in Support make

it clear that the Attorney General's intervention is to ensure a full, complete, and balanced presentation of the facts and arguments. (Ex. 9.)

At issue is not any "policy" of the Regents; what is to be decided is a matter of fact, whether the GSRAs are properly to be considered public employees under the Public Employment Relations Act. This is an issue that transcends the University, as the question of the meaning of public employment affects a wide range of legal issues for the State and its employees. As the Commission itself has noted, the Regents are without authority to opine on that question, as it is entirely within the purview of the Commission for decision. Because the University administration and the Organization are in agreement that GSRAs are public employees, of course the Attorney General's role is geared toward presenting a more balanced view. Ensuring that the ALJ hears all the facts and that the Commission and any subsequent court reviewing the decision have the benefit of a complete record hardly rises to the level of infringing on the University's constitutional autonomy, as the University administration has argued. Nor is there any reason to conclude that having the Attorney General involved in what is nothing more than a usual adversarial and balanced process would somehow be "unduly disruptive." To the contrary, the participation of the Attorney General will guarantee that the adversarial process operates properly, ensuring that different legal perspectives are presented. See, e.g., *Syrkowski,* 122 Mich App at 513.

The Attorney General has not been able to find any cases that define "inimical to the public interest" for the purposes of declining Attorney General

intervention. The dictionary states that "inimical" means "adverse in tendency or effect; unfavorable; harmful." Random House Webster's College Dictionary, 2d ed. p 672 (1997). The law has been unwavering for decades – the "broad discretion granted the attorney general... is *only* limited when intervention by the attorney general is *clearly* inimical to the public interest." *VanStock*, 61 Mich App at 299 (emphasis added); see also *Gremore*, 8 Mich App at 59.

The Commission essentially decided that despite the Attorney General's clear statements that his intervention is designed to ensure all the facts are fully disclosed at the upcoming hearing, consistent with interests of fairness and due process, the Attorney General has ulterior motives that are "adverse in tendency or effect; unfavorable, harmful" to the public interest – that is, to the interest of the People of the State of Michigan who elected him. Such an unwarranted conclusion is beyond being merely without merit – it falls into the realm of a decision "arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances or significance," in other words – arbitrary and capricious. A Commission decision that is arbitrary and capricious is not authorized by law – therefore, the Court of Appeals should grant the Attorney General's application for leave and reverse the Commission's decision.

The Attorney General sums up his argument with one simple question: What is the Commission afraid of? Surely it cannot be the usual two-sided process that is commonplace throughout our courts, agencies, and other tribunals. One would think that, instead, the Commission would welcome the Attorney General's

intervention, to assure a good record, the best and most defensible administrative result possible, and the best opportunity for full review both by the Commission and the courts.

CONCLUSION AND RELIEF REQUESTED

In rendering its ruling, the Commission committed a "substantial and material error of law" by failing to give any deference to the Attorney General's decision to intervene in this matter and ignoring the Act's stated public policy to consider, respect, and protect the interests and rights of the consumers and the People of the State. The Commission's finding that such intervention would be "inimical to the public interest" is based on speculative conclusions and conjecture about the Attorney General's motives and is arbitrary and capricious. The Attorney General has consistently reiterated the significance of the question at issue here, to the State and People of Michigan. He seeks to intervene solely in the interests of fairness and due process, to legitimize the proceedings, and enable both the Commission and any subsequently reviewing Courts to make fully informed decisions based on a record that presents evidence probative of all views. The Commission's decision to deny that process is contrary to law, as it afforded no deference to the Attorney General, and it is arbitrary and capricious, as it was based on nothing but conjecture.

Because the Commission misapplied the law and arbitrarily and capriciously denied the Attorney General intervention, the Attorney General asks this Court to immediately consider this application, grant the Attorney General leave to appeal, and stay further administrative proceedings pending appeal.

Respectfully submitted,

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