STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From The Michigan Court of Appeals
Honorable Donald S. Owens, Presiding

SHERRY LOAR,

Plaintiff-Appellant,

v

Supreme Ct. No. 140810

MICHIGAN DEPARTMENT OF HUMAN SERVICES, and ISHMAEL AHMED, in his official capacity as Director of Michigan Department of Human Services,

Court of Appeals No. 294087

Defendant-Appellee.

_______________________________________/

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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Amicus curiae, the National Federation of Independent Business Small Business Legal Center (NFIB Small Business Legal Center), hereby respectfully requests leave of the Court to file the attached *Amicus Curiae Brief in Support of Plaintiff-Appellant's Application for Leave to Appeal*, pursuant to MCR 7.306(D). In support of this motion, *amicus curiae* states:

1. *Amicus curiae* the NFIB Small Business Legal Center, which is a nonprofit and public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The 350,000 members of NFIB, including 10,000 in Michigan, own a wide variety of America's independent businesses, including neighborhood restaurants and retailers, small manufacturers and service companies, including childcare providers.

2. Small businesses account for more than 99 percent of all employers in the country and provide more than one-half of all jobs in our economy. More importantly, two-thirds of new job growth comes from small business.

3. Opening a child care business requires significant investments of time and resources to investigate current and future demand for child care services in the community, to modify one's home to provide a safe child-friendly environment, and to obtain and maintain the necessary license.

4. The 40,000 small business owners who operate day care centers in Michigan provide an essential public service. Day care centers enable low and middle income families to pursue employment and education opportunities that might not otherwise be available to them. The purpose of Michigan's child care subsidy is to help low income families obtain this vital service. The child care subsidy plays an important role in helping people move off welfare and

JAFFE RAITT HEUER & WEISS, P.C.

into jobs, and in allowing parents to pursue educational opportunities. The subsidy also provides an economic incentive to create more child care facilities and reduce the shortage of child care services throughout Michigan.

5. The purpose of the child care subsidy is to help working parents, not to fill UAW or AFSCME coffers. The forced unionization of these small business owners does nothing to improve the quality or availability of child care. If anything, it undermines the intent of the subsidy program by taking more than $3,400,000 out of the pockets of child care providers.

6. The *amicus curiae*, although not a party to this action, has a strong interest in the subject matter of the proposed issue on appeal. The issue before this Court is an important one to large and small businesses in Michigan. If the decision of the Court of Appeals is allowed to stand, the resulting uncertainty will economically affect Michigan businesses, particularly those with ties, however insubstantial, to the public sector.

Wherefore, *amicus curiae* respectfully requests this Court to grant it permission to file the attached *Amicus Curiae Brief in Support of Plaintiffs' Application for Leave to Appeal.*

JAFFE RAITT HEUER & WEISS, P.C.

Dated: April 2, 2010

Respectfully Submitted,

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Plaintiffs,

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MICHIGAN DEPARTMENT OF HUMAN SERVICES, and ISHMAEL AHMED, in his official capacity as Director of Michigan Department of Human Services,

Defendants.

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BRIEF OF *AMICUS CURIAE* THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PLAINTIFF-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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JAFFE RAITT HEUER & WEISS, P.C.

TABLE OF CONTENTS

ATTORNEY FOR AMICUS CURIAE 1

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

OPINION APPEALED AND RELIEF SOUGHT 1

QUESTION PRESENTED FOR REVIEW 2

RELEVANT FACTS AND BACKGROUND 2

DISCUSSION 4

I. PUBLIC POLICY PROHIBITS FORCED UNIONIZATION OF SMALL BUSINESS OWNERS 4

A. **Forcing Day Care Providers into Unions is bad for Parents and DHS's subsidy program.** 5

B. **Forcing Day Care Providers into Unions is bad for Day Care Providers and their employees** 5

II. HOLDING PRIVATE CHILDCARE PROVIDERS TO BE PUBLIC EMPLOYEES OPENS THE DOOR TO RECASTING ANY EMPLOYER OR EMPLOYEE WHOSE BUSINESS RECIEVES A STATE SUBSIDY 7

III. HOME CHILD CARE PROVIDERS ARE NOT PUBLIC EMPLOYEES SUBJECT TO UNIONIZATION 8

A. **MICHIGAN LAW ONLY PERMITS PUBLIC SECTOR BARGAINING WITH PUBLIC SECTOR EMPLOYEES** 8

IV. HOME CHILD CARE PROVIDERS ARE NOT PUBLIC EMPLOYEES 10

A. **Providers are not Public Employees Under the Plain Meaning of PERA** 10

B. **Providers are not Public Employees under PERA Case Law** 11

C. **Providers are not Employees of DHS or the Council** 14

D. **Recent Legislative History Supports Provider's Independence** 16

JAFFE RAITT HEUER & WEISS, P.C.

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

City of Lansing v Carl Schlegel, Inc,
257 Mich App 627 (2003) 9, 16, 17
Prisoners' Labor Union at Marquette v Department of Corrections,
61 Mich App 328 (1975) 11, 12, 13
Regents of the University of Michigan v Michigan Employment Relations Commission,
389 Mich 96 (1973) 11, 12, 13
St. Clair County Intermediate School District v St. Clair County Education Association,
245 Mich App 498 (2001) 14, 15
St. Clair Prosecutor v AFSCME,
425 Mich 204 (1986) 15, 16
Wayne Co. Civil Service Comm v Wayne Co. Board of Supervisors,
22 Mich App 287 (1970) 14

STATUTES

MCL 15.181, 15.401 10
MCL 423.201(1)(e) 10, 11, 12
MCL 423.201(1)(e)(i) 16
MCL 423.201(1)(e)(ii) 10
MCL 423.202. 1994 12
MCL 423.210(2) 9
MCL 423.211 9
MCL 423.212 9
MCL 423.215(1) 9
Child Care Licensing Act Preamble, 116 PA 1973, MCL 722.11 *et seq* 14
Correctional Industries Act, MCL 800.321 *et seq.* 12
Public Employment Relations Act, MCL 423.201 et seq. ("PERA") 2, 8
Public Employment Relations Act (PERA), MCL 423.201 *et seq* .... passim

OTHER AUTHORITIES

Deborah Chalfie, et al, National Women's Law Center, *Getting Organized: Unionizing Home Based Child Care Providers* 7 (2007) 8
http://www.miafscme.org/CCPTM.htm 7
http://www.nwlc.org/pdf/GettingOrganized2007.pdf 8
http://www.providerstogether.org/ 7

JAFFE RAITT HEUER & WEISS, P.C.

Opinion Appealed and Relief Sought

The Michigan Court of Appeals denied a complaint for mandamus filed by the Appellants here, licensed home care providers. The court left standing the position of Appellees that a self-employed, privately owned, home-based child care provider is a "public employee" subject to compulsory inclusion in a public sector collective bargaining unit merely because that child care provider receives subsidies to support low-income parents seeking work or an education. In doing so, the court erred.

First, this conclusion forces private business owners to join a union, diverting public resources from lower income parents and their child care needs to supporting union fees. Second, this conclusion ignores both the practical reality and applicable law that these child care providers are private businesses and not public employees. Third, this conclusion takes a large step down a slippery slope where other private businesses and employees are rendered "public employees" merely because they benefited from a State subsidy.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm and the voice for small business in the nation's courts. It is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB represents about 350,000 member businesses nationwide, including nearly 10,000 independent businesses in Michigan. NFIB and its members are concerned about the Michigan Department of Human Services' unprecedented and unlawful diversion of money from the revenues of self-employed day care providers to labor unions that share few common interests with the providers.

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This Court should grant the Appellants leave to appeal on the issues presented and should enter an order allowing NFIB Legal Center to file an Amicus Brief in this matter.

Question Presented for Review

1. The fundamental question presented for the Court's review is whether the owner and operator of a home-based child care business is a "public employee" subject to compulsory inclusion in a public sector collective bargaining unit where a) the child care business contracts individually with parents, and b) the business' only connections to the State are licensing requirements and receipt of subsidy payments made on behalf of low-income parents.

The Court of Appeals failed to address this or any of the related issues raised by Ms. Loar in support of her Complaint for Mandamus.

Amicus answers the question in the negative and respectfully urges the Court to grant leave to appeal. Child care providers operating as independent businesses are not public employees and may not be collected into a public sector bargaining unit where their services are engaged by private individuals, and the State serves only as a regulator and conduit for subsidy payments to providers.

Relevant Facts and Background

The relevant facts and background are provided in the Appellant's Application for Leave to Appeal. However, in brief, in 2006 DHS and Mott Community College entered into an Interlocal Agreement ("ILA") creating the Michigan Home Based Child Care Council (MHBCCC or Council). Complaint, Exhibit 8. The ILA authorizes the Council to enter into collective bargaining agreements and states that the Council shall fulfill its obligations as a public employer subject to the Public Employment Relations Act, MCL

JAFFE RAITT HEUER & WEISS, P.C.

423.201 et seq. ("PERA"). *Id.* at 16. The ILA did not authorize the Council to perform any significant DHS functions related to child care providers.

Meanwhile, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and the American Federation of State, County and Municipal Employees (AFSCME) teamed up to create an organization called Child Care Providers Together Michigan (CCPTM or Union).

The Council and the Union subsequently entered into a "collective bargaining agreement" ("CBA") naming the Union as the exclusive representative of each provider:

> licensed or registered by the Department ... or enrolled by the Department and who receives payments for providing home-based child care services *through* the Department, including payments from funds administered in Michigan by the Department under the Social Welfare Act ... or any successor child care assistance or subsidy program.

Agreement Between the Michigan Home Based Child Care Council and Child Care Providers Together Michigan 5, Jan. 2008 (emphasis added); Complaint, Exhibit 14. The CBA acknowledged the Michigan Employment Relations Commission's (MERC) certification of the Union as the sole and exclusive bargaining representative of the Providers pursuant to representation election and MERC case number R06I-106. *Id.* at 7.

The CBA does not at any point refer to the home based child care providers as employees, including in the definition of "Provider" quoted above. *Id.* at 5. Under the terms of the Michigan Child Development and Care Program (CDC), and as recognized in the CBA, "Parents have the sole and undisputed right to: 1) hire Providers of their choice; and 2) remove providers from their service at will for any reason." *Id.* at 14. The CBA additionally recognizes "the rights of Providers to select the children to be placed in their care, to terminate the relationship with Parents, and to enter into private agreements

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with Parents that are not inconsistent with the policies of the DHS Child Care Assistance Program." *Id.* at 30.

Discussion

Michigan's home childcare providers are independent businesses, not public employees who can be unionized merely because some of their customers receive subsidies. Michigan law provides that public employers may enter into collective bargaining agreements with public employees, but Ms. Loar and other home-based childcare providers are not public employees. These self-employed individuals, who provide day care services in their own homes, are independent contractors as to their clients, and they are licensed by or registered with the DHS and DHS Director Ishmael Ahmed.

The definition of "public employee" does not include State-regulated entities, or individuals subject to licensing and registration requirements under State law, or contractors providing services to State subsidy beneficiaries. The Michigan Employment Relations Commission may only certify representatives of public employees to bargain with public employers. Similarly, public employers may only bargain with public employees. Because the putative representative in this case does not represent public employees, its certification and the subsequent collective bargaining agreement are void.

I. PUBLIC POLICY PROHIBITS FORCED UNIONIZATION OF SMALL BUSINESS OWNERS

This is not a case of vulnerable workers organizing against an exploitive employer. If anything, the UAW and AFSCME are exploiting independent business owners, low-income parents and Michigan taxpayers. By agreement with an amenable State agency, a UAW/AFSCME joint venture has secured for itself a cut of the State of

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Michigan's child care subsidy payments made on behalf of low-income parents. The result is millions of dollars flowing into union coffers, and out of the small businesses responsible for the care of the State's neediest children.

A. Forcing Day Care Providers into Unions is bad for Parents and DHS's subsidy program.

In fact, the "collective bargaining agreement," touted by CCPTM and crafted jointly with the Council, prioritizes union funding ahead of parent access to CDC subsidies. Under the CBA, a CDC parent can lose their entire subsidy if their Provider declines union membership without agreeing to pay the union's "service fees." Complaint, Exhibit 14 at 9.[1] Put another way, the Union and the DHS-sponsored Council have now made it possible for an otherwise eligible low-income parent to lose their subsidy simply because their Provider of choice objects to their forced unionization. A parent who entrusts her children to a reliable Provider of her own choosing might thus be forced to find a new eligible Provider to continue to have access to affordable child care. Even if a Parent is able to find a comparable Provider with comparable hours and rates, they will have to devote precious time and energy to the task, in addition to worrying about their child's ability to adjust. This Union is a betrayal of the parents who depend on the CDC program.

B. Forcing Day Care Providers into Unions is bad for Day Care Providers and their employees

Small business owners should not be forced to join a union. Compulsory unionization of CDC Providers undermines the CDC program. The CDC program is

[1] "All Providers shall be required to either become a member of the Union or to pay a Service Fee not to exceed the amount of dues required of other members *as a condition of maintaining Provider status*... [if a Provider] avails him/herself of the opportunity to voluntarily terminate membership in the Union ... [s]uch obligations shall be fulfilled by the Provider signing, dating, and submitting *to the Council* the "Authorization for Deduction of Representation Service Fee" form."

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intended to increase quality child care options for low income families. Forcing these independent businesses to join a union and diverting their revenues to national unions will, unfortunately, have the opposite effect. First, forced unionization and mandatory service fees are a disincentive to Providers considering accepting CDC clients. Second, siphoning off mandatory union dues and service fees detracts from Providers' ability to reinvest in their facilities, pursue training, and improve educational and recreational resources for children. Perversely, the unionization of these small businesses will necessarily decrease the wages Providers will pay to their own employees. It also creates the odd situation of unionizing dare care ownership/management while leaving the actual day care employees un-unionized.

Taking money out of the pockets of these small businesses and diverting it to national unions not only offends the progressive goals of the CDC program, it also does nothing for Providers. The CCPTM cannot provide any of the benefits traditionally sought by employees who organize. It is beyond the Council's legal and practical power, for example, to affect working conditions or provide health care coverage or retirement benefits. These small businesses determine their own hours and working conditions. Providers decide how much they pay themselves and how much goes back into the business. While union and DHS maneuverings evidence some political will to increase CDC subsidies to parents, DHS hardly needed to go to the trouble of creating the virtually powerless Council (*before* a bargaining representative was even certified) to "recommend" that DHS do something it could have done unilaterally in the first place.

Providers have been denied a meaningful voice in the process, with only around 15 percent of Providers voting in an underpublicized representation election. The Union

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has continued to maintain a low profile as to the businesses it purports to serve. The CCPTM webpage on the AFSCME Council 25 website (http://www.miafscme.org/CCPTM.htm) provides a link purportedly to a dedicated CCPTM website. As of March 24, 2010, the link connects to a page offering advice on purchasing fitness equipment (http://www.providerstogether.org/). The CCPTM page on the AFSCME website also provides a link to "The Newsletter of AFSCME CCPTM," which does link to an actual newsletter, dated December, 2008 and marked, "Volume One, Number One." The Union has apparently produced one four page newsletter in the two plus years in which it claims to have been operating.

While this eviscerates CCPTM's claim to "represent" the interests of Michigan's CDC providers, the most disturbing problem is that these entrepreneurs, who have their own employees, are being forced to support a union seeking only to supplement its income. The injection of union politics into the CDC subsidy program subverts the goals of the program, allows Union pick-pocketing of the affected small businesses, and creates inefficiencies in an assistance program that needs every penny it can get.

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II. HOLDING PRIVATE CHILDCARE PROVIDERS TO BE PUBLIC EMPLOYEES OPENS THE DOOR TO RECASTING ANY EMPLOYER OR EMPLOYEE WHOSE BUSINESS RECIEVES A STATE SUBSIDY

If the UAW and AFSCME are able to force these small business owners into a public sector union, then any private sector business that accepts subsidies from the State could similarly be forced into a public sector union. This could include retailers that accept payments from DHS's Food Assistance Program, medical providers that accept payments from DHS's Adult Medical Program, or small business owners who work on State contracts.

National unions, with the help of the politicians and political appointees who benefit from their largesse, have already made inroads into the forced unionization of independent businesses by exploiting the subsidy-based model at work in this case. Describing earlier efforts to force home health care workers into public sector unions, the National Women's Law Center explains that, "[t]his model used the provider's relationship with the state – receipt of payment from the state under a program administered by the state - as the nexus to *find or fashion* an 'employer of record' with whom to bargain." Deborah Chalfie, et al, National Women's Law Center, *Getting Organized: Unionizing Home Based Child Care Providers* 7 (2007), available at http://www.nwlc.org/pdf/GettingOrganized2007.pdf (emphasis added).

The willing complicity of DHS and Director Ahmed in "fashioning" the Council shows that unions have no reason to stop with independent home child care businesses and will likely target other businesses providing services to beneficiaries of state assistance. Furthermore, because DHS has yet to defend itself on the merits, nobody knows the scope of DHS' perceived authority to abet the organization of private entrepreneurs into public sector unions. Without judicial intervention, nothing stands in the way of the unions' attempts to siphon off public subsidies and further encroach on Michigan small businesses.

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III. HOME CHILD CARE PROVIDERS ARE NOT PUBLIC EMPLOYEES SUBJECT TO UNIONIZATION

A. MICHIGAN LAW ONLY PERMITS PUBLIC SECTOR BARGAINING WITH PUBLIC SECTOR EMPLOYEES

Public employers in Michigan may enter into collective bargaining agreements with, and only with, representatives of public employees. The PERA, MCL 423.201 *et*

seq., governs public sector labor law in Michigan. *City of Lansing v Carl Schlegel, Inc*, 257 Mich App 627, 632, (2003) (finding that employees of a subcontractor on a state contract were not "public employees" under PERA). Under PERA, "a public employer shall bargain collectively with the representatives of its employees ... and may make and enter into collective bargaining agreements with those representatives." MCL 423.215(1).

PERA provides two ways to determine the representative. First, a public employer has a duty to recognize a representative "designated or selected for purposes of collective bargaining by a majority of the *public employees*" in the bargaining unit. MCL 423.211 (emphasis added). Second, if "a *public employee* or group of *public employees*, or an individual or labor organization acting on their behalf" raises a question of representation by petition to the Michigan Employment Relations Commission (MERC), MERC can order and certify the results of a representation election. MCL 423.212 (emphasis added). In either case (recognition or MERC election), a bargaining unit composed of public employees is a predicate for bargaining with a public employer, and PERA confers no authority on a public employer to bargain collectively with a representative of non-public employees. Thus, public employers may only enter into collective bargaining agreements with representatives of public employees.

Furthermore, Michigan law only allows for mandatory contributions to public sector unions in the form of "service fees" when agreed to by the public employer and the representative. MCL 423.210(2). Because public employers have no authority to make agreements with representatives of anyone except public employees, the question of whether or not home child care workers are "public employees" is vital to determining

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the legality of DHS' diversion of a portion of day care payments to the purported representative. Although both Mott Community College and DHS would each have authority to bargain with their own employees, the Council, as the vehicle for the joint exercise of their powers still must establish an employment relationship with Providers as a predicate to collective bargaining with CCPTM.

IV. HOME CHILD CARE PROVIDERS ARE NOT PUBLIC EMPLOYEES

A. Providers are not Public Employees Under the Plain Meaning of PERA

PERA defines "public employee" as:

> a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:
>
> (i) Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the State or a political subdivision of the State is not an employee of the State or that political subdivision, and is not a public employee.[2]

MCL 423.201(1)(e). On its face, the definition does not include home child care providers whose only connection to the State is that the State acts as a regulator and conduit for subsidies to low income parents.[3] Licensing of Providers is not equivalent to appointment, and Providers are self-employed and, therefore, not employed in any branch of the public service. Therefore, *amicus* urges this Court to end the inquiry here by

[2] The additional exception in MCL 423.201(1)(e)(ii) addresses public school administrators and does not apply here.

[3] This is consistent with other statutory definitions of "public employee" see, e.g., MCL 15.181, 15.401 and 35.351.

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holding that the statute excludes self-employed individuals by its terms and that the Council lacks authority to bargain with respect to the Providers. While *amicus* believes the statutory language is clear, case law and recent legislative history also strongly support the proposition that home day care providers are not public employees.

B. Providers are not Public Employees under PERA Case Law

Michigan courts have interpreted the language in MCL 423.201(1)(e) on only a few occasions to determine whether particular people were public employees. Courts have required something more than payment from a public entity. Judicial inquiry focused on whether a traditional employment relationship existed. *Prisoners' Labor Union at Marquette v Department of Corrections*, 61 Mich App 328, 332, 334 (1975). Conventional public employee fringe benefits provide substantial evidence of public employee status. *Regents of the University of Michigan v Michigan Employment Relations Commission*, 389 Mich 96, 110-11 (1973).

Cases discussing the definition of "public employee" involved circumstances akin to traditional employment relationships, in contrast to the administrative relationship between DHS and home child care providers. For example, in *Regents of the University of Michigan v MERC, supra*, this Court considered whether interns, residents, and post-doctoral fellows working at the University's hospital could be public employees under PERA even though they could also be considered students. *Regents of the University of Michigan*, 389 Mich at 107, 110-11. In upholding the MERC finding that the interns were public employees, the Court noted numerous factors indicating an employment relationship and focused its analysis on conditions of employment and employment benefits that the interns shared with other university employees and Michigan public

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employees. *Id.* The Court observed that interns received fringe benefits available only to regular university employees, including identical health insurance coverage. *Id*, 389 Mich at 107. Also, the University furnished W-2 forms and withheld portions of their compensation for federal, State, and social security tax obligations. *Id.* Additionally, the University required the signing of a loyalty oath taken by all state employees. *Id.*

In *Prisoners' Labor Union at Marquette v Department of Corrections*, the Court of Appeals interpreted language nearly identical to the current definition of public employee[4] and the Correctional Industries Act, MCL 800.321 *et seq.*, to find that, despite the "trappings of conventional employment," prisoners performing labor in the State prison system were not public employees under PERA. *Prisoners Labor Union*, 61 Mich App at 332-33. The "trappings" that the court found insufficient to establish a "traditional employment relationship," *id.* at 334, included the use of time cards, overtime pay, compensation proportional to the task, and supervision by corrections employees. *Id* at 332 n.4. The court based its conclusion on a finding that the relationship between the prisoners and the Department of Corrections was not primarily an employment relationship because the Correctional Industries Act provided inmate employment for primarily rehabilitative purposes. *Id* at 332, 334-35. The court supported its conclusion in a footnote by comparing the inmates to the student-interns in *Regents of the University of Michigan*, above, and finding none of the features most strongly suggesting an

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[4] The court was interpreting former MCL 423.202. 1994 PA 112 moved the language of the current definition of public employee to MCL 423.201(1) (e) from 423.202, which used to read: "No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee,' shall strike."

employment relationship in that case, such as fringe benefits and W-2 forms. *Id.* at 335 n.9.

The relationships between DHS and the Providers and, to an even greater extent, the Providers and the Council, lack the hallmarks of employment relationships relied on by the Court in *Regents of the University of Michigan.* Whereas the interns in that case were treated in many ways like all other university employees, home child care providers work independently without the fringe benefits available in typical employment relationships. Providers do not have health insurance coverage through DHS and are not eligible for unemployment insurance. Providers are paid as independent contractors not subject to withholding, and DHS files form 1099-MISC. Providers find their own clients, and Providers must collect payment for unsubsidized or unauthorized child care costs directly from Parents.

Providers lack even the modest "trappings" of employment noted by the Court of Appeals in *Prisoners' Labor Union.* As noted above, Providers are not paid wages. Providers receive a subsidy payment made on behalf of a Parent-client through DHS. Providers and Parents determine the hours and terms of service, without direct supervision by DHS staff and subject only to broadly applicable health and safety standards. Providers do not even work in a DHS or other public facility; Providers operate from their own homes.

The administrative and regulatory authority of DHS and the advisory authority of the Council do little to make the arrangement look any more like an employer-employee relationship. As in *Prisoners' Labor Union*, the statute involved has a primary purpose other than employment. The purpose of the Child Care Licensing Act administered by

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DHS is "to provide for the protection of children through the licensing and regulation of child care organizations." Child Care Licensing Act Preamble, 116 PA 1973, MCL 722.111 *et seq.*. Similarly, the Child Development and Care program functions to make child care more affordable for low-income parents who have to be out of the home for work, school, or other DHS approved activities. Thus any Parent can contract with any Provider for child care as long as the Provider meets the minimum health and safety requirements for obtaining and maintaining a license or registration. Furthermore, as noted in both DHS materials and the CBA, Parents and Providers each have the authority to discontinue the Provider's services at will. Neither DHS nor the Council has the power to terminate a Parent-Provider relationship that otherwise meets the licensing and CDC requirements.

C. Providers are not Employees of DHS or the Council

Michigan case law has addressed which of multiple public employers was the public employer for bargaining purposes. Although this type of analysis would only be required after the threshold determination that a bargaining unit is in fact composed of public employees, these cases illustrate why the Michigan home child care Provider model is incompatible with an employer-employee relationship.

Most recently, the Court of Appeals employed a four-factor test to determine whether a party who did not sign a collective bargaining agreement could nonetheless constitute the employer under the agreement based on the extent to which that party had the characteristics of an employer. *St. Clair County Intermediate School District v St. Clair County Education Association*, 245 Mich App 498, 515 (2001) (citing *Wayne Co. Civil Service Comm v Wayne Co. Board of Supervisors*, 22 Mich App 287, 294 (1970)).

JAFFE RAITT HEUER & WEISS, P.C.

In order to determine whether or not a school district was the public employer of a teacher in a charter school under its jurisdiction, the court looked at "(1) the power to select and hire employees, (2) the payment of wages, (3) the authority to dismiss employees, and (4) power and control over employees' conduct." *Id*, 245 Mich App at 515.

Applying the factors, the court found that despite "extensive oversight responsibilities required by law," the charter school had ultimate authority to hire and fire teachers, to discipline employees, to determine wages, and to establish work schedules. *Id* at 515-16. The school district did not have control over the school's employees "on a daily basis and to such a pervasive extent that it could reasonably be called their employer, whether independent of or jointly with" the school. *Id* at 516.

DHS similarly exercises regulatory oversight of Providers, but, as noted above, Parents have ultimate authority to hire and fire Providers, to agree upon rates, and to schedule care. Neither DHS' tangential role as the licensing authority and processor of payments, nor the undefined role of the Council with respect to Providers comes close to the pervasive control required by the four-factor test. DHS affects Providers' conduct (factor four) to a certain extent through health and safety regulation, but, again, this falls well short of employer-type control.

In an earlier case, this Court was confronted for the first time with a situation in which ultimate authority over key aspects of the employment relationship was split between two public employers. In *St. Clair Prosecutor v AFSCME*, 425 Mich 204 (1986), authority to hire and fire individual assistant prosecuting attorneys was clearly vested in the county prosecutor, while authority to determine the number of attorneys and

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their remuneration was vested in the county. *Id* at 226. In recognizing the concept of "coemployer status," allowing multiple employers to participate in collective bargaining, the Court reasoned as follows:

> When separately elected constitutional officers, with unique law enforcement powers, are given statutory authority to hire, manage, and terminate the employment of their assistants, such obvious employer criteria are not to be lightly swept away under the guise of collective bargaining convenience.

Id., 425 Mich at 233.

The rationale for the "coemployer" theory illustrates its inapplicability to home childcare providers. First, Parents, not DHS or the Council, retain authority to hire, manage, terminate, and agree to compensation rates. Second, to the extent that DHS can indirectly affect Providers' rates by altering the maximum CDC reimbursement rate, the Court's reasoning makes clear that the coemployer doctrine applies only where two or more public employers each have obvious and substantial employer-type control. Indirect influence on the private market for childcare is not such an "employer criterion."

D. Recent Legislative History Supports Provider's Independence

A 2003 Court of Appeals case caused the court to briefly examine the recent legislative history of PERA's amended definition of public employee. *City of Lansing v Carl Schlegel, Inc*, 257 Mich App at 632-33. In 1997, PERA's definition of public employee was amended, as noted above, to clarify that subcontractors and their employees working on public contracts are not public employees.[5] *See* MCL 423.201(1)(e)(i). In *Carl Schlegel*, a general contractor fired the plaintiff subcontractor

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[5] The amendment clarified the definition of public employee with the following exception: "Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee."

when the subcontractor refused to sign an agreement, required by the city, that he would use only union labor in performing the subcontract. *Carl Schlegel, Inc*, 257 Mich App at 630. The subcontractor conceded that his employees were not public employees but asserted a right to pursue a claim under PERA challenging the city's union labor requirement. *Id*, 257 Mich App at 632.

After noting that public sector labor law is a "politically sensitive field of law," the Court of Appeals acknowledged that subsection 1(e)(i) was enacted to prevent the State from becoming embroiled in the labor organization efforts of the employees of private contractors providing services to the State. *Id* at 631-33.

The bill analysis from the time of the amendment of the definition of "public employee" indicates the Legislature's intent "to further define the limits of PERA's coverage, *i.e.*, to public employees." *Id* at 632 (*quoting*, Senate Fiscal Agency Bill Analysis, SB 1015, January 30, 1997 ("This bill is needed so that the State will not be drawn into a collective bargaining relationship with the thousands of private sector employees who work for contractors doing business with the State.")).

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Conclusion

For the above stated reasons, *amicus curiae* NFIB Small Business Legal Center respectfully requests that the Court grant Plaintiffs' application for leave to appeal and any other relief the Court deems just under the circumstances.

Dated: April 2, 2010

Respectfully Submitted,

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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From The Michigan Court of Appeals
Honorable Donald S. Owens, Presiding

SHERRY LOAR,

Plaintiff-Appellant,

v

Supreme Ct. No. 140810

Court of Appeals No. 294087

MICHIGAN DEPARTMENT OF HUMAN SERVICES, and ISHMAEL AHMED, in his official capacity as Director of Michigan Department of Human Services,

Defendant-Appellee.

______________________________/

PROOF OF SERVICE

The undersigned hereby certifies that she is an employee of Jaffe, Raitt, Heuer & Weiss, P.C. and that on **April 2, 2010** she served a copy of **Motion for Leave to File Brief *Amicus Curiae* in Support of Plaintiff-Appellant's Application for Leave to Appeal, Brief of *Amicus Curiae* The National Federation of Independent Business Small Business Legal Center in Support of Plaintiff-Appellant's Application for Leave to Appeal** and this **Proof of Service** upon:

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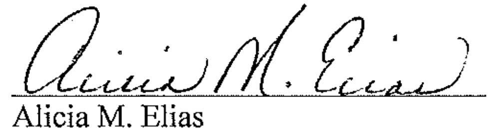
and by placing said documents into envelopes, addressed as above, with first class postage fully prepaid thereon and causing same to be deposited into a United States mail receptacle located in Southfield, Michigan.

I declare the statements herein are true to the best of my information, knowledge and belief.



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