STATE OF MICHIGAN

IN THE COURT OF APPEALS

IN THE MATTER OF:

Saginaw Education Association,

Respondent CU13 I-054; 13-013125-MERC	Court of Appeals No. 329419
Respondent CU13 I-056; 13-013128-MERC	Court of Appeals No. 329426
Respondent CU13 I-058; 13-013130-MERC	Court of Appeals No. 329428
Respondent CU13 I-060; 13-013132-MERC	Court of Appeals No. 329430

-and-

Michigan Education Association,

Respondent CU13 I-055; 13-013127-MERC	Court of Appeals No. 329425
Respondent CU13 I-057; 13-013129-MERC	Court of Appeals No. 329427
Respondent CU13 I-059; 13-013131-MERC	Court of Appeals No. 329429
Respondent CU13 I-061; 13-013134-MERC	Court of Appeals No. 329431

v

Kathy Eady-Miskiewicz,

Charging Party CU13 I-054; 13-013125-MERC	Court of Appeals No. 329419

Kathy Eady-Miskiewicz,

Charging Party CU13 I-055; 13-013127-MERC	Court of Appeals No. 329425

Matt Knapp,

Charging Party CU13 I-056; 13-013128-MERC	Court of Appeals No. 329426

Matt Knapp,

Charging Party CU13 I-057; 13-013129-MERC	Court of Appeals No. 329427

Jason LaPorte,

Charging Party CU13 I-058; 13-013130-MERC	Court of Appeals No. 329428

Jason LaPorte,

Charging Party CU13 I-059; 13-013131-MERC	Court of Appeals No. 329429

Susan Romska,

Charging Party CU13 I-060; 13-013132-MERC	Court of Appeals No. 329430

Susan Romska,

Charging Party CU13 I-061; 13-013134-MERC	Court of Appeals No. 329431

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BRIEF IN SUPPORT OF RESPONDENTS-APPELLANTS' MOTION FOR STAY OF ENFORCEMENT OF THE DECISION AND ORDER OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION PENDING APPEAL

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INTRODUCTION

This action arises out of a series of unfair labor practice charges that Charging Parties-Appellees, Kathy Eady-Miskiewicz, Matt Knapp, Jason LaPorte and Susan Romska (hereinafter referred to as "the Charging Parties"), filed against Respondents-Appellants, the Saginaw Education Association and the Michigan Education Association (hereinafter referred to as "the Associations"), with the Michigan Employment Relations Commission ("the Commission") alleging violations of §9(2)(a) and §10(2)(a) of the Public Employment Relations Act, MCL 423.201, et seq. ("PERA"). Following a hearing on Charging Parties' consolidated charges, Administrative Law Judge ("ALJ") Julia C. Stern issued a Decision and Recommended Order finding that the Associations violated §10(2)(a) by maintaining and enforcing a policy that requires members to submit their membership resignations between August 1 and August 31 of any given year and refusing to accept Charging Parties' resignations outside of August.[1]

On September 23, 2015, the Commission issued its final Decision and Order affirming ALJ Stern's Decision and Recommended Order and directing the Associations to, *inter alia*, cease enforcing their August resignation window policy and to accept the attempted membership resignations that Charging Parties submitted outside the month of August.[2] Through its Decision, however, the Commission has unlawfully elevated the statutory rights to refrain from union activity or otherwise affiliating with or financially supporting a labor organization conferred by Public Act 349 of 2012 above the freedoms to associate and contract guaranteed in our state and federal constitutions. In

[1] A copy of the ALJ's Decision and Recommended Order is attached hereto as Exhibit A.
[2] A copy of the Commission's final Decision and Order is attached hereto as Exhibit B.

addition, in reaching its Decision, the Commission ignored several arguments that the Associations raised in support of their position below and exceeded its jurisdictional authority to consider Charging Parties' claims. Accordingly, the Associations filed a Claim of Appeal of the Commission's Decision in this Court on September 25, 2015.

Through the instant Motion, the Associations request that this Court enter an order staying the Commission's September 23, 2015 Decision and Order in this matter pending the outcome of their appeal. Granting a stay here merely preserves the *status quo* that has been in place for more than a decade since the Commission issued its decision in *West Branch-Rose City Ed Ass'n*, 17 MPER 25 (2004) finding that the Associations' August resignation window policy was valid and enforceable. Absent the issuance of a stay, the Associations stand to suffer significant and irreparable harm that far outweighs any harm that Charging Parties may suffer if a stay were to issue. The issuance of a stay in this case would also promote the public interest of this State in protecting the fundamental constitutional freedoms to associate and contract. For all of these reasons and those more fully set forth below, the Associations respectfully request that this Honorable Court GRANT their Motion for Stay of Enforcement of the Decision and Order of the Michigan Employment Relations Commission Pending Appeal pursuant to MCR 7.209(D) and MCR 7.209(H)(2).

STATEMENT OF FACTS

A. The Parties

Ms. Eady-Miskiewicz, Mr. Knapp, Mr. LaPorte, and Ms. Romska are employed as teachers by the Saginaw School District ("the District"). Charging Parties'

positions are included in the bargaining unit represented by the Respondent Saginaw Education Association (“SEA”).

The Michigan Education Association ("MEA") is a private voluntary membership organization, established in 1852; it is incorporated as a private, non-profit corporation under the laws of the State of Michigan. Membership in the MEA is open to all non-supervisory personnel employed by an educational institution or agency.

The SEA is a local affiliate of the MEA and the National Education Association (“NEA”), with its own Constitution and Bylaws. An MEA local, such as the SEA, is the basic unit of self-governance within the MEA. One of the requirements for local affiliation is that membership within the local association includes membership within the MEA and NEA.

B. <u>The Dispute</u>

At or around the time of their hire, each of the Charging Parties voluntarily completed, signed, and submitted a Continuing Membership Application requesting membership in the Associations. The Continuing Membership Application includes two references to the August window. One appears next to the cash payment checkbox above the signature line on the Application, which reads: “[m]embership is continued unless I receive this authorization in writing between August 1 and August 31 of any given year.” The other appears next to the payroll deduction checkbox, which reads: “I authorize my employer to deduct Local, MEA and NEA dues, assessments and contributions as may be determined from time to time, unless I revoke this authorization in writing between August 1 and August 31 of any year.”

Related to the Continuing Membership Application, the MEA's governance documents and organizational records show that it has had some form of a continuing membership policy since at least the 1950s. As part of this policy, the MEA Representative Assembly approved a motion in 1973 to amend Article I of its Bylaws to provide that "[c]ontinuing membership in the Association shall be terminated at the request of a member when such request is submitted to the Association in writing, signed by the member and postmarked between August 1 and August 31 of the year preceding the designated membership year." Based on its Continuing Membership Application, its Bylaws, and a prior decision by the Commission finding the August resignation window lawful,[3] the MEA does not accept a member's resignation unless it is made during the month of August.

Effective March 16, 2012, Public Act 53 of 2012 ("PA 53") amended PERA to prohibit public school employers from assisting labor organizations in collecting union dues or service fees. The prohibition, however, did not apply to contracts in existence on the effective date of PA 53 until those contracts expired. The most recent collective bargaining agreement between the SEA and the District in place at the time of the events giving rise to the instant appeal expired on June 30, 2013. Following contract expiration, the District ceased dues deductions and none of the four Charging Parties paid union dues at any time thereafter.

On December 11, 2013, the Michigan Legislature passed Public Act 349 of 2012 ("PA 349"), which is commonly referred to as the "Right to Work" law by its advocates, and "Freedom to Freeload" by its opponents. PA 349, which took effect on

[3] See *West Branch-Rose City Ed Ass'n*, 17 MPER 25 (2004).

March 28, 2013, prohibits, *inter alia*, union security agreements that require employees to pay their fair share of the costs of collective bargaining, contract administration, and other benefits of representation.

Following the passage of PA 349, on January 18, 2013, MEA President Steve Cook sent an e-mail to all local leaders, officers, and staff, providing them with a form letter to send to any members who contact a local affiliate to inquire about resigning from Association membership. The letter identifies the August window period, discusses the continuing membership application, and describes how and when members may resign. Before, during, and after August of 2013, the SEA responded to inquiries by members about when and how to resign their membership by advising them of the August resignation window.

In September of 2013, Charging Parties Eady-Miskewicz, LaPorte and Romska sent letters attempting to resign from the Associations by e-mail to SEA President LeAnn Bauer. In response, Ms. Bauer advised each of the Charging Parties that their resignations were untimely because they were submitted after the August resignation window. In addition, Ms. Bauer provided Charging Parties Eady-Miskewicz and Romska with instructions about how to resign from the Associations in accordance with the Associations' stated membership resignation policy.

During that same month, Charging Party Knapp informed a SEA building representative that he was not interested in paying dues. In response, MEA UniServ Director Sue Rutherford sent Mr. Knapp an e-mail on September 11, 2013, offering to meet with him to "discuss [his] options." Mr. Knapp never contacted Ms. Rutherford to arrange for a meeting, however. Instead, on October 7, 2013, Charging Party Knapp sent

an e-mail to SEA President Bauer stating that he "was under the assumption that [he] was no longer a member if [he] did not sign up for union dues" and asking her to explain "the protocol to leave the SEA and MEA." Upon receipt of that communication, Ms. Rutherford again contacted Mr. Knapp to discuss the August resignation window and to explain that Mr. Knapp's failure to sign up for electronic dues deduction did not constitute a resignation from the SEA or MEA.

On September 26, 2013, the SEA held a general membership meeting. Charging Party LaPorte and Charging Party Romska attended, but the other Charging Parties were not present. During the meeting, an audience member asked what would happen to a member who did not pay dues. In response, one of the SEA representatives in attendance stated that the debt could be taken to collections.

None of the Charging Parties have paid any membership dues since the District ceased collecting dues after its then-existing contract with the SEA expired on June 30, 2013. To date, however, none of the Charging Parties have been referred to collections for failing to pay their membership dues. In August of 2014, each of the Charging Parties submitted a written resignation to the Associations, which the MEA accepted in accordance with its stated membership resignation policy.

C. Procedural History

On October 21, 2013, Charging Parties each filed unfair labor practice charges against the Associations alleging violations of §9(2)(a) and §10(2)(a) of PERA. On November 5, 2013, ALJ Stern issued a Complaint and Notice of Hearing consolidating the charges and scheduling them to be heard at a single hearing. On November 8, 2013, each of the Charging Parties amended their charges to allege that Respondents had

breached their duty of fair representation, in addition to the alleged violations of §9(2)(a) and §10(2)(a) of PERA.

Following a single hearing on Charging Parties' consolidated charges, ALJ Stern issued her Decision and Recommended Order in this matter on September 2, 2014.[4] In relevant part, she reasoned that when the Legislature amended §9 of PERA to include "right to refrain" language, it intended to give public sector employees the same rights afforded to private sector employees under §7 of the NLRA. Applying private sector case law, she concluded that the Association unlawfully restricted the Charging Parties' right to refrain from concerted activity by maintaining and enforcing an internal policy which requires membership resignations to be submitted during the month of August. The Associations and the Charging Parties both filed timely exceptions to the ALJ's decision with the Commission.

On September 23, 2015, the Commission issued its Decision and Order affirming the ALJ's decision and adopting the Order recommended by the ALJ. In its Decision, the Commission dismissed the Associations' constitutional and jurisdictional

[4] On October 3, 2014, ALJ David M. Peltz issued a decision in Teamsters Local 214 and Pauline Beutler, Case No. CU13 I-037, which raised similar legal issues to the ones presented by Charging Parties in this case. While generally agreeing with ALJ Stern's analysis regarding the right to waive statutory rights, ALJ Peltz found that the reliance placed on federal precedent by ALJ Stern was misplaced. ALJ Peltz concluded that ALJ Stern's analysis, which focused "almost entirely on the addition of right to refrain language in Section 9(1)(b) of PERA," essentially "ignored the other amendments to Sections 9 and 10 of the Act which were enacted as part of the right to work package of legislation." Particularly pertinent to ALJ Peltz were §9(2) and (3) of PERA, as well as §10(3), which states that individuals may not be required as a condition of employment to remain members of a labor organization. ALJ Peltz concluded:

> A thorough examination of the 2012 amendments in their entirety leads to the unavoidable conclusion that the conduct of the sort complained of by Beutler, and by the charging parties in the case heard by Judge Stern, while perhaps remediable in another forum with adequate factual support, does not constitute an unfair labor practice over which the Commission has jurisdiction.

Teamsters Local 214 (Pauline Beutler) at 12 (emphasis added).

arguments and relied on NLRB precedent to find that "where employees have a right to refrain from union activity, the union may not make rules interfering with or restraining employees in the exercise of that right." (MERC Decision at 14.) Accordingly, the Commission found that the "Unions' refusal to allow Charging Parties to resign their union membership after Charging Parties effectively notified Respondent SEA of their respective resignations to be a breach of the duty of fair representation in violation of §10(2)(a) of PERA." (MERC Decision at 20.) The Commission concluded that the Associations "did *not* breach their duty of fair representation," however, "by failing to provide more information regarding resignation from the [Associations] to Charging Parties than that reflected in the record." (MERC Decision at 22 (emphasis added).)

STANDARD OF REVIEW

MCR 7.209(D) provides that "[t]he Court of Appeals may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trail court on the *terms it deems just*." MCR 7.209(D) (emphasis added). Likewise, MCR 7.209(H)(2) provides that "[t]he Court of Appeals may stay or terminate a stay of any order or judgment of a lower court or tribunal on *just terms*." MCR 7.209(H)(2) (emphasis added). Although Michigan cases and court rules do not specifically address what constitute "just terms" or identify a standard by which a request for a stay should be reviewed, Michigan courts have long relied on a four-part balancing test in analyzing whether to grant injunctive relief, which is akin to what the Associations seek here.[5] In reviewing a request for injunctive relief, courts must weigh:

[5] And, the Michigan Supreme Court has, at least, suggested that courts should apply the four-part test for the issuance of an injunction in analyzing whether to grant a stay. See *City of Highland Park v Teamsters Local 129*, 418 Mich 851, 852; 361 NW2d 742 (1983) (Levin, J., dissenting). Moreover, the Sixth Circuit

> (1) [T]he likelihood that the party seeking the injunction will prevail on the merits; (2) the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued; (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief; and (4) the harm to the public interest if the injunction is issued.

Campau v McMath, 185 Mich App 724, 728-29; 463 NW2d 186, 189 (1990), citing *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-58; 365 NW2d 93, 96 (1984).

As a general rule, "no one factor is dispositive; rather they are to be considered as an integrative whole." *Caspar v Snyder*, 77 F Supp 3d 616, 623 (ED Mich 2015). See also *Golden v Kelsey-Hayes Co*, 73 F3d 648, 653 (CA 6, 1996) ("[n]one of [the] factors [relevant to issuance of injunctive relief], standing alone, is a prerequisite to relief; rather, the court should balance them").

ARGUMENT

On balance, an analysis of the four inquiries that Michigan courts consider relevant in determining whether to grant injunctive relief reveals that this Court should stay, or enjoin, enforcement of the Commission's final Decision and Order in this matter. Doing so will prevent the Associations from suffering significant and irreparable harm during the pendency of their appeal and promote the public interest in protecting the

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Court of Appeals has expressly recognized that the factors that govern the issuance of a stay of an order pending appeal are as follows:

> 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay.

Grutter v Bollinger, 247 F.3d 631 (2001), citing *Michigan Coalition of Radioactive Material Users, Inc. v Griepentrog*, 945 F.2d 150, 153-54 (CA 6, 1991).

freedoms of association and contracting guaranteed by our state and federal constitutions. Moreover, issuing a stay will cause Charging Parties no harm while the Associations await the outcome of their appeal, which is likely to be successful because reversal of the Commission's decision is warranted on several independent grounds. For all of these reasons and those set forth more fully below, the Associations submit that this Court should stay enforcement of the Commission's decision pending appeal.

I. IT IS HIGHLY LIKELY THAT THE ASSOCIATIONS WILL PREVAIL ON THE MERITS OF THEIR APPEAL GIVEN THAT THERE EXIST SEVERAL GROUNDS FOR REVERSAL OF THE COMMISSION'S DECISION

In discussing the standard of review to apply in a case on appeal from the Michigan Employment Relations Commission, the Michigan Supreme Court has stated:

> Our review of the commission's decision is circumscribed by the statutory mandate that factual findings of the commission are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole. M.C.L. § 423.216 (e); M.S.A. § 17.455 (16)(e), Const. 1963, art. 6, § 28…Legal rulings of administrative agencies are not given the deference accorded factual findings. 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. M.C.L. § 24.306 (1)(a), (f); M.S.A. § 3.560 (206)(1)(a), (f). *Southfield Police Officers Ass'n v. Southfield,* 433 Mich. 168, 445 N.W.2d 98 (1989).

Amalgamated Transit Union, Local 1564, AFL-CIO v Se Michigan Transp Auth, 437 Mich 441, 450; 473 NW2d 249, 253 (1991).

Section 106 of the Administrative Procedures Act ("APA"), which the *Amalgamated* Court cited, requires this Court to "hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is *any* of the following:"

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

MCL 24.306(1) (emphasis added).

Upon its de novo review of the legal questions presented here,[6] the Associations submit that it is highly likely that this Court will ultimately set aside the Commission's Decision and Order and render a judgment in their favor on several grounds, to include the ones identified and more fully set forth below.[7]

A. The Commission's decision violates rights and freedoms guaranteed to the Associations by our state and federal constitutions.

The Commission's decision infringes upon two fundamental rights guaranteed in and protected by our state and federal constitutions: the freedom to associate and the freedom to contract. While the Commission does not have jurisdiction to decide constitutional claims,[8] it nonetheless must avoid any construction of PERA that

[6] This Court reviews "de novo whether an error of law has occurred and, if so, whether it is substantial and material." *Bedford Pub Sch v Bedford Ed Ass'n MEA/NEA*, 305 Mich App 558, 564-65; 853 NW2d 452, 455 (2014) *app den* 497 Mich 989; 861 NW2d 50 (2015). Likewise, in a case on appeal from the MERC, "[l]egal questions, which include questions of statutory interpretation and questions of contract interpretation, are reviewed de novo." *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77; 833 NW2d 225, 232-33 (2013). The extent of an agency's jurisdiction is another legal question that this Court reviews de novo. *Michigan's Adventure, Inc v Dalton Tp*, 287 Mich App 151, 153; 782 NW2d 806, 807 (2010).

[7] Although the Associations have identified several of the grounds that require reversal of the Commission's decision in the instant Brief, they reserve the right to identify additional grounds and expound upon the arguments raised herein in their brief on appeal.

[8] See *Michigan State Univ*, 17 MPER 75 (2004).

would infringe on the constitutional rights of the parties or render PA 349 unconstitutional. In this case, however, it failed to do so.

1. The Commission's decision directly contravenes the Associations' constitutional right to limit membership to individuals who are willing to make a one-year commitment.

The Commission's decision directly contravenes the Associations' First Amendment right to limit membership to those individuals willing to make a one-year commitment in return for the benefits of membership. The right of working people to form, join, and engage in group activities has long received First Amendment protection. *Thomas v Collins*, 323 US 516 (1945). The First Amendment protects the right of individuals to associate together in groups to further their lawful interests. *Professional Ass'n of College Educators (PACE) v El Paso Community College*, 730 F2d 258, 262 (CA 5, 1984); *Columbus Ed Ass'n v Columbus City School* Dist, 623 F2d 1155 (CA 6, 1980).

No one has a right to demand membership in a voluntary membership association on their own terms. The Associations have a First Amendment right to "identify the people who constitute the Association, and to limit the Association to those people only." *Democratic Party of US v Wisconsin*, 450 US 107, 122 (1981). Government action that "intru[des] into the internal structure or affairs of an association," such as a "regulation that forces the group to accept members it does not desire," is unconstitutional absent a compelling state interest, because the "freedom of association plainly presupposes a freedom not to associate." *Boy Scouts of America v Dale*, 530 US 640, 648 (2000).[9]

[9] The right of association is examined "not by looking at whether the person has a right to be included, but rather whether the association had the right to exclude." *Kidwell v Transportation Communications Int'l*, 946 F2d 283, 301 (CA 4, 1991).

Because members of the Association have a First Amendment right to join together and govern their own relations "to structure their private relations as they choose"[10], any action by the Commission that interferes with the operation of the MEA's Constitution and Bylaws may only be justified if based on explicit statutory authority, and only then if supported by a compelling state interest sufficient to override the First Amendment right of Association members to govern themselves.[11] There is no state interest, much less a compelling one, however, that would justify invalidating the Association's internal rule regarding membership resignations and forcing the Associations to accept as members anyone unwilling to make a continuing membership commitment in exchange for the rights, benefits, and privileges of membership. Where that commitment is voluntarily assumed and has no impact on employment, as is the case here, such an interest is particularly lacking and the Commission's impairment of the Associations' First Amendment rights must be rejected by this Court as unconstitutional.

2. <u>The Commission's decision unconstitutionally impairs existing contracts between the Associations and Charging Parties.</u>

As Administrative Law Judge James. P Kurtz recognized more than 14 years ago, the Charging Parties were "perfectly capable and competent to enter into contracts like the one in issue and to abide by their reasonable terms without intervention and interference by the state or this agency." *West Branch-Rose City Ed Ass'n*, 14 MPER 32006 (2000) (ALJ Kurtz); aff'd *West Branch-Rose City Ed Ass'n*, 17 MPER 25 (2004).

[10] *Edmonson v Leesville Concrete Co*, 500 US 614, 619 (1991).

[11] "State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v State of Alabama*, 357 US 449, 460-461 (1958).

Whatever changes may have been brought about by the passage of PA 349, that statute may not impair any contractual arrangements that pre-date its passage.[12]

Allowing it to do so would constitute a violation of the Contract Clauses of the state and federal constitutions, which prohibit the enactment of any law that impairs existing contractual obligations or "interfere[s] with preexisting contractual arrangements." US Const, art 1, § 10; Mich Const 1963, art 1, § 10; *Studier v Michigan Public School Employees' Retirement Bd*, 260 Mich App 460, 474 (2004) (emphasis added); *Allied Structural Steel Co v Spannaus*, 438 US 234 (1978). This Court applies the following three-pronged test in determining whether a particular legislative action or judicial interpretation violates the Contract Clause of the federal and state constitutions:

> The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable…[I]f the legislative impairment of a contract is severe, then to be upheld, it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means adopted to implement the legislation are reasonably related to the public purpose.

Health Care Ass'n Workers Comp Fund v Dir of the Bureau of Worker's Comp, 265 Mich App 236, 241; 694 NW2d 761, 765-66 (2005).

Applying this test in the instant case reveals that the Commission's reading of PA 349 and its Order directing the Associations to cease and desist from enforcing their August resignation window policy and to remove the last sentence of Article I from the MEA bylaws is in violation of the state and federal Contract Clauses. First, the

[12] Even assuming *arguendo* that PA 349 did operate to invalidate the Association's membership agreement, the statute may only apply to those membership agreements entered into on or after March 28, 2013, the effective date of the statute and not to those existing prior to that date.

Commission's interpretation of PA 349 substantially impairs the rights and obligations of the parties under contracts which predate the enactment of the statute by several years. By voluntarily applying for and accepting the benefits of membership with the Association, Charging Parties freely entered into a valid contractual relationship with the Association governed by its Constitution, Bylaws, and policies in 1996, 1998, 2003 and 2005, respectively.[13] Discharging Charging Parties from their contractual obligations would substantially impair those relationships, as the Commission itself acknowledged. (MERC Decision at 18.) Second, impairing those relationships is neither necessitated by the amendments to PERA enacted through PA 349 nor by some "significant and legitimate public purpose." To the contrary, as discussed in greater detail in Section IV below, the Commission's decision conflicts with the public interest in protecting the Associations' constitutional freedoms of association and contracting. Finally, the Commission's decision to invalidate a policy that it previously deemed "reasonable" and that it has acknowledged is "justified by the [Associations'] administrative and budgetary needs" is inherently unreasonable. *West Branch*, 17 MPER ¶ 25 (2004). Accordingly, the

[13] "Associations are generally formed by the voluntary association of individuals under the common law right of contract." 7 CJS Associations, § 7. "The relationship of a voluntary association with its members is governed by contract law." 7 CJS Associations, §14. A union's constitution, bylaws and regulations constitute a contract between it and its members. 7 CJS Associations, §§14, 41.

In accepting union membership, an individual member "makes a contract that he is to be governed by the constitution and bylaws of the organization." *Cleveland Orchestra Comm'n v Cleveland Federation of Musicians,* 303 F2d 229, 230 (CA 6, 1962) (constitution and bylaws express terms of contract which define privileges secured and duties assumed by those who become members); *Dunn v Detroit Federation of Musicians*, 268 Mich 698 (1934) (constitution and bylaws create contract between members and association); *Mayo v Great Lakes Greyhounds Lines*, 333 Mich 205 (1952) (members of voluntary organization are bound by its constitution and bylaws); *Ottawa County Employees Ass'n v Ottawa County General Employees*, 130 Mich App 704, 707 (1983) (recognizing contractual relationship based on constitution and bylaws). See also, 7 CJS Associations, § 14 ("[a]n affiliation with an association ordinarily is viewed as constituting an implied agreement to be bound by its constitution and bylaws" and "[a]n association's private rules are generally binding on those who wish to remain members").

Commission's Decision and Order *does* "create an unconstitutional impairment of [the Associations'] contractual rights." (MERC Decision at 19.)

B. <u>The Commission exceeded its statutory jurisdiction</u>.

In addition to its constitutional violations, the Commission's assertion of jurisdiction over internal union matters which neither constitute a denial of Charging Parties' §9 rights nor have any impact on their terms or conditions of employment is another basis for a successful appeal here. As the Commission properly recognized, it "has no jurisdiction over the internal affairs of labor organizations in the absence of a direct impact on the employment relationship or the denial of rights under §9 of PERA." (MERC Decision at 6.) In determining that it had jurisdiction to consider "whether [the Associations'] actions in refusing to allow Charging Parties to resign…outside the August window period is an unlawful restraint on Charging Parties' right to refrain from union activity," however, the Commission failed to explain how the Associations' resignation window directly impacts Charging Parties' employment relationship or constitutes a *denial* of their §9 rights. (MERC Decision at 11).

The Associations' resignation window is an internal matter which has no impact on the terms or conditions of Charging Parties' employment. The Commission's exercise of jurisdiction in this case, which involves private membership obligations that were voluntarily assumed and which are not required as a term of condition of employment, therefore, conflicts with a long line of prior decisions where the Commission has appropriately recognized that private membership obligations are internal union matters which fall outside of its jurisdiction and do not constitute unfair labor practices.[14]

[14] See, e.g., *AFSCME Local 118*, 1991 MERC Lab Op 617 (collection of union dues, fines, or special assessments, and rules for union membership, are internal union matters which the Commission does not

Those cases reflect the constitutional limits of the Commission's authority found in Mich Const 1963, art 4, §§ 48, 49.

Moreover, the Associations' membership resignation policy has not *denied* Charging Parties their §9 rights. To the contrary, each of the Charging Parties successfully exercised their §9 right to refrain from union activity by submitting a written resignation to the Associations during August of 2014 in accordance with that policy. The one-year membership commitment embodied in the Continuing Membership Application and the Association's Bylaws is a reasonable condition for the acquisition of membership in the Association, not a denial of the statutory right to refrain. A minimum commitment, subject to automatic renewal, is a common feature found in commercial contracts and in negotiated labor agreements enforced under PERA[15]; the Association's membership agreement is certainly less onerous than many of the resignation restrictions that other state and federal courts have enforced. [16]

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regulate unless there is a proven impact on representation or employment rights); *Macomb County Professional Deputy Sheriff's Ass'n*, 1995 MERC Lab Op 595 (lawsuit to collect delinquent dues; PERA limited to union actions having an effect on employment; question of liability for delinquent dues before a court of competent jurisdiction); *Detroit Ass'n of Educational Office Employees*, 1980 MERC Lab Op 1058 (collection of back dues, no violation of PERA; no involvement of employer or interference with employment or representation); *Association of School & Community Service Administrators (Ann Arbor Public Schools)*, 1987 MERC Lab Op 710 (small claims action to collect service fee; no violation of PERA because no effect on charging party's employment)

[15] See, e.g., *Capac Bus Drivers Ass'n v Capac Community Schools,* 140 Mich App 542 (1985) (two-year automatic renewal of CBA based on failure to provide timely notice of termination); *Petition of Mackie*, 317 Mich 104 (1963) (10-year lease automatic renewal in the absence of timely notice); *Trepel v Pontiac Osteopathic Hosp,* 135 Mich App 361 (1984) (automatic renewal provisions in independent contractor agreement).

[16] Courts have enforced resignation restrictions in voluntary associations in a variety of contexts: enforcing resignation restrictions prohibiting auto dealers from resigning from an advertising association *without the consent of a majority of the members* (*Kingston Dodge, Inc v Chrysler Corp,* 449 F Supp 52 (MD Pa, 1978) and *Leon v Chrysler Motors Corp,* 358 F Supp 877, 876 (DNJ, 1973), aff'd 474 F2d 1340 (3rd Cir, 1974) ("The court's only task . . . is to inquire whether the hardship imposed by this [resignation] provision is unconscionably disproportionate to the benefit derived to the corporate whole through its enforcement.")); enforcing resignation restrictions imposed by state bar associations against their members (*Oklahoma Bar Ass'n v Gasaway,* 863 P2d 1189 (Okla, 1993)); enforcing time and manner restrictions when resigning from

C. The Commission's decision is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

Another basis for reversal is the arbitrary and capricious nature of the Commission's decision. In determining whether an administrative agency's decision is arbitrary or capricious, this Court has stated:

> To determine whether an agency's decision is "**arbitrary**," the circuit court must determine if it is " ' "**without adequate determining principle** [,] ... **fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasoned**." ' " *St. Louis v. Michigan Underground Storage Tank Financial Assurance Policy Bd.,* 215 Mich.App. 69, 75, 544 N.W.2d 705 (1996), quoting *Bundo v. Walled Lake,* 395 Mich. 679, 703 n. 17, 238 N.W.2d 154 (1976), quoting *United States v. Carmack, *585* 329 U.S. 230, 243, 67 S.Ct. 252, 91 L.Ed. 209 (1946). **"Capricious"** has been defined as: " ' "**Apt to change suddenly; freakish; whimsical; humorsome**." ' " *St Louis, supra* at 75, 544 N.W.2d 705, quoting *Bundo, supra* at 703 n. 17, 238 N.W.2d 154, quoting *Carmack, supra* at 243, 67 S.Ct. 252.

Romulus v Dep't of Environmental Quality, 260 MichApp 54, 63–64; 678 NW2d 444 (2003) (emphasis added).

Section 85 of the APA expressly requires that "[e]ach conclusion of law shall be supported by authority or reasoned opinion." MCL 24.285. Many of the conclusions that the Commission reached, however, are neither supported by legal authority nor reasoned opinion. In particular, the Commission's assertion of jurisdiction where, as is the case here, no impact on employment or denial of §9 rights has been found, is entirely devoid of support from the record or the relevant law. Although the Commission attempts

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country club membership (*Colonial Country Club v Richmond*, 140 SO 86 (La, 1932) (when resignation must be delivered to secretary of club by January 1 to be effective, delivery to the club's golf professional insufficient)); enforcing resignation restrictions denying the right to resign while back dues are owed (*Boston Club v Potter,* 212 Mass 22; 98 NE 614 (1912)); enforcing wire service bylaws stating that members of a wire service may resign membership only upon *two years' notice* or consent of the board of directors, whichever comes sooner (*Associated Press v Emmett*, 45 F Supp 907 (SD Cal, 1924)).

to offer support for its jurisdictional authority through a convoluted discussion of the amendments to PERA enacted through PA 349, its analysis is neither reasoned nor supported by the plain text or legislative history of those amendments. In addition, the Commission conducted its interpretation of those amendments "without consideration or adjustment with reference" to accepted principles of statutory construction that should have made clear that its reliance on federal precedent to guide its analysis was unsound. *Romulus*, 260 Mich App at 63-64.

That the Commission entirely ignored several of the exceptions raised by the Associations in their exceptions below provides yet another basis for reversal of its decision in this case. In its briefing below, the Associations raised ten separate and distinct exceptions to the Decision and Recommended Order of the ALJ. In its final Decision and Order, however, the Commission only identified and analyzed five. Most notably, the Commission entirely ignored the arguments that the Associations raised and the extensive legal authority that they cited below relative to and in support of their First Amendment freedom of association. Although the Commission purported to have "considered all other arguments submitted by the parties" and "conclude[d] that they would not change the result in this case," failing to conduct *any* analysis and dismissing the Associations' substantive legal arguments offhandedly constitutes an improper exercise of discretion that warrants reversal. (MERC Decision at 22.)

As the preceding section demonstrates, reversal of the Commission's decision in this case may be justified on any one of several independent grounds. Accordingly, the Associations are highly likely to prevail on the merits of their appeal to

this Court and the first inquiry in the four-part analysis weighs in favor of the issuance of a stay here.

II. THE ASSOCIATIONS WILL SUFFER IRREPARABLE INJURY UNLESS THIS COURT GRANTS THEIR REQUEST FOR A STAY OF THE COMMISSION'S DECISION PENDING APPEAL

Relative to the second inquiry before this Court, the Associations submit that they will suffer "irreparable injury" absent the issuance of a stay here. In the context of injunctive relief, "irreparable injury has special meaning under the law" and "is traditionally defined in terms of whether the injury can be repaired by means other than through the issuance of an injunction." *Michigan Coalition of State Employee Unions v Michigan Civil Serv Comm'n*, 465 Mich 212, 241; 634 NW2d 692, 707 (2001). Black's Law Dictionary defines an "irreparable injury" as one "that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction." "Irreparable Injury," Black's Law Dictionary (10th ed. 2014).

As explained in greater detail in Section I of this Brief, the Commission's decision in this matter impairs the Associations' constitutional rights of association and of contracting. This Court has expressly recognized that even "the temporary loss of a constitutional right constitutes irreparable harm which cannot be adequately remedied by an action at law." *Garner v Michigan State Univ,* 185 Mich App 750, 764; 462 NW2d 832, 838 (1990). See also *Obama for Am v Husted*, 697 F3d 423, 436 (CA 6, 2012) ("[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed"); *Connection Distrib Co v Reno*, 154 F3d 281, 288 (CA 6, 1998) ("it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably

constitutes irreparable injury'"); *Caspar v Snyder*, 77 F Supp 3d 616, 640 (ED Mich 2015) ("[i]rreparable injury may be presumed when there is a constitutional violation").

Absent a stay, the Commission's order directing the Associations to cease maintenance or enforcement of their resignation policy will deprive the Associations of their First Amendment right to limit membership to those individuals willing to make a one-year commitment in return for the benefits of membership. *Democratic Party*, 450 US at 122 (1981). Such a deprivation cannot be adequately measured or compensated by money. Rather, the loss of the Associations' fundamental freedom of association and First Amendment right "to structure their private relations as they choose"[17], can only be remedied by the issuance of an injunction that prevents the loss in the first place.

Likewise, if a stay is not issued here, enforcement of the Commission's order directing the Associations to accept Charging Parties' resignations outside of the month of August will deprive the Associations of the fundamental right to have "their agreements voluntarily and fairly made" held "valid and enforced in the courts." *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356-357 (1931). Forcing the Associations to relieve Charging Parties of contractual obligations that they voluntarily assumed will also substantially impair those contracts in violation of state and federal constitutional guarantees. Such an impairment, even if only "temporary" pending the outcome of their appeal, cannot be "adequately remedied by an action at law." *Garner*, 185 Mich App at 764. Instead, it can only be resolved through the issuance of an injunction preventing the constitutional violation *ab initio*.

[17] *Edmonson*, 500 US at 619.

In addition to the irreparable harm that these constitutional violations will cause, the denial of a stay here will also result in other harm to the Associations that cannot be remedied by an action at law. As described in greater detail in Section III.A below, the Associations' ability to offer many of the benefits and services that they provide to members is directly related to maintaining a stable membership count throughout the year. In particular, the MEA's ability to provide adequate staffing and resources to field offices throughout the State and to offer its members affordable professional liability insurance, vendor-negotiated discounts and training opportunities all depend on stability in its membership numbers. Denial of the Associations' request for a stay and enforcement of the Commission's decision, however, would result in fluctuation in membership count throughout the year that would inhibit the MEA's ability to provide these members-only benefits and services. Although the adverse impact that this would have on the Associations and their ability to retain members in the future is difficult to quantify, "[w]here damages are difficult to calculate, the injury may also be deemed irreparable." *Caspar*, 77 F Supp 3d at 640 (ED Mich 2015).[18] A review of the second factor in the four-part balancing test, therefore, weights in favor of issuing a stay here.

III. THE ASSOCIATIONS WILL SUFFER GREATER HARM IF A STAY WERE DENIED THAN CHARGING PARTIES WOULD SUFFER IF A STAY IS ISSUED

In considering the third factor for issuance of a stay, this Court must assess and weigh the prospective harm to each party if a stay were to issue. In the instant case, the Associations submit that the harm that they stand to suffer if this Court declines to

[18] See also *Basicomputer Corp v Scott*, 973 F2d 507, 511 (CA 6 1992) ("an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate").

stay enforcement of the Commission's final Decision and Order pending appeal far outweighs that which the Charging Parties may suffer if a stay is granted.

A. Denial of a stay may result in significant losses in revenues to the Associations and adversely impact their ability to carry out their budgeting, administrative, and programmatic activities.

If this Court declines to grant their request for a stay, enforcement of the Commission's decision would require the Associations to cease enforcement of their August resignation window policy and to accept membership resignations submitted at any time during the pendency of their appeal. The Association has had some form of a continuing membership policy for decades, predating PERA. The ability to budget revenues and expenditures is based upon a stable membership count for the upcoming school year and has an obvious and rational relationship to the allocation of services, staff, benefits, and other program resources for the year. That was the conclusion of both the Administrative Law Judge and the Commission in *West Branch-Rose City Ed Ass'n,* 17 MPER 25 (2004),[19] and it was also the conclusion of ALJ Stern and the Commission in the instant matter.[20] Denying the Associations' request for a stay, therefore, would

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[19] In its 2004 *West Branch* decision, the Commission acknowledged the validity of the Associations' administrative and budgetary needs for maintaining and enforcing its August resignation window policy:

> We agree with the ALJ that the Association's one month window period is a reasonable rule that is justified by the union's administrative and budgetary needs. In order to successfully perform its role as exclusive representative of bargaining unit employees and to fulfill its statutory mission to bargain collectively on behalf of public employees, a union must be able to effectively budget and allocate its resources. See Edwards v Indiana State Teachers Ass'n, 749 NE2 1220 (2001). We find that the utilization of a reasonable window period to achieve these ends is not arbitrary and does not violate the union's duty of fair representation.

West Branch Rose City Ed Ass'n, 17 MPER 25 (2004).

[20] In her Decision, ALJ Stern acknowledged that the Association had presented ample evidence that "its window period serves the interests of its membership as a whole," that it strengthens the organization and allows "Respondents to better serve the interests of all the employees it represents," and also "allows the

adversely impact their ability to provide quality benefits and services to their members and to carry out budgeting, accounting, governance and programmatic activities during the pendency of their appeal – and beyond.

Absent a stay, for example, the potential fluctuation in membership count throughout the course of the year would make it difficult, if not impossible, for the Associations to maintain their current budget or to plan their budget for the future since membership dues comprise the "vast majority" of the MEA's total revenue. (Tr, pp 66-67.)[21] MEA's budgeting and accounting procedures are all linked to the school year, which generally runs from September 1 to August 31, as does the MEA fiscal year, which begins on September 1. (Tr, pp 66-67.) Most school districts finalize their hiring decisions by the end of August, "so that's the opportunity for signing up new members." (Tr, p 67.) Likewise, members who retired at the close of the previous school year "will have had time to process by August 31." (Tr, p 67.) Accordingly, the August 31 membership count provides the basis for the MEA's planning and budgeting, and the Associations have relied on that count in developing their budget for the current fiscal year.

Likewise, in the absence of a stay, an unstable membership count would inhibit the MEA's ability to provide adequate staffing and resources to its members. Indeed, among the most significant expenditures for the organization is "providing staff to service the members." (Tr, p 68.) The MEA currently employs approximately 100 UniServ Directors, who provide assistance and support to members through 43 field offices

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MEA to negotiate significant discounts on goods and services for its members." (ALJ Decision at 15.) Likewise, in its September 23, 2015 Decision, the Commission "agree[d] with the ALJ that Respondents had legitimate business reasons for establishing the annual window period for membership resignation." (MERC Decision at 15.)

[21] A copy of relevant portions of the transcript from the hearing has been attached hereto as Exhibit C.

located throughout the State according to a "ratio based on the number of members in a geographical area." (Tr, pp 68, 69, 175.) A stable membership count is important when determining where to locate field offices and in negotiating lease terms. In addition to staff, the MEA also outfits its 43 field offices with costly technology, furniture, and supplies. (Tr, p 69.) It is critical that the MEA have a stable and accurate membership count in order for it to provide adequate staffing and resources to a given area, and denying its request for a stay here would limit its ability to do so. (Tr, p 68.)

Declining to issue a stay of enforcement of the Commission's decision here would also impair the Associations' ability to provide benefits to its members, making it even more difficult for them to retain dues-paying members and sustain a stable membership count in the future. MEA offers a variety of members-only benefits linked to a stable membership count for the fiscal year.[22] For example, the MEA provides "conferences, in-service professional development, [and] grants to local associations" on the basis of expected revenue in a given geographic area which is determined by "the number of members" in that area. (Tr, p 68.) Because of its size and the historic "stability of [its] membership numbers," the MEA has also been able to offer no-fee credit cards with low interest rates, and substantial discounts worth thousands of dollars from a variety of vendors. (Tr, p 73.) Should its membership count fluctuate widely during the pendency of its appeal, however, the MEA may not be able to offer its members the same quality or variety of vendor discounts in future years.

[22] These member-only benefits are above and beyond the benefits of collective bargaining, contract administration, and grievance representation that are provided to all bargaining unit members under the duty of fair representation.

The fluctuation in membership numbers that would inevitably result in the absence of a stay would also significantly increase the cost of members' liability insurance and inhibit the Associations' ability to provide it. Members of the Associations currently receive liability insurance through the Educators Employment Liability ("EEL") Program for the school year based upon their membership status on September 1. The NEA, which administers the EEL program, pays the insurance premium for the entire school year based upon the August 31 membership count. (Tr, p 170.) It costs the NEA approximately $4.34 per member to insure all three million of its members. (Tr, p 169.) If membership in the statewide association decreased throughout the year, however, the cost of buying insurance would "start to go up per member" in Michigan. (Tr, p 170.) Indeed, if membership fluctuated throughout the year, "it would severely . . . diminish [Respondents'] ability to provide these kinds of benefits and service." (Tr, p 75.)

Denying a stay here would also adversely impact the Associations' ability to carry out their governance activities equitably during the pendency of their appeal. Most rights, benefits, and privileges of membership are not pro-ratable on a month-to-month basis; instead, most are immediately available. (Tr, pp 75-76.) The right to vote on officers, attend and vote at conventions, and ratify contracts are membership rights that occur at a particular point in time, often at the beginning of the school year. (Tr, p 77.) Similarly, local delegates to the MEA's Representative Assembly are apportioned based on "the number of members that [the] local association has recorded" with the MEA. (Tr, p 70.) Accordingly, the membership count as of August 31 dictates the voting power of a local association for an entire year. (Tr, p 70.) Should membership fluctuate during the pendency of the appeal, therefore, inequities would inevitably result.

Absent a stay, the MEA would also have great difficulty in carrying out the procedures necessary to collect service fees from any individuals who elected to resign their membership and become fee payers. The MEA service fee collection procedures were approved in the *Lehnert v Ferris Faculty Ass'n, MEA-NEA* line of cases.[23] Those policies contain a strict timeline that is geared to the Association's fiscal year, requiring notice to non-members of the union's chargeable and non-chargeable expenditures verified by an independent auditor by November 30th; a 30-day window for non-members to file objections; a requirement for a hearing before an impartial decision-maker; and a requirement for a decision no later than May 1 of the fiscal year.

In order to collect a service fee, locals must conduct an audit of their financial statements and have that information available for the *Hudson* mailing that goes out by November 30 of the fiscal year. (Tr, pp 70, 139.) Locals determine whether or not to conduct an audit based on the number of non-member fee payers within the bargaining unit at the start of the school year in September, after the August resignation period. (Tr, p 70.) If there are few non-members, a local will usually elect not to spend the money to conduct the audit, and by doing so will waive any right to collect a service fee for the year. (Tr, p 71.) If a local did not conduct an audit because it had few non-members on September 1, it would not be able to collect any service fees if members resigned later in the year. (Tr, p 71.) If a stay does not issue here, the complicated and costly process of determining the appropriate service fee for each year would be further complicated by the greater fluctuation in membership during the pendency of the Association's appeal.

[23] *Lehnert v Ferris Faculty Ass'n*, 707 F Supp 1490 (WD Mich, 1989), aff'd 893 F2d 111 (CA 6, 1989), cert denied 496 US 905 (1990).

Finally, in the absence of a stay, enforcement of the Commission's decision ordering MEA to remove or modify the language of governance policies that have been in effect since 1973 would create unnecessary confusion and uncertainty among members on the criteria for an effective resignation should the Associations ultimately prevail on the merits of their appeal. Directing the Associations to change their membership resignation policy and notify their members of that change during the pendency of their appeal will also require significant administrative resources that the Associations could otherwise devote elsewhere. If a stay were denied here, these administrative expenses, coupled with the adverse impact on the Associations' ability to carry out its budgeting, auditing and programmatic activities and the potential loss in revenues from membership dues occasioned by members' ability to resign at any time throughout the year, will undoubtedly cause the Association substantial harm.

B. Granting a stay will not cause Charging Parties to suffer any financial or other harm.

Although the Association stands to suffer significant harm in the absence of a stay, Charging Parties will incur no cost and suffer no harm if a stay of enforcement of the Commission's decision were to issue. In August of 2014, each of the Charging Parties submitted valid written resignations from membership in accordance with the Associations' August resignation window policy. As a result, they are no longer members of the Associations and no longer have any financial obligation to the Associations. Since they have already successfully resigned their membership, issuing a stay and declining to enforce the Commission's Decision and Order during the pendency of the Associations' appeal will have absolutely no effect on Charging Parties.

Moreover, even when they were still members during the pendency of this action, enforcement of the Associations' membership resignation policy caused no harm to Charging Parties. Since "[n]one of the four Charging Parties signed up for the [Associations'] e-dues program" or "pa[id] union dues after the Employer stopped dues deductions," none sustained any loss as a result of the Associations' August resignation window. (MERC Decision at 5.) Likewise, since the Associations have not referred any of the Charging Parties to collection for their unpaid membership dues to date and have no intent of doing so during the pendency of their appeal, none have or will suffer any harm to their credit rating. Finally, since the SEA's contract has not included a union security clause since 1998, enforcement of the August resignation window has had and will continue to have no impact on the terms and conditions of Charging Parties' employment with the District. (MERC Decision at 4.)

IV. ISSUANCE OF A STAY OF THE COMMISSION'S DECISION WILL PROMOTE THE PUBLIC INTEREST BY PROTECTING THE ASSOCIATIONS' CONSTITUTIONAL RIGHTS OF ASSOCIATION AND LIBERTY OF CONTRACTING PENDING THE OUTCOME OF THEIR APPEAL

Despite the fact that they will suffer no harm, Charging Parties may argue that staying enforcement of the Commission's decision and permitting the Associations to maintain and enforce their membership resignation policy pending the outcome of their appeal will harm the public interest in enforcing the statutory right to refrain conferred by PA 349. Through their appeal, however, the Associations intend to raise several constitutional challenges to the Commission's interpretation of PA 349, and "[a] conflict between the Constitution and the statute is clearly a legal question which *only* a court can

decide."[24] *Regents of Univ of Michigan v Michigan Employment Relations Comm*, 389 Mich 96, 103; 204 NW2d 218, 221 (1973) (emphasis added). Until this Court has the opportunity to review the agency's interpretation of PA 349 in light of the potential constitutional violations that the Associations raise on appeal, therefore, there can be no harm to the public interest in preserving the *status quo* that has been in place for more than a decade since the Commission issued its 2004 decision in *West Branch* finding that "the Association's one-month window period is a reasonable rule that is justified by the Union's administrative and budgetary needs." *West Branch*, 17 MPER ¶ 25 (2004).

To the contrary, issuing a stay of the Commission's final Decision and Order would promote the public interest by protecting the Associations' constitutional freedoms to contract and to associate – or "not to associate" – during the pendency of their appeal. *Boy Scouts of America,* 530 US at 648. As federal courts have recognized, it "is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc v Michigan Liquor Control Com'n*, 23 F3d 1071, 1079 (CA 6 1994). Indeed, "the public as a whole has a significant interest in ensuring….protection of First Amendment liberties," to include the freedom of association. *Dayton Area Visually Impaired Persons, Inc v Fisher*, 70 F3d 1474, 1490 (CA 6 1995). Likewise, the public has a significant interest in ensuring protection of other liberties guaranteed by our state and federal constitutions, to include the freedom to contract. See *In re Meredith's Estate*, 275 Mich 278, 290 (1936) (internal citation omitted) ("[l]iberty of contract is an essential liberty protected by the Constitution").

[24] And, "[t]he same would undoubtedly be the view of a court in regard to the conflict between an agency's interpretation and the constitution." LeDuc, Michigan Administrative Law, § 9:19, p 660

The Associations' membership agreement, as reflected in its Bylaws and Continuing Membership Application, is perfectly consistent with the public policy of this State protecting the rights of association and the liberty of contracting. State and federal courts have long recognized that "[t]he general rule [of contract law] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356-357 (1931). Given that the Associations' membership obligations are not made a term or condition of public employment, they contravene no public policy of this State and must be enforced. Conversely, given that the Commission's decision conflicts with the public interest in protecting the freedoms guaranteed by our state and federal constitutions, it must be enjoined.

CONCLUSION

On balance, a review of the four inquiries that Michigan courts consider relevant in determining whether to grant injunctive relief reveals that staying, or enjoining, the Commission's Decision and Order is "just" under the circumstances at issue here. First, given that there exist several independent bases requiring reversal of the Commission's decision, the Associations are highly likely to prevail on the merits of their appeal. Second, absent a stay, the Commission's decision will impair the Associations' constitutional rights to associate and contract, resulting in irreparable harm to them during the pendency of their appeal. *Garner,* 185 Mich App at 764. Third, the significant harm that the Associations stand to suffer in the absence of a stay far outweighs any harm that the Charging Parties may suffer if a stay were to issue. Finally, staying the enforcement of the Commission's decision will serve to promote the public interest in protecting the

rights and freedoms guaranteed by our state and federal constitutions. Accordingly, the Associations respectfully request that this Honorable Court GRANT their Motion to Stay Enforcement of the Decision and Order of the Michigan Employment Relations Commission Pending Appeal and preserve the *status quo* that has been in place for more than a decade. See *West Branch*, 17 MPER 25 (2004).

Respectfully submitted,

By /s/ Catherine E. Tucker_____

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