STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

TECHNICAL PROFESSIONAL AND
OFFICEWORKERS ASSOCIATION
OF MICHIGAN,

Respondent-Appellant,

Supreme Court No. 162601
Court of Appeals No. 351991
MERC Case No. CU18 J-034

v

DANIEL LEE RENNER,
Charging Party-Appellee
_____/

BRIEF OF AMICUS CURIAE
MACKINAC CENTER FOR PUBLIC POLICY
ON ORAL ARGUMENT ON THE APPLICATION

Submitted by:

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Court of Appeals: No

Appellant union: Yes

Appellee charging party: No

Amicus Mackinac Center No

II. Did the Court of Appeals err in determining that MCL 423.211 did not provide a viable method for the Charging Party-Appellee to pursue grievances with the employer directly?

Court of Appeals: No

Appellant union: Yes

Appellee charging party: No

Amicus Mackinac Center No

III. Does the record support the Court of Appeals' conclusion that the Charging-Party Appellee properly exercised his right to a direct grievance?

Court of Appeals: Yes

Appellant union: No

Appellee charging party: Yes

Amicus Mackinac Center Does not answer

INTRODUCTION[1]

This case concerns whether charging nonmembers for representation during grievances violates Michigan's Public Employment Relations Act (PERA), MCL 423.201 *et. seq.* Should the union's position be accepted, nonmembers would be coerced in their right to choose whether to financially support an inherently political organization. Nonmembers facing discipline under a union-negotiated collective-bargaining agreement would be pressured: Either join or pay a union, or be unable to contest discipline issued by an employer.

As a means of addressing this Court's first question, this brief will examine the history of the duty of fair representation from its recognition in federal labor laws to its recognition under PERA. This Court's second question is also informed by the history of federal labor law and some National Labor Relations Board (NLRB) decisions. Amicus Mackinac Center is not addressing the third question.[2]

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[1] Pursuant to MCR 7.312(H)(4), Amicus Curiae Mackinac Center for Public Policy certifies that no counsel for a party authored this brief in whole or in part, nor made a monetary contribution to fund or prepare the submission of this brief. No party other than Amici Curiae, its members or its counsel, made a monetary contribution or contributed to this brief.

[2] Given amicus Mackinac Center's answer to this Court's second question (the Court of Appeals did not err in interpreting MCL 423.211), analysis of this Court's third question is unnecessary. The third question appears to be largely concerned with interpretation of county grievance policies and individualized facts from this case and not matters where amicus could provide valuable insight. It should be noted, however, that the Charging Party-Appellee is a custodian who was representing himself through the ALJ, MERC, and Court of Appeals, and who was faced with conflicting information from his employer and bargaining representative about the proper process he must follow to preserve his grievance.

STATEMENT OF FACTS

Charging Party-Appellee Daniel Lee Renner at all relevant times worked for the County of Saginaw and was covered under a collective-bargaining agreement between the county and Respondent-Appellant Technical, Professional and Officeworkers Association of Michigan (TPOAM).

Under PERA, Michigan has allowed mandatory public-sector bargaining for local employees since 1965. See 1965 PA 379.[3] From 1973, nonmembers had been clearly allowed to be charged agency fees. See generally, *Smigel v Southgate Cmty Sch Dist*, 388 Mich 531 (1972).[4]

These fees were banned when Michigan enacted a right-to-work law for public-sector workers in December 2012. 2012 PA 349.[5] The pertinent part, from § 9 of that act, stated:

> (1) Public employees may do any of the following:
>
> > (a) Organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice.
> >
> > (b) Refrain from any or all of the activities identified in subdivision (a).

Id. (codified at MCL 423.209). The relevant portion, from § 10 of that act, stated:

> (2) A labor organization or its agents shall not do any of the following:
>
> > (a) Restrain or coerce public employees in the exercise of the rights guaranteed in section 9. This subdivision does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

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[3] Attachment 1.

[4] Both *Smigel* and the public act will be discussed below.

[5] Attachment 2.

. . .

(3) Except as provided in subsection (4),[6] an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:

. . .

(c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.

. . .

Id. (codified at MCL 423.210(2)-(3)).

Sometime on or before March 1, 2017, Renner informed TPOAM that he was resigning his membership and would not be paying dues to the union. App. Doc. F.

On June 27, 2018, the United States Supreme Court decided *Janus v State, County, and Municipal Employees*, 585 U.S. ___, 138 S.Ct. 2448 (2018). In that case, the Supreme Court held under the First Amendment "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id*. at 2486. In the course of reaching this holding, the Supreme Court considered various arguments for the status quo. One claim was that without agency fees, unions would be unwilling to act as a collective-bargaining agent. *Id*. at 2467. A second was that "it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay." *Id*.

The first claim was rejected by noting that many states have mandatory collective bargaining and right to work for public sector employees. *Id*. The second claim was generally rejected: "Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation." *Id.* at 2469. While grievance fees for

[6] This subsection indicated that the new law did not apply to police and fire employees.

nonmembers were not directly at issue in *Janus*, the Supreme Court did indicate that unions might be able to require nonmembers to pay such fees:

> What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. § 315/6(b). Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee ... to the collective interests of all employees in the bargaining unit."
>
> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. Individual nonmembers could be required to pay for that service or could be denied union representation altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.
>
> [6] There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." E.g., Cal. Govt.Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

Janus, 138 SCt at 2468-69, n 6.

Relying upon that language from *Janus*, about a month later, TPOAM put forth a policy requiring nonmembers to pay for grievances. App. Doc. H.

An issue arose between Renner and a coworker regarding smoking at work. The employer sided with Renner's coworker and on September 9 issued a reprimand to Renner for making a false claim. App. at 71. This reprimand included a statement that "Any further incidents will lead to progressive disciplinary action, up to and including discharge." App. at 19. Renner contacted TPOAM about filing a grievance and a string of emails about whether or not

he could be charged a fee for this ensued. App. Doc. J. TPOAM estimated it would cost $1,290 to begin to process the grievance and sought this amount from Renner before it would begin. App. at 71. The collective-bargaining agreement made it clear that the union had the exclusive authority to pursue grievances and an employee could not do so individually. App. at 86.

On October 2, 2018, Renner filed an unfair-labor-practice charge. App. at 48. On November 18, 2018, a hearing took place before Administrative Law Judge Julia. C. Stern. App. Doc. L. Renner appeared pro se.

On April 25, 2019, Judge Stern issued her Decision and Recommended Order. App. pp. 19-36. Judge Stern noted that the grievance-charge discussion from *Janus* was not at issue. App. at 8-9. Further, she noted "The issues before me here, however, are not constitutional," (whether charging a nonmember for grievances would violate the First Amendment), "but statutory" (whether PERA allows a union to charge nonmembers for grievance representation). *Id*. at 9. The remainder of her analysis contrasted a state supreme court decision[7] allowing grievance fees with a string of NLRB decisions disallowing them. App. at 11-15. Reasoning that the National Labor Relations Act, 29 USC 151 *et seq* (NLRA), is generally guiding on interpretation of PERA, Judge Stern decided the matter in Renner's favor. *Id*. at 15-17.

TPOAM filed exceptions, and the matter proceeded to the Michigan Employment Relations Commission (MERC). Again, Renner appeared pro se. On Dec. 10, 2019, MERC unanimously affirmed. Among the arguments MERC specifically rejected were: (1) *Janus*' discussion of grievance fees meant that unions must be allowed to charge for them, App. at 6; (2) TPOAM or any other union has a heightened right not to association with nonmember employees covered by the collective-bargaining agreement as a consequence of *Janus*, App. at 7-8; (3) the

[7] *Cone v Nevada Serv Emp Union, SEIU Loc 1107*, 116 Nev 473 (2000).

NRLB grievance decisions were "archaic" and inapplicable, App. at 8-10; and (4) the new grievance-fee policy was an internal-union matter and therefore liability under PERA was improper. In rejecting the fourth argument, MERC stated:

> [W]e believe that grievance handling is fundamental to a union's duty as the exclusive bargaining agent to represent all members of the bargaining unit without discrimination. Because a union's decision not to represent a union member in a grievance or disciplinary matter has a clear impact on that unit member's terms or conditions of employment and the terms and conditions of other members of the bargaining unit, it is not merely an internal union matter. Moreover, by requiring nonmember payment for representation services, a union interferes with an employee's [MCL 423.209] right to refrain from union activities.

App. at 17-18.

TPOAM appealed. Renner was still pro se. On January 21, 2021, the Court of Appeals unanimously affirmed. *Tech, Pro and Officeworkers Ass'n of Michigan v Renner*, 335 Mich App 293 (2021).

The Court of Appeals indicated TPOAM violated MCL 423.210(2)(a), in that it restrained Renner in the exercise of his § 9 rights under PERA. *Tech, Pro and Officeworkers Ass'n*, 335 Mich App at 307. This made it unnecessary for the Court of Appeals to determine whether grievance fees were prohibited under MCL 423.210(3)(c). *Tech, Pro and Officeworkers Ass'n*, 335 Mich App at 306-07. MERC's reliance on NLRB decisions in holding that grievance fees could not be charged to nonmembers under PERA was affirmed by the Court of Appeals. *Id.* at 311-15.

The Court of Appeals further held MCL 423.211 did not prevent a holding that TPOAM violated the duty of fair representation. *Tech, Pro and Officeworkers Ass'n*, 335 Mich App at 310. In relevant part, that statutory provision states:

> [A]ny individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining

> representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

MCL 423.211. The court's holding was based on the fact that TPOAM sought and received the sole ability to resolve grievance matters in its collective bargaining agreement. *Tech, Pro*, 335 Mich App at 310.

The Court of Appeals rejected TPOAM's contention that *Janus* in and of itself allowed unions to impose grievance fees. *Id*. at 315 ("The Supreme Court did not hold that a union could unilaterally fashion a policy or procedure imposing fees for services on nonunion members of a collective-bargaining unit."). It recognized that when the Supreme Court discussed grievance fees, it was within the context of legislative action specifically allowing for them. *Id*. at 316.

Finally, the Court of Appeals rejected the claim that *Janus* was creating a new First Amendment right for unions to not associate with their nonmembers. *Id*. at 318-22.

TPOAM filed leave to appeal with this Court. On November 5, 2021, this Court filed an order asking the parties to address three questions. The Mackinac Center for Public Policy was specifically invited to file an amicus brief.

ARGUMENT

I. The Court of Appeals Correctly Decided That PERA Prohibits Charging Nonunion Members Fees for Grievance Processing Under MCL 423.209 and MCL 423.210(2)(a)

A. Introduction

The ALJ, MERC, and the Court of Appeals all referenced the duty of fair representation in their decisions that grievances could not be charged to nonmembers under PERA. The duty of fair representation originated out of Railway-Labor-Act litigation at the United States Supreme Court. After those cases began, Congress enacted the Taft-Hartley Act amendments to the Wagner Act, and they set the basic parameters of the NLRA that have persisted to today. The duty of fair representation was held to apply to the NLRA a few years later. Then, in 1965, Michigan enacted PERA and based much of that statutory scheme on the NLRA. Michigan has repeatedly looked to NLRA decisions as persuasive authority in interpreting PERA. Eventually, Michigan held the duty of fair representation applied to PERA as well. It has long been the case under the NLRA that grievance fees cannot be charged to nonmembers. Nothing should lead this Court to diverge from the NLRA decisions.

B. Legal Development of the Duty of Fair Representation

1. Initial Recognition of the Duty of Fair Representation

The duty of fair representation was first recognized by the United States Supreme Court in *Steele v Louisville & Nashville Railroad Company*, 323 US 192 (1944). There, a predominately white railroad union attempted "to amend the existing collective bargaining agreement in such a manner as to exclude all Negro firemen from the service." *Id.* at 195. If this change had been implemented, it would have prevented any black members of the bargaining unit from being promoted. *Id.* Other provisions the union negotiated were also racially

discriminatory. *Id.* at 195-96. When layoffs occurred, the union replaced more-senior black firemen with less-senior white firemen. *Id.* at 196.

The United States Supreme Court determined that such racial discrimination in bargaining could give rise to constitutional issues, reasoning:

> [T]he representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy, or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty to protect those rights.

Id. at 198. The Court nevertheless concluded that the language of the Railway Labor Act, 45 USC 151 *et seq.*, ("RLA") contained adequate protections to avoid the need to address the potential constitutional issues. *Id.* at 198-99. It held that, under the Act, a "labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them." *Id.* at 200. The Court further found that a designated representative is "responsible under the law to act for all employees with the craft or class, [including] those who are not members of the represented organizations, as well as those who are members." *Id.* at 201 (citation omitted).

The Supreme Court held that violations of the duty of fair representation could be brought directly to court. *Id*. at 207. See also *Tunstall v Bhd of Locomotive Firemen and Enginemen*, 323 US 210 (1944) (a companion case to *Steele* decided on the same day).

2. Enactment of NLRA §§ 7 and 8 (29 USC §§ 157 and 158) Predating PERA

The current version of the NLRA generally has two sources: (1) the Wagner Act of 1935; and (2) the Taft-Hartley Act of 1947.[8] Understanding the NLRA is important since, as will be shown below, it served as the model for PERA.

a. Wagner Act

As enacted, § 7 of the Wagner Act (1935) stated: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through organizations of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid and protection."

Section 8 of the Wagner Act stated:

> It shall be an unfair labor practice for an **employer** – (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . . (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

(emphasis added). Section 8(3) further allowed what were known as "closed shops," wherein unions were permitted to negotiate contracts under which employers could only hire "only persons who were already union members." *Commc'n Workers of Am v Beck*, 487 US 735, 747 (1988).

b. Taft-Hartley Act

The Taft-Hartley Act of 1947 added the following to the end of § 7: "and shall also have the right to refrain from any or all of such activities except to the extent that such right may be

[8] The as-enacted versions of both the 1935 Wagner Act and the 1947 Taft-Hartley Act are included with this brief as Attachments 3 and 4 respectively.

affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

The first sentence of Taft-Hartley § 8(a)(3) was the Wagner Act's former § 8(3) and stated: "It shall be an unfair labor practice for an employer – (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

The remainder of § 8(a)(3) of the Taft-Hartley Act allowed unions to negotiate what at the time appeared to be union-shop agreements. With a "union shop," the United States Supreme Court indicated, "an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." *Abood v Detroit Bd of Educ*, 431 US 209, 217 n 10 (1977). In 1963, the United States Supreme Court decided *National Labor Relations Board v General Motors*, 373 US 734 (1963). There, the Supreme Court held that under the NLRA, membership is "whittled down to its financial core," which entails only "payment of fees and dues." *Id.*. at 742. The Supreme Court has indicated that stripping membership to its financial core has made a "union shop . . . the 'practical equivalent' of an agency shop" under federal law. *Abood*, 431 US at 217 n 10. Importantly, in § 14(b) of the Taft-Hartley Act, Congress indicated that States could be exempt from these mandatory-membership provisions (again really financial core membership fees or agency fees) if they had a right-to-work law.[9]

[9] Under the Railway Labor Act, there is no right-to-work provision and (as of this writing) nonmembers can be charged agency fees, though there is some question whether *Janus*' holding applies in the RLA context. Thus, the federal persuasive authority for prohibiting charging nonmember grievance fees comes from NLRA decisions, and the RLA is inapplicable aside of general duty-of-fair-representation matters.

Returning to the NLRA, the Taft-Hartley Act also added a new § 8(b), which stated in pertinent part:

> It shall be an unfair labor practice for **a labor organization** or its agents –
>
> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

3. The United States Supreme Court Indicates a Duty of Fair Representation Applies Under the NLRA

The duty of fair representation was later extended to NLRA, which governs most private-sector collective bargaining:

> The National Labor Relations Act, as passed in 1935 and as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute is recognized in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198—199, 65 S.Ct. 226, 230, 89 L.Ed. 173, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any.

Ford Motor Co v Huffman, 345 US 330, 337 (1953).

4. The United States Supreme Court Clarifies That the Duty of Fair Representation Includes Grievances

In another race-discrimination case under the RLA, *Conley v Gibson*, 355 US 41 (1957), the Supreme Court extended the duty of fair representation to the grievance proceedings and other post-agreement aspects of collective bargaining:

> The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end … with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by the contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit.

Id. at 46 (footnotes omitted and emphasis added).

5. The Passage of PERA in 1965

PERA passed in 1965.[10] 1965 PA 379.[11] Section 9 stated:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Id. This Michigan provision was based on § 7 of the Wagner Act in that it did not contain a right to refrain from the protected activity.

The pertinent part of § 10 stated:

> It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; . . . (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization.

1965 PA 379 (emphasis added). Thus, like the Wagner Act's § 8, PERA did not prohibit unions from interfering with employees' organizational rights.

[10] It should be noted that PERA was not created out of whole cloth, but was instead a major reconstruction of 1947's Hutchinson Act, which was enacted to prevent (and punish) public-employee strikes. See 1947 PA 336 (Attachment 5).

[11] Attachment 1.

As originally passed, PERA did not include explicit legislative permission for union security akin to the NLRA's § 8(a)(3) under either the Wagner Act or Taft-Hartley Act.

6. Post-PERA Federal Clarification of the Duty of Fair Representation

One of the seminal cases in the development of the duty of fair representation is *Vaca v Sipes*, 386 US 171 (1967), in which the United States Supreme Court evaluated a claim that a union violated the duty by failing to properly pursue a grievance. In *Vaca*, the Court established three distinct aspects of the duty of fair representation: "[T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. Later in the opinion, the Court noted that since *Steele*, "the duty of fair representation has served as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 182.

Since *Vaca*, federal courts have consistently construed these two portions of the NLRA to require unions to process grievances of nonmembers in a non-discriminatory manner. See, e.g., *Smith v Local No 25, Sheet Metal Workers Int'l Ass'n*, 500 F2d 741, 749 (5th Cir 1974) (noting a union's authority as bargaining agent it compels it to represent the interests of members and nonmembers alike); *Richardson v Commc'n Workers of Am*, 443 F2d 974, 980-981 (8th Cir 1974) (same); *Peterson v Lehigh Valley Dist Council, United Bd of Carpenters and Joiners*, 676 F2d 81 (3d Cir 1982); *Journeymen Pipe Fitters Loc 392 v NLRB*, 712 F2d 225, 228 (6th Cir 1983) (same); *Nat'l Treasury Emp Union v FLRA*, 721 F2d 1402, 1046-7 (DC Cir 1983) (same).

7. The Michigan Supreme Court Holds Agency Fees are Illegal Under PERA

In 1972's *Smigel*, this Court considered whether agency fees were permitted under PERA. The case generated five opinions from the then seven-member court. But, a clear holding was that nonmember fees needed clear legislative authorization.

The importance of labor history and the NLRA's incorporation into PERA was discussed in Chief Justice T.M. Kavanagh's three-member opinion:[12]

> It should be emphasized at the outset that this case involves public employees and is therefore controlled by the so-called Public Employment Relations Act. The historical backdrop against which we must view this statute is most significant. The original act [The Hutchinson Act – 1947 PA 336] had as its stated purposes the prohibition of strikes by certain public employees and the provision for mediation of grievances. It was not until its amendment in 1965 that the statute granted public employees the right to organize and bargain collectively. 1965 P.A. 379 not only authorized the formation of public employees' unions, but also incorporated the policy of the National Labor Relations Act – that an employer must assume a posture of complete neutrality regarding union membership. He must do nothing to either advance or retard union organizing. Likewise must he refrain from practices which either encourage or discourage membership in labor organizations.

Smigel, 388 Mich at 539 (plurality opinion). PERA's lack of a specific provision allowing for agency fees meant that such fees were prohibited by MCL 423.210. *Smigel*, 388 Mich at 540 ("The legislature accomplished this result by not including in [PERA] the right . . . to enter into agreements containing union security clauses.") It was noted that unlike the version of MCL 423.14 then in force permitting an all-union agreement,[13] there was no specific authorization of agency fees. *Smigel*, 388 Mich at 540. The plurality continued: "The traditional 'agency shop' provision is a well known type of union security clause. Its terms are often such as to render it

[12] He was joined by Justice T. G. Kavanagh and Justice Adams.

[13] The all-union-agreement language of MCL 423.14 was stricken and replaced as part of 2012 PA 348.

the practical equivalent of a union shop and as such it by definition contravenes the policy and purposes of the Public Employment Relations Act." *Id*. at 541. The plurality summarized:

> Following this reasoning we are compelled to conclude that the 'agency shop' provision in the instant contract is repugnant on its face to the provisions of our Public Employment Relations Act.
>
> We hold that any such clause as this which makes no effort to relate the nonmembers' economic obligations to actual collective bargaining expenses is clearly prohibited by section 10 of the Public Employment Relations Act, as of necessity either encouraging or discouraging membership in a labor organization.

Id. at 543.

Justice Williams concurred that the lack of a specific legislative authorization for agency fees meant that such fees could not be charged to a nonmember: "On the question whether PERA § 10 permits an 'agency shop,' I agree . . . that it does not. This is because PERA fails to include a savings clause for union security such as [the then-in-force version of MCL 423.14] in private employment." *Id*. at 544 (Williams, J., concurring).

Justice Brennan also concurred. He too contrasted the express authorization of an all-union agreement under MCL 423.14 with the absence under PERA of an explicit authorization of agency fees. *Id*. at 545. (Brennan, J., concurring). The unions had argued that PERA only prevented either closed or union shops, but Justice Brennan rejected this: "423.210 does not address itself merely to all-union or close shop agreements. In the present context, <u>it prohibits terms and conditions of employment which are designed to encourage membership in a labor organization.</u>" *Smigel*, 388 Mich. at 546 (emphasis added). He concluded that "423.209(c) is in effect a 'right to work' law, limited to public employment." *Id*.

Thus, there were five votes for the holding that without specific legislative authorization, agency fees could not be charged to nonmembers under PERA.

8. The Michigan Supreme Court Applies *Vaca* in Deciding an NLRA case

In light of the *Vaca* decision, it became clear that duty-of-fair-representation claims under the NLRA could be heard in either state or federal courts. *Vaca*, 386 US at 186-87. The Michigan Supreme Court heard one such challenge in *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123 (1973). In examining the duty-of-fair representation, this Court stated:

> When the general good conflicts with the needs or desires of an individual member, the discretion of the union to choose the former is paramount.
>
> When the general good conflicts with the legal or civil rights of an individual member, the courts will recognize those rights and enforce them as against the will of the majority of the union membership.

Id at 145. This Court ultimately concluded that "a union owes a greater duty to its members than merely to refrain from persecuting them." *Id.* at 148.

9. The Michigan Legislature Specifically Authorizes Agency Fees Through an Amendment to PERA.

Within a year of this Court's decision in *Smigel*, the Michigan Legislature acted to explicitly allow agency fees by amending MCL 423.210. Using the Michigan Legislature's strike-and-replace system, the following changes occurred:

> Sec. 10 **(1)** It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; (b) to initiate, create, dominate, contribute to**,** or interfere with the formation or administration of any labor organization: Provided, That a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay; (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization**: PROVIDED FURTHER, THAT NOTHING IN THIS ACT OR IN ANY LAW OF THIS STATE SHALL PRECLUDE A PUBLIC EMPLOYER FROM MAKING AN AGREEMENT WITH AN EXCLUSIVE BARGAINING REPRESENTATIVE AS DEFINED IN SECTION 11 TO REQUIRE AS A CONDITION OF EMPLOYMENT THAT ALL EMPLOYEES IN THE BARGAINING UNIT PAY TO THE EXCLUSIVE BARGAINING REPRESENTATIVE A SERVICE FEE**

> **EQUIVALENT TO THE AMOUNT OF DUES UNIFORMLY REQUIRED OF MEMBERS OF THE EXCLUSIVE BARGAINING REPRESENTATIVE**; (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act; or (e) to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of Section 11.
>
> **(2) IT IS THE PURPOSE OF THIS AMENDATORY ACT TO REAFFIRM THE CONTINUING PUBLIC POLICY OF THIS STATE THAT THE STABILITY AND EFFECTIVENESS OF LABOR RELATIONS IN THE PUBLIC SECTOR REQUIRE, IF SUCH REQUIREMENT IS NEGOTIATED WITH THE PUBLIC EMPLOYER, THAT ALL EMPLOYEES IN THE BARGAINING UNIT SHALL SHARE FAIRLY IN THE FINANCIAL SUPPORT OF THEIR EXCLUSIVE BARGAINING REPRESENTATIVE BY PAYING TO THE EXCLUSIVE BARGAINING REPRESENTATIVE A SERVICE FEE WHICH MAY BE EQUIVALENT TO THE AMOUNT OF DUES UNIFORMLY REQUIRED OF MEMBERS OF THE EXCLUSIVE BARGAINING REPRESENTATIVE.**
>
> **(3) IT SHALL BE UNLAWFUL FOR A LABOR ORGANIZATION OR ITS AGENTS (A) TO RESTRAIN OR COERCE: (i) PUBLIC EMPLOYEES IN THE EXERCISE OF THE RIGHTS GUARANTEED IN SECTION 9: PROVIDED, THAT THIS SUBDIVISON SHALL NOT IMPAIR THE RIGHT OF A LABOR ORGANIZATION TO PRESCRIBE ITS OWN RULES WITH RESPECT TO THE ACQUISITION OR RETENTION OF MEMBERSHIP THEREIN; . . .**

1973 PA 25.

Thus, the Legislature showed its clear intent to allow agency fees. It also created a duty for labor organizations not to interfere with § 9 rights of public employees.

10. The Michigan Supreme Court Recognizes a Duty of Fair Representation Under PERA

In *Goolsby v Detroit*, 419 Mich 651 (1984), this Court held that the duty of fair representation also applies to cases filed under PERA. After citing the United States Supreme Court's *Humphrey* decision and its own *Lowe* decision with approval, this Court drew from *Vaca* three responsibilities related to the duty of fair representation. *Id.* at 664. After reviewing additional caselaw, this Court then summarized its holding:

> In conclusion, we hold that: (1) PERA impliedly imposes on labor organizations representing public sector employees a duty of fair representation; (2) bad-faith conduct is not always required to make out a breach of that duty; (3) the conduct prohibited by the duty of fair representation includes (a) impulsive, irrational, or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence; (4) absent a reasoned, good-faith, nondiscriminatory decision not to process a grievance, the failure of a labor organization to comply with collectively bargaining grievance procedure time limits constitutes a breach of the duty of fair representation; and (5) in this case, the union's inexplicable failure to comply with the grievance procedure time limits indicates inept conduct undertaken with little care or with indifference to the interests of plaintiffs, which could have reasonably been expected to foreclose plaintiffs from pursuing their grievance further.

Id. at 681-82 (emphasis added).

The next relevant Michigan case occurred in 1989, when the Court of Appeals decided *Hunter v Wayne-Westland Community School District*, 174 Mich App 330 (1989). This case arose when two school districts merged, with the union representing the larger school system now becoming the bargaining agent for the newly merged one. A member of the bargaining unit from the smaller school, which had previously been represented by a different union, refused to become a member of the union representing the merged school. As a result, the successor union refused to give this member the seniority she had earned under the prior collective bargaining agreement. In reviewing the matter, the Court of Appeals explained that discrimination based on the lack of fealty to the union was not a proper basis for denying seniority:

> A union may not neglect the interests of a membership minority solely to advantage a membership majority; members are to be accorded equal rights, not arbitrarily subject to the desires of a stronger, more politically favored group. "These tenets strike home when a union attempts to prefer workers based solely on how long they have been loyal to the guild." The only factor distinguishing [the employee] from other former Cherry Hill employees who received retroactive seniority was her lack of union membership while at Cherry Hill. The WWEA owed her a duty of fair representation and breached that duty.

Id. at 337.

11. Passage of 2012 PA 53

In 2012, the Michigan Legislature amended PERA § 10 by banning public-school employers from collecting dues and fees on the unions' behalf, by creating a reporting requirement for expenditures related to union representational activities, and by making a number of grammatical changes. 2012 PA 53.[14]

12. Passage of 2012 PA 349, Michigan's Right-to-Work Law

Shortly after the adoption of 2012 PA 53, the Legislature again amended PERA. This amendment, which transformed Michigan into a public-sector right-to-work state, amended MCL 243.209(1) as follows:

> Sec. 9. (1) ~~It shall be lawful for public employees to organize~~ **PUBLIC EMPLOYEES MAY DO ANY OF THE FOLLOWING:**
>
> (A) **ORGANIZE** together or ~~to~~ form, join**,** or assist in labor organizations**;** ~~, to~~ engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection**;** ~~,~~ or ~~to~~ negotiate or bargain collectively with their public employers through representatives of their own free choice.
>
> (B) **REFRAIN FROM ANY OR ALL OF THE ACTIVITIES IDENTIFIED IN SUBDIVISION (A).**

2012 PA 349.[15]

Section 10 was also amended in the following relevant ways:

> Sec. 10. (1) A public employer or an officer or agent of a public employer shall not do any of the following:
>
> (a) Interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9.
>
> . . .

[14] Attachment 6.

[15] The public act also added new subsections 9(2) and 9(3), but neither is relevant here.

(c) Discriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization. ~~However, this act or any other law of this state does not preclude a public employer from making an agreement with an exclusive bargaining representative as described in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.~~

. . .

~~(2) It is the purpose of 1973 PA 25 to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if the requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee that may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.~~

(2) ~~(3)~~ A labor organization or its agents shall not do any of the following:

(a) Restrain or coerce public employees in the exercise of the rights guaranteed in section 9. This subdivision does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.

. . .

(3) EXCEPT AS PROVIDED IN SUBSECTION (4),[16] AN INDIVIDUAL SHALL NOT BE REQUIRED AS A CONDITION OF OBTAINING OR CONTINUING PUBLIC EMPLOYMENT TO DO ANY OF THE FOLLOWING:

. . .

(C) PAY ANY DUES, FEES, ASSESSMENTS, OR OTHER CHARGES OR EXPENSES OF ANY KIND OR AMOUNT, OR PROVIDE ANYTHING OF VALUE TO A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE.

. . .

(5) AN AGREEMENT, CONTRACT, UNDERSTANDING, OR PRACTICE BETWEEN OR INVOLVING A PUBLIC EMPLOYER, LABOR ORGANIZATION, OR BARGAINING REPRESENTATIVE THAT VIOLATES SUBSECTION (3) IS UNLAWFUL AND UNENFORCEABLE. . . .

[16] Again, the subsection exempted police and fire employees.

2012 PA 349.

With of the passage of Michigan's public sector right-to-work law, agency fees were banned. After 2012 PA 349 became effective, the key statutory elements related to this grievance-fee question were in place. The relevant portions of PERA and the NLRA provisions they were based on have been set forth. The general parameters of the duty of fair representation are known. The final element is this Court's *Smigel* holding about the proper means of analyzing MCL 423.210 in the absence of an express legislative authorization of fees to nonmembers.

It is against this backdrop, that this Court's first question must be considered.

C. Analysis of Grievance Fees Under PERA

1. Michigan Courts Generally Rely on NLRA Case Law When Interpreting PERA

Undoubtedly, this Court remains the ultimate authority on Michigan law, and can determine that the Michigan cases relying on the federal judiciary's or the NRLB's interpretation of the NLRA need to be reconsidered due to the language of the *Janus* case, or for any other legal reason. Yet, Michigan has historically relied on federal interpretation of the NLRA as highly persuasive authority when considering cases under PERA where PERA and the NLRA are analogous.

This Court addressed this issue in *Demings v City of Ecorse*, 423 Mich 49 (1985), stating:

> Similarly, our labor mediation act, MCL §423.1 *et seq*., and public employment relations act, MCL § 423.201 *et seq.*, are patterned after the NLRA. Thus this court has stated that in construing our state labor statutes we look for guidance to the construction placed on the analogous provisions of the NLRA by the [National Labor Relations Board] and the Federal courts. *Rockwell v Crestwood School Dist Bd of Ed*, 393 Mich 616, 636 (1975)…. Consequently, since the rights and responsibilities imposed on labor organizations representing public sector employees by PERA … are similar to those imposed on labor organizations representing private sector employees by the NLRA, it must be concluded that PERA impliedly imposes on labor organizations representing public sector employees a duty of fair representation which is similar to the duty imposed by the NLRA….

> It is not suggested that the Legislature has, in defining the origin and nature of the substantive right of fair representation, departed from the federal model. The PERA provisions that give rise to the right of fair representation are replicas of the federal provisions. The nature of the right of fair representation, as developed by the Michigan and federal courts, also appears to be substantially the same.

Id. at 56-57, quoting *Goolsby v Detroit*, 419 Mich at 660-61, n 5 (cleaned up) (errors original).[17]

Section 7 of the NRLA (29 USC 157) and § 9 of PERA (MCL 423.209) are for all practical purposes identical. Both statutes outline the labor rights of public employees, which include the right to "form, join, or assist" a labor organization, to collectively bargain, to engage in concerted activities, or to refrain from any of those activities. In both instances, it is clear that employees have the right to participate or refrain from participating in union activities.

The NLRA and PERA also have parallel sections that protect these rights. Both § 8 of the NLRA (29 USC 158) and § 10 of PERA (MCL 423.210) forbid a labor organization from restraining or coercing public employees in exercising the rights outlined in §§ 7 and 9, respectively. Similarly, both laws explicitly exempt union rules regarding the "acquisition or retention of membership" from being considered coercive or a restraint of employee rights. Compare 29 USC 158(b)(1) with MCL 423.210(2)(a). In short, the protections of employees' rights contained in these statutes are largely identical. Based on the similarity of the language and requirements of these sections of the NLRA and PERA, this Court should look to federal decisions as guidance in this matter. Those decisions have consistently held that failing to process the grievance of a nonmember absent a fee is an unfair labor practice.

[17] Subsequent cases demonstrate that the need to adhere to NLRA precedent strong where there is the possibility of "disturbing consequence[s] of departing from the federal model that result[s] in public employees being treated differently under the PERA from private employees under the NLRA." *AFSCME v Highland Park Sch Dist Bd of Educ*, 457 Mich 74, 88 fn 2 (1998) (citing *Demings*, 423 Mich 49 at 57). This is particularly true when identical statutory provisions are at issue. *Highland Park*, 457 Mich at 88, n 2.

2. NLRA Decisions Ban Charging Nonmembers Grievance Fees

a. Relevant NLRB and MERC Decisions Definitively State that Requiring a Fee for Grievance Processing Violates the Duty of Fair Representation and is Coercive

Starting in 1953, the NLRB has never deviated from holding that charging nonmembers grievances violates the duty of fair representation under the NLRA.

The NLRB addressed the impact of pay-for-services provisions shortly after the passage of Taft-Hartley when deciding *Hughes Tool Company and Independent Metal Workers Union, Locals 1 and 2*, 104 NLRB 318 (1953). In this case, the union attempted to require a fee for grievance adjustment in a right-to-work state. *Id*. at 329. After acknowledging that the grievance process "frequently involves the interpretation and application of the terms of a contract, or otherwise affects the terms and conditions of employment not covered by a contract," the NLRB concluded that the union owed a duty to process those grievances in a non-discriminatory manner. *Id.* at 326. It stated:

> The question thus finally becomes whether or not the grievance and arbitration fees charged herein are in conflict with that duty to represent employees in grievance proceedings without discrimination. We find the answer to be in the affirmative. As we have noted above, <u>all</u> employees in an appropriate unit are entitled, upon their request, to the impartial assistance of the certified representative in the filing and adjustment of grievances. The duty of the certified representative to render such impartial assistance is clearly evaded where some employees are forced to pay a price for such help <u>or to forego it entirely</u>. The latter result is precisely what occurs under the fee schedule set up by the [union].

Id. at 327 (emphasis original).

The NLRB further recognized that an opposite holding could have significant deleterious effects on employees who would be forced to pay:

> There are obvious reasons why the assistance of the certified labor organization is of great value to an employee with a legitimate grievance. The established procedures and experienced personnel which the union has at hand;

> the background of preceding cases and knowledge of the contract stemming from participation in its negotiation; and the very prestige and authority of the union itself are all factors which may well mean the difference between the success and failure of the grievance. Where a certified bargaining representative exists, it has been held that the employees are not entitled to be represented in grievance proceedings by any labor organization other than the certificate holder. The defense of the [union]—that it does not 'refuse' such assistance as certified representative, but merely requires payment for it—begs the question. It is the employee's option alone as to whether the services of the representative are to be used in his behalf. By demanding the payment of a $15 or $400 fee by nonmembers as a prerequisite to their obtaining the assistance they are entitled to as employees in the unit and refusing the representation if not paid, the [union] has abused the privileged status it occupies as certified representative by using that status as a license to grant or deny representation according to its own arbitrary standards.

Id. at 327-28 (emphasis added). The NLRB, after rejecting additional "free-rider" arguments made by the union, proceed to hold that pay-for-services provisions are impermissible.

This opinion is not an outlier, and the position that nonmembers cannot be forced to pay a fee for grievances has been reaffirmed over and over for decades. In *International Association of Machinist and Aerospace Workers, Local Union Number 697, AFL-CIO (The HO Canfield Rubber Company of Virginia, Inc and Ronnie G Carroll*, 223 NLRB 832 (1976), the NLRB found that "[t]o discriminate against nonmembers by charging them for what is due them by right restrains them in an exercise of their statutory rights," and rejected an attempt to charge nonmembers in grievance proceedings. *Id.* at 970. It reached a similar holding the following year when deciding *Electrical Workers Local 396 (Central Telephone Co)*, 229 NLRB 469 (1977), finding pay-for-services provisions to be inherently coercive:

> [I]t is axiomatic that, in the absence of a valid union-security clause, threats to employees that they will lose their jobs or otherwise be discriminated against in employment because of nonpayment of dues violate Section 8(b)(1)(A). The violation exists even though [the union] could not require the Company to discharge [the employee]. The Board has held that the threat is coercive "because it was a threat of loss of employment reasonably calculated to have an effect on the listener without regard to the question of the Union's ability to carry out the threat."

Id. at 470 (footnote omitted).

In the decades that followed, the NLRB continued to reject similar arguments, determining that charging nonmembers a service fee for grievance processing was a per se violation of the NLRA.[18] Indeed, the NLRB rejected claims similar to those made by TPOAM as recently as 2015, when it decided *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1192 AFL-CIO, CLC (Buckeye Florida Corporation, A Subsidiary of Buckeye Technologies, Inc and Georgia Pacific, LLC) and Jimmy Ray Williams*, 362 NLRB 1649 (2015). The NLRB stated:

> The Union contends its policy Applicable Board law is well settled and unambiguous in this case. This matter arose in the State of Florida, a "right to work" state, and the collective-bargaining agreement between the Union and the employer contains no union-security clause. The Union, via its Fair Share Policy charges nonmember employees covered by the collective-bargaining agreement a fee for processing a grievance. Under these circumstances and current Board precedent, this Fair Share Policy violates Section 8(b)(1)(A) of the Act.
>
> Moreover, the Union's defenses are without merit. The Union contends its policy does not coerce employees in the exercise of their Section 7 rights because it does not make payment of the fee a condition of employment. However, in none of the cases in which the Board has addressed this issue did the policy make payment of the grievance processing fee a condition of employment. Rather the Board looked to whether the policy coerced the employee in his or her right to refrain from joining the union. In each and every case, the Board held that such policies do so.

Id. at 1652 (emphasis added). The NLRB further rejected other arguments identical to those raised by TPOAM:

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[18] See, e.g., *Columbus Area Local, Am Postal Workers Union, AFL-CIO (US Postal Serv and Jesse F Williams)*, 277 NLRB 541 (Nov 19, 1985) (applying *Hughes* in similar circumstances and reaching the same conclusion), *Furniture Workers Div, Loc 282, Int'l Union of Elec, Elec, Salaried, Mach and Furniture Workers, AFL-CIO (the Davis Co) and Everlena C Yarbrough*, 291 NLRB 182 (1988) (same).

> The Union appears to attach significance to its contention an employee can pursue a grievance without the assistance of the Union. However, there is no evidence of this practice occurring during any relevant time period. Furthermore, the Union concedes even if an employee could proceed without the Union through some steps, a grievance cannot be successfully pursued beyond the third step without the consent of the International. Therefore . . . this contention lacks merit.
>
> The Union also relies on a decision by the Supreme Court of the State of Nevada finding valid a similar policy promulgated by a union representing certain State Government employees citing [*Cone*]. . . . [The *Cone* court] considered the [NLRB] precedent cited herein interpreting these similar provisions and rejected it, disagreeing with the [NLRB]'s holding because it leads to, in the court's opinion, an "inequitable" result. The [NLRB] was well aware of these equitable concerns when, interpreting the Act, it reached its contrary conclusion. Therefore, . . . the Union's reliance on the Nevada Supreme Court's holding in *Cone* misplaced.

Id. at 1653 (citations omitted).

In short, the arguments being advanced by TPOAM are not novel. Rather, the same or similar arguments have been presented to and rejected by the NLRB for at least sixty-nine years. This Court should not now disregard that precedent absent a legislative change.

Thus, the Court of Appeals, MERC, and the Administrative Law Judge all correctly recognized that grievance fees to nonmembers are banned under PERA.

D. TPOAM's Arguments in Favor of Holding Fees for Nonmembers are Currently Permitted by PERA are Unpersuasive

TPOAM makes three arguments in favor of imposing grievance fees on nonmembers: (1) *Janus* specifically endorsed such arrangements and that should supersede any NLRA decisions to the contrary; (2) *Janus* give unions a First Amendment right not to associate with nonmembers; and (3) under MCL 423.210(2)(a) grievances are an internal matter and therefore otherwise exempt from PERA. These arguments will be addressed in turn.

1. The Relevant Language of *Janus* Demonstrates that Pay-for-Services Provisions in State Statutes may be Constitutionally Permissible, not that such Provisions are Constitutionally Required

The union's first claim related to *Janus* rests largely on a single portion of that case, which suggests that payment for grievance processing could be constitutionally permissible in certain circumstances. *Janus* specifically discussed this pay-for-grievance arrangement as being one less-burdensome approach on an employee's First Amendment associational freedoms as compared to agency fees. *Janus*, 138 SCt at 2468-69. The Supreme Court then proceeded to highlight a specific California statute which required nonmembers who were religious objectors to pay for grievance representation as an example of this approach in action. *Id.* at 2469 n 6. Thus, this portion of *Janus* appears to acknowledge that a statute like California's would be constitutionally permissible, while nevertheless finding that the First Amendment did not permit the compulsory payment of agency fees by nonmembers.

Again, in *Smigel*, this Court made it clear that positive legislative authorization is required before fees can be charged to nonmembers. This is in line with what the Supreme Court was discussing in *Janus* when it cited the California statute. The Michigan Legislature's treatment of PERA, however, suggests it has chosen not to exercise this discretion.

PERA has been amended several times following the passage of right-to-work. Amending acts include 2014 PA 322 (amending § 15b), 2014 PA 323 (amending § 15), 2014 PA 414 (amending §§ 1, 9, 10, and 15) and 2016 PA 194. None of the provisions amended by these acts are directly germane to the questions presented in this case. But, they reflect the fact that the Legislature had multiple opportunities to amend the relevant portions of §§ 9 and 10 of PERA following the adoption of right to work, but chose not to. Thus, unlike in 1973 PA 25, the

Legislature has repeatedly failed to adopt express language permitting pay-for-services provisions, so as to reach the same result as in Nevada.

Here, as noted above, the pay-for services provision at issue was adopted solely by the union's executive board. App pp 40-44. No legislation has been passed in Michigan which would alter PERA to allow for pay-for-services provisions. Unless the Michigan Legislature adopts a statute authorizing unions to charge nonmembers for representation in grievance proceedings, no such charges may be permitted.

TPOAM disagrees and cites MCL 423.120(c)(3) as positive legislative authorization. In its application, TPOAM states: "Section 10(c)(3) of PERA allows charging of fees for services requested, provided it is not 'required as a condition of obtaining or continuing public employment.'" Application for Leave at 7; see also *id*. at 7-12; and TPOAM Supplemental Brief at 25-27.

The union's basic argument is that as long as a fee request is not a condition of obtaining or continuing public employment, it can be made. TPOAM therefore seeks to use this statutory provision to allow it to charge for grievances, which it contends is not related to obtaining or continuing employment.

This is wrong for two reasons. First, TPOAM only discusses grievance fees in its analysis, but MCL 423.210(3)(c) came about in December 2012 and took effect in March of 2013 – a touch over five years before *Janus*. If TPOAM is correct, then during that approximately five-year time period, public-sector unions (not exempted by MCL 423.210(4)) would have been able to charge agency fees to any nonmember as long as they did not have a

termination clause for nonpayment in their respective collective-bargaining agreements.[19] Thus, employees could have been civilly liable for any costs the public-sector unions sought to impose for providing collective-bargaining services; they just could not have been fired for refusing to pay them. That is not what occurred, nor was it the Legislature's intent. Remember, 2012 PA 349 struck the positive authorizations for agency fees that had been located in 1973 PA 25's §§ 10(c) and 10(2). The Legislature was not merely trying to prevent people from being fired for not paying agency fees – it was attempting to end agency fees altogether.[20]

This leads to TPOAM's second error. While this Court has exclusively asked the parties about § 10(2)(a), § 10(3)(c) can also support a holding in Renner's favor. This case is about the grievance process, and the disciplinary process in this case (and perhaps in almost every case) could eventually lead to employee dismissal. That makes the entire grievance and disciplinary process within the meaning "continuing public employment" and therefore not something for which fees can be charged.

Thus, TPOAM is mistaken – § 10(c)(3) is not a positive grant that can justify fees for grievances. Michigan has not specifically authorized grievance fees, and under *Smigel* and *Janus* such fees are inappropriate unless and until it does.

2. The United States Supreme Court has Already Determined That Requiring a Union to Process Grievances on Behalf of Non-paying Nonmembers does

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[19] As noted above, as a matter of constitutional law, *Janus* prohibited charging agency fees to any public sector employees (including police and fire in Michigan despite MCL 423.210(4)) as of June 27, 2018.

[20] Michigan would not have made international and national news and the Lansing Capitol would not have been the site of vociferous protests had the Legislature merely been changing the enforcement mechanism of agency fees. It was the ending of these agency fees that made this legislation so significant.

not Violate a Union's First Amendment Right to Freedom of Association

Citing *Janus*, TPOAM attempts to relitigate arguments about the First Amendment and forced association that were rejected decades ago by the United States Supreme Court.[21] The core of TPOAM's argument relies on its First Amendment right to "eschew association for expressive purposes." TPOAM's Application for Leave to Appeal, p. 39. quoting *Janus*, 138 SCt 2463. These arguments must fail, as they have been expressly addressed and rejected by the United States Supreme Court.

TPOAM makes arguments substantially similar to those advanced by labor unions in challenging right-to-work laws shortly after the adoption of Taft Hartley in 1947. Parallel challenges arose to right-to-work laws in *American Federation of Labor v American Sash Co*, 335 US 538 (1949) and *Lincoln Federal Labor Union v Northwestern Iron and Metal Company et al*, 335 US 525 (1949). In *Lincoln Federal*, both North Carolina and Nebraska had adopted laws which provided that no person was to be denied an opportunity to obtain or retain employment based on union membership. *Lincoln Federal*, 335 US at 527-28. The unions challenged these laws on the grounds they violated their First Amendment rights to freedom of speech, assembly, and petition.

In evaluating the matter, the Supreme Court rejected the contention that a union's desire that nonmembers and members not be forced to work alongside each other was "indispensable to

[21] Further, TPOAM recasts as a First Amendment claim previously rejected union arguments that providing service to nonmembers without charging fees is "tantamount…to involuntary servitude." TPOAM's Application for Leave to Appeal, p. 39. These prior arguments cited the Thirteenth Amendment rather than the First Amendment and were rejected by the courts that had considered them. See, e.g., *Zoeller v Sweeney*, 19 NE 3d 749 (Ind 2014) (challenging Indiana's right-to-work law on the grounds it required services be provided without payment); and *Sweeney v Daniels*, No 2:12-CV-81, 2012 WL 13054830 (US Dist Ct N Dist Ind) (2012) (challenging same under the Thirteenth Amendment).

the right of self-organization and the association of workers into unions." *Id.* (internal quotations omitted). The Court stated:

> Justification for such an expansive construction of the right to speak, assemble and petition is then rested in part on appellants' assertion 'that the right to work as a non-unionist is in no way equivalent to or the parallel of the right to work as a union member; that there exists no constitutional right to work as a non-unionist on the one hand while the right to maintain employment free from discrimination because of union membership is constitutionally protected.' Cf. *Wallace Corporation v. National Labor Relations Board*, 323 U.S. 248.
>
> We deem it unnecessary to elaborate the numerous reasons for our rejection of this contention of appellants. Nor need we appraise or analyze with particularity the rather startling ideas suggested to support some of the premises on which appellants' conclusions rest. <u>There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies.</u>

Id. at 530-31 (errors original) (cleaned up) (emphasis added).

The *Lincoln Federal* Court concluded by explicitly rejecting the idea that constitutional requirements could prevent a state from adopting legislation designed to protect nonmembers, stating: "Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers." *Id.* at 537.

The Court reached a similar conclusion in *American Sash*, when considering Arizona's right-to-work constitutional amendment. *American Sash*, 335 US 538 (1949). The Arizona amendment differed from the laws at issue in *Lincoln Federal* in that it provided protections against discrimination for nonmembers, but not for members of a union. *Id.* at 540. The Court nevertheless upheld it, recognizing a legislative prerogative with respect to public-sector labor law:

> In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, this Court considered a challenge to the National Labor Relations Act on

> the ground that it applied restraints against employers but did not apply similar restraints against wrongful conduct by employees. We there pointed out, 301 U.S. at page 46, the general rule that 'legislative authority, exerted within its proper field, need not embrace all the evils within its reach.' And concerning state laws we have said that the existence of evils against which the law should afford protection and the relative need of different groups for that protection 'is a matter for the legislative judgment.' *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400. We cannot say that the Arizona amendment has denied appellants equal protection of the laws.

Id. at 541-42 (cleaned up). In short, in both *Lincoln Federal* and *American Sash*, the Supreme Court recognized that state laws which provide right-to-work protections for nonmembers did not run afoul of a union's First Amendment rights.

The Supreme Court has consistently recognized that a union's exercise of First Amendment rights on behalf of its members can be restricted by states' public-sector bargaining statutes. In *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979), a union challenged a state law requiring employees to submit a written complaint directly to an employer. *Id.* at 463. The union alleged this requirement violated its First Amendment rights by preventing it from submitting grievances on its members behalf. *Id.* The Court rejected this argument, noting that even if this requirement impaired the union's First Amendment rights, it was nevertheless constitutional:

> In the case before us, there is no claim that the Highway Commission has prohibited its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas. There is, in short, no claim of retaliation or discrimination proscribed by the First Amendment. Rather, the complaint of the union and its members is simply that the Commission refuses to consider or act upon grievances when filed by the union rather than by the employee directly.
>
> Were public employers such as the Commission subject to the same labor laws applicable to private employers, this refusal might well constitute an unfair labor practice. We may assume that it would and, further, that it tends to impair or undermine—if only slightly—the effectiveness of the union in representing the economic interests of its members.
>
> But this type of "impairment" is not one that the Constitution prohibits. Far from taking steps to prohibit or discourage union membership or association,

> all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.

Id. at 464-66 (internal citation omitted).

More recently, the Supreme Court addressed the interaction between the First Amendment and public-sector collective bargaining in *Davenport v Washington Education Association* 551 US 177 (2007). In that case, a union challenged a state law requiring a nonmember's authorization before any portion of his or her dues could be used for election-related purposes. *Id.* Nonmembers brought suit against the union, claiming that their dues had been used for this purpose without proper authorization. *Id.* In analyzing the state law at issue, the Supreme Court noted that the state had considerably more discretion to restrict the use of agency fees than it had exercised:

> As applied to agency-shop agreements with public-sector unions like respondent, § 760 is simply a condition on the union's exercise of this extraordinary power, prohibiting expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents. The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive. Respondent concedes that Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. See Brief for Respondent 46–47. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely. See id., at 46 (citing *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949)). For the reasons that follow, we conclude that the far less restrictive limitation the voters of Washington placed on respondent's authorization to exact money from government employees is of no greater constitutional concern.

Id. at 184 (emphasis added) (cleaned up). The Court noted that "unions have no constitutional entitlement to the fees of nonmember-employees," concluding that the state restriction on spending did not violate the Constitution, given state's broad discretion to regulate public-sector labor law. *Id.* at 185, 191-92.

Even if TPOAM could demonstrate an infringement of it First Amendment rights to associate, such an infringement has been recognized as constitutionally permissible as noted in cases like *Lincoln Federal* and *American Sash*. There, as here, the unions claimed it was improper for the state to force them to associate with nonmembers who did not provide financial support the union. For seventy-five years it has been clear that this associational argument was insufficient to defeat right-to-work laws, it fairs no better in seeking to constitutionalize grievance-fee payments from nonmembers.

3. Grievance Fees to Nonmembers are not Internal Union Matters Otherwise Outside the Ambit of PERA's § 10(2)(a)

While PERA does allow a union "to prescribe its own rules with respect to the acquisition or retention of membership" both a plain language reading of PERA and longstanding precedent demonstrate that pay-for-services provisions are well beyond the scope of this protection.

As a primary matter, the nonmember grievance fees are charged to nonmembers. To the extent that such fees are meant to incentivize nonmembers to become members, TPOAM would violate the no-coercion language of PERA's § 10(2)(a).

Both the NLRA and PERA contain carve outs for internal matters related to membership. Both statutes provide that a union rules relating to the "acquisition or retention of membership" do not constitute illegal restraint or coercion of employee rights. Compare MCL 423.210(2)(a) with 29 USC 158(b)(1)(A). The language of both statutes is nearly identical. Thus, the meaning of the words "acquisition or retention" are key.

As stated above, Michigan courts generally rely on federal interpretations of the NLRA for guidance when the language of PERA and the NLRA is analogous. The Supreme Court has

addressed the meaning of "acquisition or retention" under the NLRA in *Pattern Makers' League of North America v National Labor Relations Board*, 473 US 95, 109 (1985), stating:

> Petitioners first argue that the proviso to § 8(b)(1)(A) [of the NLRA] expressly allows unions to place restrictions on the right to resign…Petitioners contend that because [an internal union rule] places restrictions on the right to withdraw from the union, it is a "rul[e] with respect to the … retention of membership within the meaning of the proviso."
>
> Neither the Board nor this Court has ever interpreted the proviso as allowing unions to make rules restricting the right to resign. Rather, the Court has assumed that "rules with respect to the retention of membership" are those that provide for the expulsion of employees from the union.

Id. (emphasis original). Such an understanding is consistent with dictionary definitions of the relevant terms. Cambridge Dictionary defines "acquisition" as "the process of getting something" or "the act of obtaining or beginning to have something, or something obtained."[22] It defines "retention" as "the ability to keep or continue having something" or "the continued use, existence, or possession of something or someone." *Id.*[23] Taken together, the terms "acquisition and retention" clearly relate to the unions process for admitting or terminating memberships of those who they represent.

Here, however, the relevant union rule is not related to either of these aims. Instead, that rule attempts to redefine the scope of the union's legal obligations to represent nonmembers by creating two artificial and extra-legal categories of representation: collective representation and direct representation. App pp 40-44, see also Application for Leave at 1, n 2. The union further reads "membership" in 10(2)(a) of PERA to mean having *any* relationship to the union itself. This reading of PERA is not just well-beyond the text of PERA itself, but it is contrary to all Michigan precedent speaking to the issue.

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[22]Available at: https://dictionary.cambridge.org/us/dictionary/english/acquisition.

[23]Available at: https://dictionary.cambridge.org/us/dictionary/english/retention.

MERC opinions have held that matters even more directly related to the acquisition and retention of membership then grievance fees or agency fees are outside the protections of MCL 423.210(2)(a). MERC has repeatedly determined that internal union rules requiring employees to resign membership solely within a "window"[24] improperly restrains employees in their right to refuse to associate with a union. See, e.g., *Saginaw Ed Ass'n and Eady-Miskiewicz*, 319 Mich App 422, 459 (2017). MERC reached a similar conclusion in *West Branch-Rose City Education Association and Frank Dame*, 17 MPER 25 (2005), where MERC held that even the collection of agency fees was not a purely internal union matter. In each of these decisions, a union's ability to regulate its membership, either through the terms of when a member could resign, or through the collection of then-mandatory fees, was found to be beyond a merely internal rule. To hold that the grievance process, a matter directly relating to the entirety of the collective-bargaining agreement, is somehow a purely internal union matter, would constitute a significant divergence from past NLRA and PERA decisions.

4. As to the First Question Presented by this Court, None of the Union's Arguments are Persuasive

As noted above, Michigan's Legislature must affirmatively allow fees to be charged to nonmembers and has not done so. Nothing in *Janus* created a new forced associational right. Just as public-sector unions have had to tolerate and work with nonmembers in right-to-work states for decades preceding *Janus*, they now have to continue doing so even where nonmembers do not pay grievance fees. *Janus* changed nothing in regard to this First Amendment forced-association claim. Finally, the union's attempt to inoculate its illegal grievance fees as a purely internal matter fails.

[24] For example, a window could be limiting resignations to one month a year or perhaps a particular ten-day period within that year.

II. On this Court's Second Question, the Court of Appeals Properly held MCL 423.211 did not allow Renner to Pursue an Individual Grievance

An individual's right to pursue a grievance under MCL 423.211 does not relieve TPOAM of its obligation to represent nonmembers who do not pay for grievance services.

1. Enactment of NLRA § 9 (29 USC § 159) predating PERA

a. Wagner Act

This language related to pursuit of individual grievances originated in § 9(a) of the Wagner Act. This section originally stated:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer.

This language was later changed in light of the NLRB's decision in *Hughes Tool Company and United Steelworkers of America Locals Numbers 1742 and 2457, CIO*, 56 NLRB 981 (1944), in which the NLRB determined the presence of the union was necessary for the adjustment of any grievance.[25] This included any grievance brought by an individual employee under § 9(a), even absent an established grievance procedure requiring the union's presence. *Id.*

1. Taft-Hartley

Section 9(a) was later amended by the Taft-Hartley Act, which added the following to the end of that section:

[25] This holding was later modified to only require the union's presence when resolving the grievance would involve collective bargaining or the interpretation of existing collective bargaining provisions. See *Hughes Tool Co v NLRB*, 147 F2d 69, 72-73 (5th Cir 1945). Nevertheless, both the NLRB and Circuit Court decisions appear to have been the catalyst for the amendments to § 9(a) within Taft-Hartley.

> and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 USC 159(a). Thus, Taft-Hartley amended § 9(a) of the NLRA to make explicit that an individual-grievance adjustment must be consistent with the terms of the relevant collective-bargaining agreement, and that the union is permitted to be present at any individual-grievance hearing.

2. Passage of PERA in 1965 Creates MCL 423.211

MCL 423.211 was enacted as part of 1965 PA 379 and has not been amended since. It is nearly identical in language to 29 USC 159, and there is no substantive legal distinction between them.[26] As previously discussed, where the language of PERA and the NLRA is analogous, PERA is to be interpreted consistently with federal law. See Section I(c)(1) *supra*.

The issue of whether the NLRA permits a union to charge nonmembers fees for grievance processing has been settled law for sixty-nine years. This question was squarely addressed in *Hughes Tool Company and Independent Metal Workers Union, Locals 1 and 2*, 104

[26] MCL 423.211 reads:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

NLRB 318 (1953), in which the NLRB determined levying charges for nonmember grievances was impermissible. In addressing the issue, the NLRB stated:

> Despite the fact that the statute, by force of these provisos in Section 9 (a), grants the certified representative less than an exclusive position in the handling of grievances, we do not consider that the certified union's responsibility concerning those grievances on which its aid is requested has been lessened. It is clear that Congress, in amending the section, was concerned with the dual problem of an individual employee's right to choose to process a grievance without interference by the representative and the representative's interest in preserving intact the terms and conditions of its contract and its right to bargain about such terms. This is a distinctly different matter from that of the representative's responsibility insofar as those grievances which are tendered it by the voluntary act of the employee. We, accordingly, find that the amended Section 9 (a) still gives rise to a duty by labor organizations, as the exclusive representative in grievance proceedings (other than those processed through preference by the individual himself), impartially and without discrimination to accept and process all grievances placed in its hands by the employees it represents.
>
> The question thus finally becomes whether or not the grievance and arbitration fees charged herein are in conflict with that duty to represent employees in grievance proceedings without discrimination. We find the answer to be in the affirmative.

Id. at 327 (footnote omitted emphasis in original).

Subsequent challenges at the federal level to nonmember grievance fees have transitioned away from analyzing § 9 of the NLRA, instead reaching the conclusion that charging non-members fees for grievances violates §§ 7 and 8. See generally, Section I(c)(2), *supra*.

Neither Michigan courts nor MERC appears to have squarely addressed the application of PERA's analogous language in § 11. But, the most authoritative statement of Michigan law on this issue is that the right for an employee to pursue an individual grievance is a limited one. In *Mellon v Board of Education of Fitzgerald Public Schools*, 22 Mich App 218, 221-22 (1970), the Court of Appeals held that while an employee's § 11 rights under PERA permitted him to submit a grievance without union involvement, nothing compelled his employer to process that grievance. *Id.* Instead, it was the employer's prerogative to choose whether to deal with the

employee, or to apply the procedures that had been negotiated in the collective-bargaining agreement. *Id.*[27]

Subsequent MERC decisions are consistent with this position. See *Shelby Twp, Pub Emp and Police Officers Ass'n of Michigan and Matthew Stachowicz*, 28 MPER 77 (2015). This presents a unique problem, however, as it largely prevents employees from being able to challenge grievance determinations. *Lowe*, 389 Mich at 148-49, makes clear that exhausting the collectively bargained grievance process is a prerequisite to an employee's ability to bring an action against his employer. Here, TPOAM has the exclusive right to process grievances under the terms of the collective-bargaining agreement. App at p 86. The county processed Renner's grievance, even though it believed it had been filed under the improper policy. *Id*. at 116. Renner thus is left with no recourse; either he is forced to abandon his grievance or pay whatever grievance processing fee TPOAM sees fit to charge so that he can go through the collectively bargained process and thereby preserve his right to bring suit.

This Court has already seen the practical pitfalls in this approach when deciding *Demings*. In that case, this Court recognized that while § 11 of PERA provides for the possibility of individualized grievances, that protection is largely illusory, stating: "Nevertheless, unions typically assert in collective bargaining agreements the exclusive power in the grievance realm. Thus, the argument continues, this power of the unions to control the grievance procedure derives not from any statute, but from the collective agreement." *Id.* at 85. Thus, even to the extent that this Court finds MCL 423.211 could provide an employee with an individual

[27] In so doing, the Court of Appeals recognized that this standard was equally applicable at federal law. *Mellon*, 22 Mich App at 222 (citing *Broniman v Great Atl & Pac Tea Co*, 353 F2d 559 (6th Cir 1965 (additional citations omitted)).

grievance remedy, such a remedy would be inapplicable whenever the terms of a collective-bargaining agreement give a union with control over the grievance process.

This Court should recognize, as have the federal courts analyzing the issue in the context of the NLRA, that such an arrangement is inherently coercive, and violates an employee's § 9 rights under PERA. Given the nearly identical language of MCL 231.111 and 29 USC 159(a), such a holding would promote the continued harmony between Michigan and federal labor law, while simultaneously protecting the rights of employees who are bound by the terms of a collective bargaining agreement negotiated by a union with which they do not wish to associate.

RELIEF REQUESTED

For the reasons stated above, this Court should deny further leave to appeal in the matter. If this Court were to decide the issue in lieu of argument, it should affirm the decision of the Court of Appeals.

Respectfully Submitted,

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