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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF QUESTION INVOLVED

I. Did the Court of Appeals err in holding that a pay-for-services procedure related to nonmember grievances violates the Public Employment Relations Act?

Court of Appeals: No

Appellant union: Yes

Appellee charging party: No

Amicus Mackinac Center: No

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.* It does. Absent clear legislative authorization, nonmembers cannot be forced to financially support an inherently political organization – a mandatory public sector bargaining agent – in order to use the grievance process.

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.[2] In 1973, PERA was amended to explicitly allow nonmembers to be charged agency fees. See generally, *Smigel v Southgate Cmty Sch Dist*, 388 Mich 531 (1972); 1973 PA 25.[3]

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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] Attachment 1.

[3] Attachment 2.

These fees were banned when Michigan enacted a right-to-work law for public-sector workers in December 2012. 2012 PA 349.[4] 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.
> > . . .
>
> (3) Except as provided in subsection (4),[5] 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. at 37.

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[4] Attachment 3.

[5] This subsection indicated that agency-fee ban did not apply to police and fire employees.

On June 27, 2018, the United States Supreme Court decided *Janus v State, County, and Municipal Employees*, 585 US ___, 138 SCt 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 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. at 40-44.

An issue arose between Renner and a coworker regarding smoking at work. The employer sided with Renner's coworker and on September 19 issued a reprimand to Renner for making a false claim. App. at 132. This reprimand included a statement that "Any further incidents will lead to progressive disciplinary action, up to and including discharge." *Id*. 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. at 50-57. 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 54. 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 23.

On October 2, 2018, Renner filed an unfair-labor-practice charge. App. at 48-49. On November 13, 2018, a hearing took place before Administrative Law Judge Julia. C. Stern. App. at 67-115.

On April 25, 2019, Judge Stern issued her Decision and Recommended Order. App. at19-36.[6] In a section titled "The Unfair Labor Practice Charge," she noted that Renner alleged TPOAM "violated its duty of fair representation toward him and Section 10(2)(a) of PERA . . . by refusing to represent him in a disciplinary dispute with the Employer unless and until Renner paid [TPOAM] a fee for its services." App. at 20. Judge Stern began her "Discussion and Conclusions of Law" section with a subsection titled "PERA's 'Freedom to Work' Amendments and the Duty of Fair Representation." *Id*. at 24. Despite this title, the subjection did not explicitly discuss the duty of fair representation. It did include that 2012 PA 349 transferred the prohibition on labor unions acting to "restrain or coerce public employees in the exercise of their rights guaranteed in Section 9" from section 10(3)(a) to section 10(2)(a). App. at 25.[7]

Noting that the grievance-payment question was statutory, Judge Stern spent a couple of pages on TPOAM's best case – *Cone v Nevada Service Employees Union,* 116 Nev 473 (2000) – wherein the Nevada Supreme Court had upheld a fee-for-grievance-representation charge. Judge Stern noted that the Nevada Statute "like Section 10 of PERA, includes provisions prohibiting both employers and unions with interfering with, restraining or coercing any employee in the

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[6] In its December 9, 2022 Order granting leave to appeal, this Court expressed interest in the difference between "the common-law analysis of the duty of fair representation and the statutory analysis of 'coercion' and 'restraint' under" MCL 423.210(2)(a). Therefore, the discussion of these matters in the Administrative Law Judge's April 25, 2019, Decision and Recommended Order, app 19-35, the Michigan Employment Relations Commission's December 10, 2019 Decision and Order, app at 9-18, and the Court of Appeal's decision, *Technical, Professional and Officeworkers Association of Michigan v Renner*, 335 Mich App 293 (2021), will be addressed in this section of the brief. Should further discussion of these documents related to other issues be necessary, the pertinent portions will be set out individually in the Argument section.

[7] Judge Stern made a small error in indicating the language was shifted from 10(3)(a)(1) to 10(2)(a) by 2012 PA 349. In fact, there was an intermediate step as 2012 PA 53, Attachment 4, had shifted the language from 10(3)(a)(1) to 10(3)(a) and only then in 2012 PA 349 was the languages shifted to 10(2)(a).

exercise of rights guaranteed by the Act." App. at 28. It was noted that the Nevada Supreme Court held that the process there did not "breach its duty of fair representation as set forth in . . . the Nevada Act. The Court stated that it found no discrimination, coercion, or restraint in requiring nonunion members to pay costs for union representation." App. at 29.

Judge Stern then addressed the various National Labor Relations Board (NLRB) decisions on the fee-for-grievance issues (all of which held such fees improper) and indicated that in *Steelworkers Local 1192 (Buckeye Florida Corp)*, 362 NLRB 1649 (2015) the NLRB held fees-for-grievances "violates Section 8(b)(1)(A) of the Act . . .[which] prohibits an exclusive bargaining representative from restraining or coercing employees in the exercise of their Section 7 rights, which includes the right to refrain from joining a union." App. at 29-30. *Hughes Tool Co*, 104 NLRB 318 (1953), was described as "not a unfair labor practice charge," implicitly referring to it not being based on the coercion and restraint language; instead Judge Stern noted "the Board stated that it had previously recognized that a labor organization which is granted exclusive bargaining rights has, in return, assumed the basic responsibility to act as a genuine representative of all the employees in the bargaining unit." App. at 31. *Machinists Local 697*, 223 NLRB 832 (1976), was discussed in terms of restraint and coercion. App. at 32.

In concluding, Judge Stern noted that Michigan "imposes on labor organizations representing public sector employees a duty of fair representation which is similar to the duty imposed by the NLRA on labor organizations representing private sector employees." App. at 33. The suggested findings, however, were in terms of MCL 423.210(2)(a). App. at 34.

MERC's Dec. 19, 2019 Decision and Order, discussed the general parameters of the duty of fair representation. App. at 12-13. Its conclusion discussed both duty of fair representation and MCL 423.210(2)(a):

> Respondent's "Nonmember Payment for Labor Representation Services" Operating Procedure violates § 10(2)(a) of PERA because it unlawfully discriminates against nonunion members and restrains employees from exercising their § 9 right to refrain from joining or assisting a labor organization. Additionally, we find that the Respondent Union breached its duty of fair representation and unlawfully discriminated against and restrained Charging Party Renner in the exercise of his § 9 rights by refusing to file or process his grievance unless he paid the Union a fee for its services. Although Respondent argues that requiring a union to bear the cost of grievance representation for nonmembers in a right to work state is unfair, we believe Respondent's argument should properly be made to the Michigan legislature and not in this forum.

App. 18.

The Michigan Court of Appeals discussed MCL 423.210(2)(a) as a basis for affirming MERC. *Technical, Professional and Officeworkers Association of Michigan v Renner*, 335 Mich App 293, 304-07 (2021). It also discussed the duty of fair representation. *Id*. at 307-317.

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. It did. National Right to Work filed an amicus brief. AFSCME and the Michigan Education Association were specifically asked to file an amicus brief. They did so jointly along with AFT-Michigan and Michigan State AFL-CIO ("Four Unions' Amicus Brief on Application for Leave"). The Four Unions Amicus Brief argued that TPOAM had violated the duty of fair representation, but had not committed a violation under MCL 423.210(2)(a).

On October 13, 2022, oral argument on the application occurred. On December 9, 2023, this Court granted the application for leave to appeal and asked the parties to address three new questions:

> (1) what is the difference between the common-law analysis of the duty of fair representation and the statutory analysis of "coercion" and "restraint" under the public employment relations act (PERA), MCL 423.201 et seq., and whether the outcome in this case will differ based on which analysis is used; (2) whether the

> fee schedule in this case violates §§ 9 and 10 of PERA (MCL 423.209; MCL 423.210); and (3) whether the fee schedule in this case violates the common-law duty of fair representation.

The Mackinac Center for Public Policy was again specifically invited to file an amicus brief.

On March 23, 2023, the Legislature amended various portions of PERA with the intent to once again allow nonmembers in the bargaining unit to be charged an agency fee if either: (1) the United States Supreme Court reverses *Janus v AFSMCE*; or (2) if the United States Constitution is amended in a manner to allow agency fees. 2023 PA 9, sec 10(5).[8] This amendatory act did not receive immediate effect and will take effect 90 days after this legislative session. Const 1963, art 4, sec 27. It did not explicitly allow fees for grievances.

[8] Attachment 5.

ARGUMENT

I. Unfair labor practices under MCL 423.210(2)(a) significantly overlap duty of fair representation claims

A. Introduction

This Court's first question discusses whether there are differences between the duty of fair representation and the statutory analysis "of 'coercion' and 'restraint' under the public employment relations act." The answer to that is while there are important general differences between finding an unfair labor practice violation (such as a statutory coercion violation) and a duty of fair representation violation, on the substantive issue of fees for grievances, they both prohibit it.

According to the United States Supreme Court: "'the family resemblance [between breaches of the duty of fair representation and unfair labor practices] is undeniable, and indeed there is a substantial overlap' because the NLRB treats breaches of the duty as unfair labor practices." *Reed v United Transp Union*, 488 US 319, 333 n 7 (1989) (quoting *DelCostello v Int'l Bhd of Teamsters*, 462 US 151, 170 (1983)). In *DelCostello*, the United States Supreme Court stated: "duty-of-fair-representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions. See generally R. Gorman, Labor Law 698–701 (1976)." *DelCostello*, 462 US at 170.

The duty of fair representation can be broader than what is considered an unfair labor practice:

> [W]e reject the proposition that the duty of fair representation should be defined in terms of what is an unfair labor practice. Respondent's argument rests on a false syllogism: (a) because [*Miranda Fuel Co*, 140 NLRB 181 (1962), enf denied, 326 F2d 172 (2nd Cir 1963)], establishes that a breach of the duty of fair representation is also an unfair labor practice, and (b) the conduct in this case was not an unfair

> labor practice, therefore (c) it must not have been a breach of the duty of fair representation either. The flaw in the syllogism is that there is no reason to equate breaches of the duty of fair representation with unfair labor practices, especially in an effort to narrow the former category. The NLRB's rationale in *Miranda Fuel* was precisely the opposite; the Board determined that breaches of the duty of fair representation were also unfair labor practices in an effort to broaden, not restrict, the remedies available to union members. See 140 NLRB at 184–186. Pegging the duty of fair representation to the Board's definition of unfair labor practices would make the two redundant, despite their different purposes, and would eliminate some of the prime virtues of the duty of fair representation—flexibility and adaptability. See [*Vaca v Sipes*, 386 US 171 (1967)].
>
> The duty of fair representation is not intended to mirror the contours of § 8(b); rather, it arises independently from the grant under § 9(a) of the NLRA, 29 U.S.C. § 159(a), of the union's exclusive power to represent all employees in a particular bargaining unit. It serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." [*Vaca*, supra, at 182]; see also [NLRB v Allis–Chalmers Mfg Co, 388 US 175, 181 (1967)] ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation"). Respondent's argument assumes that enactment of the LMRA in 1947[9] somehow limited a union's duty of fair representation according to the unfair labor practices specified in § 8(b). We have never adopted such a view, and we decline to do so today.

Breininger v Sheet Metal Workers Int'l Ass'n Loc No 6, 493 US 67, 86-87 (1989).

In *Chauffeurs, Teamsters and Helpers, Local 391 v Terry*, 494 US 558 (1990), the United States Supreme Court stated:

> Although both the duty of fair representation and the unfair labor practice provisions of the NLRA are components of national labor policy, their purposes are not identical. Unlike the unfair labor practice provisions of the NLRA, which are concerned primarily with the public interest in effecting federal labor policy, the duty of fair representation targets "'the wrong done the individual employee.'" [*Electrical Workers v Foust*, 442 US 42, 49, n 12 (1979) (quoting *Vaca v Sipes*, 386 US, at 182, n 8] (emphasis deleted). Thus, the remedies appropriate for unfair labor practices may differ from the remedies for a breach of the duty of fair representation, given the need to vindicate different goals.

[9] This refers to the Labor Management Relations Act of 1947 also known as the Taft-Hartley Act.

Chauffeurs, 494 US at 573.[10]

The duty of fair representation implicitly comes from 29 USC § 159(a), not from 29 USC § 158(b). *Marquez v Screen Actors Guild, Inc*, 525 US 33, 44 (1998). In that case, the Supreme Court indicated that not all violations of Section 8(b) necessarily are violations of the duty of fair representation. *Marquez*, 525 US at 45. Specifically, a duty of fair representation claim requires a showing of "arbitrary, discriminatory, or bad faith union conduct." *Id*. at 51.[11]

Thus, while there are differences between unfair labor practices and the duty of fair representation, in the specific context of nonmembers and grievances, a treatise states the unfair labor charges via section 8(b)(2) are basically synonymous with duty of fair representation claims:

> There would . . . appear to be less need to rely on a theory of fair representation for the nonmember, [for example] a distinction between members and nonmembers in grievance processing would violate section 8(b)(1)(A), as union action to restrain or coerce employees in their section 7 right to refrain from membership. . . .
>
> Despite the availability of section[] . . . 8(b)(2) to remedy member/nonmember distinctions, there remain situations in which the nonmember-discriminate may choose to formulate a claim of breach of the duty of fair representation. . . . [For example, I]t may be thought desirable secure a judicial forum.[[12]]

[10] In that case, the Supreme Court held that jury trials were proper for duty of fair representation claims.

[11] As will be shown below, in the context of fees for grievances, that standard has been met for nearly 7 decades. Charging a nonmember for grievances is discriminatory and coerces the nonmember to seek union membership to avoid the fees. The NLRB has not wavered from this since it began analyzing the matter in 1953.

[12] Duty of fair representation claims can be brought directly in court. *Tunstall v Bhd of Locomotive Firemen and Enginemen*, 323 US 210 (1944). Again, such claims also allow the employee to receive a jury trial.

Robert A. Gorman and Matthew W. Finkin, Basic Text on Labor Law (2nd Ed 2004) at 995-96.[13]

No matter how they are designated, fees for grievances have not been allowed in NLRA decisions. Nor should they be permitted under PERA unless and until the Legislature actually provides for them by statute.

II. The impact of 2023 PA 9 on this Court's second and third questions

This Court's second question concerned the statutory analysis of this matter and the third question asks about the duty-of-fair-representation analysis. 2023 PA 9 may make the third question more important than the second.

Again, 2023 PA 9 will not take effect until 90 days after session. Const 1963, art 4, sec 27. Thus, the controlling law in the instant case is PERA's current version not PERA's soon-to-be version. Be that as it may, during the application to leave to grant process in this matter, control of the legislature changed and soon after this Court granted leave to appeal, 2023 PA 9 passed. Depending on how this case is ultimately decided, the MCR 7.305(B) grounds may have been altered.

Aside of a couple of grammatical tweaks, when it becomes effective, 2023 PA 9 is going to have the pertinent portions of MCL 423.209 and MCL 423.210 return to the versions that existed between 1973 PA 25 and 2012 PA 349. The then operative version of MCL 423.209 stated:

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[13] That same source discusses a limit to the duty of fair representation:

> Although the duty of fair representation is of considerable scope, there are certain limits to the union's accountability. Most clearly, since the duty is derived from the union's power as exclusive representative in bargaining and grievance-processing, it is only for these activities that the duty of fair representation applies.

Id. at 991. That limitation does not apply here as TPOAM is Renner's exclusive representative.

> 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 purposes of collective negotiation or bargaining or other mutual aid or protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

1965 PA 379 section 9. The then operative version of MCL 423.210 stated in pertinent part: "(3) It shall be unlawful for a labor organization or its agents (a) to restrain or coerce: (i) public employees in the exercise of rights guaranteed in section 9." 1973 PA 25 section 10. Compare 2023 PA 9 sections 9 and 10.

Assuming that this Court would be ruling in Renner's favor, this may impact the basis on which it decides to do so. If this Court were to hold that both the "common-law analysis" and the "statutory analysis of 'coercion' or 'restraint'" yield the same result, then the passage of 2023 PA 9 will not have much effect on the ruling. Charging Party and amici Mackinac Center and National Right to Work would all likely agree with this result.

But if this Court were to rely on only one of the statutory analysis or the duty of fair representation, only a duty of fair representation holding will have much lasting impact. The public employees' right to refrain currently found in MCL 423.209(1)(b) will be no more when 2023 PA 9 takes effect. Thus, a holding on whether a fees-for-grievances process violates MCL 423.210(2)(a) in regards to an MCL 423.209(1)(b) right that soon will no longer exist seems narrow. The Four Unions' Amicus Brief on Application for Leave agreed that a duty-of-fair-representation violation has been shown, *id.* at 6-10, but contend a holding based on MCL 423.210(2)(a) is improper without a factual finding of coercion.[14]

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[14] They state:

> It is far from clear - - and it certainly could not be presumed - - that the fees for service procedure coerced (or for that matter, "restrained") Appellee Renner, as is required for a finding that Section 10(a)(2) was violated. The panel

(Note continued on next page.)

If this Court is going to rule in Renner's favor on only one basis, as will be shown below, the duty of fair representation survives 2023 PA 9 and prevents fees for grievances unless there is express legislative approval.

A. Duty of fair representation and fees under PERA

This Court has made clear under PERA that fees for nonmembers require express legislative approval and there never has been such a provision in the statutory scheme allowing grievance fees.

1. 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:[15]

> 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[16]] had as its stated purposes the prohibition of strikes by certain public employees and the

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below assumed, but did not identify, any factual finding that Appellant's fee for services procedure coerced the Appellee.

Four Unions' Amicus Brief on Application for Leave at 12-13. As will be shown below, the four unions are wrong on this point. Grievance fees (without express legislative permission) show economic coercion as a matter of law and are improper under the NLRA and should also be so under PERA.

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

[16] PERA was not created out of whole cloth, but was instead a major reconstruction of 1947's Hutchinson Act, which was enacted to prohibit (and punish) public-employer strikes.

> 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 PA 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,[17] 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 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

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

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 closed shop agreements. In the present context, it prohibits terms and conditions of employment which are designed to encourage membership in a labor organization." *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.

The next year, the Michigan Legislature provided the specific legislative authorization for agency fees. 1973 PA 25.

2. 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 applies to cases filed under PERA. This Court summarized its holding:

> In conclusion, we hold that: (1) PERA impliedly imposes on labor organizations representing public sector employees a duty of fair representation; . . . (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).[18]

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 district, which had previously been represented by a different union, refused to become a member of the union representing the merged school districts. 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.

This PERA language related to PERA's sections 9 and 10 in effect during *Goolsby* and *Hunter* is the same that will be in place when 2023 PA 9 becomes effective. Once the amending language become effective, there will be no MCL 423.209(1)(b) right-to-refrain and the duty of fair representation will continue to exist. Further, the new version of PERA will still be without

[18] The Four Unions refer to *Goolsby* for their admission that fees for grievances violate the duty of fair representation under PERA. Four Unions' Amicus Brief on Application for Leave at 7-8.

an express legislative allowance of grievance fees (as it has been since PERA's creation in 1965). A holding that the duty of fair representation was violated by grievance fees based on *Goolsby* would have the most prospective impact given the forthcoming changes to PERA via 2023 PA 9.

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

To the extent that *Goolsby* alone is not sufficient for a holding that grievance fees violate the duty of fair representation under PERA, this Court can consider persuasive NLRA case law. This body of law has uniformly held that grievance fees are improper.

This Court addressed this NLRA-guidance 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 Sch 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).

a. NLRA Decisions Ban Charging Nonmembers Grievance Fees

Starting in 1953, the NLRB has never deviated from holding that charging nonmembers grievances violates the NLRA. More recently, the NLRB has shifted from referring to the duty of fair representation to discussing the language of 29 USC § 158(b)(1)(A) (section 8(b)(1)(A)).[19]

The NLRB addressed the impact of pay-for-services provisions in *Hughes Tool Co*, 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

[19] Again, according to the United States Supreme Court, "the NLRB treats breaches of the duty as unfair labor practices." *Reed*, 488 US at 333 n 7.

> 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, proceeded 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 *Machinists Local 697*, 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.[20] Indeed, the NLRB rejected claims similar to those made by TPOAM as recently as 2015, when it decided *Steelworkers Local 1192 (Buckeye Florida Corp),* 362 NLRB 1649 (2015). The NLRB stated:

> 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.
>
> > . . . 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 rejected reliance on Nevada's *Cone* decision:

> 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* [is] misplaced.

Id. at 1653 (citations omitted).

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[20] See, e.g., *Am Postal Workers Union, (Postal Serv),* 277 NLRB 541 (1985) (applying *Hughes* in similar circumstances and reaching the same conclusion), *Furniture Workers Div, Loc 282 (the Davis Co),* 291 NLRB 182 (1988) (same).

Again, the Four Unions contend under PERA that fees for grievances cannot be per se coercive. That is difficult to support given the Supreme Court's *Reed* decision recognizing the NLRB's blending duty of fair representation and statutory coercion and this Court's *Deming* decision looking for guidance from NLRA cases where there is similar language.

In short, the policy and fairness 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 70 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.

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

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

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

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."[21] It defines "retention" as "the ability to keep or continue having something" or "the continued use, existence, or possession of something or someone." *Id.*[22] 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

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

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

direct representation. 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.

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"[23] improperly restrains employees in their right to refuse to associate with a union. See, e.g., *Saginaw Ed Ass'n v 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.

B. 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

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

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 could 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), 2016 PA 194, and most recently 2023 PA 9. 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.

Here, as noted above, the pay-for services provision at issue was adopted solely by the union's executive board. 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. The legislature just had a golden opportunity to allow such fees, but 2023 PA 9 did not do so.

This Court's *Smigel* decision makes clear that nonmember fees require explicit approval. *Taylor v Pennsylvania State Corrections Officer Ass'n*, __ A.3d __, 2023 WL 2565029 (Pa. Superior March 20, 2023) is unpersuasive. In that case, there was no discussion of Pennsylvania's bargaining law and whether it is line with similar NLRA decisions. In Michigan, not only has this Court held that explicit legislative approval is required, it has also indicated that Michigan courts generally follow NLRA precedents. Post-*Janus*, some state legislatures have explicitly allowed fees for grievances. Mass General Laws ch 161A § 26 (nonmembers can be required to pay for grievances); RI General Law § 28-9.1-18(a) (firefighter unions do not have to process nonmember grievances); RI General Law § 28-9.2-18(a) (police unions do not have to process nonmember grievances); RI General Law § 29-9.3-7 (teachers unions can charge grievance fee to nonmembers). Michigan has not done so in the past and advocates of this policy did not convince Michigan's Legislature to do so in 2023 PA 9.

TPOAM contends there is currently express legislative authority and cites MCL 423.210(3)(c) as that legislative permission. 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.[24] 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.[25]

This leads to TPOAM's second error. Section 10(3)(c) of PERA 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.

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[24] 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.

[25] 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.

C. The United States Supreme Court Has Already Determined That Requiring a Union to Process Grievances on Behalf of Non-paying Nonmembers does 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.[26] The core of TPOAM's argument relies on its First Amendment right to not associate with nonmembers. This argument must fail, as it been expressly addressed and rejected by the United States Supreme Court.

TPOAM makes an argument substantially similar to one 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

[26] Further, TPOAM recasts as a First Amendment claim the 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.

All of TPOAM's arguments seeking to avoid this Court's clear holding that nonmember fees require clear legislative authorization fail.

RELIEF REQUESTED

For the reasons stated above, this Court should hold that the Court of Appeals did not err in holding that fees for grievance fees are impermissible under PERA.

Respectfully Submitted,

/s/ Patrick J. Wright
Patrick J. Wright (P54052)
Stephen A. Delie (P80209)
Attorney for Amicus Curiae
Mackinac Center for Public Policy

MCR 7.212(B)(3) word count: 11,300

April 18, 2023

Attachment 1: 1965 PA 379

A roll call of its members on any question shall be entered on the journal at the request of any member. It shall provide the manner of nominating the candidates for the first elective officers provided in the proposed charter. It shall fix the date of the first city election, and do and provide all other things necessary for making such nominations and holding such election. Such election may be held at a special election or on the same date as a general election. It shall publish such proposed charter in 1 or more newspapers published in said proposed city, at least once, not less than 2 weeks and not more than 4 weeks preceding said election, together with a notice of said election, and that on the date fixed therefor the question of adopting such proposed charter will be voted on, and that the elective officers provided for therein will be elected on the same date. Notice of such election shall also be posted in at least 10 public places within the proposed city not less than 10 days prior to such election. Said commission shall provide for 1 or more polling places for said election, and give like notice of their location, and shall appoint the inspectors of said election, and a canvassing board of 3 electors to canvass the votes at such election.

This act is ordered to take immediate effect.

Approved July 23, 1965.

[No. 379.]

AN ACT to amend the title and sections 1, 3, 6 and 7 of Act No. 336 of the Public Acts of 1947, entitled "An act to prohibit strikes by certain public employees; to provide certain disciplinary action with respect thereto; to provide for the mediation of grievances; and to prescribe penalties for the violation of the provisions of this act," being sections 423.201, 423.203, 423.206 and 423.207 of the Compiled Laws of 1948; and to add 8 new sections to stand as sections 9 to 16; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

Title and sections amended and added.

Section 1. The title and sections 1, 3, 6 and 7 of Act No. 336 of the Public Acts of 1947, being sections 423.201, 423.203, 423.206 and 423.207 of the Compiled Laws of 1948, are hereby amended and 8 new sections are added to stand as sections 9 to 16, the amended title and amended and added sections to read as follows:

TITLE

An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; and to prescribe means of enforcement and penalties for the violation of the provisions of this act.

423.201 Strike defined; rights of public employees. [M.S.A. 17.455(1)]

Sec. 1. As used in this act the word "strike" shall mean the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment. Nothing contained in this act shall be construed to limit, impair or affect the right of any public employee to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment.

423.203 Public employee; persons in authority approving or consenting to strike prohibited; participating in submittal of grievance. [M.S.A. 17.455(3)]

Sec. 3. No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike by public employees, and such person shall not authorize, approve or consent to such strike, nor shall any such person discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance in accordance with the provisions of section 7.

423.206 Public employee; conduct deemed strike; proceeding to determine violation of act; time; decision, review. [M.S.A. 17.455(6)]

Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record.

423.207 Mediation of grievances; petition, signing, filing; labor mediation board, powers and duties. [M.S.A. 17.455(7)]

Sec. 7. Upon the request of the collective bargaining representative defined in section 11, or if no representative has been designated or selected, upon the request of a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board, or upon request of any public employer of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievances set forth in said petition or notice, and for the purposes of mediating such grievances, the labor mediation board shall exercise the powers and authority conferred upon said board by sections 10 and 11 of Act No. 176 of the Public Acts of 1939.

423.209 Public employees forming or joining labor organizations; collective bargaining. [M.S.A. 17.455(9)]

Sec. 9. 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.

423.210 Interference, coercion or discrimination by employer; refusal to bargain collectively. [M.S.A. 17.455(10)]

Sec. 10. 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 work-

ing 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; (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.

423.211 Public employees; designation of bargaining representatives; grievances of individual employees. [M.S.A. 17.455(11)]

Sec. 11. 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.

423.212 Petition; claim for recognition as collective bargaining agent; investigation; hearing; election; stipulation for consent election. [M.S.A. 17.455(12)]

Sec. 12. Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the board:

(a) By a public employee or group of public employees, or an individual or labor organization acting in their behalf, alleging that 30% or more of the public employees within a unit claimed to be appropriate for such purpose wish to be represented for collective bargaining and that their public employer declines to recognize their representative as the representative defined in section 11, or assert that the individual or labor organization, which has been certified or is being currently recognized by their public employer as the bargaining representative, is no longer a representative as defined in section 11; or

(b) By a public employer or his representative alleging that 1 or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 11;

The board shall investigate the petition and, if it has reasonable cause to believe that a question of representation exists, shall provide an appropriate hearing after due notice. If the board finds upon the record of the hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the rules and regulations of the board.

423.213 Decision as to bargaining unit; fire-fighting personnel. [M.S.A. 17.455(13)]

Sec. 13. The board shall decide in each case, in order to insure public employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining as provided in section 9e of Act No. 176 of the Public Acts of 1939: Provided, That in any fire department, or any department in whole or part engaged in, or having the responsibility of, fire fighting, no person subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator, shall be deemed to be a supervisor.

423.214 Elections; time of holding; eligibility and rules; effect of valid, existing collective bargaining unit. [M.S.A. 17.455(14)]

Sec. 14. An election shall not be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election has been held. The board shall determine who is eligible to vote in the election and shall establish rules govern-

ing the election. In an election involving more than 2 choices, where none of the choices on the ballot receives a majority vote, a runoff election shall be conducted between the 2 choices receiving the 2 largest numbers of valid votes cast in the election. No election shall be directed in any bargaining unit or subdivision thereof where there is in force and effect a valid collective bargaining agreement which was not prematurely extended and which is of fixed duration: Provided, however, No collective bargaining agreement shall bar an election upon the petition of persons not parties thereto where more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

423.215 Collective bargaining; duties of employer and employees' representative; subjects and limitations. [M.S.A. 17.455(15)]

Sec. 15. A public employer shall bargain collectively with the representatives of its employees as defined in section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

423.216 Unfair labor practices; remedies and procedure. [M.S.A. 17.455(16)]

Sec. 16. Violations of the provisions of section 10 shall be deemed to be unfair labor practices remediable by the labor mediation board in the following manner:

(a) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board, or any agent designated by the board for such purposes, may issue and cause to be served upon the person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agent, at a place therein fixed, not less than 5 days after the serving of the complaint. No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom the charge is made, unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces, in which event the 6 month period shall be computed from the day of his discharge. Any complaint may be amended by the member or agent conducting the hearing or the board, at any time prior to the issuance of an order based thereon. The person upon whom the complaint is served may file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member or agent conducting the hearing or the board, any other person may be allowed to intervene in the proceeding and to present testimony. Any proceeding shall be conducted in accordance with the provisions of section 5 of Act No. 197 of the Public Acts of 1952, as amended, being section 24.105 of the Compiled Laws of 1948.

(b) The testimony taken by the member, agent or the board shall be reduced to writing and filed with the board. Thereafter the board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the board is of the opinion that any person named in the complaint has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order. If upon the preponderance of the testimony taken the board is not of the opinion that the person named in the complaint has engaged in or is engaging in the unfair labor practice, then the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of

choices, where none of the choices shall be conducted between the 2 in the election. No election shall where there is in force and effect prematurely extended and which is bargaining agreement shall bar an o where more than 3 years have newal, whichever was later.

er and employees' representa- (15)]

y with the representatives of its o make and enter into collective purposes of this section, to bar- ion of the employer and the rep- s and confer in good faith with f employment, or the negotiation the execution of a written con- t reached if requested by either o agree to a proposal or require

edure. [M.S.A. 17.455(16)]

all be deemed to be unfair labor following manner:

ged in or is engaging in any such by the board for such purposes, plaint stating the charges in that d or a member thereof, or before lays after the serving of the com- r practice occurring more than 6 nd the service of a copy thereof he person aggrieved thereby was he armed forces, in which event discharge. Any complaint may ring or the board, at any time rson upon whom the complaint plaint and to appear in person or n the complaint. In the discre- e board, any other person may estimony. Any proceeding shall 5 of Act No. 197 of the Public piled Laws of 1948.

board shall be reduced to writ- tice may take further testimony nony taken the board is of the d in or is engaging in the unfair ll issue and cause to be served from the unfair labor practice, of employees with or without order may further require the tent to which he has complied ny taken the board is not of engaged in or is engaging in lings of fact and shall issue an ll require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if the individual was suspended or discharged for cause. If the evidence is presented before a member of the board, or before examiners thereof, the member, or examiners shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the board, and if no exceptions are filed within 20 days after service thereof upon the parties, or within such further period as the board may authorize, the recommended order shall become the order of the board and become effective as prescribed in the order.

(c) Until the record in a case has been filed in a court, the board at any time, upon reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any finding or order made or issued by it.

(d) The board may petition for the enforcement of the order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings. Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction of the proceeding and shall grant such temporary or permanent relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the board. No objection that has not been urged before the board, its member or agent, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the board with respect to questions of fact if supported by competent, material and substantial evidence on the record considered as a whole shall be conclusive. If either party applies to the court for leave to present additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to present it in the hearing before the board, its member or agent, the court may order the additional evidence to be taken before the board, its member or agent, and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file the modifying or new findings, which findings with respect to questions of fact if supported by competent, material and substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the supreme court in accordance with the general court rules.

(e) Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeals by filing in the court a complaint praying that the order of the board be modified or set aside, with copy of the complaint filed on the board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the board. Upon the filing of the complaint, the court shall proceed in the same manner as in the case of an application by the board under subsection (e), and shall grant to the board such temporary relief or restraining order as it deems just and proper, enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the board. The findings of the board with respect to questions of fact if supported by competent, material and substantial evidence on the record considered as a whole shall be conclusive.

(f) The commencement of proceedings under subsections (e) or (f) shall not, unless specifically ordered by the court, operate as a stay of the board's order.

(g) Complaints filed under this act shall be heard expeditiously by the court to which presented, and for good cause shown shall take precedence over all other civil matters except earlier matters of the same character.

(h) The board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any circuit court within any circuit where the unfair labor practice in question is alleged to have occurred or where such person resides or exercises or may exercise its governmental authority, for appropriate temporary relief or restraining order

in accordance with the general court rules, and the court shall have jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper.

(i) For the purpose of all hearings and investigations, which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it under this section, the provisions of section 11 shall be applicable, except that subpoenas may issue as provided in section 11 without regard to whether mediation shall have been undertaken.

(j) The labor relations and mediation functions of this act shall be separately administered by the board.

Repeals.

Section 2. Sections 4, 5 and 8 of Act No. 336 of the Public Acts of 1947, being sections 423.204, 423.205 and 423.208 of the Compiled Laws of 1948, are repealed.

This act is ordered to take immediate effect.

Approved July 23, 1965.

[No. 380.]

AN ACT to organize the executive and administrative agencies of state government; to establish principal departments and department heads; to define the powers and duties of the principal departments and their governing agents; to allocate executive and administrative powers, duties, functions, and services among the principal departments; to provide for a method for the gradual implementation of the provisions of this act and for the transfer of existing funds and appropriations of the principal departments herein created and established.

The People of the State of Michigan enact:

CHAPTER 1.

16.101 Executive organization act of 1965; short title. [M.S.A. 3.29(1)]

Sec. 1. This act shall be known and may be cited as the "Executive organization act of 1965."

16.102 Head of department; defined. [M.S.A. 3.29(2)]

Sec. 2. Whenever the term "head of the department" is used it shall mean the head of one of the principal departments created by this act.

16.103 Types of transfers; agencies not enumerated; continuation. [M.S.A. 3.29(3)]

Sec. 3. (a) Under this act, a type I transfer means the transferring intact of an existing department, board, commission or agency to a principal department established by this act. When any board, commission, or other agency is transferred to a principal department under a type I transfer, that board, commission or agency shall be administered under the supervision of that principal department. Any board, commission or other agency granted a type I transfer shall exercise its prescribed statutory powers, duties and functions of rule-making, licensing and registration including the prescription of rules, rates, regulations and standards, and adjudication independently of the head of the department. Under a type I transfer all budgeting, procurement and related management functions of any transferred board, agency or commission shall be performed under the direction and supervision of the head of the principal department.

(b) Under this act, a type II transfer means transferring of an existing department, board, commission or agency to a principal department established by this act. Any department, board, commission or agency assigned to a type II transfer under this act shall have all its statutory authority, powers, duties and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and procurement, transferred to that principal department.

Attachment 2: 1973 PA 25

therefor; and to repeal certain acts and all other acts inconsistent herewith," being section 168.368 of the Compiled Laws of 1970; and to add sections 472a and 812.

The People of the State of Michigan enact:

Sections amended and added; Michigan election law.

Section 1. Section 368 of Act No. 116 of the Public Acts of 1954, being section 168.368 of the Compiled Laws of 1970, is amended and sections 472a and 812 are added, to read as follows:

168.368 Events creating vacancy in township offices. [M.S.A. 6.1368]

Sec. 368. The township offices become vacant upon the happening of any of the following events: Death of the incumbent; his resignation; his removal from office for cause; his ceasing to be a resident of the township where his office is located; his conviction of an infamous crime, or of an offense involving the violation of his oath of office; the decision of a competent tribunal declaring his election or appointment void, habitual drunkenness; his refusal or neglect to take and subscribe to the oath as provided in section 2 of article 16 of the state constitution and deposit the same in the manner and within the time prescribed by law; his refusal or neglect to give bond in the amount and manner and within the time prescribed by law; or the failure of the office to be filled at an election which is scheduled for the purpose of filling the office.

168.472a Presumption as to signature on petition. [M.S.A. 6.1472(1)]

Sec. 472a. It shall be rebuttably presumed that the signature on a petition which proposes an amendment to the constitution or is to initiate legislation, is stale and void if it was made more than 90 days before the petition was filed with the office of the secretary of state.

168.812 Sending election results to secretary of state; obtaining election results. [M.S.A. 6.1812]

Sec. 812. At the time the county canvass is forwarded a county clerk shall send to the secretary of state the results of the election in each precinct in his county for each office and proposal which is being voted upon on a statewide basis, for each congressional and legislative office, and for the judicial offices of the supreme court and court of appeals. A person may obtain the election results from the secretary of state upon payment of the reproduction costs.

This act is ordered to take immediate effect.
Approved June 12, 1973.

[No. 25.]

AN ACT to amend sections 1, 7 and 10 of Act No. 336 of the Public Acts of 1947, entitled as amended "An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; and to prescribe means of enforcement and penalties for the violation of the provisions of this act," being sections 423.201, 423.207 and 423.210 of the Compiled Laws of 1970.

The People of the State of Michigan enact:

Sections amended; strikes by public employees.

Section 1. Sections 1, 7 and 10 of Act No. 336 of the Public Acts of 1947, being sections 423.201, 423.207 and 423.210 of the Compiled Laws of 1970, are amended to read as follows:

423.201 Definitions; rights of public employees. [M.S.A. 17.455(1)]

Sec. 1. As used in this act:

(a) "Strike" means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, or compensation, or the rights, privileges, or obligations of employment. This act shall not be construed to limit, impair, or affect the right of a public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.

(b) "Board", "commission", or "labor mediation board" means the employment relations commission as created in section 3 of Act No. 176 of the Public Acts of 1939, as amended, being section 423.3 of the Michigan Compiled Laws.

423.207 Request for mediation of grievances; powers of labor mediation board; notification on status of negotiations; appointment of mediator. [M.S.A. 17.455(7)]

Sec. 7. (1) Upon the request of the collective bargaining representative defined in section 11 or, if no representative has been designated or selected, upon the request of a majority of any given group of public employees evidenced by a petition signed by the majority and delivered to the labor mediation board, or upon request of any public employer of the employees, the labor mediation board forthwith shall mediate the grievances set forth in the petition or notice, and for the purposes of mediating the grievances, the labor mediation board shall exercise the powers and authority conferred upon the board by sections 10 and 11 of Act No. 176 of the Public Acts of 1939, as amended, being sections 423.10 and 423.11 of the Michigan Compiled Laws.

(2) At least 60 days before the expiration date of a collective bargaining agreement, the parties shall notify the board of the status of negotiations. If the dispute remains unresolved 30 days after the notification on the status of negotiations and a request for mediation is not received, the commission shall appoint a mediator.

423.210 Prohibited conduct; service fee. [M.S.A. 17.455(10)]

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 subdivision 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 (ii) a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances; (b) to cause or attempt to cause a public employer to discriminate against a public employee in violation of subdivision (c) of subsection (1); or (c) to refuse to bargain collectively with a public employer, provided it is the representative of the public employer's employees subject to section 11.

This act is ordered to take immediate effect.
Approved June 14, 1973.

[No. 26.]

AN ACT to amend section 2 of Act No. 238 of the Public Acts of 1923, entitled as amended "An act authorizing the formation of corporations for the purpose of generating, manufacturing, producing, gathering, storing, transmitting, distributing, transforming, selling and supplying electric energy or gas, either artificial or natural, or both electric energy and gas, to the public generally, or to public utilities or natural gas companies, and providing for and giving to such corporations and also to corporations heretofore lawfully organized, among other things, for such purposes; to corporations heretofore lawfully organized, or that may hereafter be lawfully organized and duly authorized to carry on the electric or gas business as a public utility in the state of Michigan; and to foreign corporations heretofore lawfully organized or that may hereafter be lawfully organized, among other things, for such purposes, and duly authorized to carry on business in the state of Michigan, the right to condemn private property for the uses provided for herein," being section 486.252 of the Compiled Laws of 1970.

Attachment 3: 2012 PA 349

SENATE SUBSTITUTE FOR

HOUSE BILL NO. 4003

A bill to amend 1947 PA 336, entitled

"An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; to require certain provisions in collective bargaining agreements; to prescribe means of enforcement and penalties for the violation of the provisions of this act; and to make appropriations,"

by amending sections 1, 9, 10, 14, and 15 (MCL 423.201, 423.209, 423.210, 423.214, and 423.215), sections 1 and 14 as amended by 2012 PA 76, section 10 as amended by 2012 PA 53, and section 15 as amended by 2012 PA 45.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. (1) As used in this act:

(a) "Bargaining representative" means a labor organization recognized by an employer or certified by the commission as the sole and exclusive bargaining representative of certain employees of the employer.

(b) "Commission" means the employment relations commission created in section 3 of 1939 PA 176, MCL 423.3.

(c) "Intermediate school district" means that term as defined in section 4 of the revised school code, 1976 PA 451, MCL 380.4.

(d) "Lockout" means the temporary withholding of work from a group of employees by ~~means of~~ shutting down the operation of the employer ~~in order~~ to bring pressure upon the affected employees or the bargaining representative, or both, to accept the employer's terms of settlement of a labor dispute.

(e) "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:

(*i*) A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee. This provision shall not be superseded by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these.

(*ii*) If, by April 9, 2000, a public school employer that is the chief executive officer serving in a school district of the first class under part 5A of the revised school code, 1976 PA 451, MCL

380.371 to 380.376, issues an order determining that it is in the best interests of the school district, then a public school administrator employed by that school district is not a public employee for purposes of this act. The exception under this subparagraph applies to public school administrators employed by that school district after the date of the order described in this subparagraph whether or not the chief executive officer remains in place in the school district. This exception does not prohibit the chief executive officer or board of a school district of the first class or its designee from having informal meetings with public school administrators to discuss wages and working conditions.

(*iii*) An individual serving as a graduate student research assistant or in an equivalent position and any individual whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective bargaining rights under this act.

(f) "Public school academy" means a public school academy or strict discipline academy organized under the revised school code, 1976 PA 451, MCL 380.1 to 380.1852.

(g) "Public school administrator" means a superintendent, assistant superintendent, chief business official, principal, or assistant principal employed by a school district, intermediate school district, or public school academy.

(h) "Public school employer" means a public employer that is

the board of a school district, intermediate school district, or public school academy; is the chief executive officer of a school district in which a school reform board is in place under part 5A of the revised school code, 1976 PA 451, MCL 380.371 to 380.376; or is the governing board of a joint endeavor or consortium consisting of any combination of school districts, intermediate school districts, or public school academies.

(i) "School district" means that term as defined in section 6 of the revised school code, 1976 PA 451, MCL 380.6, or a local act school district as defined in section 5 of the revised school code, 1976 PA 451, MCL 380.5.

(j) "Strike" means the concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment. For employees of a public school employer, strike also includes an action described in this subdivision that is taken for the purpose of protesting or responding to an act alleged or determined to be an unfair labor practice committed by the public school employer.

(2) This act does not limit, impair, or affect the right of a public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment as long as the expression or communication does not interfere with

the full, faithful, and proper performance of the duties of employment.

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).

(2) NO PERSON SHALL BY FORCE, INTIMIDATION, OR UNLAWFUL THREATS COMPEL OR ATTEMPT TO COMPEL ANY PUBLIC EMPLOYEE TO DO ANY OF THE FOLLOWING:

(A) BECOME OR REMAIN A MEMBER OF A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE OR OTHERWISE AFFILIATE WITH OR FINANCIALLY SUPPORT A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE.

(B) REFRAIN FROM ENGAGING IN EMPLOYMENT OR REFRAIN FROM JOINING A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE OR OTHERWISE AFFILIATING WITH OR FINANCIALLY SUPPORTING A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE.

(C) PAY TO ANY CHARITABLE ORGANIZATION OR THIRD PARTY AN AMOUNT THAT IS IN LIEU OF, EQUIVALENT TO, OR ANY PORTION OF DUES, FEES, ASSESSMENTS, OR OTHER CHARGES OR EXPENSES REQUIRED OF MEMBERS OF OR PUBLIC EMPLOYEES REPRESENTED BY A LABOR ORGANIZATION OR

BARGAINING REPRESENTATIVE.

(3) A PERSON WHO VIOLATES SUBSECTION (2) IS LIABLE FOR A CIVIL FINE OF NOT MORE THAN $500.00. A CIVIL FINE RECOVERED UNDER THIS SECTION SHALL BE SUBMITTED TO THE STATE TREASURER FOR DEPOSIT IN THE GENERAL FUND OF THIS STATE.

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.

(b) Initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization. A public school employer's use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization. However, a public school employer's collection of dues or service fees pursuant to a collective bargaining agreement that is in effect on ~~the effective date of the amendatory act that added this sentence~~ **MARCH 16, 2012** is not prohibited until the agreement expires or is terminated, extended, or renewed. A public employer may permit employees to confer with a labor organization during working hours without loss of time or pay.

(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.~~

(d) Discriminate against a public employee because he or she has given testimony or instituted proceedings under this act.

(e) Refuse to bargain collectively with the representatives of its public employees, subject to the provisions of section 11.

~~(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.

(b) Restrain or coerce a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

(c) Cause or attempt to cause a public employer to

discriminate against a public employee in violation of subsection (1)(c).

(d) Refuse to bargain collectively with a public employer, provided it is the representative of the public employer's employees subject to section 11.

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

(A) REFRAIN OR RESIGN FROM MEMBERSHIP IN, VOLUNTARY AFFILIATION WITH, OR VOLUNTARY FINANCIAL SUPPORT OF A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE.

(B) BECOME OR REMAIN A MEMBER OF A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE.

(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.

(D) PAY TO ANY CHARITABLE ORGANIZATION OR THIRD PARTY ANY AMOUNT THAT IS IN LIEU OF, EQUIVALENT TO, OR ANY PORTION OF DUES, FEES, ASSESSMENTS, OR OTHER CHARGES OR EXPENSES REQUIRED OF MEMBERS OF OR PUBLIC EMPLOYEES REPRESENTED BY A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE.

(4) THE APPLICATION OF SUBSECTION (3) IS SUBJECT TO THE FOLLOWING:

(A) SUBSECTION (3) DOES NOT APPLY TO ANY OF THE FOLLOWING:

(*i*) A PUBLIC POLICE OR FIRE DEPARTMENT EMPLOYEE OR ANY PERSON WHO SEEKS TO BECOME EMPLOYED AS A PUBLIC POLICE OR FIRE DEPARTMENT EMPLOYEE AS THAT TERM IS DEFINED UNDER SECTION 2 OF 1969 PA 312,

MCL 423.232.

(*ii*) A STATE POLICE TROOPER OR SERGEANT WHO IS GRANTED RIGHTS UNDER SECTION 5 OF ARTICLE XI OF THE STATE CONSTITUTION OF 1963 OR ANY INDIVIDUAL WHO SEEKS TO BECOME EMPLOYED AS A STATE POLICE TROOPER OR SERGEANT.

(B) ANY PERSON DESCRIBED IN SUBDIVISION (A), OR A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE REPRESENTING PERSONS DESCRIBED IN SUBDIVISION (A) AND A PUBLIC EMPLOYER OR THIS STATE MAY AGREE THAT ALL EMPLOYEES IN THE BARGAINING UNIT SHALL SHARE FAIRLY IN THE FINANCIAL SUPPORT OF THE LABOR ORGANIZATION OR THEIR EXCLUSIVE BARGAINING REPRESENTATIVE BY PAYING A FEE TO THE LABOR ORGANIZATION OR EXCLUSIVE BARGAINING REPRESENTATIVE THAT MAY BE EQUIVALENT TO THE AMOUNT OF DUES UNIFORMLY REQUIRED OF MEMBERS OF THE LABOR ORGANIZATION OR EXCLUSIVE BARGAINING REPRESENTATIVE. SECTION 9(2) SHALL NOT BE CONSTRUED TO INTERFERE WITH THE RIGHT OF A PUBLIC EMPLOYER OR THIS STATE AND A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE TO ENTER INTO OR LAWFULLY ADMINISTER SUCH AN AGREEMENT AS IT RELATES TO THE EMPLOYEES OR PERSONS DESCRIBED IN SUBDIVISION (A).

(C) IF ANY OF THE EXCLUSIONS IN SUBDIVISION (A)(*i*) OR (*ii*) ARE FOUND TO BE INVALID BY A COURT, THE FOLLOWING APPLY:

(*i*) THE INDIVIDUALS DESCRIBED IN THE EXCLUSION FOUND TO BE INVALID SHALL NO LONGER BE EXCEPTED FROM THE APPLICATION OF SUBSECTION (3).

(*ii*) SUBDIVISION (B) DOES NOT APPLY TO INDIVIDUALS DESCRIBED IN THE INVALID EXCLUSION.

(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. THIS SUBSECTION APPLIES ONLY TO AN AGREEMENT, CONTRACT, UNDERSTANDING, OR PRACTICE THAT TAKES EFFECT OR IS EXTENDED OR RENEWED AFTER THE EFFECTIVE DATE OF THE AMENDATORY ACT THAT ADDED THIS SUBSECTION.

(6) THE COURT OF APPEALS HAS EXCLUSIVE ORIGINAL JURISDICTION OVER ANY ACTION CHALLENGING THE VALIDITY OF SUBSECTION (3), (4), OR (5). THE COURT OF APPEALS SHALL HEAR THE ACTION IN AN EXPEDITED MANNER.

(7) FOR FISCAL YEAR 2012-2013, $1,000,000.00 IS APPROPRIATED TO THE DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS TO BE EXPENDED TO DO ALL OF THE FOLLOWING REGARDING THE AMENDATORY ACT THAT ADDED THIS SUBSECTION:

(A) RESPOND TO PUBLIC INQUIRIES REGARDING THE AMENDATORY ACT.

(B) PROVIDE THE COMMISSION WITH SUFFICIENT STAFF AND OTHER RESOURCES TO IMPLEMENT THE AMENDATORY ACT.

(C) INFORM PUBLIC EMPLOYERS, PUBLIC EMPLOYEES, AND LABOR ORGANIZATIONS CONCERNING THEIR RIGHTS AND RESPONSIBILITIES UNDER THE AMENDATORY ACT.

(D) ANY OTHER PURPOSES THAT THE DIRECTOR OF THE DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS DETERMINES IN HIS OR HER DISCRETION ARE NECESSARY TO IMPLEMENT THE AMENDATORY ACT.

(8) A PERSON, PUBLIC EMPLOYER, OR LABOR ORGANIZATION THAT VIOLATES SUBSECTION (3) IS LIABLE FOR A CIVIL FINE OF NOT MORE THAN $500.00. A CIVIL FINE RECOVERED UNDER THIS SECTION SHALL BE SUBMITTED TO THE STATE TREASURER FOR DEPOSIT IN THE GENERAL FUND OF

THIS STATE.

(9) ~~(4)~~ By March 1 of each year, each exclusive bargaining representative that represents public employees in this state shall file with the commission an independent audit of all expenditures attributed to the costs of collective bargaining, contract administration, and grievance adjustment during the prior calendar year. The commission shall make the audits available to the public on the commission's website. For fiscal year 2011-2012, $100,000.00 is appropriated to the commission for the costs of implementing this subsection.

(10) EXCEPT FOR ACTIONS REQUIRED TO BE BROUGHT UNDER SUBSECTION (6), A PERSON WHO SUFFERS AN INJURY AS A RESULT OF A VIOLATION OR THREATENED VIOLATION OF SUBSECTION (3) MAY BRING A CIVIL ACTION FOR DAMAGES, INJUNCTIVE RELIEF, OR BOTH. IN ADDITION, A COURT SHALL AWARD COURT COSTS AND REASONABLE ATTORNEY FEES TO A PLAINTIFF WHO PREVAILS IN AN ACTION BROUGHT UNDER THIS SUBSECTION. REMEDIES PROVIDED IN THIS SUBSECTION ARE INDEPENDENT OF AND IN ADDITION TO OTHER PENALTIES AND REMEDIES PRESCRIBED BY THIS ACT.

Sec. 14. (1) An election shall not be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election was held. The commission shall determine who is eligible to vote in the election and shall promulgate rules governing the election. In an election involving more than 2 choices, if none of the choices on the ballot receives a majority vote, a runoff election shall be conducted between the 2 choices receiving the 2 largest numbers of valid votes cast in the election. An election shall not be directed in any bargaining unit

or subdivision ~~thereof where~~ **OF ANY BARGAINING UNIT IF** there is in force and effect a valid collective bargaining agreement that was not prematurely extended and that is of fixed duration. A collective bargaining agreement does not bar an election upon the petition of persons not parties ~~thereto~~ **TO THE COLLECTIVE BARGAINING AGREEMENT** if more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

(2) An election shall not be directed for, and the commission or a public employer shall not recognize, a bargaining unit of a public employer consisting of individuals who are not public employees. A bargaining unit that is formed or recognized in violation of this subsection is invalid and void.

Sec. 15. (1) A public employer shall bargain collectively with the representatives of its employees as described in section 11 and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession.

(2) A public school employer has the responsibility, authority, and right to manage and direct on behalf of the public

the operations and activities of the public schools under its control.

(3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:

(a) Who is or will be the policyholder of an employee group insurance benefit. This subdivision does not affect the duty to bargain with respect to types and levels of benefits and coverages for employee group insurance. A change or proposed change in a type or to a level of benefit, policy specification, or coverage for employee group insurance shall be bargained by the public school employer and the bargaining representative before the change may take effect.

(b) Establishment of the starting day for the school year and of the amount of pupil contact time required to receive full state school aid under section 1284 of the revised school code, 1976 PA 451, MCL 380.1284, and under section 101 of the state school aid act of 1979, 1979 PA 94, MCL 388.1701.

(c) The composition of school improvement committees established under section 1277 of the revised school code, 1976 PA 451, MCL 380.1277.

(d) The decision of whether or not to provide or allow interdistrict or intradistrict open enrollment opportunity in a school district or the selection of grade levels or schools in which to allow an open enrollment opportunity.

(e) The decision of whether or not to act as an authorizing body to grant a contract to organize and operate 1 or more public

school academies under the revised school code, 1976 PA 451, MCL 380.1 to 380.1852.

(f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.

(g) The use of volunteers in providing services at its schools.

(h) Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.

(i) Any compensation or additional work assignment intended to reimburse an employee for or allow an employee to recover any monetary penalty imposed under this act.

(j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.

(k) Decisions about the development, content, standards,

procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380.1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit.

(*l*) Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit.

(m) For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees

whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 (Ex Sess) PA 4, MCL 38.101.

(n) Decisions about the format, timing, or number of classroom observations conducted for the purposes of section 3a of article II of 1937 (Ex Sess) PA 4, MCL 38.83a, decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

(o) Decisions about the development, content, standards, procedures, adoption, and implementation of the method of compensation required under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions about how an employee performance evaluation is used to determine performance-based compensation under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions concerning the performance-based compensation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

(p) Decisions about the development, format, content, and procedures of the notification to parents and legal guardians required under section 1249a of the revised school code, 1976 PA 451, MCL 380.1249a.

(Q) ANY REQUIREMENT THAT WOULD VIOLATE SECTION 10(3).

(4) Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of

bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

(5) If a public school is placed in the state school reform/redesign school district or is placed under a chief executive officer under section 1280c of the revised school code, 1976 PA 451, MCL 380.1280c, then, for the purposes of collective bargaining under this act, the state school reform/redesign officer or the chief executive officer, as applicable, is the public school employer of the public school employees of that public school for as long as the public school is part of the state school reform/redesign school district or operated by the chief executive officer.

(6) A public school employer's collective bargaining duty under this act and a collective bargaining agreement entered into by a public school employer under this act are subject to all of the following:

(a) Any effect on collective bargaining and any modification of a collective bargaining agreement occurring under section 1280c of the revised school code, 1976 PA 451, MCL 380.1280c.

(b) For a public school in which the superintendent of public instruction implements 1 of the 4 school intervention models described in section 1280c of the revised school code, 1976 PA 451, MCL 380.1280c, if the school intervention model that is implemented affects collective bargaining or requires modification of a collective bargaining agreement, any effect on collective

bargaining and any modification of a collective bargaining agreement under that school intervention model.

(7) Each collective bargaining agreement entered into between a public employer and public employees under this act after March 16, 2011 shall include a provision that allows an emergency manager appointed under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531, to reject, modify, or terminate the collective bargaining agreement as provided in the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531. Provisions required by this subsection are prohibited subjects of bargaining under this act.

(8) Collective bargaining agreements under this act may be rejected, modified, or terminated pursuant to the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531. This act does not confer a right to bargain that would infringe on the exercise of powers under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531.

(9) A unit of local government that enters into a consent agreement under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531, is not subject to subsection (1) for the term of the consent agreement, as provided in the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531.

(10) If the charter of a city, village, or township with a population of 500,000 or more requires and specifies the method of

selection of a retirant member of the municipality's fire department, police department, or fire and police department pension or retirement board, the inclusion of the retirant member on the board and the method of selection of that retirant member are prohibited subjects of collective bargaining, and any provision in a collective bargaining agreement that purports to modify that charter requirement is void and of no effect.

(11) The following are prohibited subjects of bargaining and are at the sole discretion of the public employer:

(a) A decision as to whether or not the public employer will enter into an intergovernmental agreement to consolidate 1 or more functions or services, to jointly perform 1 or more functions or services, or to otherwise collaborate regarding 1 or more functions or services.

(b) The procedures for obtaining a contract for the transfer of functions or responsibilities under an agreement described in subdivision (a).

(c) The identities of any other parties to an agreement described in subdivision (a).

(12) Nothing in subsection (11) relieves a public employer of any duty established by law to collectively bargain with its employees as to the effect of a contract described in subsection (11)(a) on its employees.

Enacting section 1. If any part or parts of this act are found to be in conflict with the state constitution of 1963, the United States constitution, or federal law, this act shall be implemented to the maximum extent that the state constitution of 1963, the

United States constitution, and federal law permit. Any provision held invalid or inoperative shall be severable from the remaining portions of this act.

Attachment 4: 2012 PA 53

SENATE SUBSTITUTE FOR

HOUSE BILL NO. 4929

A bill to amend 1947 PA 336, entitled

"An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; to require certain provisions in collective bargaining agreements; and to prescribe means of enforcement and penalties for the violation of the provisions of this act,"

by amending the title and section 10 (MCL 423.210), the title as amended by 2011 PA 9.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

TITLE

An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of

elections; to declare and protect the rights and privileges of public employees; to require certain provisions in collective bargaining agreements; ~~and~~ to prescribe means of enforcement and penalties for the violation of the provisions of this act; **AND TO MAKE APPROPRIATIONS.**

Sec. 10. (1) ~~It shall be unlawful for a~~ **A** public employer or an officer or agent of a public employer **SHALL NOT DO ANY OF THE FOLLOWING:**

(a) ~~to interfere~~ **INTERFERE** with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9. ~~;~~

(b) ~~to initiate,~~ **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~~ **A PUBLIC SCHOOL EMPLOYER'S USE OF PUBLIC SCHOOL RESOURCES TO ASSIST A LABOR ORGANIZATION IN COLLECTING DUES OR SERVICE FEES FROM WAGES OF PUBLIC SCHOOL EMPLOYEES IS A PROHIBITED CONTRIBUTION TO THE ADMINISTRATION OF A LABOR ORGANIZATION. <<**

>>

HOWEVER, A PUBLIC SCHOOL EMPLOYER'S COLLECTION OF DUES OR SERVICE FEES PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT THAT IS IN EFFECT ON THE EFFECTIVE DATE OF THE AMENDATORY ACT THAT ADDED THIS SENTENCE IS NOT PROHIBITED UNTIL THE AGREEMENT EXPIRES OR IS TERMINATED, EXTENDED, OR RENEWED. A PUBLIC EMPLOYER MAY PERMIT employees to confer with ~~it~~ **A LABOR ORGANIZATION** during working hours without loss of time or pay. ~~;~~

(c) ~~to discriminate~~ **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~~ **HOWEVER**, this act or ~~in~~ any **OTHER** law of this state ~~shall~~ **DOES NOT** preclude a public employer from making an agreement with an exclusive bargaining representative as ~~defined~~ **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. ~~;~~

(d) ~~to discriminate~~ **DISCRIMINATE** against a public employee because he **OR SHE** has given testimony or instituted proceedings under this act. ~~; or~~

(e) ~~to refuse~~ **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~~ **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 ~~such~~ **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 ~~which~~ **THAT** may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

(3) ~~It shall be unlawful for a~~ **A** labor organization or its agents **SHALL NOT DO ANY OF THE FOLLOWING:**

(a) ~~to restrain or coerce: (i) public~~ **RESTRAIN OR COERCE PUBLIC** employees in the exercise of the rights guaranteed in section 9. ~~: Provided, That this~~ **THIS** subdivision ~~shall~~ **DOES** not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership. ~~therein; or (ii) a~~

(B) RESTRAIN OR COERCE A public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. ~~; (b) to cause~~

(C) CAUSE or attempt to cause a public employer to discriminate against a public employee in violation of ~~subdivision (c) of subsection (1); or (c) to refuse~~ **SUBSECTION (1)(C).**

(D) REFUSE to bargain collectively with a public employer, provided it is the representative of the public employer's employees subject to section 11.

(4) BY MARCH 1 OF EACH YEAR, EACH EXCLUSIVE BARGAINING REPRESENTATIVE THAT REPRESENTS PUBLIC EMPLOYEES IN THIS STATE SHALL FILE WITH THE COMMISSION AN INDEPENDENT AUDIT OF ALL EXPENDITURES ATTRIBUTED TO THE COSTS OF COLLECTIVE BARGAINING, CONTRACT ADMINISTRATION, AND GRIEVANCE ADJUSTMENT DURING THE PRIOR CALENDAR YEAR. THE COMMISSION SHALL MAKE THE AUDITS AVAILABLE TO THE PUBLIC ON THE COMMISSION'S WEBSITE. FOR FISCAL YEAR 2011-2012, $100,000.00 IS APPROPRIATED TO THE COMMISSION FOR THE COSTS OF IMPLEMENTING THIS SUBSECTION.

Attachment 5: 2023 PA 9

SUBSTITUTE FOR

HOUSE BILL NO. 4004

A bill to amend 1947 PA 336, entitled

"An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; to require certain provisions in collective bargaining agreements; to prescribe means of enforcement and penalties for the violation of the provisions of this act; and to make appropriations,"

by amending sections 9, 10, and 15 (MCL 423.209, 423.210, and 423.215), as amended by 2014 PA 414.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 9. ~~(1)~~ Public employees may ~~do any of the following:~~

~~(a) Organize~~ **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).~~

~~(2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:~~

~~(a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.~~

~~(b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.~~

~~(c) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.~~

~~(d) Pay the costs of an independent examiner verification as described in section 10(9).~~

~~(3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.~~

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.

(b) Initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization. A public school employer's use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization. However, a public school employer's collection of dues or service fees pursuant to a collective bargaining agreement that is in effect on March 16, 2012 is not prohibited until the agreement expires or is terminated, extended, or renewed. A public employer may permit employees to confer with a labor organization during working hours without loss of time or pay.

(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 other 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) Discriminate against a public employee because he or she has given testimony or instituted proceedings under this act.

(e) Refuse to bargain collectively with the representatives of its public employees, subject to section 11.

(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 other employees in the bargaining unit 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.

(3) ~~(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.

(b) Restrain or coerce a public employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

(c) Cause or attempt to cause a public employer to discriminate against a public employee in violation of subsection (1)(c).

(d) Refuse to bargain collectively with a public employer, ~~provided~~ **if** it is the representative of the public employer's employees, subject to section 11.

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

~~(a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.~~

~~(b) Become or remain a member of a labor organization or bargaining representative.~~

~~(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.~~

~~(d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.~~

~~(4) The application of subsection (3) is subject to the following:~~

~~(a) Subsection (3) does not apply to any of the following:~~

~~(*i*) A public police or fire department employee or any person who seeks to become employed as a public police or fire department employee as that term is defined under section 2 of 1969 PA 312, MCL 423.232.~~

~~(*ii*) A state police trooper or sergeant who is granted rights under section 5 of article XI of the state constitution of 1963 or any individual who seeks to become employed as a state police trooper or sergeant.~~

~~(b) Any person described in subdivision (a), or a labor organization or bargaining representative representing persons described in subdivision (a) and a public employer or this state may agree that all employees in the bargaining unit shall share fairly in the financial support of the labor organization or their exclusive bargaining representative by paying a fee to the labor organization or exclusive bargaining representative that may be equivalent to the amount of dues uniformly required of members of the labor organization or exclusive bargaining representative. Section 9(2) shall not be construed to interfere with the right of~~

~~a public employer or this state and a labor organization or bargaining representative to enter into or lawfully administer such an agreement as it relates to the employees or persons described in subdivision (a).~~

~~(c) If any of the exclusions in subdivision (a) (*i*) or (*ii*) are found to be invalid by a court, the following apply:~~

~~(*i*) The individuals described in the exclusion found to be invalid shall no longer be excepted from the application of subsection (3).~~

~~(*ii*) Subdivision (b) does not apply to individuals described in the invalid exclusion.~~

~~(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. This subsection applies only to an agreement, contract, understanding, or practice that takes effect or is extended or renewed after March 28, 2013.~~

~~(6) The court of appeals has exclusive original jurisdiction over any action challenging the validity of subsection (3), (4), or (5). The court of appeals shall hear the action in an expedited manner.~~

~~(7) For fiscal year 2012-2013, $1,000,000.00 is appropriated to the department of licensing and regulatory affairs to be expended to do all of the following regarding 2012 PA 349:~~

~~(a) Respond to public inquiries regarding 2012 PA 349.~~

~~(b) Provide the commission with sufficient staff and other resources to implement 2012 PA 349.~~

~~(c) Inform public employers, public employees, and labor organizations concerning their rights and responsibilities under~~

~~2012 PA 349.~~

~~(d) Any other purposes that the director of the department of licensing and regulatory affairs determines in his or her discretion are necessary to implement 2012 PA 349.~~

~~(8) A person, public employer, or labor organization that violates subsection (3) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.~~

(4) ~~(9)~~ By July 1 of each year, each exclusive bargaining representative that represents public employees in this state shall have an independent examiner verify the exclusive bargaining representative's calculation of all expenditures attributed to the costs of collective bargaining, contract administration, and grievance adjustment during the prior calendar year and shall file that verification with the commission. The commission shall make the exclusive bargaining representative's calculations available to the public on the commission's website. The exclusive bargaining representative shall also file a declaration identifying the local bargaining units that are represented. Local bargaining units identified in the declaration filed by the exclusive bargaining representative are not required to file a separate calculation of all expenditures attributed to the costs of collective bargaining, contract administration, and grievance adjustment. ~~For fiscal year 2011-2012, $100,000.00 is appropriated to the commission for the costs of implementing this subsection. For fiscal year 2014-2015, $100,000.00 is appropriated to the commission for the costs of implementing this subsection.~~

~~(10) Except for actions required to be brought under~~

~~subsection (6), a person who suffers an injury as a result of a violation or threatened violation of subsection (3) may bring a civil action for damages, injunctive relief, or both. In addition, a court shall award court costs and reasonable attorney fees to a plaintiff who prevails in an action brought under this subsection. Remedies provided in this subsection are independent of and in addition to other penalties and remedies prescribed by this act.~~

(5) A public employer and a bargaining representative may enter into a collective bargaining agreement that requires all public employees in the bargaining unit to share equally in the financial support of the bargaining representative. This act does not, and a law or policy of a local government must not, prohibit or limit an agreement that requires public employees in the bargaining unit, as a condition of continued employment, to pay to the bargaining representative membership dues or service fees. This subsection becomes effective immediately upon, and applies to the extent permitted by, either of the following:

(a) A decision or ruling by the United States Supreme Court that reverses or limits, in whole or in part, *Janus v AFSCME, Council 31*, ___US___; 138 S Ct 2448 (2018).

(b) The ratification of an amendment to the United States Constitution that restores the ability to require, as a condition of employment, a public employee who is not a member of a bargaining representative to pay, under any circumstances, fees, including agency fees, to the bargaining representative.

(6) For fiscal year 2022-2023, $1,000,000.00 is appropriated to the department of labor and economic opportunity to be expended to do all of the following regarding the 2023 amendatory act that added this sentence:

(a) Respond to public inquiries regarding the amendatory act.

(b) Provide the commission with sufficient staff and other resources to implement the amendatory act.

(c) Inform public employers, public employees, and bargaining representatives about changes to their rights and responsibilities under the amendatory act.

(d) Any other purposes that the director of the department of labor and economic opportunity determines in the director's sole discretion are necessary to implement the amendatory act.

Sec. 15. (1) A public employer shall bargain collectively with the representatives of its employees as described in section 11 and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession.

(2) A public school employer has the responsibility, authority, and right to manage and direct on behalf of the public the operations and activities of the public schools under its control.

(3) Collective bargaining between a public school employer and a bargaining representative of its employees ~~shall~~ **must** not include any of the following subjects:

(a) Who is or will be the policyholder of an employee group insurance benefit. This subdivision does not affect the duty to bargain with respect to types and levels of benefits and coverages for employee group insurance. A change or proposed change in a type or to a level of benefit, policy specification, or coverage for employee group insurance ~~shall~~ **must** be bargained by the public school employer and the bargaining representative before the change ~~may take~~ **takes** effect.

(b) Establishment of the starting day for the school year and of the amount of pupil contact time required to receive full state school aid under section 1284 of the revised school code, 1976 PA 451, MCL 380.1284, and under section 101 of the state school aid act of 1979, 1979 PA 94, MCL 388.1701.

(c) The composition of school improvement committees established under section 1277 of the revised school code, 1976 PA 451, MCL 380.1277.

(d) The decision of whether or not to provide or allow interdistrict or intradistrict open enrollment opportunity in a school district or the selection of grade levels or schools in which to allow an open enrollment opportunity.

(e) The decision of whether or not to act as an authorizing body to grant a contract to organize and operate 1 or more public school academies under the revised school code, 1976 PA 451, MCL 380.1 to 380.1852.

(f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; or the identity of the third party; or the impact of the contract for

noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.

(g) The use of volunteers in providing services at its schools.

(h) Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.

(i) Any compensation or additional work assignment intended to reimburse an employee for or allow an employee to recover any monetary penalty imposed under this act.

(j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.

(k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA

451, MCL 380.1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit.

(*l*) Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system adopted under section 1249 of the revised school code, 1976 PA 451, MCL 380.1249, or under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit.

(m) For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. For public employees whose employment is regulated by 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191, a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard provided under section 1 of article IV of 1937 (Ex Sess) PA 4, MCL 38.101.

(n) Decisions about the format, timing, or number of classroom observations conducted for the purposes of section 3a of article II of 1937 (Ex Sess) PA 4, MCL 38.83a, decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

(o) Decisions about the development, content, standards, procedures, adoption, and implementation of the method of compensation required under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions about how an employee performance evaluation is used to determine performance-based compensation under section 1250 of the revised school code, 1976 PA 451, MCL 380.1250, decisions concerning the performance-based compensation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

(p) Decisions about the development, format, content, and procedures of the notification to parents and legal guardians required under section 1249a of the revised school code, 1976 PA 451, MCL 380.1249a.

~~(q) Any requirement that would violate section 10(3).~~

(4) Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

~~(5) If a public school is placed in the state school reform/redesign school district or is placed under a chief executive officer under section 1280c of the revised school code, 1976 PA 451, MCL 380.1280c, then, for the purposes of collective bargaining under this act, the state school reform/redesign officer or the chief executive officer, as applicable, is the public school employer of the public school employees of that public school for as long as the public school is part of the state school reform/redesign school district or operated by the chief executive~~

~~officer.~~

~~(6) A public school employer's collective bargaining duty under this act and a collective bargaining agreement entered into by a public school employer under this act are subject to all of the following:~~

~~(a) Any effect on collective bargaining and any modification of a collective bargaining agreement occurring under section 1280c of the revised school code, 1976 PA 451, MCL 380.1280c.~~

~~(b) For a public school in which the superintendent of public instruction implements 1 of the 4 school intervention models described in section 1280c of the revised school code, 1976 PA 451, MCL 380.1280c, if the school intervention model that is implemented affects collective bargaining or requires modification of a collective bargaining agreement, any effect on collective bargaining and any modification of a collective bargaining agreement under that school intervention model.~~

(5) ~~(7)~~ Each collective bargaining agreement entered into between a public employer and public employees under this act on or after March 28, 2013 ~~shall~~ **must** include a provision that allows an emergency manager appointed under the local financial stability and choice act, 2012 PA 436, MCL 141.1541 to 141.1575, to reject, modify, or terminate the collective bargaining agreement as provided in the local financial stability and choice act, 2012 PA 436, MCL 141.1541 to 141.1575. Provisions required by this subsection are prohibited subjects of bargaining under this act.

(6) ~~(8)~~ Collective bargaining agreements under this act may be rejected, modified, or terminated pursuant to the local financial stability and choice act, 2012 PA 436, MCL 141.1541 to 141.1575. This act does not confer a right to bargain that would infringe on,

the exercise of powers under the local financial stability and choice act, 2012 PA 436, MCL 141.1541 to 141.1575.

(7) ~~(9)~~ A unit of local government that enters into a consent agreement under the local financial stability and choice act, 2012 PA 436, MCL 141.1541 to 141.1575, is not subject to subsection (1) for the term of the consent agreement, as provided in the local financial stability and choice act, 2012 PA 436, MCL 141.1541 to 141.1575.

(8) ~~(10)~~ If the charter of a city, village, or township with a population of 500,000 or more requires and specifies the method of selection of a retirant member of the municipality's fire department, police department, or fire and police department pension or retirement board, the inclusion of the retirant member on the board and the method of selection of that retirant member are prohibited subjects of collective bargaining, and any provision in a collective bargaining agreement that purports to modify that charter requirement is void and of no effect.

(9) ~~(11)~~ The following are prohibited subjects of bargaining and are at the sole discretion of the public employer:

(a) A decision as to whether or not the public employer will enter into an intergovernmental agreement to consolidate 1 or more functions or services, to jointly perform 1 or more functions or services, or to otherwise collaborate regarding 1 or more functions or services.

(b) The procedures for obtaining a contract for the transfer of functions or responsibilities under an agreement described in subdivision (a).

(c) The identities of any other parties to an agreement described in subdivision (a).

(10) ~~(12)~~ Subsection ~~(11)~~ **(9)** does not relieve a public employer of any duty established by law to collectively bargain with its employees as to the effect of a contract described in subsection ~~(11)(a)~~ **(9)(a)** on its employees.

(11) ~~(13)~~ An agreement with a collective bargaining unit ~~shall~~ **must** not require a public employer to pay the costs of an independent examiner verification described in section ~~10(9).~~**10(4).**

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.