STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
Wilder, PJ, O'Connell, and Whitbeck, JJ

MICHIGAN EDUCATION ASSOCIATION,

Plaintiff-Appellant,

v

TERRI LYNN LAND, MICHIGAN SECRETARY OF STATE,

Defendant-Appellee.
_____/

Supreme Court No. 137451

Court of Appeals No. 280792

Ingham County Circuit
No. 06-1537-AA

BRIEF OF AMICUS CURIAE
MACKINAC CENTER FOR PUBLIC POLICY

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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JURISDICTIONAL STATEMENT

Amicus curiae Mackinac Center for Public Policy does not contest jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

I. After the Court of Appeals ruling prohibiting school districts from administering payroll-deduction plans for the benefit of union political accounts, the Michigan Education Association (MEA) members can still contribute to the union's "political action committee"/separate segregated fund by mailing in a donation. Given that an easy method of political participation remains possible, can the MEA meet the requirements of MCR 7.302(B)?

Plaintiff-Appellant Michigan Education Association says: Yes

Defendant-Appellee Michigan Secretary of State says: No

Amicus curiae Mackinac Center for Public Policy says: No

II. Should MCL 169.257 be read in accord with its plain language, which would prevent public bodies from administering payroll-deduction plans for the benefit of a political fund?

Plaintiff-Appellant Michigan Education Association says: No

Defendant-Appellee Michigan Secretary of State says: Yes

Amicus curiae Mackinac Center for Public Policy says: Yes

III. Should equitable estoppel prevent current or future enforcement of the correct interpretation of MCL 169.257?

Plaintiff-Appellant Michigan Education Association says: Yes

Defendant-Appellee Michigan Secretary of State says: No

Amicus curiae Mackinac Center for Public Policy says: No

IV. Do either of the recent United States Supreme Court cases *Ysursa v Pocatello Education Association*, ___ US ___; 129 SCt 1093 (2009) and *Citizens United v Federal Election Commission*, 588 US ___; 130 SCt 876 (2010) prevent a holding that MCL 169.257 prohibits school districts from administering payroll-deduction plans for the benefit of union political accounts?

Plaintiff-Appellant Michigan Education Association says:	Yes
Defendant-Appellee Michigan Secretary of State says:	No
Amicus curiae Mackinac Center for Public Policy says:	No

INTRODUCTION

This case concerns the propriety of public school districts' withholding money from employees' paychecks to finance a union's political activity.

This case has been briefed extensively. At the application stage at this Court, amicus curiae Mackinac Center for Public Policy filed a brief in opposition to leave to appeal. That brief contained three arguments: (1) that the union, Plaintiff Michigan Education Association ("MEA"), could not meet the requirements of MCR 7.302(B), because even if this Court were to deny leave to appeal, the union could still solicit funds from it members without the assistance of public school districts; (2) that the plain language of MCL 169.257, the statute at issue, prevents school districts from administering a payroll-deduction plan for union political activity; and (3) that equitable estoppel concerns related to the manner in which Defendant Secretary of State has interpreted MCL 169.257 and a similar prohibition in MCL 169.254 cannot prevent the Secretary from prospectively enforcing section 257 properly.

Much of that brief is repeated here with minor stylistic changes. Normally, because this Court has already granted leave, amicus curiae would have dropped the first argument entirely from this brief. But because there were three dissenters to the grant of leave and there is a new member of the court, the first argument has been retained.

This brief does contain new material. Some appears at the end of the "Statement of Facts" section, discussing procedural developments since amicus

curiae's brief opposing leave to appeal (see pages 19-20); the remainder appears as Argument IV, which deals with two United States Supreme Court cases that have been decided in the period between amicus curiae's last brief and the instant one (see pages 37-41). Arguments I-III, appearing on pages 20-37, remain essentially the same.

STATEMENT OF FACTS

At issue in this case is whether MCL 169.257 of the Michigan Campaign Finance Act (MCFA) prohibits school districts from administering paycheck withdrawals for a "separate segregated fund" (more commonly referred to as a "political action committee" or "PAC").[1] On November 20, 2006, the Secretary of State issued a declaratory ruling that school districts could not administer payroll deductions for separate segregated funds even if the union agreed to reimburse the district in advance for any costs.[2] The MEA filed the instant action, and on September 4, 2007, the trial court held that as long as the union reimbursed a school district beforehand, the district could administer the payroll-deduction program that would benefit the union's separate segregated fund.

On August 28, 2008, the Court of Appeals, in a 2-1 decision, reversed. The majority held that the school district's administration of a payroll-deduction plan constituted an "expenditure" under the MCFA and that the MEA's offer to prepay

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[1] "PAC" is not used in the MCFA and comes from federal election law. See generally 2 USC § 431(4). Where necessary for style or clarity, this brief will occasionally use the term "PAC" instead of the technical "separate segregated fund."

[2] The Secretary of State is responsible for administering the MCFA and has the power to issue declaratory rulings and interpretive statements. MCL 169.215.

the costs did not prevent a violation. The dissent disagreed that administration of a payroll-deduction plan constituted an expenditure under MCFA. Rather than affirm the trial court, however, the dissent would have sought further briefing on two questions: (1) whether school district administration of a payroll-deduction plan constitutes a "contribution" under the MCFA; and (2) whether school districts have the authority to administer payroll-deduction plans for a PAC, since MCFA is silent on the subject.

In its application for leave to appeal, the MEA sought to have the trial court's opinion reinstated.

The trial court's decision appeared to be influenced in part by the Secretary of State's previous interpretations and rulings concerning other provisions of the MCFA, which the trial court apparently believed to be inconsistent. Thus, to provide this Court with the context necessary to decide this case — which is about MCL 169.257, but which has been argued in the context of companion laws — this brief will discuss some history related to the MCFA, as well as interpretive statements and rulings regarding various relevant provisions of the MCFA.

MCL 169.257 was originally enacted as part of 1995 PA 264. In its present form, MCL 169.257(1) reads in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under [MCL 169.204(3)(a)].[3]

[3] MCL 169.204(3)(a) concerns volunteer personal services and some *de minimis* costs.

MCL 169.257(1).[4]

The instant matter arose out of negotiations between the Gull Lake Community School District[5] (GLCSD) and the Kalamazoo County Education Association/Gull Lake Education Association (KCEA/GLEA), which is the collective bargaining entity for some of the education personnel in that district and is an affiliate of the MEA.

The MEA contends that the MEA-PAC has existed since 1971. Application for Leave to Appeal at 2.. The MEA further contends that the MEA-PAC has been and is "funded through the payroll deductions of public school employees." *Id*. at 21. A prior collective bargaining agreement between the GLCSD and the KCEA/GLEA had led to the district's administering the union's payroll-deduction process for the benefit of the MEA-PAC. But in February 2006, about the time the parties were negotiating a new agreement, both the Secretary of State and the Attorney General

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[4] As enacted in 1995 PA 264, MCL 169.257 stated:

> (1) A public body shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a). While acting for a public body, an elected or appointed public official, employee, or any other person shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution pursuant to [MCL 169.204(3)(a)].
>
> (2) A person who knowingly violates this section is guilty of a felony punishable, if the person is an individual, by a fine of not more than $2,000.00 or imprisonment for not more than 1 year, or both, or if the person is not an individual, by a fine of not more than $20,000.00.

Id. (footnote omitted) 1996 PA 590 specified that a public body (or a person acting for one) could not use "funds, personnel, office space, property, stationery, postage, vehicles, equipment, supplies, or other public resources to" make a contribution or expenditure. It also added six exceptions to the general prohibition. See MCL 169.257(1)(a)-(f). 2001 PA 250 left MCL 169.257 largely untouched except for the additions of "computer hardware or software" to the list of items that could not be used to make a contribution or expenditure.

[5] It is uncontested that Gull Lake Community Schools – or any other school district – is a "public body" for purposes of the MCFA. *See* MCL 169.211(6).

indicated that school district administration of union PAC payroll deductions was illegal. The GLCSD and the MEA both sought declaratory rulings on this point, which eventually led to the instant action.

Further background on various provision of the MCFA is necessary before discussing the trial court's decision. MCL 169.254 states that labor associations and corporations "shall not make a contribution or expenditure." This prohibits contributions from corporations' and labor associations' general treasury funds to "state and local candidates." *Michigan State AFL-CIO v Miller*, 65 FSupp2d 634 (ED Mich 1998). In its original form, MCL 169.254 applied only to corporations. This led the Michigan Chamber of Commerce to bring an equal protection challenge, which the United States Supreme Court rejected. *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990). Having lost in court, the Michigan Chamber of Commerce sought to have the statute amended to include labor organizations, and that change occurred with the passage of 1994 PA 117. *Michigan State AFL-CIO v Miller*, 103 F3d 1240, 1244 (6th Cir 1997).

MCL 169.255 is an exception to the general prohibition against unions' and corporations' participation in state or local elections.[6] The relevant portion of the statute allows unions and corporations to solicit for their respective separate

[6] More precisely, MCL 169.255(1) allows unions and labor organizations to "mak[e] contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees."

segregated funds. MCL 169.255(2), (4). Prior to the enactment of 1994 PA 117, MCL 169.255 allowed only corporations to create separate segregated funds.[7]

The 1994 and 1995 amendments led to a number of requests for declaratory rulings and interpretive-statement letters. These will be addressed in chronological order.

In an interpretive-statement letter to Robert LaBrant on July 11, 1997, the Secretary of State discussed the implications of MCL 169.254 for reimbursement of costs associated with administering payroll-deduction plans for separate segregated funds under MCL 169.255.[8] First, the Secretary of State indicated that corporations are not required to offer payroll-deduction plans for unions' separate segregated funds.[9] If a corporation chooses to offer a plan for the union's separate segregated fund (not the corporation's own fund), the corporation must be reimbursed for the costs of administering the plan, because those costs are an expenditure under MCL 169.254:

> Except for establishment, administration, and solicitation of contributions to its separate segregated fund, and except for ballot questions or loans made in the ordinary course of business, section 54 of the MCFA prohibits a corporation from making a contribution or an expenditure. . . .
>
> Costs incurred in the implementation and operation of a payroll deduction plan for automatic contributions is [sic] an expenditure under the MCFA. Such costs are similar to providing postage and pre-

[7] Nothing in the pleadings addresses why the MEA needed to have MEA-PAC before 1994. Almost certainly it was due to federal election law issues.

[8] A copy of this letter can be found at pages 1-8 of the following web address: http://www.michigan.gov/documents/1997_126230_7.pdf.

[9] Under federal law, if a corporation offers a payroll-deduction plan for its separate segregated fund, it must offer that same option to the union. 11 CFR 114.5(k)(1). If the corporation does not have a payroll-deduction plan, it need not offer one to the union. *Id*. at 114.5(k)(4).

> addressed envelopes, and other costs associated with the collection and delivery of contributions. The amount of the payroll deduction is a contribution of the person from whose wages the contribution is being deducted, but costs incurred in the collection and delivery of the contributions are expenditures by the person who pays for the payroll deduction system. . . .
>
> A corporation is prohibited from making a contribution to the separate segregated fund of a labor organization. However, a labor organization may compensate a corporation for all expenses incident to its instituting a payroll deduction plan for the solicitation of contributions to the labor organization's separate segregated fund.

July 11, 1997, letter to Robert LaBrant at 8 (emphasis added). This ruling was withdrawn in 1998 due to uncertainty created by subsequent litigation.

An interpretive-statement letter to David Cahill on August 4, 1998, discussed MCL 169.257 in the context of the collection of student fees by a university for the benefit of a ballot question committee.[10] The Secretary of State indicated that "[f]rom a plain reading of the language [of MCL 169.257], it appears that the Legislature's intent . . . was to re-emphasize the ban on public bodies from using public funds to make expenditures." August 4, 1998, letter to David Cahill at 4. Thus, "it is the Department's position that the University [of Michigan] would be prohibited from collecting and transferring student funds to a ballot question committee account as described." *Id.* at 6.

The Secretary of State rejected the concept that reimbursement would excuse the expenditure:

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[10] A copy of this letter can be found at pages 9-14 of the following web address: http://www.michigan.gov/documents/1998_126232_7.pdf.

> Your review also asked whether there were other alternatives that would permit the University to collect the fees and deposit them into a ballot question committee account. In this vein, one of the written comments posited that [the Michigan Student Assembly] could "reimburse" the University for its collection and payment activities. As indicated, it appears that the Legislature's intent in 1996 was to re-emphasize the ban on public bodies from using public funds to make expenditures. If the Legislature had wished to permit exceptions to this ban, they [sic] would have done so. Therefore, the underlying prohibition in section 57 can not be avoided by permitting MSA to reimburse the University for the activities, which are themselves prohibited by section 57, without express statutory authority.

Id.

An interpretive-statement letter to Kathleen Corkin Boyle on June 15, 2001, discussed MCL 169.254 in the context of the MEA's providing hyperlinks to campaign and ballot question committee websites from the MEA's homepage (which is accessible to the public, not just to members).[11] The Secretary of State began by noting that hyperlinks, even though often not charged for, have value:

> [T]he mere fact that something is ordinarily provided free of charge does not alone answer the question of whether it has value — certainly something can be free of charge but still have value. . . .
>
> . . . A hyperlink is tantamount to a form of advertising, in that it is designed to induce the Internet viewer to visit a website he or she would not ordinarily visit. It eliminates the need to learn about candidates that the user supports or opposes, finding a candidate's address (e-mail or traditional) and asking for more information. Instead, a hyperlink takes the viewer directly to the candidate — an electronic middleperson. While this process holds the potential to make campaigns and candidates more accessible, it is still something of value for the "linked" candidate, and would thus constitute an expenditure.

June 15, 2001, letter to Kathleen Corkin Boyle at 4.

[11] A copy of this letter can be found at pages 5-12 of the following web address: http://www.michigan.gov/documents/2001_126236_7.pdf.

Having determined that a hyperlink was an expenditure, the Secretary of State then discussed the concept of reimbursement for such an expenditure:

> A campaign does not make an expenditure or contribution to a candidate or committee if it is promptly reimbursed for the full value of goods or services provided because no transfer of value occurs. With regard to a corporation that provides the goods and services in the ordinary course of business, this "prompt reimbursement" would be that which is offered to entities that are not subject to the MCFA. With regard to corporations that do not ordinarily provide the goods or services in question, the payment must be made prior to the transaction.

Id. at 5.

An interpretive-statement letter to Robert LaBrant on November 14, 2005, discussed MCL 169.254 and corporate administration of a payroll-deduction plan for a union's separate segregated fund.[12] Just as in its July 11, 1997, interpretive-statement letter, the Secretary of State indicated that the administration of the payroll-deduction plan constitutes an expenditure but that a reimbursement would prevent a transfer of value:

> If a corporation through a payroll deduction system transfers anything of ascertainable monetary value for goods, materials, services or facilities to a committee other than its own separate segregated fund, it has made an expenditure that is prohibited by [MCL 169.254] of the MCFA. If the value of those goods, materials, services or facilities can be ascertained and the corporation is reimbursed, there is no corporate expenditure because there is no transfer of value.

November 14, 2005, letter to Robert LaBrant at 2.

On February 16, 2006, the Attorney General issued an opinion indicating that under MCL 169.257 the state could not administer a payroll-deduction plan for

[12] A copy of this letter can be found at pages 7-8 of the following web address: http://www.michigan.gov/documents/2005_-_Interpretive_Statement_142179_7.pdf.

the benefit of a union's separate segregated fund. The Attorney General stated that administration of a payroll-deduction plan constituted use of a public resource since use of the plan "makes" the employee's "contribution" to the separate segregated fund occur. OAG 2005-2006, No 7187, p ___ (February 16, 2006).

A reimbursement could not cure this:

> There is no basis in the plain language of [MCL 169.257] for reading in a remedy or exception to the prohibition for unions that offer to reimburse the State for its use of public resources. To do so would be contrary to the intent of the Legislature as expressed in the plain language of [MCL 169.257].
>
> . . . A labor union's offer to reimburse the State for the expenses involved in administering a payroll deduction plan to facilitate employee contributions to a political action committee would neither obviate the violation nor permit the implementation of an otherwise prohibited plan.

Id. at ___.

On February 17, 2006, the Secretary of State issued two separate interpretive-statement letters to Robert LaBrant.[13] The first letter concerned whether reimbursement for payroll deductions by a public body was possible under MCL 169.257. The letter cited both the previous day's Attorney General opinion and the Secretary of State's August 4, 1998, interpretive-statement letter regarding a university. The Secretary of State wrote:

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[13] A copy of the first and second letter can be found at the following web addresses respectively:
http://www.michigan.gov/documents/Robert_S_150708_7._LaBrant_Final_Response_Public_Body.pdf
http://www.michigan.gov/documents/Robert_S_150709_7._LaBrant_Final_Response_Corp_Payroll.pdf.

On the Secretary of State's website, these documents are entitled '1-06-CI,' and '2-06-CI,' respectively which designations will be included in the cite so to avoid confusion.

> For these reasons, the Department concludes that the utilization of public resources for the establishment and maintenance of a payroll deduction plan on behalf of a labor organization's separate segregated fund constitutes a prohibited expenditure under the MCFA, which cannot be expunged by a labor organization's reimbursement of the public body's actual costs.

February 17, 2006, letter to Robert LaBrant (1-06-CI) at 2.

The Secretary of State recognized that it was allowing reimbursement for private-sector payroll deductions under MCL 169.254 but not for public-sector deductions under MCL 169.257. The Secretary of State justified this distinction on the grounds that many statutes and government policies prohibit political activity by governmental employees:

> These policies defend the public's interest in sequestering political campaigning from the administration of government. It is imperative to maintain strict government neutrality in elections in order to protect the integrity of the democratic process. State and local units of government, and their elected officials and employees, share a heightened duty to safeguard public resources from misuse for political purposes. The MCFA is only one part of the state's comprehensive statutory scheme that prohibits a public body from engaging in a political campaign. A public body that administers a payroll deduction plan on behalf of a separate segregated fund violates the Act and runs afoul of this sound public policy.

February 17, 2006, letter to Robert LaBrant (1-06-CI) at 3-4.

The second letter discussed payroll deductions under MCL 169.254. The Secretary of State indicated the fact that corporations were allowed to set up payroll-deduction plans for stockholders, officers, directors, etc. implied that corporations were also allowed to set up such plans for the benefit of labor unions:

> [T]he Act authorizes a corporation to establish an automatic payroll deduction plan for a separate segregated fund established under MCL 169.255(1) for the purpose of collecting contributions, if the individual contributor provides his or her written consent for the deduction on an

> annual basis. MCL 169.255(6). Thus a corporate employer is authorized to (1) incur expenses in connection with the collection of contributions for a separate segregated fund, and (2) operate a payroll deduction plan for the purpose of collecting those contributions. It follows that a corporation may incur similar costs to those identified above in connection with the administration of a payroll deduction system for the collection of contributions to a labor organization's separate segregated fund.

February 17, 2006, letter to Robert LaBrant (2-06-CI) at 2 (emphasis added). The Secretary of State reiterated that "an otherwise illegal corporate expenditure is expunged by the reimbursement, as no transfer of value occurs." *Id*. at 3. A corporation must "obtain reimbursement for the actual costs it incurs in administering a payroll-deduction plan that collects contributions to a labor organization's separate segregated fund." *Id*. The corporation is responsible for making a value determination. *Id*. Where the expenditure is outside the corporation's normal course of operation, the union must pay for it in advance. *Id*. at 4.

The Secretary of State summarized:

> A corporation is authorized to make an expenditure for administrative costs incurred in the operation of a payroll deduction plan on behalf of a labor organization's separate segregated fund, provided that the corporation receives timely, complete reimbursement for the actual amount of the expenditure. Methods for calculating corporate costs incurred in the collection of contributions for a labor organization's separate segregated fund and the time limit for repayment depend on the nature of the corporation's business. A labor organization's failure to remit timely payment for the expenditure of corporate assets must result in the suspension of the payroll deduction plan.
>
> Unlike federal law, nothing in the MCFA compels a corporation that operates a payroll deduction plan for contribution to its own separate segregated fund to offer the same opportunity to a labor organization. *See* 11 C.F.R. § 114.5. However, a corporation that

> voluntarily elects to finance the administrative expenses of a labor organization's separate segregated fund assumes an affirmative duty to comply with the MCFA by making an accurate calculation of its costs and obtaining full reimbursement of its expenses in a timely manner.

Id. at 4-5.

Counsel for the GLCSD took note of the above developments and sought a declaratory ruling from the Secretary of State whether the district was allowed to administer a payroll-deduction plan. November 1, 2006, letter to Kevin S. Harty.[14] The school district had administered such a plan under the former collective bargaining agreement but was now disputing with the union whether such a plan could be in the new agreement.

In response to the GLCSD counsel's request, the Secretary of State referred to the Attorney General opinion, the November 14, 2005, letter to LaBrant, and the first February 17, 2006, letter to LaBrant and declared that MCL 169.257 prevents a public body from administering a payroll-deduction plan. It was noted that legislation had been introduced that would allow school districts to administer payroll-deduction plans for the union, but that under current law such collections were prohibited. The Secretary of State indicated that a contrary view, or one in which a union could "cure" the public body's expenditure by reimbursement, could wreak havoc with the MCFA:

> [H]ad the Department concluded that the MCFA authorized the deployment of public resources in this manner, nothing would prevent

[14] A copy of the letter can be found at the following web address:

http://www.michigan.gov/documents/sos/Kevin_S._Harty_Final_Response_Public_Body_Payroll_Deduction_Plan_178095_7.pdf.

> an incumbent officeholder from establishing a payroll deduction plan for the benefit of his or her candidate committee at taxpayer expense. This significant, institutional fundraising advantage would further weaken the ability of non-incumbent candidates to mount an effective challenge. . . .
>
> . . .
>
> If a political action committee or its sponsoring organization were permitted to reimburse a public body for costs attributed to the operation of a payroll deduction plan for political contributions, a public body could easily circumvent the prohibition against the use of public resources in [MCL 169.257]. The MCFA clearly prohibits government agencies from utilizing public resources to make a political contribution or expenditure, and makes no exception for the operation of a payroll deduction plan. Concluding that a political action committee's reimbursement of the government's cost would, in effect, create such a statutory exception where none currently exists.

November 1, 2006, letter to Kevin S. Harty at 3-4.

The MEA filed its own request for a declaratory ruling on payroll deductions, which led to a November 20, 2006, declaratory-ruling letter.[15] The Secretary of State cited many of the above interpretive-statement letters and noted that none of the six exceptions from MCL 169.257(1)(a)-(f) applied:

> Thus, [MCL 169.257] includes six exclusive exceptions to the general rule that precludes public bodies from using government resources to make contributions and expenditures, none of which reasonably can be construed to permit a public body's expenditure for the establishment, administration, or solicitation of contributions for a separate segregated fund. *Cf.* MCL 169.255(1), 169.257(1).
>
> In the absence of any statutory provision that unequivocally permits a public body to administer a payroll deduction plan on behalf of a committee, the Department is constrained to conclude that the school district is prohibited from expending government resources for a

[15] A copy of this letter can be found at the following web address:

http://www.michigan.gov/documents/sos/Kathleen_Corkin_Boyle_Final_Response_11-20-2006_178712_7.pdf.

> payroll deduction plan that deducts wages from its employees on behalf of MEA-PAC. It is the province of the legislature, and not the Department, to amend the MCFA to provide such express authority.

November 20, 2006, letter to Kathleen Corkin Boyle at 4.

The Secretary of State rejected the argument that payroll deductions must now be allowed because of the department's past approval of the content and design of the MEA's voluntary consent forms, which are meant to comply with the "paycheck protection" provision found in MCL 169.255(6):

> While the question presented for the Department's consideration makes reference to the voluntary consent form that MEA members are required to complete in compliance with [MCL 169.255(6)], this procedural requirement is irrelevant in answering the threshold question of whether a public body may properly administer a payroll deduction plan for a separate segregated fund. Despite the assertion that the Department's approval as to form of the MEA's annual consent acknowledgement document constituted tacit approval of a public body's use of public resources to manage a payroll deduction plan for political contributions, the propriety of a public body's operation of such a program was not raised at the time.

November 20, 2006, letter to Kathleen Corkin Boyle at 4.

Citing the Attorney General opinion, the August 4, 1998, letter to David Cahill, and the first February 17, 2006, letter to Robert LaBrant, the Secretary of State reiterated that reimbursement would not prevent the finding of a violation of MCL 169.257.

The MEA filed suit and claimed that from the time MCL 169.257 took effect in 1995 until the issuance of the November 20, 2006, declaratory ruling, it was common knowledge that the MEA was having school districts administer payroll deductions for the benefit of the MEA-PAC. Further, the MEA noted that in the context of MCL 169.254, the Secretary of State had allowed unions to pay

reimbursement for corporations that were administering payroll-deduction plans on a union's behalf.

On September 4, 2007, Ingham Circuit Court Judge Brown entered an order that allowed payroll-deduction plans if the union reimburses the school district in advance for all costs in implementing the system:

> This Court finds that [the Secretary of State]'s Declaratory Ruling is arbitrary, capricious, and an abuse of discretion. Relying on the plain language of [169.257], the administration of payroll deductions to a union PAC constitutes an "expenditure" under the MCFA. However, where the costs of administration are reimbursed, no transfer of value to the union PAC occurs, and therefore, an "expenditure" has not been made within the meaning of the MCFA. Thus, a public body may administer payroll deductions so long as all costs of making the deductions are reimbursed by the PAC. [MCL 169.257] does not explicitly prohibit a public body from administering the payroll deduction of its employees.
>
> . . . [T]his Court does not agree that the Declaratory Ruling in the present case is consistent with past rulings and statements of Respondent. Drawing from the history of [the MEA] and [the Secretary of State] regarding payroll deductions of MEA members, Respondent has not in the past considered these deductions to be unlawful, and the declaratory ruling challenged in this case represents a new interpretation of the statute. While this Court agrees . . . that the Secretary of State is free to prospectively make changes in the course and direction of declaratory rulings, such changes must not be arbitrary, capricious, or in violation of any other law. Respondent made such an arbitrary change when it issued the declaratory ruling in this case. Therefore, this Court holds that public bodies such as the Gull Lake Public School system may administer payroll deductions requested by their employees, provided that all expenses of making the deductions are borne by the PAC or its sponsoring labor organization and are paid in advance.

Order of September 4, 2007, at 9.

The Secretary of State sought leave to appeal, which the Court of Appeals granted on an expedited basis. On August 28, 2008, in a 2-1 opinion, that court reversed.

The crux of the majority opinion was that administration of the payroll-deduction plan constituted an expenditure and prior reimbursement of the costs does not prevent an expenditure from occurring:

> [T]he sole issue before us is whether, under the MCFA, advance reimbursement for the costs of a payroll deduction system prevents what is otherwise an illegal expenditure from ever becoming an "expenditure." We conclude that it does not. We find nothing in the plain language of the MCFA that indicates reimbursement negates something that otherwise constitutes an expenditure. . . .
>
> We also find that reimbursement, advance or otherwise, does not prevent an otherwise illegal expenditure from ever becoming an expenditure because "there is no transfer of value." Contrary to the trial court's reasoning, a transfer of value has occurred because there is time spent by employees that monetary reimbursement cannot return. For example, it takes employees to distribute voluntary payroll deduction forms, receive the signed forms, make certain the forms conform to legal requirements, enter the information into the payroll system, and update the information yearly. Although monetary reimbursement can compensate the school district for the salary paid for the time spent by the employees performing those functions, the time spent on non-school district business is irretrievably lost and cannot be recovered. This work constitutes a transfer of value for which monetary reimbursement is insufficient. Accordingly, reimbursement does not prevent an expenditure from occurring. We find that the trial court erred both in concluding that reimbursement prevents an expenditure from occurring and that the declaratory ruling was arbitrary and capricious.

Michigan Education Ass'n v Secretary of State, 280 Mich App 477, 487 (2008). ;

The dissent believed that the question of reimbursement need not be decided because under the terms of the MCFA spending for the administration of a PAC is

not an expenditure. *Id.* at 490. The dissent cited MCL 169.206(2)(c) for this proposition.

While the dissent would not have held that administration of a payroll-deduction plan constituted an expenditure, it would not have reinstated the trial court's decision. Instead, the dissent would have sought further briefing on two questions: (1) whether administration of a payroll-deduction plan is a contribution and thereby prohibited by MCL 169.257; and (2) assuming that the MCFA neither prohibits nor allows administration of payroll-deduction plans whether there is any statutory grant of authority for school districts to administer such plans. If the administration of the plan was found to be a contribution then the plan would violate the MCFA as there is no applicable statutory exemption for contributions.

The majority believed that both of the dissent's other issues had been waived by the parties, but it indicated that if faced with the first question, it would hold that administration of the payroll-deduction plan also was a contribution:

> If we were to address the dissent's issues, we would still reverse. The MCFA treats public entities different than private entities. Compare MCL 169.254 with 169.257. Based on this differential treatment, we would conclude that the allocated costs of collecting and delivering payroll deductions by members of the MEA affiliate to the MEA-PAC are both an expenditure and a contribution to the MEA-PAC by the Gull Lake Public Schools. See OAG, 2005-2006, No 7187, p ----, (February 16, 2006) (Concluding that "[a] public body's use of its resources to administer the payroll deduction plan would 'cause' the contribution to 'happen,' and thus violate section 57.").
>
> Under our system of government, public bodies should not participate in the political process. To effectuate this, our Legislature prohibited them from making "expenditures" and "contributions." MCL 169.257(1). Over time, the prohibition became more detailed, and now includes "the use or authoriz[ation of] the use of funds, personnel, office space, computer hardware or software, property, stationery,

> postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure...." *Id*. Numerous Attorney General opinions have made this proposition clear. See, e.g., OAG, 1993-1994, No 6763, p 45 (August 4, 1993) ("School districts may not permit their offices and phone equipment to be used in a restrictive manner for advocacy of one side of a ballot issue.... School districts may not endorse a particular candidate or ballot proposal."); OAG, 1965-1966, No 4291, p 1 (January 4, 1965) (School district not allowed to spend funds to advocate a favorable vote on a tax and bond ballot proposal). Given the consistency with which the MCFA has been interpreted to prohibit public bodies from spending public funds or otherwise utilizing public resources paid for by all taxpayers to advocate for a particular political position or candidate, it is absolutely illogical, inconsistent, and contrary to the very purpose of MCL 169.257 to conclude that it is permissible for a school district (a public body) to administer payroll deductions sent to MEA-PAC (a group whose very purpose is to advocate for various political positions and candidates).

Id. at 489 n. 6.

Plaintiff MEA filed an application for leave to appeal with this Court, and Defendant Secretary of State filed a response. The Mackinac Center filed an amicus brief opposing the application. The Michigan Chamber of Commerce separately filed an amicus brief opposing the application, and the Michigan State AFL-CIO filed one in favor of the application.

On February 24, 2009, after those amicus briefs were filed, the United States Supreme Court issued its decision in *Ysursa v Pocatello Education Association*, ___ US ___; 129 SCt 1093 (2009). This case concerned an Idaho statute similar to the statute in question here.

On May 8, 2009, this Court ordered oral argument on the application and requested briefing on the questions presented by the Court of Appeals' dissent. That led to additional briefs being filed by the MEA, the Secretary of State, the Michigan Chamber of Commerce, and the Michigan State AFL-CIO. A brief was also filed by a

new amicus curiae, the Michigan State Employees Association. The Mackinac Center had largely anticipated this Court's questions about the Court of Appeals' minority opinion and did not file a second brief.

Oral arguments on the application were held on November 5, 2009.

On January 21, 2010, the United States Supreme Court entered its decision in *Citizens United v Federal Election Commission*, 588 US ___; 130 SCt 876 (2010).

On June 4, 2010, this Court granted leave to appeal and requested that the parties address the impact of *Citizens United*.

ARGUMENT

I. After the Court of Appeals ruling, the Michigan Education Association (MEA) members can still contribute to the union's "political action committee"/separate segregated fund by mailing a donation. Given that an easy method of political participation remains possible, the MEA cannot meet the requirements of MCR 7.302(B).

A. Standard of Review

This Court alone determines whether an application meets the requirements of MCR 7.302(B); there is no lower court determination to review.

B. This Court should hold that leave was improvidently granted

In its application for leave to appeal, the MEA states:

> The instant case raises matters of public concern to this state's public employees and issues of significance to this state's jurisprudence. Specifically, the use of payroll deductions allows members of a labor organization to pool modest contributions in a meaningful way in order to participate more fully in the political process. The funding of MEA-PAC through payroll deductions allows allows MEA members to have a voice that is as strong as the voices of large, wealthy corporations and organizations. The Secretary of State's ruling would deny that tool to the MEA and its members.

Application for Leave to Appeal at iv.

Unstated, however, is the fact that if this Court were to deny leave to appeal, the MEA-PAC would not be prohibited from soliciting for political contributions from MEA members. Instead, all MEA-PAC would be losing is its preferred position (versus non-public employee PACs) of being able to solicit through a payroll-deduction plan. To the best of the undersigned's knowledge, neither political party currently has the ability to solicit political contributions through school district payroll-deduction plans nor does any other political participant aside of other public-employee unions.

II. MCL 169.257 should be read in accord with its plain language, which would thereby prevent public bodies from administering payroll-deduction plans for the benefit of a union.

A. Standard of Review

MCL 24.263, in pertinent part, states: "A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case." The dispute here is legal, not factual. The courts may set aside an agency's decision if it is "[i]n violation of the constitution or a statute" or is "[a]ffected by other substantial and material error of law." MCL 24.306.

The standard of review of agency interpretations of a statute was recently clarified. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (2008). This Court held "an agency's interpretation of a statute is entitled to 'respectful consideration,' but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation." *Id*. at 93.

This Court also reserved the question "of a longstanding agency interpretation in which reliance issues are at stake." *Id*. at 106 n. 46.

But in order for the standard-of-review issue to arise, a statute must be ambiguous. The Michigan Supreme Court has held (repeatedly) that "[w]hen the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Lash v Traverse City*, 479 Mich 180, 187 (2007).

B. MCL 169.257 does not permit public bodies to administer a union's separate segregated fund.

1. Unions' unique roles

This case arises in part because of the unique role that the state has assigned to public-sector unions. The United States Supreme Court has recognized that while state employees have a right to join a union, a state government has no constitutional obligation to bargain with that union. *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979). The union's authority to collective bargaining comes from the Public Employment Relations Act. MCL 423.201 *et seq*.

While the courts may see a cleavage between a union's political-advocacy role and its collective-bargaining role, it is fair to say that many unions see those roles as intertwined. Thus in collective-bargaining negotiations, many unions seek the assistance of the public bodies in collecting money for the unions' separate segregated funds, which has nothing directly to do with the workers' employment.

To the best of the undersigned's knowledge, public-sector unions are unique in their request to "rent" the apparatus of the state to help their PACs. But if this Court accepts the MEA's argument that prepayment of the public body's costs would make this "rental" legal, then others may seek the same opportunity.

If MCL 169.257 were read to allow reimbursements, then politicians' campaign committees might also seek to raise funds during the provision of any state service — not just distribution of the state payroll. Each candidate for local or state office would be free to arrange for a donation envelope for his or her candidate committee to be given to each constituent who visits the Secretary of State's office. Constituents could face similar solicitations when they seek a building license. Under the MEA's view of MCL 169.257, absent any ethical constraints, the members of this Court could send a fundraising solicitation with the decision in this matter, so long as the administrative costs to the Michigan court system were prepaid.[16]

The question presented in this case is whether that is what the Legislature intended in enacting MCL 169.257.

2. Plain meaning of MCL 169.257

As noted above, when a statute is clear, its plain language controls. This Court recently indicated that "a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is equally susceptible to

[16] This "parade of horribles" is not mere hyperbole. Before the enactment of MCL 169.257, some school districts spent public resources advocating millage increases, despite Attorney General opinions prohibiting the practice. Further, the rise of federal 527 groups shows that in the cutthroat political arena, a "loophole" will be used once it is identified.

more than a single meaning." *Fluor Enter, Inc v Revenue Div, Dep't of Treasury*, 477 Mich 170, 177 n. 3 (2007).

Again, MCL 169.257(1) states in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under [MCL 169.204(3)(a)].

MCL 169.257(1). At issue here is whether administration of a payroll deduction by a public body — the school district — for a labor organization's separate segregated fund constitutes an expenditure.

MCL 169.206 states:

> (1) "Expenditure" means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. Expenditure includes, but is not limited to, any of the following:
>
> > (a) A contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.
> >
> > . . .
>
> (2) Expenditure does not include any of the following:
>
> > (a) An expenditure for communication by a person with the person's paid members or shareholders and those individuals who can be solicited for contributions to a separate segregated fund under [MCL 169.255].
> >
> > . . .

> (c) An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee.
>
> . . .

Id. (emphasis added).

Here, the implementation of the payroll-deduction plan clearly constitutes an expenditure. The amount given to the separate segregated fund constitutes a contribution by the employee, but as stated in the July 11, 1997, interpretive-state letter, the costs of implementing the plan "are similar to providing postage and pre-addressed envelopes, and other costs associated with the collection and delivery of contributions," and so are an expenditure chargeable to the public body running the plan.

MCL 169.257 makes no mention of reimbursement "curing" an expenditure. Further, MCL 169.206 excludes two types of activities related to separate segregated funds from the definition of expenditure under the MCFA: (1) communications with those who can be solicited under the MCFA; and (2) expenditures related to the creation or administration of a separate segregated fund and solicitation of funds to that fund.[17] There is no exemption for expenditures that are "reimbursed," even though the MCFA often discusses the mechanics of separate segregated funds.

[17] As will be discussed below, this provision is meant to be limited to an entity's own separate segregated fund.

There are six exemptions to MCL 169.257. None of these are remotely applicable to reimbursement.[18]

This is not a particularly surprising result. The concept of reimbursement is incongruous when applied to the government, because the government generally does not sell its services. School districts do not put their administrative services on the open market. Government's proper role is to provide basic needs for the functioning of society; it is not to facilitate a public-sector union's political clout by allowing it to use public resources to maximize the amount its PAC will collect from public employees covered by a collective bargaining agreement.[19]

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[18] MCL 169.257 lists the following exemptions:

> This subsection does not apply to any of the following:
>
> (a) The expression of views by an elected or appointed public official who has policy making responsibilities.
>
> (b) The production or dissemination of factual information concerning issues relevant to the function of the public body.
>
> (c) The production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication.
>
> (d) The use of a public facility owned or leased by, or on behalf of, a public body if any candidate or committee has an equal opportunity to use the public facility.
>
> (e) The use of a public facility owned or leased by, or on behalf of, a public body if that facility is primarily used as a family dwelling and is not used to conduct a fund-raising event.
>
> (f) An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on his or her own personal time, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.

[19] Amicus curiae assumes that the MEA believes it will receive more in contributions via a payroll-deduction plan administered by a public body than it would if the MEA sent solicitation letters and self-addressed stamped envelopes to its members; otherwise, it would make little sense for the union to be litigating this matter. As noted earlier, a holding that MCL 169.257 prohibits a public body from administering a payroll-deduction plan does not prevent the MEA from receiving

Interestingly, at no point in its application, does the MEA adopt the dissent's reasoning about the definition of expenditure – in particular the meaning of MCL 169.206(2)(c). The MEA in essence merely mentions the dissent's view then it begins to discuss whether there can be an expenditure where there is reimbursement or prepayment, which argument is addressed below.

Perhaps the union's reluctance to advance this argument is the problems it would cause with MCL 169.254 and MCL 169.255.[20] MCL 169.254 prevents unions and corporations from making expenditures and contributions. *Id.* MCL 169.254 explicitly exempts expenditures taken pursuant to MCL 169.255. That statute allows unions and corporations to make expenditures for separate segregated funds. MCL 169.255(1). Basically, the remainder of the statute lists the people that may be solicited by separate segregated funds run by corporations, unions, and Indian tribes.

The attorney general has indicated that MCL 169.255 prohibits one corporation from contributing to a second corporation's separate segregated fund. OAG 1977-1978, No 5344, p 549, 552 (July 20, 1978). That same opinion prevents corporations from creating more than one separate segregated fund. *Id.* What eventually became MCL 169.206(2)(c) was part of the original MCFA, 1976 PA 388. If that provision is not limited to an entity's own separate segregated fund, then MCL 169.254 is in essence nugatory. Any entity could establish, solicit, and

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contributions from its members; it only changes the manner in which those contributions will be received.

[20] Both of these statutes have as their genesis the original MCFA, 1976 PA 388.

administer a separate segregated fund or multiple ones. The limits on who can be solicited in MCL 169.255 would also be meaningless since there would be no expenditure no matter who was solicited. The most likely explanation for why MCL 169.206(2)(c) does not address third-party administration is because in 1976 no one considered that to be a possibility. The only separate segregated funds contemplated were the entity's own.

Clearly, the MFCA in its entirety is not a model of statutory clarity, but this Court should not base a decision on a reading of MCL 169.206(2)(c) that would undermine significant portions of the MCFA, particularly where the petitioner has seemed to waive the argument.[21]

Thus, the plain language of MCL 169.257 indicates that public bodies may not administer payroll-deduction plans, because that administrative service constitutes an unlawful expenditure.

3. MCL 169.254 and reimbursement

The MEA points to the manner in which the Secretary of State has interpreted MCL 169.254 as proof that reimbursement is proper. In pertinent part, MCL 169.254 states:

> (1) Except with respect to the exceptions and conditions in subsections (2) and (3) and [MCL 169.255], and to loans made in the ordinary course of business, a corporation . . . or labor organization shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution pursuant to section 4(3)(a).

[21] This Court has also indicated that in construing statutes it will seeks to avoid "absurd results." See generally, *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006). A ruling that would vitiate significant portions of the MCFA would appear to meet this criterion.

. . .

> (3) A corporation . . . or labor organization may make a contribution to a ballot question committee subject to this act. A corporation . . . or labor organization may make an independent expenditure in any amount for the qualification, passage, or defeat of a ballot question. A corporation . . . or labor organization that makes an independent expenditure under this subsection is considered a ballot question committee for the purposes of this act.

Id. (emphasis added).

The MEA may be correct that there is some inconsistency in how the Secretary of State has viewed expenditures under MCL 169.254 and MCL 169.257. But the error would be in the manner in which the Secretary of State has construed MCL 169.254, not MCL 169.257.

A straightforward application of the plain-language doctrine again applies. MCL 169.254 states that corporations and unions shall not use general treasury funds to make expenditures or contributions. MCL 169.254(3) is an exemption that allows corporations and unions to use general treasury funds on ballot questions. MCL 169.255 similarly exempts money used in the creation of separate segregated funds that may make "contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees."

MCL 169.255(2)-(5) discuss who can be solicited by the various entities covered by the MCFA — for-profit corporations, not-for-profit corporations, unions, and Indian tribes. Unions may seek contributions from members of the union, officers and directors of the union, and employees of the union who have "policy

making, managerial, professional, supervisory, or administrative nonclerical responsibilities." MCL 169.255(4).

MCL 169.255(6) requires that an entity using a payroll-deduction plan obtain the annual affirmative consent of the person making the contribution:

> A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization may solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4), or (5) on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year.

As noted above, in her second letter to Robert LaBrant on February 17, 2006, the Secretary of State indicated that because a corporation could set up a payroll-deduction plan for itself, it could also set one up for a union's benefit:

> [T]he Act authorizes a corporation to establish an automatic payroll deduction plan for a separate segregated fund established under MCL 169.255(1) for the purpose of collecting contributions, if the individual contributor provides his or her written consent for the deduction on an annual basis. MCL 169.255(6). Thus a corporate employer is authorized to (1) incur expenses in connection with the collection of contributions for a separate segregated fund, and (2) operate a payroll deduction plan for the purpose of collecting those contributions. <u>It follows that a corporation may incur similar costs to those identified above in connection with the administration of a payroll deduction system for the collection of contributions to a labor organization's separate segregated fund.</u>

February 17, 2006 letter to Robert LaBrant (2-06-CI) at 2 (emphasis added).

The Secretary of State is wrong; it does not follow that because a corporation is able to set up its own payroll-deduction plan, it must be able to administer a payroll-deduction plan for the benefit of a union's separate segregated fund. Nothing in MCL 169.254 or MCL 169.255 expressly allows for this.

Nor is this conclusion implied by the fact that unions may use payroll-deduction plans for separate segregated funds. For instance, upon information and belief, there are members of the United Auto Workers who are not employees of an automobile manufacturer, but rather are employees of the union itself. The union could set up and administer a payroll-deduction plan for these employees without needing a corporation to administer it. Whether or not any union does this is irrelevant: The fact that it is possible precludes the argument that corporations must be able to administer union payroll-deduction plans for unionized workers under MCL 169.255(6) in order for the union's power to engage in payroll-deduction plans to have practical meaning.[22]

Further, in arguing for the reimbursement concept, the MEA neglects the Freedom of Information Act (FOIA), a statute in which the Legislature provided detailed guidance regarding the amount of reimbursement needed when a public body acts pursuant to a request. MCL 15.234, in pertinent part, states:

> (1) A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. A search for a public record may be conducted or copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefiting the general public. A public record

[22] It may be that 11 CFR § 114.5(k) requires a corporation that uses a payroll-deduction plan for its own benefit to offer a similar plan to a union, but that would apply only to campaign funds covered by federal election law, not funds covered by state election law. If there is a federal preemption argument, the MEA has not presented it here.

> search shall be made and a copy of a public record shall be furnished without charge for the first $20.00 of the fee for each request to an individual who is entitled to information under this act and who submits an affidavit stating that the individual is then receiving public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.
>
> . . .
>
> (3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. Fees shall be uniform and not dependent upon the identity of the requesting person. A public body shall utilize the most economical means available for making copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.

Thus, FOIA includes an extremely detailed reimbursement mechanism. In contrast, MCL 169.254, 169.255, and 169.257, contain not a single word on the subject. Given that FOIA was enacted in 1976 (19 years before MCL 169.257), and given that FOIA is one of the best-known statutes in the state, it is difficult to understand why the Legislature would not have used the FOIA model to produce detailed guidance on reimbursement under payroll-deduction plans if the Legislature really considered such reimbursement acceptable.[23]

[23] The MEA admits in its reimbursement argument that it is in essence renting the school district employees for MEA-PAC's benefit. It does so by contending that the time a school district employee spends on union-political business as opposed to school-district business does not have an ascertainable monetary value and thus cannot constitute an expenditure under MCL 169.206. See Application for Leave to Appeal at 18. Thus so long as the union is willing to pay in advance the school official pro rata salary for the time spent on the union's political project, the fact that those

To the extent that there is any conflict between the manner in which the Secretary of State has interpreted "expenditure" under MCL 169.257 and under MCL 169.254 and MCL 169.255, the former should control under plain-meaning analysis. Moreover, the plain language of all three statutes does not mention the concept of a reimbursement to enable an otherwise prohibited expenditure. There are no ambiguities in these statutes; therefore, their plain language controls, and this Court should recognize that a public body cannot administer a payroll-deduction plan for the benefit of a union's separate segregated fund because that would constitute an illegal expenditure.

4. Even if administration of a payroll-deduction plan is not an "expenditure," it is a "contribution"

The Court of Appeals indicated that even a payroll-deduction plan constitutes both an expenditure and a contribution. Thus even if this Court were to find that no legal expenditure occurred, school district administration of payroll-deduction plans for the benefit of the union's separate segregated fund would still be improper.

MCL 169.204 defines what is a contribution under the MCFA:

> (1) "Contribution" means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question.

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officials would no longer be doing the jobs they were hired for is of no concern. But it is difficult to see a termination point for such an argument. Say for example that a union collectively bargained to have all school employees work the phones in the three weeks leading up to a Presidential election. Under the MEA's argument as long as compensation for pro rata salaries were provided it would not matter that no one was left to actually educate the students for those three weeks.

> (2) Contribution includes the full purchase price of tickets or payment of an attendance fee for events such as dinners, luncheons, rallies, testimonials, and other fund-raising events; an individual's own money or property other than the individual's homestead used on behalf of that individual's candidacy; the granting of discounts or rebates not available to the general public; or the granting of discounts or rebates by broadcast media and newspapers not extended on an equal basis to all candidates for the same office; and the endorsing or guaranteeing of a loan for the amount the endorser or guarantor is liable.
>
> (3) Contribution does not include any of the following:
>
> (a) Volunteer personal services provided without compensation, or payments of costs incurred of less than $500.00 in a calendar year by an individual for personal travel expenses if the costs are voluntarily incurred without any understanding or agreement that the costs shall be, directly or indirectly, repaid.
>
> (b) Food and beverages, not to exceed $100.00 in value during a calendar year, which are donated by an individual and for which reimbursement is not given.
>
> (c) An offer or tender of a contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt.

The MEA recognizes that school district administration of payroll deductions for MEA-PAC would constitute a contribution on the district's part. But MEA contends that it is an "in-kind contribution" under MCL 169.209(3), which states: "In-kind contribution . . . means a contribution . . . other than money." MEA claims that there is no contribution if fair market value is paid:

> [T]he full payment or a full reimbursement for the value of an in-kind transfer of value negates a contribution or expenditure. If this were not so . . . goods and services purchased at fair market value by candidates and political committees would have to be treated as contributions by the vendors.

Application for Leave to Appeal at 27.

This argument is unconvincing. First, governments are not temp agencies and do not have their services on the open market. No company can come in and rent a school district's human resources department to administer the company's payroll. Second, the statute says nothing about payment preventing a contribution. This may be the reason that the MEA was so hesitant to use the dissents' MCL 169.206(2)(c) argument since it would be difficult to argue for a new reading of a statute that contradicts decades of practice in regard to expenditures and then argue against such a reading for contributions.

Regardless of the MEA's strategy, it is clear that school district administration of a payroll-deduction plan is a contribution that cannot be cured by reimbursement.

III. Equitable estoppel does not prevent current or future enforcement of MCL 169.257.

A. Standard of Review

A trial court's use of equitable estoppel is revied de novo. *West Am Ins Co v Meridian Mutual Ins Co*, 230 Mich App 305, 309 (1998).

B. The trial court cannot alter a statute enacted by the Legislature.

Without saying so explicitly, the trial court seemed to use equitable estoppel principles to hold that the Secretary of State could not now enforce MCL 169.257 because she knew that some school districts had administered payroll deductions for the benefit of the MEA-PAC in the past. The Court of Appeals has indicated that this doctrine applies only in limited circumstances: "[A]lthough equitable estoppel

will be invoked against the state when justified by the facts, the doctrine should not be lightly invoked against the state, especially when its application tends to thwart public policy." *Attorney General v Ankersen*, 148 Mich App 524, 544 (1986). In *Powers v Dignan*, 312 Mich 315 (1945), this Court held that in denying a renewal license to an auto dealer, the Secretary of State was not estopped from considering conduct that it knew of before issuing the old license. *Id.* at 319.

Even rarely enforced statutes still have the force of law. *Board of Co Road Comm'rs of Washtenaw Co v Michigan Pub Serv Comm*, 349 Mich 663, 682 (1957) ("[S]tatutes don't wither by disuse."); *Stopera v Dimarco*, 218 Mich App 565, 569-70 (1996) ("It would be a long overstepping of our role as a court to ignore a statute duly enacted and never repealed by a coequal branch of government."). The separation-of-powers doctrine helps explain why this is so: the judicial branch should not punish the legislative branch for the actions or inactions of the executive branch.

The MEA, MEA-PAC, and school districts might have an equitable estoppel argument if the Attorney General sought to criminally prosecute them for actions preceding this Court's decision in the instant case. But their future reliance interests are either slight or nonexistent. Upon information and belief, the school districts and unions have collective bargaining agreements that generally last three years or less. If this Court were to apply equitable estoppel, at most it should allow any collective bargaining agreements in which districts administer payroll-deduction plans for the unions' benefit to expire of the agreements' own force. This

Court could then prohibit any future collective bargaining agreements from allowing a district to administer a payroll-deduction plan for the benefit of a union's separate segregated fund.

Such a holding would be in line with MCL 24.263, which in pertinent part indicates that an administrative agency may change its mind about a previous declaratory ruling: "An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling."

The plain language of MCL 169.257 prevents public bodies from administering payroll-deduction plans for the benefit of a union's separate segregated fund. The executive branch of government should be allowed to enforce this statute as the Legislature enacted it.

IV. The recent United States Supreme Court cases do not prevent a holding that MCL 169.257 prohibits school districts from administering payroll-deduction plans for the benefit of union political accounts.

A. Standard of Review

This Court must presume a statute is constitutional and construe it as such unless the only proper construction renders the statute unconstitutional. *In re Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 9 (2007). Thus, the fact that this Court requested briefing on federal constitutional matters suggests that the statute is otherwise unambiguous and that the MEA can prevail only if this Court holds that a federal constitutional provision trumps MCL 169.257, which prevents school districts from administering withdrawals for the union's PAC.

B. The First Amendment and MCL 169.257

Both *Ysursa* and *Citizens United* are First Amendment cases. Neither case indicates there is a constitutional impediment to properly construing MCL 169.257.

In fact, a nearly identical question to the one presented in the instant case was considered in *Ysursa*. There, the United States Supreme Court rejected a First Amendment challenge made by a public employees union that wanted some of its members' wages "deducted and remitted to the union's political action committee" but ran afoul of an Idaho law that prohibited "payroll deductions for political activities." *Ysursa*, 129 SCt at 1096. The court noted that the law represented a legitimate policy decision, not a prohibition on political speech:

> The First Amendment prohibits government from "abridging the freedom of speech"; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. Idaho's law **does not restrict political speech**, but rather **declines to promote** that speech by allowing public employee checkoffs for political activities. Such a decision is reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity. . . . **[N]othing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for political activities**.

Id. at 1096 (emphasis added).

The United States Supreme Court held that because the Idaho law was not a content-based restriction, a simple rational-basis review, not a strict-scrutiny review, was required:

> Restrictions on speech based on its content are "presumptively invalid" and subject to strict scrutiny. The unions assert that the ban on checkoffs for political activities falls into this category because the law singles out political speech for disfavored treatment.

> . . . While publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, Idaho is under no obligation to aid the unions in their political activities. And the State's decision not to do so is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor. Idaho's decision to limit public employer payroll deductions as it has "is not subject to strict scrutiny" under the First Amendment.
>
> Given that the State has not infringed the unions' First Amendment rights, the State need only demonstrate a rational basis to justify the ban on political payroll deductions. . . . Banning payroll deductions for political speech similarly furthers the government's interest in distinguishing between internal governmental operations and private speech. Idaho's decision to allow payroll deductions for some purposes but not for political activities is plainly reasonable.

Id. at 1098-99 (citations omitted).

Thus, the United States Supreme Court held that a "ban on checkoffs for political activity" is not a restriction on speech and that the ban is therefore subject to rational-basis review. The court further held that there is a governmental interest "in distinguishing between internal governmental operations and private speech," and thus that the ban is "plainly reasonable."

In *Citizens United,* the First Amendment issue did not concern a ban on checkoffs for political activity, as it did in *Ysursa*; rather, it concerned the propriety of federal bans on corporate and union independent expenditures, which are "political speech presented to the electorate that is not coordinated with a candidate." *Citizens United*, 130 SCt at 910. These bans absolutely prohibited corporations from engaging at political speech at certain times.

The United States Supreme Court discussed some general rules related to restrictions on speech:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. . . .
>
> For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." . . .
>
> Premised on mistrust of governmental power, the First Amendment stands against attempts to favor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."

Id. at 898 (citations omitted).

The United States Supreme Court found that the independent expenditure ban was a speech restriction. Applying strict scrutiny, it held: "No sufficient government interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id*. at 913.

The general rules related to speech restrictions from *Citizens United* are those that applied in *Ysursa*. The key distinction is that in *Ysursa*, the United States Supreme Court held that a ban on checkoffs was not a restriction on speech, while in *Citizens United*, the court held that a ban on independent expenditures was. Thus, the checkoff ban was subject to rational-basis review, while the independent expenditure ban was subject to strict scrutiny. The checkoff ban was upheld, and the independent expenditure ban was not. There is nothing in *Citizens United* indicating that the key ruling of *Ysursa* — a checkoff ban is not a speech restriction — was reconsidered or overturned. The *Ysursa* holding, which is almost

directly on point in the instant case, remains valid: Bans on checkoffs for political activity do not violate the First Amendment.

RELIEF REQUESTED

For the reasons stated above, amicus curiae Mackinac Center for Public Policy requests that this Court rule that leave was improvidently granted. Alternatively, amicus curiae requests this Court hold both that MCL 169.257 prohibits school districts from administering payroll-deduction plans for the benefit of union political accounts and that this prohibition does not violate the First Amendment.

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Respectfully Submitted,

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