STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF:

UNIVERSITY OF MICHIGAN
Appellee Public employer,

and

GRADUATE EMPLOYEES ORGANIZATION/AFT,
Appellee Petitioner Labor Organization,

and

STUDENTS AGAINST GSRA UNIONIZATION,
Proposed Intervenor,

and

MICHIGAN ATTORNEY GENERAL,
Appellant Proposed Intervenor.
_____/

Supreme Court No. _____

Court of Appeals No. 307959

Michigan Employment Relations Commission No. R11 D-034

**PURSUANT TO MCR 7.302(G), EXPEDITED DECISION REQUESTED BY FEBRUARY 1, 2012 BEFORE THE ADMINISTRATIVE PROCEEDING FOR WHICH THE ATTORNEY GENERAL SEEKS INTERVENTION WILL COMMENCE**

# THE MICHIGAN ATTORNEY GENERAL'S APPLICATION FOR LEAVE TO APPEAL


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## STATEMENT OF QUESTION PRESENTED

The law grants the Attorney General broad discretion to intervene at any stage of any administrative proceeding when he deems in his own judgment that it is in the best interest of the State and the People to do so.

1. The Michigan Administrative Procedures Act (APA) provides for an interlocutory appeal process to challenge the Michigan Employment Relations Commission's order prohibiting the Attorney General to intervene in the administrative hearing the Commission convened. The Court of Appeals read the APA contrary to the statute's plain language as limiting appeals to contested cases. Did the Court of Appeals err in concluding it lacked jurisdiction under the language of the APA?

   Public Employer's answer: No

   Petitioner Labor Organization's answer: No

   Proposed Intervenor Students Against Unionization: Yes

   The Michigan Attorney General's answer: Yes

   Commission's answer: No

2. The Attorney General deemed that it is in the best interest of the State and the People to intervene to present all the facts in an administrative hearing mandated by the Commission to determine if Graduate Student Research Assistants are public employees under Michigan's Public Relations Act. The Commission denied the Attorney General's right to intervene and precluded his ability to protect and to represent the State's interest. This decision was the final adjudication of the Attorney General's right to intervention. Did the Court of Appeals err in concluding it lacked jurisdiction to consider the Attorney General's appeal?

   Public Employer's answer: No

   Petitioner Labor Organization's answer: No

   Proposed Intervenor Students Against Unionization: Yes

   The Michigan Attorney General's answer: Yes

   Commission's answer: No

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:

1963 Const, art 5, § 3

The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer and an attorney general. When a single executive is the head of a principal department, unless elected or appointed as otherwise provided in this constitution, he shall be appointed by the governor by and with the advice and consent of the senate and he shall serve at the pleasure of the governor.

When a board or commission is at the head of a principal department, unless elected or appointed as otherwise provided in this constitution, the members thereof shall be appointed by the governor by and with the advice and consent of the senate. The term of office and procedure for removal of such members shall be as prescribed in this constitution or by law.

Terms of office of any board or commission created or enlarged after the effective date of this constitution shall not exceed four years except as otherwise authorized in this constitution. The terms of office of existing boards and commissions which are longer than four years shall not be further extended except as provided in this constitution

1963 Const, art 5, § 21

The governor, lieutenant governor, secretary of state and attorney general shall be elected for four-year terms at the general election in each alternate even-numbered year.

The lieutenant governor, secretary of state and attorney general shall be nominated by party conventions in a manner prescribed by law. In the general election one vote shall be cast jointly for the candidates for governor and lieutenant governor nominated by the same party.

Vacancies in the office of the secretary of state and attorney general shall be filled by appointment by the governor.

**1963 Const, art 6, § 28**

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

Statutes:

**MCL 14.101**

The attorney general of the state is hereby authorized and empowered to intervene in any action heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state. Such right of intervention shall exist at any stage of the proceeding, and the attorney general shall have the same right to prosecute an appeal, or to apply for a re-hearing or to take any other action or step whatsoever that is had or possessed by any of the parties to such litigation

**MCL 14.28**

The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

MCL 24.301

When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

MCL 423.1

It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state.

MCL 423.216(e)

Any party aggrieved by a final order of the commission granting or denying in whole or in part the relief sought may within 20 days of such order as a matter of right obtain a review of the order in the court of appeals by filing in the court a petition praying that the order of the commission be modified or set aside, with copy of the petition filed on the commission, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the commission. Upon the timely filing of the petition, the court shall proceed in the same manner as in the case of an application by the commission under subsection (d), and shall summarily grant to the commission or to any prevailing party 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 commission. The findings of the commission 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

a timely petition for review is not filed under this subdivision by an aggrieved party, it shall be conclusively presumed that the commission's order is supported by competent, material, and substantial evidence on the record considered as a whole, and the commission or any prevailing party shall be entitled, upon application therefor, to a summary order enforcing the commission's order.

## STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

The question presented here is simple: did the Court of Appeals err in ruling it lacked jurisdiction to consider an appeal of the Commission's decision to deny the Attorney General's statutory right to intervene in a hearing on an issue that might cause serious harm to the University of Michigan and the public without anyone arguing against that possible result? The Court of Appeals thought not; the Attorney General emphatically disagrees.

The Court of Appeals determined that the Administrative Procedure Act, and more specifically, MCL 24.301, applies only to contested cases and thus does not grant it jurisdiction to review the Commission's order prohibiting the Attorney General from intervening in the administrative hearing. (January 25, 2012 Court of Appeals' Order, attached as Ex 10.) The Court of Appeals relied on an erroneous reading of the APA and factually distinguishable case law. The Court concluded (1) that a representation hearing ordered by the Commission under the Public Employment Relations Act (PERA), MCL 423.201, *et seq,* was not a contested case, and thus the Attorney General could not rely on Section 101 for his appeal, and (2) there was no other statutory authority to appeal the Commission's decision to deny intervention.

The Court of Appeals erred because it first failed to read Section 101 of the APA, MCL 24.301, consistent with principles of statutory interpretation. It did not give appropriate consideration to the plain language of the statute and the Legislature's express intent to not limit interlocutory appeals solely to orders in

contested cases. The Court then left the Attorney General without any remedy to contest the Commission's plain indifference to his broad statutory authority to intervene at his discretion under decades of well-established precedent. Despite the fact that the Attorney General exhausted his administrative remedies to dispute the issue of intervention, the Court denied his appeal without any consideration of the public policy behind limiting administrative appeals to final orders.

The Court of Appeals' decision denying jurisdiction is flawed because the law expressly recognizes a need to appeal interlocutory agency orders where waiting to appeal the final decision is inadequate and that right to appeal is not limited by distinguishing between contested and not contested cases. The Attorney General understands that interlocutory appeals to this Court are rare and disfavored. But the question to be decided by the Administrative Law Judge (ALJ) and Commission is of such import that it should be subjected to the usual rigors of a two-sided adversarial process. If the Attorney General waits until the one-sided fact-finding process is complete and the Commission issues a final decision before appealing, this Court will not be able to provide an adequate remedy retrospectively. Because the Court of Appeals denied leave for lack of jurisdiction and the Commission improperly denied the Attorney General's intervention, he asks this Court to grant leave to appeal and to stay further administrative proceedings below pending appeal.

## INTRODUCTION

This is a case of first impression involving appellate jurisdiction over a state agency's decision to prohibit the Attorney General from intervening in an administrative hearing that, in his judgment, involves matters of important public interest. (Ex 10.) Under the law applicable here, the Court of Appeals should have accepted jurisdiction and the Commission should have granted the motion to intervene. This decision contravenes decades of well-established case law that requires deference to and liberal construction of the Attorney General's statutory right to intervene.

There are substantial reasons why this Court should grant this Application for Leave to Appeal:

- First, the issue presented in this involves a significant public interest and concerns a state agency. MCR 7.302(B)(2).
    - There is a significant public interest that the Attorney General be allowed to intervene in a broad range of both administrative and judicial proceedings to protect the interests of the State and the People of Michigan. The Commission's decision to deny the Attorney General's intervention without any showing that the Attorney General's intervention is against the public interest sets a troubling precedent that undermines the Michigan Employment Relations Act's mandate to protect the rights and interests of the People of this State, MCL 423.1, and decades of case law that liberally construes and defers to the Attorney General's discretion regarding intervention
    - The Commission's decision to deny intervention in favor of a one-sided fact-finding process jeopardizes important interests and rights of the State and the People of Michigan. The University of Michigan's national renown as an elite research university will likely be compromised if the Commission revisits 30 years of precedent and reclassifies GSRAs as public employees. The issue whether the GSRAs are public employees under the Public Employment Relations Act, MCL 423.201, *et seq.*, is a significant

legal issue. A reviewing Court will be significantly hampered if the record developed is not subject to the usual adversarial process, where both sides of the facts and arguments are presented

- Second, the issue in this case involves legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3).

    - This case contains issues of jurisprudential significance relating to the Attorney General's authority and discretion to intervene whenever state interests are involved in a cause or matter. Neither party to the proceeding has even attempted to show that the Attorney General's intervention would be contrary to the public interest. So, the Commission determined this fact unilaterally and on the basis of mere speculation. The Commission's order ignores controlling case law requiring that the Attorney General be allowed to intervene *unless there is a showing* that such intervention is clearly contrary to the public interest. *VanStock v Township of Bangor*, 61 Mich App 289, 299; 232 NW2d 387 (1975); *Kelley v Gremore*, 8 Mich App 56, 59; 153 NW2d 377 (1967) (*Gremore*).

- Third, the Court of Appeals' order denying leave is clearly erroneous and will cause material injustice. MCR 7.302(B)(5).

    - Section 101 of the APA, MCL 24.301, expressly allows for appeals of non-final administrative agency decisions where waiting until the agency issues a final order would not result in an adequate remedy. The Court of Appeals improperly limited this provision to contested cases, despite the absence of such limitation in the statute's plain language.

    - The Court of Appeals relied on case law that distinguishes contested and uncontested cases for the purposes of standard of review, and not for the purposes of the right to judicial review.

For all these reasons, and those described further below, the Attorney General respectfully requests that this Court grant his application for leave to appeal and enter a stay of proceedings below pending appeal. A motion to stay and for immediate consideration accompanies this Application.

## STATEMENT OF PROCEEDINGS AND FACTS

### A. The University of Michigan's vital role in Michigan.

The University of Michigan plays a vital part in Michigan economy. The University of Michigan is a major research institution, ranking second in the nation in terms of total research expenditures. (University's October 17, 2011 Response to Petitioner's Motion for Reconsideration, p 4, attached as Ex 2.) External funding supports a large majority of GSRA studies, with total research funding exceeding $1.14 billion in fiscal year 2010. (Office of the Vice President for Research, Quick Facts, *http://research.umich.edu/quick-facts.*) The University of Michigan thus is an essential component of the University Research Corridor, a coalition between the University of Michigan, Michigan State University, and Wayne State University that has generated an "economic impact" of $14.8 billion in 2009 for the State of Michigan. (2010 Empowering Michigan Report, available at *http://urcmich.org/economic/2010/2010econimpact-report.pdf.*)

Even as state funding support dropped, Michigan's research universities remained the largest cluster in the U.S. in terms of enrollment, and they ranked third in terms of high-tech degrees. (*Id.*) The research corridor has continued to provide a significant fiscal impact on Michigan: for example, over 550,000 research alumni live in Michigan, collectively earning about $26 billion annually and generating over $400 million in state tax revenue for 2009 alone. (*Id.*) Obviously, given these numbers, any proceeding that may affect the University's ability to

continue to attract research funding and play an integral role as a member of the University Research Corridor implicates a number of state interests.

The excellence of the University will be seriously jeopardized if its status as a research institution, with the funding that status brings, is undermined. All of Michigan's taxpayers, and certainly the University's thousands of alumni, are rightfully proud of this outstanding public university. Each will lose something if an incorrect determination of the facts underlying this dispute is rendered, without the benefit of the usual adversarial process. The Attorney General has correctly judged that the public interest is implicated in having a fair and complete fact-finding process before the ALJ, especially where the Act creating the Commission requires that "the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected." MCL 423.1. Accordingly, this Court should grant the Attorney General leave to appeal the Commission's decision.

### B. Procedural History

On April 27, 2011, the Graduate Employees Organization/AFT (the Organization) filed a petition with the Commission, seeking an election to be certified as the exclusive representative of GSRAs of the University of Michigan. (September 14, 2011 Commission Decision, p 1, attached as Ex 3.) A majority of the University's Board of Regents later passed a resolution recognizing the GSRAs as employees under the Public Employment Relations Act (Act), and thus endorsing the Organization's petition. (Ex 3 at 2.) The Regents' position was opposed by 19

current and former deans who wrote a letter to the University provost on June 24, 2011:

> [T]o express our *deep and collective concern about the potential negative impacts that would result from unionization* of the University's graduate student research assistants (GSRAs). We believe that such *a union would put at risk the excellence of our university and the success of our graduate student assistants.*
>
> Research assistantships provide graduate students with opportunities to develop their research skills while working in a lab or on a project under faculty supervision. As students assist with various aspects of scholarly work, they gain in their capacity for independent research. This is an important part of their academic training. *A union would be a third party intervening in the educational program, in the middle between faculty mentors and their students. This would compromise the essential nature of doctoral preparation.*
>
> We note those graduate student research assistants are not unionized at the peer institutions against whom the University competes for faculty and graduate students. The Board of Regents in their public statements at the June 16, 2011 meeting included a list of other public institutions at which research assistants are unionized; although they are fine institutions, none of them competes in research at the same level as Michigan. *It would be a great loss to the state and the nation if our research efforts were to decline to the quality seen at lesser universities. We worry that a GSRA union would make Michigan an outlier when the best and brightest graduate students compare research opportunities, and when we work to recruit excellent research faculty. A vast majority of the faculty members with whom we have spoken do not support GSRA unionization because of the potential negative impact on their one-on-one relationships with students and the University's competitive position among its peers.* [Ex 2 (emphasis added).]

The Commission rejected the Organization's petition, correctly reasoning that GSRAs are not public employees and thus are outside the Commission's jurisdiction. The Commission had made the same finding in 1981 with the same parties as present today and, in the absence of materially different circumstances, the Commission was bound by the prior decision. (Ex 3 at 4.)

The Organization moved for reconsideration. The Organization's motion relied on a single affidavit, and it argued in essence (and illogically) that because research has grown in volume and importance to the University, and because GSRAs are an integral part of this research, they are employees of the University. Furthermore, the motion tried to reargue the law established in 1981. And, finally, it contended that the Regents' majority decision is a binding stipulation of fact. (Organization's Motion for Reconsideration, attached as Ex 4.) None of these grounds presented a compelling case for reconsideration.

Constrained from directly opposing reconsideration by the majority Regents' vote, the University merely set forth facts seeming to show that nothing has materially changed since the Commission last considered the question in 1981. (University's Response to Motion for Reconsideration, attached as Ex 5.) The University has since clarified its position that, consistent with the Regents' resolution, it supports the GSRAs rights to vote on unionization. (University's November 4, 2011 Supplemental Response, attached as Ex 6.)

The Commission's record shows that a significant percentage of GSRAs have expressed opposition to employment status and possible unionization. (See Students Against GSRA Unionization November 1, 2011 Brief in Support of Motion to Intervene and in Opposition to Motion for Reconsideration, attached as Ex 7.) Stephen Raiman, a member of a group called Students Against GSRA Unionization, stated "[w]e believe our research and our lives as students are between ourselves and our departments and our advisors. We don't believe that a third party should

be interfering in that." Goldsmith, Rayza & Williams, Kaitlin, *MERC to Reconsider GSRAs' Positions as Employees*, The Michigan Daily, Nov 8, 2011. Similarly, as noted above, a broad contingent of the University's faculty leadership registered their opposition to and concern regarding unionization.

None of these voices was to be heard by the Commission, even though the Act establishing the Commission requires that "the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected." MCL 423.1. Once the University elected to acquiesce to the Organization's petition, there was no longer any voice to support the position articulated by the current and former deans and a significant number of GSRAs. There is also no party to represent the legal position that the GSRAs are not public employees under the Public Employment Relations Act. So, the Attorney General sought to intervene before the Commission when it considered the motion for reconsideration. Further, assuming the Commission was to order fact-finding, the Attorney General requested intervention to fully participate in hearings before the ALJ.

The Attorney General has determined, in his judgment, that intervention in this matter is necessary to protect significant state interests, and would act in the fact-finding proceeding to ensure that a complete and unbiased record is created. Where the University administration is constrained to agree with the Organization on the critical issue, it seems inevitable that the evidentiary hearing will not fully disclose the facts and arguments crucial to determining whether the GSRAs'

relationship with the University has substantially changed since the 1981 decision. The Attorney General relied on his broad authority to intervene in any matter under MCL 14.101 and MCL 14.28, as well as precedents mandating liberal construction of this authority and deference to the Attorney General's judgment to intervene at any stage of any administrative proceeding. The law on Attorney General intervention is unambiguous: his authority to intervene is limited only where there is a clear showing that the intervention is inimical to the public interest.

### C. The Commission's December 16, 2011 Decision

A majority of the Commission granted the Organization's motion for reconsideration, reinstated the Organization's petition for a representation election, ordered an ALJ to conduct a factual inquiry into whether GSRAs at the University of Michigan are "employees" of the University, and denied the Attorney General's motion to intervene both at the December 16th hearing, and in the subsequent fact-finding before the ALJ. (Ex 1.) The majority reasoned that the Attorney General had moved to intervene only in "opposition to the exercise of a statutory right," that of the students to consider unionization. (*Id.* at 4.) The majority further maligned the Attorney General's motives, stating that "the Attorney General seeks intervention for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan." (*Id.* at 5.) The Commission found it "inappropriate to allow the Attorney General to intervene for the purpose of opposing a policy decision made by the Regents when that policy decision does not

determine the results of our investigation in this matter." (*Id.*) Finally, the Commission concluded, without any support, that intervention "would be unduly disruptive to the proceedings and inimical to the public interest." (*Id.*)

The dissenting Commissioner (Dr. Edward Callahan) opposed granting the motion for reconsideration, but opined that, in the event the Commission did so, it should grant the Attorney General's motion to intervene. Such intervention is necessary to assure the presentation all of the facts in the hearing given the lack of adversity between the University and the Organization. (*Id.* at 10.) Commissioner Callahan also reiterated the Commission's prior concern "over whether the University would present evidence at a hearing that might show facts exist contrary to the Regents' resolution." (*Id.*) Astutely, Commissioner Callahan noted that the Organization "has offered no arguments that might persuade me that an evidentiary hearing in this matter would fully disclose the facts necessary to accurately discern whether the [GSRAs'] relationship with the University has substantially changed since the decision in [the 1981 case]." (*Id.*) He expressed valid concerns over the legitimacy of any fact-finding process where there is no adversity of interests between the parties; it "would appear . . . to be a sham if we were to permit only one side of this crucial debate to be proffered at hearing." (*Id.*) Significantly, he concluded that "interests of fairness and due process" compel granting the Attorney General's motion to intervene. (*Id.*)

### D. The Administrative Proceedings

Immediately following issuance of the Commission's December 16, 2011 decision, the Michigan Administrative Hearing System assigned Administrative Law Judge Julia C. Stern (ALJ) to hear the administrative hearing on an expedited basis. When the Attorney General requested to participate in the January 4, 2012 telephone conference, the ALJ advised the Attorney General that his only participation will be as "an observer of a public hearing." (December 27, 2011 ALJ Stern Letter to Attorney General, attached as Ex 8.) The hearing is scheduled to begin on February 1, 2012.

### E. The Court of Appeals' Order

On January 25, 2012, the Court of Appeals dismissed the Attorney General's motion to stay the administrative proceedings and application for leave to appeal the impropriety of the Commission's decision that the Attorney General could not intervene in the administrative hearing. The Court reasoned that it did not have jurisdiction to grant an interlocutory appeal from an order of the Commission and the reliance on the APA for such jurisdiction was improper, as MCL 24.301 applies only to contested cases. The representation proceeding was deemed not to be a contested case under the APA.

The Attorney General's application for leave argued that the Court of Appeals does have jurisdiction to consider an appeal from MERC's order denying the Attorney General's intervention, because Section 101 of the APA, MCL 24.301 allows review of an interlocutory agency ruling when waiting for and appealing a

final agency decision would not provide an adequate remedy. MERC's denial of intervention will result in tainted fact-finding proceedings and therefore waiting and appealing MERC's final order on the representation proceeding would not provide the Attorney General with any remedy.

## ARGUMENT

### I. The Court of Appeals read the APA contrary to the statute's plain language and erred in concluding it lacked jurisdiction over the Attorney General's application for leave to appeal the Commission's decision denying him intervention.

#### A. Issue Preservation

The Agency preserved the issue presented by raising it at each step in the administrative and judicial appeals process

#### B. Standard of Review

The issue presented is one of statutory construction, which is a question of law. The Court reviews questions of law *de novo*. *State Treasurer v Abbott*, 468 Mich 143, 148; 660 NW2d 714 (2003).

#### C. Analysis

##### 1. The APA expressly permits interlocutory appeals from agency orders where an appeal from a final order of the agency would not provide adequate relief.

Section 101 of the APA, MCL 24.301, expressly provides for interlocutory review of orders in administrative proceedings if appeal of a final decision or order would provide an inadequate remedy. Section 101 states:

> When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. *A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.* (emphasis added).

This Court requires that Michigan statutes be interpreted within their context: "a word or phrase is given meaning by its context of setting." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 102; 754 NW2d 259 (2008). "[W]ords and clauses will not be divorced from those which precede and those which follow." *Id.* at 114. Statutory provisions must be read in the context of the entire statute, and not isolated, so as to produce a harmonious and consistent whole. *Weems v Chrysler Corp*, 448 Mich 679, 698; 533 NW2d 287 (1995). When facing issues regarding statutory interpretation, this Court must discern the legislative intent that "may reasonably be inferred from the words expressed in the statute." *Jones v Dep't of Corrections*, 468 Mich 646, 654; 664 NW2d 717 (2003). The court should apply a reasonable construction to best accomplish the Legislature's purpose. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 643; 513 NW2d 799 (1994).

Here, the Legislature deliberately constructed Section 101 of the APA, MCL 24.301, in two separate and distinct parts. The first part, consisting of the first two sentences, states when a *final* agency decision *in a contested case* is subject to *direct*

*review* (as of right) by the circuit court and clarifies what exhaustion of administrative remedies means. The second part, consisting of the last sentence, authorizes *leave for review* of non-final agency orders when waiting to appeal a final agency decision would not provide an adequate remedy. The second part is distinct from the first because it contemplates an appeal from a non-final order, by leave (as opposed to by right), and does not limit such an appeal to contested cases.

Consistent with Michigan principles of statutory interpretation, the Legislature's formulation of Section 101 into two distinct parts was deliberate, and the Court of Appeals erred when it read the limitation "in a contested case" from the first part into the second part and limited the expressly granted right to seek review of interlocutory orders where appealing a final decision would be inadequate. Moreover, the qualifier "in a contested case" is used in Section 102, MCL 24.302, further indicating that the Legislature was aware of its meaning and limiting effect, and thus the omission of that qualifier from the second part of Section 101 was deliberate.

*McBride v Pontiac School Dist*, 218 Mich App 113, 122; 553 NW2d 646 (1996) makes it clear that the APA does not solely govern "contested cases." The distinction is relevant to the standard of review used by the court, but is immaterial to whether or not a party is *entitled* to judicial review. *Id.* The Attorney General's extensive practical experience with administrative appeals is consistent with the notion that even uncontested cases are subject to judicial review. Furthermore, the Michigan Constitution, 1963 Const, art 6, § 28, provides an independent basis for

review of administrative agency decisions, evidencing the mandate of the People that judicial review not be confined solely to the cases that are considered "contested" under the APA.

### 2. The Court of Appeals relied on inapplicable court rules, statutory sections, and distinguishable case law to determine that it lacked jurisdiction.

The Court's decision that it lacks subject matter jurisdiction first cites MCR 7.203(B)(3), which allows the Court to grant leave to appeal final orders or administrative agencies. But the Attorney General did not rely on this court rule. Instead, the Attorney General relied on MCR 7.203(B)(4), which allows an appeal from any other judgment or order appealable to the Court of appeals by law or rule. Section 101 of the APA provides the independent statutory grounds for an appeal in this matter. Also, the Court cited MCL 423.216(e), a part of PERA that governs appeals to the Court of Appeals from the Commission's final decisions in an unfair labor practice charge. Because the representation proceeding is not an unfair labor practice charge, this statutory section is also inapplicable.

The Court then cited *Harper Hosp Employees' Union v Harper Hosp*, 25 Mich App 662; 181 NW2d 566 (1970). *Harper* considered whether to review an interlocutory order of the Michigan Labor Mediation Board (now the Commission). The order appealed was one directing the trial examiner to reopen the record to receive further testimony. *Harper*, 25 Mich App at 664. The Court determined the right to appeal an agency order was wholly statutory and the language of the statute the parties relied on – which was MCL 423.23 and not the APA – did not

provide for an appeal from anything other than final orders. *Id* at 665-66. Harper is not directly applicable here, because the Attorney General sought leave to appeal under Section 101 of the APA, MCL 24.301, which *expressly* permits interlocutory appeals from agency orders when waiting to appeal a final order would not afford adequate relief. Additionally, *Harper* specifically noted that the rule against interlocutory appeals from agency orders is general and not absolute, indicating that if there is statutory authority for such an appeal, it would be permitted. *Id* at 666-67.

*McBride*, 218 Mich App at 122, concluded that proceedings before the State Board of Education were not a contested hearing under the APA because no statute *requires* the Board to conduct a hearing. But the court's decision was only relevant to the standard of review. It expressly held that even in the absence of a contested case, judicial review was still available, but "judicial review is limited to a determination whether the decision is authorized by law." *Id*. *McBride* thus does not preclude judicial review of a decision from a hearing that is not 'contested' within the meaning of the APA.

Finally, *Michigan Ass'n of Public Employees v Michigan Employment Relations Comm*, 153 Mich App 536, 549; 396 NW2d 473 (1986) (*MAPE*), concluded that MERC's decisions in petitions for representation are only subject to an "authorized by law" review, as they are not contested cases under the APA. But the Court did not limit the availability of judicial review to solely contested cases. This case again is relevant only to the applicable *standard* of review.

### 3. The general rule that one may only appeal final agency orders is not applicable here because the Attorney General has exhausted his administrative remedies on the limited question of intervention.

The first sentence of Section 101 of the APA, MCL 24.301, is essentially a statement of the policy that all administrative remedies must be exhausted before the court reviews the administrative action, *Bonneville v Michigan Corrections Organization*, 190 Mich App 473, 476; 476 NW2d 411 (1991), but the last sentence of that section is intended as an exception to that general rule. While the requirement that all administrative remedies be exhausted is generally sound policy, none of those policy grounds apply here.

The Attorney General has exhausted his administrative remedies on the question of Attorney General intervention, the Commission will not revisit that issue, and even if the Commission were to revisit that issue after the hearing, it could not grant an adequate remedy because the created record would be tainted by the one-sided nature of the fact-finding process. The only distinction between contested and uncontested cases for the purposes of judicial review is the standard of review that applies. The fact that waiting to appeal the Commission's final order would not afford the Attorney General adequate remedy remains the same, whether the Commission is required to conduct an evidentiary hearing on a representation proceeding or not.

Moreover, whether the Attorney General has a right to intervene is not an issue that requires specialized Agency expertise. The Attorney General's authority to intervene is governed by MCL 14.101, MCL 14.28, and extensive case law that

requires great deference to his decision. Finally, there is no general restriction in the APA that its provisions only apply to contested cases or that uncontested cases are precluded from judicial review. Practical experience has been consistent with this notion and the Michigan Constitution permits judicial review of administrative decisions without any requirement that the case be contested or uncontested under the APA. 1963 Const, art 6, § 28. Denying the Attorney General a chance to appeal the Commission's erroneous determination of the Attorney General's right to intervene, in contravention of statute and well established case law, leaves the Attorney General without a remedy in this matter.

### 4. The Attorney General's intervention is meritorious, as his right to intervene should only be denied when a showing is made that it is clearly against the public interest.

Attorney General Bill Schuette is the chief law enforcement officer for the State of Michigan and has a duty to ensure that the laws of the state are followed. 1963 Const, art 5, §§ 3, 21. When the Attorney General determines, in his own judgment, that the interests of the state require intervention, he may "intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal." MCL 14.28; see also MCL 14.101. The Attorney General may intervene in administrative proceedings at any stage. *Kelley v Thayer*, 65 Mich App 88, 92-93; 237 NW2d 196 (1976).

Courts are to give great deference to the Attorney General's unconditional statutory right to intervene in matters of state interest. *Gremore,* 8 Mich App at 59. Unless there is a showing that the Attorney General's intervention is *clearly*

contrary to the public interest, the Attorney General should be permitted to intervene. *Id*; *VanStock*, 61 Mich App at 299.

Attorney General intervention is proper when significant matters of state interest and public policy are involved, and when a proceeding may affect unrepresented parties. *Syrkowski v Appleyard*, 122 Mich App 506, 513; 333 NW2d 90 (1983), *rev'd on other grounds* 420 Mich 367; 362 NW2d 211 (1985) (noting that intervention was proper to represent the unrepresented child's interests on the issue of entry of petitioner's name on birth certificate as natural and legal father of a child to be born to a surrogate mother who had been artificially inseminated with the sperm of petitioner). That is exactly the case here. The Act outlines the public policy to be served by the Commission:

> It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; *that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected*; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state. [MCL 423.1 (emphasis added).]

The Regents' vote to recognize the GSRAs as employees and the Organization's statements made in the letter accompanying the motion for reconsideration show that the Organization and the University administration will not be truly adverse parties before either the Commission or any ALJ assigned to

intervention was inimical to the public interest on impermissible speculation about the Attorney General's motives.

The Commission failed to give substantial deference to the Attorney General's reasoning and determination that it is in the state's interest to intervene and ensure a balanced, adverse presentation in the fact-finding process. See *Michigan State Chiropractic Ass'n v Kelley*, 79 Mich App 789, 791; 262 NW2d 676 (1977). The Commission afforded no deference to the Attorney General's legitimate decision to intervene in an otherwise one-sided hearing the result of which may have a significant impact on the State and the People of Michigan.

The majority of the Commission took the Attorney General's statement that unionization of the GSRAs may negatively affect the University's reputation and competitiveness out of context to conclude that he seeks intervention solely to oppose the majority Regents' policy decision. (Ex 1 at 4.) Actually, reading the Attorney General's Brief in Support of Intervention as a whole, the Attorney General's statements regarding the negative impact of unionization were merely part of his argument that the hearing in front of the ALJ involves the interests of the State and People of Michigan. (Ex 9.) This rather obvious position has been consistent throughout this whole matter.

But instead of liberally construing and deferring to the Attorney General's broad intervention authority as required by law, the Commission ignored the Attorney General's arguments that an adverse position needs to be presented to the ALJ to assure full and complete fact-finding on this issue of great state importance.

Only the dissenting Commissioner addressed the Attorney General's argument that it is crucial that all the relevant facts are presented to the ALJ, in the absence of adversity between the University and the Organization. The majority's decision was silent. (Ex 1 at 10.) The Commission's failure to follow well-established case law or even to discuss the Attorney General's articulated reasons for intervention is action contrary to law and amounts to a substantial and material error of law. The Commission's decision should be reversed for that reason alone.

### 6. The Commission's decision to deny the Attorney General's motion to intervene was arbitrary and capricious, as its finding that intervention was inimical to the public interest was without legal or factual basis.

Even more troubling are the Commission's unfounded conclusions regarding the Attorney General's motives, and its finding that, given such motives, intervention is inimical to the public interest. (Ex 1 at 4-5.) Despite failing to cite to any statement in the Attorney General's Motion or Brief in Support of Intervention, the Commission concludes that "the Attorney General seeks intervention *for the purpose of opposing a policy decision made by the Board of Regents of the University of Michigan*, an autonomous state institution." (*Id.* at 5 (emphasis added).) While it is true that the Attorney General has expressed concern about the negative impact GSRA unionization may have on the University and the State as a whole, the Attorney General's Motion and Brief in Support make it clear that the Attorney General's intervention is to ensure a full, complete, and balanced presentation of the facts and arguments. (Ex 9.)

At issue is not any "policy" of the Regents; what is to be decided is a matter of fact, whether the GSRAs are properly to be considered public employees under the Public Employment Relations Act. This is an issue that transcends the University, as the question of the meaning of public employment affects a wide range of legal issues for the State and its employees. As the Commission itself has noted, the Regents are without authority to opine on that question, as it is entirely within the purview of the Commission for decision.

Because the University administration and the Organization are in agreement that GSRAs are public employees, of course the Attorney General's role is geared toward presenting a more balanced view. Ensuring that the ALJ hears all the facts and that the Commission and any subsequent court reviewing the decision have the benefit of a complete record hardly rises to the level of infringing on the University's constitutional autonomy, as the University administration has argued. Nor is there any reason to conclude that having the Attorney General involved in what is nothing more than a usual adversarial and balanced process would somehow be "unduly disruptive." To the contrary, the participation of the Attorney General will guarantee that the adversarial process operates properly, ensuring that different legal perspectives are presented. See, e.g., *Syrkowski,* 122 Mich App at 513.

The Attorney General has not been able to find any cases that define "inimical to the public interest" for the purposes of declining Attorney General intervention. The dictionary states that "inimical" means "adverse in tendency or

effect; unfavorable; harmful." Random House Webster's College Dictionary, 2d ed. p 672 (1997). The law has been unwavering for decades – the "broad discretion granted the attorney general . . . is *only* limited when intervention by the attorney general is *clearly* inimical to the public interest." *VanStock*, 61 Mich App at 299 (emphasis added); see also *Gremore*, 8 Mich App at 59.

The Commission essentially decided that despite the Attorney General's clear statements that his intervention is designed to ensure all the facts are fully disclosed at the upcoming hearing, consistent with interests of fairness and due process, the Attorney General has ulterior motives that are "adverse in tendency or effect; unfavorable, harmful" to the public interest – that is, to the interest of the People of the State of Michigan who elected him. Such an unwarranted conclusion falls into the realm of a decision "arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances or significance," in other words, arbitrary and capricious. A Commission decision that is arbitrary and capricious is not authorized by law. Therefore, this Court should grant the Attorney General's application for leave and reverse the Commission's decision.

The Attorney General sums up his argument with one simple question: What is the Commission afraid of? Surely it cannot be the usual two-sided process that is commonplace throughout our courts, agencies, and other tribunals. One would think that the Commission would welcome the Attorney General's intervention, to

assure a good record, the best and most defensible administrative result possible, and the best opportunity for full review both by the Commission and the courts.

## CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erred when it dismissed for lack of jurisdiction the Attorney General's motion to stay administrative proceedings and application for leave to appeal. The APA expressly permits appeals, where, as here, appealing the final agency decision would not provide an adequate remedy. Although direct review as of right by the courts is limited to final orders in contested cases, no such restriction applies to preliminary, procedural or intermediate agency action, nor should one be implied under Michigan's principles of statutory construction. The Attorney General has exhausted his administrative remedies for the purposes of his intervention and has no relief unless the appellate courts hear this issue. Public policy considerations that favor appeals from final agency orders do not apply here because intervention is not a question uniquely within the Commission's expertise, and the order denying intervention is final for all purposes and thus should be appealable.

Finally, the argument for Attorney General intervention in this matter is meritorious. The Commission committed a "substantial and material error of law" by failing to give any deference to the Attorney General's decision to intervene in this matter and ignoring the Act's stated public policy to consider, respect, and protect the interests and rights of the consumers and the People of the State. The Commission's finding that such intervention would be "inimical to the public interest" is based on speculative conclusions and conjecture about the Attorney General's motives and is arbitrary and capricious. The Attorney General has consistently reiterated the significance of the question at issue here, to the State and People of Michigan. He seeks to intervene solely in the interests of fairness and due process, to legitimize the proceedings, and enable both the Commission and any subsequently reviewing Courts to make fully informed decisions based on a record that presents evidence probative of all views. The Commission's decision to deny that process is contrary to law, as it afforded no deference to the Attorney General, and it is arbitrary and capricious, as it was based on nothing but conjecture.

Because the Court of Appeals misapplied the law improperly denied the Attorney General his sole remedy to contest the Commission's decision on the question of his intervention, the Attorney General asks this Court to immediately consider this application, grant the Attorney General leave to appeal, and stay further administrative proceedings pending appeal.

Respectfully submitted,

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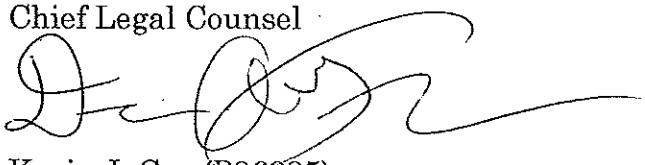

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