

**IN THE SUPREME COURT  
APPEAL FROM THE COURT OF APPEALS  
SAAD, P.J., AND DONOFRIO, AND GLEICHER, JJ.**

INTERNATIONAL UNION, UNITED  
AUTOMOBILE AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA and its LOCAL 6000; MICHIGAN  
CORRECTION ORGANIZATION, SEIU LOCAL  
526M; MICHIGAN PUBLIC EMPLOYEES, SEIU  
LOCAL 517M; and MICHIGAN STATE  
EMPLOYEES ASSOCIATION, AFSCME LOCAL 5,

Supreme Court No. 147700

Court of Appeals No. 314781

Plaintiffs-Appellants,

v

NATALIE YAW, EDWARD CALLAGHAN  
AND ROBERT LABRANT, in their official  
Capacities as members of the Michigan Employment  
Relations Commission; RICHARD "RICK" SNYDER,  
in his official capacity as Governor of the State of Michigan;  
WILLIAM D. SCHUETTE, in his official capacity as Attorney  
General for the State of Michigan; and STATE OF MICHIGAN,

Defendants-Appellees.

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**BRIEF OF AMICUS CURIAE MICHIGAN CHAMBER OF COMMERCE**

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

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE BASIS OF JURISDICTION AND AUTHORITY FOR FILING AMICUS BRIEF .....	v
QUESTION PRESENTED .....	vi
CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED .....	vii
INTRODUCTION AND STATEMENT OF THE CHAMBER’S INTEREST.....	1
BACKGROUND .....	2
I.    Constitutional framework.....	2
II.   The history of collective bargaining in the classified civil service.....	3
III.  Freedom to work .....	6
ARGUMENT.....	9
I.    Standard of review .....	9
II.   It is constitutional to apply PA 349 to the classified state civil service.....	9
A.    The Constitution grants the Legislature broad authority to enact laws relative to the conditions of employment for all employees, including those in the classified civil service.....	10
B.    The Civil Service Commission’s authority is limited.....	12
III.  It is dubious whether the Civil Service Commission even has the authority to authorize collective-bargaining for the classified civil service. ....	14
CONCLUSION.....	17

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>By Lo Oil Co v Dep't of Treasury</i> , 267 Mich App 19; 703 NW2d 822 (2005).....	11
<i>Cady v Detroit</i> , 289 Mich 499; 286 NW2d 805 (1939).....	9
<i>Council No. II, AFSCME v Civil Serv Comm'n</i> , 408 Mich 385; 292 NW2d 442 (1980).....	6, 12, 16
<i>Doyle v Election Comm of Detroit</i> , 261 Mich 546; 246 NW 220 (1933).....	2
<i>House Speaker v Governor</i> , 443 Mich 560; 506 NW2d 190 (1993).....	3
<i>Huron-Clinton Metro Auth v Bds of Suprs of Wayne, Washtenaw, Livingston, Oakland &amp; Macomb Cos</i> , 300 Mich 1; 1 NW2d 430 (1942).....	2
<i>In re Request for Advisory Opinion Regarding Constitutionality of</i> , 2011 PA 38, 490 Mich 295; 806 NW2d 683 (2011).....	9
<i>Kaiser v Allen</i> , 480 Mich 31; 746 NW2d 92 (2008).....	9
<i>Marsh v Department of Civil Service</i> , 142 Mich App 557; 370 NW2d 613 (1985).....	13
<i>Mich United Conservation Clubs v Sec'y of State</i> , 464 Mich 359; 630 NW2d 297 (2001).....	11
<i>Mich Dept of Transp v Tomkins</i> , 481 Mich 184; 749 NW2d 716 (2008).....	9
<i>Mich State AFL-CIO v Civil Service Comm'n</i> , 455 Mich 720; 566 NW2d 258 (1997).....	12
<i>People v Peltola</i> , 489 Mich 174; 803 NW2d 140 (2011).....	10
<i>Russello v United States</i> , 464 US 16, 23; 104 S Ct 296; 78 L Ed 2d 17 (1983).....	10

<i>Straus v Governor</i> , 459 Mich 526; 592 NW2d 53 (1999).....	3, 4, 9
<i>Taylor v Smithkline Beecham Corp</i> , 468 Mich 1; 658 NW2d 127 (2003).....	9
<i>Wayne Co v Hathcock</i> , 471 Mich 445; 684 NW2d 765 (2004).....	11

**CONSTITUTIONAL PROVISIONS**

Const 1963, art 3, § 2.....	2
Const 1963, art 4, §1.....	11
Const, 1963, art 4, § 48.....	passim
Const, 1963, art 4, § 49.....	passim
Const, 1963, art 11, § 5.....	passim

**RULES**

MCR 7.301(A)(2).....	v
MCR 7.306(D).....	v
MCR 7.313.....	v

**STATUTES**

MCL 423.209(1)(b).....	8
MCL 423.209(2).....	vii, 8
MCL 423.210(3).....	viii, 8, 9

**OTHER AUTHORITIES**

2 Official Record, Constitutional Convention 1961, at 2339.....	15
Arthur B. Laffer & Stephen Moore, <i>Boeing and the Union Berlin Wall</i> , The Wall Street Journal (May 13, 2011).....	7, 8
OAG 1969-1970, No. 4709 at 173.....	5, 16
Citizens Research Council of Michigan, <i>An Evaluation of the Michigan Civil Service System 89</i> (July 1988).....	3, 4, 5, 15

Merriam-Webster's Collegiate Dictionary (11<sup>th</sup> ed, 2006), p 1049 .....11  
Webster's Seventh New Collegiate Dictionary (1963).....11

**STATEMENT OF THE BASIS OF JURISDICTION AND AUTHORITY FOR  
FILING AMICUS BRIEF**

On January 29, 2014, this Court granted the Plaintiffs-Appellants' application for leave to appeal. Accordingly, the Court has jurisdiction under MCR 7.301(A)(2). The Michigan Chamber of Commerce respectfully requests that this Court accept the Chamber's Amicus brief pursuant to MCR 7.306(D) and MCR 7.313.

### **QUESTION PRESENTED**

The Michigan Constitution granted the Legislature express authority to enact laws “relative to the hours and conditions of employment” under article 4, § 49. Section 49 did *not* exclude the classified civil service from the Legislature’s reach, even though the people knew how to write that type of exclusion, having done so in the immediately preceding provision, § 48. Under article 11, § 5, the Constitution gave the Civil Service Commission the complementary authority to *regulate* all conditions of employment. Does the Constitution empower the Legislature to enact a freedom-to-work law that applies to state employees as a “condition[ ] of employment”?

Appellants’ answer: No.

Appellees’ answer: Yes.

Court of Appeals’ answer: Yes.

*Amicus Curiae* The Michigan Chamber of Commerce answers: Yes.

## CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

### I. Constitutional Provisions

#### A. 1963 Const, art 4, § 48 (emphasis added)

The legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service.*

#### B. 1963 Const, art 4, § 49 (emphasis added)

The legislature may enact laws relative to the hours and *conditions of employment.*

#### C. 1963 Const, art 11, § 5 (in relevant part) (emphasis added)

. . . The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and *regulate all conditions of employment* in the classified service.

### II. Statutes

#### A. MCL 423.209(2), as modified by 2012 PA 349

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

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

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

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

**B. MCL 423.210(3), as modified by 2012 PA 349**

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

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

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

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

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

**III. Civil Service Commission Rule**

**A. Civil Service Commission Rule 6-7.2 (emphasis added)**

Service Fee Authorized.

Nothing in this rule precludes the employer from making an agreement with an exclusive representative to require, *as a condition of continued employment*, that each eligible employee in the unit who chooses not to become a member of the exclusive representative shall pay a service fee to the exclusive representative. If agreed to in a collective bargaining agreement, the state may deduct the service fee by payroll deduction. An appointing authority shall not deduct a service fee unless the employee has filed a prior written authorization or as otherwise authorized in a collective bargaining agreement.

## INTRODUCTION AND STATEMENT OF THE CHAMBER'S INTEREST

This case presents a straightforward question: when the Legislature and the Civil Service Commission adopt conflicting policies with respect to an employment condition, who wins? The policy at issue is a public employee's freedom to work without being forced to join a union or pay a compulsory union service fee. The Legislature—through 2012 PA 349—guarantees that freedom. The Commission—through its Rule 6-7.2—purports to take that freedom away. And the Michigan Constitution resolves the question definitively in the Legislature's favor.

Specifically, article 4, § 49 of the Michigan Constitution grants the Legislature broad power to enact laws relative to “conditions of employment.” On its face, § 49 applies to all employees, public and private. That scope is very unlike the immediately preceding provision, § 48, which removes from the Legislature the power to enact employee-dispute-resolution laws applicable to “the state classified civil service.” At the same time, in article 11, § 5, the Constitution gives the Commission the complementary power to *regulate* “conditions of employment.” These corresponding powers—to legislate and to regulate—are consistent with this Court's frequent recognition that the Constitution vests state legislative power exclusively in the Legislature, and that the Commission is in fact part of the executive branch, not an independent, fourth branch of state government.

The Court of Appeals correctly held that PA 349 is constitutional and applies to all employees, even members of the classified civil service. That holding honors state employees' freedom to work without being coerced to pay an association they do not want to join or support. And it results in a narrowing of a practice with dubious constitutional validity: collective bargaining by state employees. The Chamber respectfully requests that this Court affirm.

The Michigan State Chamber of Commerce is a Michigan nonprofit membership corporation with over 6,500 members representing, among other things, manufacturing, retail, agricultural, finance, construction, and wholesale businesses, as well as local chambers of commerce and trade and professional associations. Members include businesses of every size and type and come from every one of the State's 83 counties, representing a broad cross section of the State's economy. Since its founding in 1959, the Chamber has worked with the following mission: Promote conditions favorable to job creation and business growth in Michigan.

In furthering this mission, the Chamber is particularly interested in the legal landscape that helps to make Michigan a competitive business state, including the enactment of 2012 PA 348 and 349. Freedom-to-work laws help create conditions favorable to business growth in the private sector. Equally important, such laws help attract the highest qualified employees—from within and without Michigan—to work in the public service by eliminating a significant barrier to entry: compulsory union membership or dues. PA 349's application to the state classified civil service will attract a higher quality applicant pool for state positions while giving all state employees the freedom to choose which groups they support with their membership and their hard-earned paychecks.

## **BACKGROUND**

### **I. Constitutional framework**

The Michigan Constitution divides our government into three branches, “legislative, executive and judicial.” Const 1963, art 3, § 2. The Legislature alone serves as “the repository of all legislative power.” *Huron-Clinton Metro Auth v Bds of Suprs of Wayne, Washtenaw, Livingston, Oakland & Macomb Cos*, 300 Mich 1, 12; 1 NW2d 430 (1942).

Although the Legislature has the power to do anything the Constitution does not expressly prohibit, *Doyle v Election Comm of Detroit*, 261 Mich 546, 549; 246 NW 220 (1933),

the 1963 Constitution contains a number of express grants of legislative power—including the authority to regulate employment conditions in Michigan. The two constitutional provisions relevant here are §§ 48 and 49 of article 4, which state:

- “The legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service.*” [Const 1963, art 4, § 48 (emphasis added).]
- “The legislature may enact laws relative to the hours and *conditions of employment.*” [Const 1963, art 4, § 49 (emphasis added).]

Together, these provisions (1) authorize the Legislature to define “conditions of employment” with respect to *any* employee, public or private; (2) empower the Legislature to legislate in the area of dispute resolution, but only with respect to public employees; and (3) eliminate the Legislature’s power to regulate disputes among public employees “in the state classified civil service.”

The Constitution separately creates a Civil Service Commission that has a lesser power: to “*regulate* all conditions of employment in the classified service.” Const 1963, art 11, § 5 (emphasis added). This latter authority is the natural complement to the Legislature’s § 48 and § 49 power to “enact laws” relative to the “conditions of employment” for all employees, public and private. This reality is confirmed by the Constitution’s overarching structure, which does *not* establish the Civil Service Commission as an independent, fourth branch of government, but instead as a constitutionally-established administrative agency *within* the executive branch. *Straus v Governor*, 459 Mich 526, 537 n 7; 592 NW2d 53 (1999); *House Speaker v Governor*, 443 Mich 560, 587 n 33; 506 NW2d 190 (1993).

## **II. The history of collective bargaining in the classified civil service**

From the Civil Service Commission’s inception through the mid-1970s, there was no collective bargaining in the classified civil service. Citizens Research Council of Michigan, *An*

*Evaluation of the Michigan Civil Service System* 89 (July 1988) [hereinafter, "CRC Report"]. In 1974, the Commission created a Staff Task Force on Employee Relations to study various subjects and propose revisions to the Commission's employee-relations policy. *Id.* at 89-90. And in its August 1975 report, the task force proposed a collective-bargaining framework to negotiate "wages, hours and all conditions of employment except as otherwise provided herein." *Id.* at 90. Although the task force had received many written comments and statements as part of its review process, the report made no mention of any problem with wages, workplace safety, or arbitrary dismissals, nor any need for a collective-bargaining system to solve such problems. *Id.*

In February 1976, the Commission adopted a formal statement in response to the task force's collective-bargaining proposal. The Commission "unanimously concluded" that it had "no such power" to authorize collective bargaining. "Any such fundamental change in the constitutional structure regarding classified employees of the State of Michigan would . . . have to be accomplished by a vote of the people." CRC Report at 91 (emphasis added).

The Commission reached this conclusion only after thoroughly reviewing the 1963 Constitution, the Constitutional Convention debates, pertinent decisions of this Court, the historical development of the Commission's employee-relations policies, and feedback from members of the executive branch and employee-organizations representatives. *Id.* These sources compelled the Commission's conclusion that "true collective bargaining is beyond our power to grant." *Id.*

Indeed, the Commission recognized that it lacked the power to authorize even a limited form of collective bargaining where the Commission retained final decision-making authority. CRC Report at 92. That is because the Constitution, in article 4, § 48, "empowers the *Legislature* to enact collective bargaining laws." *Id.* (emphasis added). The Governor's office

agreed, being of the view that if collective bargaining was to be implemented at all, it would have to be through constitutional amendment. *Id.* at 93.

In the ensuing years, the Legislature entered the fray. In 1975, the House proposed granting collective bargaining rights to state police sergeants and troopers. *Id.* at 94. Though the resolution was never enacted into law, sergeants and troopers did eventually obtain collective-bargaining rights in 1978 through initiative petition. *Id.* In 1977, a House joint resolution would have given the Commission authority to institute collective bargaining. *Id.* at 94. And a 1978 Senate joint resolution would have *required* binding arbitration and collective bargaining for classified employees. *Id.* at 95. Neither proposal became law.

The only authority expressing the view that the *Commission* had authority to institute collective bargaining appears to have been the Attorney General, in a 1978 letter opinion. In reaching that conclusion, the 1978 letter relied on a 1970 opinion that said, without analysis, that “by its own rules, only the civil service commission may enter into collective bargaining agreements with state classified employees.” OAG 1969-1970, No. 4709 at 173. The 1970 opinion’s reference to “rules” meant the Commission’s 1966 employee-relations policy, which was appended to the opinion, did not even provide for collective bargaining anywhere in its text. CRC Report at 95. So it is unclear precisely what legal principle supported the 1970 opinion.

Nonetheless, the Citizens Advisory Task Force on Civil Service Reform of 1979 referenced the Attorney General’s 1978 letter when recommending that the Commission adopt collective bargaining. *Id.* And even then, the ’79 task force failed to explain why collective bargaining was necessary, other than to note that unions favored it. *Id.* The task force dissent from the collective-bargaining recommendation reiterated that the Commission’s constitutional power to set compensation and the notion of collective bargaining “are so disparate in nature and

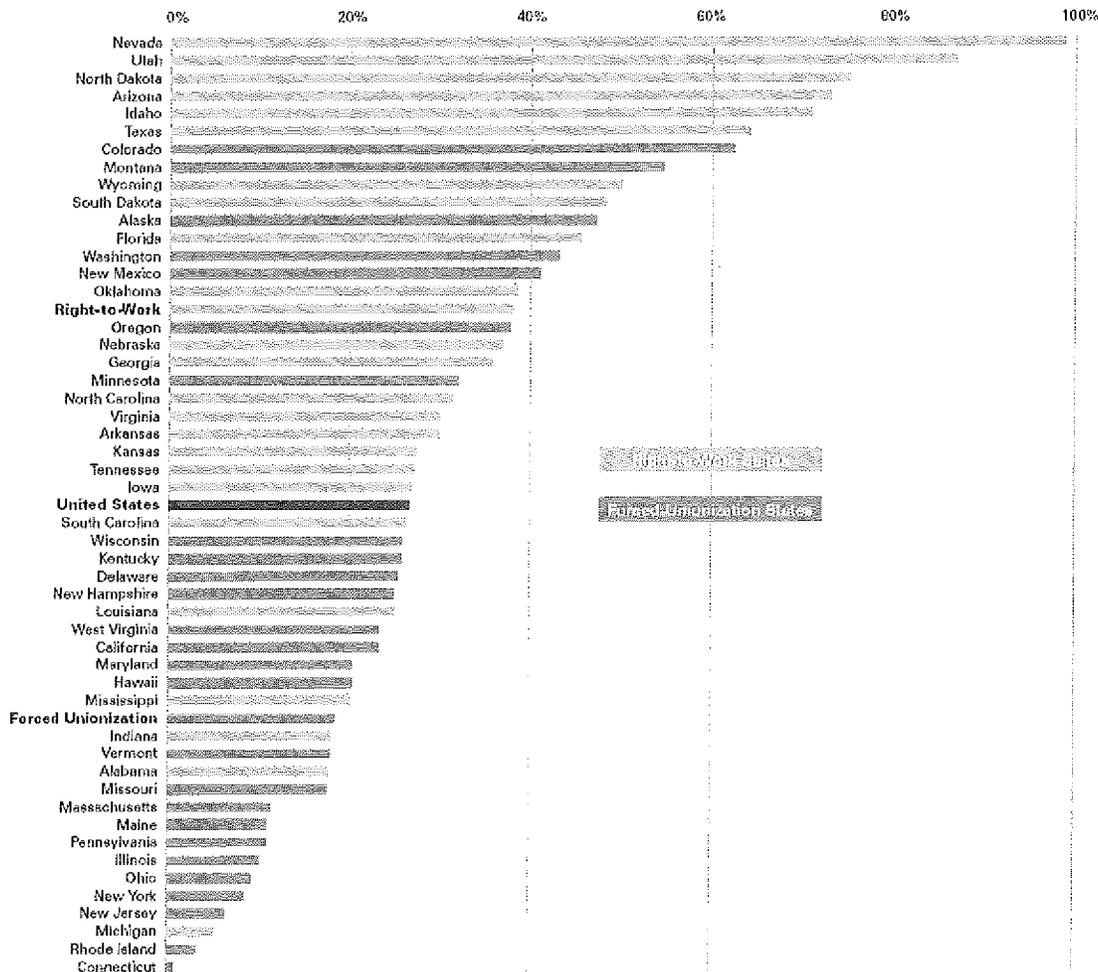
philosophy that collective bargaining should not be instituted without constitutional amendment.” *Id.* at 96. In spite of that fact, a newly composed Commission instituted collective bargaining for the state civil service in 1980 without a constitutional amendment or even authorizing legislation. *Id.* at 96. And although this Court has suggested, in *dicta*, that the Commission has such authority, see *Council No. II, AFSCME v Civil Serv Comm’n*, 408 Mich 385; 292 NW2d 442 (1980), the Commission’s power to initiate collective bargaining has never been resolved by a Michigan court.

### **III. Freedom to work**

Michigan’s Legislature enacted and Governor Snyder signed into law 2012 PA 348 (applicable to private employers) and 2012 PA 349 (applicable to public employers) to give workers the choice to opt out of union membership by prohibiting employers from requiring employees to join a union or pay a service fee to enjoy employment. This legislation, popularly known as “Freedom to Work,” was the result of many studies showing that states providing this kind of freedom of association to their citizens experience demonstrably better economic growth. Indeed, U.S. Labor Department data from January 1990 to April 2014 shows that nearly all of the top 10 states for job growth have freedom-to-work laws, while 21 of the 25 states with the slowest employment growth have forced unionization (excluding Michigan and Indiana, which became freedom-to-work states in 2013 and 2012):

# State Employment Growth 1990-2014

Oklahoma (2001), Indiana (2012) and Michigan (2013) became right-to-work states during this period.  
Adapted from Opportunity Ohio.



Source: U.S. Department of Labor, Bureau of Labor Statistics, [median.org](http://median.org), Mackinac Center for Public Policy  
January 1990 to April 2014, seasonally-adjusted data

Unions have disparaged freedom-to-work laws as tools for depressing wages, but the data does not support that contention. As *The Wall Street Journal* recently reported based on data from 2000-2009, freedom-to-work states not only outpaced forced-unionization states in gross state product (54.6% vs. 41.1%) and payrolls (4.1% vs. -0.6%), they also outpaced them in personal income growth (53.3% vs. 40.6%). Arthur B. Laffer & Stephen Moore, *Boeing and the Union Berlin Wall*, *The Wall Street Journal* (May 13, 2011). No wonder citizens of forced-

unionization states have fled to freedom-to-work states, with the latter experiencing a population growth rate nearly double (11.9% vs. 6.1%) that of the former. *Id.* Indeed, a 2010 study by economist Richard Vedder of Ohio University found that from 2000 to 2008, 4.8 *million* Americans moved to freedom-to-work states from forced-unionization states, a pace of one person for every minute of every single day. *Id.*

The upshot of 2012 PA 349 is to give all public employees—including those in the classified civil service—the ability to refrain from joining a union. MCL 423.209(1)(b). Simultaneously, the Act prohibits public employers from compelling union membership or payment of a union service fee. MCL 423.209(2), MCL 423.210(3). These laws conflict directly with the Civil Service Commission's Rule 6-7.2, which purports to authorize governments to enter into collective-bargaining agreements that require non-union employees to pay compulsory union contributions.

## ARGUMENT

### **I. Standard of review**

This Court reviews decisions involving constitutional and statutory interpretation de novo. *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008) (citation omitted); *Mich Dept of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008) (citations omitted). “[S]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003); *Cady v Detroit*, 289 Mich 499, 505; 286 NW2d 805 (1939) (emphasis added). Thus, this Court has observed that it must “exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict.” *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307-308; 806 NW2d 683 (2011) (quotation omitted).

Equally significant, “when considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation.” *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003). “[W]hen a court confronts a constitutional challenge it must determine the controversy ‘stripped of all digressive and impertinently heated veneer lest the Court enter . . . another thorny and trackless bramblebush of politics.’” *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999) (quotation omitted).

### **II. It is constitutional to apply PA 349 to the classified state civil service.**

PA 349’s plain language prohibits *all* public employers, including the State, from imposing compulsory union membership or service fees on public employees as a condition of obtaining or continuing employment. MCL 423.210(3). This language is presumed constitutional unless its unconstitutionality is “clearly apparent.” *Taylor*, 468 Mich at 6. The relevant constitutional provisions demonstrate that the Court of Appeals correctly upheld PA

349's constitutionality and further held that PA 349 invalidates the Civil Service Commission's contrary rule. Although this Brief focuses primarily on the constitutional provisions at issue in this appeal and the broader policy implications that a decision may have, the Chamber agrees with and adopts the additional arguments presented in Defendants-Appellees' Brief on Appeal.

**A. The Constitution grants the Legislature broad authority to enact laws relative to the conditions of employment for all employees, including those in the classified civil service.**

Article 4, § 49 says “[t]he legislature may enact laws relative to the hours and *conditions of employment.*” Const 1963, art 4, § 49 (emphasis added). This provision applies to *all* public employees, including those in classified civil service. This fact is made abundantly clear when comparing § 49 to § 48—the provision that immediately precedes § 49—which says “[t]he legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service.*” Const 1963, art 4, § 48 (emphasis added).

As is readily apparent from the plain language of these two sections, the People intended article 4, § 49 to apply to *all* public employees/employers. If the People did not have such an intention, they knew how to exempt the classified civil service, because they did so in article 4, § 48—only one provision earlier. The Court of Appeals recognized this fact in its opinion and stated that “[w]e cannot assume that the exception for civil service employees, which was purposely placed in § 48, was inadvertently omitted from § 49.” Slip Op. at 11.

The Court of Appeals' conclusion is consistent with fundamental principles of statutory interpretation. When language is included in one provision but excluded from another, it is presumed that such inclusion or exclusion was intentional. *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011), citing *Russello v United States*, 464 US 16, 23 (1983). Reading §§ 48 and 49 in tandem, the Constitution provides the Legislature the power to enact laws relative to

hours and conditions of employment for *all* employees, including those in the classified civil service.

The other constitutional provision that is relevant to this appeal is article 11, § 5, which provides that the CSC shall “*regulate* all conditions of employment in the classified service.” Const 1963, art 11, § 5 (emphasis added). As discussed at length by Defendants-Appellees to this case and the Court of Appeals, there is an important distinction between the Commission’s ability to *regulate* the conditions of employment (article 11, § 5) and the Legislature’s power to *enact laws* relative to conditions of employment (article 4, § 49). Appellees’ Br. at 9-10; Slip Op. at 10-11.

As the Court of Appeals explained, the Commission’s authority is “not limitless,” rather it has the ability to govern, direct, or control conditions of employment *according to rule, law or authority*. See Slip Op at 11, citing Merriam-Webster’s Collegiate Dictionary (11th ed, 2006), p 1049. The Court of Appeals’ reading of the term “regulate” not only makes sense in the broader context of the Legislature’s plenary authority<sup>1</sup> but also in relation to the “common understanding” of the term in 1963 (i.e., when the Constitution was adopted by the People). See Webster’s Seventh New Collegiate Dictionary (1963), p 722; *By Lo Oil Co v Dep’t of Treasury*, 267 Mich App 19, 39-40; 703 NW2d 822 (2005), citing *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004) (recognizing that the Court’s goal in interpreting constitutional provisions is to “ascertain and give effect to the common understanding of the text at the time of ratification.”).

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<sup>1</sup>As this Court has recognized on many occasions, the Legislature has plenary authority unless such authority is specifically limited. See Const 1963, art 4, §1; *Mich United Conservation Clubs v Sec’y of State*, 464 Mich 359, 382; 630 NW2d 297 (2001) (Young, J. concurring) (recognizing that the Legislature has plenary authority except where otherwise limited). The Legislature passes a variety of laws that are applicable to the Commission, including anti-discrimination laws and election laws. See discussion *infra* at pp 6-7.

Stated simply, the Commission may regulate the conditions of employment in accordance with the laws enacted by the Legislature under article 4, § 49 and § 48 to the extent not related to disputes concerning employees in the state classified service. A Commission rule related to conditions of employment can never supersede a conflicting statutory enactment under the plain language of the Constitution. The Court of Appeals correctly rejected Plaintiffs-Appellants' arguments and this Court should do the same.

**B. The Civil Service Commission's authority is limited.**

As noted by the Court of Appeals, "[t]he [Commission]'s power to act in its limited sphere [to regulate conditions of civil service employment] thus does not trump the Legislature's broader constitutional powers." Slip Op at 12. The Commission's power provided in article 11, § 5 "is not limitless in scope." *Id.* at 11. Although Plaintiffs-Appellants' contend that this conclusion is unprecedented, Michigan courts, including this Court, have often recognized the limited scope of the Commission's authority.

For instance, in *Council No 11, AFSCME v Civil Service Commission*, 408 Mich 385; 292 NW2d 442 (1980), this Court held that a Commission rule restricting civil service employees' participation in political activity violated a validly enacted statute and was therefore invalid. Like the Court of Appeals here, the *Council 11* Court recognized that to the extent the Commission rule at issue was in conflict with a statute, that rule was invalid. *Id.* at 391. In so holding, this Court stated that the Commission's authority to regulate "employment-related activity involving internal matters" did not extend to a statutory prohibition on certain off-duty activities "simply because such activities could conceivably interfere with satisfactory job performance." *Id.* at 406-407. See also *Mich State AFL-CIO v Civil Serv Comm'n*, 455 Mich

720; 566 NW2d 258 (1997) (holding a Commission rule invalid when it conflicted with a statute).

In *Marsh v Department of Civil Service*, 142 Mich App 557; 370 NW2d 613 (1985), the Michigan Court of Appeals recognized that the Commission's constitutional authority cannot trump any and all legislation related to employment conditions. In *Marsh*, the Court of Appeals held that the Commission is "not exempted from legislation prohibiting discrimination and securing civil rights in employment." *Id.* at 569. In explaining its decision, the Court stated as follows:

Although Const 1963, art 4, § 48, precludes the Legislature from enacting laws providing for the resolution of employment disputes concerning public employees in the state classified civil service, this provision must be read in conjunction with the provision creating the Civil Rights Commission and the equal protection/antidiscrimination provision of our constitution. Provisions of the constitution should be read in context, not in isolation, and they should be harmonized to give effect to all. [*Id.* at 566.]

For a more comprehensive discussion of relevant Michigan case law, see Defendants-Appellees' Brief on Appeal at pp 17-21.

These cases demonstrate that the Commission's authority is not limitless, and that it is subservient to the Legislature's power as related to the conditions of employment. If Plaintiffs' theory is correct, then the Commission is also not restrained by generally applicable legislative enactments like the Elliott-Larsen Civil Rights Act, or the Michigan Occupational Safety and Health Act. The Commission has never before taken such an extreme view of its own constitutional authority, and this Court should not do so.

In sum, the Court of Appeals correctly recognized that this Court's cases have consistently interpreted the Commission's authority against the backdrop of the Legislature's.

Applying the same approach here leads to the conclusion that Civil Service Commission Rule 6-7.2 cannot trump 2012 PA 349.

**III. It is dubious whether the Civil Service Commission even has the authority to authorize collective-bargaining for the classified civil service.**

A holding that PA 349 controls over Civil Service Commission Rule 6-7.2 vindicates Michigan's fundamental constitutional structure. It affirms that the legislative authority is vested exclusively in the Legislature while recognizing the Commission's role—as part of the executive branch rather than as an unconstitutional “fourth branch” of government—to regulate and implement within the system of employment laws the Legislature has enacted.

Such a holding also vindicates First Amendment principles. As Defendants-Appellees explain at pages 28-31 of their Brief, there are serious freedom-of-association problems with any regimen where a public employer is given the power to force employees, as a prerequisite to enjoying employment, to join or pay fees to an organization the employees do not support. For example, when a public employee pays a union service fee in exchange for representation in the collective-bargaining process, the union may use that process to advocate for concessions—higher government spending, seniority-based rather than merit-based pay, etc.—that are directly contrary to the employee's political desires and beliefs. It is difficult to say that the First Amendment has been honored when an employee is compelled to pay for such speech.

Conversely, a holding that the Civil Service Commission has plenary authority over collective bargaining, at the Legislature's expense, would force this Court to grapple with the elephant in the room: there is nothing in article 11, § 5 authorizing the Commission to institute collective bargaining for the classified civil service in the first instance. Indeed, until 1980, the consensus was the exact opposite.

Start with the basic purpose of article 11, § 5, which vests the Commission with authority to “fix rates of compensation for all classes of position.” There is no language in § 5 that contemplates Commission authority to delegate that power to the Office of the State Employer and third party employee bargaining units. As the Commission concluded in 1976, “to install decision-making machinery within the Department of Civil Service which would effectively preclude the Commission from discharging [its] constitutional duties would, at the very least, be contrary to the spirit of Article XI, Section 5.” CRC Report at 92 (quoting the Commission’s formal statement of February 20, 1976).

Minutes from the Constitutional Convention elucidate this point. Consider again the Constitution’s express delegation of authority to the Legislature in article 4, § 48 to provide “for the resolution of disputes concerning public employees, except those in the state classified civil service.” Given the Legislature’s broad authority to take any action the Constitution does not prohibit, § 48 would appear to be an entirely superfluous provision; the Legislature already had the presumptive authority to enact law involving public-employee disputes (including collective bargaining). This point was raised at the Convention, and Delegate Habermehl explained why the convention delegates should *not* assume the Legislature’s authority in this area:

This may seem a bit elementary that [the Legislature] should have that power, and I think in this day and age there is probably very little doubt that they do have that power, but it must be remembered that for quite a long period in our history of labor relations there was a good deal of doubt about whether the legislature could act in this field.

There are no cases in Michigan, but there were federal cases and cases in other states which held that any legislative enactment in this field was an impairment of the right of private contract that the legislature could not state anything relating to employment *because that was a matter between employer and employee*. None of us wish to continue that, and we wanted to insure that that line of cases would never come up again, so all we attempted to do was to insure that the constitution made clear that the legislature had the power to act in these fields.” [2 Official Record, Constitutional Convention 1961, at 2339 (emphasis added).]

Given this context, it is extraordinarily presumptuous to take the position that the Convention delegates believed the Commission had authority to institute collective bargaining when the same delegates were not even willing to assume that the Legislature had such authority. That is why the delegates expressly set forth in § 48 the Legislature's power to resolve public-sector employment disputes. Yet no comparable provision can be found anywhere in article 11, § 5.

As noted in the Background, this Court in *Council No. II, AFSCME v. Civil Service Commission* did not question the Commission's authority to regulate employment-related activity involving internal matters, including collective bargaining. But the question of the Commission's authority to institute collective bargaining was not at issue in that case. The Court's passing dicta on the subject was simply part of the Court's attempt to contrast examples of employment-related activity subject to Commission authority with the before- and after-work political activities at issue in the litigation. And even in dicta, the Court assumed only the Commission's power to "regulate" collective bargaining, not the Commission's authority to institute collective bargaining in the first instance.

When all assumptions are stripped away, then, the only apparent basis for the Commission's authority to institute collective bargaining for the classified civil service appears to be the Attorney General's 1978 letter opinion and the 1970 OAG on which it relies. And, as discussed above, neither of those documents provides a basis for the constitutional authority the Commission has invoked.

Accordingly, if the Court considers it a close question whether the Legislature has authority to legislate in the arena of public-employee collective bargaining, it must first determine whether the Commission has the authority to institute collective bargaining. If the

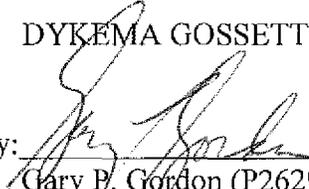
Constitution does not grant the Commission such authority, Commission Rule 6-7.2 is of no effect, and there is no conflict with 2012 PA 349 for this Court to resolve. In that event, the Chamber respectfully submits that the Court should issue a supplemental briefing schedule and direct that oral argument be held on the issue of the Commission's power to institute collective bargaining for the state classified civil service.

**CONCLUSION**

The Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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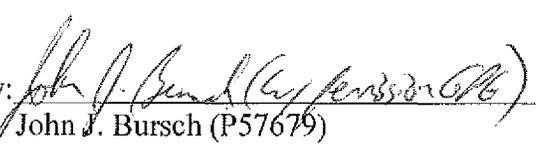
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