STATE OF MICHIGAN

COURT OF APPEALS

UAW, UAW LOCAL 6000, MICHIGAN CORRECTIONS ORGANIZATION SEIU LOCAL 526, MICHIGAN PUBLIC EMPLOYEES SEIU LOCAL 517M, MICHIGAN STATE EMPLOYEES ASSOCIATION AFSCME LOCAL S,

Plaintiffs,

v

NINO ERWIN GREEN, EDWARD D. CALLAGHAN, ROBERT LABRANT, GOVERNOR OF MICHIGAN, ATTORNEY GENERAL,

Defendants.

FOR PUBLICATION
August 15, 2013

No. 314781

Before: SAAD, P.J., and DONOFRIO and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

Article 11, § 5 of the 1963 Michigan Constitution establishes the Civil Service Commission (CSC) as an independent constitutional entity and broadly empowers the CSC to govern the classified civil service. The Convention Comment explains that the CSC's constitutional framework was "designed to continue Michigan's national leadership in public personnel practice, and to foster and encourage a career service in state government." An integral component of article 11, § 5 vests the CSC with the authority to "make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service."

Pursuant to its regulatory authority, the CSC authorizes "employees in eligible positions to engage in a form of collective bargaining." Civil Service Rule 6-1.1. Eligible classified employees "may organize, form, assist, join, or refrain from joining labor organizations." Civil Service Rule 6-5.1. If a union-eligible employee opts out of union membership, Civil Service Rule 6-7.2 permits the CSC to collect from the employee a service fee, also called an agency

fee.[1] Agency fees defray the costs associated with collective bargaining and other union activities.

2012 PA 349 amends the Public Employment Relations Act (PERA) and prohibits public employers from requiring union membership and from assessing agency fees against nonunion employees. The issue presented in this declaratory judgment action is whether PA 349's agency-fee provision applies to the classified civil service.

The majority holds that because article 4, § 49 of the 1963 Michigan Constitution permits the Legislature to "enact laws relative to the hours and conditions of employment," PA 349 trumps the CSC's agency-fee rule: "the CSC's power to issue rules governing civil service employment is not limitless in scope, but subject to and in accordance with the Legislature's power to 'enact laws' regarding 'conditions of employment.'" Despite the expansive rule-making power vested in the CSC by article 5, § 11, the majority asserts that "it is within the authority of the Legislature to pass laws on public policy matters in general and particularly those, as here, that unquestionably implicate constitutional rights of both union and nonunion public employees."

I believe that 2012 PA 349 unconstitutionally infringes on the CSC's power to "regulate all conditions of employment in the classified service." That agency fees may "implicate" constitutional rights does not empower the Legislature to exceed its constitutional authority. Therefore, I respectfully dissent.

I. THE CONSTITUTIONAL FRAMEWORK

Const 1963, art 11, § 5 describes the scope of the classified civil service, establishes the CSC's powers, and invests the CSC with regulatory independence. Its 12 paragraphs elucidate the CSC's unique, autonomous role in our constitutional system. The Constitution's framers anticipated that the CSC would remain detached from partisanship ("The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year."). Promotion or appointment in the civil service hinges on merit rather than "religious, racial or partisan considerations." Compensation increases recommended by the CSC may be rejected only upon a two-thirds vote of "the members elected to and serving in each house." The Legislature's power to limit the CSC's own budget is also substantially constrained ("To enable the commission to exercise its powers, the

[1] Specifically, the Rule provides:

> 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.

legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission.”). These elements of article 11, § 5 animate the framers’ intent to shield this State’s skilled, loyal, high quality workforce from politically motivated meddling.

The 1963 Constitution established the CSC’s unique independence to insure that the political preferences of the Governor or the Legislature would not infect the administration of the classified workforce. Article 11, § 5 deliberately insulates the management of the classified civil service from political partisanship. The majority’s acknowledgment that PA 349’s substance has engendered “demonstrations in Lansing [and] indeed, across the country” confirms the fundamentally *political* nature of the statute and decisively contradicts the majority’s claim that the Legislature acted merely to “remove politics from public employment.”

Article 11, § 5’s fourth paragraph is at the center of this dispute. This provision enables the CSC to wield the comprehensive authority bestowed upon it by the Constitution:

> 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.* [Emphasis added.]

The CSC’s prerogative to assess agency fees flows from this delegation of regulatory power.

The majority asserts that PA 349 constitutes a “proper exercise of the Legislature’s constitutional authority” because it embodies a law “‘relative to the hours and conditions of employment.’” (Emphasis omitted.) Furthermore, the majority reasons, the statute falls “uniquely within the province of the Legislature” because the Legislature possesses “‘[t]he power, indeed the duty, to protect and insure the personal freedoms of all citizens, including the rights of free speech and political association[.]’” Quoting *Council No 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 394; 292 NW2d 442 (1980).

In my view, the majority misapprehends the Legislature’s constitutional role, disregards the plain language of Const 1963, art 11, § 5, and ignores basic separation-of-powers principles.

II. THE LEGISLATURE’S CONSTITUTIONAL ROLE

The majority’s first fundamental error casts the Legislature as the branch of government “uniquely” assigned by the Constitution to ascertain the constitutional merits and demerits of the CSC’s agency-fee rule. Whether agency fees actually violate First Amendment rights is first and foremost a legal question. The judicial branch has resoundingly answered that question in the negative. No less an authority than the United States Supreme Court has repeatedly reaffirmed that a state employer may require the payment of agency fees as long as the union uses the fees for nonideological, nonpolitical collective-bargaining activity. *Lehnert v Ferris Faculty Assoc*, 500 US 507; 111 S Ct 1950; 114 L Ed 2d 572 (1991); *Chicago Teachers Union v Hudson*, 475

US 292; 106 S Ct 1066; 89 L Ed 2d 232 (1986); *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977).[2] Public sector agency fees devoted to collective bargaining purposes are wholly unobjectionable from a First Amendment standpoint. Indeed, none of the parties in this case have even hinted that the CSC's agency-fee rule improperly imposes charges used for political activity or that the rule conflicts in any manner with the First Amendment. This salient fact reinforces that the Legislature's decision to abolish mandatory agency fees rests solely on a political calculus born of a dislike for unions rather than a First Amendment analysis. Cloaking PA 349 in "right to choose" garb cannot disguise that its purpose is to interfere with the CSC's judgment that agency fees serve a positive, productive purpose in the classified workforce.

This case does not involve a substantive challenge to the CSC's agency-fee rule. Rather, the Legislature's ability to abolish agency fees in the civil service must be measured against the Legislature's constitutional authority to make a different political choice than that made by the CSC. Accordingly, whether regulation of agency fees falls within the province of the Michigan Legislature depends on the manner in which the Michigan Constitution separates and delegates power. Our Constitution disperses the powers of government and limits their exercise pursuant to art 3, § 2: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." "Because the [CSC's] grant of power is derived from the constitution, its valid exercise of power cannot be taken away by the Legislature." *Livingston Co Bd of Soc Servs v Dep't of Soc Servs*, 208 Mich App 402, 408; 529 NW2d 308 (1995).

Thus, the Legislature's interest in vindicating the First Amendment rights of certain classified civil servants remains subject to the Legislature's constitutional ability to exercise its law-making authority in the CSC's field. I believe that the Legislature lacks the power to advance a political agenda by intruding on the constitutional prerogatives expressly reserved to the CSC by Const 1963, art 11, § 5. That the CSC rule admits of no First Amendment infirmity reinforces my conclusion.

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[2] Notably *Abood* and *Lehnert* involved the constitutionality of previous versions of PERA. In *Abood*, the United States Supreme Court generally upheld the constitutionality of PERA's agency-shop provision. In *Lehnert*, the United States Supreme Court considered the constitutionality of PERA's compulsory agency fees. The Court held in part that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." *Lehnert*, 500 US at 524. More recently the Supreme Court held that public sector unions may collect agency fees as long as the unions observe various procedural requirements "to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes." *Davenport v Washington Ed Ass'n*, 551 US 177, 181; 127 S Ct 2372; 168 L Ed 2d 71 (2007).

Agency fees subsidize collective bargaining. The CSC has determined that collective bargaining enhances the employment conditions of its workforce. Because this judgment comports with the CSC's constitutional authority to "regulate all conditions of employment" applicable to the classified civil service, Rule 6-7.2 constitutes a legitimate exercise of the CSC's power.[3] By overriding the CSC's judgment concerning the need for agency fees, the Legislature has unconstitutionally usurped the CSC's constitutionally-granted rule-making authority. I would hold that Const 1963, art 11, § 5 divests the Legislature of the power to impose the agency-fee restrictions contained in 2012 PA 349 on the classified civil service.

III. THE CSC'S CONSTITUTIONAL ROLE

The CSC's establishment as a constitutional entity reflects a purposeful determination that the CSC would possess "plenary and absolute powers in its field." *Viculin v Dep't of Civil Serv*, 386 Mich 375, 393, 398; 192 NW2d 449 (1971). Consequently, the Legislature is "without power to regulate the internal procedures of the [CSC] and this fact is recognized in Const 1963, art 4, § 48." *Id.* at 393.

The Supreme Court and this Court have repeatedly reiterated that Michigan's Constitution confers on the CSC expansive and exclusive authority to regulate the workings of the classified civil service. "We do not question the [CSC's] authority to regulate employment-related activity involving *internal matters* such as job specifications, compensation, grievance procedures, discipline, *collective bargaining* and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance." *Council No 11*, 408 Mich at 406 (emphasis added). Const 1963, art 11, § 5 contemplates an autonomous administrative agency vested with "absolute power in its field." *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 15; 818 NW2d 337 (2011). And "[b]ecause the CSC's power and authority is derived from the constitution, its valid exercise of that power cannot be taken away by the Legislature." *Hanlon v Civil Serv Comm*, 253 Mich App 710, 717; 660 NW2d 74 (2002).

In *Council No 11*, the Supreme Court considered "a conflict between the rule-making power of the [CSC] and the law-making power of the legislature[.]" *Council No 11*, 408 Mich at 390. Specifically at issue were a CSC rule prohibiting classified civil servants from engaging in political activities both on- and off-duty, and a statute generally permitting political activity. *Id.* at 391. The Supreme Court held that the CSC's rule-making power did not extend to "the blanket prohibition of off-duty activities," observing that "[w]hat an employee does during his off-duty hours is not of proper concern to the [CSC] unless and until it is shown to adversely affect job performance." *Id.* at 407. Thus, the Court upheld the constitutionality of a statute

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[3] To borrow the majority's term, any incursion into the CSC's collective bargaining rules also "implicates" article 4, § 48, which permits the Legislature to pass laws "providing for the resolution of disputes concerning public employees, *except those in the state classified civil service*." (Emphasis added). Agency-fee rules "implicate" collective bargaining and the dispute resolution process created by the CSC. These "implications" supply separate grounds for finding PA 349 unconstitutional.

permitting members of the classified civil service "to enjoy the exercise of freedom of speech and expression involved in off-duty political activity, including running for public office." *Id*. at 393-394, 409.

Notwithstanding this rebuke of the CSC, the Supreme Court emphatically underscored the CSC's supremacy in its constitutionally-assigned field:

> We do not wish to be understood as qualifying in any way this Court's earlier holding that:
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> "The [CSC] by [the constitutional grant of authority] is vested with plenary powers *in its sphere of authority*." (Emphasis added.) *Plec v Liquor Control Comm*, 322 Mich 691; 34 NW2d 524 (1948).
>
> Since that grant of power is from the Constitution, any executive, legislative or judicial attempt at incursion into that "sphere" would be unavailing. We intend, rather, to be understood as emphasizing that the [CSC's] "sphere of authority" delimits its rule-making power and confines its jurisdiction over the political activity of classified personnel to on-the-job behavior related to job performance. [*Council No 11*, 408 Mich at 408.]

While *Council No 11* does not countenance curtailing a civil servant's civil right to engage in off-duty political activity, that case nowhere even hints that the Legislature may interfere with the CSC's authority to regulate on-duty employment concerns.[4]

This Court has repeatedly rebuffed challenges to the CSC's authority to perform its constitutional function. In one particularly pertinent case, *Dudkin v Civil Serv Comm*, 127 Mich App 397; 339 NW2d 190 (1983), this Court examined whether Const 1963, art 11, § 5 prohibited "discharge for failure to pay any agency shop fee because civil service employment is to be governed strictly on merit principles." *Id*. at 408. This Court unqualifiedly confirmed that the CSC's power encompassed the ability to regulate agency-shop fees:

> Designation of an exclusive representative and imposition of an agency shop fee clearly bears on the efficiency of civil service operations. The [CSC] has reserved the right to promulgate "such additional rules as it may deem necessary

[4] Citing *Council No 11*, the majority observes that the CSC's agency-fee rule serves as both a "condition of" and a "condition for" employment, and asserts that "the CSC may regulate conditions *of* employment, not *for* employment[.]" No authority supports that the CSC lacks the ability to regulate a condition "of" employment that concomitantly qualifies as a condition "for" employment, regardless of the inapplicable dicta in *Council No 11*. Job qualification requirements (for example, licensure in a certain field) constitute conditions "of" and "for" continued employment. Continuing education requirements or certain minimal exam scores qualify as conditions "of" and "for" employment. That these conditions "of" employment overlap with conditions "for" employment hardly renders them illegal usurpations of power.

> to insure the effective and orderly operation of the meet and confer system established by these regulations." The director has general authority to issue other employee relations regulations consistent with the rules. . . .
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> Finally, imposition of agency shop fees on non-union members has been upheld in the public employee context. [*Abood*, 431 US 209]; *Eastern [Mich] Univ Chapter of the American Ass'n of Univ Professors v Morgan*, 100 Mich App 219; 298 NW2d 886 (1980).
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> *We conclude that the [CSC] is constitutionally authorized to impose an agency shop fee pursuant to efficient civil service operations.* [*Dudkin*, 127 Mich App at 409 (emphasis added).[5]]

Crider v Michigan, 110 Mich App 702, 723; 313 NW2d 367 (1981), further supports that in the realm of labor relations within the classified service, the CSC reigns supreme. The plaintiffs in *Crider* were laid off pursuant to "a statewide program of one-day layoffs." *Id.* at 706. The CSC exempted from lay-off those employees "covered by [a previously existing] collective bargaining agreement limiting the right to lay off[.]" *Id.* at 709 (quotation and citation omitted). This Court found no merit in a host of challenges to this CSC rule, including that it "violate[d] the right to equal protection of the employees laid off pursuant to it, and it violate[d] the employees' right to due process." *Id.* at 717. Fundamental constitutional principles united this Court's examination of the multiple, disparate issues it considered. As to all of those issues, this Court set the analytical stage as follows: "[a] court of this state cannot substitute its judgment for that of an administrative board or commission acting within its duly granted powers. . . . *Indeed, even the Legislature is without power to regulate the internal procedures of the CSC*." *Id.* at 716 (emphasis added). This Court elaborated:

> [G]iven the broad scope of the CSC's constitutional authority to regulate the compensation and working conditions of classified state employees, defendants correctly argue that the CSC's decisions regarding the compensation of covered employees are entitled to at least as much deference as decisions of other administrative commissions. This is particularly true in light of the above-quoted section of the state constitution that gives the CSC great discretion over most, if not all, aspects of state civil service employment. [*Id.*]

These cases instruct that the CSC enjoys comprehensive regulatory prerogatives in the realm of the classified civil service. The CSC may adopt rules, fix rates of compensation, and

[5] The majority attempts to distinguish *Dudkin* on the basis that the CSC justified the fees by relying on the "merit, efficiency, and fitness" language of Const 1963, art 11, § 5 rather than the "regulate conditions of employment" language plaintiffs now invoke. Respectfully, the majority has missed the forest for the trees. *Dudkin* stands for the proposition that the CSC may constitutionally make rules regarding agency fees. Whether that power derives from one phrase found in art 11, § 5 rather than another does not change the central fact that the CSC operates within its authority when imposing agency fees.

generally control the conditions of employment for the civil service workforce. And because the Constitution grants the CSC "plenary and absolute powers in its field," *Viculin*, 386 Mich at 398, the Legislature "cannot by statute usurp [its] constitutional authority[.]" *Comm'r of Ins v Advisory Bd of the Mich State Accident Fund*, 173 Mich App 566, 583; 434 NW2d 433 (1988), overruled in part on other grounds as stated in *Faircloth v Family Independence Agency*, 232 Mich App 391, 401 n 3; 591 NW2d 314 (1998).[6]

IV. 2012 PA 349 AS APPLIED TO THE CLASSIFIED CIVIL SERVICE

The majority asserts that in enacting PA 349, the Legislature appropriately weighed in on a matter of constitutional import: "With PA 349, the Legislature has . . . remov[ed] political and ideological conflict from public employment, and eliminate[ed] the repeated need to decide, on a case by case basis, whether unions have properly allocated funds." Because "agency fees implicate government employees['] constitutional rights and important questions of public policy," the majority opines, "matters like the one at issue here are within the province of the Legislature[.]" Thus, the majority concludes, "it is within the authority of the Legislature to pass laws on public policy matters in general and particularly those, as here, that unquestionably implicate constitutional rights of both union and nonunion public employees."

In my view, the majority has lost sight of the principle that "[t]he Michigan Constitution is not a grant of power to the Legislature as is the United States Constitution, but rather, it is a limitation on general legislative power." *Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311, 317-318; 254 NW2d 544 (1977). The Legislature may wield its power only in the manner prescribed by Michigan's Constitution. It may not infringe on a sphere of power belonging to another constitutional body. See *Federated Publications, Inc v Michigan State Univ Bd of Trustees*, 460 Mich 75; 594 NW2d 491 (1999) (holding that while the Legislature has some power to control public universities, it may not interfere with those functions constitutionally placed under the universities' governance). Regardless of the Legislature's perception that the CSC's agency-fee rule is wrong-headed, the 1963 Constitution places "regula[tion of] all conditions of employment in the classified civil service" in the hands of the CSC. This limitation of power does not magically evaporate when the Legislature chooses to place its thumb on the scale in favor of a particular political preference. Nor does cloaking the Legislature's motives in civil-rights garb eliminate a separation-of-powers conflict.

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[6] Nor do *Dep't of Civil Rights ex rel Jones v Dep't of Civil Serv*, 101 Mich App 295; 301 NW2d 12 (1980), and *Marsh v Dep't of Civil Serv*, 142 Mich App 557; 370 NW2d 613 (1985), avail the majority's argument. Neither case involved a CSC rule regulating a "condition of employment." *Jones* involved a discriminatory long-term-benefit plan "made available" to classified employees. 101 Mich App at 297. *Marsh* applied the Civil Rights Act to the classified civil service, holding that the CSC's power to resolve employment disputes "does not extend to the area of employment discrimination." 142 Mich App at 569. In neither case did the legislative enactment at issue clash with a CSC rule or regulation concerning the classified workforce's "conditions of employment."

Many employment matters "implicate" constitutional rights. For example, an employee's right to a full and fair termination procedure implicates the Due Process Clause. Arbitration clauses implicate the Seventh Amendment's right to jury trial. Whether a public sector employee may be compelled to submit to drug testing implicates the Fourth Amendment. Anti-nepotism rules may implicate the constitutionally protected freedom to marry. The CSC could, and perhaps has, generated rules in all of these arenas. But that an employment rule promulgated by the CSC "implicates" or may "impact" an intact constitutional right does not authorize the Legislature to pass laws invading territory confined by constitution to an independent constitutional body. Michigan's Constitution carves out for the CSC *alone* the constitutional prerogative to "regulate all conditions of employment in the classified service."[7]

The majority minimizes the CSC's authority, asserting that despite the plain language of art 11, § 5, a different constitutional provision—Const 1963, art 4, § 49—"authorizes the Legislature to enact laws relative to the hours and conditions of employment, generally, subject only to the CSC's authority to *regulate* conditions of employment in the classified service, in addition to performing other specifically enumerated duties." According to the majority, the "collid[ing]" constitutional provisions invest "specific and plenary power" in the CSC "to regulate conditions of employment," while preserving for the Legislature the "broad constitutional authority to enact laws, including those impacting the hours and conditions of employment for classified civil service employees." 2012 PA 349, the majority insists, corresponds with the Legislature's authority to pass laws that "unquestionably implicate" constitutional rights.

"The public policy of this state as to labor relations in public employment is for legislative determination. The sole exception to the exercise of legislative power is the state classified civil service, the scheme for which is spelled out in detail in Article 11 of the Constitution of 1963." *Bd of Control of E Mich Univ v Labor Mediation Bd*, 384 Mich 561, 566; 184 NW2d 921 (1971). As explained in *Dudkin* and reemphasized by amicus CSC, "efficient civil service operations" justify the imposition of agency shop fees. One likely motivation for the CSC's policy choice is to avoid the resentment and hostilities generated by "free riders." The 1963 Constitution makes it clear that the CSC's labor relations judgments trump those of the Legislature, regardless of the reasons offered by the Legislature for drafting a "better" or "fairer" rule.

Accordingly, the majority's perceived "colli[sion]" between art 11, § 5 and art 4, § 49 must be resolved in favor of the CSC. A "fundamental rule of constitutional construction . . . requires this Court to construe every clause or section of a constitution consistent with its words or sense so as to protect and guard its purposes." *In re Proposals D & H (Mich State Chamber of Commerce v Michigan)*, 417 Mich 409, 421; 339 NW2d 848 (1983). "[N]o court should so construe a clause or section of a constitution as to impede or defeat its generally understood ends when another construction thereof, equally concordant with the words and sense of that clause or

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[7] Should the CSC overstep constitutional bounds, the judicial branch may supply correction and a remedy.

section, will guard and enforce those ends." *Mich Farm Bureau v Secretary of State*, 379 Mich 387, 393; 151 NW2d 797 (1967). Respect for each provision mandates affirmative recognition "that all constitutional provisions enjoy equal dignity." *In re Proposals D & H*, 417 Mich at 421.

"[T]he separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998). A specific, limited grant of authority to one branch "does not create encroachment or aggrandizement of one branch at the expense of the other[.]" *Id.* at 297. Where feasible, "a sharing of power may be constitutionally permissible." *Id.*

Application of these principles avoids a fatal collision. The Legislature enjoys a *general* mandate to "enact laws relative to the hours and conditions of employment" while the CSC alone regulates "all conditions of employment for the classified civil service." Thus, both entities share some authority to regulate "conditions of employment." As long as the Legislature's exercise of its power neither contradicts nor nullifies the CSC's regulation of a condition of employment, no conflict arises. However, when the Legislature passes a law directly clashing with a CSC work rule, it does so at its peril. The statute construed in *Council No 11* survived because it concerned a subject *outside* the CSC's jurisdiction. In contrast, legislative incursion into the CSC's constitutional domain that transgresses the CSC's constitutional bailiwick is improper. To hold otherwise is to write out of the Constitution the regulatory authority of the CSC. Thus, the majority's pronouncement that the Legislature's authority includes enacting politically-motivated laws contradicting CSC rules cannot be squared with separation-of-powers principles. The justness of the Legislature's cause does not alter its role in our constitutional system. Because PA 349 indisputably intrudes upon the CSC's express power to "regulate all conditions of employment in the classified service," it is unconstitutional as applied to the classified civil service.[8]

The majority holds that Const 1963, art 4, § 49 authorizes the Legislature to override the CSC's authority whenever it finds a "public policy" justifying the displacement of a CSC rule. I submit that when the CSC acts to "regulate . . . conditions of employment in the classified civil service," the Legislature must respect the CSC's constitutional authority to make public-policy choices contrary to those preferred by the Legislature. And here, it cannot seriously be questioned that imposition of an "agency fee" constitutes a regulation of a condition of employment.

Citing the 2006 *Merriam-Webster's Collegiate Dictionary*, the majority maintains that "the ordinary meaning of the word 'regulate' is to govern, direct or control *according to rule, law or authority*." (Emphasis in original.) Although the majority's point is not altogether clear, it appears to reject that the CSC's agency-fee rule qualifies as a regulation of a condition of

[8] The majority acknowledges that "[t]he Legislature possesses the broad power to enact laws relative to the conditions of *all* employment, whereas the CSC possesses the narrow power to regulate conditions of CSC employment." (Emphasis in original.) If this specific power grant to the CSC must give-way whenever the Legislature disagrees with the CSC's policy choice, article 11, § 5's empowerment of the CSC is purely illusory.

employment, adopting defendant's argument that the CSC's regulatory authority is subservient to the Legislature's power to enact general laws concerning conditions of employment.

I note preliminarily that the majority has not accurately parsed its own dictionary source; it has blended together alternative definitions to find a preferred meaning.[9] Notwithstanding the majority's fictive definition, the dictionary gambit is inappropriate and unnecessary. When construing the Constitution, we must "discern the original meaning attributed to the words of a constitutional provision by its ratifiers." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Rather than dictionaries, "we apply the rule of 'common understanding.'" *Id.* "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.'" *Id.* at 573-574, quoting 1 Cooley, Constitutional Limitations (6th ed), p 81.

"Regulate" is such a commonly understood word that dictionaries are superfluous. To regulate is simply to control by rule-making. This meaning of the term "regulate" guides my interpretation of the phrase "regulate all conditions of employment in the classified civil service." Simply put, the CSC may make rules controlling the conditions of employment in the classified civil service.

Nor is the phrase "conditions of employment" difficult to parse. In *Council No 11*, the Supreme Court identified as falling within the CSC's regulatory authority "job specifications, compensation, grievance procedures, discipline, *collective bargaining* and job performance . . . ." *Council No 11*, 408 Mich at 406 (emphasis added). Historically, Michigan has broadly interpreted a closely related phrase, "other terms and conditions of employment." *Central Mich Univ Faculty Ass'n v Central Mich Univ*, 404 Mich 268, 277; 273 NW2d 21 (1978).

Agency fees readily fall within the "all conditions of employment" rubric. The majority concedes this point by relying on article 4, § 48, which uses precisely the same phrase. In *Locke v Karass*, 555 US 207, 213; 129 S Ct 798; 172 L Ed 2d 552 (2009), the United States Supreme Court explained that "the First Amendment burdens accompanying the [agency-fee] payment requirement are justified by the government's interest in preventing freeriding by nonmembers who benefit from the union's collective-bargaining activities and in maintaining peaceful labor relations." In *Abood*, the Supreme Court similarly recognized that agency fees play an important role in labor peace by "distribut[ing] fairly" the cost of representational activities advantaging all employees while simultaneously "counteract[ing] the incentive that employees otherwise have to become 'free riders' – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Abood*, 431 US at 222. In *R Employees' Dep't v Hanson*, 351 US 225, 234; 76 S Ct 714; 100 L Ed 1112 (1956), the Supreme Court reasoned that "[t]he ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to

[9] The alternative definitions set forth in the majority's selected dictionary source are: "1a: to govern or direct according to rule," and "1b(1): to bring under the control of law or constituted authority."

industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." Michigan's Constitution appoints as the "policy makers" for the classified civil service the CSC.

The CSC has determined that agency fees foster harmonious labor relations. Rule 6-7.2 is fully consonant with the CSC's constitutional place in our system of divided powers. In my view, neither the majority nor the Legislature may cast aside the CSC's choice based on an alternate political preference. Rather than honoring art 11, § 5's specific and exclusive delegation of power to the CSC, the majority's approach strips the CSC of its regulatory supremacy. Because agency fees constitute a condition of employment in the classified civil service, they are not subject to legislative elimination. I would hold that if applied to the civil service, PA 349 would transgress the CSC's constitutional authority to make rules governing "all conditions of employment" and respectfully dissent from the majority's contrary conclusion.

/s/ Elizabeth L. Gleicher