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 5,

Plaintiffs,

v

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

Defendants.

FOR PUBLICATION
August 15, 2013
9:10 a.m.

No. 314781

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

SAAD, P.J.

I. INTRODUCTION

As an intermediate appellate Court, we typically decide appeals from orders issued by lower courts. But, here, the Legislature placed in this Court exclusive original jurisdiction over challenges to 2012 PA 349, colloquially called a "right to work" law. MCL 423.210(6). Codified at MCL 423.209, 210, PA 349 amends the Public Employment Relations Act (PERA), and states that public employers—that is, the government—cannot require government employees to join a union or pay union dues, fees, or other expenses "*as a condition of obtaining or continuing public employment . . . .*" MCL 423.210(3) (emphasis added).

Also, typically, courts entertain constitutional challenges to substantive provisions of legislation. However, this action does not challenge the Legislature's public policy decision to amend public sector labor law to make financial contributions to unions voluntary instead of compulsory. Nor does it challenge the Legislature's right to make such laws applicable to public employees. Rather, plaintiff unions challenge the Legislature's constitutional authority to pass PA 349 and defendants' right to enforce it as to a subset of public sector employees—those in the classified civil service. Plaintiffs premise this challenge on the Constitution's carve out for a

civil service system and the Michigan Civil Service Commission (CSC). Unlike other government employees, those workers identified in Const 1963, art 11, § 5 are part of the classified civil service, and they work under the aegis of the CSC. Pursuant to art 11, § 5, the CSC has the authority to "regulate all conditions of employment" for this group of government employees. Plaintiff unions and the CSC, as amicus curiae, argue that, within this limited arena, PA 349 intrudes on the CSC's sphere of authority. Defendants respond that, under the Michigan Constitution, the Legislature has the power to make laws applicable to all employees, public and private, including classified civil service employees. Defendants further maintain that the Legislature has done so in the past with the approval of our courts.

Since the most recent adoption of the Michigan Constitution in 1963, and the 1965 passage of PERA, our courts have not addressed the specific question before us. That is, in light of this historical, constitutional sharing of responsibilities for rule making by the CSC as to classified employees and law making by the Legislature as to all employees, the issue of first impression is, which government actor—the Legislature or the CSC—has the power to decide whether the payment of fees by classified civil service employees to unions should be mandatory or voluntary. This is the limited, narrow question we address as the statute directs, and as the parties ask.

II. STANDARDS OF REVIEW

Because the arguments raised involve the interpretation of provisions of the Michigan Constitution, we turn to the principles set forth in *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), which addresses the "construction of a constitution."

> The primary rule is the rule of "common understanding" described by Justice Cooley:
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> "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed.' (Cooley's Const Lim 81)." (Emphasis added.)
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> A second rule is that to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered. On this point [the Supreme] Court said the following:
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> "In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their

> adoption and the purpose sought to be accomplished." *Kearney v Bd of State Auditors*, [189 Mich 666, 673; 155 NW 510 (1915)].
>
> A third rule is that wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does. Chief Justice Marshall pursued this thought fully in *Marbury v Madison*, [5 US (1 Cranch) 137; 2 L Ed 60 (1803)], which we quote in part:
>
> "If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, [. . . ."] [*Traverse City School Dist*, 384 Mich at 405-406 (emphasis in *Traverse City School Dist*).]

And, while we recognize the political, economic, and social controversies underlying the enactment of PA 349, they are unrelated to our duty to apply these principles of constitutional interpretation. Indeed, "when a court confronts a constitutional challenge it must determine the controversy 'stripped of all digressive and impertinently heated veneer lest the Court enter—unnecessarily this time—another thorny and trackless bramblebush of politics.'" *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999), quoting *Taylor v Dearborn Twp*, 370 Mich 47, 50, 51-52; 120 NW2d 737 (1963) (Black, J., joined by T.M. Kavanagh, J.).

Moreover, when a party seeks our declaration that a statute violates the Constitution, we must operate with the presumption that the statute is constitutional "unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). As our Supreme Court further explained in *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307-308; 806 NW2d 683 (2011):

> "We 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." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). "'Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.'" *Id.* at 423, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). Therefore, "the burden of proving that a statute is unconstitutional rests with the party challenging it," *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) . . . . "[W]hen considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation." *Taylor*, 468 Mich at 6.

Thus, in keeping with the law that governs our review of this legislation, we begin with the presumption that PA 349 is constitutional and proceed with the utmost caution to determine whether the plaintiff unions have met their burden of proof to show otherwise.

III. DISCUSSION

A. THE MICHIGAN CONSTITUTION, THE ESTABLISHMENT OF THE CSC, AND THE ENACTMENT OF PERA

Our analysis necessarily begins with the Constitution itself and the particular sections applicable to the dispute. Pursuant to Const 1963, 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.

"Subject only to limitations and restrictions imposed by the State or Federal Constitution, the State legislature is the repository of all legislative power." *Huron-Clinton Metro Auth v Bds of Suprs of Wayne, Washtenaw, Livingston, Oakland and Macomb Cos*, 300 Mich 1, 12; 1 NW2d 430 (1942). Indeed, as our Supreme Court has explained, with the above limitations, the Michigan Legislature "possesses all of the power possessed by the parliament of England . . ." and "can do anything which it is not prohibited from doing by the people through the Constitution of the state or of the United States." *Doyle v Election Comm of Detroit*, 261 Mich 546, 549; 246 NW 220 (1933); *Attorney General ex rel O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936). Thus, "[t]he purpose and object of a State Constitution are not to make specific grants of legislative power, but to limit that power where it would otherwise be general or unlimited." *Young v Ann Arbor*, 267 Mich 241, 244; 255 NW 579 (1934) (citation omitted).

With regard to public employees, Const 1963, art 4, § 48 states that, "[t]he legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." However, with regard to all employees, the Constitution provides, pursuant to art 4, § 49, that "[t]he legislature may enact laws relative to the hours and conditions of employment."

The civil service system was originally created by the Legislature "to eliminate the spoils system and prohibit participation in political activities during the hours of employment." *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 10; 818 NW2d 337 (2011). A report drafted by a group appointed by then-Governor Frank Fitzgerald revealed:

> "The spoils system presupposes the existence of government jobs to be filled with loyal party workers who can be counted on not to do the state job better than it can be done by others, but rather to do the party work or the candidate work when elections roll around. The state office buildings are nearly empty during political conventions, and state money has always been used indirectly of course to enable state employees to move about the state and keep political fences in repair.
>
> "It is impossible to estimate the loss to the state of this kind of political activity, but the most inexperienced know that the amount is considerable. Not only is the regular work of the state interrupted or interfered with, but its services and funds are put at the disposal of political parties." [*Council No 11, AFSCME, AFL-CIO v Michigan Civil Service Comm*, 408 Mich 385, 397 n 10; 292 NW2d 442 (1980), quoting Report of the Civil Service Study Commission, July 20, 1936.]

The essence of the legislation, 1937 PA 346, was to prevent state workers from engaging in political activities during working hours. However, in the next session in 1939, the new Legislature made various changes, in evident opposition to the reforms intended by 1937 PA 346, including making a significant number of positions exempt from classified service. *Council No 11*, 408 Mich at 400. "Finally, in 1940, apparently dissatisfied with four years of political maneuvering and legislative advance and retreat on the civil service system issue, the people of Michigan adopted a constitutional amendment establishing a constitutional state civil service system, superseding the 1939 legislation." *Id*. at 400-401. The amendment, Const 1908, art 6 § 22, focused not on barring employees from political activities, but on establishing a merit system for hiring, promotions, demotions, and terminations. *Id*. at 401. Thus, the fundamental purpose of the amendment was to provide for an unbiased commission to promulgate and enforce rules to assure a merit-based system of government hiring and employment. The people adopted the civil service provisions in much the same form in the 1963 Constitution. Specifically, Const 1963, art 11, § 5, provides, in part:

> The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.
>
> 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.
>
> The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.
>
> 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.
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No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

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The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

To enable the commission to exercise its powers, the 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. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.

The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

As our Supreme Court has observed, the CSC is a constitutionally-established administrative agency that is part of and within the executive branch. *Straus*, 459 Mich at 537 n 7; *House Speaker v Governor*, 443 Mich 560, 587 n 33; 506 NW2d 190 (1993). However, that the CSC exists within the Constitution does not, as plaintiffs would suggest, elevate the CSC to a fourth branch of government because no fourth branch exists, and because to do so would directly violate the separation of powers provision in art 3, § 2. *Straus*, 459 Mich at 535-537. Nonetheless, the CSC indisputably has the power to "regulate all conditions of employment in the classified civil service." *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 164; 365 NW2d 93 (1984); *Plec v Liquor Control Comm*, 322 Mich 691; 34 NW2d 524 (1948).

PA 349 is an amendment to PERA, which was enacted in 1965 pursuant to the "explicit constitutional authorization" in art 4, § 48 ("[t]he legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service."). *Local 1383*, 411 Mich at 651. PERA's dispute resolution provisions do not apply to employees in the classified civil service pursuant to the plain language of art 4, § 48. *Viculin v Dept of Civil Service*, 386 Mich 375, 393; 192 NW2d 449 (1971) ("[t]he Civil Service Commission is a constitutional body possessing plenary power and may determine, consistent with due process, the procedures by which a State Civil Service employee may review his grievance."). Again, however, the Legislature, pursuant to art 4, § 49, has "the sovereign police power to regulate the terms and conditions of employment for the welfare of Michigan workers . . . ." *Western Michigan University Bd of Control v State*, 455 Mich 531, 536; 565 NW2d 828 (1997).

Section 4a of PERA states that "[t]he provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the power exists in the legislature to control employment by the state or the emoluments thereof." MCL 423.204a. The parties disagree about the proper interpretation and application of these provisions. Plaintiffs and the CSC argue that art 4, § 48 precludes legislative involvement within the sphere of the CSC's constitutional authority and they extend this argument to section 4a of PERA by maintaining that all areas of civil service employment are exempt from all provisions of PERA, and that PERA has no application to the civil service because it was born from the Legislature's purportedly limited power under art 4, § 48.

The plain and unambiguous language of art 4, § 48, grants the Legislature the power to enact a statutory scheme for resolving public sector employee disputes that arise outside the classified civil service. Clearly, PA 349 does not address resolution of public employee labor disputes, and therefore does not come within the § 48 restriction. Moreover, the plain language of MCL 423.204a, "[t]he provisions of this act as to state employees within the jurisdiction of the civil service commission *shall be deemed to apply in so far as the power exists in the legislature to control employment by the state*," clearly expresses that the legislative powers apply to civil service employees *to the extent that* the Legislature has the power to control state employment. Art 4, § 49. Plaintiffs' interpretation of section 4a as a nullification of legislative power over the civil service contravenes the plain meaning of the statutory language. Additionally, Section 1 of PERA defines "public employee" as follows:

> "public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions . . . . [MCL 423.201(e).]

The three enumerated exceptions are as follows: (*i*) employees of a private entity under a time-limited contract with the state; (*ii*) public school administrators in specific circumstances; and (*iii*) graduate student research assistants where there is insufficient indicia of an employer-employee relationship. Civil service employees are public employees within the definition in

MCL 423.201(e), and civil service employees do not come within any of the enumerated exceptions.

Despite the plain constitutional provision under art 4 § 49, and statutory language reserving a degree of legislative control over civil service employment under MCL 423.204a, plaintiffs cite cases that purportedly hold that PERA has no application to civil service employees, but all of these cases involved civil service employees and resolution of employment *disputes*. For example, to the extent *Bonneville v Michigan Corrections Org*, 190 Mich App 473, 477; 476 NW2d 411 (1991) makes the assertion that PERA does not apply to classified civil service employees, *Bonneville* involved grievance resolution, so this statement is dicta to the extent that it exempts civil service employees from all provisions of PERA. Further, contrary to the CSC's argument, *SEIU Local 79 v State Racing Commissioner*, 27 Mich App 676, 681; 183 NW2d 854 (1970), does not broadly preclude application of all provisions of PERA to all employees under the CSC's jurisdiction. It only states that PERA and MERC's jurisdiction did not apply to the resolution of the dispute between the employee veterinarians and the employer racing commissioner because the employees were under the CSC's jurisdiction. For these reasons, and those that follow, we read art 11, § 5 and art 4 § 49 in harmony, and hold that, as correctly stated in MCL 423.204a, certain provisions of PERA apply to employees in the classified civil service, including PA 349.

B. CSC RULE 6-7.2 AND PA 349

Plaintiffs and the CSC contend that the imposition of an agency fee is a "condition of employment" as contemplated by art 11, § 5, and that, therefore, PA 349 impermissibly infringes upon a matter within the CSC's constitutional authority. Defendants respond that, pursuant to Const 1963, art 4, § 49, "[t]he legislature may enact laws relative to . . . conditions of employment" and that the CSC's power to "regulate" conditions of employment does not supersede or negate the Legislature's authority to enact PA 349.

The CSC has adopted rules giving it "sovereign authority" to approve, reject, or modify a negotiated collective bargaining agreement. Rules 6-3.1, 6-3.5., 6-3.6. The CSC rules further state that civil service employees have the right to "organize, form, assist, join, or refrain from joining labor organizations." Rule 6-5.1. However, rule 6-7.2 states that a government employer may enter into an agreement with a union that, "as a condition of continued employment," an employee who chooses not to join the union "shall pay a service fee" to the union.[1]

For decades, MCL 423.209 has granted public employees the right to form, join, or assist in labor organizations and engage in activities related to the collective bargaining process. MCL 423.209(1)(a); *City of Escanaba v Michigan Labor Mediation Bd*, 19 Mich App 273, 280; 172 NW2d 836 (1969). Importantly, PA 349 preserves these rights, but also grants public employees

[1] The amount of the fee "cannot exceed the employee's proportionate share of the costs of the activities that are necessary to perform its duties as the exclusive representative in dealing with the employer on labor-management issues." Rule 6-7.3.

the right to "[r]efrain from any or all" of the above activities. MCL 423.209(1)(b). PA 349 also added subsections (2) and (3) to section 9, which provide as follows:

> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
>
> (b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.
>
> (c) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.
>
> (3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

Before PA 349, MCL 423.210(1) included a provision similar to CSC Rule 6-7.2, that a public employer could agree with a union that those employees who chose not to join a union must pay "a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." PA 349 amended section 10 by granting rights to individual public employees, with the exception of certain police and fire employees, as follows:

> (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. [MCL 423.210.]

These legislative amendments change Michigan law regarding compulsory union fees as to all public sector employees and employers and, therefore, directly conflict with the CSC's rule that permits the government to enter into agreements with unions to require compulsory union contributions by nonunion public employees.

C. CONSTITUTIONAL ANALYSIS

The arguments presented are rooted in a dispute over the phrase "conditions of employment" which appears in both art 4, § 49, and art 11, § 5. As discussed, 1963 Const art 11, § 5 confers on the CSC the power to "regulate all conditions of employment in the classified service," but art 4, § 49 confers on the Legislature the power to "enact laws relative to the hours and conditions of employment."

Plaintiff unions urge that the decision whether to impose agency fees on nonunion employees constitutes a "condition of employment." Were we to accept this as true, it is equally clear that rule 6-7.2 also amounts to a condition *for* employment, because it permits a government employer to require an agency fee payment "as a condition *of continued* employment," thus permitting termination for failure to comply. In either case, the characterization does not render PA 349 unconstitutional. Indeed, we hold that, regardless whether the mandatory payment of agency fees by nonunion civil service employees amounts to a "condition of employment," or a condition to obtain or retain employment, PA 349 is a proper exercise of the Legislature's constitutional authority to "enact laws relative to . . . conditions of employment." Const 1963, art 4 § 49.

Our holding is compelled by a plain reading of our Constitution, and an interpretation which reasonable minds and the great mass of people would give it. As noted above, Const 1963, art 4, § 48 provides that "[t]he legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service*." (Emphasis added.) Const 1963, art 4, § 49 provides that "[t]he legislature may enact laws relative to the hours and conditions of employment." The language of these two paragraphs, read together and in conjunction with art 11, § 5, clearly indicate that the people of Michigan intended for the Legislature to retain authority over public employment disputes involving employees outside of the state classified civil service, and over the hours and conditions of employment over all employees, without excluding those in the classified civil service. By ratifying a Constitution containing all three provisions, the people evinced their intent to distinguish classified civil service employees from other public employees in some, but not all, contexts, and to impose legislative checks and balances on the CSC's authority.

Clearly, art 4, § 49, confers on the Legislature the power to enact laws ("may enact"), specifications, and requirements governing employment generally, including civil service employment, while art 11, § 5 requires the CSC to *regulate* conditions of employment ("shall regulate") consistently with the legislative enactments. Again, when we interpret a provision of the Michigan Constitution, the words of that provision "must be given their ordinary meanings." *County Road Assoc of Michigan v Governor*, 260 Mich App 299, 306; 677 NW2d 340 (2004) (citation and internal quotation marks omitted). The ordinary meaning of the word "regulate" can be found in the first definition of "regulate" in *Merriam-Webster's Collegiate Dictionary*:

> **1 a** : to govern or direct according to rule, **b** (1) : to bring under the control of law or constituted authority (2): to make regulations for or concerning . . . **2** : to bring order, method, or uniformity to . . . **3** : to fix or adjust the time, amount, degree, or rate of . . . . [*Merriam-Webster's Collegiate Dictionary*, (11th ed 2006, p 1049.]

Thus, the ordinary meaning of the word "regulate" is to govern, direct, or control *according to rule, law, or authority*. Therefore, 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."

Plaintiffs argue that defendants' emphasis on the meaning of "regulate" imposes a "hypertechnical" construction, that is contrary to the common understanding of the people who ratified the Constitution, and contrary to the caveat against finding a "dark and abstruse meaning" in constitutional language. "Regulate" is not an obscure word, and its meaning as compared to the phrase "enact laws" is not subtle. Clearly, the choice of words—*regulate* for the CSC and *enact laws* for the Legislature—renders art 11, § 5 and art 4, § 49 consistent. Plaintiffs attempt to minimize the significance of art 4, § 49 by arguing that this provision is merely a holdover from the 1908 Constitution and the Progressive Era, when the ratifiers granted the Legislature the power to "enact laws relative to the hours and conditions under which men, women, and children may be employed." Plaintiffs state that this provision was intended only to clarify that the right to freedom of contract did not override the Legislature's police power to enact wage, hour, and safety laws for the benefit of workers. Plaintiffs' argument ignores the plain language of art 4, § 49, which grants the Legislature the power to enact laws "relative to the hours *and conditions*" of employment. (Emphasis added.) If the ratifiers had intended for art 4, § 49, to limit the Legislature's powers to enacting wage and hour requirements, they could have so limited the Legislature's authority in the Constitution.

Moreover, in contrast to art 4, § 48, which confers on the Legislature the power to "enact laws providing for the resolution of disputes concerning public employees, except those in the state classified service," § 49 does not provide an exception for civil service employees. We cannot assume that the exception for civil service employees, which was purposely placed in § 48, was inadvertently omitted from § 49. See *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). Plaintiffs argue that the civil service "carve out" in § 48 was included because § 48 pertained only to public employees, and that the omission of the "carve out" in § 49 is therefore of no significance because § 49 applies generally to public and private sector employees. However, the breadth of § 49 actually strengthens defendants' argument. The Legislature's authority to enact statutes relative to the conditions of employment for *all* employees, without distinguishing between the private and public sectors, negates any inference that the Legislature's authority applies equally to private and non-civil service employment, with an implied and unstated exception for civil service employment.

The reference to "conditions of employment" in both Const 1963, art 4, § 49, and art 11, § 5, can be read consistently and without deviating from either section's plain language and without encroaching upon or expanding the constitutionally-granted authority to either the Legislature or the CSC. 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. "Where as here, there is a claim that two different provisions of the constitution collide, we must seek a construction that harmonizes them both. This is so because, both having been adopted simultaneously, neither can logically trump the other." *Straus*, 459 Mich at 533.

In its amicus brief, the CSC extensively quotes from the official record of the 1962 Constitutional Convention, the *Report of the Michigan Citizens Advisory Task Force on Civil Service Reform: Toward Improvement of Service to the Public* (July 1979), "1979 *Task Force Report*," and the *Citizens' Advisory Task Force on State Labor-Management Relations: Report to Governor James J. Blanchard* (September 1987). The CSC emphasizes that these historical sources reveal an intent to limit legislative oversight of the CSC. We agree that these historical authorities reflect the framers' and ratifiers' intent to grant the CSC full authority over the areas of compensation, determination of qualifications, and other specifications of civil service employment. However, neither plaintiffs nor the CSC offer a satisfactory explanation of how Const 1963 art 4, § 49, can coexist with art 11, § 5, if the latter completely exempts the civil service from the former. The CSC argues that art 4, § 49, is a general provision, whereas art 11, § 5, is a specific provision, and that specific provisions must control in a case relating to its subject matter. *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-640; 272 NW2d 495 (1978). The CSC's general/specific dichotomy, however, would be more accurately characterized as a broad/narrow dichotomy. The 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 civil service employment. The CSC's power to act in its limited sphere thus does not trump the Legislature's broader constitutional powers.

D. CASES ADDRESSING THE AUTHORITY OF THE LEGISLATURE AND THE CSC

Our Courts have recognized the broad and exclusive authority art 5, § 11, grants the CSC to govern the *internal conditions* of civil service employment. "The Civil Service Commission is a constitutional body possessing plenary power and may determine, consistent with due process, the procedures by which a State Civil Service employee may review his grievance." *Viculin*, 386 Mich at 393. See also, *Dudkin v Michigan Civil Service Comm*, 127 Mich App 397; 339 NW2d 190 (1983) (the CSC may fashion rules with regard to agency shop fees when such fees were permitted under the former MCL 423.210(1)).[2] Our Courts have also acknowledged that the CSC's power and authority are derived from the Constitution, and "its valid exercise of that power cannot be taken away by the Legislature." *Hanlon v Civil Service Comm*, 253 Mich App 710, 717-718; 660 NW2d 74 (2002). See also *Crider v Civil Service Comm*, 110 Mich App

[2] Though plaintiffs rely on it, the Court in *Dudkin* did not address the issue raised here, namely the CSC's authority to impose or permit agency shop fees under the catch-all phrase "regulate all conditions of employment in the classified service" under Const 1963, art 11, § 5. At the time this Court decided *Dudkin*, MCL 423.210(1) specifically permitted collective bargaining agreements to require payment of a service fee as a condition of employment. Accordingly, *Dudkin* did not involve the conflict between the Legislature and the CSC presented here.

702, 723; 313 NW2d 367 (1981) (upholding the CSC's constitutional authority to impose periodic one-day layoffs to reduce payroll costs). However, the CSC's "powers are not unlimited." *Oakley v Dept of Mental Health*, 136 Mich App 58, 62; 355 NW2d 650 (1984).

In *Council No 11*, our Supreme Court addressed a conflict between a statute, MCL 15.401 *et seq*. (1976 PA 169), the Political Freedom Act, and a CSC rule restricting civil service employees' participation in political activities. *Council No 11*, 408 Mich at 390-391. The statute provided that a civil service employee had the right to join a political party committee authorized under state election laws, serve as a delegate to a political party's convention, and run for office without first obtaining a leave of absence from employment, while CSC Rule 7 prohibited such activities. *Id*. The plaintiff unions filed a complaint against the CSC on the ground that Rule 7 conflicted with 1976 PA 169 and Const 1963, art 11, § 5, guaranteeing freedom of expression rights. *Id*. at 391-392.

The Court held that the ratifiers of art 11, § 5, clearly did not intend to grant the CSC the power to abridge civil service employees' right to participate in the political process:

> We are persuaded that neither the history of the adoption of a civil service system in Michigan, including as it does the voice of the people expressed indirectly through the Legislature in 1937 and 1939 and directly in the 1940 constitutional amendment and the 1963 constitution, nor a common-sense reading of the "plain language" of art 11, § 5, interpreted according to familiar rules of constitutional construction, support the defendant's claim of authority to regulate, indeed prohibit, any off-duty political activity by state classified employees. [*Council 11*, 408 Mich at 403.]

After discussing the historical context of the 1940 amendment, the Court opined that the plain language of Const 1963, art 11, § 5, was of greater significance than the history of civil service in Michigan, and "more precisely the meaning we think [the constitutional language] had for the people who adopted it." *Id.* at 404-405. Reviewing the rules of constitutional interpretation, the Court concluded that "[a] grant of power to an administrative agency to pervasively curtail the political freedoms of thousands of citizens should not be easily inferred from a constitutional provision so facially devoid of any such language." *Id.* at 406. The Court was unable to conclude "with any degree of confidence that 'the great mass of the people themselves would' understand the language of art 11, § 5, upon which defendants rely, to be a grant of power to defendants to forbid off-duty political activity." *Id*. The Court stated that interpreting the language of art 11, § 5 "as a grant of power to curtail political freedom of speech and association, at home, off-duty, would indeed assign the words used a 'dark (and) abstruse meaning.'" *Id*. While the CSC has a grant of plenary power, "it is to be exercised with respect to determining the conditions '*of* employment,' not conditions *for* employment." *Id*. (emphasis in original). The Court ruled that the CSC's power does not include the power to prohibit off-duty political activities. *Id.* at 407.

Council 11 resolved a direct conflict between a CSC rule and a legislative enactment, finding the legislation valid. Other cases have addressed the Legislature's power to enact laws applicable to all employees, including those in the classified civil service. In *Michigan Dep't of Civil Rights ex rel Jones v Michigan Dep't of Civil Service*, 101 Mich App 295; 301 NW2d 12

(1980), three female civil service employees filed complaints with the Michigan Department of Civil Rights (MDCR) alleging that the long term disability insurance plan the Department of Civil Service offered to employees discriminated against women by denying disability benefits for disabilities related to pregnancy, childbirth, miscarriage, or abortion. *Id.* at 297-298. After the Michigan Civil Rights Commission (CRC) determined that the disability plan violated the Fair Employment Practices Act, MCL 423.301 *et seq*., and its successor statute, the Michigan Civil Rights Act, MCL 37.2102 *et seq*., the Department of Civil Service filed an appeal in circuit court for de novo review. The circuit court reversed the CRC's order, finding that the civil rights statutes did not apply to classified state employees. *Jones*, 101 Mich App at 298. On appeal, this Court rejected the argument that the CSC's plenary jurisdiction under art 11, § 5 precluded the CRC's jurisdiction over a civil rights dispute in the civil service. Citing *Council No 11*, 408 Mich 385, the Court noted that "the civil service's powers are not without limit." *Jones*, 101 at 300. The Court held that "[t]he establishment of the CRC expressed the intent of the people of Michigan to end invidious forms of discrimination through the efforts of a single commission," and the CRC's authority "to carry out its constitutional mandate to end discrimination" would be weakened if the CSC had exclusive jurisdiction over all employment concerns. *Id.* at 301.

In *Marsh v Department of Civil Service*, 142 Mich App 557; 370 NW2d 613 (1985), the plaintiff's grievances for race, sex, and disability discrimination in promotion were denied by the CSC. *Id.* at 559-560. The plaintiff filed suit in circuit court alleging violations of the Michigan Civil Rights Act, and the Handicappers' Civil Rights Act, MCL 37.1101 *et seq*. *Id*. at 560. The trial court dismissed the lawsuit on the ground that the CSC held exclusive subject matter jurisdiction over the plaintiff's claims. *Id.* at 560-561. Similar to the position it takes here, the Civil Service department argued that the anti-discrimination statutes did not apply to state employees in the state classified service because art 11, § 5 preempted and superseded any legislation governing employment conditions of civil service employees. *Id.* at 563. This Court adopted the reasoning this Court employed in *Jones*, 101 Mich App 295. The Court in *Marsh* stated:

> 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. *Saginaw County v State Tax Comm*, 54 Mich App 160; 220 NW2d 706 (1974), *vacated on other grounds* 393 Mich 779; 224 NW2d 283 (1974), *aff'd sub nom Emmet County v State Tax Comm*, 397 Mich 550; 244 NW2d 909 (1976). [*Marsh*, 142 Mich App at 566.]

At the heart of these cases is "the fact that the constitution expressly mandates the Legislature to implement constitutional provisions prohibiting discrimination and securing civil rights of all persons." *Dept of Transp v Brown*, 153 Mich App 773, 781; 396 NW2d 529 (1986). Therefore, in addition to the fundamental constitutional principles articulated in *Council No 11*, defendants' position is supported by case law holding that laws of general application do not encroach on the CSC's jurisdiction when applied to civil service employees. In *Jones*, 101 Mich App 295, and *Marsh*, 142 Mich App 557, this Court held that the Civil Rights Commission held

exclusive subject matter jurisdiction over the plaintiffs' claims of employment discrimination arising under statutory civil rights laws, and rejected the CSC's claim that the CSC held exclusive jurisdiction over employment disputes in the civil service.

Plaintiffs argue that these cases are not relevant because the decisions in *Jones* and *Marsh* were based on the constitutional authority of the Civil Rights Commission, which placed the Civil Rights Commission on equal footing with the CSC. Plaintiffs' argument misses the salient point, however, that the civil rights *statutes* enacted by the Legislature to ban workplace discrimination applied equally to civil service employees, notwithstanding the CSC's authority to "regulate all conditions of employment in the classified service." If the anti-discrimination statutes encroached upon the CSC's exclusive jurisdiction to regulate, it would not have been necessary for the Court to resolve the dispute over the proper forum for resolving disputes under the civil rights statutes.

Indeed, a wide array of statutes governing employment apply with equal force to private sector and public sector employees, with no exception for civil service employees. See, e.g., Worker's Disability Compensation Act, MCL 418.101 *et seq.* ("[e]very employer, public and private, and every employee, unless herein otherwise specifically provided, shall be subject to the provisions of this act and shall be bound thereby," MCL 418.111); the Michigan Employment Security Act, MCL 421.1 *et seq*. Availability of benefits to compensate injured workers and unemployed workers are part of employment conditions, and the statutes providing these benefits apply to civil service employees. Moreover, the Legislature has passed other laws related to hours and conditions of employment that impact private sector, government, and classified civil service employees alike including laws relating to licensing, public health, child labor, political freedoms, and occupational health and safety. Thus, while the CSC has the specific and plenary power to regulate conditions of employment, the Legislature has regularly exercised, and our courts have upheld, its broad constitutional authority to enact laws, including those impacting the hours and conditions of employment for classified civil service employees.

E. THIS ISSUE IS UNIQUELY WITHIN THE PROVINCE OF THE LEGISLATURE

As discussed, our Constitution confers upon the CSC the power to regulate conditions of employment in the classified civil service and the Legislature has the authority to enact laws affecting conditions of employment. This leads to the specific question here, which is where agency fees fit within this "sharing" of constitutional responsibilities and whether the Legislature acted within its constitutional authority in enacting PA 349 as it pertains to the classified civil service. In further considering whether this is within the province of the Legislature or the CSC, we must examine the nature of agency fees and what interests are impacted by PA 349.

In the arena of public sector employment, the government is, quite obviously, the employer. It is well settled that the government may not violate the free speech or free association rights of its citizens, and employees are citizens subject to protection. Further, the government, as employer, may not compel speech it favors or prohibit speech it disfavors by forcing employees to support or prohibiting employees from supporting ideological or political causes. To do so would violate the civil liberties and First Amendment rights of employees.

On the basis of these principles, it has long been the subject of litigation whether a government employer may require an employee to pay money to a union if the worker opposes the political or ideological views of the union. While various state and federal courts have questioned the constitutionality of agency fee provisions in the public sector, regardless of the merits of the underlying debate, the question of their elimination is certainly one that implicates significant constitutional and public policy questions. For more than 35 years, from *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977) to *Knox v SEIU, Local 1000*, ___ US ___; 132 S Ct 2277; 183 L Ed 281 (2012), the United States Supreme Court has reiterated that compulsory funding of unions by public sector employees raises critical First Amendment concerns. The primary concern repeatedly advanced by nonunion plaintiffs in *Abood* and its progeny is that unions indisputably spend union dues on political and ideological causes with which employees may disagree. *Abood*, 431 US at 212-213. And, as the *Abood* Court opined:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. *Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.* [*Id*. at 233-234 (citations omitted) (emphasis added).]

Since *Abood*, the Supreme Court has endeavored to protect the First Amendment rights of government employees through the requirement of procedural safeguards from "compulsory subsidization of ideological activity." *Id*. at 237; see also *Chicago Teachers Union v Hudson*, 475 US 292; 106 S Ct 1066; 89 L Ed 2d 232 (1986).

Part of the law in this area is settled, and part remains in flux. What is settled is that a government employer cannot force a dissenting worker, as a condition of employment, to financially support political causes of the union. However, the government employer may require the employee to pay a fee for the union's costs for collective bargaining, as long as the fee is not used to advance political or ideological causes to which the worker objects. The question that remains in contention is how a union accounts for that portion of an agency fee that is spent on constitutionally permissible collective bargaining, versus unconstitutional expenditures on politics, how an employee may pursue the question of how fees are spent, and to what extent a union must reveal its expenditures. Those who oppose compulsory union fees assert that there is no adequate system to account for whether the fees are used only for collective bargaining and that, in reality, as a condition of remaining employed, employees must financially support political causes, which violates their First Amendment rights of free speech and political association. Those who support mandatory agency fees contend that failing to require payments from each employee permits "free riders" who pay nothing for collective bargaining, but who enjoy the benefits of union-backed negotiations, and that the methods used to determine how agency fees are spent interfere with union support of political and other causes, thus infringing on their rights of free speech and association.

Michigan has decided to leave the fray. With PA 349, the Legislature has made all contributions to public sector unions voluntary, thus removing political and ideological conflict from public employment, and eliminating the repeated need to decide, on a case-by-case basis,

whether unions have properly allocated funds. The government as employer may no longer require public employees to pay money to unions its politics or ideological causes the employees oppose, and, at the same time, unions will no longer have to be wary of potential challenges to their financial contributions and may spend voluntary member dues as they see fit, without government oversight.

Importantly, the very reason the people adopted art 11, § 5 was to provide for a merit-based system of government hiring and employment, to eliminate politics, and to provide for an apolitical body to regulate issues regarding employee qualifications, promotion, and pay, which are matters completely outside the substance and application of PA 349. Further, as discussed, if agency fees are a condition of employment as plaintiffs suggest, they are also, undoubtedly, a condition *for* employment, when an employee may be terminated for failure to pay. In *Council No 11*, our Supreme Court made clear that the CSC may regulate conditions *of* employment, not *for* employment, and that such matters are for the Legislature. *Council No 11*, 408 Mich at 406. Thus, the elimination of compulsory agency fees was well within the Legislature's authority. Further, because the United States Supreme Court has long held that agency fees implicate government employees' constitutional rights and important questions of public policy, the principle applies with equal force that matters like the one at issue here are within the province of the Legislature:

> The power, indeed the duty, to protect and insure the personal freedoms of all citizens, including the rights of free speech and political association, is reposed in the Legislature as one of the three co-equal branches of government by art. 1 of the Michigan Constitution. The enactment of laws designed to assure the protection and enhancement of such rights is therefore a particularly proper legislative concern. [*Id*. at 394-395.]

And, beyond the constitutional concerns implicated by the imposition of agency fees by government employers and unions, as a matter of public policy, the decision whether to continue the practice is also within the Legislature's power. As the United States Supreme Court explained in *Abood*:

> Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. [*Abood*, 341 US at 225 n 20.]

Accordingly, we hold that, contrary to plaintiffs' claim, 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. Neither the language of Const 1963, art 11, § 5, the history of civil service law in the state of Michigan, nor the language of Const 1963, art 4, §§ 48-49, precluded the Legislature from enacting PA 349, and applying this statute to the classified civil service. The CSC's power to "regulate" civil service employment does not infringe on the legislative power under art 4, § 49, to enact laws relative to conditions of employment, and applying those laws toward all employment in the state, public and private, civil service or non-civil service. Finally, Michigan

case law fully supports the principle that the Legislature as the policymaking branch of government, has the power to pass labor laws of general applicability that also apply to classified civil service employees. For these reasons, we hold that 2012 PA 349 is constitutional as applied to classified civil service positions in Michigan.

IV. RESPONSE TO THE DISSENT

Respectfully, our dissenting colleague gives the impression that agency fees are akin to CSC rules requiring a certain educational degree for promotion, procedures for drafting qualifying examinations, or establishing job performance ratings. If that were true, there would be no demonstrations in Lansing or, indeed, across the country, about the very nature of the fees at issue and the myriad constitutional and public policy questions that flow from their imposition or abolishment. Importantly, our holding does not seek to devalue, avoid, or undermine the power of the CSC as the dissent would suggest. Rather, while recognizing the complexity of the issue before us, we acknowledge that, in varying ways, both the CSC and the Legislature have authority over the welfare of Michigan employees but, on this particular issue, we hold that the decision whether public sector employees, including those in the classified civil service, must pay fees to unions is within the Legislature's scope of authority.

The dissent relies on quotations about the CSC's authority in support of the notion that the CSC "reigns supreme" in all aspects of civil service employment, but the quotations are dicta and the cases are simply inapposite. The dissent cites *Dudkin*, 127 Mich App 397, as a "particularly pertinent case" regarding the CSC's authority but, as the Court itself explained, the issue in *Dudkin* was whether the CSC "*failed to follow its own rules and regulations* in promulgating a rule permitting negotiation of an agency shop fee with the union." *Id*. at 401 (emphasis added). The case arose when the CSC unilaterally changed a rule to dispense with its own requirement that a majority of employees must agree before an agency fee could be imposed. *Id*. at 401-403. This Court held that the CSC's own rules did not require the CSC to notify each employee about rule changes and that the new rule did not violate the CSC's obligations in art 11, § 5. *Id*. at 406-408. The panel noted that the imposition of agency fees was upheld in *Abood* and observed that designating a union and imposing "an agency shop fee clearly bears on the efficiency of civil service operations." *Id*. at 408-409.

The dissent's reliance on *Dudkin* is misplaced because, not only is it not binding on this Court under MCR 7.215(J)(1), the law has since changed. *Dudkin* was decided at a time when our Legislature explicitly permitted government employers and unions to impose agency fees on public employees under the former MCL 423.210(1), but this is no longer the law. *Dudkin* was also decided before the U.S. Supreme Court established the procedural safeguards in *Hudson*, which not only supersede any civil service rule to the contrary, but also include notice requirements for the collection of fees from nonunion employees, specifically to avoid infringement of their constitutional rights. *Hudson*, 475 US at 303. Moreover, *Dudkin* did not address, much less decide, a dispute over the rule-making power of the CSC and the law-making power of the Legislature that would, in any way, answer whether the Legislature's enactment of PA 349 applies to classified civil service employees.

The same holds true of *Crider*, 110 Mich App 702. Because of a state financial crisis, and to avoid long-term layoffs, in *Crider*, the CSC bypassed its own rules and enacted a new rule

permitting layoffs for classified employees who were not performing immediate essential public services, and who were not covered by contrary collective bargaining agreements. *Id*. at 708-709. Michigan State Police command officers sued the CSC and argued that the CSC exceeded its powers under art 11, § 5. *Id*. at 710, 714-715. This Court ruled that the CSC had the authority to temporarily suspend its own rules and regulations in an emergency financial situation and that, pursuant to its authority to regulate conditions of employment, the CSC could impose a layoff program for certain classified employees. *Id*. at 716-717, 724-730.

Crider did not involve agency fees or legislation conflicting with a CSC rule, and it appears the dissent cites it, along with *Dudkin*, in a search for any available language stating that the CSC has broad constitutional powers. We do not dispute the cited language or the point that the CSC has extensive power within its scope of authority, but the dissent seems unable to tolerate the notion that *both* the CSC and the Legislature have constitutional authority over public employment matters. Indeed, notably absent from the dissenting opinion is an acknowledgement of the many Michigan appellate decisions upholding legislative "incursions" into what the dissent describes as the CSC's constitutional "domain." The Legislature has enacted various laws that apply to all Michigan employees, including those in the classified civil service, related to equal protection, antidiscrimination, civil rights, disability rights, political freedom, occupational health and safety, and others.[3] Again, as the opinion states, we recognize the authority of both the CSC and the Legislature and, while the dissent declines to do the same, the critical and difficult question here is the nature of the matter at issue and whether it falls within the province of the Legislature or the CSC.

In addition to its denial of any overlapping or shared authority, it appears the dissent underplays the importance of agency fees on the basis of its fundamentally erroneous view that our courts have "resoundingly" decided that agency fees do not burden the exercise of First Amendment rights. To the contrary, as the United States Supreme Court made clear in *Knox*:

[3] See *Council No 11*, 408 Mich 385; *Marsh*, 142 Mich App 557; *Dep't of Civil Rights ex rel Jones*, 101 Mich App 295 (the Civil Rights Commission has jurisdiction over discrimination claims brought by classified civil service employees and the department of civil service's failure to provide benefits violated the anti-discrimination provisions of the Fair Employment Practices Act and the successor Civil Rights Act); *Dept of Transp v Brown*, 153 Mich App at 782 ("In light of Const 1963, art 4, § 51, which directs the Legislature to protect and promote public health for all persons, we conclude that the prohibition of legislation for resolution of employment disputes of classified civil service employees does not extend to the area of occupational health and safety."); *Civil Service Comm v Dep't of Labor*, 424 Mich 571, 625; 384 NW2d 728 (1986), modified in part and reh den 425 Mich 1201 ("the power of the Civil Service Commission to 'regulate all conditions of employment in the classified service' does not preclude the Legislature from eliminating a position once it is classified as within the civil service system."); *Walters v Dept of Treasury*, 148 Mich App 809, 815; 385 NW2d 695 (1986) ("[t]he state, its subdivisions and agencies are 'employers' covered by the [Civil Rights Act].")

> When a State establishes an "agency shop" that exacts compulsory union fees as a condition of public employment, "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Ellis [v Railway Clerks*, 466 US 435, 455; 104 S Ct 1883; 80 L Ed 2d 428 (1984).] Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, . . . the compulsory fees constitute a form of compelled speech and association that imposes a "significant impingement on First Amendment rights." [*Id*.] Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake. [*Knox*, 132 S Ct at 2289.]

Thus, in direct opposition to the dissent's assertion, the Supreme Court has explicitly declared that agency fees impose a "significant" burden on "critical" First Amendment rights. *Id*. That fact has been decisively established. What remains in continuous litigation is how to determine when agency fees are spent on matters not germane to purposes of collective bargaining, how to protect the constitutional rights of those employees who oppose funding speech on political or ideological matters the union espouses, and how to also protect the constitutional rights of employees who wish to join unions and support those views. That is, since *Abood*, our courts have repeatedly grappled with questions about which public sector union expenses are chargeable to nonmembers, which are nonchargeable, and how employees may vindicate their rights.[4]

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[4] *Knox*, 132 S Ct 2277; *Davenport*, 551 US 177; *Air Line Pilots Ass'n v Miller*, 523 US 866, 877; 118 S Ct 1761; 140 L Ed 2d 1070 (1998); *Lehnert v Ferris Faculty Ass*, 500 US 507; 111 S Ct 1950; 114 L Ed 2d 572 (1991); *Hudson*, 475 US 292; *Abood*, 431 US 209; *Merritt v International Ass'n of Machinists and Aerospace Workers*, 613 F3d 609 (CA 6, 2010); *Scheffer v Civil Service Employees Ass'n, Local 828*, 610 F3d 782 (CA 2, 2010); *Locke v Karass*, 498 F3d 49 (CA 1, 2007); *Cummings v Connell*, 402 F3d 936 (CA 9, 2005); *Otto v Pennsylvania State Ed Ass'n-NEA*, 330 F3d 125 (CA 3, 2003); *Wessel v City of Albuquerque*, 299 F3d 1186 (CA 10, 2002); *Shea v Int'l Ass'n of Machinists and Aerospace Workers*, 154 F3d 508 (CA 5, 1998); *Abrams v Communications Workers of America*, 313 US App DC 385; 59 F3d 1373 (1995); *Dashiell v Montgomery Cty, Md*, 925 F2d 750 (CA 4, 1991). Further, while the United States Supreme Court has thus far declined to rule agency fees per se unconstitutional, it is clear that "[a] union's collection of fees from nonmembers is authorized by an act of legislative grace . . . ." *Knox*, 132 S Ct at 2291 (internal quotes and citation omitted.) And, a state legislature clearly has the constitutional right to make the policy decision to abolish the requirement of union membership and to prohibit compulsory agency fees. *Davenport*, 551 US at 184; *Lincoln Federal Labor Union No 19129, AF of L v Northwestern Iron & Metal Co*, 335 US 525; 69 S Ct 251 (1949). Moreover, though the dissent wrongly urges that it makes no difference whether agency fees constitute a condition "of" employment or "for" employment, again, our Supreme Court stated otherwise in *Council No 11*, 408 Mich at 406.

In light of the First Amendment rights at stake, the Michigan Legislature has made the policy decision to settle the matter by giving all employees a right to choose. This is quite the opposite of "advanc[ing] a political agenda" as described by the dissent; to the contrary, it is a decision to further remove politics from public employment and to end all inquiry or debate about how public sector union fees are spent. Again, at issue here is whether our Legislature may prohibit agency fees as to classified civil service employees when a CSC rule permits them. The CSC is an agency created to ensure a merit system in public employment and to abolish political cronyism in hiring and promotion, which it does through rules regarding matters such as pay grades, conditions for promotion, and dispute resolution. The Legislature in a representative constitutional republic speaks for the people on matters of significant public concern. Our conclusion, as fully set forth in the opinion, is premised on the authoritative boundaries of the Legislature and the CSC as defined in our Constitution, but the dissent begs further comment on the impact of its position. By enacting PA 349, the Legislature made a choice and thereby spoke for the people of Michigan. A subsequent, duly-elected Legislature may decide that PA 349 is contrary to the will of the people and can change the law or, if dissatisfied, citizens themselves may reject PA 349 through referendum or propose a new law through initiative. Simply stated, it would strip this power away from the people, and eliminate their collective voice on a matter of constitutional importance were we to accept the dissent's view that four unelected, unaccountable members of an executive agency have the authority to decide the matter, outside of the public arena, when the Constitution gives that agency no such power. While we do not question the CSC's authority within the limited scope set forth by the people in our Constitution, *Viculin*, 386 Mich at 393, for the reasons set forth in the opinion, we hold that the Legislature has the authority to enact legislation with regard to agency fees and that the legislation, PA 349, applies to employees in the classified civil service.

/s/ Henry William Saad
/s/ Pat M. Donofrio