STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF:

Technical, Professional and Officeworkers Association of Michigan,

Respondent-Appellant,

v.

Daniel Lee Renner,

Charging Party-Appellee.

Supreme Court No. 162601

COA No. 351991

MERC Case No. CU14 C-020

BRIEF OF AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

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QUESTIONS PRESENTED

1. Does a union's policy of charging nonmembers a compulsory grievance fee violate Michigan's Public Employee Relations Act?

The Commission answered:	Yes
The Court of Appeals answered:	Yes
Mr. Renner answers:	Yes
Amicus answers:	Yes
The Union answers:	No

2. Does MCL 423.211 grant Mr. Renner the ability to pursue his grievance outside of the exclusive grievance procedure contained in the collective bargaining agreement governing his employment?

The Court of Appeals answered:	No
Mr. Renner answers:	No
Amicus answers:	No
The Union answers	Yes

INTEREST OF AMICUS[1]

The National Right to Work Legal Defense Foundation ("Foundation"), founded in 1968, is the leading litigation advocate for employee free choice concerning unionization. To advance this mission, Foundation attorneys have represented individuals before the United States Supreme Court and numerous federal and state courts. *E.g.*, *Janus v AFSCME Council 31*, 138 S Ct 2448 (2018); *Harris v. Quinn*, 573 US 616 (2014); *Knox v SEIU, Local 1000*, 567 US 298 (2012); *Communications Workers v Beck*, 487 US 735 (1988); *Tierney v City of Toledo*, 824 F2d 1497 (CA 6 1987), *further proceedings*, 917 F.2d 927 (1990)*; Lowary v. Lexington Local Board of Education*, 854 F2d 131 (CA 6 1988), *further proceedings*, 902 F.2d 422 (1990).

Since the Right to Work provisions were added to the Public Employee Relations Act in 2012, Foundation attorneys have represented dozens of individuals in Michigan proceedings concerning application of that law. *See*, *e.g.*, *Saginaw Educ Ass'n v Eady-Miskiewicz*, 319 Mich App 422; 902 NW2d 1 (2017); *Teamsters Local 214*, 31 MPER ¶ 38 (2018); *Clarkston Community Schools*, 31 MPER ¶ 26 (2018). We submit this amicus brief to provide the Court the Foundation's unique

[1] In accordance with MCR 7.212(H)(3), amicus states that no counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the submission of this brief. Nor did any other individual other than the amicus, its members, or counsel make such a monetary contribution.

perspective on the Public Employee Relations Act ("PERA") and how that statute explicitly outlaws compulsory grievance fees.

SUMMARY OF ARGUMENT

In 2012, Michigan amended PERA and passed its Right to Work law ("2012 amendments"), giving employees who are not members of a union the statutory right not to pay *any* form of union dues or fees. The Technical, Professional, and Officeworkers Association of Michigan ("TPOAM" or "Union") claims, instead, that the Michigan legislature allowed unions to charge a compulsory grievance fee. This claim is contrary to at least three provisions of the 2012 amendments, which specifically ban mandatory union fees, however denominated.

First, the legislature amended PERA Section 9(1) to grant public employees a right to "refrain" from "form[ing], join[ing], or assist[ing] in labor organizations." MCL 423.209(1). This "right to refrain" language mirrors that found in NLRA Section 7, 29 USC 157. As discussed below, the National Labor Relations Board ("NLRB") and federal courts have long held this right to refrain language prohibits mandatory grievance fees in Right to Work states. The Michigan legislature's adoption of this statutory language, in and of itself, confirms the legislature's intention to prohibit mandatory grievance fees.

Second, in amending PERA Section 9(2), the Michigan legislature went further than Congress did with the NLRA to ensure employees cannot be required to pay

any fee to a union. PERA Section 9(2) states it is unlawful for unions to "compel or attempt to compel any public employee to . . . affiliate with *or financially support* a labor organization." MCL 423.209(2)(a) (emphasis added). TPOAM's attempt to compel Renner to financially support it as a condition of having his contractual grievance processed violates this unambiguous statutory command.

Finally, PERA Section 10 establishes that no employee, as a condition of employment, can be required to "[p]ay *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*." MCL 423.210(3)(c) (emphases added). This provision similarly prohibits TPOAM's attempts to compel any fee from Renner.

In short, TPOAM's compulsory grievance fee violates three provisions of PERA: Section 9(1)'s right to refrain language, Section 9(2)'s prohibition on compelled financial support, and Section 10's provision banning payments as a condition of employment. The legislature's inclusion of these provisions shows a specific intent to outlaw compulsory grievance fee schemes like those successfully challenged here. The Court should affirm the Michigan Employment Relations Commission's ("MERC") and Court of Appeals' decisions.

STATEMENT OF FACTS

The Foundation adopts Renner's statement of facts. Renner Br. at 14-18.

STANDARD OF REVIEW

In interpreting PERA, the "'paramount rule of statutory interpretation is . . . to effect the intent of the Legislature . . . . If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *Omelenchuk v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002) (internal citation omitted). "In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Id.*

PERA's provisions must be given the broadest possible application because it is a remedial statute intended to protect employees' individual rights. *See Dudewicz v Norris-Schmidt, Inc*, 443 Mich 68, 77; 503 NW2d 645 (1993) (remedial statutes are broadly construed); *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988) (citing "the well-established rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy"); cf. *Davenport v Wash Ed Ass'n*, 551 US 177, 184, 187; 127 S Ct 2372, 2378–79, 2380 (2007) (calling a union's ability to force employees to pay dues an "extraordinary power" and noting that a union does not have a "state entitlement to acquire and spend *other people's* money" (emphasis in original)).

ARGUMENT

I. PERA Section 9 and Section 10 prohibit compulsory grievance fees.

A. The 2012 Amendments

On December 11, 2012, the legislature passed Public Act 349, which amended PERA Sections 9 and 10, MCL 423.209; 423.210. Prior to amendment, PERA Section 9(1) only granted employees a right to "[o]rganize together or form, join, or assist in labor organizations." *Id.* 423.209(1). The 2012 amendments changed this by giving employees an all embracing right to refrain from those activities and a corresponding right not to financially support a union. Section 9, after the amendment, now states:

> (1) Public employees may do any of the following:
> (a) Organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice.
> (b) Refrain from any or all of the activities identified in subdivision (a).
> (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.

MCL 423.209(1), (2)(a).

Section 9(1)(b)'s "right to refrain" language is nearly identical to NLRA Section 7, which states: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or

all of such activities . . . .” 29 USC 157. The adoption of nearly identical language makes it evident the legislature intended PERA Section 9(1) to track NLRA Section 7. *Detroit Fire Fighters Ass’n, Local 344 v City of Detroit*, 408 Mich 663, 718-19; 293 NW2d 278 (1980) (It is “safe to assume that the Michigan legislature intentionally adopted [language from the NLRA] with the expectation that MERC and the Michigan Courts would rely on the legal precedents developed under the NLRA.”).

Section 9(2)(a)’s prohibition on compelling financial support for a union, however, goes further than the NLRA, which contains no similar provision. With Section 9(2)(a), Michigan chose to provide even greater protections for public-sector nonmember employees by making it unlawful for a union or public employer to compel any employee to “financially support a labor organization or bargaining representative.”

Similarly, prior to the 2012 amendments, PERA Section 10 allowed employers and unions to enter into agreements “to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.” *See Taylor School Dist v Rhatigan*, 318 Mich App 617, 627; 900 NW2d 699 (2016) (quoting prior version of 423.210).

Section 10 now prohibits all requirements that public employees, other than police and fire fighters, pay any monies to a union as a condition of employment:

> (3) . . . 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 (emphasis added).

B. A compulsory grievance fee violates Section 9's right to refrain from joining or financially assisting a union.

MERC and the Court of Appeals were correct in finding that TPOAM's compulsory grievance fee coerced Renner in the exercise of his Section 9(1)(b) right to refrain from joining or assisting a union. As noted, PERA Section 9(1)(b)'s right to refrain language tracks NLRA Section 7, which grants private-sector employees a right to refrain from "form[ing], join[ing], or assist[ing] labor organizations." 29 USC 157. The legislature's decision to adopt the NLRA's right to refrain language

strongly infers the legislature intended PERA Section 9(1)(b) to be construed in the same manner. See *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993) ("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws."); *Detroit Fire Fighters Ass'n,* 408 Mich at 718-19 ("safe to assume that the Michigan legislature intentionally adopted [language from the NLRA] with the expectation that MERC and the Michigan Courts would rely on the legal precedents developed under the NLRA.").

NLRA Section 7 long has been interpreted to prohibit compulsory grievance fees in Right to Work states. In 1953, in *Hughes Tool Co*, 104 NLRB 318 (1953), the NLRB held a union violates a nonmember's Section 7's rights by refusing to process a grievance based on the nonmember's refusal to pay a union fee. 104 NLRB at 329. In 1976, in *Canfield Rubber Co*, 223 NLRB 832 (1976), the NLRB reaffirmed that an employee's right to refrain from joining or otherwise supporting a union is unlawfully restrained when, absent a "compulsory union membership provision" requiring payment of union dues, a union requires that nonmembers pay a fee to have their grievances processed.

The NLRB has consistently reaffirmed these principles. *See, e.g.*, *Prof'l Ass'n of Golf Officials*, 317 NLRB 774, 778 (1995) (Congress permitted unions to charge nonmembers costs associated with collective bargaining "only where" a union-

security agreement exists); *Furniture Workers Div, Local 282 (The Davis Co)*, 291 NLRB 182, 183 (1988) ("Where state law prohibits a labor organization from compelling membership, a union may not require a fee for vital collective-bargaining services, including grievance processing . . ."). The NLRB has also clarified that payment of dues by members does not cure the coercive effect of a grievance-processing fee that only nonmembers pay. *Am Postal Workers Union (Postal Serv)*, 277 NLRB 541, 543 (1985).

Federal courts have also held compulsory grievance fee schemes coercive. In *Plumbers, Local 141*, 252 NLRB 1299 (1980), *enforced*, 219 US App DC 32; 675 F2d 1257 (1982), a union operating in several Right to Work states attempted to bargain for a clause requiring employees pay for representation in contractual grievance proceedings. The NLRB found the union's efforts per se unlawful and ordered the union to stop bargaining for imposition of a compulsory grievance fee. 252 NLRB at 1299. On appeal, the D.C. Circuit affirmed the NLRB, noting that the "[u]nion and the dissent complain that free riders pose more of a burden today than they did when § 14(b) was enacted, but that argument is better addressed to Congress than to this court." 675 F.2d at 1262.

Similarly, in *NLRB v North Dakota*, 504 F Supp 2d 750 (DND 2007), a federal district court struck down a state law requiring nonmembers to pay a fee to have their grievances processed. North Dakota, a Right to Work state, passed a statute

allowing unions to charge nonmembers for grievance processing whenever they requested representation. *Id.* at 752. The NLRB sought to enjoin the law as preempted by NLRA Section 7. The district court agreed, finding a compulsory grievance fee "alters the considerations underlying an employee's choice of whether to join or refrain from joining a union." *North Dakota*, 504 F Supp 2d at 757. Consequently, "[c]harging non-union members the cost of providing a service which union members get free (even though they pay dues) has a coercive effect on non-members in their right to join or refrain from joining a union." *Id.* at 757-58.

Given this unanimous federal judicial and administrative agency precedent interpreting NLRA Section 7's "right to refrain" language—language adopted by the Michigan legislature in PERA Section 9's 2012 amendments—MERC and the Court of Appeals were correct in holding that charging nonmembers a compulsory grievance fee violates PERA Section 9(1). *See Detroit Fire Fighters Ass'n, Local 344*, 408 Mich at 718-19 (where the Michigan legislature adopts the NLRA's language it is "safe to assume" such language was "intentionally adopted in anticipation of this Court's as well as MERC's reliance on federal precedent.").

In its leave to appeal, TPOAM makes much ado about the fact that MERC has said it "is not bound to follow 'every turn and twist' of NLRB case law." *Hurley Medical Center*, 31 MPER 41 (2018). TPOAM completely ignores that statement's controlling context: NLRB and federal precedent is given "great weight" in

Michigan, especially when the language of the NLRA and PERA are identical. *Id.* *See also CMU Faculty Ass'n v CMU*, 404 Mich 268, 266 n 1; 273 NW2d 21 (1978) ("Because of the virtually identical language of the two acts, this Court has concluded that the Michigan Legislature intended that federal precedent would be given great weight in interpreting [Section] 15 of the PERA").

MERC only declines to follow NLRB precedent when it "conflicts with that of the Commission or other NLRB precedent." *Hurley Medical Center*, 31 MPER 41. Here, TPOAM points to no conflicting federal or Michigan precedent because none exists.[2] Rather, in the 2012 amendments, the Michigan legislature expressly adopted language that the federal courts and NLRB have unanimously interpreted to ban *all* compulsory fees, including explicitly banning compulsory grievance fees.

Even without NLRA case law,[3] TPOAM's grievance fee infringes on Renner's Section 9(1) right to refrain from "join[ing] or assist[ing] a labor organization."

[2] TPOAM only claims NLRB precedent is "archaic" and "ring[s] hollow post-*Janus*." TPOAM Leave to Appeal at 36. *Janus* has no application to the interpretation of Section 7 of the NLRA or Sections 9 and 10 of PERA. This case concerns a question of statutory interpretation, not a question of what is constitutionally permissible. *See* below at p. 23. Any disagreement TPOAM may have with PERA outlawing compulsory grievance fees should be directed at the legislature, not this Court.

[3] Because TPOAM cannot cite any federal precedent that allows a compulsory grievance fee, it turns to the lone opinion in support of its position, *Cone v Nevada Service Employees Union*, 116 Nev 473; 998 P2d 1178 (2000). However, the statutory scheme in *Cone* is distinguishable for the reasons MERC and the Court of Appeals cited. Moreover, the *Cone* court gave no weight to federal precedent. *Id.* at

TPOAM demanded Renner pay $1,290, the estimated cost of processing his grievance through the initial step. Renner Br. at 15 (citing App'x p. 50-55). This was only an initial down payment, as TPOAM reserved the right to charge additional fees if the matter costs more or proceeded to arbitration. *Id.* (citing App'x p. 54-55). Even the initial fee of $1,290 far exceeds what most unions charge in yearly dues. And if Renner had to file another grievance, TPOAM would charge him again. Employees subject to such an open-ended fee confront a Hobson's choice to either (1) "join" the union before having to file a grievance, or (2) "assist" the union by paying an exorbitant and limitless fee for processing the grievance. This Hobson's choice nullifies an employees' right under PERA Section 9(1) to refrain from joining or financially assisting a union.

C. Section 9(2) prohibits a compulsory grievance fee.

TPOAM's threat not to process Renner's grievance unless he financially supports the Union violates Section 9(2)'s unambiguous language. That section protects employees from *all* compulsory union fee requirements. The legislature did not only adopt the NLRA's right to refrain language in PERA Section 9(1), which guarantees the right not to pay any union fees, including grievance fees, by codifying the right

1183. In contrast, this Court has consistently given "great weight" to NLRA precedent. Finally, the legislature passed the 2012 amendments with the expectation that Michigan courts would interpret its law in accordance with federal precedent, given that has been this Court's unbroken practice since PERA was enacted. *See Detroit Fire Fighters Ass'n, Local 344*, 408 Mich at 718-19.

not to "assist" unions. The legislature also adopted even broader and more explicit protections for employees in Section 9(2). PERA Section 9(2) makes it unlawful for any person to "by force, intimidation, or unlawful threats to compel or attempt to compel any public employee to . . . financially support a labor organization," MCL 423.209(2)(a).

Sections 9(1) and 9(2) grant employees an expansive right, the right to refrain from financially assisting a union unconnected to conditions of employment. *Id.* 423.209(1), (2). This language undermines TPOAM's argument that it may charge a compulsory grievance fee because that fee may not relate to an employee's hiring and firing. TPOAM Supp. Br. 8, 12.

This language of Section 9(2) also directly supports the proposition that Section 9(1) provides protections at least as prescriptive as those found in NLRA Section 7, which prohibits all compulsory grievance fee schemes. It would make little sense to interpret PERA more narrowly than the NLRA given that the legislature provided additional protections for nonmembers in PERA Section 9(2).

D. Section 10 does not allow unions to charge a compulsory grievance fee.

1. Section 10(3) prohibits compulsory grievance fees.

PERA Section 10(3) also prohibits a compulsory grievance fee. Section 10(3) states: "an individual shall not be required as a condition of obtaining or continuing public employment to . . . *[p]ay any dues, fees, assessments, or other charges or*

expenses of any kind or amount, or provide anything of value to a labor organization." MCL 423.210(3)(c) (emphasis added). This provision forbids compulsory grievance fee schemes that require a "charge" assessed upon employees. If the legislature only meant to prohibit compulsory "union security" agreements, it merely would have prohibited "compulsory dues or fees." Instead, the legislature went further and outlawed "*any* fees, assessments, or *other* charges or expenses *of any kind* or amount," or "provid[ing] anything of value" to a union. *Id.* (emphases added). That prohibition clearly encompasses compulsory grievance fees.

Instead of focusing on the broad language of Section 10(3)(c), TPOAM claims that Section 10(3)'s prohibition on payments to a union only applies to terms that impact an employee's hiring or firing. TPOAM Supp. Br. 26. Even if TPOAM's cramped reading were true, Section 10(3)(c) would still outlaw compulsory grievance fees which most certainly impact employment.

For example, consider a nonmember public employee wrongfully fired in violation of a collective bargaining agreement. That employee's only recourse is to file a meritorious grievance through the procedure outlined in the union-negotiated collective bargaining agreement. As in this case, and in most contracts, there is at least one step in the grievance procedure that requires union representation. The union then requires the nonmember to pay fees for the privilege of using that exclusive process. In such a situation the nonmember's "continuing" public

employment is completely dependent on being forced to pay "fees, "assessments" or "charges or expenses of [some] kind or amount," MCL 423.210(3)(c). There would be no way for him to reclaim his job under the contract without paying the union's grievance fee.

Similarly, here, Renner's grievance impacts his "continuing" employment. As noted by MERC, Renner received a warning from his employer stating another "incident will lead to progressive disciplinary action, up to and including discharge." App'x at 019. Any separate employment incidents, which can be used to support or ultimately lead to an employee's suspension or discharge, unquestionably relates to a condition of "continuing" employment. TPOAM negotiated a contract which gives it exclusive power over the grievance process, meaning any employee wanting to process a grievance must go through TPOAM. App'x at 86. Thus, any union assessed fee for grievance processing implicates "continuing" employment.

Even without a scenario like this, the best reading of Section 10 bans compulsory grievance fees. Before the 2012 amendments, Section 10 allowed employers and unions to enter into agreements "to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." *Rhatigan*, 318 Mich App at 627 (quoting prior version of 423.210). Under that version of the statute, a union was only able to

charge nonmembers, as a condition of employment, for the purposes of "collective bargaining, contract administration, and grievance adjustment." *Abood v Detroit Board of Ed*, 431 US 209, 225-26, 97 S Ct 1782, 52 L Ed2d 261 (1977) (interpreting previous version of 423.210). It would make little sense for the legislature to repeal the section allowing a union to charge nonmembers their per capita costs for grievance adjustment and ban all such charges as a condition of "acquiring" or "continuing" employment, but then tacitly allow the union to compel a nonmember to pay a total lump sum exceeding membership dues in return for processing a grievance under the union's own contract. Such a result would judicially nullify both the text of PERA and the legislature's intent.

2. Section 10(2)(a)'s "impairment of rights" provision does not authorize a compulsory grievance fee.

TPOAM argues the "impairment of rights" provision in Section 10(2)(a) of PERA permits it to charge a compulsory grievance fee. Section 10(2)(a) of PERA states: "this subdivision does not impair the right of a labor organization to prescribe its own rules with respect to the *acquisition and retention of membership*." MCL 423.210(2)(a) (emphasis added). The argument fails because Section 10(2)(a) applies only to internal union rules governing union *members*, while TPOAM's compulsory grievance fee requirement applies solely to *nonmembers*.

The NLRA has identical "impairment of rights" language in NLRA Section 8(b)(1), 29 USC 158(b)(1). The NLRB has never held this proviso allows a union to

impose internal or any other rules on nonmembers, much less a compulsory grievance fee requirement. Rather, the Supreme Court and other federal courts have recognized the proviso applies only to union rules governing union *members*. *See Pattern Makers' v NLRB*, 473 US 95, 109; 105 S Ct 3064; 87 L Ed 2d 68 (1985) (holding the proviso protects union rules pertaining to the "admission" of or the "expulsion of employees from the union"); *Price v NLRB*, 373 F2d 443, 447 (CA 9 1967) (finding the proviso "was intended to permit the union to suspend or expel a member who [attacks the union's position as the bargaining agent]"); *NLRB v Machinists District Lodge No 99*, 489 F2d 769, 772 (CA 1 1974) ("the proviso . . . preserves a union's most basic power: that of granting or withholding membership"); *cf. NLRB v Marine Workers*, 391 US 418, 424; 88 S Ct 1717; 20 L Ed 2d 706 (1968) (union internal discipline of members limited by "consideration of public policy"). TPOAM's compulsory grievance fee rule for nonmembers finds no safe harbor in PERA Section 10(2)(a).

This argument also fails because charging a compulsory grievance fee is not an internal union matter. The grievance procedures, including the provisions requiring union representation in grievance proceedings (App'x at 86) were negotiated by TPOAM as the exclusive bargaining representative and apply to the entire unit, members and nonmembers alike. In bargaining for these bilateral contractual

proceedings as exclusive bargaining representative, TPOAM's procedures cannot be considered as merely "internal union rules."[4]

If anything, TPOAM undermines its own position by asserting that its grievance fee pertains to the acquisition and retention of membership. TPOAM is tacitly admitting it adopted the compulsory grievance fee scheme to acquire new members, and retain current members, who absent the threat of the grievance fee would not be members. This policy—a true Hobson's choice—directly impairs employees' right to refrain from joining or assisting a union under PERA Section 9(1), coerces employees to financially support the union in violation of PERA Section 9(2), and is an illegal condition of employment under PERA Section 10.

[4] TPOAM makes an odd argument that *Scofield v NLRB*, 394 US 423, 89 S Ct 1154; 22 L Ed 2d 285 (1969), supports its position. TPOAM Supp. Br. at 7-8. In *Scofield*, the Supreme Court held the NLRA allows a union to fine and expel its own members. However, the Supreme Court also reaffirmed the proposition that a union has no power to fine *nonmembers*. *Id.* at 430 (noting internal union rules do not violate the Act as along as "union members . . . are free to leave the union and *escape the rule*") (emphasis added). In other words, a union's internal disciplinary rules cannot reach nonmembers. TPOAM ignores this crucial caveat.

II. TPOAM's additional arguments are red herrings that ignore both PERA's text and the legislature's intent.

A. The duty of fair representation is not the correct standard to analyze this case. The proper standard is whether TPOAM's actions "restrain" or "coerce" Renner in his rights under the Act.

TPOAM contends a compulsory grievance fee is consistent with its duty of fair representation. That misses the point because the federal judicially created duty of fair representation is not the legislatively enacted statutory standard by which this compulsory fee is measured. The issue is whether TPOAM's compulsory grievance fee violates PERA Sections 9(1), 9(2), and 10, which it does.[5] The standard under those sections is whether a union's actions "restrain" or "coerce" employees in the exercise of their rights.

The NLRB recognized as much in *Canfield Rubber*. There, a union argued it could lawfully charge nonmembers a compulsory grievance fee because its behavior

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[5] Amicus believes the statutory analysis resolves the issue. However, should the Court decide to engage in a duty of fair representation analysis, it should affirm the lower court and adopt its well-reasoned analysis:

> Respondent's duty of fair representation in collective bargaining would be rendered meaningless if it could lawfully secure equal employment rights for all members of the bargaining unit during the collective-bargaining process, only to later implement a policy placing potentially prohibitive restrictions on a nonunion member's access to those rights.

Ct. App. Decision at 12; *see Hughes Tool Co.*, 104 NLRB 318, 327 (1953) (grievance fees charged nonmembers in a Right to Work state "are in conflict with [the union's] duty to represent employees in grievance proceedings without discrimination").

was not "a breach of the duty of fair representation under Section 9 of the [NLRA]." 233 NLRB at 833. The NLRB recognized that "resolution of this proceeding does not turn upon the duty of fair representation in Section 9 of the [NLRA]." *Id.* at 834. Instead the "issue here is whether Respondent's discrimination against nonmembers is such that it restrains or coerces them in the exercise of Section 7 rights . . . ." *Id.* The NLRB concluded that charging nonmembers a fee for grievance processing in a Right to Work state unlawfully "restrains them in the exercise of their statutory rights." *Id*. at 825.

So too here. TPOAM's fee infringes on employees' right to refrain from assisting a union under PERA Section 9(1), compels employees to financially support the union in violation of PERA Section 9(2), and constitutes compulsory union "fees, assessments, or other charges or expenses of any kind or amount" under PERA Section 10.

TPOAM's argument that it can charge a compulsory grievance fee because of a "mutuality of obligation" that arises out of its "duty of fair representation" misinterprets the origin of the duty of fair representation itself. TPOAM Supp. Br. at 12-13. The duty does not arise from employees paying dues or fees to the union

or any "obligation" employees have to a union.[6] The duty of fair representation arises only when a union like TPOAM *chooses* to become the exclusive representative of all the employees in the unit. It has no connection with and is not dependent on the payment of dues or fees to the union. *See Ford Motor Co v. Huffman*, 345 US 330, 338; 73 S Ct 681; 97 L Ed 1048 (1953); *Steele v. Louisville & NR Co*, 323 US 192, 199; 65 S Ct 226; 89 L Ed 173 (1944).

The Seventh Circuit elucidated this point in *Sweeney v Pence*, 767 F3d 654 (CA 7 2014). There, a private sector union challenged Indiana's Right to Work law as unconstitutional. *Id.* at 657. In rejecting an argument that Indiana's Right to Work law imposed an uncompensated taking of union services, the court held "[t]he powers of the [union] are comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. The duty of fair representation is therefore a corresponding duty imposed in exchange for the powers granted to the Union as an exclusive representative." *Id.* at 666. (citation and quotation marks omitted). Consequently, because the union gets the sole seat at the bargaining table it is granted "a set of powers and benefits as well as responsibilities and duties. And no information before us persuades us that the Union is not fully

[6] Indeed, pre-amendment PERA did not require the payment of fees as a condition of employment. Rather, it merely allowed a union to negotiate a contract requiring fees as a condition of employment.

and adequately compensated by its rights as the sole and exclusive member at the negotiating table." *Id.* No duty can be imposed on Renner by virtue of the Union's exclusive bargaining power, which it chose to assume.

B. Grievance fees for nonmembers would have been illegal prior to the 2012 amendment; the legislature has never authorized them.

TPOAM claims PERA always allowed for charging a compulsory grievance fee, but it was unnecessary to charge such fees prior to the enactment of the 2012 amendments. TPOAM Supp. Br. at 13. TPOAM cites no precedent for the proposition that a compulsory grievance fee charged to nonmembers was legal prior to the 2012 amendments. No such precedent exists. If a union had attempted to charge nonmembers a compulsory grievance fee prior to the 2012 amendments, that would have violated PERA because such a fee would not have been "equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." *See Rhatigan*, 318 Mich App at 627.

TPOAM's "mutuality of obligation" argument is based on its supposition that the 2012 amendments changed the circumstances under which it operated and thereby created (out of whole cloth) an *entitlement* to a compulsory grievance fee. At bottom, TPOAM's contention is that the legislature's 2012 amendments either intended to or tacitly allowed unions to charge nonmembers fees to enforce the terms and conditions of employment the union negotiated. The text of the 2012 amendments demonstrates that the legislature's intent was the opposite.

The text shows the legislature intended to free employees from the payment of *any* fee. This is why PERA gives employees' the right to "refrain" from "assist[ing]" a union, MCL 423.209(1); why unions cannot "compel or attempt to compel any public employee to . . . affiliate with or financially support a labor organization," MCL 423.209(2)(b); and why they cannot require employees to "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" as a condition of employment, MCL 423.210(3)(c).

C. *Janus* is immaterial to this case of statutory interpretation.

TPOAM claims *Janus v AFSCME*, 138 S Ct 2448 (2018), supports charging a compulsory grievance fee. It does not. *Janus* did not address PERA Sections 9 or 10. It only concerned whether compelling nonmember public employees to pay union fees violates the First Amendment. *Janus* held it violates the First Amendment for the government and union to force union dues or fees upon employees as a condition of employment without their consent. *Id.* at 2460.

In dicta, the Court posited that the First Amendment might not be violated if nonmembers were "required to pay for [grievance representation] or be . . . denied union representation altogether." *Id.* at 2468-69. That speculation was not a holding, because no such scheme was at issue in *Janus*. Moreover, this case does not concern the First Amendment. This case is one of statutory interpretation—whether PERA

prohibits a compulsory grievance fee—that does not involve First Amendment jurisprudence. *Janus* has no bearing on this separate question of state law.

D. Section 11 does not give Renner a right to present his own grievance outside of the exclusive process negotiated by TPOAM.

TPOAM argues it may charge Renner a compulsory grievance fee because Section 11 of PERA, MCL 423.211,[7] ostensibly gives employees a right to pursue their own grievances.[8] This alleged "right" is a mirage because the adjustment of any grievance can "not [be] inconsistent with the terms of a collective bargaining contract or agreement," and a union must have "been given opportunity to be present at such adjustment." *Id*. A nonmember has no freedom at all to represent himself or herself in a grievance and strike a deal with the employer to his or her own liking without the union's involvement and concurrence.

[7] Section 11's proviso states "any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment." MCL 423.211.

[8] Ultimately, this point is a non-sequitur. Whether an employee has a right to bring their own grievance to the employer is immaterial. Even if Renner did have a right to bring his own grievance, that would not change the proper interpretation of PERA Sections 9 and 10.

PERA Section 11 is nearly identical to the proviso to Section 9(a) of the NLRA.[9] The NLRB and federal courts have held the ability of an employee to grieve under Section 9(a) "exists largely at the sufferance of the union, which may negate it through a collective-bargaining agreement." *Murphy Oil USA*, 361 NLRB 774, 790 (2014); *see, e.g.*, *Black-Clawson Co v Machinists*, 313 F2d 179, 185 (CA 2 1962). This means that if a union negotiates a collective bargaining agreement with an exclusive grievance procedure, an employee has no right to have his employer or anyone else hear his grievance. Rather, the employer can decline to hear the grievance and suffer no recourse. *Id.*

In *Emporium Capwell Co v Western Addition Community Organization*, 420 US 50; 95 S Ct 977; 43 L Ed 2d 12 (1975), the Supreme Court explained that NLRA Section 9(a)'s proviso merely permits employees to present informal grievances to their employer without subjecting the employer to liability. 420 US at 61 n 12. The Court recognized that the union controls both the processing and substantive outcome of grievances because no grievance can be inconsistent with the union's collective bargaining agreement. *Id*. at 69-70.

[9] The proviso to NLRA Section 9(a) states: "any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, *as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect*." 29 USC 159(a) (emphasis added).

Here, as the Court of Appeals found, TPOAM exclusively owns and controls all grievances, and employees have no ability to process their grievances by themselves without the concurrence and approval of the union. (App'x at 86). TPOAM sought and achieved the power of "exclusive representation" precisely so it would own and control all bargaining, contract administration, and grievance adjustment in Renner's bargaining unit. Unions uniformly seek control over grievance procedures because "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government" and is the "vehicle by which meaning and content are given to the collective bargaining agreement." *USW v Warrior & Gulf Nav Co*, 363 US 574; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). TPOAM cannot now turn around and claim that it lacks the power to negotiate or enforce these types of agreements, including its exclusive control over the grievance process.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals and MERC.

Date: March 25, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2022 I electronically filed the foregoing with the Michigan Supreme Court by using MiFILE.

I further certify that the foregoing document was served on all parties or their counsel of record through MiFILE as they are registered users. In addition, this document was served by Federal Express to the following:

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