STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Owens, P.J., and Gleicher and Stephens, JJ.

MICHIGAN COALITION OF STATE EMPLOYEE UNIONS; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCAL 6000; MICHIGAN CORRECTIONS ORGANIZATION/SEIU MICHIGAN PUBLIC EMPLOYEES/ SEIU LOCAL 517M; MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 5; MICHIGAN AFSCME COUNCIL 25; and ANTHONY MCNEILL, RAY HOLMAN, ANDREW POTTER, ED CLEMENTS, AMY LIPSET, WILLIAM RUHF, KENNETH MOORE, RUSSELL WATERS, MARK MOZDZEN and KATHLEEN WINE, on behalf of themselves and a similarly situated class,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN; MICHIGAN STATE EMPLOYEES RETIREMENT SYSTEM; MICHIGAN STATE EMPLOYEES RETIREMENT SYSTEM BOARD; MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; JOHN NIXON, AS THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; PHIL STODDARD, AS THE DIRECTOR OF THE OFFICE OF RETIREMENT SERVICES OF THE MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; AND ANDY DILLON, AS THE TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellants. /

Supreme Court No. 147758

Court of Appeals No. 314048

Ingham Circuit Court No. 12-17-MM

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF ON APPEAL OF APPELLANTS STATE OF MICHIGAN, ET AL.

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This appeal stems from the Court of Appeals' August 13, 2013 published opinion (App 176a-186a). Defendant-Appellants State of Michigan, *et al,* timely filed an application for leave to appeal, which this Court granted in an order dated January 29, 2014. Accordingly, this Court has jurisdiction over this appeal under MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Civil Service Commission is vested with the responsibility to "fix rates of compensation" and to "regulate all conditions of employment" for State classified employees. Since the Commission's inception, the Commission, the Legislature, and Michigan courts have agreed that the Commission's authority does not extend to pensions. Indeed, the Legislature enacted the pension system for State employees without the Commission's approval.

In 2011 PA 264, the Legislature acted to secure the viability of the pension system by requiring a 4% contribution if the State employees elected to accrue additional pension benefits while keeping existing benefits. The question presented is whether the Constitution required the Civil Service Commission's approval for the Legislature to make this change.

Defendants-Appellants' answer: No.

Plaintiffs-Appellees' answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 3, § 2 of the 1963 Constitution provides:

> 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.

Article 4, § 1 of the 1963 Constitution provides in relevant part:

> The legislative power of the State of Michigan is vested in a senate and a house of representatives.

Article 4, § 2 of the 1908 Constitution provided:

> No person belonging to 1 department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.

Article 4, § 51 of the 1963 Constitution provides:

> The public health and general welfare of the people of the State are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

Article 5, § 1 of the 1908 Constitution provided in relevant part:

> The legislative power of the State of Michigan is vested in a senate and a house of representatives[.]

Article 6, § 22 of the 1908 Constitution provided in relevant part:

> The State civil service shall consist of all positions in the State service except those filled by popular election, heads of departments, members of boards and commissions, employees of courts of record, of the legislature, of the higher educational institutions recognized by the State constitution, all persons in the military and naval forces of the State, and not to exceed 2 other exempt positions for each elected administrative officer, and each department, board and commission.

***

> The commission shall classify all positions in the State civil 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 performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the State civil service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the State civil service who has not been certified as so qualified for such appointment or promotion by the commission. No removals from or demotions in the State civil service shall be made for partisan, racial, or religious considerations.

Article 11, § 5 of the 1963 Constitution provides in relevant 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 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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> Increases in rates of compensation authorized by the commission may be effective only at the start of the 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 the 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.

Article 11, § 5 of the 1963 Constitution was amended on November 7, 1978 to add the following paragraph:

> State Police Troopers and Sergeants shall, through their elected representative designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness; and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.

Sections 1(o), 13, 20(c), and 35 of 1943 PA 240 provided in relevant part:

> 1(o). "Average final compensation" shall mean the average annual pay, salary, or compensation received by a member during his last 5 years of service as a State employe[e]; or if he has less than 5 years of service, then the average annual pay, salary, or compensation received by him during his total years of service....
>
> 13. Membership of retirement system. (a). Membership in the retirement system shall consist of all State employe[e]s occupying permanent positions in the State civil service: *Provided*, That any State employe[e] whose position is not included in the State civil service may become a member by filing a written notice with the retirement board within 1 year of his employment by the State, or before July 1, 1944, whichever date occurs later: ...
>
> 20(c). Membership service pension. A membership service pension, subject to the provisions of paragraph (e) of this section, which shall be equal to one-one hundred fortieth of his average final compensation for

each year of membership service credited to his service account, not to exceed 35 years: *Provided*, That the membership service pension when added to the basic service pension, provided for in paragraph (b) of this section, shall not exceed $900.00 per annum; and

35. Employes' savings fund-members' deductions. Beginning July 1, 1943, each State employe[e] who is a member of the retirement system shall contribute 5 per centum of that part of his compensation earnable, not in excess of $3600.00 per annum, to the employe[e]s' savings fund; compensation earnable, as herein used, shall mean salary or wages received during a payroll period for personal services plus such allowance for maintenance as may be recognized by the maintenance compensation schedules of the civil service ...

Sections 1e, 35a(1) and 50a(1) and (2) of 2011 PA 264 amended 1943 PA 240 and provide in relevant part:

1e. Beginning January 1, 2012, compensation used to compute final average compensation shall not include includable overtime compensation paid to the member on or after January 1, 2012, except that a member's final average compensation that is calculated using any time period on or after January 1, 2012 shall also include, as prorated for the time period, the average of annual includable overtime compensation paid to the member during the 6 consecutive years of credited service ending on the same final date as used to calculate the final average compensation or, if the calculation date is before January 1, 2015, the average of the annual includable overtime compensation paid to the member on or after January 1, 2009 and before the final date as used to calculate the final average compensation.

35(a). (1) Beginning with the first pay date after April 1, 2012 and ending upon the member's termination of employment or attainment date, as applicable under section 50a, each member who made the election under section 50a shall contribute an amount equal to 4% of his or her compensation to the employees' savings fund to provide for the amount of retirement allowance that is calculated only on the credited service and compensation received by that member after March 31, 2012. The member shall not contribute any amount under this subsection for any years of credited service accrued or compensation received before April 1, 2012.

50a. (1) The retirement system shall permit each member who is a member on December 31, 2011 to make an election with the retirement system to continue to receive credit for any future service and

compensation after March 31, 2012, for purposes of a calculation of a retirement allowance under this act. A member who makes the election under this section shall make the contributions prescribed in section 35a.

(2) As part of the election under subsection (1), the retirement system shall permit the member to make a designation that the contributions prescribed in section 35a shall be paid only until the member's attainment date. A member who makes the election under subsection (1) and who makes the designation under this subsection shall make the contributions prescribed in section 35a only until the member's attainment date. A member who makes the election under subsection (1) and who does not make the designation or rescinds the designation under this subsection shall make the contributions prescribed in section 35a until termination of employment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves whether the ratifiers of Michigan's Constitution intended that giving the Civil Service Commission the authority to "fix rates of compensation" for civil service positions would divest the Legislature of its authority to enact a retirement plan for former State employees. The plain language of the Constitution and the history of the creation of the Commission clearly demonstrate that the ratifiers did not intend to divest the Legislature of that authority.

Article XI, § 5 of the Constitution makes clear that the terms "compensation," "retirement," and "pensions" are distinct items with different meanings. While paragraph 4 of § 5 grants authority to the Commission to "fix rates of compensation" for civil service positions, it says nothing about pensions or retirement. In contrast, the very next paragraph of § 5 expressly gives the State Police the right to bargain collectively about "compensation, . . . retirement, [and] pensions." In short, the ratifiers of the Constitution knew the difference between compensation and retirement plans, knew how to specifically address retirement plans and pensions, and chose not to give the Commission authority over those topics.

Consistent with this and other plain language in the Constitution, the Legislature, seeking to secure the viability of the State employee pension system, has done what it has scores times before: it amended Public Act 240, the statute governing State-employee pensions. In doing so, the Legislature has given more than 18,000 State employees in the defined benefit plan the opportunity to choose whether to continue their participation and, if so, to share in the funding of future

pension benefits. More than 95% said "yes." This legislative action secures the system's viability for tens of thousands of current and former State employees.

In overturning this legislative action, the Court of Appeals undermined the financial ground for State employee pensions—and effectively nullified the entire State retirement system as well as the worker's compensation system established by the Legislature. The decision creates the potential for disaster affecting each and every plan and pensioner covered by the State Employees' Retirement Act (PA 240), 1943 PA 240 as amended, MCL 38.1 *et seq.*

The decision also ignores how the Commission and the Legislature have consistently interpreted their respective roles. The Commission's authority to "fix rates of compensation" and to "regulate conditions of employment in the classified service" was added to the Constitution in 1940 to end the spoils system that allowed politicians to reward or punish State employees, depending on their political allegiance. Just three years later, in 1943, the Legislature enacted PA 240 to create a pension plan for State employees. This contemporaneous action by the Legislature, made with no objection by the Commission, confirms that compensation for employees still serving in the civil service was understood to be different from a pension provided to former employees. And nothing in the 1963 Constitution changed that understanding or affirmatively authorized the Commission to enact a pension plan for former State employees. Indeed, the same language was retained, without change, by the ratifiers of the 1963 Constitution,

despite the fact that the Legislature had already enacted PA 240 and amended it numerous times in the interim.

The amendment at issue here, 2011 PA 264, was enacted in the same manner, without Commission approval, as PA 240 and the more than 100 previous amendments to that Act. But under the Court of Appeals' reasoning, PA 240—as well as the pension plans established thereunder—would be unconstitutional because the Commission never approved them. Such a conclusion would invalidate the existing pensions of thousands of retirees.

Not only is this result contrary to the intent of the ratifiers of the Constitution, but it is inconsistent with other decisions that recognize that the Commission's power is subject to the Legislature's constitutional authority to enact laws that authorize payment of compensation different that the compensation (salary and wages) approved by the Commission, such as workers' compensation or supplemental disability payments. See, e.g., *Oakley v Dep't of Mental Health*, 136 Mich App 58; 355 NW2d 650 (1984). In fact, the Court of Appeals reiterated that principle in a published opinion only two days after the decision in this case. *UAW v Green,* 302 Mich App 246, 255; 839 NW2d 1 (2013). In that case, the Court of Appeals recognized that the Legislature had the right to pass a law which affected the working conditions of both State and non-State employees even though the Commission had the authority under article 5, § 11 to "regulate all conditions of employment" for classified employees.

COUNTER-STATEMENT OF FACTS

History of the Civil Service Commission

In 1936, the Governor's Civil Service Study Commission issued its report condemning the "spoils system" where government jobs were filled with political loyalists who performed party work during election season. *Council No. 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 397, n 10; 292 NW2d 442 (1980). In response, the Legislature enacted 1937 PA 346, which created a merit system for hiring State employees and prohibited political activity during hours of employment. *Id.* However, the Legislature amended 1937 PA 346 two years later in 1939 PA 97, significantly increasing the number of "exempt" positions from the classified Civil Service thereby allowing a return of the "spoils system." *Id.* at 400.

In 1940, through an initiative petition drive, the people of Michigan rejected the "spoils system" and re-established the merit system by adopting article 6, § 22 and adding it to the 1908 Constitution. The focus in article 6, § 22 was on abolishing "appointments, demotions and discharging based upon partisan political consideration." *Id.* at 401. As a result, the first paragraph of § 22 required all but a select few State employees to be in the classified service subject to a Commission established merit system. The third paragraph of § 22 required the Commission to "fix rates of compensation" for those State employees included in the civil service system. Section 22, however, did not contain any language that required the Legislature to obtain the approval of the Commission before enacting a retirement plan or thereafter amending such plan.

Moreover, at the time of the adoption of article 6, § 22, the 1908 Constitution already contained article 4, § 2 and article 5, § 1, respectively, which provided that:

> No person belonging to 1 department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.
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> The legislative power of the state of Michigan is vested in a senate and house of representatives[.]

Article 6, § 22 did not contain any express language limiting the Legislature's authority to enact a retirement plan for State employees or giving the Commission the authority to enact such a plan.

In 1941, a year after the adoption of § 22, the Commission promulgated Rule XXXVIII to encourage the Legislature to enact a retirement plan for State civil service employees, including requiring employees to contribute toward their retirement benefits:

> The director [of Civil Service] in conjunction with appointing authorities, other supervising officials, the State budget director and members of the legislature, shall prepare and submit to the commission for approval and subsequent recommendation to the governor and *legislature for adoption by law*, a comprehensive and workable *contributory retirement system for employees in the State civil service*. (Emphasis added, Exhibit 4, ¶ 3(a).[1]; App 126a-127a, 141a)

On November 27, 1942, the Commission appointed A.G. Gabriel to prepare a retirement plan for State civil service employees; the plan was submitted to the Governor for his suggestions on February 11, 1943. (Exhibit 4, ¶ 5; App 127a, 130a) Before the Governor completed his review, HB 177 (Exhibit 10; App 15a-25a) was

[1] Numbered Exhibits were attached to Defendants-Appellants' Briefs filed in the Court of Claims.

introduced in the House of Representatives on February 15, 1943. (Exhibit G; App 36a.)[2] Section 13 of HB 177 proposed the establishment of a pension plan for both civil service and non-civil service employees. SB 292 (Exhibit 11; App 37a-78a) was identical to HB 177 and, after extensive amendments, became 1943 PA 240, MCL 38.1, *et seq*, which established a retirement plan for both civil service and non-civil service employees. There is no reference in the 1943 House Journal or the 1943 Senate Journal that HB 177 or SB 292 was introduced at the Commission's request. (Exhibit 12; App 79a-80a). Moreover, there is no indication in the Commission's minutes that it: (a) ever approved what Mr. Gabriel drafted or any other retirement plan; (b) recommended any specific plan to the Legislature; or (c) consented to or approved what became 1943 PA 240. (Exhibit 4, ¶¶ 2(a), 2(b), & 5; App 126a, 129a-143a) Furthermore, Rule XXXVIII only required the drafting of a retirement system for "employees in the State civil service." Thus, it is inconceivable Mr. Gabriel would have drafted a plan that would cover both civil service and non-civil service employees as PA 240 did.

Article 11, § 5 of the 1963 Constitution continued, without change, the Commission's authority to "fix rates of compensation." Notably, article 11, § 5 did not invalidate PA 240 as a whole or § 35 in particular, which continued to require members of the retirement system to contribute toward their retirement pension. (Exhibit 5; App 81a-82a.) Moreover, no language was added to article 11, § 5 to eliminate the Legislature's previously enacted amendments to PA 240 or to prohibit

[2] Lettered Exhibits were attached to Plaintiffs-Appellees' Briefs filed in the Court of Claims.

future amendments to PA 240. Instead, the only language added to article 11, § 5 gave the Legislature more authority to reject wage increases approved by the Commission. Article 3, § 2 continued to provide that anyone exercising the powers of one branch of government, *i.e.* the executive branch, could not exercise the powers properly belonging to another branch, *i.e.* the Legislature, unless "expressly provided in this constitution." See also Const 1963, art 4, § 1. By continuing the same language in article 11, § 5 that formerly was in article 6, § 22 without change, ratifiers did not expressly give the Commission the authority to legislate a pension plan.

In its 1979 "Report of the Michigan Citizens Advisory Task Force on Civil Service Reform," drafters concluded that "Pensions should remain a function of the Legislature," which "is appropriate." (Exhibit A, pp 2, 14; App 87a-88a) Even more significant is that the Task Force did not conclude that the Commission's authority to "fix rates of compensation" had been unconstitutionally usurped by the Legislature when it enacted PA 240 or when it amended PA 240 without the Commission's approval. Finally in 2001, the Commission adopted Rule 5-13 to recognize that retirement benefits are "provided by law" i.e. by the Legislature. (Exhibit 4, ¶ 3, h; App 127a-143a)

Legislative Amendments to the State Pension System

The Legislature has amended the State pension system scores of times over the years, without any objection by the Commission. Under § 13 of PA 240, all State civil service employees were "members" of the retirement system, and non-

civil service employees were given the opportunity to become "members." Under § 20(c) of PA 240, at retirement a member received a pension that included "one-one hundred fortieth of his average final compensation for each year of membership service . . . ." Average final compensation was defined in PA 240, § 1(o) to mean the "average annual pay, salary, or compensation received by a member during his last 5 years of service . . . ." As a result, the more years of service credit that a member earned, the higher his or her pension allowance. In 1987 PA 57 § 1(r), the Legislature amended § 1 of PA 240 to increase the amount of future pensions by reducing the five-year average used to calculate a pension under MCL 38.20(1) to a three-year average. The Commission did not approve this amendment, and its constitutionality has not been challenged. (Exhibit 19, minutes for 1987; App 89a-99a.)

1996 PA 487 amended PA 240 to require that every employee hired on or after April 1, 1997, who would have previously been a "member" of the retirement plan, would now be a "qualified participant." See MCL 38.1;, 38.13(3)(d), 38.50 and 38.55(2). 1996 PA 487 also allowed existing members to elect to transfer and become "qualified participants" and over 3300 members did so. (Exhibit 15 ¶ 3; App 46a) 1996 PA 487 provided that "qualified participants" would be in the Defined Contribution (DC) plan and that the State would contribute an amount equal to four percent of the participant's compensation and up to a three percent match for contributing participants to their individual 401(k) accounts, thereby eliminating the receipt of pensions. MCL 38.55(2) and 38.63(2). The Commission never

approved such a radical change to PA 240, but it has never been challenged as being unconstitutional. (Exhibit 4, ¶ 6; App 128a)

On four separate occasions—in 1987 PA 57, 1993 PA 195, 1998 PA 205, and 2002 PA 93—the Legislature amended PA 240 to allow members to purchase service credit to increase their pensions. Further, seven other laws—1984 PA 3, 1991 PA 62, 1992 PA 64, 1996 PA 487, 2002 PA 93, 2002 PA 743 and 2010 PA 185—gave members an increase in their pensions as an incentive to retire early. None of these amendments were approved by the Commission.

2011 PA 264

On December 15, 2011, the Legislature enacted 2011 PA 264, which amended the definition of "Final Average Compensation" in MCL 38.1e to average overtime pay in the calculation of a pension over 6 years instead of 3 years beginning January 1, 2012. PA 264 also added § 35a, MCL 38.35a, and § 50a, MCL 38.50a. Section 50a gave all Defined Benefit (DB) members of the retirement system four options. First, a member could have chosen to become a qualified participant in the DC plan and the State would contribute an amount equal to 4% of the participant's compensation to his or her 401(k) account. Under this option nothing is deducted from the member's compensation. Second, if the member who chose to become a qualified participant wanted, he or she could have chosen to personally contribute to his or her 401(k) account and receive up to a 3% State employer match, thus increasing his or her retirement savings. MCL 38.63. Third, a member could have chosen to remain in the DB plan and contribute 4% of his or her compensation to

acquire additional years of service credit, thus increasing his or her pension. MCL 38.35a. Fourth, a member could have chosen to remain in the DB plan, make the 4% contribution until he or she attained 30 years of service and then transfer to the DC plan for the balance of his or her career. MCL 38.50a(1) and (2). Members had from January 3, 2012, until March 2, 2012, to make their election. MCL 38.50a(3).

At present, there are approximately 51,370 State employees in the State Employees Retirement plan. Of this number, approximately 18,810 are members of the DB plan. The remaining approximately 32,560 State employees in the DC plan were not subject to the election described in MCL 38.35a because they were not "members." Of the approximately 18,810 members in the DB plan, some 18,210 elected to make the 4% contribution provided in MCL 38.35a and 38.50a. (Exhibit 2, ¶ 4(a & b); App 112a-113a.)

PROCEEDINGS BELOW

Court of Claims Proceedings

Plaintiffs-Appellees filed suit on February 13, 2012, alleging that 2011 PA 264 and, in particular, MCL 38.35a and 38.50a were unconstitutional because they were enacted without the input, consent, or approval of the Commission. (Complaint ¶¶ 64–68; App 104a.) The parties filed cross-motions for summary disposition. In an opinion and order dated September 25, 2012, the Court of Claims concluded that § 35a of PA 264 mandated that members contribute 4% of their compensation toward their pension cost, which reduced their compensation without the Commissions' approval or consent contrary to the authority of the Commission under article 11, §5 of the 1963 Constitution. (Opinion, pp 8, 11; App 154a, 157a).

As a result, the Court issued an order granting Plaintiffs' motion and denying Defendants' motion. (Opinion, p 12; App 158a.)

During oral argument on Defendants' motion for a stay, the Court indicated that its September 25, 2012 order was not a final order. (Tr 10/10/12, p 11; App 159a.) As a result, Plaintiffs filed a motion for partial summary disposition on October 15, 2012, in which they argued that the revisions to the overtime calculation in § 1e of PA 264 were unconstitutional. Plaintiffs also moved to voluntarily dismiss, without prejudice, Plaintiffs' claims that other sections of PA 264 were unconstitutional. Briefs were filed by the parties, and oral argument was held on November 28, 2012. At the conclusion of the arguments, the Court, relying on its September opinion, held that § 1e was unconstitutional because it was enacted without the Commission's approval and would affect the rates of compensation of members. (Tr 11/28/12, pp 15–17; App 160a-163a.) The Court also granted Plaintiffs' motion to dismiss without prejudice any other claims regarding the constitutionality of other sections of PA 264. An order confirming the Court's opinion of November 28, 2012 was entered on December 12, 2014, along with a stipulated order that allowed Defendants to continue to collect the contributions elected by members in § 35a and § 50a of PA 264 and to continue to apply § 1e of PA 264, pending the appeal of this case. (App 165a-167a)

Court of Appeals Proceedings

The Court of Appeals affirmed the Court of Claims determination that the challenged portions of PA 264 are unconstitutional, holding that they are

incompatible with article 11, § 5 of the Constitution. *Michigan Coalition of State Employee Unions v Michigan*, 302 Mich App 187, 204, 838 NW2d 708, 718 (2013). Specifically, the Court held that MCL 38.35a and MCL 38.50a had the effect of changing "rates of compensation" or "conditions of employment," which are within the exclusive authority of the Commission, not the Legislature. *Id.* at 203. With regard to MCL 38.1e, the Court held that it too invaded the province of the Commission by making a change to a fringe benefit. *Id.* at 204.

The Court did, however, reverse the Court of Claims' determination that PA 264 is void in its entirety, and it remanded the case to the trial court for a determination regarding the severability of the remaining portions of PA 264. *Id.* at 206.

STANDARD OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition as well as issues concerning contractual and statutory interpretation. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Archambo v Lawyers Title Ins Corp*, 466 Mich. 402, 408; 646 NW2d 170 (2002); *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). When reviewing a statute to determine if it is constitutional, "[a]ll possible presumptions should be afforded to find constitutionality." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 464; 208 NW2d 469 (1973). Moreover, courts have a duty to construe a statute as constitutional unless

its unconstitutionality is clearly apparent. *Caterpillar, Inc. v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992).

ARGUMENT

I. Sections 1e, 35a, and 50a of 2011 PA 264, enacted to secure the viability of the State pension system, are constitutional.

The language of the Constitution does not restrict the Legislature's authority to establish and amend a pension plan. This conclusion comports with the history of the 1908 Constitution, its amendment in 1940, as well as the plain language of the 1963 Constitution. Otherwise, all of the revisions to the State retirement system are illegal, as were the Legislature's actions creating the pension plan in the first place.

Contrary to the opinion of this Court, the Court of Appeals made several other fundamental errors, starting with its failure to determine what the ratifiers of article 6, § 22 of the 1908 Constitution and article 11, § 5 of the 1963 Constitution intended, as required by *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642; 698 NW2d 350 (2005). In addition, the Court failed to acknowledge the Commission's own admitted lack of authority, misread the import of the Commission's power to "regulate all conditions of employment," and failed to make critical distinctions in attempting to apply the relevant constitutional provisions.

A. The ratifiers of the 1908 Constitution did not intend to restrict the Legislature's inherent authority to enact and amend a pension plan.

The Court of Appeals concluded, improperly, that article 11, § 5 vests in the Commission, rather than the Legislature, the authority to regulate retirement

benefits provided to former State employees under PA 240. *Michigan Coalition*, 302 Mich App at 201–203. As explained below, however, the Court of Appeals' analysis of the constitutionality of PA 264 is materially deficient in several crucial respects, beginning with its improper focus on how the citizens who adopted the 1963 Constitution understood the meaning of the term "compensation." Instead, the requisite analysis must start with examination of the constitutional authority that created the Commission, namely article 6, § 22 of the 1908 Constitution, which was adopted in 1940.

1. Article 6, § 22 of the 1908 Constitution did not impose limits on the Legislature regarding the establishment or maintenance of a pension plan.

The fundamental purpose article 6, § 22 of the 1908 Constitution was to provide for an unbiased commission to promulgate and enforce rules that would end the spoils system to assure a merit–based system of government hiring and employment. *UAW v Green*, 302 Mich App 246, 255; 839 NW2d 1 (2013); *Civil Service Comm v Auditor General*, 302 Mich 673, 677, 681–682; 5 NW2d 536 (1942); *Reed v Civil Service Comm*, 301 Mich 137, 154–155; 3 NW2d 41 (1942). This purpose must be kept in mind when interpreting article 6, § 22. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745; 330 NW2d 346 (1982).

It is a bedrock principle, ensconced firmly in both the 1908 and 1963 Constitutions, that the power to make laws is reposed in the people as reflected in the work of the Legislature. Const 1908, art 5, § 1; Const 1963, art 4, § 1. This Court has observed that the Legislature's power is as broad and comprehensive as

necessary to accomplish the legitimate purposes of government, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself. *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934); *Huron-Clinton Metro Auth v Bds of Suprs of Wayne, Washtenaw, Livingston, Oakland and Macomb Cos*, 300 Mich 1, 12; 1 NW2d 430 (1942). Moreover, both the 1908 and 1963 Constitutions prohibit the Commission from exercising legislative power unless the grant of such power is "expressly provided" in the Constitution. Const 1908, art 4, § 2; Const 1963, art 3, § 2. It follows that, in the absence of a specific grant of authority to the Commission, the Legislature has inherent authority to enact laws governing the retirement of State employees, and any amounts payable thereto.

The Commission is an administrative agency within the executive branch. *UAW*, 302 Mich App at 257. Under article 4, § 2 of the 1908 Constitution and article 3, § 2 of the 1963 Constitution, the Commission cannot exercise the power of the Legislature unless expressly granted to it. *House Speaker v Governor*, 195 Mich App 376, 389; 491 NW2d 832 (1992), reversed on other grounds 443 Mich 560; 506 NW2d 190 (1993). Here, neither article 6, § 22 of the 1908 Constitution nor article 11 § 5 of the 1963 Constitution expressly grant the Commission the authority to enact a pension plan. Nor do these provisions prohibit the Legislature from enacting a pension plan or require the Legislature to obtain the approval of the Commission before enacting a pension plan or subsequently amending it by PA 264.

Furthermore, if the ratifiers had intended to give the Commission this authority, they would have done so using specific language since the Legislature has comprehensive, absolute, and unlimited power unless restrained by the Constitution. *Young v City of Ann Arbor*, 267 Mich at 255. Clearly, the purpose for adopting article 6, § 22 was to end the spoils system and create a merit system for the hiring, classification, and promotion of State employees, not to give the Commission the authority to establish a pension plan for State employees. Finally, as more fully discussed below, the great mass of people who ratified article 6, § 22 in 1940 would not have understood that they gave the Commission authority over retirement matters. Thus, the Legislature had the authority to enact PA 240 and to amend it by 2011 PA 264.

2. In 1940, the phrase "rates of compensation" was not understood to refer to pensions.

The standard for interpreting the meaning of the Constitution is "that which reasonable minds, the great mass of the people themselves, [who ratified it] would give." *Studier*, 472 Mich at 652. When construing the Constitution, a court must also consider "the circumstances surrounding the adoption of the constitutional provision and the purposes sought to be accomplished." *Soap & Detergent Ass'n*, 415 Mich at 745. Since the phrase "fix rates of compensation" was retained in article 11, § 5 of the 1963 Constitution, it is necessary to determine what the ratifiers of article 6, § 22 intended when they added that section in 1940 to evaluate whether 2011 PA 264 is constitutional.

At the outset, it is critical to recognize that the ratifiers of article 6, § 22 contemplated empowering the Commission to classify all positions and establish pay rates for each class of positions:

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

In context, the phrase "fix rates of compensation for all classes of positions" cannot be read to encompass pensions because pensions are not "fixed" relative to an employee's job classification. Rather, the ratifiers were referring to job-specific salary, or pay *schedules*. Importantly, under the Retirement Act, a State employee's position or classification has no relevance to his or her pension amount. In fact, an employee's pension is determined based on a legislatively determined formula that comprises some factors entirely outside of the Commission's control, including specifically the employee's retirement credit. Significantly, retirement credit (or "credited service") is governed by the Retirement Act, MCL 38.1b(4), and is not, in any event, synonymous with an employee's "seniority," or any other factor regulated by Civil Service. To that end, there are myriad ways an employee can earn retirement credit that have nothing to do with the service he or she actually renders to the State and, hence, are unquestionably outside of the Commission's control. Examples include the ability to transfer retirement credit earned from other employers (MCL 38.17a; 38.17b; 38.17c; 38.17d; 38.17n), the ability to purchase

retirement credit (MCL 38.17g; 38.17h; 38.17i; 38.17l; 38.17m; 38.17n; and 38.18), and the mandatory crediting of service for intervening military service (MCL 38.18).

Furthermore, the ratifiers of article 6, § 22 would not have even contemplated, let alone intended, that the phrase "fix rates of compensation" would include giving the Commission the authority to establish a retirement plan and prohibiting the Legislature from doing so. Instead, the ratifiers intended to end the spoils system by giving the Commission the authority to regulate the employment and fix the rates of compensation for employees "in the state civil service." Moreover, once a civil service employee leaves State employment, he or she is no longer "in" civil service and, therefore, ratifiers would not have intended to give the Commission the authority to determine whether someone who is no longer a civil service employee should be a pension.

Just three years after the adoption of article 6, § 22, the Legislature, in 1943, enacted PA 240. Being close in time, it is significant to note the Legislature's choice of words when it enacted § 1(o) in PA 240. There, the Legislature defined "average final compensation" to be the "average annual pay, salary, or compensation received by a member during his last 5 years of service . . . ." "Average final compensation" had to be determined before a retiree's pension could be calculated under § 20(c) of PA 240. Moreover, § 6 of PA 240, which authorizes the Retirement Board to hire actuarial, technical, and other administrative employees for the proper operation of the retirement system, provides that "[t]he compensation of all persons so appointed and employed shall be fixed in accordance with the official compensation schedules

of the civil service commission." Thus, the general understanding of the meaning of "compensation" at the time of the enactment of PA 240 must only have meant salary because it could not have included pensions.[3]

The ratifiers of article 6, § 22 simply intended the phrase – "fix rates of compensation" – to give the Commission the authority to establish pay schedules for each of the various positions in State civil service. For example, all secretaries doing the same work with the same experience would receive the same pay rate. The Commission enacted such a schedule on July 1, 1941. *Civil Service Commission*, 302 Mich at 677. As a result, the ratifiers understood that the plain meaning of "compensation" was the amount that employees were paid, subject to voluntary deductions that a member might choose to make.

B. The ratifiers of the 1963 Constitution did not expand the authority given to the Commission from that given in the 1908 Constitution and therefore did not prohibit the Legislature from continuing to amend PA 240.

The address to the voters did not indicate that approval of article 11, § 5 would eliminate the ability of the Legislature to continue to amend PA 240. Without changing the language in article 6, § 22, the ratifiers of article 11, § 5 continued to give the Commission authority to "fix rates of compensation" and

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[3] This conclusion is reinforced by the definition of "compensation," as it appeared in Funk & Wagnalls New Standard Dictionary, 1937 Edition, p 541:

> the act of compensating, the State of being compensated, or that which compensates; whatever makes good loss or lack, or counterbalances variation; payment; amends; especially an equivalent in value or the like.

"regulate the terms and conditions of employment" for civil service employees. Rather than expand the scope of the Commission's authority at the expense of the Legislature, the ratifiers did exactly the opposite in article 11, § 5 when they gave the Legislature the ability to reject increases in rates of compensation fixed by the Commission:

> Increases in rates of compensation authorized by the commission may be effective only at the start of the 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 the 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.

As used in this provision, "rates of compensation" clearly means pay rates established by the Commission, not pensions since the amount of a pension depends on the years of service and final average compensation. MCL 38.1e and 38.20. The meaning of "rates of compensation" cannot vary within article 11, § 5. Thus, the ratifiers of article 11, § 5 intended that the Commission have the authority over pay rates, not pensions.

Delegates at the 1961 Constitutional Convention explained underpinnings of this proposal as follows:

> [T]his amendment would . . . only affect[ ] increases in rates of compensation for classified personnel. Presently, the civil service

> commission has *the absolute power to fix rates of compensation in any amount and at any time it desires, free from legislative control or accountability.* [. . .] 1 Record of the Constitutional Convention of 1961, p. 652. [*Mich. Ass'n of Governmental Employees*, 125 Mich App at 187–189, 336 N.W.2d 463.] (Emphasis added.)

This remark indicates that at the time the 1963 Constitution was ratified, it was commonly understood that the Civil Service Commission's "absolute power to fix rates of compensation" did not touch upon pension matters which, by then, had been firmly within the control of the Legislature from the enactment of PA 240 in 1943. In other words, the ratifiers could not have meant that the Commission's "absolute power to fix rates of compensation" included pensions, because the Commission had never made adjustments to pensions "free from legislative control or accountability" or otherwise. To the contrary, the *Legislature* had always fixed pensions *free from Commission control or accountability.*

Further, the ratifiers of the Constitution of 1963 are presumed to have been aware of the more than 20 amendments to PA 240 enacted between 1943 and 1963 (Exhibit 18; App 102a-103a) without the Commission's approval. *Hall v Ira Township*, 348 Mich 402, 407; 83 NW2d 443 (1957); *Richardson v Secretary of State*, 381 Mich 304, 311–312; 160 NW2d 883 (1968). While reaffirming the Commission's power to set the rates of State civil service employee compensation, the ratifiers of the 1963 Constitution did not take any steps to nullify those 20 amendments or strip the Legislature of the authority to continue to amend PA 240 in the future. OAG, 1971-1972, No. 4732, pp 66, 72–73 (December 29, 1971). The reasonable inference is that the great mass of people who voted for article 11, § 5 of the 1963 Constitution wanted to continue to allow the Legislature to amend PA 240.

Council No. 11, AFSCME supports this analysis as well. In that case, the Legislature enacted 1976 PA 169 to give State employees the right to become members of a political party, to be delegates to a State convention, and to be candidates for political office. But Commission Rule 7 prohibited all political activity by State civil service employees. *Council No. 11, AFSCME,* 408 Mich at 390–391 n 2 and n 3. The Court held that if it had been the intention of the voters in 1940 to give the Commission the authority to deny these rights to State employees, the voters would have clearly said so: "The [voters'] failure to do so by adopting the 1940 amendment without such provision is strongly suggestive of a knowledgeable rejection of such a ban." *Council No. 11, AFSCME,* 408 Mich at 404.

By way of example, article 4, § 48 of the 1963 Constitution contains an express limitation on the Legislature's authority, providing:

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

Thus, it is clear that when ratifiers want to limit the Legislature's authority, they know how do it and have done so explicitly in article 4, § 48. Likewise here, the fact that the ratifiers of article 11, § 5 of the 1963 Constitution did not prohibit, abrogate, or limit the application of the more than 20 amendments to PA 240 enacted between 1943 and 1963 (Exhibit 18; App 102a-103a) establishes that voters did not prohibit the Legislature from enacting future amendments like PA 264.

1. The addition of article 9, § 24 to the 1963 Constitution supports the conclusion that the ratifiers of article 11, § 5

did not intend to prohibit the Legislature from amending PA 240.

Article 9 § 24 was new in the 1963 Constitution. It recognized that the Legislature had created a State retirement system:

> The accrued financial benefits of each pension plan and retirement system of the State and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

If the ratifiers of the 1963 Constitution had intended to prohibit the Legislature from amending PA 240 that created a retirement system, they would not have recognized the existing retirement system in article 9, § 24, *which already required employee contributions in* 1943 PA 240, § 35. Ratification of article 9, § 24 after § 35 had been effective for nearly 20 years demonstrates that the ratifiers accepted a *legislatively enacted* retirement system funded, in part, by employee contributions. To emphasize that point, article 3, § 7 of the 1963 Constitution recognized that existing statutes would remain in force unless repugnant to the Constitution. Accordingly, § 35 of PA 240 remained in effect until its repeal in 1974 PA 216.

This Court has held that:

> Under this constitutional limitation [article 9, § 24] the Legislature cannot diminish or impair accrued financial benefits, but we think it may properly attach new conditions for earning financial benefits which have not yet accrued. [*Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich at 663].

Thus, this Court has recognized that the Legislature may add new conditions to receive a future pension such as those included in § 1e, § 35a, and § 50a of PA 264.

Although under article 9, § 24 the Legislature may not diminish or impair pension benefits that have already accrued, it is free to repeal 1943 PA 240 and

thereby end the accrual of any additional pension amount. OAG No. 4732, at p 73. Since the Legislature has that authority, it can surely provide that a member may accrue additional service credit only if the member contributes four percent of his compensation toward the cost of the pension as provided in § 35a and § 50a of PA 264. In sum, the ratifiers of article 11, § 5 did not prohibit the enactment of PA 264.

2. Article 4, § 51 of the 1963 Constitution gives the Legislature the authority to enact 2011 PA 264.

Article 4, § 51 of the 1963 Constitution provides that the public health and general welfare of the people of the State are matters of primary public concern. Based upon this provision, the Legislature has broad power to enact legislation that advances "a public purpose." *City of Gaylord v City Clerk*, 378 Mich 273, 295; 144 NW2d 460 (1966). Here, § 1e of PA 264 was enacted to limit the effect that overtime pay during the last three years of employment would have on the calculation of a pension. Sections 35a and 50a were enacted for the public purpose of encouraging the retention of experienced State employees by allowing them to purchase service credit to enhance their pensions. This purpose easily satisfies the article 4, § 51 criteria. As a result, this constitutional provision must be harmonized with the authority given to the Commission in article 11, § 5 since "no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003); *Walters v Dep't of Treasury*, 148 Mich App 809, 817–818; 385 NW2d 695 (1986).

Harmonizing article 11, § 5's grant of authority to the Commission within its limited sphere of authority with article 4, § 51's broad grant of legislative authority to the Legislature leads to the conclusion that the Legislature may amend PA 240 as long as any amendment does not affect the Commission's authority to set the wage rates for any classified State positions. *Dep't of Transportation v Brown*, 153 Mich 773, 781–782; 396 NW2d 529 (1986). Here, PA 264 does not affect the wage rates set by the Commission and therefore does not impinge on the Commission's authority.

While the Commission has significant power in its sphere of authority, its sphere of authority is limited. *Jones v Dep't of Civil Service*, 101 Mich App 295, 301; 301 NW2d 12 (1980). In *Jones* the Court held that, even though article 11, § 5 gave the Commission authority over the conditions of employment of civil service employees, article 5, § 29 of the 1963 Constitution gave a different commission, the Civil Rights Commission, the authority over those same civil service employees in the area of job discrimination. *Id.* at 301. Moreover, the Court held that the Civil Service Commission violated a State law enacted under article 5, § 29 when it denied disability benefits to pregnant women despite the Commission's authority to fix rates of compensation." *Id.* at 303–304.

In *Oakley v Department of Mental Health*, 136 Mich App 58; 355 NW2d 650 (1984), the Legislature enacted 1976 PA 414 to give State civil service employees in the Department of Mental Health a wage and fringe benefit continuation plan in the event that an employee was injured as a result of an assault by a patient. *Id.* at

60–61. Referencing the Legislature's authority under article 4, § 51, the Court concluded that the enactment of this benefit was not unconstitutional under article 11, § 5. *Id.* at 60–61. Specifically, the Court held that "compensation," as used in article 11, § 5, did not include the disability compensation included in 1976 PA 414. *Id.* at 63. In addition, the Court held that if 1976 PA 414 was unconstitutional under article 11, § 5, then the Worker's Disability Compensation Act would be unconstitutional because it applied to State employees. Finally, the Court concluded that 1976 PA 414 was a method to provide for the general welfare as allowed in article 4, § 51. *Id.* at 64; see also *Michigan State Employees Ass'n v Dep't of Corrections*, 172 Mich App 155, 158; 431 NW2d 411 (1988).

In *Livingston County Board of Social Services v Department of Social Services*, 208 Mich App 402, 411; 529 NW2d 308 (1995), *lv den* 450 Mich 858; 538 NW2d 680 (1995), the Court held that MCL 400.45(5) was constitutional under article 11, § 5, even though it affected how classified civil service employees would be appointed to the position of County Director of Social Services. Similarly, in *Department of Transportation*, 153 Mich App at 781–782, the Court upheld the constitutionality of the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq*, even when it applied to the working conditions of State civil service employees. The Court has also upheld the constitutionality of the Elliott Larsen Civil Rights Act even though it applies to claims of discrimination in the work place filed by State civil service employees. *Walters v Dep't of Treasury*, 148 Mich App at 815; *Marsh v Civil Service Dep't*, 142 Mich App 557, 564; 370 NW2d 613 (1985).

Thus, there have been many statutes found constitutional when they affected the pay and working conditions of State civil service employees despite the Commission's authority under article 11, § 5.

Likewise, the Legislature had the authority under article 4, § 1 and article 4, § 51 to enact PA 264. While the Commission has the authority to fix the rates of compensation of civil service employees, article 11, § 5 does not explicitly give the Commission the authority to establish and amend a retirement plan. As a result, the Commission does not have the authority over pensions under its authority to "fix rates of compensation." Moreover, if § 1e, § 35a and § 50a of PA 264 are unconstitutional because they were not approved by the Commission, then the more than 100 other amendments to PA 240 since 1963 would be also unconstitutional, and pension payments to thousands of current retirees would be subject to reduction. The ratifiers of article 11, § 5 never intended that result. Thus, PA 264 is not unconstitutional under article 11, § 5.

3. The distinct usage of the terms "compensation" and "pension" within article 11, § 5 of the 1963 Constitution evinces the ratifiers' separate understanding of each.

As noted, the ratifiers of the 1963 Constitution retained in the Commission the authority to "fix rates of compensation" and "regulate the terms and conditions of employment" for classified employees. Significantly, in 1978, the ratifiers added a clause to article 11, § 5 that empowers State Police troopers and sergeants to collectively bargain with their employer as follows:

> State Police Troopers and Sergeants shall, through their elected representative designated by 50% of such troopers and sergeants, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness; and they shall have the right 30 days after commencement of such bargaining to submit any unresolved disputes to binding arbitration for the resolution thereof the same as now provided by law for Public Police and Fire Departments.

It is axiomatic that a constitutional provision, like a statute, is to be construed as a unified whole to give effect to each of its provisions and to produce internal harmony and consistency. *Muskegon Building and Construction Trades v Muskegon Area Intermediate School District*, 130 Mich App 420, 343 NW2d 579 (1983) (overruled on other grounds by *Western Michigan University Board of Control v State*, 455 Mich 531, 565 NW2d 828 (1997)). Every word should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part surplusage or nugatory. *In re MCI Telecomms Complaint*, 460 Mich 396; 596 NW2d 164 (1999).

The distinctive inclusion of the terms "compensation" and "pension" within article 11, § 5 is important. Because the ratifiers used both words, the words are generally construed to connote different meanings. *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Asss'n*, 484 Mich. 1, 14; 795 NW2d 101 (2009). Put simply, had the ratifiers intended for "compensation" (or "rates of compensation") to include "pensions," it would not have been necessary for them to separately specify "retirement" and "pensions" in regard to State Police. In other words, the ratifiers of the 1978 amendment to article 11, § 5 must have recognized

that "compensation" did not include "pensions" because they added "pensions" to make sure that pensions were subject to collective bargaining.

C. The Court of Appeals erred in holding that the Legislature's enactment of PA 264 is incompatible with, or otherwise usurped, the Commission's authority to "fix rates of compensation" and failed to recognize the Commission's own acknowledgment that it lacked such authority.

The Court of Appeals' holding that § 1e, § 38.35a, and § 38.50a are unconstitutional rests on the unsubstantiated assumption that the Legislature is precluded from enacting PA 264 unless it first obtains the approval of the Civil Service Commission. *Michigan Coalition*, 302 Mich App at 202–203. Critically, however, the Court's assumption appears to be rooted in its perfunctory remark that the Civil Service Commission had authorized the enactment of PA 240 in the first place. *Id.* at 191. As noted above (at pages 5–6), there is no record of that being the case.

Further, even if the Commission initiated the creation of the retirement plan, the Legislature enacted it into law. Had the ratifiers of article 6, § 22 given the Commission the authority to enact a retirement plan, the Commission could not have delegated it to the Legislature and there would have been no need for the Commission to request the Legislature to enact it. *Groehn v Michigan Corp & Securities Comm*, 350 Mich 250, 259; 86 NW2d 291 (1957).

Moreover, and dispositively, neither the 1908 Constitution nor the 1963 Constitution expressly give the Commission the authority to legislate a pension plan or restrict the Legislature from establishing a retirement plan without first

obtaining the Civil Service Commission's approval. (Const 1908, art 4, § 2 and Const 1963, art 3, § 2.) And, as demonstrated below, the Commission's absolute lack of involvement in pension matters for the last 60 years, coupled with its acknowledgement in Rule 5-13 that it has no such authority, demonstrates that the Court of Appeals' ruling is erroneous.

1. Sections 1e, 35a, and 50a of PA 264 do not change the "rates of compensation" approved by the commission.

It is undisputed that the Commission has the power to "fix rates of compensation" for positions in the civil service. *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 164; 365 NW2d 93 (1984). As explained above, however, neither article 11, § 5 of the 1963 Constitution, nor its 1908 predecessor, purport to limit the Legislature's authority to enact laws establishing—or amending—a pension plan for retired State employees. By the same token, nothing in either the 1908 or 1963 Constitutions specifically grants the Commission the authority to create a pension plan for retired former State employees.

Nevertheless, the Court of Appeals took for granted that the "central"—and seemingly sole—question, at least with regard to MCL 38.35a and MCL 38.50a, is whether pension payments constitute a form of "compensation" subject to the Commission's exclusive regulation. *Michigan Coalition*, 302 Mich App at 199. As explained below, an individual's election to contribute toward his or her retirement does not implicate the Commission's authority to "fix rates of compensation" and does not "effectively reduce the employee's immediate compensation." *Id.* at 195.

The Court of Appeals selectively relied on a handful of inapposite cases that do not, in any event, shed light on the scope of Commission's authority in the instant case.

The Court of Appeals focused its discussion primarily on *Kane v City of Flint*, 342 Mich 74; 69 NW2d 156 (1955), wherein this Court upheld the city commission's authority to take into account the value of retirement benefits payable to firefighters and police officers when determining whether "like compensation" was being paid for "like classifications." There, certain firefighters and police officers who participated in the city's retirement plan asserted their entitlement to premium night pay that, by ordinance, was payable only to firefighters and police officers who did not participate in the retirement plan. Under those facts, the Court concluded that the city commission properly considered the plaintiffs' retirement benefits when allowing them "like compensation" for like classifications. *Id.* at 83. That case neither addressed whether the ratifiers of article 6, § 22 or article 11, § 5 intended compensation to include pensions, nor did it address the purpose for the enactment of those sections in an attempt to determine the meaning of "fix rates of compensation." As a result *Kane* does not support the Court of Appeals' conclusion that the Commission's authority to "fix rates of compensation," particularly in light of the history surrounding it, includes the power to fix pensions.

Likewise, the Court's reliance on *AFSCME Council 25*, 294 Mich App 1; 818 NW2d 337 (2011), was also misplaced. There, the Legislature, through MCL 38.35, *mandated* a 3% retiree healthcare contribution in order to balance the budget after the Legislature failed, under the authority in article 11, § 5, to reject a 3% pay rate

increase authorized by the Commission. Here, the 4% contribution is voluntary, is not connected to a pay increase approved by the Commission, and was not done to balance the budget. For those reasons, it is more akin to 1996 PA 487, which gave existing members the option to join the newly created DC plan. Transfer from the DB to DC plan eliminated a pension for future service but was not approved by the Commission and never constitutionally challenged because it did not infringe upon the Commission's authority to fix rates of compensation.

Further, the Court of Appeals erred in relying on *AFSCME Council 25* to support the proposition that "'compensation' includes fringe benefits." Significantly—and distinguishably—*AFSCME Council 25* relied upon a 2001 dictionary definition of the term "compensation." *Id.* at 23. As explained above, however, it is only relevant to consider the meaning of the term, as it was understood in 1940 when article 6 § 22 was added.

Moreover, this Court has recognized the authority of the Legislature to amend PA 240 in a manner that affected the payment of Commission-established compensation. In *Stone v State*, 467 Mich 288; 651 NW2d 64 (2002), State civil-service and non-civil-service retirees who left employment under a 1996 early retirement program argued that their accumulated sick payments (which were payments earned before retirement, while still in civil service) were exempt from State and local income taxes under MCL 38.40b. In return for an enhanced pension formula, the retirees had agreed to take their sick-leave payout in sixty equal monthly payments, rather than in a lump sum at retirement. MCL 38.19f(3). The

Court held that the Legislature had the authority to tax sick-leave payments because, although the sick-leave payout was created by Commission Regulation 5.10, the Legislature only "altered the manner of payment" in MCL 38.19f(3). *Stone*, 467 Mich at 291.

Likewise, the enactment of MCL 38.1e, which merely changes the manner in which *future* overtime pay is factored into the calculation of a member's pension, does not infringe upon the Commission's authority. Significantly, it does not affect or reduce the actual amount of pay that an employee receives for services rendered. And, contrary to the Court of Appeals' remark, it does not result in "any employee who remained in the DB plan [having] their final average compensation reduced." *Michigan Coalition*, 302 Mich App at 195. Rather, at most, this provision would affect only those who work in overtime eligible classifications and whose overtime pay will have been greater in a prospective three-year averaging period than in it would during a six-year averaging period. Moreover, since MCL 38.1e only affects the amount of a pension calculated using overtime pay to be earned in the future—that is, amounts not yet accrued—it does not violate article 9, § 24. Finally, since this calculation affects a pension, it does not violate the Commission's authority to "fix rates of compensation."

Here, § 1e, § 35a, and § 50a of PA 264 do not change the rates of compensation approved by the Commission and those rates are being paid. Rather, §1e simply changed the definition of Final Average Compensation with regard to future overtime pay for the purposes of calculating a pension, while § 35a and § 50a

gave members the option of paying a 4% contribution to increase their retirement allowances.[4]

2. The Court of Appeals failed to recognize the Commission's own acknowledgment that it does not have authority to enact a retirement plan.

This Court has held that the construction given article 6, § 22 by the Commission "is entitled to serious consideration." *Reed*, 301 Mich at 151. Here, the Commission adopted Rule XXXVIII in 1941 to recognize the Legislature's authority to enact a retirement system. (Exhibit 4, ¶ 3(a) & (b); App 142a.) If the Commission thought it had the authority to enact a retirement system, it would have adopted rules to do so without requesting the Legislature to do so. *Harlan v Civil Service Comm*, 253 Mich App 710, 718; 660 NW2d 74 (2002), lv den 469 Mich 874; 668 NW2d 147 (2003). But the Commission never adopted rules regarding pensions.

For example, the 1972 Rules of the Michigan Civil Service Commission[5] regarding the "Compensation of Employees" provide for the Commission to "establish and approve a compensation schedule" and require that all civil service employees are paid in accordance with such schedule. The Compensation of Employees Rule goes on to provide that "no employee in the State civil service shall

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[4] The 4% contribution provided by MCL 38.35a is comparable to the contributions *required* by MCL 38.1343a of new members of the Michigan Public School Employees Retirement System hired after January 1, 1990. The constitutionality of MCL 38.1343a has not been challenged.

[5] The 1972 Rules of the Civil Service Commission were excerpted in an appendix to this Court's decision in *Hardy v Singer*, 392 Mich 1, 12; 219 NW2d 61 (1974).

be paid a *salary* less than the minimum nor greater than the maximum of the *salary range* for the class as *fixed by the compensation schedule*[.]" (Emphasis added.)

In context, the Commission's own rules reveal that its power to "fix rates of compensation" concerned the establishment of *salary schedules* for the various job classifications and ensuring that employees are paid in accordance therewith. Glaringly, the Commission's rules concerning "compensation" are silent as to any pension, or other post-employment, benefits.

Moreover, the Commission has recognized that it lacks the authority to approve, reject, or alter legislatively enacted retirement benefits. For example, on July 18, 1973, the Michigan State AFL-CIO, supported by the Service Employees International Union (SEIU) and AFSCME, submitted a resolution to the Commission requesting the Commission to fix retirement benefits. (Exhibit 4, paragraph 2; App 126a, 132a-135a). But on December 13, 1974, the Commission made recommendations for retirement benefits stating that:

> All of these retirement actions require positive legislative action for implementation. (Exhibit 4, ¶ 2(c) ; App 136a-14a).

In addition, Civil Service Commission Rule 5-13 provides that "a classified employee is eligible for *retirement benefits as provided by law.*" (Exhibit 4, ¶ 3(h); App 127a, 142a (emphasis added).) Thus, the Commission has interpreted article 11, § 5 as retaining the Legislature's authority to amend PA 240.

Finally, as demonstrated by Plaintiffs' own statements, retirement issues are regulated entirely by statute, are not subject to negotiation, and may be changed by

the Legislature. (Exhibits 7 and 8; App 100a-101a, 106a-110a.) Thus, for over 65 years the Commission recognized the Legislature's authority to enact and amend a retirement plan for State employees.

3. The Court of Appeals failed to recognize that amendments to PA 240, enacted without the Commission's consent, already provide for the purchase of service credit.

It is further noted that PA 240 permits, as it has for decades, members to purchase and obtain service credit in a variety of ways, all of which are done without the Commission's involvement, let alone approval. For example, MCL 38.17g, 17h, 17i, 17l, 17m, and 17n allow a DB member to purchase multiple years of service credit upon payment of the "actuarial cost" as calculated in MCL 38.17j (4). For a 40-year-old member, the actuarial cost to acquire one year of service credit is 11% of the member's annual compensation; for a 50-year-old, 14%; and for a 60-year-old, 15.5%. (Exhibit 2, ¶ 6; App 111a-124a). Under § 35a, a member may acquire one year of service credit for only four percent of his or her annual compensation. Thus, § 35a is a constitutional method for members to increase their pension allowance in a very cost effective manner. If this Court were to find § 35a unconstitutional, MCL 38.17g, 17h, 17i, 17l, 17m, and 17n would also be unconstitutional because none of those amendments to PA 240 were approved by the Commission and all of these amendments allow the purchase of service credit. If these amendments are unconstitutional, thousands of purchases of service credit

would be void. The ratifiers of article 11, § 5 never would have intended such a result.

Just as members may voluntarily elect to increase their service credit by making voluntary purchases, so too can they elect to make the voluntary contribution in § 35a. Such deductions from compensation are no different than that which members already make to their 401(k) plan. (Exhibit 2, ¶ 5; App 114a.) In each case, the actual compensation rate fixed by the Commission remains the same but the member has elected to reduce his or her take-home pay for personal economic advantage, in one case to receive additional service credit and in the latter case to increase his or her tax advantaged savings for retirement.

In summary, the ratifiers of article 11, § 5 did not prohibit the Legislature from enacting § 1e, § 35a, and § 50a of PA 264 and those amendments to PA 240 are constitutional.

D. The Court of Appeals erred in holding that the Legislature's enactment of PA 264 is incompatible with the Commission's authority to "regulate all conditions of employment" under article 11, § 5.

After concluding that pension benefits are "compensation" for purposes of article 11, § 5, the Court of Appeals went on to State, "[m]oreover, defendants make no argument that the nature of the pension plan is not within the definition of 'conditions of employment.'" *Michigan Coalition*, 302 Mich App at 203.[6] Then,

[6] It should be noted that the Court of Claims did not find that PA 264 was unconstitutional because it usurped the Commission's authority over conditions of employment. As a result, the State did not address that argument.

with only a citation to *Mt Clemens Fire Fighters Union v Mt Clemens*, 58 Mich App 635, 645; 228 NW2d 500 (1975), the Court concluded, "[t]hus, whether it concerns 'rates of compensation' or 'conditions of employment,' the pension plan may not be changed in this way by the Legislature acting without the approval of the Commission." *Id.* (Emphasis added.)

Not only was the Court's holding regarding "conditions of employment" procedurally and legally improper, but it conflicts with the holding in *UAW*. Even assuming the "conditions of employment" issue was properly before the Court of Appeals in this case, which it was not, the Commission's constitutional authority to regulate conditions of employment does not, as recognized in *UAW*, trump the Legislature's constitutional authority to enact laws regarding conditions of employment for all employees, including those in the civil service employment. *UAW*, 302 Mich App at 268. PA 264 applies not only to civil service employees but also non-civil service employees of the retirement system. Thus, PA 264 was a proper exercise of the Legislature's authority over "conditions of employment" that is not incompatible with article 11, § 5 and the Commission's authority thereunder.

1. PA 264's compatibility with the Commission's authority to "regulate all conditions of employment" under article 11, § 5 was not an issue before the Court of Appeals.

As an initial matter, the State did not specifically raise whether PA 264 infringed on the Commission's authority to regulate conditions of employment under article 11, § 5, because the Court of Claims never addressed that question. Since there was no ruling on the issue by the Court of Claims, there was no error for

the Court of Appeals to correct in that regard. In any event, in its reply brief, the State did briefly address plaintiffs' conclusory assertion on appeal that PA 264 regulated a condition of employment within the exclusive control of the Commission. See Defendants-Appellants' Reply Brief in the Court of Appeals, pp 7–8. [7]

In the absence of a ruling by the Court of Claims and adequate briefing by the parties, it was procedurally improper for the Court of Appeals to rely upon the "conditions of employment" language of article 11, § 5 as an alternative basis for affirmance. See generally, *Wiggins v City of Burton*, 291 Mich App 532, 542; 805 NW2d 517 (2011) (recognizing that issues not decided in the trial court are generally considered unpreserved for appellate review); *Detroit Edison Co v Michigan Public Service Comm'n*, 264 Mich App 462, 473; 691 NW2d 61 (2004) (recognizing that issues not adequately briefed are deemed abandoned). This is particularly true given the dearth of analysis offered by the Court of Appeals, which merely consisted of a citation to *Mt Clemens Fire Fighters Union*, a non-binding opinion that was not on point.

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[7] In reply in the Court of Appeals, the State contended that PA 264 did not affect a "condition of employment" because pension benefits are not an "employment related activity involving internal matters." See Defendants-Appellants' Reply Brief in the Court of Appeals, pp 7-8, citing *Council No 11, AFSCME*, 408 Mich 385, 406-407; 292 NW2d 442 (1980); *Oakley v Dep't of Mental Health*, 136 Mich App 58, 63; 355 NW2d 650 (1984). The State reiterates, and is not abandoning, that contention in this Court, but in light of *UAW*, argues, alternatively, that even assuming the Court of Appeals was correct in characterizing PA 264 as affecting a condition of employment, PA 264 was a proper exercise of the Legislature's constitutional authority.

2. The Commission's constitutional authority to regulate conditions of employment does not trump the Legislature's constitutional authority to enact laws relative to conditions of employment for all employees, including civil service employees.

Two days after the Court of Appeals decision in this case, the Court decided *UAW v Green*, which offers a thorough, proper analysis of the respective constitutional authority of the Commission and the Legislature regarding "conditions of employment" that is at odds with the Court's decision in the case at bar. *UAW*, 302 Mich App at 257-260.

As mentioned, the Commission has the constitutional authority "to regulate all conditions of employment in the classified service." Const 1963, art 11, § 5. PA 264 applies to both civil service employees and non-civil service employees. As recognized in *UAW*, the Legislature also has constitutional authority over "conditions of employment." Specifically, "[t]he legislature may enact laws relative to the . . . conditions of employment." Const 1963, art 4, § 49. Since these two constitutional provisions were adopted simultaneously, "neither can logically trump the other." *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999). Instead, the provisions must be construed in harmony with one another. *Id.* Here, the distinct wording of article 4, § 49 and article 11, § 5 allows for a harmonious construction that renders PA 264 a constitutional exercise of the Legislature's authority to enact laws relative to the conditions of employment.

a. The absence of language in article 4, § 49 that limits the Legislature's authority to enact laws regarding

the conditions of employment of civil service employees must be deemed intentional.

Conspicuously absent from article 4, § 49 is any limitation on the Legislature's authority to enact laws regarding the conditions of employment of those in the State classified service. This is in contrast to an immediately adjacent section of the constitution that does contain a specific limitation on the Legislature's authority to enact laws affecting those in State classified service. In particular, article 4, § 48 grants the Legislature the authority to "enact laws providing for the resolution of disputes concerning public employees, *except those in the State classified service*" (emphasis added).

The omission of language in one section of the constitution that is included in a different section of the constitution is deemed intentional. *Hammel v Speaker of the House*, 297 Mich App 641, 649; 825 NW2d 616 (2012). Therefore, as stated in *UAW*, "[w]e cannot assume that the exception for civil service employees, which was purposely placed in § 48, was inadvertently omitted from § 49." *UAW*, 302 Mich App at 267. In other words, the ratifiers' failure to limit the authority granted in article 4, § 49, such that the Legislature could enact laws relative to the conditions of employment, *except for those in the State classified civil service*, is deemed intentional. Accordingly, article 4, § 49 must be read to vest the Legislature with authority to enact laws relative to the conditions of employment for all employees, including those in the State classified civil service. "[A]n implied and unstated exception for civil service employment," cannot be read into article 4, § 49. *UAW*, 302 Mich App at 267.

b. The Legislature's authority to enact laws relative to the conditions of employment of those in the classified service is in harmony with the Commission's authority to "regulate" conditions of employment of those in the classified service.

The broad grant of authority to the Legislature to enact laws relative to the conditions of employment for all employees, including those in the classified service, is entirely consistent and harmonious with the Commission's more narrow authority to "*regulate* all conditions of employment in the classified service." Const 1963, art 11, § 5 (emphasis added).

Courts must "apply the plain meaning of terms used in the constitution unless technical legal terms were employed." *Toll Northville LTD v Township of Northville*, 480 Mich 6, 11; 743 NW2d 902 (2008). Here, the constitution provides that the Commission has the authority to "regulate" conditions of employment. As discussed in *UAW*, the plain, ordinary meaning of the word "regulate" is "to govern, direct, or control *according to rule, law, or authority*." *UAW*, 302 Mich App at 267, quoting *Merriam-Webster's Collegiate Dictionary*, (11th ed 2006, p 1049) (emphasis in *UAW*). Therefore, the Commission's authority to regulate (i.e., govern, direct, or control) conditions of employment, is "subject to and in accordance with the Legislature's power to 'enact laws' regarding 'conditions of employment.'" *UAW*, 302 Mich App at 286–287. In fact, the Commission itself recognizes this dichotomy in relation to pension benefits as Commission Rule 5-13 states, "[a] classified employee is eligible for retirement benefits as provided by law" (emphasis added).

As succinctly summarized in *UAW*, "[t]he Legislature possesses the broad power to enact laws relative to the conditions of *all* employment, whereas the

[Commission] possesses the narrow power to regulate conditions of civil service employment." *UAW*, 302 Mich App at 267 (emphasis in original). Here, PA 264 is a proper exercise of the Legislature's broad constitutional power to enact laws relative to the conditions of employment—of both employees that are regulated by the Commission and those that are not—that is in no way incompatible with the Commission's narrow power to regulate conditions of civil service employment. Such a harmonious reading of article 4, § 49 and article 11, § 5 renders incorrect the Court of Appeals' conclusion that the Commission's authority effectively trumped that of the Legislature.

3. The Court of Appeals' reliance on *Mt Clemens Fire Fighters Union* was misplaced.

The extent of the Court's analysis in concluding that PA 264 affected "conditions of employment" in violation of article 11, § 5 was to cite *Mt Clemens Fire Fighters Union* and parenthetically note that "'a change in the retirement plan constitutes a change in conditions of employment.'" *Michigan Coalition*, 302 Mich App at 302–303. Such a cursory analysis does not justify this conclusion.

First of all, *Mt Clemens Fire Fighters Union* is not binding precedent under the rule of stare decisis as it was decided prior to 1990. MCR 7.215(J)(1). Regardless, the case is factually and legally distinguishable as it dealt with whether pensions were conditions of employment for purposes of a collective bargaining agreement and the jurisdiction of the Michigan Employment Relations Commission. The decision did not mention, let alone analyze, the authority of the Commission

under article 11, § 5 or the authority of the Legislature under article 4, § 49. Relying on the non-binding, clearly distinguishable decision in *Mt Clemens Fire Fighters Union*, without any analysis whatsoever, and ignoring the authority and analysis previously discussed, was error that warrants correction by this Court.

E. The Court of Appeals holding is deficient in several other material respects.

1. The Court of Appeals improperly invoked the Public Employment Relations Act to support its holding.

The Court of Appeals held that PA 264 is unconstitutional because it "makes a change to a fringe benefit" and thus "improperly invades the authority of the Commission[.]" *Michigan Coalition*, 302 Mich App at 204. But in support of this conclusion, the Court of Appeals notes only, and with scant explanation, that "[m]andatory subjects of collective bargaining under [§ 15 of the Public Employment Relations Act (PERA), MCL 423.215] are those concerning 'wages, hours, and other terms and conditions of employment.'" *Id.* While the significance of this statement is unclear, it bears mentioning that § 15 of the PERA, which became effective in 1965, *does not apply* to classified State employees. *Welfare Employees Union v Michigan Civil Serv Comm'n*, 28 Mich App 343, 352; 184 NW2d 287 (1970). This is because, since 1940, the Commission has determined wages, hours, and terms and conditions of classified State employment under the authority derived from article 6, § 22 of the 1908 Constitution and continued in article 11, § 5 of the 1963 Constitution. In any event, § 15 of the PERA does not shed light on the scope of the Commission's authority to "fix rates of compensation."

2. The Court of Appeals incorrectly suggested that *Oakley* concerned laws applicable to all employers, public and private.

Although the Court of Appeals acknowledged the State's argument that the Commission's authority over legislation affecting State employees is not unlimited, it nevertheless Stated that the cases relied upon by the State, including *Oakley*, are distinguishable "because the legislation at issue in those cases concerned laws applicable to all employers, public and private." *Michigan Coalition,* 302 Mich App at 204–205. But the Court of Appeals was mistaken because *Oakley* involved a supplemental benefits provision of the mental health code providing, *inter alia,* benefits to employees of the Department of Mental Health, i.e., State employees. Thus, for the reasons discussed above, *Oakley* is both relevant and applicable to this case.

3. The Court of Appeals incorrectly Stated that the Legislature "cannot control the specific terms" of a retirement plan, private or public.

Likewise, the Court of Appeals was mistaken when it attempted to distinguish the cases relied upon the State by stating that "the Legislature cannot control the specific terms of a private employer's retirement plan (nor that of a public employer at the municipal or county level)." *Michigan Coalition,* 302 Mich App at 205. In point of fact, the Legislature can—and does—control, in some instances, the terms of a municipal retirement plan. Beyond the fact that the Legislature has established a Statewide retirement plan encompassing virtually all local school districts (MCL 38.1301 *et seq*), the Legislature has also enacted, for

example, the Fire Fighters and Police Officers Retirement Act, Act 345 of 1937, MCL 38.551 *et seq*. That act provides not only the framework within which municipalities may establish a retirement plan for their fire fighters and police personnel, but also great detail concerning, *inter alia*, the age and service requirements of retirement and the formula to be used for said retirement benefits. See MCL 38.556.

4. The Court of Appeals failed to distinguish between civil service employees and non-civil service employees when it held that § 1e, § 35a, and § 50a of PA 264 are unconstitutional.

As mentioned above (at pages 5–6), PA 240 encompasses both civil service and non-civil service employees. Consequently, the Court of Appeals opinion is erroneous for failing to recognize, at minimum, that PA 264 is constitutional vis-à-vis non-civil service employees.

CONCLUSION AND RELIEF REQUESTED

Sections 1e, 35a and 50a are constitutional because the ratifiers of article 6, § 22 of the 1908 Constitution did not intend to give the Civil Service Commission authority over retirement matters. This is evident from the fact that article 4, § 2 of the 1908 Constitution prohibited the Commission from exercising the power to enact a pension plan because that was a function of the Legislature under article 5, § 1. When ratifiers gave the Commission the authority to fix rates of compensation of civil service employees, they could not have intended to include authority over retirement matters because the ratifiers did not understand "compensation" to include pensions. Moreover, the fact that the Legislature enacted 1943 PA 240 to cover both civil service and non-civil service employees establishes that the Commission would not have had such a plan drafted. In addition, the 1978 amendment to article 11, § 5 that gave State Police collective bargaining rights demonstrates that the ratifiers included pensions because they knew that "compensation" did not.

Furthermore, the fact that the ratifiers of article 11, § 5 of the 1963 Constitution did not repudiate PA 240 or the amendments to it establishes that they did not intent to prohibit the Legislature from amending PA 240 by 2011 PA 264. In addition, the fact that the ratifiers of article 9, § 24 of the 1963 Constitution recognized that the Legislature had created a retirement plan supports the conclusion that ratifiers did not intend to restrict the Legislature's authority to amend that plan. Also, article 4, § 51 of the 1963 Constitution gives the Legislature

the authority to enact 2011 PA 264 since it was enacted for the general welfare of State residents.

Finally, if this Court were to find PA 264 unconstitutional because it was not approved by the Commission, then over 100 other amendments to PA 240 would be unconstitutional which would cause existing pensions to be void, creating a severe hardship to thousands of existing retirees.

Accordingly, the State of Michigan respectfully requests that the Court reverse the decision of the Court of Appeals and instead conclude that § 1e, § 35a, and § 50a of 2011 PA 264 are constitutional. Since these sections are the only sections challenged as unconstitutional by Plaintiffs-Appellees and found to be unconstitutional by the Court of Appeals, the State of Michigan contends that the entire Act 264 is constitutional. The State of Michigan reserves the right to respond if Plaintiffs-Appellees argue that other sections of PA 264 are unconstitutional.

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