STATE OF MICHIGAN
IN THE COURT OF APPEALS

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN,

Plaintiff-Appellant,

v

DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET,

Defendant-Appellee,

and

MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL,

Intervening Defendant-Appellee.
/

Court of Appeals No. 363601

Court of Claims No. 22-000111-MZ

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

BRIEF OF APPELLEE DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant-Appellee Michigan Department of Technology Management and Budget ("DTMB") does not dispute that the claim of appeal of Plaintiff-Appellant Associated Builders and Contractors Michigan ("ABC") was timely filed. However, because ABC is not an "aggrieved party," this Court does not have jurisdiction under MCR 7.203(A).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. A litigant must present a justiciable controversy to maintain its claims. Here, ABC lacks standing to maintain its unripe claims, which are premised on hypothetical injuries and barred by this Court's disappointed bidder caselaw, and ABC is not an aggrieved party on appeal. Did the Court of Claims err in holding that ABC's complaint presents justiciable claims?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: No.

2. Although the separation-of-powers doctrine prevents the Legislature from delegating its power to the executive branch, the Legislature may delegate a task to an executive branch agency if the Legislature provides sufficient standards to accompany the delegation. The Management and Budget Act contains both sufficient standards by which the Department of Technology, Management and Budget is to exercise the task of contract procurement. Did the Court of claims err in holding that there was not a separation-of-powers doctrine violation?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

3. The Administrative Procedures Act requires the promulgation of "rules" but not where the agency decision at issue is to exercise a permissive statutory power. The Department of Technology, Management and Budget exercised a permissive power—determining bid requirements and specifications for state contracts—granted to it through the Management and Budget Act by requiring parties to state contracts to pay a prevailing wage. Did the Court of Claims err in holding that the prevailing wage decision was not required to be promulgated as a rule?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const 1963, Article 3, § 2 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.

Const 1963, Article 9, § 2 provides in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. . . . To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
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> ***
>
> Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.

MCL 18.1241(1), (3)–(4) provides:

> (1) Except for the contracts permitted in section 240, a contract shall not be awarded for the construction, repair, remodeling, or demolition of a facility unless the contract is let pursuant to a bidding procedure that is approved by the board. The department shall issue directives prescribing procedures to be used to implement this section. The procedures shall require a competitive solicitation in the award of any contract for construction, repair, remodeling, or demolition of a facility.
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> (3) In awarding a contract under this section, the department shall give a preference of up to 10% of the amount of the contract to a qualified disabled veteran, as defined in section 261. If the qualified disabled veteran otherwise meets the requirements of the contract solicitation and with the preference is the lowest bidder, the department shall enter into a construction contract

with the qualified disabled veteran under this act. If 2 or more qualified disabled veterans are the lowest bidders on a contract, all other things being equal, the qualified disabled veteran with the lowest bid shall be awarded the contract under this act.

(4) Subject to subsection (3), for projects funded in whole or part with state funds, the construction contract award shall be made to the responsive and responsible best value bidder. As used in this subsection, "responsive and responsible best value bidder" means a bidder who meets all the following:

(a) A bidder who complies with all bid specifications and requirements.

(b) A bidder who has been determined by the department to be responsible by the following criteria:

(i) The bidder's financial resources.

(ii) The bidder's technical capabilities.

(iii) The bidder's professional experience.

(iv) The bidder's past performance.

(v) The bidder's insurance and bonding capacity.

(vi) The bidder's business integrity.

(c) A bidder who has been selected by the department through a selection process that evaluates the bid on both price and qualitative components to determine what is the best value for this state. Qualitative components may include, but are not limited to, all of the following:

(i) Technical design.

(ii) Technical approach.

(iii) Quality of proposed personnel.

(iv) Management plans.

MCL 18.1261(2) provides:

> The department shall make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts.

MCL 24.207(j) provides:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following:
>
> (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

INTRODUCTION

Since 1984, the DTMB has exercised the discretionary function of procuring certain contracts for the State. See 1984 PA 431. And since at least 1999, that function has included awarding contracts for construction-related projects through a competitive solicitation process. 1999 PA 8. The Legislature has provided that DTMB may award a construction-related contract only to a "responsive and responsible best value bidder," which, includes, among other things, "compli[ance] with all bid specifications and requirements." MCL 18.1241(4)(a). The Legislature does not set the specifications and requirements of the hundreds of contracts let by DTMB each year; rather, the Management and Budget Act provides that DTMB "shall make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2); see also *Groves v Dep't of Corrections*, 295 Mich App 1, 6 (2011) (explaining that the award of a public contract is "discretionary").

In exercising this discretionary authority, DTMB, in March 2022, began requiring, as part of bid requirements, state contractors and subcontractors to pay a prevailing wage on construction-related contracts. This requirement went into effect approximately four years after the Legislature repealed the State's prevailing wage law, 1965 PA 166, following a voter-initiated petition. 2018 PA 171 ("PA 171"). PA 171 neither amended nor repealed any portion of the Management and Budget Act.

ABC disagrees with the rationales behind the prevailing wage requirement and asserts that it is unlawful. Specifically, ABC maintains that the requirement

violates the nondelegation and separation-of-powers doctrines and should have been promulgated as a rule under the Administrative Procedures Act ("APA"), MCL 24.201 *et seq*. But this case was properly dismissed for three reasons.

First, while dismissed on alternative grounds below, ABC does not have standing, its claims are not ripe, and it is not an aggrieved party on appeal. Both disappointed bidder caselaw, *Groves*, 295 Mich App at 7, and Michigan standing principles, *Lansing Sch Ed Ass'n v Lansing Bd of Ed,* 487 Mich 349, 372 (2010) (*LSEA*), bar ABC's action. Further, the purported controversy presented by ABC is entirely hypothetical, and thus, not ripe for review. And the lack of an actual controversy precludes this Court's appellate jurisdiction under MCR 7.203(A)(2).

Second, the separation-of-powers and nondelegation doctrines do not prevent DTMB from enforcing the prevailing wage requirement. The Management and Budget Act gives DTMB discretion to require prevailing wages on state contracts. MCL 18.1241(4); MCL 18.1261(2). And the standards set forth in the Act are as reasonably precise as the subject matter—state contracting decisions—permits.

Third, the prevailing wage decision is not required to be promulgated as a rule under the APA. The APA exempts from rulemaking "decision[s] by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). As explained above, the Management and Budget Act clearly authorizes DTMB to make discretionary decisions concerning the solicitation and award of state contracts. That is what DTMB did here.

For these reasons, this Court of Claims properly dismissed ABC's suit.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The repeal of 1965 PA 166

This case arises from the voter-initiated repeal of 1965 PA 166, the Prevailing Wages on State Projects Act, MCL 408.551 *et seq.* ("PA 166"), which provided in relevant part:

> [e]very contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics . . . and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. [Former MCL 408.552.]

The Legislature enacted the voter-initiated petition repealing the Act without amendment pursuant to Const 1963, Article 2, § 9, and it was effective June 6, 2018. PA 171. The repealer simply stated, "408.551-408.588 Repealed. 2018, Act 171, Imd. Eff. June 6, 2018." *Id.* It also appropriated funds towards communicating the repeal of PA 166 and contained a severability clause. *Id.* Because PA 171 was enacted as a result of a voter-initiated petition, it was not subject to the veto power of the Governor. Const 1963, art 2, § 9 ("No law initiated or adopted by the people shall be subject to the veto power of the governor[.]").

The Prevailing Wage Requirement

On October 7, 2021, three years after PA 166's repeal, Governor Gretchen Whitmer issued a statement announcing that the State would require contractors and subcontractors to pay a prevailing wage on state construction projects.

(Appellant's ("AT") Appx at 10.) This statement was followed by an announcement from DTMB explaining that the requirement would be effective for all construction-related contracts posted for bidding after March 1, 2022. (*Id.* at 15, 18.) DTMB also further clarified the State's decision:

> With the exception of lease build-outs, if a project greater than $50,000 involves employing construction mechanics . . . and is sponsored or financed in whole or in part by State funds, state contractors must pay a prevailing wage. [*Id.*]

DTMB noted that wage rates would be "established for each County . . . through a process of submission and review of established wages, benefits, and training investments from bona fide employee and employer organizations." (*Id.* at 16.)

While PA 166 and DTMB's prevailing wage requirement have several similarities, they are not identical. For example, unlike PA 166's criminal penalty for violations of its provisions, a violation of the prevailing wage requirement does not constitute a crime; rather, it will result in "a breach of contract[,]" which "may result in contract termination." (Compare *id.* at 18, with former MCL 408.557.) Further, while PA 166 applied to "[e]very contract . . . for a state project" involving construction mechanics, DTMB's requirement applies only to state projects for $50,000 or more involving construction mechanics issued by DTMB. (Compare *id.* at 15, 18, with former MCL 408.552.)

The Management and Budget Act

In addition to the provisions concerning state contracts in PA 166, provisions for the regulation of state contracts are also provided for in the Management and Budget Act, MCL 18.1101 *et seq.* In relevant part, the Act provides that DTMB

"shall require a competitive solicitation in the award of any contract for construction[.]" MCL 18.1241(1). This includes "giv[ing] a preference of up to 10% of the amount of the contract to a qualified disabled veteran[,]" MCL 18.1241(3), MCL 18.1261(9), and awarding contracts for projects funded in whole or part with state funds "to the responsive and responsible best value bidder[,]" MCL 18.1241(4). The Act defines "responsive and responsible best value bidder" as a bidder who (1) "complies with all bid specifications and requirements[,]" (2) "has been determined by [DTMB] to be responsible" based on the bidder's financial resources, technical capabilities, professional experience, past performance, insurance and bonding capacity, and business integrity, and (3) "has been selected by [DTMB] through a selection process that evaluates the bid on both price and qualitative components to determine what is the best value for this state[.]"[1]

Further, the Act provides that DTMB "shall make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2). Enacted in 1984, the neither the Act nor its provisions concerning construction-related contracts were amended or repealed by PA 171.

The instant action

On July 21, 2022, ABC, a trade association representing construction and construction-related firms in Michigan, filed suit against DTMB for declaratory and

[1] "Qualitative components may include, but are not limited to, all of the following: (i) [t]echnical design[,] (ii) [t]echnical approach[,] (iii) [q]uality of proposed personnel[,] (iv) [m]anagement plans."

injunctive relief. ABC asserted three claims: (1) the prevailing wage requirement violates the separation-of-powers and nondelegation doctrines; (2) the requirement does not comply with the APA.; and (3) the requirement is an *ultra vires* act.

Simultaneous with filing its complaint, ABC also moved for a preliminary injunction to enjoin the prevailing wage requirement. DTMB opposed the motion and also filed a motion for summary disposition in lieu of an answer under MCR 2.116(C)(4) and (8). Additionally, the Michigan Building and Construction Trades Council ("MBCTC") filed a motion to intervene with a proposed answer. The Court of Claims granted the motion to intervene, and MBCTC filed concurrences with DTMB's motion for summary disposition and response to ABC's motion for preliminary injunction.

The Court of Claims heard oral argument on the motions on September 20, 2022, and issued an opinion granting DTMB's motion for summary disposition and dismissing ABC's motion for preliminary injunction as moot on October 10, 2022.

ABC timely appealed the court's opinion and order on October 28, 2022.

Subsequent legislative developments.

On March 21, 2023, the Senate and House of Representatives passed bills that would require contractors for State projects to pay a prevailing wage. See 2023 SB 0006; 2023 HB 4007. The Governor is expected to sign the bills imminently, and, if signed, prevailing wage will be reinstated, effective March 2024.[2]

[2] To the extent prevailing wage is reinstated by the Legislature, this case will be moot in March 2024.

STANDARDS OF REVIEW

A grant or denial of summary disposition is reviewed "de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118 (1999). "In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Id.*, citing *Groncki v Detroit Edison*, 453 Mich 644, 649 (1996).

Where a motion for summary disposition is brought under MCR 2.116(C)(4), the Court "must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155 (2008) (quotation marks and citation omitted). And where a motion is brought under MCR 2.116(C)(8), the Court may grant the motion where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden*, 461 Mich at 119.

ARGUMENT

I. This Court does not have jurisdiction because ABC's claims are not justiciable, and it is not an aggrieved party.

Below, DTMB argued that ABC's claims were not justiciable because ABC does not have standing and the issues presented are not ripe for review. (Appellee's ("AE") Appx at 5.) The Court of Claims disagreed, (*id.* at 5–8), but dismissed ABC's lawsuit on other grounds, (see Parts II and III). However, because courts are bound to dismiss a case when jurisdiction is lacking, *Smith v Smith*, 218 Mich App 727, 731 (1996), this Court should revisit this holding and affirm the Court of Claims' decision to dismiss ABC's case on jurisdictional grounds, *Messenger v Ingham County Prosecutor*, 232 Mich App 633, 643 (1998) ("When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").

A. ABC lacks standing to challenge DTMB's statutory discretion to set the terms of public contracts.

ABC has asserted that, "[a]s bidders on state contract[s], [its] members have standing to challenge the policies that are the subject of this action." (AE Appx at 22, ¶ 3.) Not so. Michigan's appellate courts have repeatedly held that litigants like ABC's members lack standing to challenge a public bid process. And even if Michigan's longstanding disappointed bidder caselaw does not preclude ABC's suit, neither ABC nor its members meet the standing requirements set forth in *LSEA*.

1. Michigan courts have consistently held that bidders do not have standing to challenge a public bid process.

Since 1896, Michigan courts have prohibited review of a public bidding process. *Groves*, 295 Mich App at 5 ("Michigan jurisprudence has never recognized that a disappointed bidder . . . has the right to challenge the bidding process.") (citations omitted). This is because "competitive bidding on public contracts is designed for the benefit of taxpayers and *not those seeking the contract*." *Id.* at 7 (emphasis added) (citations omitted); see *id.* ("Put differently, the purpose of competitive bidding is to guard against favoritism, fraud, corruption, and 'to secure the best work at the lowest price practicable . . . .' ") (citation omitted). "Litigation aimed at second-guessing the exercise of discretion by the appropriate public officials in awarding a public contract will not further the public interest; it will only add uncertainty, delay, and expense to fulfilling the contract." *Id.* (citations omitted). For this reason, "when the government has broad discretion to choose its contractors, a bidder has *no expectancy* in the contract to be awarded." *Id.* (emphasis added); see also *Cedroni Assocs, Inc v Tomblinson, Harburn Assocs, Architects & Planners Inc*, 492 Mich 40, 46 (2012) (explaining that the awarding of state contracts is a "highly discretionary process"). This rule has been repeatedly reaffirmed by this Court and the Supreme Court. See *Detroit v Wayne Circuit Judges*, 128 Mich 438, 439 (1901); *MCNA Ins Co,* 326 Mich App at 745; *Rayford v City of Detroit*, 132 Mich App 248, 256–257 (1984).

While not expressly pled as a disappointed bidder lawsuit, at its core, that is precisely what ABC has filed on behalf of its members. For example, it asserts that

its "members are able to offer comparative advantages over competitors without prevailing wage by providing high-quality services at a lower cost to the taxpayer[,]" and thus, "[p]revailing wage hurts ABC's members by preventing them from being able to compete on the highly important factor of price . . . ." (AE Appx at 23, ¶ 5.) In other words, ABC second-guesses DTMB's exercise of discretion in requiring a prevailing wage as part of the bid process because ABC's members want to secure state contracts. This goes to the heart of the rule against disappointed bidder standing. See *Groves*, 295 Mich App at 6 ("[W]hile [the plaintiffs] ostensibly seek to rectify a public wrong, . . . [they] seek to further their own interests and circumvent the century-old rule that denies standing to disappointed bidders to challenge the discretionary award of a public contract.") (citations omitted). Accordingly, this Court should reverse the Court of Claims' decision regarding standing and remand for dismissal on that basis.

2. ABC does not otherwise have standing to sue.

Even if Michigan's disappointed bidder caselaw does not preclude ABC's suit, ABC still does not have standing under Michigan's standing jurisprudence. In *LSEA*, the Supreme Court set forth the following test for standing:

> [a] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. . . . A litigant may [also] have standing . . . if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [487 Mich 349, 352 (2010).]

ABC meets none of these avenues for standing.

a. No legal cause of action gives ABC standing, nor did the Legislature confer such standing.

In the Court of Claims, ABC relied on section 64 of the APA, MCL 24.264, as a source for standing. (AE Appx at 23, ¶ 8.) Section 64 of the RJA does not provide ABC or its members a legal cause of action to challenge the wage requirement. That section provides a cause of action to litigants who seek to challenge the validity or applicability of an administrative rule. MCL 24.264 ("[T]he validity or applicability of a rule . . . may be determined in an action for declaratory judgment[.]"). There is no dispute that an administrative rule did not issue for the prevailing wage requirement. Nor did ABC request a declaratory ruling from DTMB. MCL 24.264 ("An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously."). As a result, ABC cannot rely on MCL 24.264 as proof that the Legislature conferred standing to challenge the prevailing wage requirements.

Nor does the Management and Budget Act create a legal cause of action to challenge the prevailing wage requirement. Not only is there no provision in the Act explicitly providing an avenue for relief, but, as explained in Part I(A)(1), this Court has held that there is no standing for bidders to challenge a discretionary bid process. *Groves*, 295 Mich App at 11.

b. ABC does not meet the requirement for standing under MCR 2.605.

ABC also does not establish that it has standing to seek a declaratory judgment on behalf of its members. Under MCR 2.605(A)(1), "[t]he existence of an actual controversy is a condition precedent to the invocation of declaratory relief." *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand),* 293 Mich App 506, 515 (2011). "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters v Secretary of State*, 506 Mich 561, 586 (2020). But this Court has ruled "[a] case of actual controversy does not exist . . . where . . . the injury sought to be prevented is merely hypothetical." *Chrysler Corp v Home Ins Co*, 213 Mich App 610, 613 (1995).

There is no actual controversy here. To the contrary, all ABC has alleged is a *hypothetical* issue—namely, it asserts that its members will not be able to compete on future state contracts because of the prevailing wage requirement. But ABC has not alleged that its members have bid on any contracts posted after March 1, 2022. Nor has it alleged that its members have failed to secure bids on state contracts because of DTMB's prevailing wage decision.[3] Instead, ABC projects that, *in the future*, if its members ever bid on a state contract that requires prevailing wage they will be rejected because they do not meet that requirement. This does not satisfy the actual controversy standard. *Citizens for Common Sense in Gov't v*

[3] To the extent that SB 0006 and HB 4007 are enacted, they will supersede DTMB's prevailing wage requirement upon effect.

Attorney General, 243 Mich App 43, 55 (2000) (holding no actual controversy existed where claim was based on the plaintiff's "speculation concerning how the Secretary of State would have acted if called on to do so"); *P.T. Today, Inc v Comm'r of Fin & Ins Servs*, 270 Mich App 110, 141 (2006) (explaining that there was no actual controversy where the "plaintiffs' business expectancies [were] 'merely hypothetical' ") (citation omitted).

c. ABC does not have a legitimate injury different from the citizenry at large.

ABC also cannot show that it "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *LSEA,* 487 Mich at 371. The prevailing wage requirement impacts ABC and its members the *same* as the citizenry at large. Below, ABC attempted to raise a special injury, asserting that "[p]revailing wage hurts ABC's members by preventing them from being able to compete on the highly important factor of price, which many smaller and entrepreneurial members are able to leverage to their advantage." (AE Appx at 23, ¶ 5.) But the prevailing wage requirement applies equally to ABC, ABC's members, smaller entrepreneurs, and every other contractor who bids on state projects. Thus, no special injury or right exists here.

B. ABC's claims are not ripe for review.

Even if ABC has standing to sue, remand for dismissal is still warranted because ABC's claims are not ripe for review. Generally, a party must "sustain[ ] an actual injury to bring a claim." *Van Buren Charter Twp v Visteon Corp*, 319 Mich

App 538, 554 (2017). Consequently, a claim must be ripe in order for it be reviewed by the courts. *Id.* But "[a] claim is not ripe if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615–616 (2008). Thus, in considering ripeness, "the timing of the action is the primary focus of concern." *Id.*

ABC's brief on appeal, like the complaint filed below, fails to reference a single instance where ABC or one of its members bid on or was denied a state contract because the bid failed to include prevailing wages. It merely projects that, at some future time, DTMB may not let one of ABC's members a state contract. This is not enough to show an "actual injury[,]" *Visteon Corp*, 319 Mich App at 554, and dismissal is warranted.

C. This Court does not have appellate jurisdiction because ABC is not an aggrieved party.

MCR 7.203(A)(2) provides that this Court "has jurisdiction of an appeal *filed by an aggrieved party* from" "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule." (Emphasis added). "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, 326 Mich App 740, 745 (2019) (additional quotation marks and citation omitted). For this reason, "a litigant must have suffered a concrete and particularized injury, . . . [and] must demonstrate an injury arising from either the

actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Id.* at 745 (citation omitted). In other words, "[a] party who could not benefit from a change in the judgment has no appealable interest." *Manuel v Gill*, 481 Mich 637, 643 (2008).

ABC's lack of standing as noted in Part I(A) is equally applicable in the appellate context. ABC does not mention a particular pending contract that will resolve differently or that its members are precluded from bidding for contracts. ABC simply disagrees with the rationale behind the prevailing wage requirement. But this Court cannot import ABC's policy preferences into otherwise clear law. *Frey v Dir of Dep't of Social Servs*, 162 Mich App 586, 589 n 1 (1987), *aff'd Frey v Dep't of Mgt & Budget*, 429 Mich 315 (1987). At most, ABC's complaint speculates that DTMB will not let state contracts to its members. But ABC does not plead facts that establish anything more than speculation in this regard, and, in any event, ABC's members have no expectancy to be awarded state contracts. *Groves*, 295 Mich App at 7. Thus, ABC cannot demonstrate an injury arising from DTMB's consideration of certain factors in awarding those contracts. Further, ABC will not benefit from a change in the Court of Claims' judgment because there is no indication that ABC will do anything different regardless of how this case turns out. It will continue to advocate for its members, who will, ostensibly, continue to not pay a prevailing wage.

For these reasons, ABC is not an aggrieved party and has no standing to bring an appeal.

II. The prevailing wage requirement does not violate the nondelegation or separation-of-powers doctrines.

ABC attempts to style this case as one about the improper delegation of legislative power to DTMB. (ABC Br. at 8–12.) Yet, neither on appeal nor in the Court of Claims did ABC detail *how* the Management and Budget Act's provisions violate the separation-of-powers or nondelegation doctrines. Rather, ABC's real contention seems to be that the Management and Budget Act does not authorize DTMB to require prevailing wage in procurement decisions. It further argues that the Fair and Open Competition in governmental Construction Act, MCL 408.871 *et seq.*, and the repeal of PA 166 prohibits DTMB from requiring a prevailing wage in its bids. For the reasons discussed below, these arguments are without merit.

A. The Management and Budget Act authorizes DTMB to consider prevailing wage in procurement decisions.

The Management and Budget Act, among other things, prescribes the powers and duties of DTMB, including DTMB's powers with respect to state contracts. In this regard, the Legislature has vested DTMB with the power to "make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2). And with respect to construction contracts, the Act provides in part:

> a contract shall not be awarded for the construction, repair, remodeling, or demolition of a facility unless the contract is let pursuant to a bidding procedure that is approved by the board. The department shall issue directives prescribing procedures to be used to implement this section. The procedures shall require a competitive solicitation in the award of any contract for construction, repair, remodeling, or demolition of a facility. [MCL 18.1241(1).]

The Management and Budget act also specifies various factors DTMB must consider in awarding construction contracts. For example, DTMB must "give a preference of up to 10% of the amount of the contract to a qualified disabled veteran[.]" MCL 18.1241(3). And in awarding construction contracts, DTMB shall make the award "to the responsive and responsible best value bidder[,]" which the Legislature defined as a bidder who "has been determined by [DTMB] to be responsible" based on certain criteria,[4] "has been selected by [DTMB] through a selection process that evaluates the bid on both price and qualitative components to determine what is best value for this state,"[5] and, importantly, "complies with all bid specifications and requirements." MCL 18.1241(4)(a)–(c).

In explaining its prevailing wage requirement, DTMB's website provides that "[c]ontracts requiring prevailing wage will include wage schedule and prevailing wage language *in bid documents*."[6] (Emphasis added). In other words, if a bidder to a contract requiring prevailing wage does not agree to the wage schedule and prevailing wage language, they will not be in "compli[ance] with all bid specification

[4] DTMB must determine whether a bidder is responsible through consideration of the bidder's "financial resources," "technical capabilities," "professional experience," "past performance," "insurance and bonding capacity," and "business integrity." MCL 18.1241(4)(b)(i)–(iv).

[5] The Legislature specified that "[q]ualitative components may include, but are not limited to, all of the following: (i) [t]echnical design[;] (ii) [t]echnical approach[;] (iii) [q]uality of proposed personnel[;] (iv) "[m]anagement plans." MCL 18.1241(c)(i)–(iv).

[6] Department of Technology, Management and Budget*, Prevailing Wage for DTMB Construction Contracts* <https://www.michigan.gov/dtmb/procurement/design-and-construction/prevailing-wage-information> (last accessed February 15, 2023).

and requirements." MCL 18.1241(4)(a). Notably, the Legislature did not specify each and every bid specification and requirement that DTMB must provide in its contracts. And this makes sense as each of DTMB's hundreds of contracts may require different specifications and requirements. Nor did the Legislature prohibit DTMB from using its discretionary decision-making authority, MCL 18.1261(2), from requiring prevailing wage in those specifications and requirements.

In sum, the Management and Budget Act sets forth certain criteria for the selection of responsive and responsible best value bidders, including compliance with a bid's specifications and requirements. The Legislature did not (and could not) list the specifications and requirements for each bid, and thus, left that decision to the discretion of DTMB, which DTMB exercised in requiring a prevailing wage in all construction-related contracts. See MCL 18.1261(2). For this reason, and contrary to ABC's argument, the Management and Budget Act authorizes DTMB to consider prevailing wage.

B. The Management and Budget Act does not violate the separation-of-powers or nondelegation doctrines.

While ABC does not detail how DTMB violated the separation-of-powers and nondelegation doctrines in requiring a prevailing wage in construction-related contracts, the language of the Management and Budget Act—which authorizes its action—makes clear that it passes scrutiny.

The Michigan Constitution provides for the separation of powers among three branches of government. Specifically, article 3, § 2 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.

This provision has led to the constitutional discipline known as the nondelegation doctrine. *Taylor v Gate Pharm*, 468 Mich 1, 8 (2003). Under this doctrine, "the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." *In re Certified Questions*, 506 Mich 332, 358 (2020) (citation omitted).

But as recognized by ABC, courts have not interpreted this provision to mean that there can never be any overlapping functions between branches. (ABC Br. at 9, citing *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 751–752 (1982)); see also *Mistretta v United States*, 488 US 361, 419 (1989) (Scalia, J., dissenting) ("[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action[.]"). While "the Legislature cannot delegate its legislative power to the executive branch, the Legislature may delegate a task to an executive branch agency if the Legislature provides 'sufficient standards.' " *Taylor*, 468 Mich at 10 n 9; see *id.* ("If sufficient standards accompany the delegation it is transformed into a proper exercise of executive power.") (citation omitted).

In determining whether a statute contains sufficient standards, the Supreme Court has explained that "(1) the act must be read as a whole; (2) the act carries a presumption of constitutionality; and (3) the standards must be as reasonably precise as the subject matter requires or permits." *Blue Cross & Blue Shield v Governor*, 422 Mich 1, 51 (1985). As it relates to the third consideration, "[s]o long

as [the Legislature] 'shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *In re Certified Questions*, 506 Mich at 359, quoting *Mistretta*, 488 US at 372. Courts "must [also] be mindful that . . . standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials." *Id.*, quoting *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308–309 (1976) (quotation marks omitted).

As noted in Part II(A)., the Legislature, through the Management and Budget Act, delegated to DTMB the authority to contract for services and construction projects needed by the State. MCL 18.1261(1) ("The department shall provide for . . . the contracting for . . . services . . . needed by state agencies for which the legislature has not otherwise expressly provided."); MCL 18.1241(1) ("[A] contract shall not be awarded for the construction, repair, remodeling, or demolition of a facility unless the contract is let pursuant to a bidding procedure that is approved by the board."). And regardless of the type of contract, the Management and Budget Act authorizes DTMB to "make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2). This delegation of authority, however, is not without reasonably precise standards.

Take, for example, MCL 18.1261(1), which requires DTMB to "solicit competitive bids from the private sector whenever practicable to efficiently and effectively meet the state's needs." MCL 18.1241(1) similarly requires DTMB to use "competitive solicitation in the award of any contract for construction, repair, remodeling, or demolition of a facility." As noted previously, the Legislature provided detailed considerations that DTMB must use in selecting contractors. DTMB must "give a preference of up to 10% of the amount of the contract to a qualified disabled veteran." MCL 18.1241(3). It must award contracts to "the responsive and responsible best value bidder," which the Legislature defined as a bidder who "complies with all bid specifications and requirements[,]" "has been determined by [DTMB] to be responsible" based on certain criteria, and "has been selected by [DTMB] through a selection process that evaluates the bid on both price and qualitative components to determine what is best value for this state[.]" MCL 18.1241(4)(a)–(c). Further, DTMB must require persons working on a construction project and those employed by a contractor or subcontract to meet certain residency requirements, MCL 18.1241a, and it must "consider the energy efficiency of all materials used[,]" MCL 18.1241b.

These detailed requirements provide more than sufficient standards by which DTMB exercises its delegated task of procuring state contracts. And while ABC may argue that the Legislature could have provided more detailed standards, "standards must [only] be as reasonably precise as the subject matter requires or permits." *Blue Cross & Blue Shield*, 422 Mich at 51. Indeed, "[t]he preciseness of

the standards will vary in proportion to the degree to which the subject regulated requires constantly changing regulation." *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Director (On Remand)*, 267 Mich App 386, 391 (2005). The subject matter—here, state contracts and the bids on which they are based—requires discretion be granted to DTMB. To be sure, the Legislature is not in the position to determine the requirements and specifications of each state contract. These requirements and specifications will vary based on the contract as well as changing legal requirements and considerations. Unless the Legislature intends to spell out every provision of these bids and contracts, DTMB must retain discretion over the contents of bid requirements and specifications absent an express legislative provision barring consideration of a factor, such as prevailing wage, which the Legislature did not do here.

Despite these realities, ABC argues that the "major questions doctrine" should be applied in this case to prohibit DTMB from exercising any delegation of authority that would authorize it to require a prevailing wage. (ABC Br. at 19–22.) Under this doctrine, if a federal agency seeks to decide an issue of major national significance, a general delegation of authority may not be enough; rather, the agency's decision must be supported by a clear statutory authorization. See *West Virginia v EPA*, 142 S Ct 2587, 2605 (2022) (explaining that "courts 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance' "), quoting *Utility Air Regulatory Group v EPA*, 573 US 302, 324 (2014). But this doctrine is inapplicable here for two reasons.

First, it has never been applied by Michigan courts, and this Court should not be the first to do so. (ABC Br. at 19–20.) Second, even in the federal context, this doctrine is applied only in "extraordinary cases;" this is not one. *West Virginia*, 142 S Ct at 2608; see also *id.*, quoting *Brown & Williamson*, 529 US 120 (2000) (noting that the Court invoked the doctrine where Congress could not have delegated to the agency "such a sweeping and consequential authority 'in so cryptic a fashion' "). For example, the U.S. Supreme Court has applied the doctrine to an environmental regulation that would affect millions of small pollutant sources, *Utility Air*, 573 US at 307, a nationwide eviction moratorium that created an estimated economic impact of tens of billions of dollars and interfered with landlord-tenant relationships, *Alabama Ass'n of Realtors v Dep't of Health & Human Servs*, 141 S Ct 2485, 2489 (2021), and a COVID-19 vaccination and testing requirement that would impact 84.2 million employees, *Nat'l Federation of Indep Business v Dep't of Labor, Occupational Safety & Health Admin*, 142 S Ct 661, 664, 665 (2022).

In each of those cases, the Court highlighted the nationwide impact of the regulation at issue as well as the fact that the statutes at issue were not designed to grant the agencies the authority they exercised. Not so here. The prevailing wage requirement affects only a subset of contracts in the State—construction-related bids for contracts over $50,000—and there is no evidence that the Legislature, in enacting the Management and Budget Act did not intend for this decisionmaking to be vested in DTMB. See MCL 18.1261(2); MCL 18.1241(1), (4); *Bradford v United State Dep't of Labor*, 582 F Supp 3d 819, 840 (D Colo, 2022) (holding that the major

questions doctrine did not apply because the "plaintiffs ha[d] identified no 'special reasons for doubt' or that the [federal] Procurement Act is 'an ambiguous statutory provision' ") (citations omitted). Accordingly, the major questions doctrine is inapplicable here, and there has been no improper delegation of authority.

C. The prevailing wage requirement does not violate the Fair and Open Competition in Governmental Construction Act.

ABC also asserts that the prevailing wage requirement violates the Fair and Open Competition in Governmental Construction Act, MCL 408.871 *et seq.* (ABC Br. at 12–15.) In essence, ABC argues that the prevailing wage requirement violates the Act by permitting contractors who have collective bargaining agreements to set the wages and terms of employment for all bidders. (*Id.* at 13.) This is not the case.

The Fair and Open Competition in Governmental Construction Act was enacted "to provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services by this state and political subdivisions of this state as market participants[.]" MCL 408.872. To this end and in relevant part, the Act provides as follows:

> [A] governmental unit awarding a contract . . . for the construction, repair, remodeling, or demolition of a facility and any construction manager acting on its behalf shall not, in any bid specifications, project agreements, or other controlling documents:
>
> (b) Otherwise discriminate against a bidder, offeror, contractor, or subcontractor for becoming or remaining or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, an agreement with 1 or more labor organizations in regard to that project or a related construction project. [MCL 408.875(b).]

ABC contends that the prevailing wage requirement violates subsection (b) because, in determining prevailing wages in Michigan, the Michigan Department of Labor and Economic Opportunity ("LEO") issued a "DTMB Prevailing Wage Commercial Survey" requesting only wage rates for prospective bidders who are parties to collective bargaining agreements.[7] (ABC Br. at 13–14.) Thus, ABC argues that, through this survey, "[t]he prevailing wage policy allows contractors who have collective-bargaining agreements to set the wages and terms of employment for all bidders[,]" which, in turn, violates the Act "by establishing terms of bidding that discriminate in favor of unionized forms while ignoring non-union contractors." (*Id.* at 13, 15.)

ABC, however, ignores the plain language of the Act. MCL 408.875(b), which ABC contends that DTMB violates through its prevailing wage requirement, prohibits discrimination against union or nonunion contractors in "bid specifications, project agreements, or other controlling documents." But as explained by the lower court, the LEO Survey is not a "bid specification," "project agreement," or another "controlling document" as provided in MCL 480.875. (AE Appx at 15.) This alone defeats ABC's argument.

[7] The survey provided the following directions: "Please provide prevailing wages and fringe benefits currently in effect under the applicable collective bargaining agreement, and under any applicable understandings associated with the agreement. List rates separately for each geographic area and, if applicable, for each size of project for which there are different rates in effect. . . . Rates cannot be included in the state prevailing wage schedules if they are not submitted with a current collective bargaining agreement or understanding." (AT Appx at 59.)

There is also no evidence that DTMB has discriminated or will discriminate against a bidder for refusing to enter into a collective bargaining agreement. To the contrary, in a document titled, "Informational Sheet: Prevailing Wages on DTMB Projects," which was attached to ABC's complaint, DTMB expressly provides that "[w]hile the DTMB prevailing wage rates are compiled though surveys of collectively bargained agreements, a collective bargaining agreement is not required for contractors to be on or be awarded state projects." (AT Appx at 32.) Thus, while the prevailing wage rates were compiled through the LEO Survey, a collective bargaining agreement is not a requirement for state contracts. To the contrary, any bidder—whether subject to a collective bargaining unit or not—who does not meet the prevailing wage will not be considered for a state construction contract. (*Id.* at 15, 17.)

For these reasons, the prevailing wage requirement does not violate the Fair and Open Competition in Governmental Construction Act.

D. The repeal of PA 166 does not act as a prohibition on DTMB to require prevailing wages in construction contracts.

ABC also claims that the Legislature's repeal of PA 166 itself serves as a prohibition on DTMB to consider prevailing wages in the procurement of state contracts. This, too, fails as a matter of law.

Article 2, § 9 of the Constitution reserves to the people the power to reject laws, called the initiative. "Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40

session days from the time such petition is received by the legislature." *Id.* And "[n]o law initiated . . . by the people shall be subject to the veto power of the governor[.]" *Id.*

Here, the people, through an initiative petition enacted by the Legislature, repealed PA 166, which required a prevailing wage on state construction projects. See PA 171. Approximately three years later, the Governor announced that State would require contractors and subcontractors to pay a prevailing wage on state construction-based contracts issued by the Department. (AT Appx at 10.) DTMB subsequently explained that its prevailing wage requirement would apply to construction contracts greater than $50,000 and that the prevailing wage requirement would be imposed on contracts posted for bidding after March 1, 2022. (*Id.* at 15–16.) ABC maintains that this requirement is necessarily prohibited by the repeal of PA 166. This argument fails for three reasons.

First, nothing in the text of PA 171 supports such a conclusion. The text of the statute merely repealed the Prevailing Wages on State Projects Act. PA 171 ("1965 PA 166, MCL 408.551 to 408.558, is repealed."). It made no reference to the Management and Budget Act, despite the Management and Budget Act's focus on contract procurement. *Id.* For this reason alone, ABC's argument fails as a matter of law. See *People v Morey*, 461 Mich 325, (1999) (explaining that were the language of a statute "is unambiguous, [courts] presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written").

Second, nothing in the text of Article 2, § 9 of the Constitution supports the conclusion that ABC asks this Court to reach. The plain text of Article 2, § 9 states that the Legislature must act within 40 session days of receiving an initiative petition. Here, the Legislature did act—it enacted PA 171, which repealed PA 166. The only relevant restriction Article 2, § 9 places on a law proposed by initiative petition and enacted by the Legislature is that it is not subject to the veto power of the Governor. Const 1963, art 2, § 9. And the Governor did not exercise that power over PA 171.[8] Thus, nothing about the prevailing wage requirement expressly conflicts with Article 2, § 9's commands.[9]

Third, to the extent ABC argues that PA 171 implicitly repealed a portion of the statutory discretion afforded to DTMB, it is mistaken. Essentially, ABC asserts that while the Legislature has knowledge about other existing laws and regulations, the People do not. (ABC Br. at 17.) Thus, because the People allegedly intended to "end the prevailing-wage requirement for bidders on state contracts," that intent must govern regardless of what other statutes say. (*Id.*) But the People, like the

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[8] See Const 1963, art IV, § 33 ("Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it. . . . If he disapproves, and the legislature continues the session at which the bill was passed, he shall return it within such 14-day period with his objections, to the house in which it originated.").

[9] ABC relies in part on the Court of Claims opinion in *Mothering Justice v State*, unpublished opinion of the Court of Claims, issued July 19, 2022 (Docket No. 21-000095-MM). (ABC Br. at 17–18.) *Mothering Justice* is not only factually and legally distinguishable from this case, but the Court of Claims' opinion has since been reversed by this Court on appeal, see *Mothering Justice v State*, __ Mich App __ (2023) (Docket No. 362271); 2023 WL 444874, and an application for leave to appeal has been filed with the Michigan Supreme Court.

Legislature, *are* presumed to know the law. *People v Thompson*, 424 Mich 118, (1985) ("Those who draft a constitution are presumed to be aware of existing law and judicial construction and to act in light of that knowledge.") (citation omitted). This includes the Management and Budget Act, which has been in effect since 1984, as well as case law instructing that the State "has broad discretion to choose its contractors." *Groves*, 295 Mich App at 5. Moreover, the prevailing wage requirement differs in a number of material respects from PA 161. For example, while PA 161 required a prevailing wage for *every* contract for a state project requiring or involving the employment of construction mechanics, DTMB's requirement applies only to construction-related contracts over $50,000 issued by DTMB. (AT Appx at 4); Former MCL 408.552. Further, PA 161 contained a criminal penalty for a violation of its provisions. See Former MCL 408.557. DTMB has imposed no such penalty on bidders to applicable contracts.

Ultimately, to read PA 171 to bar DTMB from imposing a prevailing wage requirement would be to import ABC's policy preference into the otherwise clear law. PA 171 simply repealed a law on the books; it did nothing more. The People by initiative or the Legislature of its own accord could have proposed or enacted a law that explicitly barred DTMB from applying a prevailing wage requirement. That has not happened. ABC's argument asks this Court to make a legislative choice that was not made; the proper venue for ABC to make its case is with the Legislature, not the courts. Consequently, this Court should affirm.

III. The prevailing wage requirement is not subject to the rule-making requirements of the APA.

The prevailing wage requirement is not a "rule" within the meaning of the APA. Instead, it falls under an exception to the APA's rulemaking requirements, MCL 24.207(j).

Section 7 of the APA, MCL 24.207, sets forth the definition of a rule:

> "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.

When issuing rules, "an agency must follow specified statutory procedures that include various notice and public hearing requirements." *Pyke v Dep't of Social Servs*, 182 Mich App 619, 629 (1990) (citing MCL 24.231–24.264). "Failure to substantially comply with the procedural requirements renders the rule invalid." *Id.*, citing MCL 24.243; *Jordan v Dep't of Corrections*, 165 Mich App 20, 24 (1987). However, where an agency policy or action does not fall within the definition of a "rule," the rule-making provisions of the APA do not apply.

The APA provides several exceptions to the definition of "rule." One exception is for "decision[s] by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). Courts have applied this exception in situations in which "an agency policy . . . follows from its statutory authority." *Hinderer v Director*, 95 Mich App 716, 727 (1980); *Village of Wolverine Lake v Mich State Boundary Comm'n*, 79 Mich App 56, 59 (1977) ("If the disfavor of the SBC for small communities within the larger

metropolitan area follows from the statutory authority, then it is the exercise of a permissive statutory power and is not a rule requiring formal adoption under the APA.") Here, for the same reasons as explained above in Part II, *supra*, the election to require prevailing wages in state contracts was an exercise of permissive statutory power. Again, the Legislature gave DTMB the authority to "make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2). Because the decision to require prevailing wages in state contracts is a decision by DTMB to exercise a permissive statutory authority, the rule-making provisions of the APA do not apply.

CONCLUSION AND RELIEF REQUESTED

ABC fails to present either a justiciable controversy or that they are an aggrieved party on appeal. And its nondelegation doctrine, separation of powers, and APA claims fail as a matter of law. For these reasons, this Court should affirm the Court of Claims' opinion and order granting summary disposition to DTMB.

Respectfully submitted,

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