STATE OF MICHIGAN
COURT OF APPEALS

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN (aka ABC of MICHIGAN),
Appellant-Plaintiff,

v.

DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET (aka DTMB)
Appellee-Defendant

and

MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL,
Appellee-Intervening Defendant.

Court of Appeals Case No.: 363601

L/C Case No.: 22-000111-MZ
Hon. Douglas Shapiro

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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BRIEF OF APPELLEE INTERVENOR MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL

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STATEMENT OF JURISDICTION

Intervenor Defendant Appellee Michigan Building and Construction Trades Council ("MBCTC") concurs with and adopts by reference the Statement of Jurisdiction in the Brief of Appellee Department of Technology, Management and Budget ("DTMB").

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

MBCTC concurs with and adopts by reference the Counter-Statement of Questions Presented in the Brief of Appellee DTMB.

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I. INTRODUCTION

Intervenor Defendant Appellee Michigan Building and Construction Trades Council ("MBCTC") fully concurs with and adopts by reference the arguments made by Defendant-Appellee Michigan Department of Management and Budget ("DTMB") in its Appellee Brief. MBCTC files this Brief to further focus on how the Legislature could have, but did not, prohibit DTMB from requiring prevailing wages in its contracts for state construction projects when it repealed the Prevailing Wage Act. For the reasons stated by DTMB, and as MBCTC further argues herein, the Court of Claims' October 22, 2022 Opinion and Order dismissing Plaintiff's complaint should be affirmed.

II. COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

MBCTC concurs with and adopts by reference the Counter-Statement of Facts and Proceedings in the Brief of Appellee DTMB.

III. ARGUMENT

A. Standards of Review

MBCTC concurs with and adopts by reference the Standards of Review stated in the Brief of Appellee DTMB.

B. When the Legislature repealed the Prevailing Wage Act it could have, but did not, prohibit DTMB from requiring prevailing wages in certain state construction projects.

Prior to 2011, project labor agreements (PLAs) were utilized by the State of Michigan (and local governments) on public construction projects in Michigan, even though no statute required or explicitly authorized their use. See *Michigan Bldg and Construction Trades v. Snyder*, 729 F.3d 572, 574 (6th Cir. 2013) (noting that PLAs "are contracts typically used in the construction

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industry" and that question presented was whether State of Michigan could legally make across-the-board determination not to require that its contractors enter into PLAs on its public construction projects).[1] But there was no question that the state had the authority to utilize PLAs on its public projects. As here with respect to DTMB's authority to require prevailing wages on certain state projects, the authority to include PLA requirements in the state's construction contracts derives from the discretionary authority granted to DTMB in the Management and Budget Act, MCL 18.1101 *et seq*. As the Court of Claims explained, and explained correctly:

> The Legislature has delegated certain powers to defendant in the Management and Budget Act. Among other powers, MCL 18.1261(2) grants defendant broad discretionary authority over the award, solicitation, and amendment of state contracts. The statute provides, "The department shall *make all discretionary decisions* concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2) (emphasis added).

Oct. 10, 2022 Opinion and Order, Slip Op. at 10.

Pursuant to this authority, DTMB routinely makes countless decisions as to the requirements and conditions of its construction contracts, including the type and quality of materials to be used, the sequence and manner of construction, and the experience and qualifications of contractors, professionals, and other personnel. If DTMB decides to require the highest grade of lumber or steel, the most highly qualified architects and engineers, the most advanced construction methods, and to hire only the best contractors with a demonstrated track record, it does not need an explicit statutory authorization to do any one or all of those things. It

[1] As the Sixth Circuit explained, PLAs "are contracts typically used in the construction industry to set common terms and conditions of employment for large projects involving multiple subcontractors and unions. … Once a PLA is in force, every lower-level contractor must abide by it to be able to work on the project. Thus, if the governmental unit itself enters into a PLA, all contractors bidding on the project must agree to abide by the PLA. If a general contractor enters into a PLA, all its subcontractors on that project must agree to abide by the PLA. The PLAs will often incorporate terms from individual local union collective bargaining agreements, but the PLA will supersede those agreements. *Id*.

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already has the authority to "make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2). The same is true with respect to its authority to require that employers provide workers on those projects with certain terms and conditions of employment, including that they be paid not less than prevailing wages. And prior to 2011, the same was true with respect to the use of PLAs on state projects.

In 2011, the Legislature made the policy decision to put a stop to the practice of requiring PLAs on any state (or local government) construction projects, and enacted the Fair and Open Competition in Government Construction Act ("FOCGCA"), 2011 PA 98. After the 2011 law was enjoined as preempted by the National Labor Relations Act (NLRA), *Mich Bldg and Constr Trades Council v Snyder*, 846 F Supp. 2d 766 (ED Mich 2012), the Legislature in 2012 amended the law. 2012 PA 238, codified as MCL 408.871 *et seq*. The district court again enjoined the amended law as preempted, *Mich Bldg and Constr Trades Council v Snyder,* No. 12-13567, 2012 WL 6155964 (ED Mich, Nov. 15, 2012). The Court of Appeals reversed, holding that the law was not preempted because the Legislature was acting in a proprietary (and not regulatory) capacity when it decided to prohibit the state and local governments from requiring PLAs on public construction projects in Michigan. In *Snyder*, the Sixth Circuit held that the state acts as a market participant when it enters into contracts for its own properties; therefore, the State Legislature can decide just as a private purchaser does to require or not to require PLAs on state projects. 729 F. 3d at 577-582. Because the state is acting as a market participant with an interest in using resources efficiently, the court held that the FOCGCA was "proprietary" and not "regulatory," and rejected the argument that the statute was preempted by the NLRA. *Id.* at 582.

Although there is no federal preemption question presented here, *Snyder* illustrates that the Michigan Legislature could have chosen, as a market participant, to enact legislation prohibiting

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prevailing wage requirements for state-funded construction projects in the same way it chose to prohibit PLAs. Despite its inherent authority to prohibit certain contracting practices, the Legislature has not exercised that authority to prohibit prevailing wage requirements in state construction projects. Plaintiff erroneously suggests that the Legislature's repeal of Michigan's Prevailing Wage Act is equivalent to a prohibition on any prevailing wage requirements in state contracts. But the Legislature simply repealed the Prevailing Wage Act, nothing more. That repeal simply means that the state is no longer *required* to impose prevailing wage requirements on state projects. The Legislature plainly did not *prohibit* the state from ever requiring prevailing wages on state projects, although it could have done so. The DTMB has the statutory authority to contract for state projects under the Management and Budget Act, MCL 18.1101 *et seq.*, which contains no prohibition on prevailing wage considerations. Because the Legislature has chosen not to limit the DTMB's discretion with respect to prevailing wage requirements, Plaintiff's attempt to fabricate such a limitation is meritless.

Plaintiff's argument that DTMB's policy to require prevailing wages on state projects somehow violates the FOCGCA strains credulity. As noted, the fact that the Legislature in the FOCGCA chose to prohibit PLAs, but not prevailing wages, on state projects *supports* the validity of DTMB's policy. And nothing in DTMB's policy, despite Plaintiff's baseless claims, requires anyone to enter into a collective bargaining agreement, or discriminates against anyone who chooses not to do so, on state projects. As the Court of Claims correctly noted, the survey which Plaintiff erroneously claims is evidence that DTMB's policy violates the FOCGCA, is just that – a survey. It is a tool used by DTMB to establish the correct prevailing wage rates to be used. It is not a contract requirement or bid specification. *See*, Slip Opinion at 14-15. Moreover, in the

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Information Sheet: Prevailing Wages on DTMB Projects document attached to Plaintiff's Complaint, DTMB expressly represents that:

> Prevailing rates are compiled from the rates contained in collectively bargained agreements which cover the locations of the state projects. While the DTMB prevailing wage rates are compiled though surveys of collectively bargained agreements, a collective bargaining agreement is *not required* for contractors to bid on or be awarded state projects.

Id. (emphasis in original)

The Supreme Court's decision in *Associated Builders & Contractors v. City of Lansing*, 499 Mich 177, 880 NW2d 765 (2016) and the Legislature's enactment in 2015 of the Local Government Labor Regulatory Limitations Act, MCL 123.1381 *et seq*., also show that DTMB has the authority to require prevailing wages on state projects and that the Legislature therefore could have chosen to limit or revoke that authority but did not. In *City of Lansing*, the Supreme Court held that municipalities, as part of their home rule powers to adopt "resolutions and ordinances relating to [their] municipal … property," could require prevailing wages on city projects paid for with city money:

> Those wage rates concern how a municipality acts as a market participant, spending its own money on its own projects. If a municipality has broad powers over local concerns, it certainly has the power to set terms for the contracts it enters into with third parties for its own municipal projects -- including provisions relating to the wages paid to third-party employees. This way the municipality controls its own money, and presumably expresses its citizens' preference as to what those who work on *public* projects should be paid.

499 Mich at 187-188. (footnote omitted)

Plaintiff attempts to distinguish this case by arguing that municipalities have greater powers under the Constitution than does the executive branch. While that claim is dubious, it is irrelevant here. It is irrelevant because DTMB has been granted broad discretionary authority over its contracting decisions in the Management and Budget Act, as explained above and as the Court of Claims correctly held.

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The Local Government Labor Regulatory Limitations Act, MCL 123.1381 *et seq*. ("LGLRLA"), is also instructive. Again, this act shows that the Legislature could have limited or restricted DTMB's authority to require prevailing wages in its state construction contracts, but chose not to do so. Section 6 of the LGLRLA provides:

> A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution requiring an employer to pay to an employee a wage or fringe benefit based on wage and fringe benefit rates prevailing in the locality. This section does not apply to state projects subject to 1965 PA 166, MCL 408.551 to 408.558

MCL 123.1386. Thus, the Legislature not only prohibited local government bodies from requiring prevailing wages, it specifically excluded state projects from that prohibition. The Legislature obviously knew how to prohibit government bodies from requiring prevailing wages on their construction projects. It did not prohibit DTMB from doing so when it enacted the LGLRLA. It likewise did not prohibit DTMB from doing so when it enacted the FOCGCA. And it did not prohibit DTMB from doing so when it enacted 2018 PA 171 and repealed the Prevailing Wage Act.

Plaintiff argues that because 2018 PA 171 originated from an initiative petition it is somehow subject to more lenient rules of statutory interpretation and that the court should therefore read into 2018 PA 171 words that are simply not present. That argument is nonsense. Not only does it ignore the most fundamental rule of statutory interpretation – that statutes must be interpreted according to their plain meaning – but it ignores how 2018 PA 171 was enacted. It was never subject to a vote of the people and was therefore not enacted by the voters. It was *enacted by the Legislature*, by majority votes in the House and Senate on June 6, 2018. See House Journal No. 57, p. 1237; Senate Journal No. 58, p. 1003. As the Court of Claims noted, the Legislature had choices other than to simply accept the proposed legislation without change. Slip

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Op. at 13. See, Const 1963 art 2 § 9. As the Legislature chose to pass the proposed law in its present form, 2018 PA 171 must be interpreted according to its plain meaning, which simply does not prohibit DTMB from requiring prevailing wages in state construction contracts.

IV. CONCLUSION AND RELIEF REQUESTED

For the reasons stated herein, MBCTC respectfully requests that the Court of Appeals affirm the October 22, 2022 Opinion and Order of the Court of Claims dismissing Plaintiff's complaint.

Respectfully Submitted,

McKNIGHT, CANZANO, SMITH,
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By: *<u>/s/ John R. Canzano</u>*

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PURSUANT TO MCR 7.212(B)(3), THIS BRIEF CONTAINS 2037 COUNTABLE WORDS.

Dated: March 24, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2023, I electronically filed the foregoing document with the Clerk of the Court using the MiFile system, which will send notification of such filing to all MiFile participants.

/s/John R. Canzano
John R. Canzano

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