STATE OF MICHIGAN
COURT OF APPEALS

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN,

Plaintiff-Appellant,

v.

DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET,

Defendant-Appellee,

and

MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL,

Intervening Defendant-Appellee.

Court of Appeals Case No. 363601

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

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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BASIS OF JURISDICTION

This court has appellate jurisdiction under MCR 7.203(A)(1) to review the Order granting Defendant's request for summary disposition and dismissing the matter, entered on October 10, 2022, in the Court of Claims Case No. 22-000111-MZ.

Plaintiff-Appellant timely filed its Claim of Appeal on October 28, 2022.

STATEMENT OF QUESTIONS INVOLVED

1. Is an executive-branch agency confined to its enumerated constitutional and legislatively-authorized powers?

Appellant says:	Yes
Appellees say:	No
The Court of Claims said:	No

2. Assuming there is a statutory basis for the Department of Technology, Management and Budget to enact a prevailing-wage policy, must this policy be implemented pursuant to the Administrative Procedures Act?

Appellant says:	Yes
Appellees say:	No
The Court of Claims said:	No

STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff-Appellant Associated Builders and Contractors of Michigan ("ABC") is a trade association representing more than 900 construction and construction-related firms throughout the State of Michigan and in bordering states. ABC's members include both unionized and non-union construction contractors who share a belief that construction contracts should be awarded to and performed by the lowest responsible bidder based upon merit. ABC's members employ a combined workforce of more than 30,000 individuals who will be injured by the unlawful acts of the Defendant-Appellee.

The Defendant-Appellee, State of Michigan's Department of Technology, Management & Budget ("DTMB") has instituted a requirement that those bidding on state construction contracts for projects greater than $50,000 pay their employees no less than the "prevailing wage" in a given region. A contractor cannot make a bid on a contract if that bid includes payments to employees of less than this required rate. This policy is commonly referred to as "prevailing wage."

Michigan had enacted a prevailing-wage policy via statute through 1965 PA 166, which was titled "PREVAILING WAGES ON STATE PROJECTS," and contained a subtitle of "An act to require prevailing wages and fringe benefits on state projects; to establish the requirements and responsibilities of contracting agents and bidders; to prescribe penalties." MCL 408.551 to 408.558. (repealed) (Exhibit A). This prevailing-wage act was repealed by 2018 PA 171, whereby

the Legislature accepted the language of an initiatory petition pursuant to Const 1963, art 2, § 9. (Exhibit B).[1]

Governor Whitmer announced the purported reimplementation of a prevailing-wage policy on or about October 7, 2021 via a press release. (Exhibit C).[2] There was no executive order or directive accompanying the press release. The Governor described the basis to reimplement prevailing wage as being a natural function of DTMB's agency authority: "Michigan's repeal eliminated the state's prevailing wage requirement, but left the door open for DTMB to require prevailing wage under its authority to develop the terms of state contracts. Governor Whitmer is proud to make that call and reinstate prevailing wage." (*Id.*)

Sometime before March 1, 2022, DTMB posted certain requirements on its website: "Beginning March 1, 2022, the State of Michigan will require state contractors and subcontractors to pay prevailing wage on construction-based contracts issued by the Department of Technology, Management & Budget. These changes do not impact or change any provisions in place to comply with the Federal Davis-Bacon act." (See Exhibit D).[3] DTMB similarly published a number of requirements that contract bidders must comply with. (See Exhibit E and F). [4]

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[1] See also, http://www.legislature.mi.gov/(S(1dhufadf2qtuvukcdsuamw3g))/documents/mcl/pdf/mcl-Act-166-of-1965.pdf, last accessed April 19, 2022. 2018 PA 171 specifically stated: "408.551-408.558 Repealed. 2018, Act 171, Imd. Eff. June 6, 2018." (*Id.*)

[2] See also, https://www.michigan.gov/whitmer/news/press-releases/2021/10/07/gov--whitmer-to-reinstate-prevailing-wage-for-state-construction-projects, last accessed April 19, 2022.

[3] See also, https://www.michigan.gov/dtmb/procurement/design-and-construction/prevailing-wage-information, last accessed April 19, 2022.

[4] For Exhibit E, see also, https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/WAGE-HOUR/WHD-99xx-Information-Sheets/WHD-9917-PW-FRINGE-BENEFIT-INFO-SHEET/WHD-9917-SOM_commercial_Issued_Schedule_Attachments_2022.pdf?rev=a943b3ed039d4e8a8b82fd73fdbbf18a&hash=AB3A1518BEF29B0C7CF55A86D17A1133, last accessed April 19, 2022. For

On October 21, 2021, the Mackinac Center for Public Policy[5] submitted a Freedom of Information Act ("FOIA") request to DTMB requesting records of any directive issued by the Governor that required the implementation of this prevailing-wage policy. Specifically, it requested: "The executive directive issued by Governor Whitmer requiring the Department to implement prevailing wage requirements for state construction projects. To assist you in your search, this action was announced by Governor Whitmer on October 7, 2021." (See Exhibit G).

On October 25, 2021, DTMB responded to this request with a denial, stating: "It is hereby certified that, to the best of the undersigned's knowledge, information, and belief, records do not exist within the Department of Technology, Management and Budget, under the description you provided or under another name reasonably known to the department." (See Exhibit H).

Thus, as of October 25, 2021, DTMB had not received any written direction from the Governor to implement the prevailing-wage policy.

On March 2, 2022, Mackinac Center again submitted another related FOIA request. This time the Center requested the following: "Any instruction from Governor Whitmer to the Department of Technology, Management, and Budget (DTMB) regarding prevailing wage requirements. The executive directive issued by Governor Whitmer requiring the Department to implement prevailing wage requirements for state construction projects. Any documents with DTMB which demonstrates their ability to enforce 'prevailing wage' requirements." (Exhibit I).

Exhibit 5, see also https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/WAGE-HOUR/WHD-99xx-Information-Sheets/WHD-9918-PW-REQUIREMENTS-INFO-SHEET/WHD-9918-DTMB-PW-rates-1-31-2022_ad-jf_.pdf?rev=c57b0d340ff949628e047b97ad0ec7e8&hash=7EB99D633A319BF2F786BAE24E60396E. last accessed April 19, 2022.

[5] Mackinac Center is not a party to this action, although attorneys affiliated with it represent ABC.

On May 12, 2022, DTMB responded by granting the Center's response in part and denying it in part. DTMB also produced documents and correspondence, much of which appears to have been between the Attorney General's Office and DTMB. (Exhibit J).

The records produced on May 12, 2022 demonstrate that representatives from the Governor's office communicated with DTMB. For example, Zach Kolodin (then the Deputy Legal Counsel and Public Policy Counsel for the Officer of the Governor) was in communication with DTMB regarding prevailing wage. (See Exhibit K, Kolodin email).

A June 4, 2021 email from Brom Stibitz, the Director and Chief Information Officer for DTMB, to Mark Totten, then the Governor's Chief Legal Counsel, reveals that DTMB engaged in discussions with the Attorney General's office at Totten's request. Upon information and belief, the subject of that redacted discussion was the implementation of prevailing wage for state construction projects, as the subject line of this correspondence was "Prevailing Wage." (See Exhibit L).

Upon information and belief, DTMB was prompted to adopt prevailing wage requirements after a request from the Governor's office. DTMB was not granted explicit legislative authority to adopt prevailing wage requirements, nor had it previously implemented prevailing wage through administrative action.

ABC filed a lawsuit challenging the validity of this policy in the Court of Claims on July 21, 2022. ABC alleged that the reinstitution of a prevailing-wage policy by the executive branch after it had been repealed by the legislative branch was an impermissible violation of the separation of powers and an improper delegation of authority. ABC further alleged that the enactment of the policy was ultra vires as it exceeded the authority given to DTMB by the Legislature. Alternatively, ABC argued that if DTMB had the necessary authority to implement such a policy,

it should have done so by following the requirements and procedures of the Administrative Procedures Act (the "APA"). The complaint requested a declaratory judgment and injunctive relief.

Defendant-Appellee never filed an answer to the complaint. An answer was filed however, by Intervening Intervening Defendant-Appellee Michigan Building and Construction Trades Council ("MBCTC"), along with its motion to intervene. The lower court allowed MBCTC to become an intervening party.

When it filed its complaint, Plaintiff-Appellant also filed a Motion for Preliminary Injunction. Defendant-Appellee DTMB filed its response to the Preliminary Injunction and MBCTC filed a concurrence to that response.

On August 19, 2022, DTMB filed a motion for summary disposition and dismissal. A hearing was held on September 20, 2022.

The lower court issued its Opinion and Order on October 10, 2022. The lower court held that DTMB had sufficient authority to implement this prevailing-wage policy, granted Defendant-Appellee's summary disposition motion, and dismissed the case. Plaintiff-Appellant then filed this timely right of appeal.

STANDARD OF REVIEW

There are two questions before this court: (1) whether DTMB, an executive-branch agency, is limited in its authority by legislative and constitutional constraints; and (2) assuming that DTMB had sufficient authority to enact this policy, should it have done so through the policies set forth in the Administrative Procedures Act? Resolution of these involves questions of constitutional and statutory interpretation.

Questions regarding the separation of powers and the proper delegation of legislative authority are constitutional questions that are reviewed by this court de novo. This same standard is used for questions of statutory interpretation. "Matters of constitutional and statutory interpretation are reviewed de novo." *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018).

ARGUMENT

I. The separation of powers and the nondelegation doctrine.

A. Prevailing-wage laws generally.

Prevailing-wage laws require bidders on public construction projects to pay their employees wage rates that meet or exceed those which prevail in the geographic region within which the project takes place. These wage rates are typically derived from the collective-bargaining agreements negotiated by labor unions. Other forms of compensation, such as fringe benefits, are also considered for purposes of implementing prevailing wage.

Currently, other than Michigan, approximately 27 states have prevailing-wage laws, 15 had such laws but repealed them, and 8 states never had such laws.[6] (*Id.*) (See Appellant's survey of prevailing-wage laws in other states, attached as Exhibit S). The federal government has also adopted prevailing-wage requirements through the Davis-Bacon Act, 40 USC 3141 *et seq.*, which requires prevailing wage for federally-funded public projects.

No other state has enacted prevailing-wage requirements through administrative action. Nor has any other state repealed a prevailing-wage requirement without either a legislative enactment, popular referendum, or a court ruling that such a law was unconstitutional. Michigan is unique in that it has now enacted prevailing-wage requirements through an administrative agency, without a clear legislative directive. In addition, the administrative action taken by DTMB lacks the two hallmarks of every other state's prevailing-wage law: (1) a mandate that the contract

[6] This adds up to 50 instead of 49. Appellant counts Tennessee as both having and repealing such a law. It had such a law for all state-funded projects, but repealed it for all projects except highway projects. (Exhibit S, supra).

bidders pay the prevailing wage on the projects; and (2) a mandate that a specific state executive agency officer determines the prevailing wage. *Id*.

Michigan's previous legislatively-enacted and since-repealed statutory scheme had the two mandates. First, it had the requirement that contractors be paid at least the local prevailing wage:

> Every 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, other than those subject to the jurisdiction of the state civil service commission, 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.

MCL 408.552, repealed by 2018 PA 171 (Exhibit A).

Second, it mandated that "The commissioner [of the Department of Labor] shall establish prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employers." MCL 408.554, repealed by 2018 PA 171 (*Id*.). Since the 2018 repeal, there has been no statutory mandate or authorization of prevailing wage.

Having discuss the generalities of prevailing-wage laws, we now turn to whether DTMB's actions were constitutional.

B. DTMB's reinstatement of prevailing wage violates the nondelegation doctrine and the separation of powers.

Under the separation of powers and nondelegation doctrines, a law or rule is not valid unless it is enacted in accordance with the constitutional scheme for such actions. Generally, the executive branch cannot exercise legislative functions. Const 1963, art 3, § 2. Our Supreme Court has described the separation of powers and nondelegation doctrine thusly:

> The doctrine of separation of powers is generally attributed to Montesquieu who pinpointed the fault with the vesting of both legislative and executive functions in one branch of the government.
>
> > "When the legislative and executive powers are united in the same person or body…there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." (Emphasis added). Madison, in The Federalist No. 47, clarifies Montesquieu, explaining that he did not mean there could be no overlapping of functions between branches, or no control over the acts of the other. Rather,
> >
> > > "[h]is meaning … can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." The Federalist No. 47 (J. Madison).
>
> These principles have been adopted in Michigan.

Soap and Detergent Ass'n v Nat Res Comm'n, 415 Mich 728, 751-752; 330 NW2d 346 (1982) (footnote omitted).

This is not to say that one branch can never exercise the powers of another and must be kept "wholly separate." *Id.* at 752 (internal citations omitted). Rather, a branch may delegate its authority to another branch, provided that such delegation is clearly and explicitly defined. This is the nondelegation doctrine:

> This Court has established that the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers. ***If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible.***

Judicial Att'ys' Ass'n v State, 459 Mich 291, 297; 586 NW2d 894 (1998) (internal citations removed and emphasis added).

The executive branch cannot exercise the powers belonging to the Legislature, through an administrative agency, absent a clear grant of authority. "Statutes that grant power to

administrative agencies are strictly construed and the authority granted the administrative agency must be plainly granted." *Michigan State Emp Ass'n v Dep't of Corr*, 275 Mich App 474, 486; 737 NW2d 835 (2007). Under this nondelegation doctrine, one branch may only delegate its authority to another if such delegation is within certain boundaries. "[T]he standards prescribed for guidance [must be] as reasonably precise as the subject-matter requires or permits." *In re Certified Questions from US Dist Ct*, 506 Mich 332, 359; 958 NW2d 1 (2020), citing *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956). In the case of prevailing wage, no such grant of authority exists.

C. The lower court erred by concluding the legislature granted DTMB the necessary authority to implement prevailing wage.

Using the standard for proper delegation, we now apply that analysis to the lower court's Order. The lower court found that the language of the Management and Budget Act[7] was sufficient legislative authorization for DTMB to implement a rule requiring prevailing wage, despite the legislature's prior repeal. The lower court held:

> 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).
>
> With that said, the Legislature also gave defendant ample guidance to support its discretionary decision making, as required under the nondelegation doctrine. By way of example, the Legislature requires defendant to award a construction contract to the "responsive and responsible best value bidder." MCL 18.1241(4).
>
> ….

[7] Management and Budget Act, Act 431 of 1984, MCL 18.1101 *et seq.*

> By providing the above criteria, the Legislature provides defendant with "sufficient standards" to follow, making the Management and Budget Act a proper delegation of legislative power. But beyond providing the above standards, the Legislature does not regulate defendant's discretionary powers at the granular level. For example, when deciding the quality of proposed personnel, defendant has the discretion to determine what metrics it uses to measure the quality of the personnel, such as experiential background. Nor does the Legislature, provide detailed guidance on how to measure the bidder's business integrity, leaving the specifics of that decision to defendant as well. The Legislature also does not direct defendant on what materials to require as part of the "technical design" or the "technical approach."

October 10, 2022 Opinion and Order of the Lower Court (the "Order"), at pages 10-11.

In its Order, the lower court held that such discretionary decisions are allowed under the Management and Budget Act. Specifically, the lower court relied on MCL 18.1261(2), which authorizes DTMB to "make all discretionary decisions concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." This reads the word "discretionary" extraordinarily broadly. Under this interpretation, DTMB has discretion to make nearly any major contracting-policy decision it can imagine – as long as it is not specifically prohibited. But the Legislature cannot delegate authority by issuing broad grants of authority. Instead, the legislature must issue specific, narrow, and clear grants of authority, carefully tailored to guide an agency's policymaking.

As we saw, under the nondelegation doctrine, one branch may only delegate its authority to another when it provides reasonably precise standards for the use of that power. *In re Certified Questions*, supra. To determine whether the standards accompanying a delegation are sufficient, courts must necessarily evaluate the statute in which that delegation occurs. When interpreting statutes, courts are generally tasked with determining the intent of the legislature that passed the law, and absent an ambiguity, the plain and ordinary meaning of the language will control:

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich. 59, 65 (1993). The statutory language must be read

> and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward*, 460 Mich 230 (1999). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27 (1995).

In re Certified Question from US Ct Appeals for 6th Cir, 468 Mich 109, 113; 659 NW2d 597 (2003).

Contrary to the lower court, DTMB's discretion is limited to the specific options found within the Management and Budget Act. Enacting a prevailing-wage policy is not one of the available discretionary options.

The statute provides a number of possible actions which DTMB *does* have discretion to do by the use of the word "may."[8] In these areas, DTMB may choose among the choices explicitly set forth. This is in contrast to those portions of the Act which use the mandatory word "shall" to prohibit DTMB from exercising discretion.[9] Put plainly, although DTMB has some limited policy choices it does not have absolute discretion.

DTMB's discretion is further limited by the Fair and Open Competition in Governmental Construction Act, MCL 408.871 *et seq*. This Act specifically prohibits discriminating against a bidder based on whether it has entered into a collective-bargaining agreement with a union when making contracts for "construction, repair, remodeling, or demolition":

> [A] governmental unit awarding a contract … for the construction, repair, remodeling, or demolition of a facility and any construction manager acting on its

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[8] See, e.g., MCL 18.1261(4) ("The Department *may* delegate its procurement authority [with set limitations]") (emphasis added); MCL 18.1261(5) ("The department *may* enter into lease purchases…") (emphasis added), MCL 18.1261(7) ("The department *may* enter into a cooperative purchasing agreement with 1 or more other states…") (emphasis added).

[9] See, e.g., MCL 18.1261(3) ("The department *shall* utilize competitive solicitation for all purchases authorized under this Act unless 1 or more of the following apply:..") (emphasis added).

behalf ***shall not***, in any bid specifications, project agreements, or other controlling documents:

> (a) Require or prohibit a bidder, offeror, contractor, or subcontractor from entering into or adhering to an agreement with 1 or more labor organizations in regard to that project or a related construction project.
>
> (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 (emphasis added). These requirements apply to all Michigan governmental units. MCL 408.873. It is therefore binding on DTMB.

DTMB's prevailing-wage policy violates the Fair and Open Competition in Governmental Construction Act by giving preference to bidders who have entered into a collective-bargaining contract with unionized employees. The prevailing-wage policy allows contractors who have collective-bargaining agreements to set the wages and terms of employment for all bidders. The steps DTMB took to implement prevailing wage demonstrate the improper preference. To determine prevailing wages throughout Michigan, the Michigan Department of Labor and Economic Opportunity issued a "DTMB Prevailing Wage Commercial Survey," which is form "WHD-9462, Revised 6/22." (Exhibit O). This survey is explicit that only wage rates based on a collective-bargaining agreement will be included in the survey:

> It is critical that you provide a copy of the pertinent collective bargaining agreement and applicable understanding, if any, for each listed rate … Rates cannot be included in the state prevailing wage schedules if they are not submitted with a current collective bargaining agreement or understanding.

Id. [10] The Survey then goes on to list wage rates and fringe benefits, and categorizes these according to accepted job classifications found in collective-bargaining agreements (apprentice, journeyman, etc.).

By determining prevailing wage exclusively based on the terms of collective-bargaining agreements, DTMB essentially outsources the standards for state construction projects to unions. There is no option for a contractor to provide wage and compensation information from an alternative source. Even if the majority of contractors in a region are non-union, the prevailing-wage policy will only account for the wages and benefits of unionized firms. This violates the Fair and Open Competition in Governmental Construction Act by establishing terms of bidding that discriminate in favor of unionized firms while ignoring non-union contractors.

While it may be argued that basing the prevailing wage on union collective-bargaining agreements does not completely shut out other bidders, this rings hollow. The bidder's business model under these prevailing wage conditions must be based on the employee-classification system used in collective-bargaining agreements. This locks in place the collective bargaining-based model, and shuts out those who would use alternative job classifications. (Exhibit M).

When two statutes cover the same subject matter, the courts are required to read them together – *in pari materia* – i.e. in the same matter. "It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system." *Robinson v Lansing*, 486 Mich 1, 8 n 4; 782 NW2d 171 (2010). The Fair and Open Competition in Governmental

[10] For this reason, it is not accurate to call it DTMB's policy a 'prevailing wage' rule, because it only considers wages and benefits for job classifications included in collective-bargaining agreements It is thus the prevailing *union* wage that is being used. Nevertheless, Plaintiff-Appellant will continue to call it "prevailing wage," as that is a commonly used term.

Construction Act shows that the legislature did not want to give unions an unfair advantage in bidding. But DTMB's prevailing-wage policy does just that. Taking the two statutes together, it's clear that the legislature would not have cryptically given the DTMB the power to enact prevailing wage, given the legislature's express policy preference against doing so.

It was also an error where the lower court held that, although the previous prevailing-wage law was repealed, the repeal did not include a prohibition on a similar policy being enacted through other means. "The repealer did not restrict defendant from establishing its own prevailing-wage policy based on its authority to develop the terms of state contracts, as outlined in the Management and Budget Act, MCL 18.1101 *et seq*." Order, pages 2-3.

The lower court went on to note that, when the legislature repealed the prevailing-wage law, it did not include a prohibition on the policy's reenactment through other means, although it could have done so. The court recognized that the Legislature, at another time, had enacted a prohibition on local municipal governments from enacting prevailing wage, and that the failure of the Legislature to do so here showed that its intent was not to prohibit its reimplementation:

> The Court declines to read any prohibitions into the Prevailing Wage Act repealer that do not appear in, and cannot be implied from, the language of the statute. See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 564; 741 NW2d 549 (2007) ("A court cannot read into a clear statute that which is not within the manifest intention of the Legislature as derived from the language of the statute itself.").
>
> ….
>
> Had the Legislature wished to limit defendant's ability to set a prevailing wage, it could have done so through statute. The Local Government Labor Regulatory Limitation Act, MCL 123.1381 *et seq*., expressly prohibits local governments from requiring employers to pay an employee a wage or benefit based on the prevailing wage in the locality. MCL 123.1386 provides, in relevant part, "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." The statute did not apply to state projects subject to the Prevailing Wage Act (which

> was still in effect at the time the Local Government Labor Regulatory Limitation Act was enacted). *Id*. The rationale for the Local Government Labor Regulatory Limitation Act was the Legislature's conclusion that "regulation of the employment relationship between a nonpublic employer and its employees is a matter of state concern and is outside the express or implied authority of local governmental bodies to regulate, absent express delegation of that authority to the local governmental body." MCL 123.1382. This statute demonstrates that the Legislature knew how to limit another governmental body's ability to set a prevailing wage. The Legislature declined to do so here.

Order at page 12.

The lower court erroneously determined that, since this repeal did not contain a prohibition on future implementations of prevailing-wage policies, these can be reimplemented by DTMB.[11] To support its claim, the court cited an instance in which the Legislature wrote a ban on prevailing wage into a statute – the Local Government Labor Regulatory Act, MCL 123.1381, *et seq*., and therefore alleges that the Legislature here could have done the same when it passed the repeal. The court erred, however, as its decision applies the wrong standard for statutory interpretation. Here, the Legislature did not write the statute which repealed prevailing wage – it was a voter-initiated petition, written by the electorate. This fact affects both the options the Legislature had to amend the initiated language, as well as the proper method of statutory interpretation to be employed. We must interpret the meaning of the statute as the electors would have:

> "[T]he intent of the electors governs" the interpretation of voter-initiated statutes, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes. A statute's plain language provides "the most reliable evidence of ... intent...." "If the statutory language is unambiguous, ... '[n]o further judicial construction is required or permitted'" because we must conclude that the electors "'intended the meaning clearly expressed.'"

[11] The policy at issue here may not be exactly the same as the repealed policy. The lower court noted that, "Unlike a violation of the Prevailing Wage Act, violation of defendant's prevailing-wage policy does not constitute a crime." Order at page 3. Nevertheless, the core of the new policy is the same as the repealed policy, even if a few details are different.

People v Bylsma, 493 Mich 17, 26; 825 NW2d 543 (2012) (internal footnote citations omitted).

Interpreting the will of the electorate is similar to the interpretation of constitutional provisions, rather than statutory ones. "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004). While legislators may have knowledge about the operation of government and the potential for alternative ways to enact or prohibit rules and regulations, the electors typically do not. The plain meaning of their voter-initiated legislation is clear – end the prevailing-wage requirement for bidders on state contracts in Michigan. That intention must govern.

The lower court's assertion that the Legislature could have rewritten what the electors proposed is contradicted by the Court of Claim's recent opinion in *Mothering Justice v Nessel*, Case No. 21-000095-MM, Opinion and Order of July 19, 2022. (Exhibit Q.) In *Mothering Justice*, the Court of Claims held:

> Article 2, § 9 explicitly and affirmatively outlines the three options that are available to the Legislature … ***The Legislature's third alternative defined in art 2, § 9 is to enact the law proposed in the initiative without change. See Const 1963, art 2, § 9. Article 2, § 9 does not provide the Legislature with any other options during (or after) the 40-day period, including the option to significantly amend the proposed law after adopting it.***
>
> ….
>
> Then, if the proposed law is approved through the general-election process, the law takes effect 10 days after the official-vote declaration. And once passed by the voters, the initiated law can only be repealed by another election vote or by a supermajority vote of ¾ of the Legislature. *Id*. ***This provision once again indicates that the Legislature cannot significantly amend a voter-initiated law in the same legislative session.*** Otherwise, the adopt-and-amend procedure would render the purpose of the supermajority requirement meaningless.
>
> ….
>
> [T]he fact that the People contemplated that the law enacted through popular vote could only be amended or repealed by a supermajority in both Houses only

> confirms that the People desired strong safeguards against legislative interference with the People's constitutional right of initiative.

Mothering Justice, (Exhibit Q, supra at 8-10) (emphasis added).

Mothering Justice further demonstrates precisely how limited the Legislature was when considering the voter-initiated repeal of prevailing wage:

> The State invokes Article 4 to argue that the Legislature can do "anything which it is not prohibited from doing." But Article 2, § 9 does prohibit the Legislature from taking action beyond what is outlined in the constitutional provision. In essence, the State attempts to treat the Legislature's power regarding initiatives as if it stemmed from their powers defined in Article 4. It does not.

Id. at page 10.

If the constitutional interpretation in *Mothering Justice* is sound, the lower court erred in concluding the Legislature could have altered the repeal of prevailing wage to include a prohibition on its reinstatement. Perhaps more importantly, however, is the fact that what the Legislature could have done, or what it intended to do, is irrelevant for purposes of this case. Only the intent of the electors, those who initiated the repeal of prevailing wage, is relevant. The Legislature's choice was merely to approve or reject the elector's intent.

Additionally, the lower court seems to be asserting that DTMB, as an executive branch agency, has the power under Article 5 to do anything not expressly denied to it – including abrogating voter-initiated legislation. This is an error, as is the lower court's comparison of the agency's actions to the powers of municipalities outlined in *ABC v Lansing*, 499 Mich 177; 880 NW2d 765 (2016). Order at page 12. *ABC v Lansing* concerned the powers granted to local municipalities, which are very broad under Michigan's Constitution:

> Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

Const 1963, art 7, § 22.

The Constitution grants broad authority to municipalities to regulate matters "relating to its municipal concerns," *Id.*, without specific grants of authority. Put differently, Michigan municipalities have independent legislative authority, limited only by the Constitution and state law. The executive branch, on the other hand, is not a legislative body. It has no such broad grant of legislative authority and it is not free to do anything that is not prohibited. The fact that prevailing wage repeal was enacted by voter-initiated legislation created strong constitutional constraints on both the Legislature's and the executive branch's authority to modify the People's actions.

In short, the Legislature did not write this legislation, and could not alter it in the way Court suggests. The Legislature could not supersede the intent of the people without a supermajority vote, yet the lower court held that the Legislature's failure to do so evidences an intent to permit such a delegation.

Having considered delegation, in determining whether DTMB exceeded its legislatively-delegated authority, it may be useful to consider a tool of constitutional interpretation that has been developed by the U.S. Supreme Court - a doctrine called the "major questions doctrine." This doctrine instructs courts to presume that legislatures do not delegate policy decisions of great political or economic magnitude to agencies.[12] Although Michigan courts have not formally

[12] That prevailing wage is a policy of great political significance cannot be doubted. A bill to introduce such a policy was recently introduced on the first day of the 2022-23 legislative session, and was the seventh bill introduced by its new majority: http://www.legislature.mi.gov/documents/2023-2024/billintroduced/House/pdf/2023-HIB-4007.pdf Legislative leaders were publicly announcing that this policy was a top political priority: https://www.detroitnews.com/story/news/politics/michigan/2023/01/11/democrats-first-bills-include-right-to-work-repeal-prevailing-wage/69800087007/

adopted this doctrine, its reasoning is nonetheless persuasive and could be employed in determining whether the Legislature gave DTMB the authority to implement prevailing wage. *In re Certified Questions*, supra, at 378.

The doctrine was explicitly adopted by the Supreme Court in the recent opinion *West Virginia v EPA*, 597 US __; 142 SCt 2587 (2022).[13] As described by the Court, the doctrine serves to limit agencies attempting to assert broader powers than what is clearly established in legislative text:

> As for the major questions doctrine "label[ ]," … it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions.

Id. at 2609.

In *West Virginia*, the high court discussed previous applications of the major questions doctrine's rationale. One case was *FDA v Brown & Williams Tobacco Corp*, 529 US 120; 120 SCt 1291 (2000), wherein the question arose as to whether the FDA had within its authorizing statutes the ability to regulate or even ban tobacco products. As the court would later explain in *West Virginia*:

> In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. *Id*., at 126–127, 120 SCt 1291. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." In *Alabama Association of Realtors v DHHS*, 494 US ___; 141 SCt 2485 (2021), we concluded that the Centers for Disease Control and

[13] The major questions doctrine has its origins, at least in naming, in an article written by Justice Stephen Breyer when he was a judge on U.S. Court of Appeals for the First Circuit, Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L Rev 363 (1986).

> Prevention "could not, under its authority to adopt measures 'necessary to prevent the ... spread of' disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic." We found the statute's language a 'wafer-thin reed' on which to rest such a measure, given 'the sheer scope of the CDC's claimed authority,' its 'unprecedented' nature, and the fact that Congress had failed to extend the moratorium after previously having done so."

West Virginia, supra, at 2608.

A second case discussed was *Utility Air Regulatory Group v EPA*, 573 US 302; 134 SCt 2427 (2014), where the high court similarly rejected an attempt by the EPA to expand its authority to regulate greenhouse gases as an air pollutant. In *West Virginia,* the Court described that case's holding:

> Our decision in *Utility Air* addressed another question regarding EPA's authority—namely, whether EPA could construe the term 'air pollutant,' in a specific provision of the Clean Air Act, to cover greenhouse gases. 573 US at 310, 134 SCt 2427. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements.

West Virginia, supra, at 2608.

As noted, Michigan has not formally adopted the major questions doctrine - but it should be persuasive when considering the 'wafer thin' pretext that DTMB relied upon here. The DTMB Act grants discretion for the agency to choose among options explicitly spelled out in the statute MCL 18.1261, and also the discretion to make minor changes to "administrative and procedural directives" MCL 18.1131. The Act does not, however, grant DTMB the authority to implement a major policy that had been the subject of legislation in enactment and repeal. The question of prevailing wage was not one which was clearly delegated and, to the extent that some authority was given, this authority was not enough to empower an administrative agency to create a policy of major public and political importance.

This is a policy with major political implications, as shown by the priority given to it by the new 2022-2023 legislative majority and the fact that all prior enactments and repeals (in every state) have happened through the political and legislative process. (Exhibit S, supra). DTMB's actions sought to give oversight and control of such a policy to itself, an agency that had never exercised it before. When the policy was validly enacted by statute before, it was the Department of Labor, not DTMB, that ran the program. See MCL 408.551 (repealed), (Exhibit A, supra). DTMB, without clear and specific legislative authority, is claiming powers that no other agency in any other state has. All these are factors that the major questions doctrine would use to determine that making this policy was beyond what has been delegated by the Legislature.

II. If DTMB has the Authority to Enact Prevailing Wage, it Nevertheless Failed to Comply with the Requirements of the Administrative Procedures Act.

Even if DTMB had some authorization to make and enforce a prevailing-wage policy, the policy was not promulgated in accordance with the APA, MCL 24.201 *et seq*. DTMB is an administrative agency subject to the provisions of the APA. The subject prevailing-wage requirements, to be valid as administrative rules, should have been promulgated in accordance with the APA, MCL 24.201 *et seq.*

It is the policy of this state that policy determinations be made pursuant to APA rulemaking, and the courts will not support an attempt to avoid the rule-making process. "The definition of 'rule' under MCL 24.207 is broadly construed to reflect the APA's preference for policy determinations pursuant to rules, while the exceptions are narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). In addition, an agency may not avoid the requirements for promulgating rules by issuing its directives under different labels, such as "guidelines." MCL 24.226.

Despite the clear preference for formalized rulemaking, the lower court held that "The APA did not bind defendant because it was exercising a legislative grant of power when enacting the prevailing-wage policy." Order at page 4. The lower court held that certain exceptions to the rulemaking process found in the APA applied here:

> Here, as discussed earlier, the Management and Budget Act grants defendant broad discretionary powers when awarding state contracts, but provides certain criteria for defendant to consider when awarding a contract to the responsive and responsible best-value bidder. Defendant's prevailing-wage policy follows from its permissive statutory authority to make all discretionary decisions about the solicitation and award of state contracts. See MCL 18.1261(2). Thus, the prevailing-wage policy falls within the exception to rulemaking outlined in MCL 24.207(j). Additionally, the prevailing-wage policy applies to, and forms a term of, defendant's contracts with private entities. So the rulemaking exception outlined in MCL 24.207(p) applies in this circumstance as well.

Order at pages 18-19 (footnote omitted).

As an initial matter, DTMB is an agency subject to the Management and Budget Act. The act provides that the DTMB's director has the authority to promulgate rules as necessary to implement the act. Those rules, however, are subject to the rulemaking requirements of the APA. MCL 18.1131(2). DTMB did not promulgate any rules in compliance with APA in its creation of this prevailing-wage policy.

The director does have some additional authority outside the rulemaking process, but that authority is limited to the issuance of "administrative and procedural directives." While these directives are exempt from the APA requirements, these directives are aimed at simple procedural and administrative matters.

> The director may issue, alter, or rescind administrative and procedural directives as determined to be necessary for the effective administration of this act. The directives are exempt from the definition of a rule pursuant to section 7 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.207. The directives shall be placed in the appropriate manual and distributed to each principal department, autonomous entity within state government, the senate and house appropriations committees, and the fiscal agencies. The directives shall take effect upon written approval of the director unless a later date is specified. Before a

> directive may become effective, the department shall give the affected principal departments reasonable time, as determined by the department of management and budget, to respond.

MCL 18.1131(1).

A policy that has always been enacted or repealed by legislative action cannot be considered to be within the proper scope of a mere administrative or procedural directive. It almost certainly should have been done by legislative enactment and, at the very least, by the APA rule-making process. If something as consequential as the reinstatement of prevailing wage can be done by an administrative directive, the statutory requirement that the director use the APA rule-making process becomes irrelevant surplusage. DTMB would have no need to go through the APA rule-making process if major policy changes could be shoehorned into an administrative or procedural directive. This negation violates our canons of statutory interpretation, which require courts to avoid construing a statute in a manner that renders statutory language nugatory or surplusage. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). The statutory mandate to go through the APA rule-making process would be rendered nugatory or mere surplusage if the court were to allow DTMB to sidestep these requirements under a claim of discretion. And it is not yet clear that the DTMB went through the proper procedure even for administrative and procedural directives which is contained in MCL 18.1131(1).

DTMB itself has tacitly acknowledged that the APA provides the proper procedure for it to implement significant policies. An example of this acknowledgment can be found in DTMB's recent Request for Rulemaking submitted to the Michigan Office of Administrative Hearings and Rules regarding the debarment of venders. (Exhibit P). In this Request, DTMB stated:

> **7. Describe the general purpose of these rules, including any problems the changes are intended to address.**
>
> ….

> Most State of Michigan vendors are upstanding corporate citizens that provide needed goods and services to the State, create jobs, and make Michigan a better place to live. However, vendors that commit serious or repetitive violations of the law present significant risks to the State and its citizenry, as well as reputational harm.
>
> ***The purpose of this rule is to allow the Department of Technology, Management and Budget (DTMB) to exercise its authority under MCL 18.1264.*** That statute allows DTMB to debar a vendor from participating in the bid process and from contract award upon notice and a finding that the vendor is not able to perform responsibly, or that the vendor, or an officer or an owner of 25% or greater share of the vendor, has demonstrated a lack of integrity that could jeopardize the state's interest if the state were to contract with the vendor.
>
> **8. Please cite the specific promulgation authority for the rules (i.e. department director, commission, board, etc.).**
>
> DTMB has rulemaking authority under MCL 18.1131(2), which states that DTMB "…may promulgate rules as necessary to implement this act. The rules shall be promulgated pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328."
> ***This rule is necessary to implement DTMB's debarment authority under MCL 18.1264.***

Id. (emphasis added).

The statute, cited in the request, grants DTMB clear discretion to act to debar a vendor: "The department *may* debar a vendor from participation in the bid process and from contract award…" MCL 18.1264 (emphasis added). Yet, in this request, DTMB acknowledges that even though it has specific discretionary authority to debar a vendor, it cannot do so absent rulemaking to establish the criteria and procedure for doing so.

This is markedly different than what DTMB has done in this matter, where it has no specific discretion, but claims the ability to act outside of the rulemaking process.[14] In the debarring

[14] This is also somewhat ironic, given that DTMB has effectively debarred ABC's member-contractors from prevailing on a bid based on any lower wages they pay, without having made a rule through the APA process.

request, it acknowledges that such a rule is necessary to debar vendors, despite already having a grant of statutory discretion. Yet, according to the reasoning used by the lower court, DTMB would not need to rely on rulemaking, and instead could have simply made a pronouncement debarring vendors who had committed violations. This request shows that DTMB's recognition that the APA rulemaking procedure is necessary even when DTMB possesses statutory discretion. Despite this, DTMB bypassed that procedure here. In doing so, DTMB violated the law. "The rulemaking procedures of the APA may not be circumvented." *Delta Co v Michigan Dep't of Natural Resources*, 118 Mich App 458, 460; 325 NW2d 455 (1982) (overruled in part on other grounds by *Livingston Co v Dep't of Mgmt and Budget*, 430 Mich 635; 425 NW2d 65 (1988)).

In other states with a prevailing-wage law the courts have found that the APA must be followed by the agencies administering those laws. In Nevada, a case arose involving that state's APA when the Labor Commissioner altered a prevailing-wage job classification without going through the APA rule-making process. The court there concluded this change violated the APA. *S Nevada Operating Engineers Cont Compliance Tr v Johnson*, 121 Nev 523 (2005). Similarly, in California, courts have concluded that prevailing-wage job classification alterations are required to be promulgated pursuant to the APA rule-making process. *Div of Lab Stds Enf't v Ericsson Info Sys*, 221 Cal App 3d 114 (1990). If merely altering prevailing-wage job classifications without going through the rule-making process violates those states' APAs, the creation of an entire scheme of prevailing-wage job classifications and wage rates out of whole cloth, as DTMB did here, must also violate Michigan's APA.

CONCLUSION

For the forgoing reasons, the lower court's Order should be overturned, and this Court should issue a declaratory judgment that the policy as enacted by the DTMB is invalid and should enjoin any further enforcement of the policy.

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