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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 828 CD 2021

URSINUS COLLEGE,
PETITIONER

V.

PREVAILING WAGE APPEALS BOARD,
RESPONDENT

BRIEF OF *AMICI CURIAE* PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, PENNSYLVANIA COUNCIL OF GENERAL CONTRACTORS, LEADINGAGE PA, PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION, AND PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION IN SUPPORT OF APPELLANT

Appeal from the Final Decision and Order of the Prevailing Wage Appeals Board dated June 25, 2021

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Dated: November 17, 2021

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The Pennsylvania Chamber of Business and Industry was founded on Dec. 16, 1916, by a group of influential business leaders from across the Commonwealth who recognized the need for a unified voice for business in the halls of the state Capitol. For more than 100 years, the Chamber's mission has been to advocate for job creation and lead Pennsylvania to greater prosperity for its residents. The Chamber is the largest broad-based business association in Pennsylvania, counting among its membership close to 10,000 businesses of all sizes and industry sectors, from sole proprietors to Fortune 100 companies, representing nearly 50 percent of the private workforce in the Commonwealth.

The Pennsylvania Council of General Contractors (PennCGC) is a council of quality general contractors who believe in the importance of fair, efficient, and competitive construction (bidding, awarding, and building). The organization is focused solely on the general construction industry in Pennsylvania and strives to help council member grow their operations and help them and their employees succeed in the Commonwealth's construction industry. Members are recruited from throughout Pennsylvania.

LeadingAge PA is a trade association representing more than 380 not-for-profit providers offering continuing care retirement communities (life plan communities), skilled nursing facilities, assisted living residences, personal care homes, affordable senior housing, life and home and community based services. In their buildings and on their campuses, members of LeadingAge PA serve more than 75,000 seniors and employ 50,000 Pennsylvanians in local communities.

The Pennsylvania Waste Industries Association ("PWIA") is a non-profit trade association that represents the interests of the private waste industry. It is the Pennsylvania chapter of the National Waste & Recycling Association. PWIA's missions are to advance the safe, efficient, profitable, and environmentally responsible management of solid waste in Pennsylvania, and to promote sound public policy in that regard. PWIA members own and manage 28 (out of 43) permitted operating municipal waste disposal facilities, and numerous recycling facilities, transfer stations and collection operations, in every county of the Commonwealth.[1] Day in and day out, the solid waste industry safely and efficiently manages our society's discarded items. This is no small task—in

[1] *See* Pennsylvania Department of Environmental Protection ("DEP"), Solid Waste Programs, https://www.dep.pa.gov/Business/Land/Waste/SolidWaste/MunicipalWaste/MunicipalWastePermitting/Pages/MW-Landfills-and-Resource-Recovery-Facilities.aspx (last visited Nov. 15, 2021).

calendar year 2020 the Pennsylvania solid waste industry safely collected, transported and disposed of approximately 22.4 million tons of waste.[2] The municipal waste industry in Pennsylvania produces a total economic impact of more than $4.2 billion dollars a year and supports more than 26,000 jobs.[3]

Founded in 1941, the Pennsylvania Municipal Authorities Association (PMAA) was established to assist authorities in providing services that protect and enhance the environment as well as promote the economic vitality and general welfare of the Commonwealth and its citizens. PMAA represents the interests of more than 700 municipal authorities which provide drinking water, wastewater treatment, waste management, and recreational and community projects valued at billions of dollars to over six million Pennsylvania residents. In addition to active members, PMAA has over 500 associate members, such as CPAs, engineers and solicitors, who provide services to municipal authorities.

This case involves the application of the Pennsylvania Prevailing Wage Act to privately-funded construction projects facilitated by municipal authorities. In this matter, Ursinus College worked with the Municipal County Higher Education

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[2] *See* DEP, Solid Waste Programs, http://cedatareporting.pa.gov/reports/powerbi/Public/DEP/WM/PBI/Solid_Waste_Disposal_Information (last visited Nov. 15, 2021).

[3] See, PWIA, Benefits to Citizens, https://pawasteindustries.org/about/ (last visited Nov. 15, 2021).

and Health Authority to obtain bond financing for a $23,000,000 construction project. The funds involved were never in the coffers of the Authority, and Authority had no rights or duties with respect to the construction project. On the contrary, the funds were underwritten by a private entity, held by a trustee, disbursed to Ursinus College, and owed by Ursinus College back to the private lenders. Nonetheless, the Board held that, since the specific financing terms could not have been obtained without the Authorities' involvement, the Ursinus construction project was "public work" subject to prevailing wage minimums.

The Board's holding is contrary to the general approach taken by nonprofit entities, contractors, and municipal authorities in the Commonwealth going back many years, and its impact will be far-reaching, affecting construction projects involving other higher educational institutions, healthcare institutions, and nonprofit entities devoted to affordable housing, among others. It also has the potential to affect the ability of municipal authorities and other, similar entities to encourage private work that benefits the public good. It is in that context that *amicus curiae* respectfully submit this brief, offering their views for such assistance as they may provide the Court in deciding the important statutory question presented.

II. SUMMARY OF ARGUMENT

The Prevailing Wage Act applies only to "public work." The language of the Act, as well as that of the implementing regulations, makes clear that it is intended to apply only when the public body—here, a municipal authority—has a close relationship to a project, either as a contracting party or partial funder of the project. Indeed, the Act and its regulations place the majority of the rights and obligations at the feet of the public body. For example, it is the *public body's* duty to determine the prevailing wage and ensure contractors comply. It is the *public body's* right to terminate a covered project for noncompliance. Here, the public body involved, a municipal authority, had no rights or duties for the project; as soon as it facilitated the relationship between the underwriter and the loan recipient, its involvement ceased. The Board's holding that this type of project is covered by the Act is an overly broad expansion of coverage and is contrary to the Act's language and judicial precedent.

Moreover, allowing the Board's decision to stand will have far-reaching negative impacts, both on municipal authorities and on the non-profit entities who often work with these authorities to obtain low-cost financing. The Board's holding essentially requires private entities to pay prevailing wage without obtaining the benefit of any public funding. The result is likely to be a reduction in

private construction projects that affect the public good and a diminished role for municipal authorities.

III. ARGUMENT

A. THE BOARD'S HOLDING UNREASONABLY EXPANDS THE PWA'S DEFINITION OF "PUBLIC WORK."

The Prevailing Wage Act, 43 P.S. § 165-1 *et seq*. (hereinafter the "PWA"), applies only to "public work." 43 P.S. § 165-2. To be considered "public work," a project must be "paid for in whole or in part *out of the funds of a public body*." 43 P.S. § 165-2(5). This makes logical sense; when taxpayer money is involved, the legislature has a duty to place more limitations on the use of that money.

The language of the PWA contemplates transactions in which the public body has a close relationship to the contracted-for work—if not as an actual party to the contract. Therefore, "out of the funds of a public body" cannot be read so broadly as to apply to funds that were never in the custody of a municipal authority *and to which the Authority had no liability*. In fact, the bonds themselves reflect that no recourse could be had against the Authority, placing the bondholders and underwriter on notice of this arrangement. Accordingly, it is simply improper to find that the funds used for Ursinus' construction project (hereinafter the "Ursinus Project") constituted "public funds," where the Authority neither had custody of

the funds at any point, nor any risk at all with respect to the bonds. *See San Antonio Bldg. Constr. Trades Council v. City of San Antonio*, 224 S.W.3d 738 (Tex. App. 2007) (holding that project did not utilize "public funds" and, ergo, that Texas' Prevailing Wage law did not apply to project after finding that no public body was at risk with respect to bonds).

Regardless, the Board held that the Ursinus Project constituted "public work" because "Ursinus would not have had this funding stream available but for the existence of the [Municipal County Higher Education and Health] Authority and its coordination of the funding through its statutory powers as a public body." (R. 199A.) However, "coordination" and the availability of a funding stream is irrelevant when, as here, the Ursinus Project was not "paid for in whole or in part out of the funds of" the Authority. The Board's holding therefore constitutes an unprecedented expansion of the PWA well beyond its intended scope.

The PWA provides, *inter alia*, that "[n]ot less than the prevailing minimum wages as determined [t]hereunder shall be paid to all workmen employed on *public work*." 43 P.S. § 165-5 (emphasis added). "Public work" is defined to mean "construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and *paid for in whole or in part out of the funds of a public body* where the estimated cost of the total project is in excess of

twenty-five thousand dollars ($25,000)…" *Id*. at § 165-2(5) (emphasis added). Accordingly, work paid for entirely out of the funds of a private person or entity is not subject to the PWA. If the legislature intended for the opposite to be true, they "could have crafted the definition of "public work" to include work that was not paid for in whole or in part with funds of a public body." *See Pennsylvania Nat. Mut. Cas. Ins. Co. v. Dep't of Lab. & Indus., Prevailing Wage Appeals Bd.*, 715 A.2d 1068, 1074 (Pa. 1998). Rather, the legislature "chose to limit the prevailing wage to be paid only on that work which satisfies the four-element definition of 'public work.'" *See id*.

The Board's decision that the Ursinus Project constitutes "public work" rests upon two false premises. First, the Board apparently believed as a factual matter, incorrectly and without record support, that the "Authority provided financing for the Ursinus Project[], through the Trustee" and that the loan that would be "returned to the public coffers for further public use." (*See* R. 197A–198A.) This is a mischaracterization of the transaction's structure: the Authority did not provide financing, the Underwriter did. And Ursinus's loan is never "returned to the public coffers"; on the contrary, it never resided in the public coffers to begin with.

Second, as noted above, the Board held that the Authority's "coordination of the funding"—in other words, its mere involvement as a facilitator between the

private funder and Ursinus College, so that Ursinus could get the benefit of lower financing—brought the Ursinus Project within the scope of the PWA. To apply the PWA to all projects in which a municipal authority is involved ignores the actual text of the statute and its implementing regulations.

First, the PWA itself speaks in terms of rights and responsibilities of a "public body," and the Authority had no such rights or responsibilities in this transaction. In fact, the majority of the PWA's provisions contemplate transactions in which the public body itself is a party to the contract for work. Section 165-3 (relating to specifications), for example, provides that "[t]he specifications for every contract for any public work *to which any public body is a party*, shall contain a provision stating the minimum wage rate that must be paid to the workmen employed in performance of the contract." *Id*. at § 165-3 (emphasis added). And section 165-6 (relating to the duty of contractor to keep and preserve records) indicates that "[t]he record shall be open at all reasonable hours to inspection of the *public body awarding the contract* and to the secretary." *Id*. at § 165-4 (emphasis added).

Even when the PWA does not explicitly refer to a transaction in which the public body is a party to the contract, it alludes to a transaction where the public body has significant interest in, and familiarity with, the work to be completed. For

example, section 165-4 of the PWA (relating to the duty of public body) states that "[i]t shall be the duty of every *public body which proposes the making of a contract* for any project of public work to determine from the secretary the prevailing minimum wage rates which shall be paid…" *Id*. at § 165-4 (emphasis added). The duty is on the public body to determine the prevailing minimum wage, not the project owner. Beyond suggesting that such a contract is to be proposed by a public body, section 165-4 requires that the public body be familiar enough with the nature and character of the work to determine from the Secretary the applicable prevailing minimum wage rates. *See id*.; *see also* 34 Pa. Code § 9.105 (requiring the Secretary to determine the general prevailing minimum wage for each craft or classification needed for the contract). And the PWA expressly requires contractors and subcontractors to post the relevant general prevailing minimum wage rates at the site of the work only when they are "performing public work *for a public body*." 43 P.S. § 165-9 (emphasis added). Again, the language of the PWA makes clear that the Act only pertains to projects in which a public body has a direct interest.

This is consistent with judicial precedent. The lead cases in Pennsylvania are the companion decisions relating to the construction of the Penn National Insurance headquarters in Harrisburg. *See Pa. Nat. Mut. Cas. Ins.*, 715 A.2d 1068

(Pa. 1998) ("*Penn National I*"); *Pa. State Bldg. & Constr. Trades Council, FL-CIO v. Dep't of Labor & Indus.*, 808 A.2d 881 (Pa. 2002) ("*Penn National II")*. In *Penn National I*, the Court described the transactions at issue: the City of Harrisburg entered into a development agreement for a new Penn National office tower and parking garage and took on certain initial obligations relating to the acquisition of the property. *Penn National I*, 715 A.2d at 1070. The Court held that while the initial phase of the project was covered by the PWA, the subsequent construction was conducted entirely by the private entity and, therefore, it was not clear whether the Act applied. *Id.* at 1074. The Court was therefore unpersuaded that the public entity's *involvement*, alone, was sufficient to bring the project within the scope of the PWA. In other words, the Penn National project, like the Ursinus Project, would not have occurred but for the public body's involvement; notably, the Court did not consider that involvement relevant to the analysis.

Instead, the Court remanded for a closer examination of the method used the finance the project. *Id.* at 1075. This examination revealed that the Penn National construction project was funded by tax increment financing. *Penn National II*, 808 A.2d at 886–89. Specifically, the taxing bodies "actually collected" real estate taxes, which were then paid to the Harrisburg Redevelopment Authority to repay the tax increment bonds Penn National purchased to fund the project. *Id.* In this

way, the public bodies involved had a direct financial interest in the project, and the PWA applied. *Id.* at 889.

Here, in contrast, the Authority had no rights or obligations in connection with the project funds, and had no direct financial interest in the project. The Authority did not "actually collect" any project funds, nor did the Authority disburse any funds to the lender or to Ursinus. *See id.* As noted above, the bonds explicitly provided that no claims could be made against the Authority in the event of default. No tax dollars were used at any time, so no funds came out of or would be returned to the public coffers. The public entity's credit was never pledged in connection with the bonds. Simply put, public dollars were never at risk.

Perhaps the most revealing, in the PWA itself, is § 165-12, relating to failure to comply. When any person or firm has failed to pay the prevailing wages required under the PWA, this section provides "the public body may terminate, any such contractor's right to proceed with the public work." *See id*. at § 165-12. This section, one of the PWA's arms of enforcement, envisions at the very least a transaction in which the public body has the power to terminate the contractor's right to proceed with the work. *See id*. In contrast, with respect to the Ursinus Project, the Authority had no power to do anything. Once the Authority had

facilitated the connection between the private underwriter and Ursinus College, its involvement was over.

The PWA's implementing regulations, too, explicitly limit themselves to transactions in which the public body has specific rights and responsibilities not present here. For instance, the regulation relating to the PWA's purpose and scope refers to "contracts to which the Commonwealth, its political subdivisions, an authority created by the General Assembly of the Commonwealth, including authorities created under the Municipality Authorities Act of 1945 and instrumentalities or agency of the Commonwealth *is a party*." 34 Pa. Code § 9.101(a). Moreover, the regulation which requires certain provisions to be included in a contract for public work states that each such contract "shall also provide that each contractor and each subcontractor shall file a statement each week and a final statement at the conclusion of the work on the contract with *the contracting agency*…certifying that workmen have been paid wages" in accordance with the PWA. *Id*. at § 9.103(12). Indeed, the regulation suggests that contracts to which a public body is not a party may not even have been contemplated by the PWA. *See id*.

The implementing regulations, like the statute itself, also explicitly impose a majority of the duties required thereunder upon the involved public body. *See* 43

P.S. §§ 165-4 (requiring public body to determine from the Secretary the applicable prevailing minimum wage rates), 165-10(a) (obligation of public body to obtain required statements from contractors and subcontractors); 34 Pa. Code § 9.104(b) (requiring public body to enforce the posting of wage rate determinations at work sites, and to ensure that such wage rates are paid and that job classifications are maintained). This makes sense in the context of projects in which the public body has a financial interest, either because it is a party to the contract itself or because, as in the *Penn National* case, tax increment financing was used and collected by the taxing authority. But neither the PWA nor the regulations address the roles that Ursinus College, the private underwriter, and the Trustee played in connection with the Ursinus Project, much less impose any duties on them. The most logical conclusion is that the PWA was not intended to apply to projects where the public body has no rights or duties.

Admittedly, in this case, the Authority was involved in connecting private funders and Ursinus College. But that was the extent of the Authority's involvement. Ursinus College's Board of Trustees resolved to complete the Ursinus Project and authorized the College to borrow sufficient funds for the same. Ursinus College, in turn, asked the Authority to facilitate financing for the Ursinus Project through the Authority's issuance of tax-exempt bonds, whereby the bonds

would be underwritten using private capital provided by RBC Capital Markets. Ursinus College then directly contracted with contractors in connection to the Ursinus Project—not the Authority.

The Authority, therefore was merely the vehicle through which Ursinus College obtained financing from the private underwriter. This particular vehicle would not have been available but for the Authority's existence. But that circumstance does not transform funds used from private sources into those of the Authority, nor did it require that the funds ever reside in the Authority's custody. To construe those funds, now, as having been public funds simply because of the Authority's role as a facilitator or intermediary is an unwarranted expansion of the PWA.

B. EXPANDING THE SCOPE OF THE PWA TO COVER ALL TRANSACTIONS FACILITATED BY A MUNICIPAL AUTHORITY, REGARDLESS OF WHETHER TAXPAYER MONEY IS INVOLVED, WILL DISCOURAGE PRIVATE CONSTRUCTION PROJECTS THAT ARE FOR THE PUBLIC GOOD AND IRREVOCABLY DIMINISH THE ROLE OF MUNICIPAL AUTHORITIES IN GUIDING DEVELOPMENT.

The structure used to fund the Ursinus Project is typical for bond transactions. Indeed, this type of structure is used not only to finance projects of nonprofit colleges, but is also used regularly by housing authorities and economic or industrial development authorities. Prevailing

wage, as a general matter, increases the cost of a particular project from between twenty to forty percent over a standard market rate. (*See* Twp. of Penn, County of Berks, Pa., Resolution No. 2012-7, attached as Exhibit A; Twp. of Washington, County of Franklin, Pa., Resolution No. 545, attached as Exhibit B). In fact, "[a]ccording to a 2007 Right to Know Law request, prevailing wages cost Pennsylvania an additional $9 billion in 2007 alone." *500 James Hance Court v. Pennsylvania Prevailing Wage Appeals Board*, Brief of Amicus Curiae Keystone Chapter of Associated Builders and Contractors, Inc., November 17, 2010, 2010 WL 7367598.[4] The Board's holding, if allowed to stand, will therefore have far-reaching consequences, and it ultimately has the potential to vastly reduce (1) the number of scope of these kinds of construction projects generally and (2) the use and influence of municipal authorities.

To take the Ursinus Project itself as an example, Ursinus presumably approached the Authority because it wanted to take advantage of the more attractive financing that the Authority could facilitate through issuance of the bonds. "The purpose and intent" of the Municipal Authorities Act is "to benefit the people of the Commonwealth by, among other things, increasing

[4] Attached as Exhibit C.

their commerce, health, safety and prosperity and not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises." *See* 53 P.S. § 5607. Accordingly, the Authority in this case—whose mission is to promote institutions of higher education and health—was a natural partner in assisting Ursinus. The ultimate bonds issued were in the amount of $23,000,000, with no one involved contemplating that prevailing wage rates would apply. A forty percent premium would put the cost of the project at almost $32,200,000. That cost difference ultimately may have exceeded the benefit of the favorable financing rates obtained through the Authority's involvement.

Any nonprofit entity contemplating a similar project in the future will therefore be faced with three choices: (1) raise additional capital to pay off the substantially higher cost of the project, due to the 40% prevailing wage premium, (2) lower the scope of the project, resulting in less development overall in the Commonwealth (and fewer jobs), or (3) if they are able, skip Authority bond financing altogether and simply approach private investors for less attractive financing (albeit at a lower total cost than paying prevailing wage). In addition, some educational institutions, hospitals, or nonprofit housing entities may decide to postpone projects due to the higher

costs involved or, worse, will determine that the projects contemplated simply are infeasible.

In short, affirming the Board's decision places the burden on private entities—often, non-profit entities incorporated for the public good—to pay prevailing wages without the benefit of obtaining public funds to do so. This is an unwarranted expansion of the PWA's reach to projects that are not at all funded by tax dollars. Affirming the Board's holding will also serve to impede the purposes of the Municipal Authorities Act, produce a significantly less construction-friendly environment within the Commonwealth, and, ultimately, persuade these private entities to look to alternative financing options. Specifically, private entities that are able to do so will, instead, likely go to private funders at higher interest rates and, thus, diminish the impact of municipal authorities in the communities they serve.

IV. CONCLUSION

For the reasons set forth herein, *amicus curiae* respectfully submits that the Board decision should be reversed. The Board's decision imposes an overly broad reading of the PWA that is inconsistent with the statute, regulations, and judicial precedent. Moreover, reversing the Board will, more generally, avoid the

unnecessary negative impact that such a broad reading will have on the work of municipal authorities and economic development within the Commonwealth.

Respectfully submitted,

BARLEY SNYDER, LLC

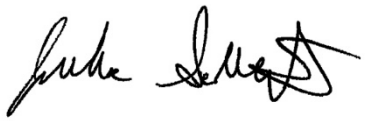

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EXHIBIT A

PREVAILING WAGE REFORM RESOLUTION 2017-7

A **RESOLUTION** OF THE TOWNSHIP OF Penn, COUNTY OF Berks, COMMONWEALTH OF PENNSYLVANIA URGING THE PENNSYLVANIA GENERAL ASSEMBLY TO ELIMINATE OR AMEND THE STATE PREVAILING WAGE ACT *(ACT 442 of 1961)*

WHEREAS, the Pennsylvania Prevailing Wage Act requires that workers on public construction, reconstruction, demolition, alteration, and/or repair projects with an estimated cost greater than $25,000 be paid a wage set by the Secretary of Labor and Industry rather than local market rates; and

WHEREAS, the prevailing wage rates set by the Secretary of Labor and Industry are generally 20 to 40 percent higher than local market labor rates; and

WHEREAS, the cost and burden of these artificially inflated wages are borne by taxpayers in the form of higher construction costs and higher taxes than would otherwise be necessary; and

WHEREAS, local contractors often choose not to bid on prevailing wage projects due to the administrative and financial overhead required; and

WHEREAS, according to the U.S. Bureau of Labor Statistics' CPI Inflation Calculator, $25,000 in 1963 dollars equals $183,203 in 2011 dollars; and

WHEREAS, current state law and regulations that determine prevailing wage rates are fundamentally vague and often favor collective bargaining agreements and union wages, which skews rates unnecessarily higher than they otherwise would have been if determined under alternative means; and

WHEREAS, the Pennsylvania State Association of Township Supervisors has a standing policy that urges the General Assembly to adopt common sense reforms to the Prevailing Wage Act including increasing the threshold, establishing clearer guidelines in the determination of wage rates, providing for a local option, or the complete repeal of the law; and

WHEREAS, HB 1329 (Session of 2011) would, if adopted, increase the prevailing wage threshold from $25,000 to $185,000, and adjust this amount annually based on the Consumer Price Index; and

WHEREAS, HB 1685 (Session of 2011) would, if adopted, require the Secretary of Labor and Industry to develop a uniform and complete list of worker classifications and place this information on a publically accessible website; therefore be it

RESOLVED, the Township of Penn, County of Berks supports meaningful and commonsense reforms to the Prevailing Wage Act; and be it further

RESOLVED, that members of the General Assembly be urged to support and pass House Bills 1329 and 1685, as well as any other proposal that offers relief to Pennsylvania's local governments and taxpayers from the burdens of the Prevailing Wage Act.

ADOPTED by the Board of Supervisors of the Township of Penn, County of Berks, the Commonwealth of Pennsylvania, this 26th day of March, 20___.

ATTEST: .

BOARD OF SUPERVISORS

EXHIBIT B

TOWNSHIP OF WASHINGTON
FRANKLIN COUNTY, PENNSYLVANIA

RESOLUTION NO. 545

A RESOLUTION OF THE BOARD OF SUPERVISORS OF THIS TOWNSHIP URGING THE PENNSYLVANIA GENERAL ASSEMBLY TO ELIMINATE OR AMEND THE STATE PREVAILING WAGE ACT *(ACT 442 of 1961).*

WHEREAS, the Pennsylvania Prevailing Wage Act requires that workers on public construction, reconstruction, demolition, alteration, and/or repair projects with an estimated cost greater than $25,000 be paid a wage set by the Secretary of Labor and Industry rather than local market rates; and

WHEREAS, the prevailing wage rates set by the Secretary of Labor and Industry are generally 20 to 40 percent higher than local market labor rates; and

WHEREAS, the cost and burden of these artificially inflated wages are borne by taxpayers in the form of higher construction costs and higher taxes than would otherwise be necessary; and

WHEREAS, local contractors often choose not to bid on prevailing wage projects due to the administrative and financial overhead required; and

WHEREAS, according to the U.S. Bureau of Labor Statistics' CPI Inflation Calculator, $25,000 in 1963 dollars equals $183,203 in 2011 dollars; and

WHEREAS, current state law and regulations that determine prevailing wage rates are fundamentally vague and often favor collective bargaining agreements and union wages, which skews rates unnecessarily higher than they otherwise would have been if determined under alternative means; and

WHEREAS, the Pennsylvania State Association of Township Supervisors has a standing policy that urges the General Assembly to adopt common sense reforms to the Prevailing Wage Act including increasing the threshold, establishing clearer guidelines in the determination of wage rates, providing for a local option, or the complete repeal of the law; and

WHEREAS, the Pennsylvania Prevailing Wage Act has outlasted its usefulness and should be repealed; and

WHEREAS, if the Pennsylvania Prevailing Wage Act cannot be repealed outright, consideration should be given to permit the municipalities in each county to choose if the Pennsylvania Prevailing Wage Act should be applied to their construction project; and

WHEREAS, if the Pennsylvania Prevailing Wage Act cannot be repealed outright or amended given municipalities a choice then consideration should be given to HB 1329 and HB 1685 to amend the law; and

WHEREAS, HB 1329 (Session of 2011) would, if adopted, increase the prevailing wage threshold from $25,000 to $185,000, and adjust this amount annually based on the Consumer Price Index; and

WHEREAS, HB 1685 (Session of 2011) would, if adopted, require the Secretary of Labor and Industry to develop a uniform and complete list of worker classifications and place this information on a publically accessible website.

NOW THEREFORE, BE IT RESOLVED, the Board of Supervisors of Washington Township, Franklin County, supports the elimination of or meaningful reforms including county choice to the Prevailing Wage Act; and

BE IT FURTHER RESOLVED, that members of the General Assembly be urged to support and pass House Bills 1329 and 1685 if the elimination of the Pennsylvania Prevailing Wage Act is not possible.

DULY RESOLVED this 16th day April 2012 by the Board of Supervisors of Washington Township, Franklin County, Pennsylvania, in lawful session duly assembled.

TOWNSHIP OF WASHINGTON
FRANKLIN COUNTY, PENNSYLVANIA

Attest:

Karen S. Hargrave, Secretary

Jeffrey B. Geesaman, Chairman

EXHIBIT C

2010 WL 7367598 (Pa.) (Appellate Brief)
Supreme Court of Pennsylvania.

500 JAMES HANCE COURT and Knauer and Gorman Construction Co., Inc.,

v.

PENNSYLVANIA PREVAILING WAGE APPEALS BOARD,
Bureau of Labor Law Compliance, Intervenor,
Appeal of: Bureau of Labor Law Compliance, Intervenor.

No. 49 MAP 2010.
November 17, 2010.

Appeal from the Order of the Commonwealth Court dated August 31, 2009, No. 1404 C.D. 2008 Reversing the Final Decision and Order of the Prevailing Wage Appeal Board on Greivance Filed by 500 James Hance Court and Kriauer and Gorman Construction Co., Inc., PWAB-8G-2006, issued on June 30, 2008

Brief of Amicus Curiae Keystone Chapter of Associated Builders and Contractors, Inc. in Support of Appellee

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*1 *STATEMENT OF INTEREST*

This amicus brief is filed on behalf of the Keystone Chapter of Associated Builders and Contractors, Inc. (ABC), a national trade association of employers in the construction industry. ABC represents over 25,000 merit shop construction and construction-related firms in 77 chapters across the United States. ABC Keystone encompasses the commercial, industrial, and institutional markets in south central Pennsylvania with over 700 member firms. The mission of ABC Keystone includes promoting, protecting and defending principled competition for its members and expanding business development opportunities.

ABC Keystone has played a central role in the litigation concerning prevailing wage in Pennsylvania and continues to advocate on behalf of the construction industry. In order to protect the rights of its members, ABC has participated as either a party, intervenor or *amicus* in numerous cases before the courts in Pennsylvania. *See, e.g., Keystone Chapter, Associated Builders and Contractors, Inc. v. Foley*, 37 F.3d 945 (3rd Cir. 1994); *Pennsylvania State Building and Construction Trades Council AFL-CIO v. Commonwealth Prevailing Wage Appeals Board*, 722 A.2d 1140 (Pa. 1999); *Keystone Chapter of Associated Builders and Contractors v. Department of Labor and Industry*, 414 A.2d 1129 (Pa. 1980).

*2 *COUNTER STATEMENT OF THE CASE*

Amicus Curiae adopts Appellee's counter statement of the case.

*3 *SUMMARY OF ARGUMENT*

The Commonwealth Court, through its reversal of the Pennsylvania Prevailing Wage Appeals Board, properly held that the Prevailing Wage Act did not apply to 500 James Hance Court's private contract for the construction of the shell of a building it leased to the Collegium Charter School regardless of the fact that construction of the fit-out of the building, under a separate contract, was subject to the Act. This is a proper interpretation of the law given its contents and the legislative intent behind it and to hold otherwise would be an impermissible expansion of the Act through case law.

The Bureau of Labor Law Compliance urges this Court to rule that if one aspect of a project is public, the entire project must be subject to the Prevailing Wage Act. Additionally, the Bureau would have this Court find lease payments, although completely separate from the construction contract at issue, enough to constitute public funding under the Act. Such precedent would be an overreaching application of the law and contrary to the intent of the General Assembly.

Moreover, broadening the application of the Prevailing Wage Act could have detrimental effects on development of Pennsylvania and the construction industry. The bifurcation of construction projects (between the construction of the building shell and tenant fit out) is a common practice. The fact that, as here, the tenant turns out to be a public body, should not turn the first phase of the project, which was not paid, in whole or in part by public funds, into a public project subject to the Prevailing Wage Act. Indeed, any such ruling might make developers less likely to offer their space to public users.

*4 *ARGUMENT*

I. THE PREVAILING WAGE ACT APPLIES ONLY TO THE SEGMENT OF THE PROJECT OWNER'S CONSTRUCTION CONTRACT RECEIVING PUBLIC FUNDS AND TO FIND OTHERWISE WOULD HAVE DETRIMENTAL AFFECTS ON THE CONSTRUCTION INDUSTRY AND THE COMMONWEALTH AS A WHOLE.

In the matter below, the Commonwealth Court correctly reversed the Pennsylvania Prevailing Wage Appeals Board and found that 500 James Hance Court ("JHC") properly bifurcated their contract for construction of the property to be used by Collegium Charter School ("School") and that the building shell of such does not constitute public work under the Pennsylvania Prevailing Wage Act. For the reasons outlined below, the Keystone Chapter of Associated Builders and Contractors, Inc, as *Amicus Curiae* in this matter, urge this Court to affirm the Commonwealth Court's decision and reinforce the important public policy the legislature had in mind when limiting the application of the Wage Act.

A. The Prevailing Wage Act does not require a total project to be covered by its application and deeming lease payments sufficient to establish a public work is an unfounded attempt to amend the Prevailing Wage Act through case law.

The Prevailing Wage Act requires only workmen who labor on public work to be paid the minimum prevailing wage. 43 P.S, § 165-5. To be a public work, four elements must be satisfied:
(1) There must be certain work;

(2) such work must be under contract;

(3) such work must be paid for in whole or in party with public funds; and

(4) the estimated cost of the total project must be in excess of $25,000.

***5** 43 P.S. § 165-2(5). Holding that the Prevailing Wage Act applies to the "total project" would be an incorrect interpretation and invalid expansion of the law. Nothing in Section Five of the Prevailing Wage Act mandates that an entire construction project be covered by the Act. *Pennsylvania National Mutual Casualty Insurance Company v. Department of Labor and Industry, Prevailing Wage Appeals Board*, 715 A.2d 1068, 1074 (PA 1998). It is actually the opposite; the Act *limits* its application to workmen on a public work, the definition of which has the four requirements referenced above. If the legislature had intended that work not paid for in whole or in part by public funds to be subject to the Prevailing Wage Act, it could and would have drafted the law to reflect such.

This is a principle with which this Court agrees. *Pennsylvania National Mutual Casualty Insurance Company* at 1074. Instead of applying the Prevailing Wage Act to all projects in their entirety, the legislature drafted the Prevailing Wage Act so that it explicitly requires the four prong definition of "public work" be met. To find otherwise would be an incorrect interpretation of law and would fly in the face of legislative intent. The statute requires that to be a public work, the project must be funded, in whole or in part, with public funds. The work at issue, constructing the shell of the building, is a separate contract paid for by a private loan secured by JHC's own mortgage on the property. No part of this separate contract is being paid for by public funds. Therefore, it is not a public work and not subject to the Prevailing Wage Act.

The Bureau of Labor Compliance ("Bureau") urges this Court to consider the School's rental payments under the lease as public funding. This is a misconstrued attempt to apply the Prevailing Wage Act to private projects. JHC entered into the contract for the building shell prior to finalizing its lease with the School. As the Commonwealth Court correctly observed, JHC ***6** took a risk that no lease agreement would be finalized with the School when it signed the contract for the building shell. There is

no other reason to do this but for the fact that JHC could have rented the property to another party had the lease agreement not been achieved. If this arrangement had been nothing more than a means to allow the School to acquire the building, JHC would not have entered into a contract for the building shell and secured its own loan before finalizing a lease with the School.

Moreover, the terms of the lease illustrate JHC's maintained control of the property while restricting the rights of the School. The lease prohibits the school from making any alterations or additions to the premises. The lease further requires the School to allow JHC to make routine periodic inspections of the premises and disallows subletting and mortgaging of any kind by the School. Also of note is the fact that JHC maintains the title and reversionary interest in the property. These provisions thwart the Prevailing Wage Appeals Board and the Bureau's attempt to establish public funding through the test outlined by the federal Administrative Review Board in *In Re: Phoenix Field Office, Bureau of Land Management*, ARB Case No. 01-010 (June 29, 2001). Not only does the lease between JHC and the School fail to establish the contract as a public work through an acquisition of the building, but it is another unfounded effort at expanding the Prevailing Wage Act. The *Phoenix Field Office* decision is based on the Davis Bacon Act, not the Pennsylvania Prevailing Wage Act, and is a test this Court has not adopted. Any reliance on such a test is misplaced.

Our Commonwealth Court, as well as others around the nation, has recognized that this type of leasing arrangement does not constitute a public work under the Prevailing Wage Act. A similar situation existed in *Mosaica Education, Inc. v. Pennsylvania Prevailing Wage Appeals Board*, a case on which the court below properly relied. 925 A.2d. 176 (Pa. 2007). In *Mosaica*, a ***7** private, for-profit organization, Mosaica, entered into a contract with a school to provide management services. *Id*. at 178. Mosaica owned the building used by the school through a limited liability company of which it was the sole shareholder and made renovations to it in preparation for its use by the school. *Id*,

The Commonwealth Court found that Mosaica was not a contractor for purposes of the Prevailing Wage Act. *Mosaica Education, Inc*. at 184. Of more consequence for the case at hand, however, is the fact that the court also found that even if Mosaica was a contractor for purposes of the Act, the contractual relationship between Mosaica and the school did not arise until the two finalized their agreement, which occurred after Mosaica entered into the construction contract at issue in that case. *Id*. Because there was no formal relationship between Mosaica and the school, it could not be said that the renovation contract was made on behalf of the school. *Id*.

Furthermore, in *Mosaica*, the Commonwealth Court recognized that it would be an incorrect expansion of the Prevailing Wage Act to burden the private owner of the property by requiring it to pay prevailing wages and otherwise apply its provisions. The court noted that contractors are explicitly burdened with accounting for time and labor of constructions workers and with direct oversight responsibility. *Id*. at 184, fn.13. As such, it is the contractor's relationship with the payor that is relevant under the Prevailing Wage Act. *Id*. Mosaica paid the contractor; the public body did not. This foils any argument that there was a contract subject to the Prevailing Wage Act. *Id*. Mosaica was not a contractor under the Act and no public funds were used to pay for the renovations. *Id*. Moreover, perhaps all of the school's payments to Mosaica would cover the cost of renovations; nonetheless, this was not enough to invoke application of the Prevailing Wage Act.

***8** The School's lease payments to JHC are similarly irrelevant. The School is not a party to the building shell contract; thus, the contractual arrangement for the shell is void of any contractor subject to the Prevailing Wage Act. Moreover, the possibility that the School's lease payments will eventually cover the cost of the construction is not enough to deem an otherwise privately funded project as public. It would be an unjust burden to impose the Prevailing Wage Act's administrative and oversight responsibility requirements on a relationship devoid of any contractor or public funds per the requirements of the Act itself.

The Supreme Court of Ohio, the highest court of a state in which prevailing wage law is as controversial is it is in Pennsylvania, has also held that the prevailing wage law cannot apply where no public funds are spent on the construction of a project. *Northwesterm Ohio Building & Construction Trades Council v. Ottawa City Improvement Corporation*, 910 N.E.2d 1025, (Ohio 2009).

In *Northwesterm Ohio Building & Construction Trades Council*, a private, for-profit contractor purchased a building and the property on which it stood. 910 N.E.2d 1025, 1027. In order to make such a purchase, the contractor acquired public grants and loans. To renovate the building, the contractor took out an additional private loan. *Id*. The Trade Council subsequently brought an action seeking preliminary injunction, claiming prevailing wages must be paid on the construction for renovations. *Id*.

The Ohio Prevailing Wage Act, like that of Pennsylvania, requires that a project or public improvement must be made "in whole or in part by public funds" in order to be subject to its requirements. O.R.C. § 4115.03. The Ohio Supreme Court wisely acknowledged that the intent of this was requirement was clearly not to saddle developers with a prevailing wage obligation every time a public institution's funds are involved. *Northwestern Ohio Building & Trades* ***9** *Council* at 1029. Moreover, the court noted that a holding that the spending of *any* public funds by an institution triggers application of prevailing wage law would unjustifiably expand the scope of prevailing wage law to include project that are not constructed by a public authority. *Id*. Therefore, the expenditure of public funds triggers the prevailing wage requirement only when the project meets all the criteria for application of the law; i.e. where a public authority using public funds contracts for the construction. *Id*.

Similar to the legislature of Ohio, the Pennsylvania General Assembly did not intend to the requirements of the Prevailing Wage Act to be triggered any time a public institution spends funds that are in some way related to a project. Here, the Bureau argues that just because JHC is in receipt of the School's lease payments, the entire project should be deemed public because public funds are involved. Applying the Prevailing Wage Act to private contracts used for leased property will affect numerous private projects that are not subject to the act. To hold that the Prevailing Wage Act applies in this circumstance would thrust the Act's application into the private sector and burden unintended contractors and developers, thus impermissibly amending the Prevailing Wage Act through case law.

B. Subjecting private contracts to the Prevailing Wage Act would have a profound stifling affect on the construction industry and lead to higher costs and a higher unemployment rate in the Commonwealth.

The Commonwealth Court correctly held that the work was properly bifurcated and the building shell is not subject to the Prevailing Wage Act. Finding otherwise would cause a stifling effect on construction in Pennsylvania.

This type of project, where a developer engages a contractor to build the shell of a building, while the developer seeks potential tenants, is a standard in the industry. The developer takes a significant risk that it will be able to find such tenants. Otherwise, it will own an empty ***10** building shell that generates no revenue to repay the investment. Indeed during the recent downturn, many developers experienced this fate. The ultimate identity of the tenant, whether the lease is signed days after or many years after the building shell contract, should not affect the private nature of the building shell work. Any such approach would have a chilling effect on this process because of the uncertainties for both contractor and developer.

The increased costs of prevailing wages add an additional 20 to 25 percent to the overall cost of a construction project. When part of a project is in fact private, developers are able to mitigate this cost by bifurcating the contract. Otherwise, they may not be able to proceed with the job at all. Labor costs total 50 percent of an entire construction project; freedom from the burden of paying prevailing wages on a portion that is private can mean the difference in pursuing the project or not.

In the event that a developer can proceed despite this burden, the additional cost will be passed on to others. For example, if JHC thought they would have to pay prevailing wages on both projects, they would likely have negotiated a higher rental fee from the School. This, in turn, would cause the School to pass on their additional costs to taxpayers. The Commonwealth of Pennsylvania surely cannot afford to pay higher rent just to further this unfounded attempt at expanding the Prevailing Wage Act. According to a 2007 Right to Know Law request, prevailing wages cost Pennsylvania an additional $9 billion in 2007 alone. This cycle of passing on these inflated costs will never cease if the Bureau has its way.

Further, requiring contractors to pay artificially inflated prevailing wages to all men and women working on projects, regardless of whether a separate part is privately funded, could lead to fewer projects being built and less workers, thus raising the level

of unemployment in the state. Simply put, given the inflation in cost caused by the Prevailing Wage Act, requiring it for ***11** private aspects of a job will mean fewer jobs, and fewer jobs means a higher unemployment rate. A study conducted in West Virginia, the state whose precedent the Bureau urges this Court to follow, found that in 2008, the cost of an inaccurate prevailing wage alone led to an additional 1,515 unemployed West Virginia residents. Andrea M. Dean, *An Economic Examination of West Virginia's Prevailing Wage Law*, The Public Policy Foundation of West Virginia, January 2009, p. 25-26.

Burdening developers and contractors with unnecessary costs from the onset will not be beneficial to the worker. Unfortunately, prevailing wage rates do not reflect the natural supply and demand relationship. Instead, prevailing wages are set at much higher levels than the true local market wage, usually those of the unions in large, metropolitan areas. This artificial increase in wages results in fewer workers being hired and fewer projects being initiated and completed. This principle will only be exacerbated by expanding the Prevailing Wage Act's application to privately funded portions of a project. The purpose of the Prevailing Wage Act is to protect workmen employed on public work projects from "substandard" pay. *Pennsylvania National* at 1072. While this is a purpose worth serving, it is not furthered by treating a private project as public. The opposite is actually true, as it will increase the number of workers on private projects who become unemployed. This not only detrimentally affects individual workers, but the region as a whole. Less work means less development and less employment in the long run.

Broadening the application of the Prevailing Wage Act will also lead to higher compliance costs for contractors. Not only are contractors forced to pay higher wages, but they are also required to comply with tedious documentation requirements. 43 P.S. § 165-6. These, too, add to the cost of the project. This process is particularly cumbersome if a project, which ***12** was thought at the outset to be private, later becomes a "public" project because of a lease entered into by the developer.

The above referenced effects of expanding the Prevailing Wage Act into the private sector illustrate the severe implications such a ruling would have on the construction industry and the Commonwealth as a whole. Such costs are not an option for the industry or the State.

CONCLUSION

For all of the foregoing reasons, the Keystone Chapter of Associated Builders and Contractors, Inc, as *Amicus Curiae* in this matter, respectfully request that this Honorable Court affirm the decision of the Commonwealth Court below.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2021, a true and correct copy of the foregoing Brief of Amicus Curiae was served via PACFile:

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I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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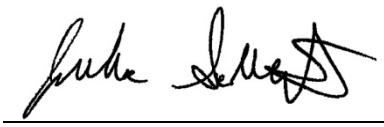

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CERTIFICATE OF COMPLIANCE FOR WORD COUNT LIMITS

The undersigned counsel verifies that the Brief of Amicus Curiae Pennsylvania Chamber of Business and Industry, Pennsylvania Council of General Contractors, LeadingAge PA, Pennsylvania Waste Industries Association, and Pennsylvania Municipal Authorities Association in Support of Appellant contains 3,923 words exclusive of the cover page, table of contents/authorities, proof service, signature block, and appendices, which is below the 7,000 word count limit.

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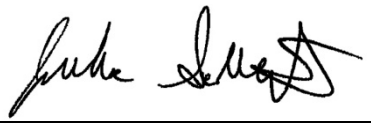

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