

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

ASSOCIATED BUILDERS
AND CONTRACTORS,

Plaintiff-Appellant,

v.

CITY OF LANSING,

Defendant-Appellee.

Supreme Court No. 149622

Court of Appeals No. 313684

Lower Court No. 12-406-CZ

***AMICUS CURIAE* BRIEF OF
MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL
AND MICHIGAN STATE AFL-CIO
IN SUPPORT OF DEFENDANT-APPELLEE CITY OF LANSING
AND IN OPPOSITION TO PLAINTIFF-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

FILED

OCT 3 2014

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT



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STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Building and Construction Trades Council (“Trades Council”) is an umbrella labor organization whose membership is comprised of numerous labor unions, as well as regional councils, representing building and construction trades workers in Michigan. The Trades Council has a fundamental interest in protecting and enhancing the work opportunities, wages, hours, benefits, and other terms and conditions of employment of the union building trades workers who seek to be employed on public works construction projects in Michigan that are covered by prevailing wage laws—including Lansing’s Prevailing Wage Ordinance (“Ordinance”).

The Trades Council was one of the primary organizations supporting passage of the Michigan Prevailing Wage Act, MCL 408.551 *et seq.* Since this Act was adopted in 1965, the Trades Council has been involved in virtually every Federal and Michigan appellate case in which the applicability of the Act was challenged.¹ The Trades Council has also been an intervening party in other similar cases where the validity of a city’s prevailing wage ordinance was at issue. See *Associated Builders and Contractors, Saginaw Valley Area Chapter v City of Bay City* (Bay County Circuit Court, Case No. 11-3243-CZ).

The Trades Council’s member unions are parties to collective bargaining agreements with building trades contractors, which generally require the payment of wages and benefits at or above prevailing wage levels. The Trades Council, its member unions and workers, and their union contractors have an interest in maintaining prevailing wage laws in order to create a level playing

¹ See *Associated Builders & Contractors v Wilbur*, 472 Mich 117; 693 NW2d 374 (2005), on remand, *Associated Builders & Contractors v Dir, Dep’t of Consumer & Indus Servs*, 267 Mich App 386; 705 NW2d 509 (2005); *Michigan State Bldg & Constr Trades Council v Perry*, 241 Mich App 406; 616 NW2d 697 (2000); *Western Mich Univ Bd of Control v State*, 455 Mich 531; 565 NW2d 828 (1997).

field in bidding for public construction work. If Lansing's Ordinance is declared invalid, as Plaintiff-Appellant seeks, the contractors, unions and employees who are governed by these collective bargaining agreements would be placed at a competitive disadvantage. Specifically, in bidding on Lansing projects, union building trades contractors who are required by their collective bargaining agreements to pay prevailing wages and benefits, would be at a competitive disadvantage with contractors who are not required to pay prevailing wage and benefit rates.

Importantly, union building trades contractors invest heavily in certified apprenticeship and training programs through collectively bargained benefit contributions to these programs, and contractor payments to these programs are included among the fringe benefits that are used to calculate composite prevailing wage and fringe benefit rates. See *Michigan State Bldg & Constr Trades Council v Perry*, 241 Mich App 406, 414; 616 NW2d 697 (2000). As a result of this heavy investment in training by the unionized construction industry, union construction workers can command higher wages because of their high skill levels and productivity.

If the Ordinance is declared invalid, the result would be to depress wage and benefit levels paid to all construction workers on Lansing projects, and a "race to the bottom" in terms of construction wages and benefits. Instead of competing on the basis of quality and productivity, substandard contractors could compete on the basis of labor costs alone, thereby undercutting quality contractors (both union and nonunion) who pay their workers higher wages and benefits commensurate with their higher skill levels and higher productivity. Such a result would be directly contrary to the Trades Council's organizational purpose of maintaining and improving the wages, benefits and working conditions of Michigan construction workers.

The Michigan State AFL-CIO ("State AFL") is a labor federation comprised of constituent labor organizations in Michigan. Local unions affiliated with the State AFL represent hundreds

of thousands of employees in the public sector and private sector throughout Michigan. A primary objective of the State AFL is to improve the quality of life for working families in Michigan. In furtherance of this objective, the State AFL has sponsored, promoted and supported national, state and local legislation to improve wages, benefits and working conditions for workers, including local prevailing wage ordinances throughout Michigan.

Given their experience and long-term interest in the issues raised by this case, the amicus curiae brief submitted by the Trades Council and State AFL brings additional necessary perspective to the attention of the Court as the Court considers the merits of this appeal.

STATEMENT OF THE BASIS OF JURISDICTION

Amici Michigan Building and Construction Trades Council and Michigan State AFL-CIO incorporate by reference and rely upon the Statement of the Basis of Jurisdiction contained in Defendant-Appellee's brief.

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Court of Appeals correctly conclude that, under the Michigan Constitution of 1963, the City of Lansing has the home rule authority to enact an ordinance setting minimum wage rates for construction trade workers employed by city contractors on city-owned and city-funded construction projects?

The Court of Appeals answered "Yes."

Amicus Curiae answers "Yes."

Defendant-Appellee answers "Yes."

Plaintiff-Appellant answers "No."

2. Given that the holding in *Attorney General ex rel Lennane v City of Detroit*, 225 Mich 631; 196 NW 391 (1923) was superseded by the Michigan Constitution of 1963, did the Court of Appeals correctly conclude that *Lennane* is not binding precedent?

The Court of Appeals answered "Yes."

Amicus Curiae answers "Yes."

Defendant-Appellee answers "Yes."

Plaintiff-Appellant answers "No."

INTRODUCTION

This case involves what should be an easy question: whether the Court of Appeals correctly concluded that the City of Lansing, a Michigan home rule city, has authority under its general police powers, its authority to regulate trades and occupations, its authority with respect to its property and its authority to contract, pursuant to the Michigan Home Rule City Act and the Michigan Constitution of 1963, to enact an ordinance setting minimum prevailing wage rates for construction trade workers employed on city-owned and city-funded construction projects. Because under the 1963 Constitution cities enjoy broad police powers, coextensive with those of the state, to legislate for the public health and welfare, including the regulation of employment conditions of city employees as well as workers employed on city-owned and city-funded projects, unless expressly denied by the state, the answer is clearly "yes."

STATEMENT OF FACTS

Amici Michigan Building and Construction Trades Council and Michigan State AFL-CIO incorporate by reference and rely upon the Statement of Facts contained in Defendant-Appellee's brief.

ARGUMENT

I. THE CITY OF LANSING'S PREVAILING WAGE ORDINANCE IS WELL WITHIN THE CITY'S HOME RULE AUTHORITY UNDER THE MICHIGAN CONSTITUTION OF 1963

Standard of Review

Amici Trades Council and State AFL adopt and incorporate by reference the Standard of Review contained in Defendant-Appellee's brief.

Argument

A. The Ordinance Seeks to Protect Employees of City Contractors Working on City Projects from Substandard Wages and Promote the Hiring of Quality Local Contractors and More Highly Skilled and Productive Labor. It Is a Proper Exercise of the City's Home Rule Police Power to Legislate for the Public Health, Safety, and Welfare.

Lansing's Prevailing Wage Ordinance ("Ordinance") requires, with respect to certain public works projects "for construction on behalf of the City," all contractors "employed directly upon the site of work" to:

furnish proof and agree that such mechanics and laborers so employed shall receive at least the prevailing wages and fringe benefits for corresponding classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing area by such Department.

(Ordinance Sec. 206.18)

The Ordinance further requires that all bid documents for City construction projects contain provisions requiring the payment of prevailing wages. *Id.* Thus, the Ordinance requires that city contracts on covered construction projects contain a provision that contractors must pay a minimum prevailing wage at rates established for the Greater Lansing area.

The Ordinance, therefore, is simply a means to insure that when the city is spending its own money on construction projects to develop, maintain or improve the city's own property, the

bricklayers, cement masons, carpenters, iron workers, plumbers, electricians and other tradesmen and women performing the work are paid a prevailing wage commensurate with their skill level, according to the rates established by the U.S. Department of Labor for the Greater Lansing Area. The Ordinance is limited to city projects funded by the city. It does not attempt to establish minimum wage levels generally for any other type of work, public or private, inside or outside of the city. In short, the Ordinance is strictly limited to public construction work performed on the city's *own property* funded with the city's *own money*.

The Ordinance is patterned after the Michigan Prevailing Wage Act, MCL 408.551 *et seq.*, which in turn is patterned after the federal Davis Bacon Act, 40 USC 3141 *et seq.* In *Western Michigan University v State of Michigan*, 455 Mich 531, 535; 565 NW2d 828 (1997), the Court explained the purpose of prevailing wage laws as follows:

[Prevailing wage laws] serve to protect employees of government contractors from substandard wages. Federal courts have explained the public policy underlying the federal act as

"protecting local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area" . . . [and] "giving local labor and the local contractor a fair opportunity to participate in this building program." [*Universities Research Ass'n, Inc v Coutu*, 450 US 754, 773-774; 101 S Ct 1451; 67 L Ed 2d 662 (1981)]. The purposes of the Davis-Bacon Act are to protect the employees of Government contractors from substandard wages and to promote the hiring of local labor rather than cheap labor from distant sources. [*North Georgia Building & Construction Trades Council v Goldschmidt*, 621 F2d 697, 702 (CA 5, 1980)].

There should be no doubt that protecting employees of city contractors from substandard wages when working on city projects, and promoting the hiring of local contractors and local labor, are proper exercises of the city's home rule police power.

Moreover, many public sector construction owners make a policy choice to require prevailing wages based on social benefits to the local economy, including attracting higher quality

contractors using more high skilled and productive workers to work on local projects. Many economic studies show that prevailing wage laws provide social benefits from higher wages and better workplace safety, increase government revenues, and elevate worker skills in the construction industry. These studies also show that prevailing wage laws do not increase construction costs, for a number of reasons. One significant reason is that improved productivity can offset higher wages, because better-skilled workers attracted by the higher wage can complete the job in less time, and firms are encouraged to utilize labor-saving technologies to reduce higher labor costs.² The merits of the policy choice to require prevailing wages may be debatable, but there can be no debate that it is, in fact, a legitimate policy choice. In short, protecting employees of city contractors working on city projects from substandard wages, promoting the hiring of local labor and local contractors rather than cheap labor and substandard contractors from distant sources, encouraging the use of high quality contractors using highly skilled and productive workers, and creating social and economic benefits to the local economy, are inarguably matters of legitimate local concern and a proper exercise of a city's police power.

Modern Michigan courts have consistently held that Article 7, §22 of the 1963 Constitution grants broad police powers to home rule cities delegating "not only those powers specifically granted, but . . . also . . . all powers not expressly denied." *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003) (citing *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994)). See also *Rental Property Owners Ass'n of Kent County v Grand Rapids*, 455 Mich 246, 253-254; 566 NW2d 514 (1997); *Detroit Firefighters Ass'n v Detroit*, 449 Mich 629, 669; 537 NW2d 436

²See Mahalia, *Prevailing Wages and Government Contracting Costs, A Review of the Research* (Economic Policy Institute, Washington, D.C., July 8, 2008, Briefing Paper #215) at pp 1-2, available at http://www.epi.org/publication/bp_215/ (accessed Aug. 8, 2014).

(1995); *Detroit v Walker*, 445 Mich at 690; *City of Monroe v Jones*, 259 Mich App 443, 452; 674 NW2d 703 (2003); and *Adams Outdoor Advertising Inc v City of Holland*, 234 Mich App 681, 687; 600 NW2d 339 (1999), *aff'd* 463 Mich 675; 625 NW2d 377 (2001).

In addition to the general powers granted pursuant to Article 7, §22 and §34 of the 1963 Constitution, the Home Rule City Act specifically delegates general police powers to Michigan's cities. The Home Rule City Act requires mandatory city charter provisions that provide for:

Sec 3(j) *The public peace and health and for the safety of persons and property.*
In providing for the public peace, health and safety, a city may ***expend funds or enter into contracts*** with a private organization, the federal or state government, a county, village or township, or another city for services considered necessary by the legislative body. MCL 117.3(j) (emphasis added)

The Home Rule City Act also states that each city charter may provide for:

Sec 4i(d) The regulation of trades, occupations, and amusements within city boundaries, if the regulations are not inconsistent with state or federal law
MCL 117.4i(d)

* * *

Sec 4i(j) The enforcement of police, sanitary, and other ordinances that are not in conflict with the general laws. MCL 117.4i(j)

* * *

Sec 4j(3) [T]he exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state. MCL 117.4j(3)

Michigan appellate courts now routinely find that the Home Rule City Act at §117.3 and §117.4i also delegates broad police power to Michigan cities. See, e.g., *Rental Property Owners Ass'n of Kent County v Grand Rapids*, 455 Mich at 254-255; *People v Krezen*, 427 Mich 681, 694; 397 NW2d 803 (1986). In *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 480-481; 666

NW2d 271 (2003), the court cited both Article 7, §22 of the 1963 Constitution and §117.3 of the Home Rule City Act in support of its finding that:

Among the powers that may properly be exercised by a home rule city is the police power. Except where limited by constitution or statute, ***“the police power of Detroit as a home rule city is of the same general scope and nature as that of the state.”*** The state, pursuant to its inherent police power, may enact regulations to promote the public health, safety, and welfare. Thus, it is clear that defendant had the authority to enact the operations order for the public health, safety, and welfare of its citizens. (citations omitted and emphasis added).

Michigan Courts have also cited MCL 117.4i(j) in finding that the state’s police powers have been delegated to Michigan’s cities. See *People v Krezen*, 427 Mich at 694; and *Belle Isle Grill Corp v Detroit*, 256 Mich App at 480-481.

Current court decisions thus find municipal police power is limited only when in direct conflict with provisions of the state Constitution or when preempted by state statutes. In *Gora v City of Ferndale*, the Supreme Court recognized that ordinances passed pursuant to broadly conceived municipal police powers are valid “as long as [the] ordinance does not conflict with [the] constitution or general laws.” 456 Mich 704, 711; 576 NW2d 141 (1998). See also *Rental Property Owners Ass’n of Kent Co v Grand Rapids*, 455 Mich at 253.

Even before the 1963 amendment to the Michigan Constitution, Michigan courts recognized that broad police powers, including the ability to regulate wages, hours, and conditions of employment for city workers, had been delegated to Michigan’s cities. In *People v Sell*, the Michigan Supreme Court held:

[T]he police power of Detroit is of the same general scope and nature as that of the state. Therefore, authorities relating to the police power of the State are equally applicable in relation to the police power of the city.

People v Sell, 310 Mich 305, 315; 17 NW2d 193 (1945) (emphasis added). See also *People v Litvin*, 312 Mich 57, 62; 19 NW2d 485 (1945). *Olson v Highland Park*, 312 Mich 688; 20 NW2d

773 (1945) is particularly instructive here. There, Highland Park's charter required overtime pay for employees of the city. *Id* at 692. The defendant argued that the power to regulate workers' wages, hours, and other working conditions was reserved to the state legislature. *Id* at 695. The court, however, ruled that where not otherwise in conflict with state law, *municipalities had the power to regulate workers' wages, hours and working conditions:*

The city contends that, because article V, §29 of the Michigan Constitution commits to the Legislature power to enact laws relative to hours and conditions under which men, women and children may be employed, a charter amendment on this subject, inconsistent with the State law, is void. We find no conflict between the statutes on the subject and the provisions of the charter; and in the absence of such conflict, there is no legal inhibition preventing the people of a municipality from speaking on that subject by their vote on an amendment to their charter when such amendment is not contrary to State Law. (citations omitted)

Id.

Michigan law defines the scope of police powers broadly. In *People v Sell*, the court defined the scope of municipal police power as follows:

The police power is said to be a . . . a system of regulations tending to the health, order, convenience, and comfort of the people and to the prevention and punishment of injuries and offenses to the public . . . It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about the greatest good of the greatest number. *Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction.*

310 Mich at 308-309 (citations and internal quotation marks omitted, emphasis added).

This Court has consistently found broad areas of commercial activity to be subject to police power regulation. For example, in *Cady v Detroit*, the court found municipal police power to permit such regulation, explaining:

Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children,

the protection of morals and health, the *safeguarding of the economic structure* upon which the public good depends.

289 Mich 499, 514; 286 NW 805 (1939) (emphasis added). See also *People v Derror*, 475 Mich 316, 338; 715 NW2d 822 (2006) (citing *Berman v Parker*, 348 US 26, 32; 75 S Ct 98; 99 L Ed 27 (1954), overruled on other gds by *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010); *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1, 73; 367 NW2d 1 (1985); *People v Murphy*, 364 Mich 363; 110 NW2d 805 (1961); *Patchak v Lansing Tp*, 361 Mich 489, 105 NW2d 406 (1960).

The terms "public peace, health and safety" are not limited to protection from physical harm. "The police power relates not merely to the public health and public safety but, also, to public financial safety. Laws may be passed within the police power to protect the public from financial loss." *People v Murphy*, 364 Mich at 368 (internal citations omitted) And, as noted, Section 4i(d), MCL 117.4i(d), grants cities authority concerning "[t]he regulation of trades, occupations, and amusements within city boundaries, if the regulations are not inconsistent with state or federal law. . . ."

In other words, a municipality's police power include measures to strengthen the local economy, enhance the financial security of workers employed by the city and its contractors, and utilize measures such as prevailing wage requirements to promote productivity and quality on its construction projects. Certainly it is within a local government's purview to accomplish those police power objectives by regulating the terms of construction contracts for city-owned projects funded from a city government's budget. Lansing's Ordinance regulates only the terms of contracts entered into by the city for city projects. It does not affect public sector construction outside the city; and it does not affect private sector construction inside or outside the City. The

statutory home rule power to enter into contracts for the public good unquestionably includes the power to set reasonable terms, conditions and requirements for those entering into such contracts, including terms relating to the fair and equitable treatment of the workers performing construction work for the city, provided they are not in conflict with state law.

This Court has specifically recognized that the state's prevailing wage law, MCL 408.551 *et seq.*, was enacted pursuant to the state's police powers. *Western Michigan University Bd of Control v State*, 455 Mich 531, 536; 565 NW2d 828 (1997), n 2. And as the Court of Appeals properly concluded, because municipal police power is of the same general nature and scope as that of the state, see, e.g., *People v Sell*, 310 Mich at 315, local prevailing wage ordinances are clearly within the scope of police powers delegated to Michigan's cities.

As the Court of Appeals properly concluded, the Lansing Ordinance is not preempted by state law. There is no conflict between Michigan's prevailing wage law and Lansing's, because the state law applies only to projects by state institutions or school boards, sponsored or financed in whole or in part by the state; it does not apply to projects when a city is the owner or contracting agent. See MCL 408.551(b)&(c) and 408.552. As there is no conflict with state law, and as the City of Lansing's police power to enact such a law is coextensive with the state's police power, see, eg, *People v Sell*, 310 Mich at 315, and *Belle Isle Grill Corp v Detroit*, 256 Mich App at 480-481, *supra*, the city is not precluded from legislating in this area. See *Olson v City of Highland Park, supra*, 312 Mich at 695.

Accordingly, Lansing's Prevailing Wage Ordinance is not only within the scope of delegated police powers, it is also consistent with state policy as established by the legislature, and is rationally related to the police power goals of promoting the general welfare and economic well-being of Lansing.

B. The Michigan Constitution of 1963 Substantively and Fundamentally Changed the Law as to the Scope of a City's Police Power under the Home Rule City Act.

In 1963 Michigan adopted a new Constitution, replacing the previous constitution of 1908. With respect to the home rule authority of cities, the new constitution reflected a reversal of the view which had prevailed in the early 20th century. Instead of the archaic, common-law rule under which cities possessed only those powers that were explicitly and directly delegated, the 1963 Constitution embodied the modern view that home rule cities now enjoy all powers not expressly denied, rather than those specifically granted. In short, the relationship between the state and home rule municipal governments in Michigan "has matured to one of general grants of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified." *Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994).

Unlike the Constitution of 1908, the Michigan Constitution of 1963 included new wording and a new section expressly stating how constitutional and statutory provisions concerning local government shall be interpreted. New language in Article 7, §22 provides that the specific grant of powers does not limit the general grant of powers to cities, and that these general powers extend to "*property and government*" as well as "municipal concerns." This language *was not* included in the 1908 Constitution. The relevant section currently reads:

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.* (New language italicized).

Similarly, Article 7, §34 mandates that the Constitution and Home Rule City Act be liberally construed to empower rather than restrict the actions of local government. Const 1963, art 7, §34. This section also did not exist in the 1908 Constitution. It reads in pertinent part:

The provisions of this *constitution and law* concerning counties, townships, cities and villages *shall be liberally construed* in their favor. (emphasis added).

The drafters of the present Constitution understood that by adding the foregoing provisions they were memorializing a broadened and evolved concept of home rule powers. The official comment concerning Article 7, §34 of the 1963 Constitution stated in part:

This is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments.

Official Record of the Constitutional Convention of 1961 ("Record"), v II, p 3395. The official comment explained the revisions to Article 7, §22 as reflecting "Michigan's successful experience with home rule. The new language is a more positive statement of municipal powers, *giving home rule cities and villages full power over their own property and government*, subject to this constitution and law." *Id.* at 3393 (emphasis supplied).

The Convention Record further shows that the proponents and drafters were concerned with overly restrictive judicial interpretations of home rule powers under the prior Constitution. Their solution was to clarify that local governments are granted broad home rule power absent specific limitation by the Legislature, rather than having home rule power dependent on an express legislative grant. The drafting committee explained the changes made to what became Article 7, §22 as follows:

In addition, home rule cities and villages are guaranteed full power over *their own property* and government, and these powers cannot be limited except by deliberate statement of intent by the legislature.

(*Record*, v 1, p 1007, revised statement) (emphasis supplied).

There is no question that the Constitution of 1963 represents a sea change in the state's law regarding home rule. Michigan courts now reject the early 20th Century rule of "strict construction" of the Constitution and Home Rule City Act's provisions regarding the delegation of police power, which has been supplanted and overruled by the 1963 Constitution. As the Court explained in *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310, 319; 471 NW2d 321 (1991):

At common law, we narrowly construed township ordinances enacted pursuant to the delegated police power in the township ordinance act. The delegates to the 1961 Michigan Constitutional Convention replaced the common-law rule of strict construction by constitutionally requiring courts to liberally construe all legislative and constitutional powers conferred upon townships. Const 1963, art 7, §34; see also, 1 Official Record, Constitutional Convention 1961, pp 1048-1058.

II. THE COURT OF APPEALS PROPERLY CONCLUDED THAT *LENNANE* HAS BEEN SUPERSEDED BY SUBSEQUENT CHANGES IN THE LAW, IN PARTICULAR THE 1963 CONSTITUTION

Standard of Review

Amici Trades Council and State AFL adopt and incorporate by reference the Standard of Review contained in Defendant-Appellee's brief.

Argument

In *Attorney General ex rel Lennane v Detroit*, 225 Mich 631, 196 NW 391 (1923) the Supreme Court concluded that a Detroit ordinance which established minimum wage rates, maximum hours of work, and overtime requirements for city employees; and required city

contractors to pay prevailing wages to their employees working on city contracts, was beyond the city's authority and *ultra vires* under the 1908 Michigan Constitution.³

The circuit court's decision in this case relied entirely on *Lennane* in concluding that the City of Lansing lacked authority under the Home Rule City Act to enact its prevailing wage ordinance. Despite finding "compelling" the City's argument that *Lennane* had been superseded by subsequent changes in the law, the court concluded it had no choice but to follow *Lennane* because that case had never been expressly overruled by this Court. Similarly, in *Rudolph v Guardian Protective Svcs, Inc*, unpublished opinion per curium of the Court of Appeals, issued September 22, 2009 (Docket No. 279433); 2009 Mich App Lexis 1989, a panel of the Court of Appeals concluded that *Lennane* was "obsolete" and its interpretation of the home rule power of cities in 1923 (under the 1908 Constitution) was incompatible with subsequent changes in the law, including the 1963 Constitution.

The *Rudolph* panel properly concluded that *Lennane's* reasoning was no longer good law "in light of the significant changes to our constitution and in our other case precedent," explaining:

Under *Lennane*, the test was whether a city's powers were expressly and unmistakably granted. Today, the test would be whether they had been restricted.

Id., slip op at 4; 2009 Mich App LEXIS 1989 at *6.

³It should be noted that the 91-year old *Lennane* case was decided in 1923 at the height of the "*Lochner*" era, named after the United States Supreme Court's infamous decision in *Lochner v New York*, 198 US 45; 25 S Ct 539; 49 L Ed 937 (1905), declaring that compulsory minimum wage laws were unconstitutional. Such laws were thus illegal throughout the country during this time. *Lochner* was the product of a long-discredited judicial philosophy in which courts struck down what they viewed as imprudent economic regulation under the guise of "due process." The *Lochner* era, of course, is long gone. See *Ferguson v Skrupa*, 372 US 726, 730; 83 S Ct 1028; 10 L Ed 2d 93 (1963) ("The doctrine that prevailed in *Lochner* . . ., and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.")

The *Rudolph* panel wrongly concluded, however, that it must follow *Lennane* simply because *Lennane* had not been expressly overruled.⁴

The Court of Appeals got it right. As explained above, *Lennane* has been superseded by changes to the Michigan Constitution in 1963, and this Court's decisions subsequent to *Lennane*—both before and after 1963—reaffirm that conclusion. In fact, *Lennane* appears to have been clearly (if not expressly) overruled by this Court's 1945 decision in *Olson v Highland Park*, 312 Mich 688, *supra*, even before the 1963 Constitution. In *Olson* this Court upheld the City of Highland Park's charter amendment requiring overtime pay for city workers, rejecting a claim that the power to regulate wages, hours and working conditions was reserved exclusively to the state. *Id.* The Detroit ordinance struck down in *Lennane* included overtime (and minimum wage) requirements for city workers as well as prevailing wage provisions for workers of city contractors working on city projects. 255 Mich at 633-635. There is no difference in terms of a city's home rule authority between the ordinance upheld in *Olson* and the ordinance struck down in *Lennane*. See *Brimmer v Village of Elk Rapids*, 365 Mich 6; 112 NW2d 222 (1961); *Gildenleave v Lamont*, 331

⁴The dissenting opinion below reached a similar determination, concluding that "it is not for us to reject the continued viability of *Lennane*. (Dissenting opinion, slip op at 2). Notably, none of the judicial actors considering this issue—not the panel in *Rudolph*, not the circuit court, and not the dissenting judge below—argue that *Lennane* was correctly decided or that a court would reach the same result today given the vast changes in the law over the past 91 years. Only Appellant attempts to make that argument—and it does so half-heartedly. Appellant's faith in the substantive viability of *Lennane's* ruling on the merits is belied by its request for relief to this Court: Even though the ABC seeks leave to appeal here, it asks this Court *not* to decide the continued viability of *Lennane* but instead to remand—**without deciding whether *Lennane* is still good law**—with instructions to the Court of Appeals simply to follow *Lennane*. That in itself speaks volumes about why leave to appeal should be denied. There is no compelling reason why this Court should waste scarce judicial resources by granting leave for the sole purpose of concluding, as the Court of Appeals has already (and correctly) concluded, that *Lennane* is no longer controlling because of subsequent changes in decisional law and the Michigan Constitution.

Mich 8; 49 NW2d 36 (1951); and *Kane v Flint*, 342 Mich 74; 69 NW2d 156 (1955) (holding that municipal police power includes power to set wages). That *Lennane* cannot be squared with these later decisions is another example, and another reason, why *Lennane* is no longer good law, and why *Lennane* is not binding precedent.⁵

It should go without saying that a judicial decision interpreting one law (like the 1908 Constitution) which is later amended, supplanted or replaced by a new law (like the 1963 Constitution) that significantly and substantively changes the prior law, is not binding precedent under the new law. Otherwise, cases such as *Dred Scott v Sanford*, 60 US (19 How) 393, 407; 15 L Ed 691 (1857), in which the United States Supreme Court stated, *inter alia*, that slaves “had no rights which the white man was bound to respect,” would still be “binding precedent” despite

⁵The argument asserted by Appellant (and the dissent)—that the 1963 Constitution left intact *Lennane*’s conclusion that the wages paid to employees of city contractors working on city projects paid for with city funds is not a matter of “municipal concern”—is without merit. *First*, this argument overlooks that the new language in Article 7, §22 of the 1963 Constitution explicitly expanded the police power of cities to include matters of municipal “*property and government*,” as well as “municipal concern.” The Lansing ordinance simply establishes contract requirements for work on city property, and is thus explicitly authorized by the 1963 Constitution. *Second*, this argument ignores that *Olsen v Highland Park*, 312 Mich 688; 20 NW2d 733 (1945), *Brimmer v Village of Elk Rapids*, 365 Mich 6; 112 NW2d 222 (1961), *Gildenleave v Lamont*, 331 Mich 8; 49 NW2d 36 (1951), and *Kane v Flint*, 342 Mich 74; 69 NW2d 156 (1955) all held that municipal police power includes the power to set wages for city workers, in direct contradiction to *Lennane*, which held that cities did not have such power based on the now long-rejected notion that municipal wages are not a matter of municipal concern. *Third*, the argument overlooks that since at least *People v Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945), Michigan law has recognized that the police power of home Rule cities “is of the same general scope and nature as that of the state,” and that unless the subject matter of regulation has been exclusively reserved to the state, i.e.—unless it is preempted—municipal regulation on the subject is not precluded. See *Detroit v Qualls*, 434 Mich 340, 361-362; 454 NW2d 374 (1990). Notably, neither Appellant nor the dissenting opinion contests the Court of Appeals’ cogent analysis as to why the Lansing ordinance is not preempted. See Slip Opinion at 10-13. As the Court of Appeals properly concluded, *Lennane* is no longer binding precedent because its rationale directly conflicts with the expanded police power of home rule cities expressly recognized in the 1963 Constitution.

later adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution! Like *Lennane*, the *Dred Scott* decision was never explicitly overruled by judicial order, because the act of amending the constitution effectively overruled the decision. The Supreme Court acknowledged as much in *McDonald v City of Chicago*, 561 US 742, 858; 130 S Ct 3020, 3060. 177 L Ed 2d 894, 940-941 (2010), when it found that the 14th Amendment – not the Courts – “significantly altered our system of government” and thus “unambiguously overruled” the *Dred Scott* holding.⁶

In *San Juan County v United States*, 503 F3d 1163 (CA 10, 2007) (*en banc*) the 10th Circuit considered the effect of a change in the law on so-called “binding precedent.” In that case the court was considering an issue regarding the interpretation of Rule 24 of the Federal Rules of Civil Procedure, and pointedly noted that cases—including Supreme Court cases—decided prior to an amendment of the rule were no longer binding precedent:

It should go without saying that the 1966 amendments to Rule 24 changed the law. Pre-1966 decisions are no longer binding precedent . . . And even if *Smith v Gale*, 144 US 509, 518, 12 S Ct 674, 36 L Ed 521 (1892), is a “triple super-duper precedent” because it is 115 years old, Op (Kelly, J., concurring) at 1 n.1 (internal quotation marks omitted), it would be such a precedent with respect to only the matter resolved by that decision—the meaning of a provision of the Code of the Dakota territory in the late nineteenth century. *Gale* hardly controls our interpretation of current Rule 24.

503 F3d at 1189.

⁶ Appellant relies upon *Boyd v WG Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993) in support of its argument that *Lennane* remains binding precedent. However, that case is clearly distinguishable. In *Boyd* the Court held that a 1932 Supreme Court decision which interpreted the Michigan Workers Compensation Act to require disability applicants to be residents of Michigan in order to recover benefits was binding precedent regardless of various lower court decisions to the contrary. *Id.* at 523. Unlike the Michigan Constitution here, the relevant provision of the Workers Compensation Act analyzed in *Boyd* had remained unchanged since the 1932 decision was rendered.

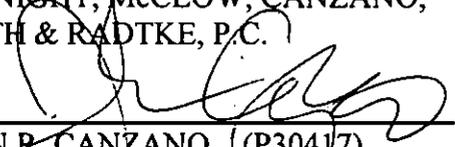
In short, the Court of Appeals correctly concluded that *Lennane* was no longer binding precedent. The current law in Michigan (i.e., the Michigan Constitution of 1963), overruled *Lennane*'s reasoning and decision.

CONCLUSION

For the reasons stated, *Amici* Michigan Building and Construction Trades Council and Michigan State AFL-CIO respectfully requests that the Court Deny Appellant's Application for Leave to Appeal.

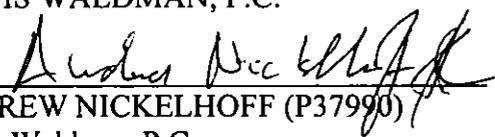
Respectfully Submitted,

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Dated: October 2, 2014