

IN THE SUPREME COURT OF OHIO

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 33,

Appellee,

v.

GENE'S REFRIGERATION, HEATING
& AIR CONDITIONING, INC.

Appellant.

: On Appeal From the Medina County Court
: of Appeals, Ninth Appellate District

: Court of Appeals
: Case No. 06CA0104-M

: Medina County Court of Common Pleas,
: Case No. 05-CIV-1249

08-0780

MEMORANDUM IN SUPPORT OF JURISDICTION
OF AMICUS CURIAE,
ASSOCIATED BUILDERS & CONTRACTORS OF OHIO, INC.

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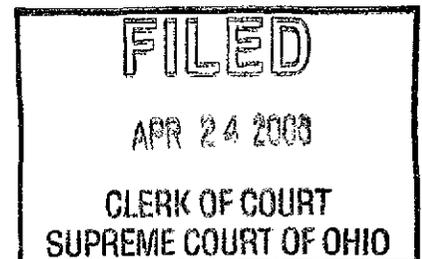


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CERTIFICATE OF SERVICE

IDENTIFICATION AND INTEREST OF AMICUS CURIAE
ASSOCIATED BUILDERS & CONTRACTORS OF OHIO, INC.

Associated Builders & Contractors of Ohio, Inc. (“ABC”) is a statewide trade association of over one thousand construction industry employers, suppliers and associates adhering to the merit shop, free enterprise philosophy that projects should be awarded based upon merit, to the lowest responsible bidder. Its members perform construction work, manufacture/fabricate, supply and transport products and materials under public works construction contracts, thus bringing them under Ohio’s Prevailing Wage Laws. Like other construction contractors and other off-site producers of materials, they have relied on this Court’s ruling in *Clymer v. Zane*¹ for seventy-four years that workmen employed off-site in a private enterprise are not covered by Ohio’s Prevailing Wage Law. Further, these construction industry employers and suppliers, most of whom are non-union, submit that the Court’s decision in *Sheet Metal Workers Local 33 v. Mohawk Mechanical*² limits the standing of a union in representing employees who are not members of their union to only those who have specifically authorized such union to represent them in prevailing wage complaint proceedings. Members of ABC, manufacturers, employees, governmental entities and the public will be seriously impacted if the decision of the Ninth District is allowed to stand.

¹ 128 Ohio St. 359 (1934)

² 86 Ohio St.3d 611 (1999)

I. INTRODUCTION

The Associated Builders & Contractors Inc. is the largest association of construction contractors and subcontractors in America. Its membership includes nearly twenty-five thousand (25,000) construction and construction related firms in eighty-four (84) chapters across the United States. The goal of ABC is “to provide the best educational and entrepreneurial activities and ensure all of its members the right to work in a free and competitive business climate, regardless of union or non-union affiliation.” Associated Builders & Contractors of Ohio, Inc. (“ABC”) represents the interests of over one thousand contractors, suppliers and associates in the three chapters – the Northern Ohio, Central Ohio and Ohio Valley Chapters that cover the entire state.

Any case involving Ohio’s Prevailing Wage Law is by definition of interest to ABC, as large numbers of its members consistently perform work on public improvement projects throughout the State of Ohio. In the last several years, ABC has seen a dramatic increase in prevailing wage litigation. The issues presented in this case are considered by ABC to be some of the most critical issues in prevailing wage presented to this Court in its history. ABC urges this Court to accept jurisdiction over this case in that, for the reasons set forth below, the decision of the Ninth District Court of Appeals is of great public significance and interest to all our members and cannot be allowed to stand.³

II. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This cause presents two critical issues regarding the construction of public improvement projects subject to Ohio’s Prevailing Wage Law: (1) whether the off-site manufacturing of all

³ ABC incorporates the arguments made in Appellant’s Memorandum in Support of Jurisdiction. In addition, this amicus brief also contains additional arguments for the Court to consider in deciding to accept review.

materials to be “used in or in connection with” a public improvement project are to be paid at prevailing wage rates pursuant to R.C. 4115.05;⁴ and (2) whether a labor organization has standing as an “interested party” to represent all employees who worked on a public improvement project when only one employee, who never even performed work on jobsite of the project, had authorized a labor organization to represent him pursuant to R.C. 4115.03(F) and R.C. 4115.16.

The Ninth District Court of Appeals is the first Court in the State of Ohio to conclude that a one sentence amendment to Ohio General Code Section 17-4a in 1935 (present day R.C. 4115.05), had *legislatively superseded* the Ohio Supreme Court’s long followed holding in *Clymer v. Zane* which held that off-site work was not subject to the requirements of Ohio’s Prevailing Wage Law. Until the Ninth District’s decision, no court or governmental agency since the enactment of Ohio’s Prevailing Wage Law in 1931, has ever held that the manufacturing of “materials used in or in connection with” a public works project was subject the requirements of this law.

In reliance upon *Clymer*, countless industry practices have embedded themselves in the way contractors, suppliers, and manufacturers interface with public projects. Until the Ninth District’s decision, industries that fabricate, formulate, prepare, mix and deliver products and materials understand and operate with certainty that their work is beyond the reach of prevailing wage. For example, relying explicitly upon *Clymer*, which addresses work performed in a gravel pit in preparation for concrete ready mix, no aspect of the ready mix industry is covered by prevailing wage from the gravel pit, to the batch plant, and to the delivery to the jobsite. With the Ninth District’s decision, the employee at a local hardware store that mixes a bucket of paint

⁴ Use of the word “manufacturing” is intended to include off-site fabrication or preparation of material used in or in connection with a public project.

for a painter for application at a public works project will have to be paid prevailing wage and the owner of the hardware store will now be subject to all the recordkeeping and reporting requirements imposed by the prevailing wage law.

The erroneous holding of the Ninth District is of great general interest and public concern to all ABC member construction contractors doing work in Ohio. First, because Ohio's Prevailing Wage Law has a two year statute of limitations, every construction contractor or manufacturer who performed work in connection with a public project is now subject to employee for back pay liability for any manufacturing, delivery, preparation or fabrication work performed by off-site employees who were not paid prevailing wages. This decision not only imposes substantial and unforeseen financial burdens upon construction contractors, manufacturers and suppliers, but creates potential liability for public authorities who fail to inform contractors that off-site work was also subject to prevailing wage.

Requiring prevailing wages to be paid for the manufacturing of all off-site materials would make the cost of public improvement projects skyrocket in the State of Ohio. The cost of road construction alone would dramatically increase if employees working in gravel pits and batch plants are now required to be paid prevailing wages. Governmental entities currently struggling to complete public improvement projects would either have to raise taxes to fund the public projects or would have to indefinitely postpone road repairs and other needed construction projects because they would not be able to afford the increased costs of construction. Because this interpretation affects the cost of public improvements and Ohio's ability to affordably maintain its infrastructure, this case is a matter of great public interest and broad general significance to the State's population as a whole.

Suppliers of pre-manufactured materials are also subject to liability under the Ninth District's holding. Currently, a contractor can purchase pre-cut wood, sheet metal, doors, etc... which are pre-manufactured or fabricated and put into stock for later sale. The stock is then sold when needed to contractors working on public projects. Because these stock materials are "to be used in or in connection with" the prevailing wage project, the companies who manufactured the materials must have paid their employees prevailing wages. How could the Department of Commerce ("the Department") ensure Ohio's Prevailing Wage Law was complied with?

In addition to the massive increase in public construction costs and the burden placed upon taxpayers, mandating that employees at all off-site manufacturing facilities are to be paid at prevailing wages will create a recordkeeping nightmare which Ohio business and the Department is not prepared to handle.

The financial burden placed on construction contractors, manufacturers and suppliers is also of great public significance. Construction prevailing wage rates are not the "prevailing wages" in manufacturing and fabrication industries. Because Ohio's prevailing wage law simply adopts the union construction trades' collective bargaining agreements as the "prevailing wage," wage rates which are considerably higher than wages paid to manufacturing workers will be paid sporadically as materials identified for installation at public works move through the manufacturing process. This will inevitably lead to Ohio's prevailing wage law conflicting with wages, hours and other terms and conditions of employment that are collectively bargained for between management and labor unions in other industries. For example, a cabinet manufacturer may have a collectively bargained agreement with another union. The cabinet makers' collective bargaining agreement will likely conflict with the wage scale determined, by law, to be the prevailing wage. The collectively bargained wages in manufacturing plants represented by the

United Steelworkers, Machinists' Union, and United Autoworkers, to name a few, will conflict with the various building and construction trades unions' whose wages are determined, by law, to be the prevailing wage.

Most significant, the Ninth District interpretation of R.C. 4115.05 would lead contractors to use out of state companies over Ohio manufactures and fabricators in order to avoid application of the Ohio Prevailing Wage Law altogether, to reduce costs and gain a competitive advantage in bidding and to eliminate the need to keep payroll records. This would result in the loss of jobs and opportunities for tens of thousands of Ohio workers. Ohio's Prevailing Wage Law is unenforceable upon manufacturers and fabricators located outside the State of Ohio. Thus, the payment of prevailing wages for off-site work on materials will most certainly encourage Ohio construction contractors to purchase all materials from manufactures located outside the State of Ohio. Any contractor who would choose to purchase materials for a public project from a manufacturer located within the State of Ohio would have an inherently higher bid for the project. This loss of business resulting from this ruling will lead to a shut down of manufacturing and fabrication facilities that currently operate in the State of Ohio in favor of out of State competitors. In today's global economy, where materials used on public projects could be manufactured all over the world, the Ninth District holding does nothing more than to force additional businesses out of the State of Ohio.

The second proposition presented to this Court for review regarding "interested party" standing under R.C. 4115.03(F) and R.C. 4115.16 is also of great public concern and interest in the State of Ohio. Litigation regarding Ohio's prevailing wage law has already grown exponentially in the last several years, with nearly all the litigation brought by labor organizations claiming to be "interested parties" under the statute. The Ninth District's

expansion of the definition of interested party is beyond the intent of the legislature and contrary to this Court's holding in *Mohawk Mechanical*. The interested party provision contained in the statute is truly an anomaly which allows a labor organization to gain standing to file a complaint or to bring a lawsuit when in most cases, the labor organization and its members do not suffer an "injury in fact," nor do they have a direct interest in the outcome in the litigation.

The Ninth District improperly held that a labor organization has the right to represent every employee who worked on a public improvement project when just one employee had authorized the union to represent his own interest. As Chief Justice Moyer stated in his dissent in *Mohawk Mechanical*, "the execution of authorization forms such as those used in the case is analogous to the creation of an attorney-in-fact relationship, and sufficient to satisfy subsection (F)(3), if the forms are executed before the union takes an action on behalf of the employees." This creation of an "attorney-in-fact" relationship should only apply to the individual non-union employees who authorized the labor organization to represent them. By expanding the definition of interested party, the Ninth District's decision impinges upon the rights of Ohio workers performing work on public improvement projects by imposing representation upon them without their consent.

For example, when a labor organization removes a case from the jurisdiction of the Department pursuant to R.C. 4115.16(B), the Director of the Department is divested of jurisdiction to continue any investigation of the administrative complaint. The labor organization then becomes a plaintiff and may settle the lawsuit filed against the contractor (and now, manufacturer) in any way it chooses without any repercussions under the law. The labor organization can dismiss the lawsuit in its entirety if the contractor agrees to sign a collective bargaining agreement, even though no affected employee ever receives back pay or the union

may settle the case for any amount of back wages without any obligation to confer with the employees involved. The case then becomes *res judicata* and the Department and the affected employee are forever foreclosed from collecting back pay, penalties or interest, nor can the affected employee choose, let alone obtain advice from, his/her own attorney. As the prevailing wage law is written, neither the affected employees, nor the Department has any legal recourse against the interested party labor organization after a civil complaint had been filed, settled and dismissed in the common pleas court. Can an employee, who never authorized the Union to represent him/her, sue the Union's attorney for malpractice if a case is settled and dismissed in a manner that compromises the employee's rights? Can an attorney representing the Union, armed with a single authorization, ethically represent employees who have not appointed that attorney to represent them in court? Is there not an inherent conflict of interest in representing a Union as an interested party and employees who neither authorized the Union nor its attorney to represent their individual interests? The multiplicity of ethical and related issue likewise makes this matter one of great public interest.

Any employee, without a labor organization, can file a prevailing wage complaint with the Department and the Director must investigate the claim. Unions have acted in recent years to undermine this statutory scheme by inserting themselves into the middle of the dispute and settling the cases on term that are in the union's best interests and not the affected employee. This issue should be accepted for review in order to address these practices. The legislature only intended to allow labor unions to bring interested party actions on behalf of only those employees who authorize the unions to do so, especially when dealing with employees they do not represent under the National Labor Relations Act.

III. STATEMENT OF THE CASE AND FACTS

ABC adopts the statement of facts proposed in Appellant's Memorandum in Support of Jurisdiction.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The off-site fabrication of materials to be Used in or in Connection with a Public Improvement Project is Not Subject to Ohio's Prevailing Wage Law Because the Requirements of Ohio's Prevailing Wage Law Only Apply to the Jobsite of the Public Improvement Project

In holding that one sentence added by the legislature in 1935 by Am.S.B. No. 294⁵ had *legislatively superseded* the holding of *Clymer v. Zane*, the Ninth District made a simple proximity in time argument concluding that *Clymer v. Zane* was decided in 1934 and the legislature subsequently amended the statute in 1935 in response to that decision. However, there is no legislative history available to explain why this sentence was added, or to explain what the legislature intended this sentence to mean. The only intent the legislature has provided Courts with is the fact that in 74 years this sentence has never been interpreted to require the off-site manufacturing of materials to be subject to Ohio's Prevailing Wage Law. In 74 years, the prevailing wage statute as a whole has grown from just four paragraphs to over 16 statutory sections with a full complimentary administrative code. See R.C. 4115.03 to 4115.16, and 4115.99; see also O.A.C. 4101: 9-4-01 to O.A.C. 4101: 9-4-28. With all of these additions to the prevailing wage law, the legislature's intent was made clear through its failure to act to mandate

⁵ The wages to be paid for a legal day's work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash.

that prevailing wages be paid for off-site work of all materials to be used in or in connection with a public project.

For 74 years, various administrative agencies, Ohio Courts and industry practice has revealed that the manufacturing of off-site “materials used in or in connection with” a public improvement project is not subject to the requirements of Ohio’s Prevailing Wage Law because prevailing wages are paid only for time spent performing work on the jobsite of the public project. This intent is clear and is demonstrated through various provisions contained in Ohio’s Prevailing Wage Law. For example, R.C. 4115.10(A) states, that “[a]ny employee **upon any public improvement** who is paid less than the...[prevailing wage] may recover...the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference.” (Emphasis added). Even R.C. 4115.05 which the Ninth District relied upon in rendering its decision provides, “[e]very contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, **or other person about or upon such public work**, shall be paid the prevailing rate of wages provided in this section.” (Emphasis added).

In construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings. See *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d 62, 65. The language used in the prevailing wage statute “upon” or “about” simply means “on,” referring to the jobsite of the project. “It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law.” *State v. Moaning* (1996), 76 Ohio St.3d 126, 128; *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535,

1998 Ohio 190, 696 N.E.2d 1079 (statutes pertaining to the same general subject matter must be construed *in pari material*)

This Court has held that courts must avoid statutory interpretations that create absurd or unreasonable results. *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St. 3d 262, 2005 Ohio 6432, 838 N.E.2d 658. When possible, courts should also avoid interpretations that create confusion or uncertainty. See *Crawford Cty. Bd. of Commrs. v. Gibson* (1924), 110 Ohio St. 290, 298-299, 2 Ohio Law Abs. 341, 144 N.E. 117. There is no doubt given the history and enforcement of this statute that the Ninth District's interpretation will cause confusion and uncertainty for all business who deal in some way with public works projects.

Compliance with the provisions of Ohio's Prevailing Wage Law with regard to the work performed on the jobsite of a public improvement project is further evidenced by the Sixth District Court of Appeals decision rendered in *Vaughn Industries, LLC v. DiMech Servs., et al.*, 167 Ohio App.3d 634, 2006-Ohio-3381, 856 N.E.2d 312 where the Court of Appeals explicitly held the requirements of Ohio's Prevailing Wage Law apply only to work performed on the jobsite of the public project.

Furthermore, the Ohio Supreme Court's decision in *Clymer v. Zane* was never "legislatively overruled" as the Ninth District erroneously asserts. Various Ohio Courts, including the Ohio Supreme Court, as well as other State Courts have continued to cite *Clymer* for various reasons; none have ever indicated the holding of this case was in part *legislatively superseded*. See *Dean v. Seco Electric Co.* (1988), 35 Ohio St. 3d 203, 519 N.E.2d 837; *Wadsworth v. Dambach* (1954), 99 Ohio App. 269, 133 N.E.2d 158; *State ex. rel. Corrigan v. Barnes* (1982), 3 Ohio App. 3d 40, 443 N.E.2d 1034; *Allen v. Eden* (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848; *Callaway v. NDB Downing Co.* (1961), 172 A.2d 260, at 264-266, 1961 Del. Super. LEXIS 100.

The holding in *Clymer v. Zane* is sound and was carefully reasoned. This Court held that the words “upon a public improvement” did not cover work performed off-site work and this phrase particularly referred to the jobsite of the project. This Court reasoned to hold otherwise would surely lead to conflicts with regulations and codes governing wages of other industries. Most significantly, the Ohio Supreme Court noted that since the statute provided for sanctions and was penal in nature, it should be narrowly construed. The Ninth District did not “narrowly construe” the one sentence contained in R.C. 4115.05 when the Court held that all materials used in a public project are subject to Ohio’s Prevailing Wage Law.

In *Allen v. Eden* (1954), 267 S.W.2d 714, 1954 Ky. LEXIS 848, the Kentucky Court of Appeals specifically adopted the sound reasoning of the Ohio Supreme Court’s decision in *Clymer v. Zane* holding that work performed in the production of materials used in the construction of a public project is not work performed on the jobsite of the project and not subject to their state’s prevailing wage law.

Given the sound reasoning in *Clymer* and taking the R.C. 4115.05 into context with the rest of the prevailing wage statute, the Ninth District clearly misinterpreted the language contained in R.C. 4115.05 by claiming it *legislatively superseded* the holding of *Clymer*. The Ninth District erroneously assumes that R.C. 4115.05 would be applicable to off-site fabrication work. However, based upon the explicit language of the statute, the non enforcement of this provision in 74 year, and the legislature’s own inaction, the language “upon any material to be used in or in connection with a public work” must apply only to materials prepared on the jobsite of the public improvement project in question. The statute simply does not state or make any reference to the fact that materials prepared, manufactured or fabricated off-site would be subject to the requirements of Ohio’s Prevailing Wage Law. If this holding is contrary to the

legislature's intent, it would have been simple for the legislature to add appropriate words to the statute to clarify its intent over the past 73 years – it has not done so.

The Ninth District's holding regarding prevailing wages to be paid for off-site preparation, fabrication and manufacturing of "material used in or in connection with a public improvement" project is unreasonable, unworkable, and without statutory foundation.

Proposition of Law No. 2: A Labor Organization that Obtains Written a Authorization from an Employee Who Claims to have Worked on a Project Subject to the Requirements of Ohio's Prevailing Wage Law Only has Standing as an Interested Party to Pursue Claims on Behalf of the Employee who Expressly Authorized the Representation

Ohio's Prevailing Wage Law does not allow an interested party to pursue or enforce provisions of the law that are not specific to the employee who "authorized" the action. To allow an "interested party" to pursue and enforce the claims on behalf of other Gene's employees who did not authorize the action would violate this Court's holding in *Mohawk Mechanical*, the legislature's intent, and ethical requirements in the practice of law.

Ohio law is well settled regarding when a labor organization has standing as an "interested party" to bring a prevailing wage complaint, and more importantly, who the union is authorized to represent pursuant to R.C. 4115.03(F) when bringing that complaint. In *Mohawk*, three employees of Mohawk Mechanical, a non-union contractor, signed "authorization forms" that expressly granted authority to Local 33 pursuant to R.C. 4115.03(F) to file a prevailing wage complaint "on their behalf" with regard to work they performed on a public improvement project. *Id.* at 613. Over the course of the next year, after the Complaint was filed, three other Mohawk employees who also worked "on the public project" signed Local 33's authorization forms. *Id.* The employees authorized Local 33 to file a complaint on their behalf to collect alleged underpayments; the difference between the prevailing wage required to be paid on the project and the wages the employees actually received from Mohawk. *Id.* at 611. After sixty

days elapsed without a ruling from the Ohio Bureau of Employment Services, Local 33 filed its prevailing wage complaint on behalf of these six employees into the trial court. *Id.* at 613.

Shortly thereafter, Mohawk Mechanical filed a motion for summary judgment challenging Local 33's "interested party" standing pursuant to R.C. 4115.03(F), alleging Local 33 "was not authorized to represent" Mohawk employees because Mohawk was not signatory to a collective bargaining agreement with Local 33. *Id.* at 614. The Ohio Supreme Court disagreed and held that certain employees of Mohawk "took affirmative acts to authorize Local 33 to file a complaint **on their behalf**...within sixty days of the filing of the complaint, three Mohawk employees had given **written authorization** to Local 33 **to represent them in the prevailing wage action**." *Id.* at 614 (emphasis added). In reading *Mohawk*, it is clear that the Ohio Supreme Court permitted Local 33 to file a complaint on behalf of only those Mohawk employees who signed authorization cards, not on behalf of all employees who worked on the public project at issue. The Ohio Supreme Court's reasoning in *Mohawk* for limiting Local 33's representation to only those employees who authorize the union to file suit on their behalf is sound considering the "attorney-in-fact" relationship created. The ethical and related questions discussed above raise serious ethical questions as to whether representation of employees by a Union and its attorney in a lawsuit is appropriate without each employee's timely authorization.

If the Ninth District's interpretation of *Mohawk* and the statute are correct, why did the Ohio Supreme Court even bother mentioning the three other Mohawk Mechanical employees who authorized Local 33's representation? Why did the Ohio Supreme Court continuously use the terms "on their behalf" and "to represent them," when describing the prevailing wage complaint authorized by the Mohawk employees? The terms chosen by the Ohio Supreme Court

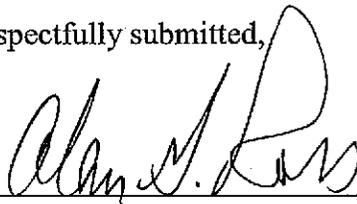
purposefully articulate that the Union only had standing to represent employees who affirmatively authorized the representation.

The Ninth District expansive holding for establishing an unlimited right for an interested party to represent employees in an "attorney-in-fact" relationship who did not authorize the representation should not be allowed to stand.

V. CONCLUSION

For the foregoing reasons, and for the reasons stated in the Appellant's Brief is incorporated herein and other amicus curiae briefs submitted to this Court, this case involves a matter of great public interest and should be accepted for review.

Respectfully submitted,



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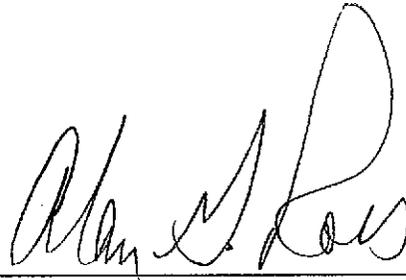
Dated: April 23, 2008

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing, Memorandum In Support of Jurisdiction of Amicus Curiae, Associated Builders & Contractors of Ohio, Inc., was served via ordinary U.S. mail, postage prepaid, upon the following:

Joseph M. D'Angelo, Esq.
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this 23rd day of April, 2008.

A handwritten signature in black ink, appearing to read "Adam J. Lewis". The signature is written in a cursive style with a large, prominent loop at the end of the last name.

Counsel for Appellant