

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.

: Ohio Supreme Court Case No. 2008-
: 0780

:
: On Appeal From the Medina County
: Court of Appeals, Ninth Appellate
: District Case No. 06CA0104-M

BRIEF OF AMICI CURIAE

**OHIO CHAMBER OF COMMERCE, DAYTON AREA CHAMBER OF COMMERCE,
COUNCIL OF SMALLER ENTERPRISES, GREATER AKRON CHAMBER OF
COMMERCE, YOUNGSTOWN/WARREN REGIONAL CHAMBER, TOLEDO
REGIONAL CHAMBER OF COMMERCE, AND CINCINNATI USA REGIONAL
CHAMBER IN SUPPORT OF
GENE'S REFRIGERATION, HEATING AND AIR CONDITIONING, INC.**

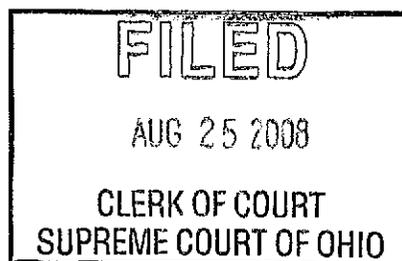
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I. INTRODUCTION – THE OHIO CHAMBER OF COMMERCE, DAYTON AREA CHAMBER OF COMMERCE, COUNCIL OF SMALLER ENTERPRISES, GREATER AKRON CHAMBER OF COMMERCE, YOUNGSTOWN / WARREN CHAMBER OF COMMERCE, TOLEDO REGIONAL CHAMBER OF COMMERCE AND CINCINNATI USA REGIONAL CHAMBER

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

The Dayton Area Chamber of Commerce was formed in 1907 as a leader in economic development, public policy and business advocacy for the Dayton area business community. The Dayton Area Chamber of Commerce represents 3,000 businesses in a nine-county region. The Dayton Chamber continues to lead public policy initiatives and economic development projects that foster a business friendly environment for Dayton area businesses. Through the Dayton Chamber's membership services and networking opportunities businesses are able to connect and grown in the Dayton region, and support the Dayton area's history of innovation and entrepreneurial success.

The Council of Smaller Enterprises, (COSE), is Northeast Ohio's largest small business support organization. COSE strives to help small businesses grow and maintain their independence. Comprised of more than 17,000 member companies, COSE has a long history of fighting for the rights of all small business owners, whether it's through group purchasing programs in healthcare, workers' compensation, payroll services, or shipping, or advocating for specific changes in legislation or regulation.

The Greater Akron Chamber is a regional chamber of commerce and economic development organization serving the Northeast Ohio counties of Medina, Portage, and Summit. For 101 years, the Greater Akron Chamber has been committed to continual improvement of our community, our economy, and our quality of life. For our more than 1,500 member companies, we offer the best bottom-line, result-producing benefits; networking and marketing opportunities; small business support; public representation; and information services.

The Youngstown/Warren Regional Chamber is a private, non-profit organization formed in 1993 (a merger of the Youngstown, Warren and Niles chambers of commerce) that provides leadership and business services to promote the growth of our nearly 3,000 members—representing more than 150,000 employees in the Mahoning Valley.

Since 1894, the Toledo Regional Chamber of Commerce has been making an impact for business in Northwest Ohio. The Chamber has built a solid membership of over 3400 businesses, spanning from Fortune 500 companies to small businesses with only one employee. The Chamber's mission is to make its members more competitive by saving them time and money and providing opportunities for business growth and development.

The Cincinnati USA Regional Chamber is the nation's fifth largest chamber, representing the interests of nearly 6,000 member businesses. Its mission is to capture Cincinnati USA as one of the world's favorite American business centers. The Chamber serves its membership and the Cincinnati USA community through economic development, government advocacy, festivals and events, regional vision and collaboration, money-saving benefit programs, leadership and networking opportunities and educational programs. Twice in the last decade, the Cincinnati USA Regional Chamber has been recognized as the national chamber of the year.

II. CONCERNS OF THE AMICI CURIAE

This matter presents two critical issues regarding the construction of public improvement projects subject to Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16: (1) whether the labor performed in off-site manufacturing of all materials to be "used in or in connection with" a public improvement project are to be paid at prevailing wages pursuant to R.C. 4115.05; and (2) whether a labor organization has standing as an "interested party" to represent all union and non-union employees in every trade or craft who worked on a public improvement project when only one employee has authorized a labor organization to represent him pursuant to R.C. 4115.03(F) and R.C. 4115.16.

On March 10, 2008, the Ninth District Court of Appeals in a two to one decision (Judge Slaby dissenting), held that all persons performing off-site manufacturing of "materials to be used in or in connection with" a public improvement project are subject to the requirements of Ohio's Prevailing Wage Law, including the payment of applicable prevailing wages. The Ninth District also held that a labor organization, pursuant to R.C. 4115.03(F) and 4115.16, has standing as an "interested party" under Ohio's Prevailing Wage Law to represent all union and non-union employees in every trade or craft who performed work on the public improvement project, even though only one employee had signed a written form authorizing his own representation. In effect, the Ninth District's decision legislates a new type of class action litigation.

The Ninth District Court of Appeals decision is contrary to two well established Ohio Supreme Court decisions,¹ undermines the intent of the legislature, and ignores the precise language of the prevailing wage statute, as well as 74 years of statutory interpretation,

¹ See *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, 125 and *Sheet Metal Workers Local Union 33 v. Mohawk Mechanical*, 86 Ohio St.3d 611, 1999-Ohio-209, 716 N.E. 2d 198.

enforcement and industry practice. The drastic economic effects of the Ninth District's decision are injurious to Ohio businesses, public authorities and publicly funded projects.

The Ninth District is the first Court in the State of Ohio in 74 years to determine 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 standing holding in *Clymer v. Zane* which held that off-site work was not subject to the requirements of Ohio's Prevailing Wage Law. Since the holding in *Clymer* in 1934, no Court or administrative agency, including the Ohio Department of Commerce, the state department currently charged with the enforcement of Ohio's Prevailing Wage Law, or its predecessors, Ohio Bureau of Employment Services and the Bureau of Industrial Relations, have ever held to the contrary, or required prevailing wages to be paid for the off-site preparation, manufacture or fabrication of materials used in a public works projects. Because Ohio's Prevailing Wage Law contains a two year statute of limitations, every contractor, manufacturer, and public authority who has worked on, or authorized construction projects in the last two years, is subject to liability for the underpayment of wages to any employee who has manufactured any material that was "used in or in connection" with a public improvement project.

The erroneous holding of the Ninth District is of great concern to all of the Chambers' manufacturing businesses and construction contractors doing work in Ohio who are members of the multiple Amici Curiae. The impact of this decision on our members would be devastating economically. Simply put, every item that is mixed, fabricated or manufactured off-site that is then delivered and installed at a prevailing wage project will now require that all employees involved in the process be paid building and construction trade prevailing wages. Chamber members will now have to ascertain with each sale whether the product(s) they are supplying are

destined for a prevailing wage project. If that can be ascertained, then the merchant will have to: (1) determine the appropriate trade or craft classification for the work performed to mix or fabricate the product or item involved (R.C. 4115.05); (2) determine which employee(s) performed the work; (3) obtain the wage determination for the project and provide written notification to each employee of their job classification(s), the prevailing wages applicable, separated into the hourly rate of pay and fringe benefit payments and the identify of the prevailing wage coordinator (R.C. 4115.05); (4) for each covered project, the merchant will have to post each wage determination for the duration of each project (R.C. 4115.07); and (5) the merchant will have to prepare and file certified payroll reports for each project covering the time periods during which work activities are covered (R.C. 4115.071(C)).

The impact of these requirements will be mind boggling, onerous and exceedingly costly. Imagine for a moment a fabrication shop that fabricates parts or mixes “materials to be used in” a prevailing wage project, whether it be air ducts, guardrails, wood roof trusses, concrete, cuts sprinkler pipes to specified lengths or simply mixes buckets of paint. Under the Ninth District’s decision, the corner hardware store, Home Depot, a concrete ready mix supplier, a lumber supplier or a fabrication shop – all of which have never had to comply with prevailing wage – will be buried under a sea of paperwork and as a result will likely choose to withdraw from doing business in this new prevailing wage arena. The corner hardware store that mixes a few buckets of paint that are now covered by “material to be used in” a covered project will, among other things, be required to obtain the wage determination for each project it mixed paint and post it for the life of that project. (R.C. 4115.07). It is not difficult to conceive that this could happen five times a week, twenty times a month, two hundred and forty times a year. For a concrete ready mix supplier, the numbers could be even greater. What wall is large enough, at what cost

to post and monitor hundreds of wage determinations? Is it not equally absurd that the employees mixing the paint or the concrete would be served with hundreds of written notifications setting forth their building trades classifications, prevailing wages and the identity of the wage coordinator on hundreds of projects. Will anyone truly know how to accurately keep records of time and properly compensate any off-site work activity such that any employer could prepare a certified payroll report and swear to its accuracy. Given the sporadic nature of the work activity involved, it is submitted that it is impossible. The Ninth Circuit's formulation is patently unworkable and unwieldy.

Further, the decision of the Ninth District would also require prevailing wages to be paid for persons delivering such materials to the public project as the delivery would be considered "upon any material to be used in or in connection with a public work."

As can readily be seen, as a practical matter, Ohio's prevailing wage law was only ever intended to address jobsite work activities and conditions. Posting of the wage determination in a jobsite trailer at a single jobsite is what was intended. Setting prevailing wages based upon traditional construction site work activities in centuries-old recognized construction trades and crafts, not off-site shops and factories, is what Chapter 4115 was intended to reach.

As such, the Ninth District's decision imposes additional substantial and costly burdens upon members of Amici Curiae never intended by the Legislature and will result in the loss of jobs and opportunities for untold numbers of Ohio workers. This is so because contractors would be economically driven to use out-of-state companies rather than Ohio manufacturers and fabricators since this Ohio law is unenforceable in other states or due to the imposition of these onerous requirements, Chambers members will simply have to withdraw from the market.

The second issue presented to this Court for review concerns the broadening of “interested party” standing under R.C. 4115.03(F) and R.C. 4115.16. The Ninth District improperly held that a labor organization has the right to represent every union or non-union employee in every trade or craft who worked on a public improvement project and/or now who manufactured materials for the project when just one employee had authorized a single union to represent that employee’s individual interests. As 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.” (*Id.* at 616). This creation of an “attorney-in-fact” relationship should only apply to the individual employee(s) who authorized the labor organization to represent them. By expanding the definition of interested party, the Ninth District’s decision injures the rights of all Ohio workers performing work on public improvement projects because any employee, without a labor organization, can file a prevailing wage complaint with the Ohio Department of Commerce and the Director must investigate and pursue to collection their claim. The Ninth District’s decision legislates a new class action form of litigation, certainly not within the contemplation of the legislature by virtue of the “authorization” requirement.

Mohawk Mechanical does not impose representation by a union upon employees who neither requested such representation and/or who prefer to represent themselves or select their own attorney. The Ninth District’s decision would give unions the license to undermine this statutory scheme by inserting themselves so that there is a grave potential that the union may proceed with litigation or resolve it on terms that are in the union’s best interests and not the affected employees. The legislature only intended to allow labor unions to bring interested party

actions on behalf of their own members or those employees who expressly authorize the unions to do so by making the union and its attorney their “attorney in fact.”

III. ADOPTION OF THE STATEMENT OF THE CASE AND FACTS

The facts set forth by Appellant are adopted by Amici Curiae.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

- A. **Proposition of Law No. 1:** The Off-Site Manufacturing 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 Applies to Work Performed at and Upon the Jobsite of the Public Improvement Project.

In 74 years since this Court’s decision in *Clymer v. Zane*, research reveals that not a single Ohio Court or Administrative Agency² has held that manufacturers or contractors are required to pay their employees prevailing wages for off-site manufacturing work performed pursuant to R.C. 4115.05.³ The Ninth District simply ignored the fact that for 74 years no court or administrative body has ever imposed this law on off-site work and ignored the practice firmly embedded in

² O.A.C. 4101:9-4-10 (A), “Procedure for requesting wage rate schedules,” provides, “Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have commerce determine the prevailing rate of wages to be paid to laborers, workmen, and mechanics for the class or classes of work called for in the construction of the public improvement.” To date, the Department of Commerce has never issued a wage rate schedule covering off-site manufacturing or fabrication work. Hence, how could a contractor be required to make payment of prevailing wages as required by O.A.C. 4101:9-4-20(A) (An employer shall not pay or permit any worker to accept wages less than the prevailing rate of wages as determined by the director and evidenced by the prevailing wage rate schedule) if such off-site wages were never included in the schedule of wages issued by the Department of Commerce?

³ In the Court below, Local 33 did not present any evidence that *Clymer v. Zane* had been “legislatively overruled” except for a citation to a law review article written by its former legal counsel in this litigation, Ryan Hymore. See *Taylor v. Douglass Co.:Applying Ohio’s Prevailing-Wage Law to Institutions Supported in Whole or in Part by Public Funds*, 37 U. Tol. L. Rev. 497 (2006). In seventy-four years, Mr. Hymore, a law student at the time he published the article, is the only “authority” to ever make the argument that off-site fabrication work is compensable under Ohio’s Prevailing Wage Law or to even suggest that the holding of *Clymer* has been overruled.

and relied upon that such off-site work is not covered. Instead the Ninth District held that this Court's 1934 holding *Clymer v. Zane* was *legislatively superseded* in 1935 by Am.S.B. No. 294 with the addition of the following sentence to the Section 17-4a of the General Code:

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.

There is no legislative history available to explain the Legislature's amendment in 1935, only 74 years of non-enforcement of this provision upon off-site work. All the while the Legislature has continued to make amendments to the prevailing wage statute which has grown from just four paragraphs to over fourteen statutory sections, with a full complimentary administrative code. See R.C. 4115.03 to 4115.16, and 4115.99; O.A.C. 4101: 9-4-01 to O.A.C. 4101: 9-4-28. No provision contained in the administrative code, which is supposed to interpret and supplement the language of the statute, including R.C. 4115.05, even hints that the off-site manufacturing of materials for a public improvement project is subject to prevailing wages.

Moreover, when the Administrative Code was adopted by the Director pursuant to R.C. 4115.12, which allows the Department of Commerce to adopt reasonable rules not inconsistent with the statutory sections regarding the application and administration of Ohio's prevailing wage law, the issue of off-site manufacturing of materials to be used in or in connection with a public works project was never raised or addressed. Before the administrative code was enacted, extensive hearings were held and testimony was taken from members of organized labor, construction industry employer groups and other stakeholders regarding the meaning, intent and interpretation of these statutory sections. If *Clymer* was really overruled by the one sentence added in 1935, one would think that at least one of the building trades unions (or the Department itself) would have

raised the point that off-site manufacturing/fabrication was within the reach and scope of Ohio's prevailing wage law, and subsequently the administrative code would have been drafted to reflect coverage to extend to off-site work. Such was not the case.

To the contrary, the administrative code administered by the Department of Commerce specifically states in various sections that Ohio's Prevailing Wage Law applies only to the jobsite of the public improvement.

O.A.C. 4101:9-4-02 (GG) defines "'subcontractor' to mean any business association hired by a contractor to perform construction on a public improvement or any business association hired by such subcontractor, or any subcontractor whose subcontract derives from the chain of contracts from the original subcontractor.

O.A.C. 4101:9-4-09 (A), Determination of wage rate schedule, explicitly states the director shall determine the prevailing rate of wages to be paid for a legal day's work to employees upon public works.

O.A.C. 4101:9-4-21 (A), Maintenance, preservation, and inspection of payroll records, provides "Each contractor and subcontractor performing work on a public improvement shall keep, maintain for inspection, and preserve accurate payroll records in accordance with these rules. If an employer performs both prevailing wage work and non-prevailing wage work, the records must be capable of being segregated. The employer may segregate such records on an hourly, daily, weekly, work shift, or project basis.

O.A.C. 4101:9-4-21 (C) continues, any records maintained by contractors and subcontractors concerning wages paid each employee or the number of hours worked by each employee on a public improvement shall be made available for inspection by any authorized representative of the contracting public authority, including the project prevailing wage coordinator and commerce, during normal working hours of business days.

O.A.C. 4101:9-4-23, Investigation states, a complaint may be filed with commerce by any employee upon a public improvement or any interested party.

(Emphasis added).

Furthermore, the Ohio Supreme Court's decision in *Clymer v. Zane* was not *legislatively superseded* as the Ninth District held. To the contrary, various Ohio Courts including this Court, as

well as other State Courts have continued to cite *Clymer*, and none have ever indicated this case has been *legislatively superseded*.⁴

1. Statutory Interpretation Mandates that Ohio's Prevailing Wage Law Applies Only to the Site of the Work.

In holding that one sentence added by the legislature in 1935 by Am.S.B. No. 294 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’s subsequent amendment of the statute in 1935 must have been 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 the addition of this sentence to mean.⁵

The clear intent of the legislature provided to this Court is the fact that in 74 years, this one sentence has never been interpreted by any administrative agency or court to require the off-site manufacturing of materials to be subject to Ohio’s Prevailing Wage Law and the Legislature has taken no action to correct this universally accepted interpretation of its 1935 amendment. In fact, R.C. 4115.05 has been amended at least eight times since 1935, and if it was truly the Legislature’s intent to require that the off-site manufacturing work was to be paid at prevailing wages, then the Ohio Legislature has had ample opportunity to revisit and clarify its intent on

⁴ 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. Moreover, until the Ninth District’s decision, Shepard’s Citation Service on Lexis-Nexis is unaware of any negative feedback regarding the holding of *Clymer*.

⁵ Perhaps this sentence was added to address only the specific facts of *Clymer*, in other words, wages of employees working in gravel and batch plants preparing “materials” for road construction work, but was not intended to apply to manufacturing or fabrication of sheet metal work, windows, doors, steel etc. . .

the issue.⁶ The failure of the Legislature to take steps to require that off-site manufacturing work to be paid at prevailing wages, or to have the Ohio Department of Commerce or its multiple predecessor agencies enforce R.C. 4115.05 as the Ninth District has interpreted it, make the present day intent of the Legislature clear.

Contrary to the Ninth District's decision and in 74 years of enforcement of prevailing wage laws, various administrative agencies, Ohio Courts and industry practice has made clear 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. This is because prevailing wages are paid only for time spent performing work on the jobsite of the public project. The intent that prevailing wage law applies only to the jobsite of the public improvement project is clearly demonstrated through various provisions contained in the statutory sections of Ohio's Prevailing Wage Law.

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). Similarly 4115.10 (B) continues, "Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the director upon a form furnished by the director. R.C. 4115.032, "Construction projects to which prevailing wage provisions apply" states, "Construction on any project, facility, or project facility to which section 122.452 [122.45.2], 122.80, 165.031 [165.03.1], 166.02, 1551.13, 1728.07, or 3706.042 [3706.04.2] of the Revised

⁶ GC § 17-4a; 116 v 206; 118 v 587; Bureau of Code Revision, 10-1-53; 128 v 935 (Eff 11-9-59); 131 v 992 (Eff 11-3-65); 135 v H 1171 (Eff 9-26-74); 137 v H 1129 (Eff 9-25-78); 141 v H 238 (Eff 7-1-85); 146 v S 162 (Eff 10-29-95); 148 v H 471. Eff 7-1-2000.

Code applies is hereby deemed to be construction of a public improvement within section 4115.03 All contractors and subcontractors working on such projects, facilities, or project facilities shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code” Even R.C. 4115.05, which the Ninth District relied upon in rendering its decision begins with, “[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).

These sections clearly state that prevailing wages must be paid for construction work performed on the jobsite of the public improvement project and is fully supported by the definition of “construction” contained in R.C. 4115.03(B):

“Construction” means:

(1) Any new construction of any public improvement, the total overall project cost of which is fairly estimated to be more than fifty thousand dollars (“threshold”) adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority.

(2) Any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating of any public improvement the total overall project cost of which is fairly estimated to be more than fifteen thousand dollars (“threshold”) adjusted biennially by the administrator and performed by other than full-time employees who have completed their probationary period in the classified service of a public authority. Construction includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, clean up, landscaping, scaffolding, installation and any other change to the physical structure of a public improvement.

(Emphasis Added). See also, O.A.C. Ann. 4101:9-4-02 (G).

Nowhere in the definition of “construction” is off-site “manufacturing” or “fabrication” of “materials” mentioned or included, but the statute specifically mentions demolition, installation,

clean up, etc. If the off-site manufacturing or fabrication is not mentioned in the definition of “construction” then it must be the intent of the Legislature to exclude this type of work from coverage of Ohio’s prevailing wage law. “Construction” of a “public improvement” are the quintessential elements of any project which triggers coverage of Ohio’s prevailing wage law. The fact that manufacturing and fabrication are excluded from the definition of “construction,” coupled with the fact that various sections of the statute refer to “on” or “upon” a public improvement establishes that prevailing wages are to be paid for construction work performed at the jobsite of the project.⁷

The fact that prevailing wages only apply to the jobsite of the public improvement project is supported by two other sections of the Revised and Administrative Codes.⁸ R.C. 4115.05 and O.A.C. 4101:9-4-13(3) specifically refers to a posting of the schedule of wages, which must be placed at the “site of the work.”⁹ The “site of the work” has been interpreted by two Sixth District decisions to be the jobsite. See *Vaughn Industries, LLC v. DiMech Servs., et al.*, 167

⁷ Furthermore, O.A.C. 4101:9-4-13 defines the “Duties of contractors,” however nowhere contained in the “duty of contractors” is the obligation to pay workers prevailing wages for off-site manufacturing or fabrication work.

⁸ O.A.C. 4101:9-4-13 (3) provides that a contractor shall: “Post in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract for the various occupations of laborers, workmen, and mechanics employed. The notice must remain posted during the life of the contract and must be supplemented in its entirety whenever new wage rate schedules are issued by the department. The schedule must also state the name, address, and phone number of the prevailing wage coordinator.”

R.C. 4115.05, which O.A.C. 4101:9-4-13(3) is derived from similarly states: “There shall be posted in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract to the various classifications of laborers, workers, and mechanics employed, said statement to remain posted during the life of each contract.”

⁹ No court has ever interpreted “site of the work” to mean a fabrication shop or manufacturing facility. Site of the work, like with Davis Bacon provisions has been defined to mean the jobsite of the public improvement project.

Ohio App.3d 634, 643, 2006-Ohio-3381, 856 N.E.2d 312 (“The prevailing rate of wages for a specific jobsite is then set forth in a prevailing wage rate schedule which is posted at the jobsite. That schedule is to include the ratio of apprentices to skilled workers allowed on the jobsite. Ohio Adm.Code 4101:9-4-16(H).”) (Emphasis added); *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries*, 6th Dist. App. No. WD-07-026, 2008-Ohio-2992, ¶41 (the Defendant properly posted the name of the prevailing wage coordinator on the “job box” located at the site of the construction project giving proper written notice of the coordinator’s identity to its employees pursuant to R.C. 4115.05); See also, *Robbins Sound, Inc. v. Ohio University*, 70 Ohio App. 3d 212, 590 N.E.2d 877, 1990 Ohio App. LEXIS 4910 (1990) (Every subcontractor performing work on a public project in this state has an independent duty to ascertain the prevailing wage for such project). If the Ninth District’s decision is sustained, then the Chamber members operating local hardware or other stores or concrete ready mix facilities become the “site of the work” where the bucket of paint or concrete is mixed. That then triggers the onerous imposition of posting hundreds of wage determinations and hundreds of employee wage notifications. It is inconceivable that it was the Legislature’s intent to impose such a burden on off-site businesses. Amici Curiae submit that the language quoted above in Chapter 4115 distinctively directs itself to construction jobsites, where construction trades work is performed, under working conditions unique to construction industry employers and their crafted employees.

The Ninth District did not “narrowly construe” the one sentence contained in R.C. 4115.05 when the Court read this sentence in isolation from the rest of the statute and held that all materials used in a public project are subject to Ohio’s Prevailing Wage Law. When reading R.C. 4115.05 *in pari materia* with the rest of the provisions of Ohio’s prevailing wage statute

(and the Administrative Code), it is clear that prevailing wages apply to the work performed upon a public improvement, i.e. the jobsite, and the Ninth District clearly misinterpreted the language contained in R.C. 4115.05 by reading this one sentence in isolation and concluding that *Clymer* had been *legislatively superseded*.

2. *Clymer v. Zane* is Well Reasoned, Valid and Still the Law in Ohio

The holding and reasoning of *Clymer* remains valid today. In *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E.123, a defendant-contractor was awarded a highway public improvement contract subject to Ohio's Prevailing Wage Law. The defendant-contractor also owned a gravel pit where the plaintiffs were employed in the removal of gravel for use on the highway improvement project. The plaintiff-employees of the gravel pit contended they were employees "upon a public improvement" and thus were entitled to the benefits of the minimum wage law [prevailing wage law]. The Supreme Court of Ohio held against this contention and stated:

To extend the provisions of the statute to all employees who prepare material for a public improvement would be to include within the provisions of the law the employees of a cement factory which makes cement for a public improvement, and the employees of a brick plant which makes paving brick for a public highway, if such cement plant or brick factory is owned or operated by the contractor in charge of the public improvement. Such a construction would likely lead to conflicts with regulations and codes governing wages of other industries. Clearly it was not the intention of the Legislature to extend the provisions [of the prevailing wage law] so far.

Id. at 125.

The Ohio Supreme Court, pointing out that the workers in their testimony had referred to the work at the improvement site as being "out on the road" or at "the job," stressed that the workers did not consider themselves to be employed "upon" the highway improvements, in that they distinguished between their work and the work performed at the site of the improvement.

Moreover, the Court held that the statute, in providing for sanctions against employers, was a penal statute that was required to be construed narrowly. *Id.*

Furthermore, the Court noted other considerations showing that the work at the gravel pit was separate from the operations required under the highway improvement contract. The Court pointed out that the contractor acquired the gravel pit prior to the commencement of work on the improvement, and that the contractor sold more than 8000 tons of material to other construction contractors separate and distinct of the public improvement project at issue. The gravel pit was equipped to produce materials above and beyond that needed for the improvement, and that the contractor maintained ownership of the pit long after the completion of the improvement.

In its opinion, the Ninth District entirely fails to address the *Clymer* Court's analysis of the Legislature's intent and instead, 73 years after the 1935 amendment, propounds a new version out of thin air.

3. Prevailing Wages Applying to Off-Site Manufacturing is Completely Unfeasible, Unworkable and Unenforceable

The complete unfeasibility of the Ninth District's off-site manufacturing holding becomes apparent when attempting to apply it to Ohio's Prevailing Wage Law. As Judge Slaby noted in this dissent:

The majority attempts to limit the practical effects of its holding, but one might fairly ask at what point that fabrication process achieves the 'intimate connection' the majority envisions. Must the fabricator of materials that are incorporated in machines used in job assembly pay the prevailing wage because the machine is ultimately used in connection with the public work? When certain off-site employees are paid for fabrication of materials, how is the fraction of their time spent on those items that become part of a public improvement to be determined and compensated out of an entire working day? Must a contractor now record those fractions of working time spent by off-site employees whose work bears a tangential relationship to material used in public improvements? Simply put, the rule is unworkable.

Gene's Refrigeration, at ¶50. As Judge Slaby observes, the majority's holding will surely lead to confusion in the application of Ohio's Prevailing Wage Law, lead to absurd results and cause more unneeded litigation in this area.

If an employer, whether it be a manufacturer, supplier, or contractor, must pay prevailing wages to its employees for any material that is assembled, manufactured, fabricated, or otherwise constructed "in connection" with a public work the extent of the law under the Ninth District's holding would be endless. Any business dealing with sheet metal products, like the corrugated sheet metal on the exterior of a building or the flashing on roofing systems, would have to pay construction industry wages for off-site sheet metal workers; window manufacturers, cabinet makers, or door manufacturers would have to pay their employees "carpenters prevailing wages;" any manufacturer of material used on the project that was painted or stained in the fabrication process would have to pay its employees "painters prevailing wages;" glass makers for windows or mirrors would pay Glazier's rates; manufacturers of air conditioning units, boilers or heaters would pay millwright, electrician, pipe fitter, and sheet metal rates; the list is virtually endless. This effect would lead to conflicts with collective bargaining agreements negotiated in the other industries beside construction, and would lead to conflicts with federal labor laws. Furthermore, it would undermine the industrialized system of collective bargaining agreements, job classifications and other duties negotiated by industrial/manufacturing labor unions for decades.

Given the sound reasoning in *Clymer* and reading R.C. 4115.05 *in pari materia* with the rest of the provisions of Ohio's prevailing wage statute, including the administrative code, the Ninth District clearly misinterpreted the language contained in R.C. 4115.05 by reading this one sentence in isolation and concluding that *Clymer* had been *legislatively superseded*. Based upon

the explicit language of the statute when read as a whole, industry practice and enforcement of this law in 74 years, and the sound and affirmed reasoning of *Clymer*, 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.

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. Reversing the Ninth District’s decision does not change the status of the law in Ohio it simply returns the law to the status quo as it has been enforced in the last 74 years.¹⁰ It is respectfully requested that this first Proposition of Law No. 1 should be adopted by the Court.

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

Ohio’s Prevailing Wage Law, pursuant to R.C. 4115.03(F) and R.C. 4115.16, grants standing to an “interested party” to file a complaint on behalf of an employee to enforce his

¹⁰ If the decision of the Ninth District is upheld, every public authority could be responsible for underpayments owed to manufacturing and fabrication employees who performed work off-site and where not paid prevailing wages. R.C. 4115.05 states “If the director determines that a contractor or subcontractor has violated sections 4115.03 to 4115.16 of the Revised Code because the public authority has not notified the contractor or subcontractor as required by this section, the public authority is liable for any back wages, fines, damages, court costs, and attorney’s fees associated with the enforcement of said sections by the director for the period of time running until the public authority gives the required notice to the contractor or subcontractor.” No public authority has notified any contractors that wages have to be paid for off-site manufacturing or fabrication work.

rights.¹¹ However, contrary to Ninth District holding, Ohio's Prevailing Wage Law does not allow an interested party to pursue claims on behalf of any employee who has not "authorized" such action or representation. To allow an "interested party" to pursue and enforce claims on behalf of other Gene's employees or employees of other employers working at the jobsite who did not authorize the lawsuit violates this Court's holding in *Mohawk Mechanical*, the legislature's intent, and the right of every employee to select his/her own "attorney-in-fact."

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 alleged underpayments for work they performed on a public improvement project. *Id.* at 613. After the lawsuit was filed, three other Mohawk employees who also worked "on the public project" signed Local 33's authorization forms. *Id.* 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 three employees in the trial court. *Id.* at 613.

¹¹ A labor organization acting as an interested party may also sue to enforce provisions of Ohio's Prevailing Wage Law if the labor organization "has as members" employees of a contractor who submitted a losing bid on a public improvement project awarded to another contractor. R.C. 4115.03(F)(3). See *Lovsey v. Morris Sheet Metal, Inc.* (Jul. 24, 1985), 4th Dist. App. No. 1242, 1985 Ohio App. Lexis 6903, (R.C. 4115.03 to 4115.16 provides a scheme to establish wage rates for public construction projects in keeping with those in the private sector. To ensure no discrimination between union and non-union contractors in the bidding process, all contractors are required to pay the same hourly rates as those paid to union workers under collective bargaining agreements). This is done to protect the competitive bidding process with regards to other contractors who are signatory with the union and who are bidding on public projects. However, when a contractor's employee brings an action, the action is exclusively brought in relation to the rights of that particular employee, i.e. to collect underpayments in wages. See R.C. 4115.10; and *Mohawk*, discussed supra. In the instant matter, no union contractor submitted a bid on the Project at issue. There is no competitive bidding claim at issue in this litigation. Local 33's entire standing argument is precariously perched on Mr. Cherfan's authorization form, a Gene's employee who never set foot of the jobsite of the Project.

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.

This Court's reasoning in *Mohawk* for limiting Local 33's representation to only those employees who authorized the union to file suit on their behalf is sound. Allowing a labor organization to bring a prevailing wage complaint on behalf of employees who did not authorize the union to represent them would violate their inherent right to select their own legal counsel, and would further violate their rights under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.¹² The National Labor Relations Act specifically grants every employee the right to accept or reject union representation; any law which would conflict with this right would be preempted. *Id.*

¹² 29 U.S.C. § 157 states, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]."

The Third District Court of Appeals in *International Asso. of Bridge, etc. Local Union 290 v. Ohio Bridge Corp.* (1987), 32 Ohio App. 3d 18, 20, 513 N.E.2d 358, reasoned like this Court in *Mohawk*, that labor organizations under Ohio's Prevailing Wage Law are only "authorized" to represent employees who have specifically authorized the representation:

We find no legislative intent that the union's own bylaws or constitution can be asserted to "authorize" the Union's representation of non-union employees working on a construction site which itself has no relation to the union, statutory or otherwise. The term "authorize" is not defined in the statute. Therefore, the common meaning associated with the term must be employed. The term "authorize" requires some sort of active delegation of rights. Black's Law Dictionary (5 Ed. 1979) 122 defines "authorize" as "To empower; to give a right or authority to act. To endow with authority or effective legal power, warrant, or right" **Thus, based on common meaning, the Union's own constitution cannot be used to "authorize" the Union's representation of individuals who have not sought such representation. To hold otherwise would permit any union to "bootstrap" itself into the position of an "interested party."**

(Emphasis added).

Following the same logic and reasoning employed in *Mohawk* and *Ohio Bridge Corp.*, Local 33 only has standing as an "interested party" in the instant matter to file a prevailing wage complaint on behalf of the single Gene's employee who signed an authorization form. It is undisputed that Local 33 only obtained one authorization form from Mr. Cherfan, a Gene's employee who worked exclusively in Gene's off-site fabrication shop. Mr. Cherfan never worked on the jobsite of the public improvement Project at issue. To allow the Ninth District's interpretation of R.C. 4115.03(F) to stand, would allow an authorization from a single employee, in a single construction company to effectively authorize the representation of hundreds of union and non-union employees from numerous companies at a project and make a single labor union their unwitting "attorney-in-fact."¹³ Based upon the holding in *Mohawk*, and the language used

¹³ A union acting as an attorney-in-fact has unlimited and unrestricted power to settle lawsuits for whatever is in the best interests of the union. A union may settle a prevailing wage case for

in the statute, Ohio Law is clear and it is logical that a labor organization only has standing as an interested party to pursue a prevailing wage complaint on behalf of the employee(s) who authorized the action, not every employee, and not from every trade or craft employed at the project.

Furthermore, if the Ninth District's interpretation of *Mohawk* and the statute are correct, why would this Court have bothered mentioning the three Mohawk Mechanical employees who authorized Local 33's representation after the lawsuit was filed? Why did the Court continuously use the terms "on their behalf" and "to represent them," when describing the prevailing wage complaint authorized by six Mohawk employees? Given the content of the dissent in *Mohawk Mechanical* by Chief Justice Moyer, with Justices Cook and Lundberg Stratton concurring, most assuredly that dissent would have included a dissent to the majority opinion if that majority opinion had also held that a single employee authorization grants a single union standing and authority to represent all other union and non-union employees from all other trades or crafts. The holding by

attorney's fees or in return for the employer signing a collective bargaining agreement, and never the collect or ensure that back pay is paid for any affected employees. These employees under Ohio law have absolutely no recourse against the union, and would be effectively precluded from filing a prevailing wage complaint under the doctrine of res judicata simply because the law was read to allow the union to represent these unwilling employees' interests in lawsuits. Having litigated prevailing wage cases, it is the experience of the undersigned that the true interests of the Union in filing prevailing wage lawsuits are not in line with the interests of non-union employees who performed work on a project covered by prevailing wage.

In *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 92 (Ohio 1982), this Court held that above all else, the primary purpose of the prevailing wage law was to "support the integrity of the collective bargaining process by preventing the undercutting of wages in the private construction sector." However, non-union employees who choose not to be in any union have little or no concern for collective bargaining or its integrity. On the other hand, Union's have as their primary goal, the representation of the interests of their members – not the interests of non-union employees or union members from other trades or crafts who have never authorized a union they mindfully chose not to join. The opportunity for disservice to these non-union employees by the unions through the Ninth District's decision is at once apparent and substantial.

the Ohio Supreme Court purposefully articulates that a union only has standing to represent employee(s) who affirmatively authorize such representation in their particular trade or craft.

The Legislature did not intend to allow an “interested party” labor organization 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 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. 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.¹⁴

¹⁴ The Ninth District’s decision and a recent Sixth District’s decision in *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1581 v. Edgerton Hardware Co., Inc.* 2007-Ohio-3958, 2007 Ohio App. LEXIS 3602 have effectively expanded the definition of “interested party” to allow any labor organization of any trade jurisdiction to file a complaint against any contractor performing work on a project. See also *Ohio State Ass’n or the United Ass’n of Journeyman & Apprentices of the Plumbing & Pipefitting Indus. v. Johnson Controls, Inc.* (1997), 123 Ohio App.3d 190, 703 N.E.2d 861, 864 where the Eighth District Court of Appeals stated a labor organization is given standing to bring a complaint on behalf of any person who is not paid the prevailing wage.

Hence, a labor organization representing plumbers could sue a contractor performing carpentry work on a prevailing wage project for prevailing wage violations. This Plumbers Union will be effectively representing employees performing carpentry work. This cannot be what the Legislature or the *Mohawk Mechanical* Court intended as the labor union bringing the complaint should be required to possess some expertise regarding the particular trade or craft work being performed. For example, plumbers and carpenters have different wage rates, perform completely different work and have different work rules. How could one union call itself an “expert” and be given the legal authority to represent employees performing work in a completely different trade when the labor organization knows little about the specific trade work being performed or the collective bargaining agreement involved? Moreover, what if the Carpenters Union obtains an

The Ninth District's decision permits a single union based upon a single employee's authorization to bring a class action lawsuit. A single union has inherent conflicts of interest with the interests of employees who have chosen to be non-union, as well as with employees who choose to be members of different labor unions. In either case, the union that takes on this class representation can hardly, fairly and adequately represent the interests of this broad and diversified multi-trade group of union and non-union employees. The ethical issues for the union and its attorney are substantial, particularly when this new class action is rooted in Chapter 4115, which was not designed to accommodate the substantive and procedural complexities inextricably intertwined with class action litigation. Thus, the simple, but necessary obtaining of employee authorizations to establish the attorney/client relationship envisioned by the *Mohawk* Court is readily apparent. It is submitted that the statutory creation of an "interested party" by the Legislature, as interpreted by the *Mohawk* Court, was not with the intent to create a new form of unprotected and unregulated class action litigation.

The status of the law before the Ninth District's expansive holding sufficiently protects any employee's interest whom elects union representation. In essence any labor organization, acting as an "interested party" would be allowed pursuant to R.C. 4115.03(F) and 4115.16 after receiving a signed authorization card, to "step into the shoes" of the employee and bring a complaint on his/her behalf. R.C. 4115.10 provides the remedy for employees under Ohio's

authorization as well? Will the Carpenters Union, at odds with the Plumbers Union, also claim to represent all the employees of the Project, including persons performing plumbers work?

Interested parties should be limited to: (1) representing only those employees performing work in that union's trade or craft and who specifically authorize the union's representation; and (2) when standing is achieved by virtue of a contractor who merely submitted a bid on the project, then, the labor organization should be limited in being only able to enforce the prevailing wage law with respect to that labor organization's specific trade jurisdiction, i.e. the plumber's union filing complaints against contractors doing plumbing work on the project, the electrician union files against contractors doing electrical work on the project, etc. . . .

Prevailing Wage Law, to receive back pay resulting from underpayments of the prevailing wage. 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. The employee may file suit for recovery. . .” (Emphasis added.) See generally, *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.*, (1988), 36 Ohio St. 3d 74; 521 N.E.2d 809, 812. Union representation should not be forced upon union or non-union employees who do not request it. More so, without unsolicited union representation, any employee may file a confidential complaint with the Ohio Department of Commerce who will enforce their rights under the law.¹⁵

There is no need to read Ohio’s Prevailing Wage Law more broadly. In fact, reading the statute more broadly will lead to conflicts and confusion in the law. For instance, what happens if two different employees working for the same company were to authorize two separate unions to represent them? According the Ninth District both unions would have the unlimited right to sue the same employer and all employers on the project claiming to represent all employees performing all work on the project. How could a case like this be resolved or litigated? Which union would have the authority to settle claims? The Ninth District’s holding regarding interested party standing is simply unworkable.

The Ninth District’s decision regarding the union’s interested party standing is unduly expansive, contrary to the Legislature’s intent and is clearly erroneous in light of this Court’s

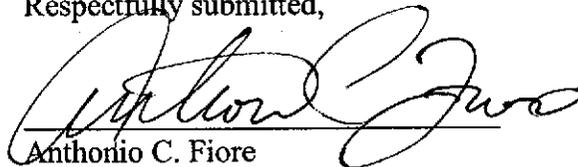
¹⁵ The Director of the Ohio Department of Commerce may bring a claim against a contractor for any violation of Ohio’s Prevailing Wage Law at anytime. See R.C. 4115.13; see also *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 550 N.E.2d 461. Contrary to Local 33’s assertions, the Department of Commerce, not an interested party, is charged with the enforcement of Ohio’s Prevailing Wage Law and the collection of underpayment for all affected employees.

holding in *Mohawk*. As such, “interested party” standing by labor organizations should be limited to representing only those employees who specifically authorize the representation. Gene’s Proposition of Law No. 2 should be adopted by the Court.

V. **CONCLUSION**

The decision of the Ninth District Court of Appeals is fundamentally wrong and has turned 74 years of prevailing wage law interpretation and application on its head. In light of the lack of any legislative history to support any aspect of the Ninth District’s decision, together with this Court’s decisions in *Clymer* and *Mohawk*, it is submitted that the Union’s lawsuit is unreasonable and without foundation. The Ninth District’s decision has introduced confusion and absurdity into what was otherwise well established principles of law. As such, it is respectfully requested that the Ninth District decision should be reversed in total and the Propositions of Law adopted.

Respectfully submitted,



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