

IN THE SUPREME COURT OF OHIO

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

Plaintiff-Appellee, :

v. :

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

Defendant-Appellant. :

Case No. 2008-0780

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

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**BRIEF OF *AMICUS CURIAE*, THE OHIO STATE BUILDING AND CONSTRUCTION  
TRADES COUNCIL, AFL-CIO, IN SUPPORT OF APPELLEE**

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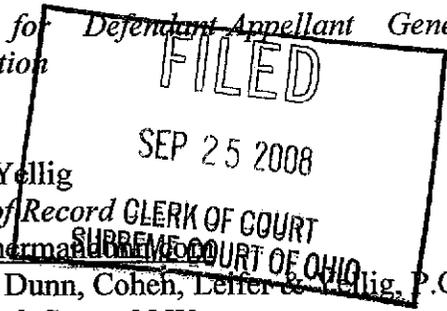
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## INTRODUCTION

Amicus Curiae, The Ohio State Building and Construction Trades Council, AFL-CIO (“Council”), is a statewide organization representing construction trades unions throughout the State of Ohio. There are approximately 100,000 union construction tradesmen engaged in construction throughout the state.

The Ohio Prevailing Wage Law, R.C. 4115.03 *et seq.*, has for many decades protected the private sector collective bargaining agreements of union construction tradesmen by preventing the undermining of the collective bargaining process, *i.e.*, limiting the potential for the slashing of wage rates on public construction. *State, ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91. See also *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26. The law was enacted as a means of fostering and encouraging collective bargaining as the preferred method of resolving labor disputes. *State, ex rel. Evans v. Moore*, 69 Ohio St.2d at 91. The Council's interest in cases dealing with the Prevailing Wage Law is well documented by its participation in numerous such cases before this Court. See *State, ex rel. Evans v. Moore, supra*; *State v. Buckeye Elec. Co.* (1984), 12 Ohio St.3d 252; *State, ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198; *Harris v. Van Hoose, supra*; *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations* (1991), 61 Ohio St.3d 366; *Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations* (1992), 63 Ohio St.3d 512; *Harris v. Atlas Single Ply Sys., Inc.* (1992), 64 Ohio St.3d 171; *U.S. Corrections Corp. v. Ohio Dep't of Indus. Relations* (1995), 73 Ohio St.3d 210; *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St.3d 346, *cert denied* (1998), 525 U.S. 871; *Sheet Metal Workers' Int'l Ass'n, Local Union No. 33 v. Mohawk Mech., Inc.* (1999), 86 Ohio St.3d 611, 1999-Ohio-209.

## STATEMENT OF THE CASE AND THE FACTS

The facts in this case are not in dispute, and indeed, were largely stipulated by the parties herein. Supp. at 94-97. Defendant-Appellant Gene's Refrigeration, Heating & Air Conditioning, Inc. ("Gene's Refrigeration") is a mechanical contractor with its principle place of business in Medina, Ohio. Gene's Refrigeration submitted a bid for work on the Granger Fire Station located in Medina County. The Granger Fire Station project ("Project") is a "public improvement" as that term is defined in R.C. 4115.03(C). The parties agreed that the prevailing wage law, R.C. 4115.03, *et seq.*, applied to the construction of the Project.

Gene's Refrigeration was awarded a contract for work on the Project and, in fact, performed work on the Project. One of Gene's Refrigeration's employees, Elie Cherfan ("Cherfan"), performed work on the Project by fabricating duct work to be installed on the Project by other Gene's Refrigeration employees. Cherfan performed his work at Gene's Refrigeration's workshop, which was not located on the Project site. It is undisputed that Cherfan and the other workshop employees fabricating materials for installation on the Project were paid less than the prevailing rate of wages.

Plaintiff-Appellee Sheet Metal Workers' International Association, Local Union No. 33 ("Local 33") is a "bona fide organization of labor . . . which exists in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees." R.C. 4115.03(F)(3). Cherfan authorized Local 33 to represent him "in all matters pertaining to my claims regarding any and all prevailing wage issues, pursuant to any federal and/or state law." Supp. at 66.

On July 12, 2005, Local 33 filed, as an "interested party," see R.C. 4115.03(F) and 4115.16(A), an administrative complaint with the Ohio Department of Commerce, Division of

Labor and Worker Safety, Bureau of Wage and Hour, asserting that Gene's Refrigeration had failed to pay its employees on the Project the prevailing rates of wages as required by the prevailing wage law. The Director of the Department of Commerce did not rule on the merits of the complaint within sixty days and, accordingly, on September 16, 2005, Local 33 instituted an action in the Court of Common Pleas for Medina County seeking enforcement of the prevailing wage law on the Project. See R.C. 4115.16(B). Specifically, Local 33 alleged that Gene's Refrigeration had underpaid its employees, including Cherfan, who had performed work on the Project by fabricating materials in Gene's Refrigeration's workshop for installation on the Project.

The parties filed cross-motions for summary judgment, and the matter was referred to a magistrate. On April 27, 2006, the magistrate issued a decision holding that Local 33 had "standing to pursue this action only on behalf of Elie Cherfan," and that "the shop work performed by Cherfan off site from the public improvement project known herein as the Granger Fire Station Project is not subject to the prevailing wage law." *Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.* (Medina C.P. April 27, 2006), No. 05CIV1249. See Appendix to Appellant's Brief at 34, ¶¶ 5-6. On June 9, 2006, the trial court overruled the parties' objections to the magistrate's decision and entered judgment in favor of Gene's Refrigeration. *Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.* (Medina C.P. June 9, 2006), No. 05CIV1249. See Appendix to Appellant's Brief at 32. Local 33 thereafter timely appealed.<sup>1</sup>

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<sup>1</sup>The Court of Appeals for Medina County, Ninth Appellate District, dismissed the initial appeal because the trial court's judgment entry "fail[ed] to independently enter judgment as to the parties' motions for summary judgment." *Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.* (Medina App. Aug. 4, 2006), No.

On appeal, the Court of Appeals for Medina County, Ninth Appellate District, reversed. The court held that Local 33 had standing "to file a prevailing wage complaint with respect to the entire project and any and all violations with respect to any and all of Gene's employees," *Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.* (Medina App. March 10, 2008), No 06CA0104-M, 2008-Ohio-1005 at 10, ¶ 22, and that the prevailing wage law "expressly provides for the payment of the prevailing rate of wages to employees who fabricate materials to be used in or in connection with a public work." *Id.*, 2008-Ohio-1005 at 17, ¶ 39. See Appendix to Appellant's Brief at 13, 19. Gene's Refrigeration thereafter timely sought the review of this Court, which granted the jurisdictional motion on July 9, 2008. *Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.* (2008), 118 Ohio St.3d 1505, 2008-Ohio-3369.

### ARGUMENT

#### Amicus Curiae's Proposition of Law No. 1:

**PURSUANT TO R.C. 4115.16, AN "INTERESTED PARTY" MAY FILE ADMINISTRATIVE AND JUDICIAL COMPLAINTS ALLEGING ANY AND ALL VIOLATIONS OF THE PREVAILING WAGE LAW ON A PUBLIC IMPROVEMENT PROJECT, AND IS NOT LIMITED TO SEEKING RELIEF ONLY FOR THOSE EMPLOYEES WHO HAVE EXPRESSLY AUTHORIZED THE INTERESTED PARTY TO REPRESENT THEM.**

Gene's Refrigeration and its *amici curiae* urge this Court to restrict the enforcement of the prevailing wage law by severely limiting the standing of interested parties to seek redress for violations of the law. Gene's Refrigeration's position is supported neither by the plain language

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06CA0053-M, slip op. at 1. See Appendix to Appellant's Brief at 30. On remand, the trial court again entered judgment in Gene's Refrigeration's favor, and additionally denied Gene's Refrigeration's motion for attorneys fees. *Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.* (Medina C.P. Nov. 22 & 29, 2006), No. 05CIV1249. See Appendix to Appellant's Brief at 27-29. Local 33 again appealed to the Ninth District Court of Appeals.

of the prevailing wage law itself nor the precedent of this Court. This Court should, therefore, reject the arguments advanced by Gene's Refrigeration and its *amici curiae* and affirm the decision of the court below.

"R.C. Chapter 4115 provides a comprehensive statutory procedure for effecting compliance with the prevailing wage law through administrative and civil proceedings." *State, ex rel. Harris, v. Williams*, 18 Ohio St.3d at 200. See also *Van Hoose*, 49 Ohio St.3d at 26.

R.C. 4115.03 to 4115.16 set forth requirements relating to the payment of the prevailing wage on public works projects, and also provide a comprehensive framework for securing compliance with such provisions. R.C. 4115.032, 4115.071(D), 4115.14 and 4115.15 relate to the authority of the department to take action to secure compliance with the prevailing wage laws. R.C. 4115.10 and 4115.13 relate to the authority of the department to bring actions to obtain compensation for employees who were paid less than the prevailing wage. R.C. 4115.16 provides a procedure whereby certain adversely affected parties may institute proceedings to secure compliance and compensation when the department has failed to take appropriate action. The foregoing sections provide a comprehensive and uniform system under which the department is initially responsible for securing compliance and compensation through administrative and civil proceedings.

*State v. Buckeye Electric Co.*, 12 Ohio St.3d at 253.

This Court has firmly rejected interpretations of the prevailing wage law that restrict the available means of its enforcement. *Harris v. Van Hoose, supra*. "Clearly, the legislative intent is to enforce claims for prevailing wage violations, *even where the affected worker fails to act.*" *Van Hoose*, 49 Ohio St.3d at 27 (emphasis added). In *Van Hoose*, the Court rejected an argument similar to the argument advanced by Gene's Refrigeration: if a single employee commenced suit or assigned his prevailing wage claims to the Director for enforcement, the Director should be foreclosed from seeking redress for violations relating to other employees on the project. In rejecting this argument, the Court refused to adopt a "construction of the statute [that] would eviscerate the legislative intent." *Id.*

If a single employee were to sue or assign a claim, the employer would escape liability for the claims of all other employees. Thus, if a contractor employing a hundred workers on a public improvement violated the prevailing wage law, and only one of those workers sued or assigned the claim, the other ninety-nine claims would not be enforced. The General Assembly could not have intended to shackle the director's authority in a manner which would make enforcement of claims more difficult on larger projects, where the need to ensure compliance is greatest.

*Van Hoose*, 49 Ohio St.3d at 27.

The Court revisited the enforcement of the prevailing wage law in 1999 when it rejected a construction of the statute that would have limited the ability of "interested parties" to seek enforcement. *Sheet Metal Workers' Int'l Ass'n, Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611. In doing so, the Court considered the same statutory provisions at issue herein. R.C. 4115.16 provides, in pertinent part:

(A) An interested party may file a complaint with the director of commerce alleging a violation of sections 4115.03 to 4115.16 of the Revised Code. \* \* \*

(B) If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director. Contemporaneous with service of the complaint, the interested party shall deliver a copy of the complaint to the director. Upon receipt thereof, the director shall cease investigating or otherwise acting upon the complaint filed pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, *shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director. The court may order the director to take such action as will prevent further violation and afford to injured persons the remedies specified under sections 4115.03 to 4115.16 of the Revised Code.* Upon receipt of any order of the court pursuant to this section, the director shall undertake enforcement action without further investigation or hearings.

R.C. 4115.16(A) & (B) (emphasis added). The term "interested party" is defined in R.C. 4113.03(F):

(F) "Interested party," *with respect to a particular public improvement*, means:

(1) Any person who submits a bid for the purpose of securing the award of a contract for construction of the public improvement;

(2) Any person acting as a subcontractor of a person mentioned in division (F)(1) of this section;

(3) *Any bona fide organization of labor which has as members or is authorized to represent employees of a person mentioned in division (F)(1) or (2) of this section and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees;*

(4) Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section.

R.C. 4115.03(F) (emphasis added).

In *Mohawk Mechanical, Inc.*, the Court concluded that a labor organization was not required to represent employees in collective bargaining to qualify as an "interested party" under the prevailing wage law:

There is not even a hint of a requirement in the statute that the labor organization be a party to a collective bargaining agreement with the employer in question. The statute states that the labor organization must exist, in whole or in part, for the purpose of negotiating with employers, not "the employer in question." The statute speaks in a general sense, ensuring that the labor organization in its normal course concerns itself with the stuff of the prevailing wage statute. Bargaining about wages and hours just has to be something that the labor organization normally does. This provision ensures that employees will have their rights defended by an organization with some expertise. \* \* \*

The statute does not require that a majority of employees authorize the representation. Employees of Mohawk took affirmative acts to authorize Local 33 to file a complaint on their behalf. Local 33 claims that the union received oral authorization from Mohawk employees to represent them in the prevailing wage complaint. While verbal authorization may be enough under the terms of the statute to allow a union to file a complaint, the record is devoid of any evidence of such authorization. However, 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. That action cured any jurisdictional defect that may have been present.

*Mohawk Mechanical, Inc.*, 86 Ohio St.3d at 614.

Gene's Refrigeration's attempt to limit the enforcement of the prevailing wage to a single employee runs counter to the Court's decisions in *Van Hoose* and *Mohawk Mechanical, Inc.* In *Van Hoose*, the Court properly observed that "the legislative intent is to enforce claims for prevailing wage violations, even where the affected worker fails to act" so that employers cannot "escape liability for the claims of all other employees." *Van Hoose*, 49 Ohio St.3d at 27. To hold otherwise "would make enforcement of claims more difficult on larger projects, where the need to ensure compliance is greatest." Indeed, the Court of Appeals' ruling herein is entirely consistent with both this legislative intent and the plain wording of the statute, which provides that a contractor, subcontractor, trade association, or labor organization becomes an interested party "with respect to a particular public improvement." R.C. 4115.03(F).

In addition to the court below, several other courts have interpreted R.C. 4115.03(F) and 4115.16 to vest interested parties with broad authority to seek enforcement of the prevailing wage law. In *Ohio State Ass'n of United Ass'n of Journeymen & Apprentices v. Johnson Controls, Inc.* (Cuyahoga App. 1997), 123 Ohio App.3d 190, *jurisdictional motion overruled* (1998), 81 Ohio St.3d 1443, the Court of Appeals for Cuyahoga County, Eighth Appellate District, considered the very issue now before this Court—whether a "union has standing to sue under the prevailing wage law on behalf of nonunion employees . . . who did not authorize the union to file suit on their behalf." *Ohio State Ass'n*, 123 Ohio App.3d at 194.

Given the purpose of the prevailing wage law, labor organizations have standing to ensure that contractors pay the prevailing wage on public improvements. Contrary to appellant's arguments, a labor organization is given standing to bring a complaint on behalf of any person who is not paid the prevailing wage. To accept appellant's position would limit a labor organization's standing to only complain where its membership were not paid the prevailing

wage. This position is antithetical to the purpose of the prevailing wage law as well as to the plain meaning of R.C. 4115.03(F).

In this case, appellee's membership was employed by subcontractors who performed work [on the public improvement project]. Accordingly, pursuant to R.C. 4115.03(F), appellee was an interested party entitled to bring a complaint to the [Director] and subsequently had standing to initiate this lawsuit.

*Ohio State Ass'n*, 123 Ohio App.3d at 194.

Similarly, in *United Bhd. of Carpenters & Joiners of Am., Local Union No. 1581 v. Edgerton Hardware Co.* (Williams App. Aug. 3, 2007), No. WM-06-017, 2007-Ohio-3958, the Court of Appeals for Williams County, Sixth Appellate District, rejected the assertion that a labor organization was limited to seeking redress for prevailing wage violations for only those employees performing work within the labor organization's particular craft:

"Any" is defined as "one or some indiscriminately of whatever kind" and is "used to indicate one selected without restriction." As applied to the present case, and keeping in mind the legislative intent in enacting prevailing wage law, the uncontroverted evidence offered by Local 1581, which is any (of whatever kind) labor organization, establishes that its members work for Duerk Construction Company, that is, any (of whatever kind) person. Duerk Construction Company submitted a bid on a contract for the construction of a city hall in Holiday City, Williams County, Ohio. Consequently, Local 1581 is an "interested party" within the meaning of R.C. 4115.03(F) and has the standing required to pursue administrative and civil remedies under R.C. 4115.16.

*Edgerton Hardware Co.*, 2007-Ohio-3958 at 7, ¶ 19 (citation omitted). See also *Pipefitters Union Local 392 v. Kokosing Constr. Co.* (Hamilton App. Aug. 23, 1996), Nos. C-950220 & C-950234, 1996 WL 482932 at \*2 ("The definition of 'interested party' is broad enough to include a labor organization whose members worked on the construction of the public improvement even though those members were working for a contractor who bid on a bid package that did not include the work in dispute.").

As noted by the court in *Edgerton Hardware Co.*, the attempt to limit enforcement of the prevailing wage law is contrary to the plain wording of the statute. As noted above, an

"interested party" includes "[a]ny bona fide organization of labor which has as members or is authorized to represent employees of a" contractor or subcontractor submitting a bid for work on the public improvement project "and which exists, in whole or in part, for the purpose of negotiating with employers concerning the wages, hours, or terms and conditions of employment of employees." R.C. 4115.03(F)(3). Local 33 unquestionably fits within this definition—it is authorized to represent an employee of Gene's Refrigeration, a contractor that submitted a bid for, and was awarded, a contract on the Project. Gene's Refrigeration does not argue otherwise.

Instead, Gene's Refrigeration asserts that, notwithstanding Local 33's qualification as an "interested party," Local 33 is limited to enforcing the claims of only those employees it represents. This limitation is not found anywhere in the prevailing wage law. Indeed, R.C. 4115.16(A) provides that "[a]n interested party may file a complaint with the director of commerce alleging a violation of sections 4115.03 to 4115.16 of the Revised Code." This provision sets forth no restriction on the breadth of an interested party's administrative complaint or on the violations such an interested party may assert.

Similarly, R.C. 4115.16(B) sets forth no restriction on the breadth of an interested party's judicial complaint or on the violations it may allege therein, should the Director fail to rule on the merits of the administrative complaint within sixty days. Indeed, in such cases, trial courts are commanded to "make such orders as will *prevent further violation and afford to injured persons* the relief specified under sections 4115.03 to 4115.16 of the Revised Code." R.C. 4115.16(B) (emphasis added). In addition, the courts "may order the director to take such action as will *prevent further violation and afford to injured persons* the remedies specified under sections 4115.03 to 4115.16 of the Revised Code." Awarding relief to Cherfan, while denying relief to all other employees on the Project, does not accomplish this goal. In fact, such a narrow

construction would allow employers to repeatedly escape liability for the vast majority of their violations when only one or two employees on a large project authorize a labor organization to pursue prevailing wage claims on their behalf.

The construction advanced by Gene's Refrigeration is the very kind of narrowing construction rejected by the Court in *Van Hoose* and runs counter to the legislative intent to enforce all claims for violations of the prevailing wage law, even when the individual employees fail to act. Accordingly, this Court should affirm the decision of the Court of Appeals for Medina County, Ninth Appellate District.

**Amicus Curiae's Proposition of Law No. 2:**

**THE PREVAILING WAGE LAW REQUIRES THE PAYMENT OF PREVAILING WAGES "TO LABORERS, WORKERS, OR MECHANICS, UPON ANY MATERIAL TO BE USED IN OR IN CONNECTION WITH A PUBLIC WORK," AND THAT REQUIREMENT APPLIES TO OFF-SITE WORKSHOP EMPLOYEES WHO ENGAGE IN THE CUSTOMIZED FABRICATION OF MATERIALS FOR INSTALLATION ON A PUBLIC IMPROVEMENT PROJECT.**

The Court of Appeals herein held that the prevailing wage law "expressly provides for the payment of the prevailing rate of wages to employees who fabricate materials to be used in or in connection with a public work." *Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 2008-Ohio-1005 at 17, ¶ 39. In an effort to convince this Court that the lower court erred in so holding, Gene's Refrigeration and its *amici curiae* ignore the plain wording of the statute and paint a completely inaccurate picture of the consequences of that holding. Gene's Refrigeration's arguments are without merit, and this Court should, therefore, affirm the decision of the Court of Appeals herein.

"In construing a statute, a court's paramount concern is the legislative intent." *State, ex rel. Moss v. Ohio State Highway Patrol Retirement Sys.* (2002), 97 Ohio St.3d 198, 201, 2002-

Ohio-5806 at ¶21. "A court must look to the language and purpose of the statute in order to determine legislative intent." *State v. Cook* (1998), 83 Ohio St.3d 404, 416, 1998-Ohio-291, *cert. denied* (1999), 525 U.S. 1182. See also *In re Adoption of Baby Boy Brooks*, (Franklin App.), 136 Ohio App.3d 824, 828 ("[T]he court must first look to the plain language of the statute itself to determine the legislative intent.") (citation omitted), *appeal denied* (2000), 89 Ohio St.3d 1433. When construing a statute, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. See also *State, ex rel. Solomon v. Board of Trustees* (1995), 72 Ohio St.3d 62, 65, 1995-Ohio-172 ("Words used in a statute must be taken in their usual, normal or customary meaning.") (citation omitted); *John Ken Alzheimer's Center v. Ohio Certificate of Need Review Bd.* (Franklin App. 1989), 65 Ohio App.3d 134, 138. A court "is not permitted to read words into or out of that statute but must accept the enactment of the General Assembly as it stands." *State v. Stevens* (1954), 161 Ohio St. 432, 435. See also *State, ex rel. Solomon*, 72 Ohio St.3d at 65.

In *Clymer v. Zane* (1934), 128 Ohio St. 359, this Court determined that employees at a gravel pit that supplied gravel for use in a public highway construction projection were not employed "upon a public improvement," and were not, therefore, subject to the requirements of the prevailing wage law as it was then written. At the time of the *Clymer* decision, Gen. Code § 17-6 required the payment of prevailing wages only to "employee[s] upon any public improvement." (emphasis added).<sup>2</sup> In reaching its conclusion, the Court noted that the gravel pit employees "were not employees upon a public improvement," and to hold otherwise would be to ignore the plain language of the statute:

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<sup>2</sup>The provisions of Gen. Code § 17-6 are now generally found in R.C. 4115.10.

However desirable it may be that all laborers working for the same employer in the same vicinity should receive the same wages, and however commendable the legislative purpose to obtain for laborers adequate compensation, still such ends could not justify the violation by this court of one of the fundamental rules of statutory construction.

*Clymer*, 128 Ohio St. at 365.

In 1935, shortly after the Court issued its decision in *Clymer*, however, the General Assembly amended the prevailing wage law to add Gen. Code § 17-4a, which provided, in pertinent part:

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.

(emphasis added). See Amended Senate Bill 294 (91st General Assembly, effective Aug. 19, 1935), 116 Ohio Laws 207. The substance of Gen. Code §§ 17-4a is now contained in R.C. 4115.05, which provides in pertinent part:

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

(emphasis added).

"When confronted with amendments to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law." *Lynch v. Gallia County Bd. of Comm'rs* (1997), 79 Ohio St.3d 251, 254 (citation omitted). Accordingly, given this significant change in the statute following the decision in *Clymer*, the Court of Appeals herein was unquestionably correct when it observed that this "Court's holding in *Clymer*, that off-

site workers are not entitled to receive the prevailing wage, has been superseded by the legislature in its amendment and express supplementing of the prevailing wage law. The statute now expressly provides for the payment of the prevailing rate of wages to employees who fabricate materials to be used in or in connection with a public work." *Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 2008-Ohio-1005 at 17, ¶ 39.

Notwithstanding the plain wording of R.C. 4115.05, *Gene's Refrigeration* and its *amici curiae* advance several arguments to avoid its application: (1) that the federal Davis-Bacon Act, 40 U.S.C. § 3141, *et seq.*, and other state prevailing wage laws have not been applied to off-site workers; (2) that the Department of Commerce, the agency charged with enforcement of Ohio's prevailing wage law, has not applied it to off-site workers, and (3) that application of the prevailing wage law to off-site workers presents a host of unmanageable problems in enforcing the statute. Each of these arguments is without merit.

**A. The Interpretation of Other Prevailing Wage Laws Cannot Alter the Plain Wording of R.C. 4115.05.**

*Gene's Refrigeration* first asserts that *Clymer* continues to represent a proper interpretation of Ohio's prevailing wage law, notwithstanding the 1935 amendment. In support of this assertion, *Gene's Refrigeration* directs this Court's attention to the U.S. Department of Labor's interpretation of the Davis-Bacon Act, as embodied in the Department's regulations, and judicial determinations from several other states indicating that those state laws do not apply to off-site workers. This argument must be rejected.

As explained in detail in the Amicus Brief of Building and Construction Trades Department, the Davis-Bacon Act, unlike R.C. 4115.05, expressly provides that contractors must pay prevailing wages to those "mechanics and laborers *employed directly on the site of work* . . .

." 40 U.S.C. § 3142(c)(1) (emphasis added). It is not surprising, therefore, that the Department of Labor's most-recent Davis-Bacon regulations limit the application of the Act to sites "where a significant portion of the building or work is constructed . . ." and workshops "dedicated exclusively, or nearly so, to performance of the contract or project" that "are adjacent or virtually adjacent to the site of the work . . ." 29 C.F.R. § 5.2(D)(1) and (2).

Similarly, the decisions from other states excluding off-site work are of little relevance given the significant differences in the wording of the those state's statutes. For example, the Kentucky Supreme Court—then known as the Kentucky Court of Appeals—noted that its law only required the payment of prevailing "[w]ages on public projects." *Allen v. Eden* (Ky. 1954), 267 S.W.2d 714, 715. The Delaware statute only expressly "applie[d] to laborers and mechanics employed on such public work." *Callaway v. N.B. Downing Co.* (Del.Super.Ct. 1961), 53 Del. 493, 502, 172 A.2d 260, 265. The Kentucky and Delaware prevailing wage laws did not contain a provision requiring the payment of prevailing wages to workers "upon any material to be used in or in connection with a public work . . ." R.C. 4115.05.<sup>3</sup>

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<sup>3</sup>In *Ewen v. Thompson-Starrett Co.* (1913), 208 N.Y. 245, the New York Court of Appeals concluded that quarrymen and stonecutters employed outside of the State of New York were not covered by that state's prevailing wage law. The concurring judge cautioned against too broad an application of the ruling that the law did not apply to off-site workers:

As construed in the prevailing opinion the contractor for a public building might bring to the place where the building is to stand all the material necessary for its construction in a highly finished state, and the statute would apply to the bare assembling of the material in the completed structure. For the labor performed elsewhere in the production or shaping of such material the contractor might pay wages as he chose.

This construction of the statute nullifies its provisions to a very great extent, and furthermore it is unnecessary.

*Ewen*, 2098 N.Y. at 252 (Cuddeback, J., concurring).

Moreover, several courts in other states have concluded that their state's prevailing wage laws do apply to some off-site work. For example, in *Everett Concrete Prods., Inc. v. Department of Labor & Indus.* (1988), 109 Wash.2d 819, 748 P.2d 1112, the Washington Supreme Court distinguished the Davis-Bacon Act in ruling that the state prevailing wage law applied to "the off-site manufacture of prefabricated items for use on a particular public works project." *Everett Concrete Prods., Inc.*, 109 Wash.2d at 820.

In this case, the Washington Legislature departed from the language of the Davis-Bacon Act when it enacted RCW 39.12. The Davis-Bacon Act provides for payment of prevailing wages to "mechanics and laborers employed *directly* upon the site of the work." (italics ours). In contrast, RCW 39.12.020 provides for payment of prevailing wages to "laborers, workmen or mechanics, upon all public works." The omission of the word "directly" from the language of RCW 39.12.020 leads to the conclusion that the Legislature intended the scope of the State prevailing wage law to be broader than that of the Davis-Bacon Act. ECP's reliance on regulations interpreting the Davis-Bacon Act is misplaced.

*Everett Concrete Prods., Inc.*, 109 Wash.2d at 826 (citation omitted). See also *Superior Asphalt v. Department of Labor & Indus.* (1997), 84 Wash.App. 401, 929 P.2d 1120, 1123 (truck drivers delivering material and incorporating the materials into the project are entitled to prevailing wages).

The Nevada Supreme Court made a similar distinction in ruling that truck drivers hauling materials from aggregate pits to road construction project sites were entitled to prevailing wages:

Because of this change in language, the statutory provisions of the federal act and Nevada's act are not substantially similar. The Legislature intended the scope of NRS 338.040 to be broader than that of the Davis-Bacon Act when it selected the phrase "at the site of the work" instead of "directly upon the site of the work." Thus, the federal cases cited by Granite are not controlling in determining the coverage of Nevada's act. The federal act, by its plain language, is more restrictive than Nevada's act, and the omission of the words "directly upon" from the language of NRS 338.040 leads to the conclusion that the Nevada Legislature did not intend geographic proximity to be determinative of coverage under Nevada's prevailing wage law. Rather, the adoption of the language "at the

site of the work” suggests that the Legislature intended geographic proximity to be just one factor in determining coverage under the statute.

*State, Dep't of Business and Indus. v. Granite Constr. Co.* (2002), 118 Nev. 83, 89-90, 40 P.3d 423, 427-28. See also *Sharifi v. Young Bros., Inc.* (Tex.App.1992), 835 S.W.2d 221, 223 (truck driver delivering materials to a public works construction site was entitled to the prevailing wage); *Green v. Jones* (1964), 23 Wis.2d 551, 128 N.W.2d 1, 7 (truck drivers whose materials were distributed over the surface of the roadway immediately after their arrival at construction site were entitled to prevailing wages).

Whatever interpretation is given to the Davis-Bacon Act or other state prevailing wage laws by either the administrative agencies charged with their enforcement or the courts, those interpretations cannot override the plain wording of R.C. 4115.05, which mandates the payment of prevailing wages to workers "upon any material to be used in or in connection with a public work." Accordingly, the Court should affirm the decision of the court below.

**B. The Ohio Department of Commerce Has Not Interpreted R.C. 4115.05 to Exclude the Off-Site Customized Fabrication of Materials for Installation on a Public Improvement Project.**

Gene's Refrigeration asserts that the Ohio Department of Commerce has expressly interpreted R.C. 4115.05 to exclude the off-site fabrication of materials for installation on a public improvement project, while at the same time inconsistently asserting that the Department's failure to promulgate interpretive regulations since the post-*Clymer* amendment to the prevailing wage evinces its view that *Clymer* remains good law. Compare Appellant's Brief at 7 n.4 with Appellant's Brief at 14-18. This argument is without merit as well.

Initially, it must be observed that, contrary to Gene's Refrigeration's assertion, the Department of Commerce has never "inferred" that the prevailing wage law does not apply to

any off-site work. See Appellant's Brief at 7 n.4. The Department may, for a variety of reasons, decide to not publish, or to remove from publication, prevailing wage rates submitted by a local union. See *Brisben Dev., Inc. v. Ohio Dep't of Commerce* (S.D.Ohio Dec. 26, 2002), No. C-2-01-1048, slip op. at 14-15. A single Department letter removing rates from publication, without stating the reasons for doing so, can hardly be considered as setting forth the official position of the Department on this issue. Indeed, the Council is not aware of any administrative or judicial case, until this one, where the Department has been expressly asked to apply the post-*Clymer* amendment to the prevailing wage law. Thus, contrary to Gene's Refrigeration's assertion, it cannot be said that the Department has taken a position on the issue by "inference."

Moreover, the failure of the Department to promulgate regulations following the post-*Clymer* amendment cannot be considered as reliable evidence of the proper interpretation of R.C. 4115.05. R.C. 4115.12—which gave the Department's predecessor agency the power to promulgate regulations "to facilitate the administration of" the prevailing wage law—was not enacted until 1965, or thirty years after the 1935 amendment at issue herein. See Amended Senate Bill 201 (106th General Assembly, effective Nov. 3, 1965), 131 Ohio Laws 996. Moreover, the Department of Industrial Relations—the Department of Commerce's predecessor in prevailing wage enforcement—did not adopt any regulations until February, 1990, or nearly 55 years after the 1935 amendment. The Department's failure to promulgate a regulation addressing this one narrow issue of the application of the law to off-site fabrication work can hardly, therefore, lend credence to Gene's Refrigeration's argument that the 1935 amendment was not intended to overrule the Court's decision in *Clymer*. Accordingly, this Court should affirm the decision of the Court below.

**C. The Application of the Prevailing Wage to Off-Site Customized Fabrication of Materials for Installation on a Public Improvement Project Does Not Create Unmanageable Obstacles for the Enforcement of the Law.**

Gene's Refrigeration and its *amici curiae* devote most of their briefs to their efforts to convince the Court that the Court of Appeals' decision creates unmanageable problems for the enforcement of the prevailing wage law. As the Court of Appeals noted, however, the wording of the statute itself "foreclose[s] Gene's argument that a break from the holding in *Clymer* would create unwieldy results." *Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 2008-Ohio-1005 at 16, ¶ 37. See Appendix to Appellant's Brief at 19. Moreover, the Council maintains that the Court is not free to ignore the plain language of the statute to arrive at an interpretation that is more palatable to Gene's Refrigeration and its *amici curiae*.

As previously noted, R.C. 4115.05 requires the payment of prevailing wages "to laborers, workers, or mechanics, upon any material to be used in or in connection with a public work . . . ." The Court of Appeals concluded that this statute "includes a presupposition that the materials at issue must be fabricated specifically 'to be used' in regard to the project, rather than pre-fabricated materials made in the ordinary course of business by suppliers."<sup>4</sup> The statute does not require the payment of prevailing wages for work in producing or manufacturing materials which may eventually be used in the construction of a public work. Rather, it requires prevailing

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<sup>4</sup> Gene's Refrigeration, to support its argument that enforcement would be unmanageable, contends that the Court of Appeals improperly limited the application of this provision of R.C. 4115.05 to "materials made specifically for a particular improvement . . . ." *Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 2008-Ohio-1005 at 17, ¶ 39. It is significant that Gene's is only able to construct its parade of enforcement horrors by advancing an interpretation of R.C. 4115.05 far broader than that actually adopted by the court below or proposed by Local 33 herein.

wages for work "*upon any material*" to be used in public works "where the material in its final or completed form is to be situated, erected, or used."

Where materials are customized or fabricated for a particular public improvement project, it would not be particularly difficult to determine to which off-site workers the prevailing wage law applies. Significantly, the enormous enforcement problems foreseen by Gene's Refrigeration have not materialized in the other states that have applied their prevailing wage laws to off-site workers.

Moreover, it would not be particularly difficult to track the amount of time such off-site workers spend fabricating materials for a specific public improvement project. Indeed, as established by the detailed time records Gene's Refrigeration submitted to the trial court in support of its Motion for Summary Judgment, it already maintains such records in course of its business. See Supp. at 24-37.

The Ohio Attorney General, *before either the decision in Clymer or the 1935 amendment to the prevailing wage law*, noted the distinction between simply supplying materials and specifically fabricating materials for a public improvement project:

I am of the opinion, therefore, that where a person or firm furnishes materials to a contractor or subcontractor to be used in the construction of a public *improvement and such person or firm has nothing to do with the installation or fabrication of such materials into such improvement*, sections 17-4 to 17-6, General Code, inclusive, do not operate to empower the public authority authorized to contract for such improvement to provide in the contract with the successful bidder a minimum rate of wages to be paid to the men employed and paid by such persons or firm furnishing such materials when engaged in the delivery of such materials to the site of the improvement.

1932 Op. Ohio Att'y Gen. No. 4836 at 1420 (Dec. 23, 1932) (emphasis added). The Court of Appeals herein properly recognized this same distinction and concluded that the wording of the statute itself "foreclose[s] Gene's argument that a break from the holding in *Clymer* would create

unwieldy results." *Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 2008-Ohio-1005 at 16, ¶ 37. See Appendix to Appellant's Brief at 19.

Furthermore, the conflict with wages paid in the manufacturing sector is simply illusory. To the extent that employees are engaged in the "manufacture" of prefabricated materials capable of being used in any construction project, as opposed to fabrication specifically for a particular public improvement project, the prevailing wage law would simply not apply. Accordingly, the asserted potential conflict with collective bargaining agreements negotiated by industrial unions simply does not exist.

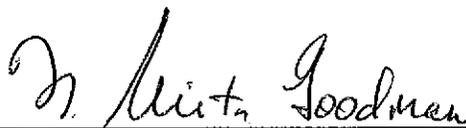
Finally, Gene's Refrigeration asserts that the application of prevailing wage law to off-site fabrication work would "dramatically increase" the cost of public construction. Appellant's Brief at 10 n.7. Significantly, Gene's offers no support for this assertion, and indeed the overwhelming academic research on the subject has concluded that "the modern econometric literature finds no cost impact on public construction associated with the implementation of prevailing wage regulations." Mahalia, N., "Prevailing Wages and Government Contracting Costs: A Review of the Research," Economic Policy Institute Briefing Paper No. 215 (July 8, 2008) (visited Sep. 25, 2008, <http://www.epi.org/briefingpapers/215/bp215.pdf>).

The Court of Appeals' decision, and the interpretation of the prevailing wage law contained therein, is neither "unreasonable" nor "unworkable." Rather, it is entirely consistent with the plain language of the statute. Accordingly, this Court must affirm the decision of the Court of Appeals for Medina County, Ninth Appellate District.

## CONCLUSION

For the foregoing reasons, and for the reasons stated by Plaintiff-Appellee Local 33, and *Amicus Curiae* Building and Construction Trades Department, AFL-CIO, *Amicus Curiae*, The Ohio State Building and Construction Trades Council, AFL-CIO, respectfully urges this Court to affirm the judgment of the Court of Appeals for Medina County, Ninth Appellate District.

Respectfully submitted,



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The undersigned hereby certifies that a copy of the foregoing was sent via regular U.S.

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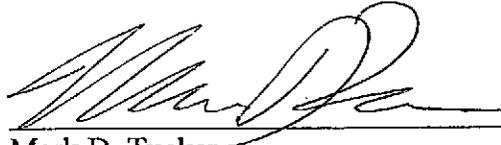
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