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## INTEREST OF THE AMICUS CURIAE

The Building and Construction Trades Department, AFL-CIO (hereafter "BCTD"), represents more than 2.5 million laborers and mechanics actively employed or seeking employment in the building and construction industry throughout the United States. It is affiliated with thirteen national and international labor unions, each of which represents workers employed in the building and construction industry. Many of these laborers and mechanics are employed on public works projects covered by state prevailing wage laws, including the Ohio Prevailing Wage Law.

The issue before the Court in the above-entitled case is whether the Ohio Prevailing Wage Law, Ohio Rev. Code Ann. §§ 41103 to 4116, is applicable to laborers and mechanics employed by public improvement contractors and subcontractors, who work at off-site locations to provide materials that are used on public improvement projects.

Labor unions normally seek to organize the unorganized and to negotiate collective bargaining agreements with employers. But labor unions also have a legitimate interest apart from organizing and bargaining in seeing to it that public improvement contractors comply with prevailing wage requirements, for otherwise public improvement contractors paying less than prevailing wage rates would ultimately undermine local area standards. Indeed, the importance of maintaining local area standards as a matter of public as well as union interest was long ago endorsed by the Ohio General Assembly when it enacted the Ohio Prevailing Wage Law in 1931.

Therefore, labor organizations such as the BCTD and its affiliates have a legitimate interest, apart from organizing and bargaining, in ensuring that public improvement contractors and subcontractors comply with applicable prevailing wage requirements. Otherwise, union-negotiated labor standards could be undermined, and employers paying substandard wages and

benefits could gain a competitive advantage over contractors and subcontractors whose employees are represented by and have a collective bargaining agreement with such labor unions.

This interest and concern in ensuring that public improvement contractors and subcontractors comply with prevailing wage requirements has prompted the BCTD and its affiliates actively to participate in the litigation of numerous cases in state and federal courts concerning the interpretation and application of the Davis-Bacon Act and state statutes that include requirements to pay prevailing wages rates, which are often called "little Davis-Bacon Acts." It is for this reason that the BCTD submits this *amicus* brief in support of Appellee Sheet Metal Workers' International Association, Local Union No. 33 (hereafter "Local No. 33") regarding Proposition of Law No. 1 in the above-entitled case now pending before the Court.

#### **STATEMENT OF THE CASE**

This case involves an appeal by Gene's Refrigeration, Heating & Air Conditioning, Inc. (hereafter "Gene's Refrigeration") from the decision in *Sheet Metal Workers' Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 2008 Ohio 1005, 2008 Ohio App. LEXIS 875 (Ohio Ct. App. Mar. 10, 2008), which held, *inter alia*, that contractors, subcontractors and other persons otherwise covered by the Ohio Prevailing Wage Law, Ohio Rev. Code Ann. §§ 41103 to 4116,<sup>1/</sup> are required to pay laborers, mechanics and other persons they employ at locations other than where the public improvement is located in accordance with the prevailing wage requirements in the State statute.

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<sup>1/</sup> All statutory references are to Page's Ohio Revised Code Annotated (Anderson) unless otherwise noted.

## STATEMENT OF THE FACTS

*Amicus Curiae* BCTD incorporates by reference as if it was set forth herein in its entirety the Statement of Facts set forth in the Merit Brief of Appellee Sheet Metal Workers' International Association, Local Union No. 33.

## ARGUMENT

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

**Public Improvement Contractors and Subcontractors are Required to Pay Prevailing Wages to Laborers, Workers, and Mechanics Who They Employ to Work Off-Site on Materials Used in or in Connection with Performance of a Public Improvement Contract.**

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This case involves an appeal by Gene's Refrigeration, Heating & Air Conditioning, Inc. (hereafter "Gene's Refrigeration") from the decision in *Sheet Metal Workers' Int'l Ass'n, Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.*, 2008 Ohio 1005, 2008 Ohio App. LEXIS 875 (Ohio Ct. App. Mar. 10, 2008) (Appendix Doc. No. 3 at 4-26) (hereafter "*Local Union No. 33 v. Gene's Refrigeration*"), which held, *inter alia*, that Gene's Refrigeration was required to pay the laborers, mechanics and other persons who it employed at its off-site workshop in accordance with the prevailing wage requirements in the Ohio Prevailing Wage Law.

**EMPLOYEES OF A PUBLIC IMPROVEMENT CONTRACTOR WHO FABRICATED DUCT WORK IN THE CONTRACTOR'S OFF-SITE WORKSHOP FOR USE IN OR IN CONNECTION WITH A PUBLIC IMPROVEMENT COVERED BY THE OHIO PREVAILING WAGE LAW ARE ENTITLED TO BE PAID THE PREVAILING WAGE RATE.**

The Ohio Prevailing Wage Law, §§ 4115.03 to 4115.16, requires public improvement contractors and subcontractors to pay laborers and mechanics they employ the prevailing wage in the locality where the project is to be performed. Gene's Refrigeration and its *amici* supporters contend, notwithstanding the broad remedial purpose of the Ohio Prevailing Wage Law, that the

Court of Appeals of Ohio erred when it held that the public improvement contractor was obligated to pay prevailing wages to the laborers and mechanics it employed at the Company's off-site workshop, who fabricated duct work some of which was installed in a public improvement project covered by the statute. They argue that § 4115.10<sup>2/</sup> expressly restricts

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<sup>2/</sup> § 4115.10(A), (B) states:

(A) No person, firm, corporation, or public authority that constructs a public improvement with its own forces, the total overall project cost of which is fairly estimated to be more than the amounts set forth in division (B)(1) or (2) of section 4115.03 of the Revised Code, adjusted biennially by the director of commerce pursuant to section 4115.034 [4115.03.4] of the Revised Code, shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. *Any employee upon any public improvement*, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the director of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement. The director shall deposit all moneys received from penalties paid to the director pursuant to this section into the penalty enforcement fund, which is hereby created in the state treasury. The director shall use the fund for the enforcement of sections 4115.03 to 4115.16 of the Revised Code. The employee may file suit for recovery within ninety days of the director's determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) *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. The complaint shall include documented evidence to demonstrate that the employee was paid less than the prevailing wage in violation of this chapter. Upon receipt of a properly completed written complaint of any employee paid less than the prevailing rate of wages applicable, the director shall take an assignment of a claim in trust for the

application of the prevailing wage law to those laborers and mechanics employed “upon any public improvement.” Specifically, Gene’s Refrigeration asserts that the Court of Appeals decision is erroneous because it incorrectly distinguished the holding in *Clymer v. Zane*, 128 Ohio St. 359, 191 N.E. 123 (1934), which held that employees of a contractor, who worked in an off-site gravel pit owned by the contractor that provided sand and gravel for concrete used on a State public works project, were not “employees upon any public improvement” as that term was used in Section 17-6 of the General Code in 1934, which is the predecessor of the current § 4115.10.

The Ohio Prevailing Wage Law was codified in Section 17 of the General Code at the time *Clymer* was decided. In particular, § 17-6, General Code, provided for fines and penalties for any contractor/subcontractor who violated the wage provisions of a State public works contract. In addition, § 17-6 provided for recovery by “[a]ny employee upon any public improvement” of a penalty sum from the contractor or subcontractor.<sup>3/</sup> The issue before the Court in *Clymer* was whether “the men who worked in the gravel pit [were] employees *upon a public*

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assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

Appendix Doc. No. 22 at 61 (emphasis added).

<sup>3/</sup> Section 17-6, General Code, as enacted in 1931, stated:

Any contractor or sub-contractor who shall violate the wage provisions of such contract, or who shall suffer, permit or require any employee to work for less than the rate of wages so fixed, shall be fined not less than \$ 50.00 or more than \$ 500.00. ***Any employee upon any public improvement*** who is paid less than the fixed rate of wages applicable thereto may recover from the contractor or sub-contractor the difference between the fixed rate of wages and the amount paid to him, and in addition thereto a penalty equal in amount to such difference.

(Emphasis added).

*improvement?” Clymer* 128 Ohio St. at 362, 191 N.E. at 125 (emphasis in original). The Court held:

A private enterprise, separate in time and in space, is not necessarily a part of a public improvement because owned and operated by the contractor in charge of the public improvement, and workmen employed in such private enterprise cannot be held to be employees upon a public improvement solely because material prepared in such enterprise is used in the public improvement.

128 Ohio St. 359, 191 N.E. 12 at paragraph three of the syllabus.

The Court reasoned:

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 section 17-6 so far. It can be safely assumed that the intention of the Legislature is accurately stated in the section of the law which imposes the penalty. From its position in the series of sections and from its very nature we must conclude that it determines the legislative intent. And because it is a penal section it must be construed in favor of the person against whom it assesses the penalty.

*Id.* at 363-64, 191 N.E. at 126.

The Court of Appeals found in this case, however, that in the year following this Court's opinion in *Clymer*, the Ohio General Assembly enacted Amended Senate Bill No. 294, which amended Sections 17-3, 17-4 and 17.5 of the General Code and enacted two new supplemental sections "pertaining to prevailing rate of wages on public improvements." Appendix Doc. No. 27 at 70-72. One of the new supplemental sections added to the General Code by Amended Senate Bill No. 294 was Section 17-4a, which stated:

**Prevailing rate of wages to control; redetermination, when,**

Sec. 17-4a. The wages to be paid for a legal day's work, as herein-before prescribed in section 17-4 of this act, to laborers, workmen or mechanics *upon*

***such public works*** shall not be less than the wages paid in the same trade or occupation in the locality where such public work is being performed, under collective agreements or understanding between bona fide organizations of labor and employers, at the date such contract is made, and in the event there be no such agreement or understanding, then not less than the prevailing rate of wages to be determined as provided in section 17-4 of this act. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the wage in the locality as a result of collective agreement or understanding and if no such agreement or understanding exists, shall be paid not less than the prevailing rate of wages to be ascertained as provided in section 17-4 of this act. 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.*** Such contracts shall contain a provision that ***each laborer, workman or mechanic, employed by such contractor, sub-contractor or other person about or upon such public work, shall be paid the wages herein provided.***

Where contracts are not awarded or construction undertaken within ninety days from the date of the establishment of the prevailing rate of wages as provided in section 17-4 of this act, there shall be a redetermination of the prevailing rate of wages before the contract is awarded.

Amended Senate Bill No. 294 (Appendix Doc. No. 27 at 72) (emphasis added).

The Court of Appeals held in *Local Union No. 33 v. Gene's Refrigeration* (Appendix Doc. No. 3 at 16) that the General Assembly "presumed to have been aware of the holding in the *Clymer* case, took swift and affirmative action to supplement the prevailing wage law to require the payment of the prevailing rate to 'laborers, workmen or mechanics upon any material to be used upon or in connection [with public improvements].'" *Local Union No. 33 v. Gene's Refrigeration* (Appendix Doc. No. 3 at 17) (quoting Amended Senate Bill No. 294). Consequently, the Court of Appeals held in *Local Union No. 33 v. Gene's Refrigeration* "that the Ohio Supreme 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." *Id.* at 20. Furthermore, the Court of Appeals held

that the Ohio Prevailing Wage Law “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.” *Ibid.*

**A. The Court of Appeals Correctly Held that the Plain Language of Amended Senate Bill No. 294 Enacted by the Ohio General Assembly in 1935 Legislatively Superseded the Court’s Holding in *Clymer v. Zane.***

Gene’s Refrigeration maintains that the Court of Appeals wrongly decided this case because: (1) it ignored the fact that since the Court issued *Clymer* no court or administrative agency has held that public improvement contractors and subcontractors are required to pay their employees prevailing wages for off-site work performed pursuant to the Ohio Prevailing Wage Law, Merit Brief of Appellant Gene’s Refrigeration, Heating & Air Conditioning, Inc. (hereafter “Appellant’s Brief”) at 14; (2) there is no legislative history, which explains the 1935 amendment of the Ohio Prevailing Wage Law, when all the while the General Assembly has continued to make amendments to the prevailing wage statute with a full complimentary Administrative Code, which contains no provision that interprets and supplements the language incorporated in the prevailing wage statute in 1935, *id.* at 15-16 (on the contrary, the Administrative Code specifically states in various sections that the Ohio Prevailing Wage Law applies only to the jobsite of the public improvement); and (3) various Ohio courts including this Court, have continued to cite *Clymer*, and none have ever indicated that it has been legislatively superseded, *id.* at 17.

These arguments beg the question of whether enactment of Amended Senate Bill No. 294 legislatively superseded this Court’s holding in *Clymer*. Gene’s Refrigeration contends that the Court of Appeals’ reliance on the addition of one sentence in Section 17-4a of the General Code in 1935 is misplaced, because it was unaccompanied by any legislative history, which indicates

that the General Assembly intended to supersede the Court's earlier decision in *Clymer*. As such, Gene's Refrigeration maintains that the General Assembly's action in 1935 cannot off-set 74 years of non-enforcement of the prevailing wage law to off-site work. Appellant's Brief at 15.

It is well-settled that in all cases involving statutory construction, it is necessary for the Court to ascertain the intent of the General Assembly in enacting the statute in question and give effect to that intent. *Cochrel v. Robinson*, 113 Ohio St. 526, 149 N.E. 871 (1925), paragraph four of the syllabus. "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Education*, 74 Ohio St. 3d 543, 545, 660 N.E.2d 463, 465 (1996). Gene's Refrigeration asserts that there is no ambiguity in § 4115.10(A) (then Section 17-6 of the General Code), which this Court held in *Clymer* restricted the requirement to pay prevailing wage rates to employees of public improvement contractors and subcontractors who work "upon any public improvement," and does not extend that requirement under any circumstances to employees who prepare material off-site for use in construction of public improvements. 128 Ohio St. at 363-64, 191 N.E. 2d at 126. Therefore, Gene's Refrigeration argues that *Clymer* is still good law since Section 17-6 of the General Code was not amended in 1935.

However, this argument ignores another well-settled principal of statutory construction that the Court must give effect to all the words used in the statute in order to determine the intent of the General Assembly in enacting legislation. *Bernardini v. Conneaut Area City School Dist. Bd. of Education*, 58 Ohio St. 2d 1, 4, 387 N.E.2d 1222, 1224 (1979). Thus, the Court must consider the context of the 1935 amendments of the Ohio Prevailing Wage Law because "a legislative body in enacting amendments is presumed to have in mind prior judicial constructions

of the [existing statute when enacting amendments thereto].” *The State ex rel. County Bd. of Education of Huron County v. Howard*, 167 Ohio St. 93, 96, 146 N.E. 2d 604, 607 (1957).

Additionally, when the General Assembly amended Sections 17-3, 17-4 and 17-5 of the General Code and enacted two new supplementary sections in 1935, including Section 17-4a, it made clear that the laborers, workmen and mechanics who public improvement contractors and subcontractors are required by Section 17-6 of the General Code (now § 4115.10(A)) to pay prevailing wage rates, while employed “upon any public improvement,” includes those who work “*upon any material to be used upon or in connection therewith;*” and that all public contracts for construction of public improvements covered by the prevailing wage law must “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 wages herein provided.” Section 17-4a (emphasis added).

Consequently, inasmuch as the General Assembly is presumed to be fully aware of any prior judicial interpretation of an existing statute when enacting an amendment of its own legislation, it is reasonable to conclude that its choice of the terms “upon any material to be used upon or in connection therewith” and “about or upon such public work” in Section 17-4a of the General Code to describe the breadth of the obligation of public improvement contractors and subcontractors to pay their employees prevailing wage rates required by the law was consciously intended to supersede this Court’s earlier interpretation of Section 17-6 of the General Code set forth in *Clymer*. The absence of a legislative or administrative explanation of the intended breadth of application of the Ohio Prevailing Wage Law to off-site work performed pursuant to § 4115.10 since the Court issued *Clymer* does not change the fact that the language of the Ohio Prevailing Wage Law as amended by the General Assembly in 1935 and ever since has included

provisions, which make it clear that it applies to employees of public improvement contractors and subcontractors other than those who work directly “upon any public improvement.” That is, the words incorporated in Section 17-4a of the General Code, which now appear in § 4115.05, plainly indicate that the General Assembly superseded this Court’s the interpretation in *Clymer* that the Ohio Prevailing Wage Law does not apply to any off-site employees of public improvement contractors and subcontractors.

**B. The Legislative Intent of the General Assembly to Extend Application of the Ohio Prevailing Wage Law to at Least Some Work Off-Site Performed by Employees of Public Improvement Contractors and Subcontractors is Clear Even if the Language of the Law is Ambiguous Regarding the Breadth of its Application.**

There is no dispute that the Ohio Prevailing Wage Law does not specifically define the term “upon the public improvement” that appears in § 4115.10(A), (B) and elsewhere throughout the statute. For this reason, assuming *arguendo* that it is arguable the breadth of the statute’s applicability to off-site employees of public improvement contractors and subcontractors is ambiguous notwithstanding the clarity of the words added to the statute in 1935, it is appropriate and necessary to examine the intent of the Legislature when it amended the prevailing wage law in 1935. The Court has said in numerous cases that a statute is ambiguous when its language is subject to more than one reasonable interpretation. *State v. Jordan*, 89 Ohio St. 3d 488, 492, 733 N.E.2d 601, 605 (2000). Where the words of a statute are ambiguous, the Court is charged with construing its language in a manner that reflects the intent of the General Assembly. *Cochrel*, 113 Ohio St. 526, 149 N.E. 871, paragraph four of the syllabus.

Gene’s Refrigeration argues that “the language used in the prevailing wage [State] statute ‘upon’ or ‘about’ simply means ‘on,’ referring to the jobsite of the project, not some off-site location” have a clear and unambiguous meaning. Appellant’s Brief at 22 (citing *State ex rel.*

*Solomon v. Police & Firemen's Disability & Pension Fund Board of Trustees*, 72 Ohio St. 3d 62, 65 (1995) (in construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings)). Gene's Refrigeration maintains that the use of the words "upon any public improvement" connotes a clear geographical limitation on those entitled to compensation at the prevailing wage rate and restricts application of the prevailing wage law to employees working directly on the physical site of the public improvement being constructed, which in this case was the Granger Fire Station in Medina County. *Id.*

On the other hand, as already discussed, the plain words added to the Ohio Prevailing Wage Law in 1935 extended its application to employees of public improvement contractors and subcontractors who work at off-site facilities performing services, which are integral to construction of the public improvement. This interpretation contradicts Gene's Refrigeration's argument. Therefore, inasmuch as the Ohio Prevailing Wage Law is susceptible to more than one honest interpretation, it is ambiguous, and thus the Court should turn to legislative intent.

As noted above, like most other state prevailing wage laws that were enacted during this period, the 1931 Ohio Prevailing Wage Law was undoubtedly modeled after the Federal Davis-Bacon Act, of March 3, 1931, Pub. L. 798, c. 411, §§ 1 & 2, 46 Stat. 1494. There is a well-known canon of statutory construction, which states that "when the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated." *Everett Concrete Products, Inc. v. The Dep't of Labor and Industries*, 109 Wash. 2d 819, 824, 748 P.2d 1112, 1114 (Wash. 1988) (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 52.02 (4<sup>th</sup> ed. 1984)); *Hartnett v. Union Mutual Fire Insurance Co., City of St. Albans*, 153 Vt. 152, 569 A.2d 486 (Vt. 1989) (same); *Treiber v. Citizens State Bank*, 1999 N.D.

130; 598 N.W.2d 96 (N.D. 1999) (quoting 2A (sic) Norman J. Singer, *Sutherland Statutory Construction* § 52.02 (5<sup>th</sup> ed. 1992) for the same proposition).<sup>4/</sup>

As noted above, there is general agreement that the Ohio Prevailing Wage Law is based on the Davis-Bacon Act. Not surprisingly, therefore, Section 1 of the original Davis-Bacon Act, enacted by Congress in 1931, provided, *inter alia*, that “every contract in excess of \$ 5,000 . . . to which the United States or the District of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings . . . shall contain a provision to the effect that the rate of wage for all laborers and mechanics *employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature. . .*.” (Emphasis added).<sup>5/</sup>

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<sup>4/</sup> 2B Norman J. Singer, *Sutherland Statutory Construction* § 52.02 (5<sup>th</sup> ed. 1992) has been superseded by 2B Norman J. Singer, *Sutherland Statutory Construction* § 52.02 (6<sup>th</sup> ed. 2000).

<sup>5/</sup> The full text of the 1931 Davis-Bacon Act stated as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that

Sec. 1. Every contract in excess of \$5,000 in amount, to which the United States or the District of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, shall contain a provision to the effect that the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil subdivision of the State in which the public buildings are located, in the District of Columbia if the public buildings are located there, and a further provision that in case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be conclusive on all parties to the contract:

The wording of Section 1 of the original Davis-Bacon Act is remarkably similar to the wording of the original Ohio Prevailing Wage Law. In particular, the original Davis-Bacon Act described the breadth of its application to “laborers and mechanics employed . . . on the public buildings covered by the contract.” Similarly, Section 17-6 of the General Code extended application of the Ohio Prevailing Wage Law to “any employee upon any public improvement.” *See* fn. 4 *supra*.

More importantly, if in fact “[m]ost of Ohio’s original prevailing wage law was simply copied from the provisions of the Davis-Bacon Act” as Gene’s Refrigeration asserts, *see* Appellant’s Brief at 24-25; it follows that the amendments of the State statute adopted in 1935 were also intended to track the amendments of the Davis-Bacon Act, which were also enacted in 1935.<sup>6/</sup>

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*Provided*, That in case of national emergency the President is authorized to suspend the provisions of this Act.

Sec. 2. This Act shall take effect thirty days after its passage but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding at the time of the passage of this Act.

<sup>6/</sup> The Davis-Bacon Act was substantially amended in 1935, Act of August 30, 1935, Pub. L. 403, c. 825, §§ 1-7, 49 Stat. 1011, 40 U.S.C. §§ 276a to 276a-6. This occurred approximately three months after Amended Senate Bill No. 294 was passed by the General Assembly on May 1, 1935 and approved by the Governor on May 17, 1935. However, the amended Davis-Bacon Act passed by Congress in 1935 was virtually identical to S. 3847, 74th Cong. 1<sup>st</sup> Sess. (1932), which was a bill to amend the Davis-Bacon Act that Congress passed in 1932 but was vetoed by President Herbert Hoover. This bill included the same “directly upon the site of the work” language, which was incorporated in the 1935 legislation that was enacted. In fact, this language was one of the reasons that President Hoover vetoed the 1932 bill because he was concerned that it would extend application of the prevailing wage requirement to the manufacture of materials, supplies and equipment used on project sites covered by the Act. Nonetheless, there is substantial legislative history relating to the 1932 bill, which was vetoed, and the 1935 bill, which became law, concerning application of Davis-Bacon prevailing wage requirements to off-site employee of otherwise covered contractors and subcontractors. *See* 75 Cong. Rec. 12366 (1932) (colloquy between Congressmen LaGuardia and Connery); and H. Rep. No. 1756, 74<sup>th</sup> Cong., 1<sup>st</sup> Sess.

Section 1(a) of the Davis-Bacon Act, as amended in 1935, 40 U.S.C. § 276a(a), stated, in relevant part, as follows:

(a) The advertised specifications for every contract in excess of \$ 2,000, to which the United States . . . is a party, for construction, alteration, and/or repair, . . . of public buildings or public works of the United States . . . which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed . . . and every contract based upon these specifications shall pay *all mechanics and laborers employed directly upon the site of the work*, unconditionally and not less than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics . . .

(Emphasis added).<sup>7/</sup> However, unlike the amended Davis-Bacon Act, the General Assembly did not choose to use the adverb “directly” to qualify any of the references in the Ohio Prevailing Wage Law to “upon any public improvement.”

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(1935); S. Rep. 1155, 74<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1935). Accordingly, it is highly unlikely that the General Assembly was unaware of the debate in the U.S. Congress concerning this issue when it enacted Senate Amended Bill No. 294 even though it was passed three month before the Davis-Bacon amendments became law.

<sup>7/</sup> This wording was carried forward when the Davis-Bacon Act was recodified in 2002 as 40 U.S.C. §§ 3141 to 3148. Pub. L. 407, § 1, Aug. 21, 2002, 116 Stat. 1150-53. Specifically, section 3142(c)(1) states:

**(c) Stipulations Required in Contract.** - Every contract based upon the specifications referred to in subsection (a) must contain stipulations that -

(1) the contractor or subcontractor shall pay all mechanics and laborers employed *directly on the site of the work*, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship

Unfortunately, Congress did not explain what it intended when it incorporated the phrase “directly upon the site of the work” in the 1935 Davis-Bacon Act, as amended. Nonetheless, for more than fifty (50) years after the Davis-Bacon Act was amended in 1935, the U.S. Department of Labor consistently interpreted that term as including work performed by employees of covered contractors and subcontractors at off-site facilities established for the purpose of performing work related to completion of the public building or work contracted by a federal agency or assisted in whole or in part by federal financial support of one kind or another.

Although the definition of “site of the work” was not codified in the U.S. Department of Labor’s regulations until 1982, it nevertheless represented a longstanding interpretation of the Davis-Bacon Act. In fact, the Solicitor of Labor testified at length concerning the Department of Labor’s longstanding interpretation of the phrase “site of the work” in the context of the Davis-Bacon Act during oversight hearings concerning administration of the program in 1962. *Administration of the Davis-Bacon Act: Hearings before the Special Subcomm. on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess., Pt. 3, at 830-31, 899-900 (1962).*

Upon concluding these oversight hearings, the General Subcommittee on Labor of the House Committee on Education and Labor issued a report which noted:

Testimony was heard to the effect that coverage of the act has been extended by the Department of Labor to include those subcontractors who perform work off the site of the actual project but whose work produces items and materials specifically and exclusively for the project. The Department has held that such people are covered if their offsite activities are from a temporary facility which is not used regularly to conduct the general business activity of the subcontractor.

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which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics;

40 U.S.C. § 3142(c) (2008) (emphasis added).

This interpretation of the Department insures that the act would not be avoided by the subterfuge of subcontractors setting up offsite facilities to do work on a project in order to avoid being subject to the coverage of the Davis-Bacon Act.

*Administration of the Davis-Bacon Act*, Report of the General Subcommittee on Labor of the Committee on Education and Labor, 88th Cong., 1st Sess., 7 (Comm. Print 1963).

Subsequently, in 1982, the Department finally promulgated a regulation, which codified its longstanding definition of “site of the work.” Thus, from 1982 until early 2001, the Secretary of Labor’s regulations implementing the Davis-Bacon Act defined the term “site of the work” as follows:

(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (1)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (1)(1) of this section;

(3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (1)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

29 C.F.R. § 5.2(l) (2001).

This definition reflected the Secretary of Labor’s long-held determination that the “site of the work” under the Davis-Bacon Act — the area where laborers and mechanics are to be paid not less than prevailing wage rates— included both the location where a public building or work

would remain after construction is completed, and nearby locations used for activities directly related to the covered construction project, provided such locations were dedicated exclusively or nearly so to meeting the needs of the covered project. The Wage Appeals Board, which until 1996 acted with full and final authority for the Secretary of Labor on matters concerning the labor standards provisions of the Davis-Bacon and related Acts (*see* 29 C.F.R. §§ 5.1 and 7.1(c)),<sup>8/</sup> consistently interpreted 29 C.F.R. § 5.2(l) to include as part of the “site of the work,” for purposes of application of the Davis-Bacon prevailing wage requirements, support facilities dedicated exclusively or nearly so to the covered project and located within a reasonable distance from the actual construction site. Consistent with the regulations, the Board also treated the transportation of materials and supplies between the covered locations and transportation of materials or supplies to or from a covered location by employees of the construction contractor or subcontractor as covered Davis-Bacon work. *See, e.g., Patton-Tully Transportation Co.*, WAB No. 90-27 (Mar. 12, 1993) (distances of 5.4 to 14 miles, and 16 to 60 miles); *Winzler Excavating Co.*, WAB No. 88-10 (Oct. 30 1992) (12½ miles); *ABC Paving Co.*, WAB Case No. 85-14 (Sept. 27, 1985) (3 miles).

The Secretary’s definition of “site of the work” also reflected her awareness that Congress did not intend the Davis-Bacon Act, as amended in 1935, to apply to employees of materialmen and suppliers even though the statute does not include a provision to that effect. Consequently, a succession of administrative interpretations by the Secretary, which appeared as opinions of the Solicitor of Labor beginning as early as 1942, excluded from Davis-Bacon

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<sup>8/</sup> On April 17, 1996, the Secretary of Labor re delegated jurisdiction to issue final agency decisions under, *inter alia*, the Davis-Bacon and related Acts and their implementing regulations, to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996.

coverage the employees of bona fide materialmen who sell to contractors engaged in construction contracts covered by the Davis-Bacon Act. The U.S. Court of Claims described the evolution of the Secretary of Labor's interpretation of the exception of "materialmen" from Davis-Bacon coverage in *H.B. Zachry Co. v. United States*, 170 Ct. Cl. 115, 344 F.2d 353 (1965).

Recently, however, several federal appellate courts interpreting the Davis-Bacon Act, as amended, have concluded, notwithstanding the Secretary of Labor's longstanding interpretation set forth in 29 C.F.R. § 5.2(*l*), that the statutory phrase "directly upon the site of the work" expressly limits coverage under the Act to employees working directly on, or virtually adjacent to, the physical site of the public work under construction. *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1453 (D.C. Cir. 1994) (holding that contractor's employees working in borrow pits and batch plants two miles from where the public works project was located were not employed "directly upon the site of the work" pursuant to Davis-Bacon Act); *L.P. Cavett Co. v. U.S. Dept. of Labor*, 101 F.3d 1111, 1115 (6th Cir. 1996) (holding that truck drivers hauling asphalt from a batch plant to a highway site were not employed "directly upon the site of the work" pursuant to Davis-Bacon Act); *Building Const. Trades Dept. v. Dept. of Labor*, 932 F.2d 985, 986 (D.C. Cir. 1991) ("*Midway Excavators*") (holding that the statutory language "directly upon the site of the work" restricts coverage of the Davis-Bacon Act to the geographical confines of the actual project site).

Subsequent to the rulings in *Ball, Ball & Brosamer*; *L.P. Cavett*; and *Midway Excavators*, the U.S. Department of Labor amended the definition of "site of the work" in its regulations implementing the Davis-Bacon Act, as amended, to comply with the aforesaid federal appellate court opinions. See 65 Fed. Reg. 80278 (Dec. 20, 2000) (to be codified as 29

C.F.R. § 5.2(l)). The revised definition of “site of the work,” which became effective on January 19, 2001, states as follows:

(l) The term *site of the work* is defined as follows:

(1) *The site of the work* is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, *provided* that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the *site of the work*, *provided* they are dedicated exclusively, or nearly so, to performance of the contract or project, *and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (l)(1) of this section*;

(3) Not included in the *site of the work* are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the *site of the work*. Such permanent, previously established facilities are not part of the *site of the work*, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

29 C.F.R. § 5.2(l) (2008) (emphasis added).

Hence, Gene’s Refrigeration is correct that under the current interpretation of the term “site of the work” in the Davis-Bacon Act, as amended, the workshop where employees of Gene’s Refrigeration fabricated duct work for installation in the Granger Fire Station public improvement project might not be considered employed “directly upon site of the work” because it is not adjacent or virtually adjacent to the project site. Nevertheless, this fact does not further the quest to ascertain the General Assembly’s intent when it amended the Ohio Prevailing Wage Law in 1935.

It is clear that the Ohio General Assembly did not mimic the language of the Davis-Bacon Act when that statute was amended in 1935, *i.e.*, use the adverb “directly” to qualify “upon any public improvement” in the Ohio Prevailing Wage Law. It is likely, however, that the General Assembly intended to extend application of the requirements of the prevailing wage law to off-site workers when it incorporated the phrase “upon any material to be used upon or in connection therewith” in Section 17-4a of the General Code (now codified in § 4115.05 as “Every contract for a public work shall contain a provision that each laborer, worker, 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”); and “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,” *see id.* (now also codified in § 4115.05 as “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”); instead of incorporating the adverb “directly” to qualify the term “upon every public improvement,” which already appeared in Section 17-6 of the General Code. On this issue, the decisions of the highest courts of two other states are particularly noteworthy.

The Supreme Court of Alaska addressed a similar issue in *Board of Trade, Inc. v. Department of Labor, Wage & Hour Administration*, 968 P.2d 86 (Alaska 1998), *appeal after*

*remand sub nom.* 83 P.3d 1072 (Alaska, 2004).<sup>9/</sup> Alaska's version of the Davis-Bacon Act, referred to as the "Little Davis-Bacon Act" ("LBDA"), provided that mechanics, laborers, or field surveyors were to be paid the prevailing wage if they were involved in public construction, which was defined as the "*on-site* field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, highways, or other improvements to real property under contract for the state. . . ." *Id.* at 90 (quoting ALASKA STAT. § 36.95.010(3)). The Alaska Department of Labor promulgated an administrative regulation that defined "on-site" to cover "not only the 'physical place where the construction . . . will remain when work on it has been completed,' but also 'other adjacent or nearby property . . . which can be reasonably said to be included in the site because of proximity.'" *Id.* (quoting 8 ALASKA ADMIN. CODE title 8, 30.910(a)).

The Alaska Supreme Court found significant the fact that the Davis-Bacon Act included the phrase "directly upon the site of the work," whereas the LBDA merely required the work to be "on-site," and concluded that "elimination of the language 'directly on the site of the work' from the LBDA was intended to provide broader and more flexible coverage than the federal act." *Id.* at 91 (citing *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 748 P.2d at 1115-16 (interpreting Washington prevailing wage act more broadly given omission of the phrase "directly upon the site of the work")). Because the term "on-site" in the Alaska LBDA implied a geographical limitation, and the administrative regulation also contained a geographical limitation based on proximity, the court determined that the regulation was consistent with the State statute and, therefore, was valid. *See Board of Trade*, 968 P.2d at 91-92.

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<sup>9/</sup> The case was subsequently reversed because the Alaska Department of Labor interpreted its regulation to require a finding of geographical proximity for smaller projects, but no geographical restriction for larger ones, which was a distinction that was not found in the regulation or the LBDA.

More recently, the Supreme Court of Nevada interpreted its version of the Davis-Bacon Act in *State of Nevada, Department of Business and Industry, Office of the Labor Commissioner v. Granite Construction Co.*, 118 Nev. 83, 40 P.3d 423 (Nev. 2002). Nevada's version of the federal Act, also referred to as the "Little Davis-Bacon Act," in effect at the relevant time, provided "Workmen employed by contractors or subcontractors or by public bodies at the site of the work and necessary in the execution of any contract for public works are deemed to be employed on public works." *Id.* at 426 (quoting NEV. REV. STAT. § 338.040 (1999)). Turning to legislative intent, the Nevada Supreme Court found that the "directly upon" language in the federal Act was conspicuously absent from the State's LDBA, and, thus, the Nevada Legislature's omission suggested that it intended geographic proximity to be just one factor in determining coverage under the LDBA. *See id.* at 427-28. The Court noted:

Our reasoning is consistent with the manner in which other states have interpreted their prevailing wage laws. Although each state's statute and/or regulations are not identical to ours, other states have broadly interpreted their prevailing wage laws to encompass activities performed at ancillary locations based upon the failure of their state statutes to use the federal "directly upon" language.

*Id.* at 428 (citing *Sharifi v. Young Bros., Inc.*, 835 S.W.2d 221, 223 (Tex. App. 1992) ("When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. This rule of [statutory] construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent"); *see also Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus. of the State of Wash.*, 84 Wash. App. 401, 929 P.2d 1120, 1123 (Wash. Ct. App. 1997) (holding that truck drivers delivering material and incorporating materials into the project are entitled to prevailing wages); *Green v. Jones*, 23 Wis. 2d 551, 128 N.W.2d 1, 7 (Wis. 1964) (holding that truck drivers whose materials were

distributed over the surface of the roadway immediately after their arrival at construction site were entitled to prevailing wages)).

These two cases are instructive in determining whether the General Assembly intended to extend application of the Ohio Prevailing Wage Law to off-site work when it amended that statute in 1935. The Davis-Bacon Act requires the payment of prevailing wage rates to “mechanics and laborers employed directly upon the site of the work,” while Ohio’s Prevailing Wage Law requires the payment of prevailing wage rates to workmen employed “upon every public improvement.” *Compare* 40 U.S.C. § 3142(c)(1) with § 4115.10(A). By omitting the adverb “directly” from the State law and adding the phrases “upon any material to be used upon or in connection therewith” and “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,” the General Assembly evinced an intent to broaden the scope of application of Ohio’s prevailing wage law beyond what is encompassed in the federal statute. This omission of a key word, combined with the language, which was added to the statute by Section 17-4a of the General Code and remains in the law today, strongly indicates that the General Assembly did not intend to restrict application of the Ohio Prevailing Wage law to employees of public improvement contractors and subcontractors working “directly” “upon any public improvement.”

As such, the interpretation of the Ohio Prevailing Wage Law adopted by the Court of Appeals in *Local Union No. 33 v. Gene’s Refrigeration* is consistent with the legislative intent of the 1935 amendments of the State law. The Court of Appeals’ interpretation does not arbitrarily or unreasonably expand application of the law beyond the scope of what the General Assembly likely intended. The Court of Appeals’ interpretation speaks only of application of prevailing wage requirements to employees of public improvement contractors and subcontractors who are

employed at off-site facilities that have “an intimate connection” with the location of the public improvement “both geographically and otherwise.” *Local Union No. 33 v. Gene’s Refrigeration* (Appendix Doc. No. 3 at 19 (quoting *Clymer*, 128 Ohio St. at 365 [191 N.E. at 126], Zimmerman, J. dissenting). The appeals court further explained:

This idea [of an “intimate connection”) is mirrored in the legislature’s 1935 amendment to the prevailing wage law, which required the payment of the prevailing wage to workers upon materials to be used in or in connection with a public improvement. The legislature has maintained that same requirement within the current version of the statute.

*Id.*

The “intimate connection” concept articulated by Justice Zimmerman in his dissenting opinion in *Clymer* and gleaned by the Court of Appeals in *Local Union No. 33 v. Gene’s Refrigeration* from the statutory language added to the Ohio Prevailing Wage Law in 1935 is roughly analogous to the U.S. Department of Labor’s longstanding interpretation of the “site of the work” adopted shortly after the Davis-Bacon Act was amended in 1935 and incorporated in its interpretive regulations at 29 C.F.R. § 5.2(*l*) until 2001. As such, the Court of Appeals observed that the Ohio Prevailing Wage Law “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.”

This limitation is also similar to the Secretary of Labor’s interpretation of the exception of “materialmen” and “suppliers” from Davis-Bacon coverage described by the U.S. Court of Claims in *H.B. Zachry Co. v. United States*, which reflects Congress’s intention not to extend application of Davis-Bacon prevailing wage requirements to employees of businesses that simply sell building materials and supplies to contractors and subcontractors that construct public

buildings and works covered by the Act.<sup>10/</sup> This interpretation also refutes the argument by Gene's Refrigeration that application of the Ohio Prevailing Wage Law to off-site workers employed by public improvement contractors and subcontractors is "completely unfeasible, unworkable, and unenforceable." See Appellant's Brief at 31-34. As already discussed hereinabove, similar interpretations of application of the Davis-Bacon Act, as amended, and many state prevailing wage laws have been effectively enforced for 50 years or more.

Overall, the Court of Appeals' interpretation speaks only to a well-defined set of limited circumstances in which a public improvement contractor or subcontractor might seek to avoid payment of the prevailing wage rates by "setting up shop" beyond the confines of the final project site after being awarded a public improvements contract or subcontract, and, in this regard, the court's interpretation furthers the policy of the Ohio Prevailing Wage Law expressed in *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88 91, 431 N.E.2d 311, 313 (1982) (The legislative intent of the Ohio Prevailing Wage Law is, among other things, to provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies *vis-à-vis* private contractors, sub-contractors and materialmen engaged in the construction of public improvements). Therefore, it cannot be said with any degree of confidence that the Court of Appeals' interpretation of the Ohio Prevailing Wage Law is plainly inconsistent with the letter or spirit of that statute or the General Assembly's broad intent.

In essence, Gene's Refrigeration's argument that the Ohio Prevailing Wage Law should be interpreted in the same manner that federal courts have interpreted the Davis-Bacon Act by

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<sup>10/</sup> The Court of Appeals' limited application of the Ohio Prevailing Wage Law to employees of public improvement contractors and subcontractors who work off-site also dispels Gene's Refrigeration's speculation "that it would be a logistical nightmare to track all materials used in a public improvements to ensure that those off-site fabricators paid the correct wage." *Local Union No. 33 v. Gene's Refrigeration* (Appendix Doc. No. 3 at 19).

limiting applicability to those workers employed “directly” “upon every public improvement” is contrary to the legislative intent of the General Assembly, which plainly intended a broader application of the State law.

**CONCLUSION**

For the foregoing reasons, it is submitted that the General Assembly intended to extend application of the Ohio Prevailing Wage Law to employees of public improvement contractors and subcontractors, who work off-site performing services integral to completion of public improvements.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing *Amicus Curiae* Brief in Support of Appellee Sheet Metal Workers International Association, Local Union 33 was served upon the following by U.S. mail, first-class postage prepaid, this 25<sup>th</sup> day of September, 2008:

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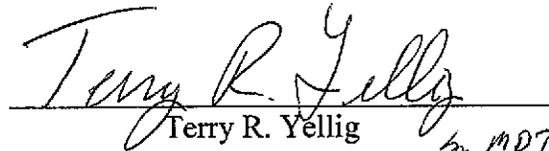
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